# ARBITRAL AWARD

**(BAT 0464/13)**

by the

# BASKETBALL ARBITRAL TRIBUNAL (BAT)

**Mr. Klaus Reichert SC**

in the arbitration proceedings between

**Mr. Hirant Manakian**

**- Claimant -**

represented by Mr. Larry H. Fox, attorney at law,
401E. 80th Street, Suite 17F, New York, NY 10075, USA

vs.

**FC Bayern München e.V.**
Säbenerstr. 51-57, 81547 München, Germany

**- Respondent -**

represented by Mr. Marko Pesic, CEO, FC Bayern Basketball,
Säbenerstr. 51-57, 81547 Munich, Germany

## 1. The Parties

### 1.1 The Claimant

1. Mr Hirant Manakian (“Claimant”) is a FIBA licensed agent based in Fontenille, France.

### 1.2 The Respondent

2. FC Bayern München e.V. (“Respondent”) is a professional basketball club in Munich, Germany.

## 2. The Arbitrator

3. On 14 November 2013, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert SC, as arbitrator (“Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal ("BAT Rules").

4. On 25 November 2013, pursuant to Article 8.3 of the BAT Rules, Claimant challenged the appointment of the Arbitrator.

5. On 27 November 2013, the President of the BAT issued a Procedural Order in accordance with Article 8 of the BAT Rules.

6. On 28 November 2013, the BAT communicated the Arbitrator’s statement of 27 November 2013 and invited comment.

7. On 29 November 2013, Respondent stated that it had no comment on the Arbitrator’s statement.

8. On 2 December 2013, Claimant stated that he had no comment on the Arbitrator’s

statement.

9. On 25 February 2014, the President of the BAT rejected the challenge to the appointment of the Arbitrator.

## 3. Facts and Proceedings

### 3.1 Summary of the Background and the Dispute

10. Claimant is a FIBA licensed agent and along with Mr. Imam Shokuohizadeh and Mr. Christopher Kupcunas, signed a contract entitled "Legal Fee Agreement" with Respondent on 8 October 2011.

11. The Legal Fee Agreement describes the appointment of Claimant, Shokuohizadeh and Kupeunas, as legal advisors by Respondent in relation to the recruiting of a player, Mr. Chevon Troutman ("Player"), for the 2011-12 season. Fees of USD 13,000.00 were agreed upon for payment by Respondent to Claimant.

12. Clause 3 of the Legal Fee Agreement states as follows:

> *"If the club and the player renew the contract with the said player beyond current agreement duration, club will exclusively employ the legal advisor's services for further contract(s) with the player and remunerate the legal advisors accordingly. The commission will be paid on the basis of an invoice 'for legal professional services rendered' to the club made by the legal advisors."*

13. Player was retained by Respondent for 2012-13 and 2013-14. Claimant was not involved in the making of those contractual arrangements.

14. Claimant says that the further retention of Player by Respondent for 2012-2013 and 2013-14 (and any subsequent seasons) triggers an entitlement to fees in accordance with Clause 3 of the Legal Fee Agreement. Respondent disputes this and says that

fees are only triggered if Claimant was needed and had provided services.

### 3.2 The Proceedings before the BAT

15. On 4 November 2013, Claimant filed a Request for Arbitration dated 20 October 2013 in accordance with the BAT Rules.

16. The non-reimbursable handling fee in the amount of EUR 2,000.00 was paid on 28 October 2013.

17. On 21 November 2013, the BAT informed the parties that Mr. Klaus Reichert, SC had been appointed as the Arbitrator in this matter; there followed the challenge described in Section 2 above. Further, the BAT fixed the advance on costs to be paid by the parties as follows:

> *"Claimant (Mr Hirant Manakian) EUR 4,000*
>
> *Respondent (FC Bayern München e.V.) EUR 4,000"*

The advance on costs was adjusted on 28 November 2013 to EUR 5,500.00 per party. The foregoing sums were paid as follows (all by Claimant): 4 December 2013, EUR 5,500.00; and 30 December 2013, EUR 5,550.00.

18. Respondent filed its Answer on 11 March 2014.

19. On 12 March 2014, the Arbitrator directed Respondent to produce a document referenced in the Answer. This was produced on 17 March 2014.

20. By Procedural Order dated 18 March 2014, the Arbitrator gave Claimant the right to comment on the Answer. On 8 April 2014 Claimant filed his comments; thereafter, Respondent filed its comments on 30 April 2014 (following an agreed extension of time).

21. On 6 May 2014, the parties were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules. The parties were invited to submit their claims for costs.

22. On 7 May 2014, Claimant sought permission to put in a further submission arising from Respondent's submission dated 30 April 2014. On 8 May 2014 the Arbitrator refused this request of Claimant in light of the fact that the proceedings were closed on 6 May 2014.

23. On 12 May 2014, Claimant filed his claim for costs. Respondent did not file a claim for costs.

24. On 23 May 2014, Respondent commented upon the claim for costs of Claimant.

## 4. The Positions of the Parties

25. Claimant's claim for relief, as articulated in the Request for Arbitration, is as follows:

> *"We request that a 5% agent commission (plus interest) be paid to Claimant on the net amount of the Player's contract for the 2012-13 and 2013-14 seasons, believed to total approximately $46,250 USD as well as a standing judgment for payment of 5% of any future contract extensions signed between the Respondent and the Player."*

26. Respondent seeks a dismissal of the claims.

## 5. The Jurisdiction of the BAT

27. 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).

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

29. 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]

30. The jurisdiction of the BAT results from clause 4 of the Legal Fee Agreement, which reads as follows:

> *"Any dispute arising from or related to the present contract shall be submitted to the 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 in Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

31. This arbitration clause is in written form and thus it fulfils the formal requirements of Article 178(1) PILA.

32. 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).

33. The Parties have joined issue fully in this arbitration and at no stage has either side called into question the Arbitrator's jurisdiction to determine all claims made herein.

34. For the above reasons, the Arbitrator has jurisdiction to adjudicate upon the claims.

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[1] 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

35. 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".*

36. 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."*

37. In clause 4 of the Legal Fee Agreement the parties have expressly conferred the power to rule *ex aequo et bono* on the Arbitrator.

38. Therefore, the Arbitrator will decide the dispute at hand ex aequo et bono.

39. 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[2] (Concordat)[3], under which Swiss courts have held that arbitration "en équité" is fundamentally different from

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[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.

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]

40. 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]

41. 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*."

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

### 6.2 Findings

43. 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 guiding basic principle by which the Arbitrator will examine the merits of the claims.

44. The dispute between the parties is quite simple. Does clause 3 of the Legal Fee Agreement give rise to an obligation of Respondent to pay fees to Claimant in the event that Player continued with Respondent past 2011-12? It follows therefore that an analysis of clause 3 is essential for the resolution of this dispute.

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

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

45. The parties have devoted much space in their submissions as to the significance (or not, as the case may be) of the nomenclature of the Legal Fee Agreement. Claimant says that there was a tax reason on the part of Respondent for this description, and notes that he (and also the other two persons named in the Legal Fee Agreement on the "agent" side) is not a lawyer. Respondent refers to the complications of bringing a player under contract in Italy to play for it and sought to have the ability to have assistance of Claimant (and the two other persons) if difficulties arose in the future.

46. The Arbitrator does not see much substance to the dispute as regards nomenclature and the labels or descriptions used by the parties in the Legal Fee Agreement. It is clear to the Arbitrator that Claimant (and the other two agents named in that contract) is not a lawyer, and the language (including the fee arrangements) does not give rise to an obligation to provide legal advice in a strict sense. However, viewed in a wider and perhaps looser way, the "legal" assistance envisaged by the Legal Fee Agreement concerned the legalities of moving Player from Italy to Germany and safely extricating him from the various contractual arrangements there. The Legal Fee Agreement was, to all intents and purposes, an agency agreement.

47. What is not in dispute is that Player terminated his contract with Claimant (and the other two agents) in or around May 2012. What is also not in dispute is that Player has continued with Respondent into the 2012-13 and 2013-14 seasons. Further, what is not in dispute is that Claimant (or the other two agents) were not called upon in any way to take part in the making of the contractual arrangements as between Player and Respondent for the 2012-13 and 2013-14 seasons.

48. Respondent suggests importance is to be attached to the fact that Player terminated his arrangements with Claimant (and the other two agents). The Arbitrator does not see the Player's position as being determinative or indeed significant. What is significant and material in this case are the contractual arrangements put in place between Claimant and Respondent. Claimant correctly observes that a third party (Player) who

is not involved in the Legal Fee Agreement could not bring about the end of that contract.

49. The parties adopt diametrically opposed positions on the meaning of the key contractual provision of the Legal Fee Agreement, namely clause 3. Claimant asserts that clause 3 operates to give it a right to a fee in the event of a contract renewal as between Player and Respondent. He says that this right was vested when the Legal Fee Agreement was entered into, and also says that Respondent was obliged to use him (and the two other agents) if a contract renewal was in the offing. Claimant also suggests that Respondent used the services of another agency.

50. Respondent specifically states, in the Answer, that no other agent was used when it renewed the contractual arrangements with Player and therefore no violation occurred of Claimant's exclusive right to be employed in relation to further contracts. This does not appear to be substantively disputed by Claimant and the materials before the Arbitrator do not contain any evidence that another agency actually had any role in the making of the further contract as between Player and Respondent. The Arbitrator does note that there is an email dated 30 May 2013 from Player in which he says that he does not "collaborate anymore with Agency" and, further, he says to Respondent, "[I]f you would like to negotiate my contract, please contact my new representatives…". This is not evidence that Respondent actually used the services of a different agent to Claimant as regards the new contract of Player, but rather an expression by Player of a suggestion only. At best the email is equivocal, and does not evidence conduct by Respondent.

51. Bearing the foregoing discussion in mind, the Arbitrator will now analyze Clause 3 of the Legal Fee Agreement.

52. Clause 3 of the Legal Fee Agreement starts with the following condition:

> *"If the club and the player renew the contract with the said player beyond current agreement duration…"*

This has plainly been satisfied as Respondent and Player did indeed renew their contractual arrangements beyond the 2011-12 season.

53. The next part of clause 3 therefore becomes critical for the outcome of the dispute:

> *"...club will exclusively employ the legal advisor's services for further contract(s) with the player and remunerate the legal advisors accordingly."*

54. The language used is important both for what it says, and also for what it does not say.

55. Insofar as what it does say, it creates a right of exclusivity on the part of Claimant (and the other two agents) for their services to be used for any further contract/s as between Respondent and Player. Therefore, if Respondent were to use another agent or person to assist in the making of such contract/s as between it and Player, that would be a breach of Claimant's right of exclusivity. As noted above in paragraph 49, there is no evidence to support the proposition that Respondent used the services of another agent when it renewed, extended (or whatever the term might be – it does not really matter) the contractual arrangements with Player. Thus, Respondent did not breach the obligation of exclusivity.

56. The key question therefore is whether the word "will" in clause 3 of the Legal Fee Agreement means one or other of the following two interpretations:

(a) Respondent must use the services of Claimant (and the other two agents) if there is to be an extension of Player's time with Respondent beyond the 2011-12 seasons, and even if those services are not used, Respondent must be, in such circumstances, taken to have triggered the fee obligations contained in clause 3; or

(b) Respondent does not have to use the services of Claimant (and the other two agents) but if it does so then the fee obligations contained in clause 3 are triggered.

57. The Arbitrator prefers the second interpretation. The first interpretation gives rise to an open-ended and potentially limitless payment obligation on the part of Respondent (as long as it retains Player as a professional basketball player). That is a consequence which the Arbitrator would see as necessitating the most explicit contractual language. The parties did not make use of such language (such as, *the fee shall be payable regardless of use of service*) and left their arrangements in a much less explicit manner.

58. As regards the word "will" (as opposed to "shall"), the Arbitrator does approach fine etymological distinctions with caution in an arbitration governed *ex aequo et bono*, however it is important in the specific context of this case to thoroughly understand the exact meaning of these words.

59. "Will", when used by a third person (as in "the company will…."), is an expression of the simple future. On the other hand, "shall" when used by a third person (as in "the company shall….") is a determined expression of intention. There is nothing in the submissions or the evidence before the Arbitrator which he finds could place a different colour or interpretation from the surrounding circumstances on the words used by the parties in their contract.

60. The parties used the word "will" in clause 3, as an expression of the simple (as in non-binding) future, rather than using the word "shall" which would be of a markedly different nature for the purposes of their contractual arrangements.

61. In summary, therefore, the Arbitrator is satisfied that the parties did not intend to bargain for a fee to be incurred by Respondent in favour of Claimant (and the two other

agents) for 2012-13 and subsequent years regardless of whether Claimant was engaged for services or not. The conclusion which the Arbitrator has arrived at is based upon a careful assessment of the contractual language used by the parties, and results in Claimant's case being dismissed.

62. Respondent did not breach the exclusivity obligation in clause 3 of the Legal Fee Agreement, and in such circumstances was entirely at liberty to choose whether or not it wanted to engage Claimant (and the other two agents) to render services in connection with any retention of Player beyond the 2011-12 season. It is immaterial whether the services were necessary or not. Respondent had the option to decide to use Claimant (and the other two agents), but could not use anyone else; if Respondent used Claimant (and the other two agents) then it would have to pay fees; if Respondent did not use them, then no fees are payable.

63. Claimant's claim is dismissed.

## 7. Costs

64. 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.

65. On 29 July 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 7,230.00.

66. Considering that Claimant did not succeed, it follows that he should bear his own costs as well as those of Respondent. However, as Respondent has not made any claim for costs, nor did it pay any of the advances on costs, Claimant does not have to pay over any further money.

67. The Arbitrator decides that in application of article 17.3 of the BAT Rules:

(i) Claimant shall bear his own costs, legal fees and expenses.

(ii) As Respondent has not paid any advance on costs, nor sought any legal fees and expenses, no order is necessary in that regard.

(iii) Claimant shall receive EUR 3,820.00 from the BAT being the difference of the advances on costs paid by him and the arbitration costs determined by the BAT President.

## 8. AWARD

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

1. **The claims of Mr. Hirant Manakian as against FC Bayern München e.V. made herein are dismissed.**

2. **Mr. Hirant Manakian shall bear the arbitration costs as well as his own legal fees and expenses.**

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

Geneva, seat of the arbitration, 4 August 2014

Klaus Reichert
(Arbitrator)