



**BASKETBALL**  
ARBITRAL TRIBUNAL

## **ARBITRAL AWARD**

**(BAT 0445/13)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Quentin Byrne-Sutton**

in the arbitration proceedings between

**Mr. Predrag Samardziski,**

represented by Mr. Boris Noshpal,  
Slave Delovski 7, 1000 Skopje, FYROM

**- Claimant -**

vs.

**BC Crvena Zvezda Telekom**  
Stjepana Supanca 15a, 11000 Beograd, Serbia

represented by Mr. Zoran Toskovic,  
274 Bulevar Kralja, Aleksandra street, Belgrade, Serbia

**- Respondent -**

## **1. The Parties**

### **1.1 The Claimant**

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

### **1.2 The Respondent**

2. BC Crvena Zvezda Telekom (hereinafter also referred to as “the Club” or “the Respondent”) is a professional basketball club in Serbia.

## **2. The Arbitrator**

3. On 25 October 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 25 January 2013, the Club and the Player entered into a contract for the remainder of the 2012/2013 season (the “Agreement”), whereby the latter would receive a total net salary of EUR 175,000 in five monthly installments payable from February to June 2013 (by the 25<sup>th</sup> of each month), as well as have the opportunity to earn various bonuses, including an amount of EUR 8,750 in case of a victory in the Cup of Serbia; all such amounts being net of tax.

5. Article 6 of the Agreement provided that all the amounts due would “... *be paid in dinar equivalent at the middle exchange rate of the NBS on the payment date*”.

6. Article 4 of the Agreement stipulated the following:

*“In case of unilateral termination of the Contract by the Club during the competitive season, such termination must be submitted to the player in writing, and otherwise it does not generate any legal effect. In above case the Club remains obliged to effect all its monetary obligations undertaken by this Contract for the competitive season in which the contract is being terminated”.*

7. The Club acknowledges that to date it only paid the Player a total amount of remuneration of EUR 10,000.

8. Furthermore, the Club acknowledges that in effect it unilaterally terminated the Player’s Agreement on 27 April 2013 because it deemed that during the 14 games he had participated in by that date he had not performed as expected.

9. In that connection, the Club states:

*“... statistical data of this player show that he played for our Club far below the assumed quality [...] For this reason, after the last game of the ABA League season 2012/2013, [...] on April 27, 2013, he was informed by the Director of the Club, Mr. Davor Ristic, that the Club is no longer counting on him, meaning that he did not play any of the games in the ensuing national championship”.*

10. The Club also states, as follows, that it therefore made an offer to the Player, which he rejected:

*“At the time the Director of the Club offered him **EUR 103,750.00** to be paid in 12 equal monthly installments for the three months that he had spent in the Club, EUR 35,000.00 EUR [for] each [month] + a premium in the amount of EUR 8,750.00 for the achieved National Cup – Radivoje Korac Cup, reduced by EUR 10,000.00 that were already paid by him”.*

11. The Player indicates that he believed the entire outstanding contractually-stipulated remuneration was owed to him, i.e. an amount of EUR 173.750 (EUR 183.750 – EUR 10,000), and that because the Club failed to respond to his requests for payment, he decided to file a claim with the BAT.

### 3.2 The Proceedings before the BAT

12. The Player filed a Request for Arbitration dated 21 August 2013, in accordance with the BAT Rules, which was received by the BAT on 6 September 2013; and the BAT received the non-reimbursable handling fee of EUR 3,000 on 29 August 2013.

13. On 29 October 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. Predrag Samardziski)</i>	<i>EUR 4,500</i>
<i>Respondent (BC Crvena Zvezda)</i>	<i>EUR 4,500”</i>

14. On 7 November 2013, the Player paid his share of the Advance on Costs.

15. On 27 November 2013, the Player substituted for the Club’s failure to pay its share of the Advance on Costs within the fixed deadlines.

16. On 29 November 2013, the Club filed its Answer.

17. By Procedural Order of 23 December 2013, the Player was requested to answer two questions from the Arbitrator.

18. On 30 December 2013, the Player submitted his reply to the questions.

19. On 7 January 2014, the proceedings were closed and the Parties invited to file their statements of costs. In addition, the Arbitrator noted that *“...for reasons of equality of treatment between the Parties, the additional non-solicited comments made by the Claimant as a form of rejoinder are not admitted on record.”*

20. On 13 and 14 January 2014, respectively, the Player and the Club each filed their statement of costs.

21. By Procedural Order of 14 January 2014, each Party was given the opportunity to file

comments on the other Party's statement of costs; however neither Party did so.

#### **4. The Positions of the Parties**

##### **4.1 The Claimant's Position**

22. The Player submits the following in substance:

- The Club unilaterally terminated the Agreement without cause and was not entitled to do so without paying him all the outstanding contractual salaries due for the 2012-2013 season.
- Thus, by failing to pay the entire remuneration owed in accordance with article 5 and 6 of the Agreement, the Club breached its obligations and is responsible for such payment.

23. In his Request for Arbitration dated 21 August 2013, the Player requested the following relief:

*"a) To award claimant with amount of 173.750 EUR.*

*b) To award claimant's interest on above mentioned amount at the applicable statutory rate, starting from the 25<sup>th</sup> of June 2013.*

*d) To award claimant with the full covered costs of this Arbitration. Having in mind that in case of dispute, the Article 11 sets the authority of Basketball Arbitration Tribunal (BAT), therefore, the claimant demands arbitrage of BAT."*

##### **4.2 Respondent's Position**

24. The Club submits the following in substance:

- It is having financial difficulties and is therefore unable to pay its share of the advance on costs in this arbitration.

- It always acted fairly with the Player.
- Given that the Player had been engaged at the height of the 2012-2013 season to help the Club succeed in the ABA League, the Euro Cup and the Cup of Serbia, his individual performance (as established statistically) had been insufficient and disappointing by the time the ABA League games had been played.
- It was therefore justified in informing the Player on 27 April 2013, after the last ABA League game, that his services for the team were no longer required.
- Furthermore, considering that by such date he had only played for the Club for three months, the Club's proposal to pay him a reduced but nevertheless high total amount of EUR 103,750 was fair – it making him one of the highest paid players in the region – and should be deemed fair and just under the *ex aequo et bono* principle applicable in front of the BAT.
- The Club remains willing to pay the Player an amount of EUR 103,750, providing the payment takes place in 12 monthly instalments.
- In the circumstances, the Player's claim for a higher amount is contrary to the *ex aequo et bono* principle applicable in front of the BAT.

25. In its Answer of 29 November 2013, the Club requests that the Player's claim be rejected and that it be entitled to submit its costs in accordance with the BAT Rules.

## **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.<sup>1</sup>
29. The Claimant is invoking the jurisdiction of the BAT over the dispute on the basis of the arbitration clause contained under article 11 of the Agreement, which reads as follows:

*“In case of any dispute the Parties shall contract the jurisdiction of the BAT in Geneva, where such dispute shall be finally resolved by the arbitrator sole elected by the Tribunal President, and by application of the principle of Ex aequo et bono (good and rightfully).”*
30. The foregoing arbitration agreement is in written form and thus fulfils the formal requirements of Article 178(1) PILA.
31. 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) PILA).
32. Furthermore, the Arbitrator finds that the arbitration agreement covers the subject matter of the claim.
33. For the above reasons, and because in addition the jurisdiction of the BAT is not contested by the Respondent, the Arbitrator finds he has jurisdiction to adjudicate the Player’s claims against the Club.

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

## 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. Article 11 of the Agreement includes wording providing that if and when any dispute is submitted to the BAT it shall be finally resolved: “... by application of the principle *Ex aequo et bono* (good and rightfully)”.

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’arbitrage<sup>2</sup> (Concordat)<sup>3</sup>, under

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<sup>2</sup> 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).

<sup>3</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

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.”<sup>4</sup>*

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.

## 6.2 Findings

41. It is undisputed that the Player’s total contractual remuneration that remains outstanding according to the terms of the Agreement corresponds to the amount being claimed by him, i.e. to an amount of EUR 173,750, which is made up of EUR 165,000 in salaries and EUR 8,750 as a bonus for the team winning the Serbian Cup.
42. It is also undisputed that, in effect, the Club terminated the Player’s Agreement unilaterally on 27 April 2013 – i.e. after the Player had been with the Club for three months and when two months of contract remained to run – based on the ground that at such point in time (at the end of the ABA League games), statistically-speaking, the Player’s performance was unsatisfactory and below the level the Club could legitimately have expected given the purpose for which the Player had been engaged.
43. Consequently, the only question which needs addressing is whether, as the Club argues, it was fair and just in the circumstances for it to only offer the Player a reduced total remuneration of EUR 103,750 in compensation for the termination of the

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<sup>4</sup> JdT 1981 III, p. 93 (free translation).

Agreement, instead of the total outstanding remuneration of EUR 173,750, given the statistics regarding the Player's performance and the fact that he had only played for the Club for three months on the date of termination.

44. The Arbitrator finds, for a combination of the following reasons, that, in fairness, the Club could not expect the Player to accept its offer of reduced remuneration:

- Ordinarily, upon being engaged by a club, professional basketball players do not contractually guarantee any specific level of performance in relation to statistically-measurable elements of performance or any other criteria.
- In theory, it would be possible to contractually subject certain levels of remuneration to the achievement of measurable elements of performance, however this would need to be explicitly written into the contract or otherwise proven to have been contractually accepted by the Player.
- In the present case there is no clause in the Agreement that subjects the payment of the Player's full remuneration to the achievement of any form of individual performance by him or to any specific results of the team (except for the claimed bonus with respect to which the criteria was met). Neither has any evidence been adduced that the Player envisaged or accepted any such form of condition.
- Consequently, even if the Club deemed the Player to be a special reinforcement for the team engaged during the season to help it achieve particular results, it cannot in good faith have understood that the Player accepted his right to the full contractual remuneration to be subject to a certain level of performance which was not even specified or known to him, i.e. to be subject to the Club's discretionary evaluation of what it deemed a satisfactory performance.
- In addition, article 4 of the Agreement implies the opposite, since it provides that

the Club may unilaterally terminate the Agreement before the end of its term but that in such case “... *the Club remains obligated to effect all its monetary obligations undertaken by this Contract for the competitive season in which the contract is being terminated*”.

45. Accordingly, the Arbitrator finds that it is fair and just, and in keeping with the principle “*pacta sunt servanda*”, that the Club be required to pay the Player the entire outstanding contractual remuneration of **EUR 173,750** he is claiming.
46. In keeping with BAT jurisprudence, interest at 5% per annum will be awarded on the foregoing principal amount, and the Arbitrator finds it fair that such interest run from 26 June 2013, since according to the Agreement all the salaries and the earned bonus stipulated under its articles 5 and 6 were due for payment by 25 June 2013.

## 7. Costs

47. 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.
48. On 7 February 2014 – 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 5,910.

49. Considering that the Claimant entirely prevailed in his claim, it is fair that the fees and costs of the arbitration be borne by the Club and that it be required to cover its own legal fees and expenses as well as make a contribution to those of the Claimant.
50. Given that the Claimant paid advances on costs of EUR 9,000 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 Club failed to pay any advance on costs, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:
- (i) BAT shall reimburse EUR 3,090 to the Claimant, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President.
  - (ii) The Club shall pay EUR 5,910 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 Club shall pay to the Claimant EUR 6,000 (3,000 for the non-reimbursable fee + 3,000 for legal fees) representing a contribution to his legal fees and other expenses. The total amount awarded does not exceed the maximum compensation stipulated in Article 17.4 of the BAT Rules for cases of this value.

## **8. AWARD**

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

- 1. BC Crvena Zvezda Telekom shall pay Mr. Predrag Samardziski - in dinars calculated at the middle exchange rate of the National Bank of Serbia on the payment date - an amount equivalent to EUR 173,750.00 net of tax, as compensation, plus interest at 5% per annum on such amount from 26 June 2013 onwards.**
- 2. BC Crvena Zvezda Telekom shall pay Mr. Predrag Samardziski an amount of EUR 5,910.00 as reimbursement for his arbitration costs.**
- 3. BC Crvena Zvezda Telekom shall pay Mr. Predrag Samardziski an amount of EUR 6,000.00 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, 12 February 2014

Quentin Byrne-Sutton  
(Arbitrator)