



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0374/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Raj Parker

in the arbitration proceedings between

Mr. Gordan Giriček

represented by Mr. Andrea Raffaelli,
attorney at law, Milan, Italy

vs.

KK Cibona Zagreb

- Claimant -

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Gordan Giriček (hereinafter the “Claimant”) is a professional basketball player from Croatia.

1.2 The Respondent

2. KK Cibona Zagreb (hereinafter the “Respondent”) is a professional basketball club based in Zagreb, Croatia.

2. The Arbitrator

3. On 16 April 2013, the President of the Basketball Arbitral Tribunal (the “BAT”), Professor Richard H. McLaren, appointed Mr. Raj Parker as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Arbitration Rules of the BAT (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 24 December 2010, the Claimant and the Respondent entered into a “Standard

Player's Contract" under which the Respondent engaged the Claimant as a professional basketball player for the remainder of the 2010-2011 basketball season (hereinafter the "Contract").

5. Under Article 2 of the Contract, the Respondent agreed to pay the Claimant EUR 125,000.00 (net of all Croatian taxes) in five equal instalments of EUR 25,000.00 on the first day of each month beginning 1 January 2010 and ending on 1 May 2011.
6. On 22 March 2011, the Claimant and the Respondent entered into a settlement and release agreement under which they agreed, subject to certain conditions, to terminate the Contract and release one another from all obligations under it (hereinafter, the "Settlement Agreement"). In particular, the Settlement Agreement provided, so far as relevant for present purposes, as follows:

"[Respondent] and [Claimant] shall terminate their Contract and fully settle and mutually release one another from all of their obligations set forth in their Contract, provided that:

1. *[Respondent] shall pay [Claimant] by wire transfer the sum of 75,000 EUR (seventy-five thousand Euros) net within 60 days of the signing of this Settlement and Release Agreement.*
2. ...
3. ...

Upon the fulfillment [sic] of the conditions listed in Paragraph 1 and 2 above, the Contract shall terminate. In the event [Respondent] does not make such scheduled payment listed herein on time to the [Claimant], [Claimant] shall be entitled to his remedies as provided for in Article 7 of the Contract. Such remedies include, but are not limited to, the obligation of the [Respondent] to pay [Claimant] immediately all the payments provided for in the Contract (that is, 125.000 EUR [one hundred twenty-five thousand Euros])." (Emphasis in original)

7. Over a year later, on 20 June 2012, the Claimant and the Respondent entered into an agreement to amend the Settlement Agreement (hereinafter, the "Amendment Agreement"). So far as is relevant for present purposes, the Settlement Agreement provided as follows:

“WHEREAS [Respondent] acknowledges it has paid [Claimant] only 33,000 EUR (thirty-three thousand Euros) of the 75,000 EUR (seventy-five thousand Euros) due under Paragraph 1 of the [Settlement Agreement] and that it will pay the remaining 42,000 EUR (forty-two thousand Euros) to Player by September 20, 2012;

NOW THEREFORE, the parties hereby agree to amend [the Settlement Agreement] as follows:

1) Paragraph 1 shall be amended so that the payment due date shall now be September 20, 2012 instead of 60 days of the signing of the Agreement.

...

All other terms and conditions of the [Settlement Agreement] shall remain in full force and effect.”

8. On 1 October 2012 the Claimant’s agent, Mr. Marc Fleisher, wrote to the Respondent (addressing the letter to a Mr. Nikola Prkacin). The letter:
- referred to the Amendment Agreement and the Respondent’s obligation thereunder to pay the Claimant EUR 42,000.00 by 20 September 2012;
 - noted that at the date of the letter no payment had been made; and
 - informed Mr. Prkacin that if payment were not received by 15 January 2013, the Claimant would file a case with the BAT.
9. The Claimant has submitted that no such payment was received. The Respondent has not made any submissions at all.

3.2 The Proceedings before the BAT

10. On 11 February 2013, the Claimant filed a Request for Arbitration in accordance with the BAT Rules seeking an award for payment of outstanding amounts in the sum of EUR 42,000.00 plus interest. The non-reimbursable handling fee of EUR 2,000.00 was

received by BAT on 12 February 2013.

11. On 22 April 2013, the BAT Secretariat wrote to the parties:

- informing them that the Arbitrator had been appointed;
- fixing the Advance on Costs at EUR 3,500.00 from each of the parties, to be paid by no later than 3 May 2013; and
- requiring that the Respondent file its answer to the Request for Arbitration (hereinafter, an “Answer”) by no later than 13 May 2013.

12. On 15 May 2013, the BAT Secretariat wrote to both parties:

- noting that the Respondent failed to submit the Answer;
- advising that neither party had paid its share of the Advance on Costs; and
- urgently requesting that the parties pay their respective shares of the Advance on Costs by no later than 27 May 2013.

13. BAT received payment of the Claimant’s share of the Advance on Costs on 20 May 2013. On 22 May 2013, the BAT Secretariat wrote to the parties:

- acknowledging the Claimant’s payment;
- noting that under Article 9.3 of the BAT Rules, the arbitration would not proceed until the full amount of the Advance on Costs is received, but that where one party (here, the Respondent) fails to pay its share the other party may substitute for it; and

- giving the Claimant until 7 June 2013 to take advantage of his right to pay the Respondent's share.
14. BAT received payment from the Claimant of the Respondent's share of the Advance on Costs on 27 May 2013. On 11 June 2013, the BAT Secretariat wrote to the parties:
- acknowledging payment by the Claimant of both parties' shares of the Advance on Costs;
 - informing them that the exchange of documents was completed; and
 - requesting that the parties submit a detailed account of their costs by 20 June 2013.
15. On 12 June 2013, the Claimant submitted his account of costs and the BAT Secretariat acknowledged that on 13 June 2013. On 25 June 2013, the BAT Secretariat wrote to the parties inviting the Respondent to submit any comments by 2 July 2013.
16. On 15 July 2013, the BAT Secretariat wrote to the parties correcting an administrative error in its communication of 25 June. An incorrect document had been attached to the 25 June email and the Claimant's schedule of costs had not been attached. Accordingly, the BAT Secretariat's 15 July email attached the Claimant's schedule of costs and invited the Respondent to submit any comments by 22 July 2013.
17. Neither of the Parties requested an oral hearing and, as such, 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 him.
18. The Respondent did not submit an Answer, or respond in any way to any of the BAT Secretariat's communications.

4. The Parties' Submissions

4.1 The Claimant's Position

19. The Claimant's position is very simple: he claims he is owed EUR 42,000.00 under the Amendment Agreement and he seeks payment of that amount plus interest.
20. In the Request for Arbitration, under the heading "Request for Relief", the Claimant asked the Arbitrator:
- "1) to establish that the Respondent is in default with respect to its obligations deriving from the [Contract], as amended by the Settlement Agreement and the Amendment Agreement;
 - 2) to condemn the Respondent to pay in favour of [the Claimant] the amount of **Euro 42,000.00**, plus the interests at the rate of 5% per annum, or at the different rate deemed appropriate by the Arbitrator *ex aequo et bono*;
 - 3) to condemn the Respondent to pay all expenses and costs, including the costs for the arbitration and Counsel's fees and costs, incurred by the Claimant in connection with the proceeding."

(Emphasis in original.)

4.2 The Respondent's Position

21. Despite several invitations to do so, the Respondent did not engage in these proceedings or make any submissions within the time limits set by the Arbitrator in accordance with the BAT Rules.

5. The Jurisdiction of the BAT

22. 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”).

23. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
24. 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) of the PILA.¹
25. The jurisdiction of the BAT in this dispute arises from the dispute resolution provisions in the Settlement Agreement, as amended in the Amendment Agreement. The relevant part of the Settlement Agreement is the third sub-paragraph of paragraph 3 of that agreement, and it provides as follows:

“Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT 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.”

26. The relevant part of the Amendment Agreement provides as follows:

“2) The third subparagraph of Paragraph 3 shall be deleted and in its place shall be the following: “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. The arbitrator shall decide the dispute ex aequo et bono.”

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

All other terms and conditions of the [Settlement Agreement] shall remain in full force and effect.”

27. The Amendment Agreement is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA. 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 agreement under Swiss law (referred to by Article 178(2) of the PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” clearly covers the present dispute. In addition, the Respondent did not object to the jurisdiction of BAT.
28. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimant’s claim.

6. Other Procedural Issues

29. 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.² However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
30. This requirement is met in the present case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with

² 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.

the relevant rules. It was also given sufficient opportunity to respond to Claimant's Request for Arbitration (two deadlines were fixed for that purpose) and to his Account on Costs. The Respondent, however, chose not to participate in this Arbitration.

7. Discussion

7.1 Applicable Law – ex aequo et bono

31. With respect to the law governing the merits of the dispute, Article 187(1) of the 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) of the 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) of the PILA is generally translated into English as follows:

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

32. Under the heading "Law Applicable to the Merits", 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."

33. The concept of "équité" (or ex aequo et bono) used in Article 187(2) of the PILA

originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage³ (Concordat)⁴, 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.”⁵

34. 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*”.

35. The Arbitrator notes that the fourth sub-paragraph of paragraph 3 of the Settlement Agreement, which is not amended by the Amendment Agreement, states:

“FAT shall apply the laws of Switzerland in deciding any dispute between [Respondent] and [Claimant].”

36. The Arbitrator further notes that:

- as set out at paragraphs 25 and 26 above, the original dispute resolution clause in the Settlement Agreement and the replacement dispute resolution clause introduced in the Amendment Agreement, both expressly provide that the arbitrator shall decide the dispute *ex aequo et bono*,⁶ and
- it is clear from the Request for Arbitration (and in particular the Request for

³ 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).

⁴ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

⁵ JdT 1981 III, p. 93 (free translation).

⁶ As did the dispute resolution clause in the Contract.

Relief),⁷ that the Claimant expects the Arbitrator to decide this matter *ex aequo et bono*. The Respondent, if it considered the agreement between them to have meant anything else, has had the opportunity to say so.

37. The Arbitrator therefore finds that the meaning of the dispute resolution clause in the Settlement Agreement, as amended, including the words “*FAT shall apply the laws of Switzerland in deciding any dispute between [Respondent] and [Claimant]*” is that the Arbitrator will decide any dispute between the parties *ex aequo et bono*, but Swiss arbitration law (namely the PILA) shall apply to the proceedings.
38. In light of the foregoing considerations, the Arbitrator will decide this dispute *ex aequo et bono*, and makes the findings below.

7.2 Findings

39. The simple question to be determined in these proceedings is whether or not the Respondent owes the Claimant EUR 42,000.00 under the Settlement Agreement, as amended.
40. The Arbitrator has reviewed and considered the Contract, the Settlement Agreement and the Amendment Agreement.
41. The Arbitrator finds that, under the Settlement Agreement, as amended by the Amendment Agreement, the Respondent was obliged to pay the Claimant EUR 42,000.00 by 20 September 2012.

⁷ E.g., “[o]n the foregoing amount shall accrue interests at the rate of 5% per annum, or at the different rate deemed appropriate by the Arbitrator *ex aequo et bono*, until the full and unconditional payment”.

42. The Claimant's agent wrote to the Respondent on 1 October 2012 referring to the Respondent's failure to pay by the agreed deadline and demanding payment. The Arbitrator notes that in that letter the Claimant's agent stated that "*in the event payment is not received by January 15, 2013, Mr Giriček will immediately file a case with BAT pursuant to the terms of [the Amendment Agreement]*", and that "[n]othing contained in this letter shall be deemed a waiver of any of Mr. Giriček's rights under the [Amendment Agreement] or [the Contract]".
43. The Arbitrator finds that, although the Claimant gave the Respondent the opportunity to pay the amount due under the Settlement Agreement, as amended, by 15 January 2013, the Claimant did not thereby waive his legal right to receive payment by 20 September 2012.
44. The Claimant has asserted in the Request for Arbitration that the Respondent did not pay the Respondent the amount owed, even after the Claimant demanded payment and made clear that, failing payment, BAT proceedings would be commenced.
45. The Respondent has had numerous opportunities to refute that allegation or to justify its failure to make payment. In particular, the Respondent could have submitted an Answer to the Request for Arbitration. However, the Respondent chose not to do so and has not responded to or engaged in these proceedings at all.
46. Based on the evidence before him, the Arbitrator finds that the Respondent has not paid the EUR 42,000.00 owed to the Claimant under the Settlement Agreement, as amended by the Amendment Agreement.
47. The Arbitrator finds that the Respondent must pay the Claimant the amount due and unpaid under the Settlement Agreement, as amended under the Amendment Agreement, being EUR 42,000.00.

7.3 Interest

48. The Claimant has claimed an interest at a rate of “5% per annum, or at the different rate deemed appropriate by the Arbitrator ex aequo et bono”.
49. The Arbitrator notes that the Settlement Agreement is silent on the availability of interest for late payment. Nevertheless, the Arbitrator finds that payment of interest is a customary compensation for late payment and there is no reason why the Claimant should not be awarded interest in relation to the amount awarded. The Arbitrator finds that a rate of 5% per annum is a reasonable rate of interest, which is in line with BAT jurisprudence, and which should be applied to outstanding payments on which payment of interest is appropriate.
50. As stated at paragraphs 41 and 43 above, the amount due was due on 20 September 2012. Accordingly, the Arbitrator finds that interest must be paid from the day after that, i.e. 21 September 2012.
51. The Arbitrator therefore awards interest at a rate of 5% per annum on EUR 42,000.00, being the amount due but unpaid at 20 September 2012, from 21 September 2012 until the date that payment is made.

8. Costs

52. 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.

53. Article 17.2 of the BAT Rules provides that “*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. Having those provisions in mind, on 25 October 2013 the BAT President determined the arbitration costs in the present matter to be EUR 7,000.
54. The Arbitrator notes that the Claimant was successful in establishing his claim and therefore the costs of these proceedings shall be borne by the Respondent alone. As a result, the Respondent shall pay to the Claimant an amount of EUR 7,000, which is equal to the amount of arbitration costs advanced by the Claimant in this case.
55. The Claimant provided a breakdown of his costs on 12 June 2013, which indicated total costs of EUR 14,000.00 comprising the non-reimbursable handling fee of EUR 2,000.00, the Claimant’s and Respondent’s shares of the Advance on Costs (being EUR 7,000.00 in total) and counsel’s fees of EUR 5,000.00.
56. The Arbitrator’s findings in relation to the Advance on Costs are set out at paragraph 54 above. The Claimant’s costs in respect of counsel’s fees and the non-reimbursable handling fee fall to be dealt with in accordance with Article 17.4 of the BAT Rules.
57. The Arbitrator notes that, under Article 17.4 of the BAT Rules, EUR 7,500.00 is the maximum contribution to a party’s reasonable legal fees and expenses for a claim worth between EUR 30,001.00 and EUR 100,000.00. The Arbitrator further notes that the facts and issues in these proceedings are simple and there has been no need for the Claimant’s counsel to consider and respond to representations made on behalf of the Respondent or procedural orders made by the Arbitrator.



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58. In those circumstances, and considering that this claim's value is towards the lower end of the range in respect of which EUR 7,500.00 is the maximum contribution allowed, the Arbitrator finds that the Respondent shall pay the Claimant a contribution towards his reasonable legal fees and expenses in the total amount (i.e. including the non-reimbursable handling fee) of EUR 5,000.00.

9. AWARD

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

- 1. KK Cibona Zagreb shall pay Mr. Gordan Giriček, in respect of contractual amounts due and unpaid, EUR 42,000.00.**
- 2. KK Cibona Zagreb shall pay Mr. Gordan Giriček interest at 5% per annum on the amount of EUR 42,000.00 from 21 September 2012 until the date that payment is made.**
- 3. KK Cibona Zagreb shall pay Mr. Gordan Giriček EUR 7,000.00 as reimbursement for his arbitration costs.**
- 4. KK Cibona Zagreb shall pay Mr. Gordan Giriček EUR 5,000.00 as reimbursement for his legal fees and expenses.**
- 5. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 8 November 2013.

Raj Parker
(Arbitrator)