



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0373/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Rasko Katic

represented by Mr. Zoran Toskovic, attorney at law,
Bulevar Kralja Aleksandra St. 274, 11000 Belgrade, Serbia

- Claimant -

vs.

Basketball Club Partizan MTS
Humska 1, 11000 Belgrade, Serbia

represented by Mr. Ilija Drazic, attorney at law,
Drazic, Beatovic & Stojic LLP, Kralja Milana 29,
11000 Belgrade, Serbia

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Rasko Katic is a professional basketball player (hereinafter referred to as “the Player” or “Claimant”).

1.2 The Respondent

2. Basketball Club Partizan MTS (hereinafter also referred to as “the Club” or “the Respondent”) is a professional basketball club in Serbia.

2. The Arbitrator

3. On 16 April 2013, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). Neither 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 Dispute

4. On 4 and 5 July 2011, the Player and the Club signed a fully guaranteed employment contract (the “Contract”), including an annex (the “Annex”), whereby the Player was engaged for the 2011/2012 season.
5. Due to a difficult financial situation that developed for the Club during the 2011/2012 season, it was unable to pay the Player the full remuneration guaranteed under the

Contract. In that relation, the Club submits in these proceedings: *“Only cause for delay is hard financial situation of the Respondent, directly connected with general financial problems of sport in Serbia”*.

6. The Club submits that it *“... accepts jurisdiction of the BAT”* and accepts the Player’s claim as follows: *“Rasko Katic ... in principle properly described factual situation in his Request for Arbitration ... At the date when the Request for Arbitration was submitted to the BAT figures of principal debt expressed in the Request for Relief of €122,400 is correct”* [...] *“The Respondent does not oppose to the claim though the Claimant did not play at all for the Club over two months in critical period of season 2011/2012 due to the _____ [Player’s illness], which was result of the byte (sic) of infected ticks (that was result of player’s carelessness and non-observance of club’s health guidance). Therefore, the Respondent accepts that remaining principal debt is exact, and amounts €122,400. However, the Respondent opposing obligation to pay any “interest” that, by the way, was not properly determined in the claim ...”*.
7. In keeping with its above position, during these proceedings the Club made a settlement proposal whereby its principal debt would be paid in installments over a period of time and any interest allegedly owed by it would be written off.
8. The Player denied the Club’s allegation that his sickness caused by a tick bite was due to his lifestyle, which, in addition, he submits was exemplary.
9. With respect to the settlement proposal, the Player submits that it would be unfair for him to have to accept payment by installments because he has already been waiting for payment for a considerable period of time on the basis of promises from the Club and because a player needs to receive his earnings. He cannot therefore accept that part of the settlement proposal. However *“As an amicable gesture toward the defendant, the claimant, on this occasion, writes off to the defendant all accrued interest on the funds owed by the defendant, and suggests the Arbiter brings the decision to commit the defendant to immediately pay the entire debt to claimant, and all*

costs incurred by proceeding before subject Arbitration, i.e. costs generated by debt non-payment, including attorneys' fees, which are determined to EUR 3.600.00".

3.2 The Proceedings before the BAT

10. On 16 January 2013, the Claimant filed a Request for Arbitration (dated 1 January 2013) in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 3,000, which was received by the BAT on 1 February 2013.
11. On 22 April 2013, the BAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

<i>"Claimant (Mr. Rasko Katic)</i>	<i>EUR 4,000</i>
<i>Respondent (BC Partizan MTS)</i>	<i>EUR 4,000"</i>
12. On 8 May 2013, the Claimant paid his share of the advance on costs.
13. On 13 May 2013, the Respondent submitted its Answer, containing a settlement proposal.
14. By Procedural Order of 16 May 2013, the parties were invited to indicate whether they would accept a suspension of the proceedings pending settlement discussions.
15. On 17 May 2013, the Respondent submitted that it would accept a suspension of the proceedings.
16. On 20 May 2013, the Claimant submitted in substance that he refused any suspension of the proceedings and replied to the Respondent's settlement proposal.
17. By Procedural Order of 22 May 2013, the proceedings were closed with respect to the exchange of documents on the merits and the Claimant was given a deadline within which to substitute for the Respondent's failure to pay its share of the advance on

costs. The parties were also requested to submit their statements of costs.

18. On 4 June 2013, the Claimant substituted for the Respondent in paying the latter's share of advance on costs, filed his statement of costs and made various unsolicited additional submissions relating to the merits of the claim.
19. The Respondent filed no statement of costs.
20. By Procedural Order of 11 June 2013, the Respondent was invited to comment on the Claimant's statement of costs.
21. On 17 June 2013, the Respondent submitted its comments on the Claimant's statement of costs and made various unsolicited observations in reply to the Claimant's submissions of 4 June.
22. By Procedural Order of 24 June 2013, the parties were reminded that the proceedings with respect to the merits of the claim had been closed on 22 May 2013, that therefore the content of their respective submissions of 4 June and 17 June which went beyond the issue of costs was not being admitted on record and that they should refrain from making any further submissions.

4. The Positions of the Parties

4.1 The Claimant's Position

23. Given that the Claimant expressly renounced claiming any interest on the principal amount being claimed, his prayer for relief now consists of requesting the payment of EUR 122,400, plus full compensation for his expenses relating to the arbitration proceedings, including an amount of EUR 5,000 in legal fees.

4.2 Respondent's Position

24. The Respondent acknowledges the debt of EUR 122,400 and does not oppose the claim but considers that it would be fair if it were allowed to pay the amount owed in several instalments given the difficult financial situation the Club has been experiencing.
25. The Respondent also accepts to pay the amount of the costs of arbitration. However, it contests the Claimant has the right to claim EUR 5,000 in legal fees considering that under the mandatory Attorneys' Tariff applicable in Serbia a claim of the value being made may not engender a fee of more than an amount equivalent to EUR 540 and because the Club's early acknowledgment of the substance of the claim shortened and simplified the proceedings.

5. The Jurisdiction of the BAT

26. 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).
27. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
28. 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
29. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under clause 7 of the Annex to the Contract, which reads as follows:

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

“Any dispute stemming from this Contract shall be forwarded to the BAT Arbitration Court in Geneva, Switzerland, and shall be finally resolved on the basis of BAT Book of Arbitration Rules. A Judge/Arbiter shall resolve the dispute ex aequo et bono (fairly and justly).”

30. The foregoing arbitration agreement is in written form and thus fulfils the formal requirements of Article 178(1) PILA.
31. With respect to its substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).
32. Moreover, the arbitration agreement covers all aspects of the dispute being raised in these proceedings and the Respondent expressly confirmed during these proceedings its acceptance of the jurisdiction of the BAT.
33. For the above reasons, the Arbitrator has jurisdiction to adjudicate the claims submitted by the Player against the Club.

6. Discussion

6.1 Applicable Law – ex aequo et bono

34. 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 is generally translated into English as follows:

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

35. 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.”

36. Clause 7 of the Annex to the Contract provides that if and when any dispute between the parties hereto is submitted to the BAT, the appointed arbitrator “... shall resolve the dispute ex aequo et bono (fairly and justly)”.
37. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Player against the Club in this arbitration in front of the BAT.
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’arbitrage² (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* 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”.

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).

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

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

6.2 Findings

42. Given that the Club has acknowledged the basis and amount of the Player's claim for EUR 122,400, the Club shall be ordered to pay such amount.

43. Because the Player expressly renounced claiming any interest on the foregoing principal amount, no interest shall be awarded.

44. In the circumstances of this case, the Arbitrator finds that it would not be fair or just to further delay payment of the principal amount due by allowing the Club to pay its debt in instalments.

45. Indeed, although the Club adopted a fair and commendable attitude during these proceedings – by immediately and clearly accepting the Player's position – and even if the Club did suffer from a financial crisis that prevented it from paying its debts earlier, it remains true that the Player showed some patience before filing his claim and has been waiting for over a year for the payment of a substantial amount of his last season's salary, which constitutes part of his livelihood as a professional player.

46. Furthermore, the Player has demonstrated fairness and made a financial concession by accepting to renounce claiming any interest despite the Club's debt being over a year old, and the Arbitrator finds there is no evidence that the Player's behaviour or lifestyle while he was playing for the Club was reprehensible or questionable in any manner or affected his capacity to perform.

47. Consequently, the Club shall be ordered to pay immediately the entire amount owed.

7. Costs

48. 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.

49. 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*”, 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 5,225.00
50. Considering the Claimant entirely prevailed in his claim, it is fair that the fees and costs of the arbitration be borne by the Respondent and that it be required to cover its own legal fees and expenses as well as make a contribution to those of the Claimant.
51. However, the Arbitrator finds that the Club’s commendable attitude during these proceedings has served to make them shorter and cheaper while reducing the amount of work necessary on the part of the Player’s counsel. For those reasons, the Arbitrator decides *ex aequo et bono* to limit the Club’s contribution to the legal fees of the Player to an amount of EUR 2,000. In that relation, the Arbitrator notes that domestic rules applicable to attorneys’ tariffs when pleading in front of national courts do not apply in front of the BAT – which has adopted its own rules on the matter which are accepted by the parties when they accept the BAT Arbitration Rules in their agreement to arbitrate.
52. Given that the Claimant paid advances on costs of EUR 8,000 as well as a non-reimbursable handling fee of EUR 3,000 (which will be taken into account when determining the Claimant’s legal fees and expenses), while the Respondent failed to

pay any advance on costs, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

- (i) BAT shall reimburse EUR 2,775.00 to the Claimant, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President;
- (ii) The Respondent shall pay EUR 5,225.00 to the Claimant, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT;
- (iii) The Respondent shall pay to the Claimant EUR 5,000 (3,000 for the non-reimbursable fee + 2,000 for legal fees) representing the amount of the Respondent's contribution to the Claimant's legal fees and other expenses. This amount is in line also with the maximum contribution to a party's reasonable legal fees and other expenses established in Article 17.4 of the BAT Rules for cases of such value.

8. AWARD

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

- 1. Basketball Club Partizan MTS shall pay Mr. Rasko Katic immediately an amount of EUR 122,400 as compensation for unpaid salaries.**
- 2. Basketball Club Partizan MTS shall pay Mr. Rasko Katic an amount of EUR 5,225.00 as reimbursement for his arbitration costs.**
- 3. Basketball Club Partizan MTS shall pay Mr. Rasko Katic an amount of EUR 5,000 as a contribution to his legal fees and expenses.**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration 3 July 2013.

Quentin Byrne-Sutton
(Arbitrator)