



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0367/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Annett Rombach

in the arbitration proceedings between

Mr. Goran Ikonic

- Claimant 1 -

Mr. Jovo Stanojevic

- Claimant 2 -

Both represented by Mr. Miodrag Raznatovic, Attorney at Law,
Strahinjica Bana 18,11000 Belgrade, Serbia

vs.

Karsiyaka Spor Kulübü Basketbol Şubesi

Yalı Cad. No:396, 35530 Karsiyaka – Izmir, Turkey

- Respondent -

1. The Parties

1.1 The Claimants

1. The first claimant, Mr. Goran Ikonic (“Claimant 1”), is a professional basketball player of Slovenian nationality. The second claimant, Mr. Jovo Stanojevic (“Claimant 2” and together with Claimant 1 the “Claimants”), is a professional basketball player of Serbian nationality. During the 2011-2012 basketball season, Claimants were playing basketball for the Turkish Club Karsiyaka Spor Kulübü Basketbol Şubesi.

1.2 The Respondent

2. Karsiyaka Spor Kulübü Basketbol Şubesi (the “Club” or “Respondent” and together with Claimants the “Parties”) is a professional basketball club located in Izmir, Turkey.

2. The Arbitrator

3. On 4 March 2013, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the “BAT”), appointed Ms. Annett Rombach as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the “BAT Rules”). None of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. On 6 June 2011, Claimant 1 and the Club entered into a contract (the “First Player Contract”), pursuant to which Respondent engaged Claimant 1 as a professional basketball player for the seasons of 2011-2012 and 2012-2013. Similarly, the Club

engaged Claimant 2 as a professional basketball player for the same term (seasons 2011-2012 and 2012-2013) in a contract signed on 6 June 2011 (the “Second Player Contract” and together with the First Player Contract, the “Player Contracts”). Except for the agreed salary and bonus amounts, the terms of the First and the Second Player Contract are virtually identical.

5. Pursuant to the Player Contracts, Respondent promised to pay total base salaries of USD 180,000 net to Claimant 1 and USD 280,000 net to Claimant 2 for the 2011-2012 season, respectively. The respective annual salaries were to be paid in ten consecutive equal payments between September 2011 and June 2012 (USD 18,000 for Claimant 1 and USD 28,000 for Claimant 2).
6. It is undisputed that Respondent made certain (partial) payments under the Player Contracts. The dispute revolves around a remainder of USD 27,750 for Claimant 1 and USD 40,000 for Claimant 2, which the Club allegedly failed to pay to date.

3.2 The Proceedings before the BAT

7. On 23 January 2013, the Claimants filed a Request for Arbitration (with several exhibits) in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 2,000 was received in the BAT bank account on 25 January 2013.
8. On 6 March 2013, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 28 March 2013 (the “Answer”), and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 18 March 2013 as follows:

<i>“Claimant 1 (Mr. Ikonic)</i>	<i>EUR 2,000</i>
<i>Claimant 2 (Mr. Stanojevic)</i>	<i>EUR 2,000</i>
<i>Respondent (Karsiyaka SK)</i>	<i>EUR 4,000”</i>

9. By letter to the Parties dated 2 April 2013, the BAT Secretariat noted that Respondent failed to submit its Answer and that none of the Parties had paid its share of the Advance on Costs. Upon the BAT Secretariat's urgent request to comply with their respective payments obligations, Claimants paid their respective shares of the Advance on Costs on 3 April 2013 and eventually substituted for Respondent's share, which was received in the BAT bank account on 30 April 2013.
10. On 6 May 2013, the Parties were informed that Respondent, despite several invitations by the Arbitrator, had failed to submit its Answer. The Arbitrator declared the exchange of documents completed and invited the Parties to submit a detailed account of their costs by no later than 13 May 2013.
11. By letter of 6 May 2013, Claimants submitted the following account of costs:
- | | |
|---|-----------------------|
| <i>"1. Advance of the costs (Claimant)</i> | <i>4.000,00 Euro</i> |
| <i>2. Advance of the costs (Respondent's share [sic])</i> | <i>4.000,00 Euro</i> |
| <i>3. Legal fee for representing 2 clients</i> | <i>7.250,00 Euro"</i> |
12. On 15 May 2013, the BAT Secretariat forwarded Claimants' account of costs to the Respondent and invited it to comment on it by no later than 17 May 2013. No comments were filed by the Respondent.
13. As none of the Parties requested to hold a hearing, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to render the award based on the written record before her.

4. The Positions of the Parties

4.1 Claimants' Position and Request for Relief

14. Claimants submit that the Club did not make certain salary payments due under the Player Contracts despite their continuous efforts to receive the outstanding payments from it.
15. In their Request for Arbitration, Claimants request the following relief:

“a) To award claimant player Goran Ikonic with amount of 27.750 USD.

b) To award claimant player Jovo Stanojevic with amount of 40.000 USD.

b) [sic] To award both claimants interest on mentioned amounts at the applicable Swiss statutory rate, starting from the 1st July 2012.

d) [sic] To award both claimants with the full covered costs of this Arbitration.”

4.2 Respondent's Position and Request for Relief

16. Despite several invitations by the BAT, the Club neither engaged in the arbitration proceedings at hand, nor did it make any submissions within the time limits set by the Arbitrator in accordance with the BAT Rules.
17. As part of the pre-arbitration correspondence between the Parties, the Club, by e-mail of 22 January 2013, informed Claimants' counsel that it lacked the financial resources to render the outstanding payments.

5. The Jurisdiction of the BAT

18. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in this arbitration, she will examine her jurisdiction *ex officio* on the basis of the record as it stands.
19. Pursuant to Art. 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).
20. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
21. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Art. 177(1) PILA.
22. The jurisdiction of the BAT over the Claimants’ claims results from the (identical) arbitration agreements contained in Clause 8 of the First and the Second Player Contract, respectively. Both clauses read as follows:

“Any dispute arising from or related to the present contract shall be submitted to the FIBA Basketball Arbitral Tribunal (BAT) 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.

Awards of the FAT [sic] can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the BAT, as provided in Article 192 of the Swiss Act on Private International Law.

The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.”

23. The agreements are in written form and thus the arbitration clauses fulfil the formal requirements of Article 178(1) PILA.
24. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity of the arbitration agreements in the present matter under Swiss law (cf. Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” in Clause 8 of the Player Contracts clearly covers the present dispute.
25. Finally, the Arbitrator notes that the jurisdiction of BAT has not been contested by either Claimants or Respondent. In view of all the above, the Arbitrator, therefore, holds that she has jurisdiction to decide the present dispute.

6. Other Procedural Issues

26. Article 14.2 of the BAT Rules specifies that “*the Arbitrator may [...] proceed with the arbitration and deliver an award*” if “*the Respondent fails to submit an Answer.*” The Arbitrator’s authority to proceed with the arbitration in case of default by one of the parties is in accordance with Swiss arbitration law and the practice of the BAT.¹ However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
27. This requirement is met in the present case. The Club was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules. It was also given sufficient opportunity to respond to Claimants’ Request

¹ See *ex multis* BAT cases 0001/07, Ostojic and Raznatovic vs. PAOK KAE; 0018/08, Nicevic vs. Beşiktaş; 0093/09, A.S.D. Pallacanestro Femminile Schio vs. Braxton; 0170/11, Haritopoulos and Kallergis vs. Panionios BC K.A.E. and Gallis.

for Arbitration and to their Account on Costs. Respondent, however, chose not to participate in this Arbitration.

7. **Applicable Law – *ex aequo et bono***

28. With respect to the law governing the merits of the dispute, Article 187(1) PILA 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 reads as follows:

“the parties may authorize the arbitral tribunal to decide ex aequo et bono”.

29. 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.”

30. In Clause 8 of the First and the Second Player Contract, respectively, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to her in this proceeding *ex aequo et bono*.

31. This also applies to Claimants’ claims for the payment of interest, despite the fact that Claimants, in their request for relief, claim interest “at the applicable Swiss statutory rate”. The parties’ choice of law generally extends to ancillary claims (such as claims for the payment of interest) absent any agreement between them to the contrary. There is nothing in the record suggesting that the parties agreed to have interest claims governed by Swiss law.

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

8. Findings

33. Claimants essentially request the payment of outstanding salaries (8.1), and interest “at the applicable Swiss statutory rate” on all outstanding amounts (8.2).

8.1 Salaries in the Amount of USD 27,750 (Claimant 1) and USD 40,000 (Claimant 2)

34. According to the First Player Contract, Claimant 1 was entitled to a base salary for the 2011-2012 season in the total amount of USD 180,000 net of all Turkish taxes and charges. A partial amount of USD 27,750 remains allegedly outstanding.

35. Under the Second Player Contract, the Club promised to pay Claimant 2 a base salary of USD 280,000 net for the same period (2011-2012 season). A partial amount of USD 40,000 remains allegedly outstanding.

36. Respondent neither disputed the existence, nor the quantum of the claimed amounts before or during this arbitration. To the contrary, in an e-mail dated 22 January 2013, the Club implicitly acknowledged the outstanding claims by submitting that “[u]nfortunately our financial balance does not let us make the payments right now”. Based on the record before her, the Arbitrator finds that there is no indication that would cast doubt on the existence of the Club’s obligation to pay Claimants the (outstanding) salaries as stipulated under the Player Contracts. The Arbitrator therefore finds that Claimants are entitled to the claimed salary payments for the season 2011-2012 in the amount of USD 27,750 (Claimant 1) and USD 40,000 (Claimant 2).

8.2 Interest on Outstanding Salaries

37. Claimants request the payment of interest on the outstanding salaries from 1 July 2012 “at the applicable Swiss statutory rate”.
38. As a preliminary matter, the Arbitrator finds that the issue of (default) interest is one that is governed by the same substantive law applicable to Claimants’ claims, i.e. must be decided in accordance with the principles of *ex aequo et bono*.²
39. The Player Contracts do not provide for any obligation by the Club to pay interest in case of non-payment. However, it is a generally accepted principle embodied in most legal systems and reflected in the BAT jurisprudence,³ that default interest can be awarded even if the underlying agreement does not explicitly provide for a respective obligation. The Arbitrator, deciding *ex aequo et bono* and in accordance with constant BAT jurisprudence, considers an interest rate of 5% per annum to be fair and just to avoid that the Club derives any profit from the non-fulfillment of its obligations.
40. The starting date of 1 July 2012 requested by Claimants is justified. Pursuant to the payment schedule in Clause 2 of both Player Contracts, the last salary instalment became due on 15 June 2012, respectively. Although the Player Contracts do not explicitly address the issue of default in case of late or non-payments, a helpful provision can be found in clause 5 of the Player Contracts, stipulating (in relevant part) as follows:

² See above para. 31.

³ See, *ex multis*, the following BAT awards: 0092/10, Ronci, Coelho vs. WBC Mizo Pecs 2010; 0069/09, Ivezic, Draskicevic vs. Basketball Club Pecs Noi Kosariabda Kft; 0056/09, Branzova vs. Basketball Club Nadezhda; 0237/11, Ivanovic, GPK Sports Management Limited vs. Kolossos Rhodes Basketball Club.

“The delay of 15 days in payments will not be considered as the [sic] delay.”

41. It follows, *argumentum e contrario*, from this clause that any payment deferral by more than 15 days must be considered a legally relevant delay, triggering Claimants’ right to claim default interest.

9. Costs

42. 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 legal fees and expenses incurred in connection with the proceedings.
43. On 2 July 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”; 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”, and 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 6,215.
44. Considering that Claimants prevailed with all of their claims, it is appropriate that all of the fees and costs related to this arbitration be borne by Respondent and that Respondent be required to cover its own legal costs.
45. However, with respect to Claimants’ legal costs in the amount of EUR 7,250, the Arbitrator is of the view that these costs are excessive and that Respondent must bear only a portion of such costs. The Request for Arbitration was rather short and simple

and included a very small number of exhibits. The proceedings required only one round of submissions and Respondent chose not to participate at all. The fact that the arbitration involved two Claimants, who each filed a separate claim, did not bring any additional complexity to the case, because the legal issues to be resolved were identical, and the claims were based on standard contracts with almost identical terms. In light of these circumstances, the Arbitrator finds, in accordance with Article 17.3 of the BAT Rules, that Claimant should be granted a reduced contribution towards its legal costs in the amount of EUR 3,800.

46. Although, in their cost account, Claimants did not explicitly address the handling fee paid by them in accordance with Article 9.2 of the BAT Rules, Respondent must reimburse Claimants also for this amount. In awarding Claimants the handling fee (despite the respective omission in their cost account), the Arbitrator does not act *ultra petita*, because Claimants expressly request the “full covered costs of this Arbitration” in their request for relief. The request for “full covered costs” can only be understood to include all expenses in connection with the arbitration, including the handling fee.
47. Given that Claimants paid all shares of the Advance on Costs in the amount of 2x EUR 2,000 and EUR 4,000 (in total EUR 8,000), the Arbitrator decides that in application of Article 17.3 of the BAT Rules:
 - (i) BAT shall reimburse EUR 1,785 to Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the BAT President;
 - (ii) Respondent shall pay EUR 6,215 to Claimants, being the difference between the costs advanced by Claimants and the amount to be reimbursed by the BAT.
 - (iii) Furthermore, as stated above, the Arbitrator considers it appropriate to take into account the non-reimbursable handling fee of EUR 2,000 when assessing the expenses incurred by Claimants in connection with these proceedings. Hence, because the Arbitrator, as stated above, considers a reduced amount of EUR



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3,800 for Claimant's legal fees and expenses to be reasonable, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at EUR 5,800.

10. AWARD

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

- 1. Karsiyaka Spor Kulübü Basketbol Şubesi is ordered to pay to Mr. Goran Ikonic USD 27,750 together with interest of 5% p.a. on this amount from 1 July 2012.**
- 2. Karsiyaka Spor Kulübü Basketbol Şubesi is ordered to pay to Mr. Jovo Stanojevic USD 40,000 together with interest of 5% p.a. on this amount from 1 July 2012.**
- 3. Karsiyaka Spor Kulübü Basketbol Subesi is ordered to pay to Mr. Goran Ikonic and to Mr. Jovo Stanojevic, jointly and severally, EUR 6,215 as a reimbursement of the Advance on Costs.**
- 4. Karsiyaka Spor Kulübü Basketbol Subesi is ordered to pay to Mr. Goran Ikonic and to Mr. Jovo Stanojevic, jointly and severally, EUR 5,800 as a contribution towards their legal fees and expenses.**
- 5. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 5 July 2013

Annett Rombach
(Arbitrator)