BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0375/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Damjan Kandic

- Claimant 1 -

Mr. Miljan Pupovic

- Claimant 2 -

both represented by Mr. Marko Skuletic, Volley 4 Me,
Bulevar Revolucije 80, 81000 Podgorica, Montenegro

vs.

CSM Bucuresti
Calea Victoriei, Nr. 126, Bucharest,
sector 1 (intrarea Teatru Act, etajul 2), Romania

- Respondent -

BASKETBALL
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1. The Parties

1.1 The Claimants

1. Mr. Damjan Kandic (hereinafter referred to as “Player 1”) is a professional basketball player who was retained by CSM Bucuresti for the 2012-2013 season.

2. Mr. Miljan Pupovic (hereinafter referred to as “Player 2”) is a professional basketball player who was retained by CSM Bucuresti for the 2012-2013 season.

1.2 The Respondent

3. CSM Bucuresti (hereinafter referred to as “Respondent”) is a professional basketball club in Bucharest, Romania.

2. The Arbitrator

4. On 16 April 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

5. On 20 June 2012, Player 1 and Respondent entered into an agreement (“the Player 1 Agreement”) whereby the latter engaged the former to play basketball for the 2012-2013 season. The salary of Player 1 was agreed at EUR 40,000.00 net of tax.

6. On 1 September 2012, Player 2 and Respondent entered into an agreement ("the Player 2 Agreement") whereby the latter engaged the former to play basketball for the 2012-2013 season. The salary of Player 2 was agreed at EUR 34,650.00 net of tax.

7. By letters dated 15 December 2012, Player 1 and Player 2 wrote to Respondent notifying it that they were terminating their respective contracts due to non-payment of salaries. At that stage, they state that Respondent was well behind in its obligations to them.

8. Player 1 and Player 2 are seeking their remaining outstanding salaries from Respondent in these proceedings.

3.2 The Proceedings before the BAT

9. On 11 February 2013, Claimants filed a Request for Arbitration of that date in accordance with the BAT Rules.

10. The non-reimbursable handling fee in the amount of EUR 2,000.00 was paid on 12 February 2013.

11. On 22 April 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 1 (Mr. Damjan Kandic) EUR 2,000*
>
> *Claimant 2 (Miljan Pupovic) EUR 2,000*
>
> *Respondent (CSM Bucuresti) EUR 4,000"*

The foregoing sums were paid as follows (all on behalf of Claimants):

27.05.2013	2.000,00 €	Miljan Pupovic	Advance on Costs (Respondent's Share)
24.05.2013	2.000,00 €	Damian Kandic	Advance on Costs (Respondent's Share)
02.05.2013	2.000,00 €	Miljan Pupovic	Advance on Costs (Claimant's Share)
30.04.2013	2.000,00 €	Damian Kandic	Advance on Costs (Claimant's Share)

12. Respondent did not file an Answer in a timely fashion, despite several invitations by the BAT to do so.

13. On 12 June 2013, the Parties were invited to submit their statements of costs by 19 June 2013 and were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.

14. On 12 June 2013, Claimants submitted their statement of costs. Their claim for costs was confined to the Advances on Costs, and expenses for the non-reimbursable handling fee.

15. Respondent did not submit any costs.

16. On 25 June 2013, Respondent was invited to comment on the claim for costs of Claimants.

17. On 26 June 2013, Respondent, writing from an email address csmbucuresti@gmail.com (which was the email address to which the notification of these proceedings was sent by the BAT noted at paragraph 11 above), sent submissions on the merits of the case; on 28 June 2013, Respondent, writing from the same email address, sent club regulations.

18. By way of an attachment to an email dated 1 July 2013, the BAT informed the Parties as follows (the letter is dated, mistakenly, 12 June 2013):

> *"Given that the proceedings were closed on 25 June 2013 and in view of the fact that all correspondence in this matter has been delivered successfully to the Respondent, the*

Arbitrator is not prepared to admit the attached documents to the file."

19. On 6 August 2013, Claimants were asked the following:

> *"The Claimants are herewith requested to inform the Arbitrator by no later than **Monday, 12 August 2013** whether they received any salaries for playing elsewhere in the 2012-2013 season after they left the Respondent, and if so, how much they earned. The corresponding contracts should be filed. In case the Claimants did not play elsewhere, they are requested to inform the Arbitrator within the same time limit of any steps taken to find alternative employment. Supporting evidence for any such steps should be filed.*
>
> *Upon receipt of the Claimants' reply, the Respondent will be granted a chance to comment thereon."*

20. On 12 August 2013 Claimants responded as follows:

- Claimant 1 stated that he earned EUR 5,000.00 in a subsequent playing contract with BC Mures; and

- Claimant 2 stated that he sustained serious injuries while still with Respondent. He then stated "[S]ince leaving he was contacted over phone by coach of Iraqi Duhok and Igokea which he could not accept due to his injuries."

21. Respondent was afforded until 15 August 2013 to comment, but did not avail itself of the opportunity to do so.

4. The Positions of the Parties

22. Claimants say that their case is a simple one. Respondent was obliged to pay them agreed monthly salaries, but apart from some initial payments, they did not receive what was due to them. They refer to their respective contracts (Article 3) which prescribe that, in the event of non-payment, after 30 working days they are free to leave and all sums under each contract become due.

- Player 1 says he received his August salary on 12 October 2012, and his September salary was only paid in full on 13 December 2012. Thus, by 13 December 2012 he says he was still owed his full monthly salary for October and November. When he terminated on 15 December 2012 he says that he was owed EUR 31,266.00 as the remaining total sum of salaries under the Player 1 Agreement. He has limited his claim to EUR 30,000.00, and also seeks legal fees, costs, expenses and interest.

- Player 2 says that his September salary was only partially paid (two amounts of EUR 1,750.00 in October and November) with nothing further emanating from Respondent. By 15 December 2012 he says he was still owed a portion of his September salary, and his full monthly salary for October and November. When he terminated on 15 December 2012 he says that he was owed EUR 31,150.00 as the remaining total sum of salaries under the Player 2 Agreement. He has limited his claim to EUR 30,000.00, and also seeks legal fees, costs, expenses and interest.

23. As already noted, despite several invitations by the BAT, Respondent did not participate in a timely fashion in this arbitration.

5. The Jurisdiction of the BAT

24. As a preliminary matter, the Arbitrator wishes to emphasize that, since Respondent did not participate in a timely fashion in this arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.

25. 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).

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

27. 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].

28. The jurisdiction of the BAT over Claimants' claims is stated to result from the arbitration clauses in paragraph 10 of both contracts, which read as follows (the text is identical in each):

> *"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."*

29. These arbitration clauses are in written form and thus they fulfil the formal requirements of Article 178(1) PILA.

30. 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).

31. For the above reasons, the Arbitrator has jurisdiction to adjudicate Claimants' claims.

6. Other Procedural Issues

32. 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

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

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.

33. 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 the relevant rules. It was also given sufficient opportunity to respond to Claimants' Request for Arbitration (two deadlines were fixed for that purpose), to their Account on Costs and to their reply to the Arbitrator's questions. Respondent, however, chose not to file the requested submissions within the time limits fixed by the Arbitrator. The Respondent's submission of 26 June 2013 was unsolicited since the period for exchange of documentation had been closed and the Arbitrator was seeking merely Respondent's comments on Claimants' costs. In any event, Respondent was granted one more opportunity to make comments on Claimants' reply to the Arbitrator's questions in August 2013, but again did not avail of its right to do so.

7. Discussion

7.1 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

[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.

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. As stated above (paragraph 28), both contracts clearly stipulate that: "*[T]he arbitrator shall decide the dispute ex aequo et bono*".

37. 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[3] (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]

38. 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."*[6]

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

39. 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*."

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

7.2 Findings

41. 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.

42. As regards Player 1, he asserts that when he terminated on 15 December 2012 he had only been paid his salary for August and September. However, upon examination of the Player 1 Agreement, there appear to be several inconsistencies between the total salary amount of EUR 40,000.00 (net) and the schedule of payments, and also the salary amount appears to include the agency commission of EUR 2,000.00. These inconsistencies require a careful scrutiny.

43. The Player 1 Agreement provides for three instalments of EUR 4,367.00 payable on the 15th of each month from September to November 2012 (with no mention of August). This results in a total up to then of EUR 13,101.00.

44. There are then seven instalments of EUR 3,700.00 payable on the 15th of each month from December to May 2013. However, that time period is only 6 months. Even assuming that there is to be an additional monthly instalment included somewhere during the course of this period, seven instalments of EUR 3,700.00 results in a total of EUR 25,900.00, which when added to the figure of EUR 13,101.00 mentioned above, gives a total of EUR 39,001.00. This is EUR 999.00 short of the apparent total agreed salary amount.

45. There is a further complexity in that there is no August instalment scheduled in the Player 1 Agreement, notwithstanding the submission that Player 1 received an "August" salary. The Player 1 Agreement is clear in that the first instalment was due on 15 September 2012, and not before. Player 1 says that his first payment of EUR 4,367.00 was made on 13 October 2012. This is well within the limit of 30 working[7] days (two periods of 15 working days) provided for in Article 3 of the Player 1 Agreement which would open up the option of termination. While it was unsatisfactory that a payment due on 15 September 2012 was only paid on 13 October 2012, Player 1 could not have legitimately terminated his contractual relations with Respondent by reason of that delay. Such delay was not 30 working days, but shorter, and therefore could not come within the specific circumstances the parties to the Player 1 Agreement articulated as triggering the right to terminate.

46. Player 1 was paid two amounts of EUR 2,183.00 on 13 November 2012 and 13 December 2012. Thus, it was only on 13 December 2012 that his October salary payment was fully discharged (except a logistical difference of 1 Euro). At that moment, Player 1 was still owed his November 2012 salary. The question, therefore, for the Arbitrator to determine is whether Player 1 was justified in terminating his contractual relations on 15 December 2012 by reason of Respondent's failure to follow the agreed payment schedule.

47. On 15 December 2012, Player 1 was still owed his November salary but, as already noted above, the entitlement to terminate was only triggered by a delay of 30 working days. From 15 November 2012 (the due date of the November salary instalment) to 15 December 2012, is a period of 30 days, but not 30 working days. Thirty working days translates into a longer period of time. It is therefore clear to the Arbitrator that on

[7] The Arbitrator finds that Saturday and Sunday are not working days. Also, even if Saturday would be considered a working day, the period from 15 September to 13 October would be less than 30 working days.

15 December 2012, Player 1 purported to invoke his right to terminate the Player 1 Agreement too soon – 30 working days had not yet passed from the due date of the November instalment.

48. In summary, Player 1 was not entitled, as a matter of the terms of the Player 1 Agreement, to terminate on 15 December 2012. Respondent was unquestionably in breach by reason of its delay in the payment of the November instalment, but the Parties were unequivocal that only after 30 working days did the right to terminate accrue to Player 1. The fact that Respondent attempted to settle the dispute by offering an amount to the Claimants is a legitimate approach to a contractual dispute with former players represented by the same agent. There is nothing in the wording of the Respondent's letter dated 11 January 2013 which allows the Arbitrator to infer an admission or other type of concession on behalf of the Respondent that can legally impact the Claimants' claims for compensation. As stated earlier, the Arbitrator finds that Respondent was in breach of the Player 1 Agreement but such breach did not meet the contractual conditions for a termination by Player 1. The parties to the Player 1 Agreement made their arrangements in their contract in a particular way in this regard and specifically used the phrase "working days".

49. The claims of Player 1 repose upon the validity of his purported termination on 15 December 2012. As discussed above, that purported termination is not valid. As a consequence, the claims of Player 1 for salaries after the termination must fail and, therefore, they are dismissed.

50. However, Player 1 performed his services to Respondent until 15 December 2012 and should have received both the November and December instalments, in a total of EUR 8,067.00. Therefore, Respondent shall be ordered to pay to Player 1 the amount of EUR 8,067.00 for outstanding salaries.

51. As regards Player 2, the agreed instalments of salary were as follows (all payable on

the 15th day of the month): three monthly payments of EUR 4,550.00 from October to December 2012; six monthly payments of EUR 3,500.00 from January to June 2013.

52. Player 2 submits that his September salary was only partly paid with two payments of EUR 1,750.00 on 13 October 2012 and 13 December 2012. However, the Player 2 Agreement makes no provision for a September payment, rather the instalments started on 15 October 2012. However, this does not present an obstacle to the claims of Player 2. His October salary was never paid in full, and therefore when he wrote his termination letter on 15 December 2012 a period of 30 working days had long since passed from the due date of October salary.

53. The Arbitrator holds that Player 2 was entitled to terminate the Player 2 Agreement on 15 December 2012.

54. Article 3 of the Player 2 Agreement provides that all payments are guaranteed. Player 2's claim for EUR 30,000.00 (having limited his claim in these proceedings) therefore succeeds. As he was injured and not able to secure employment elsewhere in the season, no deduction is made to his claim for EUR 30,000.00.

55. Turning to interest, the Arbitrator finds that the appropriate date from which interest should run (at a rate of 5% per annum in line with BAT jurisprudence) is 16 December 2012 being the day after Claimants wrote their termination letters to Respondent.

8. Costs

56. 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.

57. On 10 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 6,215.00

58. Considering that Player 1 failed in the major part of his claim, and that Player 2 prevailed in his claim, it is fair that 60% of costs of the arbitration be borne by Respondent, and that it be required to cover its own legal fees and expenses as well as those of Player 2. Player 1 is to bear his own costs and expenses.

59. Claimants' claim for legal fees and expenses amounts to EUR 2,000.00, namely the non-reimbursable handling fee. Half of this is to be borne by Respondent in favour of Player 2.

60. Given that Claimants paid advances on costs of EUR 8,000.00, as well as a non-reimbursable handling fee of EUR 2,000.00 (which, as noted above, is taken into account when determining Claimants' legal expenses), the Arbitrator decides that in application of article 17.3 of the BAT Rules:

    (i) BAT shall reimburse EUR 1,785.00 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 621.50 to Player 1 (representing 10% of the arbitration costs) and EUR 3,107.50 to Player 2 (representing 50% of the arbitration costs, being the difference between the costs advanced by Player 2

and the amount he is going to receive in reimbursement from the BAT);

(iii) Respondent shall pay EUR 1,000.00 to Player 2, representing a contribution towards his legal fees and expenses.

9. AWARD

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

1. **CSM Bucuresti shall pay Mr. Damjan Kandic EUR 8,067.00 net in respect of unpaid salary together with interest at 5% per annum from 16 December 2012.**

2. **CSM Bucuresti shall pay Mr. Miljan Pupovic EUR 30,000.00 net in respect of unpaid salary together with interest at 5% per annum from 16 December 2012.**

3. **CSM Bucuresti shall pay Mr. Miljan Pupovic EUR 1,000.00 as reimbursement for his legal fees and expenses.**

4. **CSM Bucuresti shall pay Mr. Damjan Kandic EUR 621.50 and Mr. Miljan Pupovic EUR 3,107.50 as reimbursement for their arbitration costs.**

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

Geneva, seat of the arbitration, 17 October 2013

Klaus Reichert SC

(Arbitrator)