BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0358/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Adam Morrison

- Claimant -

represented by Mr. Brad Ames, Priority Sports and Entertainment,
325 N La Salle Drive, Suite 650, Chicago, IL 60610, USA

vs.

Besiktas Jimnastik Kulübü
Suleyman Seba Caddesi, No. 48 BJK Plaza, Akaretler,
Besiktas, 34357 Istanbul, Turkey

- Respondent -

represented by Mr. Emin Ozkurt, attorney at law,
İnönü Caddesi, Gözcü Apartmanı, No: 35, Kat: 2, Gümüşsuyu,
Beyoğlu, İstanbul, Turkey

1. The Parties

1.1 The Claimant

1. Mr. Adam Morrison (hereinafter referred to as “Player”) is a professional basketball player who was retained by Besiktas Jimnastik Kulübü for part of the 2011-2012 season.

1.2 The Respondent

2. Besiktas Jimnastik Kulübü (hereinafter referred to as “Respondent”) is a professional basketball club in Istanbul, Turkey.

2. The Arbitrator

3. On 22 January 2013, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert SC, as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Background and the Dispute

4. On 9 January 2012, Player and Respondent entered into an agreement (“the Agreement”) whereby the latter engaged the former to play basketball for the then remaining part of the 2011-2012 season. The salary of Player was agreed at EUR 175,000.00 net of tax.

5. Player submits that Respondent did not pay the salary instalment of USD 30,000.00 due to him at the end of March 2012, and on 30 April 2012 he exercised his right to terminate the Agreement triggering an entitlement to USD 90,000.00 as the remaining amount payable.

3.2 The Proceedings before the BAT

6. On 28 December 2012, Player filed a Request for Arbitration of that date in accordance with the BAT Rules.

7. The non-reimbursable handling fee in the amount of EUR 2,015.53 was paid on 31 December 2012.

8. On 4 February 2013, the BAT informed the Parties that Mr. Klaus Reichert SC had been appointed as the Arbitrator in this matter. Further, the BAT fixed the advance on costs to be paid by the Parties as follows:

> *"Claimant (Mr Adam Morrison) EUR 4,500*
>
> *Respondent (Besiktas JK) EUR 4,500"*

The foregoing sums were paid as follows (all on behalf of Player): 13 February 2013, EUR 4,500.00; and 7 March 2013, EUR 4,500.00.

9. On 25 February 2013, Respondent submitted its Answer.

10. On 11 March 2013, the Arbitrator directed that Player file a reply submission by 25 March 2013 and noted that Respondent would be given an opportunity to file a further submission thereafter.

11. On 22 March 2013, Player delivered his reply submission.

12. On 8 April 2013, Respondent delivered its rejoinder submission.

13. On 16 April 2013, the Parties were invited to submit their statements of costs by 23 April 2013 and were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.

14. On 22 April 2013, Respondent submitted its statement of costs and also included further information about the payments made to Player. Respondent's reason for including this information at this late stage was that its sponsor had only recently provided it with payslips.

15. On 22 April 2013, Player submitted his statement of costs, and objected to admission of the further information on payments submitted by Respondent.

16. On 23 April 2013, the Arbitrator stated as follows to the Parties:

> *"[…] the Claimant is herewith requested to provide the Arbitrator with detailed information by no later than Monday, 29 April 2013:*
>
> 1. *about any payments he received under his contract with the Respondent, be it from Respondent or from third parties (such as the sponsor Milangaz LPG Dagitim Tic. ve San. A.S.)*
>
> 2. *about his claimed attorney's fees."*

Later that same day the Arbitrator stated as follows to the Parties:

> *"the Arbitrator invites the Claimant to provide by the said time limit invoices or other evidence in support of his submission, due to the fact that he was not represented by any attorney during the present proceedings."*

17. On 29 April 2013, Player responded to the direction of the Arbitrator sent on 23 April 2013; amongst other matters, he sought an amendment of his claim for relief and reduced his claim for unpaid salary to USD 56,613.44.

18. On 2 May 2013, Respondent was invited by the Arbitrator to comment on the amended claim now being advanced by Player.

19. On 7 June 2013, Respondent commented upon the amended claim of Player, and also made observations on the claim for legal costs.

20. On 12 June 2013, the Parties were informed as follows by the Arbitrator:

> *"After review of all documents submitted by the parties and in accordance with Article 12.1 of the BAT Arbitration Rules, the Arbitrator hereby declares that the exchange of documents is finally completed and that he will be rendering the final award as soon as possible."*

21. On 13 June 2013, Player sought to make further submissions concerning alleged non-payment of a bonus of USD 10,000.00 connected to the winning of the Turkish Cup by Respondent in February 2013.

22. On 14 June 2013, the Parties were informed that the Arbitrator was not admitting Player's further submissions dated 13 June 2013 to the file.

23. On 14 June 2013 Player submitted the following:

> *"Claimant would like to draw the BAT's attention to BAT case 0318/12 – Hunter, Priority Sports vs Polisportiva Dinamo S.R.L. In that case, the Arbitrator issued a procedural order dated 24 April 2013 that declared, on the second page of the order, "the Arbitrator hereby declares that* ***the exchange of documents is completed*** *and that he will be rendering the final award as soon as possible."*
>
> *However, the Arbitrator in that case considered unsolicited submissions on behalf of the*

Respondent after declaring "the exchange of documents is completed," and even allowed the Claimants to submit their comments to the unsolicited submissions, and accepted the unsolicited submissions and comments as part of the case as a whole. I quote from the applicable procedural order dated 07 May 2013: "We acknowledge receipt of the unsolicited submissions provided by the Respondent in its emails of 24 and 25 April 2013. Copies of the said emails are hereto attached for the information of the Claimants. ***The Claimants*** *are invited to submit their comments on the Respondent's submissions by no later than* ***Tuesday, 14 May 2013****. However, such comments shall be limited to the aforementioned Respondent's submissions."*

We kindly ask the Arbitrator in the current case to follow procedural precedent set forth in the Hunter case referenced above, and to take into consideration the Claimant's submissions dated 13 June 2013. Thank you."

24. On 24 June 2013 the Parties were informed of the following by the Arbitrator:

"Following the Claimant's email below, the Arbitrator informs the parties of the following:

The latest correspondence from the Claimant is not admitted to the file of this case. The Claimant cites an apparent precedent in another BAT case, however that argument is not sustainable. First, the other BAT case is not yet concluded and therefore it is inappropriate to rely upon a procedural decision in a separate arbitration. All procedural decisions are context and case sensitive; furthermore a procedural decision in a yet-to-be concluded BAT arbitration cannot possibly be a precedent. The Claimant demonstrates no reason why this latest argument should be admitted to the file when there has been a full opportunity for each side to articulate their respective cases. If a point was not included in the submissions made to date, and it was a point which was reasonably available to a party to make (similarly with a piece of evidence), then if it chooses not to include it at the time of filing its documents it must take the consequences of that decision or omission."

4. The Positions of the Parties

25. Player's claim for relief has changed from when he first filed the Request for Arbitration. The claim he now asserts was articulated on 29 April 2013. He confirms in his submission of that date that he received the following sums from Respondent: USD 25,000.00 on 30 January 2012; USD 55,000.00 on 15 February 2012; USD 10,000.00 on 1 March 2012; and USD 28,385.56 on 20 March 2012. He confirms that the total received from Respondent was USD 118,386.56. This amount, he says, left him short USD 56,613.44 out of his total agreed salary of USD 175,000.00. The basis of his action remains his claim that he was entitled to terminate (and then trigger the entitlement to the balance of his total salary) on 30 April 2012.

26. Respondent submits that it was not in default of its payment obligations to Player at the time when he sought to terminate the Agreement. It further submits that it was Player who breached the Agreement and Respondent has no further obligations to him as a result.

5. The Jurisdiction of the BAT

27. Pursuant to Article 2.1 of the BAT Rules, *"[t]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland*". Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).

28. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

29. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus

arbitrable within the meaning of Article 177(1) PILA[1].

30. The jurisdiction of the BAT over Player's claims is stated to result from the arbitration clause in paragraph 11 of the Agreement, which reads as follows:

> *"Any dispute arising under the Agreement shall be submitted to the Basketball Arbitral Tribunal in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

31. This arbitration clause is in written form and thus fulfils the formal requirements of Article 178(1) PILA.

32. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration clause under Swiss law (referred to by Article 178(2) PILA).

33. At stages throughout the course of this arbitration, the Parties have fully participated without reservation as to jurisdiction.

34. For the above reasons, the Arbitrator has jurisdiction to adjudicate upon Player's claims.

6. Discussion

6.1 Applicable Law – ex aequo et bono

35. With respect to the law governing the merits of the dispute, Article 187(1) PILA

[1] Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the Arbitrators to decide "*en équité*" instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

> *"the parties may authorize the arbitral tribunal to decide ex aequo et bono".*

36. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

> *"Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law."*

37. As stated above, the arbitration clause in the Agreement clearly stipulates that: "*[T]he arbitrator shall decide the dispute ex aequo et bono*".

38. The concept of "équité" (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage[2] (Concordat)[3], under which Swiss courts have held that arbitration "en équité" is fundamentally different from arbitration "en droit":

> *"When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[4]

39. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono*

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2 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

3 P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

4 JdT 1981 III, p. 93 (free translation).

receives *"a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case."*[5]

40. This is confirmed by Article 15.1 of the BAT Rules *in fine*, according to which the Arbitrator applies "*general considerations of justice and fairness without reference to any particular national or international law*."

41. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2 Findings

42. The doctrine of *pacta sunt servanda* (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the principle by which the Arbitrator will examine the merits of the claims.

43. The Agreement sets out in paragraph 2 the schedule of payments to Player. Respondent agreed to make the following net payments: USD 25,000.00 upon passing of the medical examination; USD 30,000.00 on 30 January 2012; USD 30,000.00 on 29 February 2012; USD 30,000.00 on 30 March 2012; USD 30,000.00 on 30 April 2012; and USD 30,000.00 on 30 May 2012.

44. The Agreement (also in paragraph 2) provides that if a payment is 30 days late then Player has the right to exercise an option to terminate and accelerate all remaining payments. Termination of a contract is a matter of great seriousness and the Parties to the Agreement made a clear and unambiguous threshold of a 30-day delay in payment prior to allowing Player exercise his option to bring his relationship with Respondent to an end.

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5 Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717. pp.625-626.

45. With the foregoing in mind, the key issue in this case is whether Player was entitled to exercise his option to terminate the Agreement on 30 April 2012.

46. On 19 April 2012, Player's Agent wrote to Respondent stating that the payment of USD 30,000.00 which was due on 30 March 2012 had not been paid. That letter also specifically warned Respondent that if the payment was not made on or before 30 April 2012 then Player's reserved the right to terminate.

47. On 30 April 2012, Player's Agent wrote again to Respondent stating that the USD 30,000.00 which was due on 30 March 2012 had not been received, and Player was exercising the right to terminate.

48. As already noted, Player confirms that as of 20 March 2012 he had received a total of USD 118,386.56 from Respondent. The financial obligation of Respondent as of that moment was to have paid USD 85,000.00 in total to Player (USD 25,000.00 for passing the medical plus USD 30,000.00 on 30 January 2012 plus USD 30,000.00 on 29 February 2012). Plainly Respondent was well ahead in its obligations to Player as of 20 March 2012; Respondent was actually USD 33,386.56 ahead of its obligations to Player. On 30 March 2012 when the next instalment fell due in the amount of USD 30,000.00 Respondent had already paid this sum in full in advance. Once the instalment of 30 March 2012 had been taken into account, Respondent was still in credit to Player in the amount of USD 3,386.56.

49. In light of the foregoing analysis, it emerges clearly that the letters on 19 and 30 April 2012 from Player's Agent to Respondent were based on assertions which were incorrect. Respondent was not delinquent in its payments to Player in the manner suggested in those letters. Respondent was not 30 days behind in its salary instalments to Player. Respondent was actually in credit with Player throughout April 2012.

50. Consequentially Player's purported termination of the Agreement on 30 April 2012 was not supported by the underlying facts. In a matter as serious and as important as the early termination of a professional basketball contract, it is essential in the Arbitrator's view that the prescribed conditions for such termination are followed with precision. Player did not do so in this case and his purported termination on 30 April 2012 was invalid. Therefore, Player's claim that the balance of his contractual salary was then accelerated also must fail.

51. What, therefore, becomes of the balance of Player's salary? This is dealt with shortly and simply. Respondent makes the point that once Player, in effect, walked away from the Agreement (and did not play or train further with Respondent) then it cannot have any remaining financial obligations to him. The Arbitrator accepts this submission. If Player left Respondent on an invalid premise, then as a matter of justice and equity he cannot expect or be entitled to any further payments on foot of the Agreement.

52. In summary, Player's claim is dismissed.

7. Costs

53. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

54. On 9 October 2013 – considering that pursuant to Article 17.2 of the BAT Rules "*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*", and that "*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President*

from time to time", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 6,875.00.

55. Considering that Player failed in his claim the Arbitrator decides that the Player has to bear the costs of the proceedings alone. In addition, the Arbitrator has to consider whether the Player should contribute to the Respondent's legal fees and expenses. Respondent has successfully defended this claim, however the Arbitrator does consider it relevant that the correct payment position emerged at a late stage (Respondent did present a reason for their late submissions), Player paid all of the Advances on Costs, and by the invalid termination letter of Player on 30 April 2012 it has been saved the further expense of the balance of the April instalment which it would otherwise have had to pay.

56. In summary, and taking into account all of the circumstances of this case, the Arbitrator holds that the Parties shall bear their own legal fees and expenses.

57. Given that Player paid advances on costs of EUR 9,000.00, the Arbitrator decides that in application of article 17.3 of the BAT Rules: BAT shall reimburse EUR 2,125.00 to Player, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President.

8. AWARD

For the reasons set forth above, the Arbitrator decides as follows:

1. **The claims of Mr. Adam Morrison are dismissed.**

2. **The arbitration costs shall be borne by Mr. Adam Morrison alone.**

3. **Mr. Adam Morrison and Besiktas Jimnastik Kulübü shall bear their own legal fees and expenses.**

4. **Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 15 October 2013

Klaus Reichert SC
(Arbitrator)