



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0468/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Ms. Ivanka Matić

- Claimant -

represented by Mr. Joseph Gayer, attorney at law,
41-45 Rothschild Blvd, Tel Aviv 65784, Israel

vs.

Club Sportiv Municipal Targoviste
Revolutei No 8B, 130011 Targoviste, Romania

- Respondent -

represented by Mr. Adrian Fetcu, attorney at law,
str. A. Panu, nr.27, bl. Moldova III, et. 2, ap.5, Iasi, Romania

1. The Parties

1.1. The Claimant

1. Ms. Ivanka Matic (hereinafter the “Claimant” or the “Player”) is a professional basketball player of Serbian nationality.

1.2. The Respondent

2. Club Sportiv Municipal Targoviste (hereinafter the “Respondent” or the “Club”) is a professional basketball club in Targoviste, Romania.

2. The Arbitrator

3. On 2 December 2013, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren, appointed Dr. Stephan Netzle 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. The Claimant, the Respondent and Mr. Yves Lejeune, FIBA Agent (hereinafter the “Agent”) entered into an agreement dated 1 May 2012 regarding the Player’s provision of services during the basketball seasons 2012/2013 and 2013/2014 (hereinafter the “First Player Contract”). The First Player Contract contains the following salary provision:

“SEASON 2013-2014 (115 000 EUR):

- a) *The preceding quantity will be paid by the **Club** in the following manner:*



BASKETBALL
ARBITRAL TRIBUNAL

- **13,500.00 EUR** net on or before September 5, 2012
- **13,500.00 EUR** net on or before September 30, 2012
- **13,500.00 EUR** net on or before October 31, 2012
- **13,500.00 EUR** net on or before November 30, 2012
- **11,000.00 EUR** net on or before December 31, 2012
- **11,000.00 EUR** net on or before January 31, 2013
- **11,000.00 EUR** net on or before February 28, 2013
- **11,000.00 EUR** net on or before March 31, 2013
- **11,000.00 EUR** net on or before April 30, 2013
- **6,000.00 EUR** net on or before May 15, 2013”

5. The Player played the entire 2012/2013 season for the Club’s team and travelled home after that season.
6. By emails dated 31 August and 9 September 2013, the Agent asked the Club to inform the Player about the date on which she should return to the team’s practice sessions for the 2013/2014 season and to provide her with a flight ticket. The email dated 31 August 2013 reads as follows:

*“Hello Gabriel
Ivanka MATIC is waiting the flight ticket for her arrival in Targoviste on September 2013.
Thank you to email us her electronic ticket from Belgrad – Serbia.
We saw your coach will be present at the middle of September in the club.
Best regards, Yves”*

By email dated 9 September 2013, the agent reminded the club as follows:

*“Hello again
Please answer us the player Ivanka MATIC is waiting your feedback and her eticket from Belgrade / Serbia for her arrival in your club.
We saw your coach will arrive on September 17, 2013 in the club but Ivanka is ready to arrive in front to start a preparation with the club
Thank you to answer us”*

7. By email dated 9 September 2013, the Club replied as follows:

*“Hello
Sorry, but this season we have a low budget and we don’t afford a player like Ivanka Matic. This is because we’ve lost the championship last season and the local authorities sanctions us and all salaries of the club’s employees were sanctioned with half all year.*

*All we can do in the next 2 weeks is to be able to honor 2 remaining salaries for each player, including our debt to you, means 7.400 euros.
Please, understand us that this season our objective is to keep the team in the first division.*

Thank you.

Regards

*Doba Marius
CSM Targoviste"*

8. The Player did not return to the Club's team, but signed a new employment contract with the Serbian club BC Crvena Zvezda on 3 December 2013 for a contract period until 14 March 2014.
9. During this arbitration, the Club submitted a second player contract bearing signatures of the Club and the Player which was dated 24 July 2012 (the "Second Player Contract"). The Second Player Contract was concluded for a term of only one year and provided for a substantially lower salary than the First Player Contract.
10. The main issue in this arbitration is whether the First or the Second Player Contract must be considered as the valid legal basis for the Player's claim.

3.2. The Proceedings before the BAT

11. On 7 November 2013, the Claimant filed a Request for Arbitration. The non-reimbursable handling fee of EUR 2,000.00 was received in the BAT bank account on the same date. Together with the Request for Arbitration, the Claimant submitted the First Player Contract.
12. By letter dated 11 December 2013 to the Parties, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit of 13 January 2014 was fixed for the Respondent to file its answer to the Request for Arbitration (the "Answer") in accordance with Article 11.2 of the BAT Rules. The BAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs by no later than 13 January 2014:

Advance on Costs should be lowered as much as possible or, alternatively, that she was granted an extension for the payment of such share of 20 days.

20. By letter dated 25 February 2014, the Player's time limit to substitute the Club's share of the Advance on Costs was postponed until 17 March 2014. Within the same time limit, the Player was requested to provide the original copy of the First Player Contract as well as more detailed information regarding a potential employment relationship during the season 2013/2014. Both were submitted on 5 March 2014.
21. By letter dated 27 March 2014, the BAT Secretariat confirmed receipt of the full Advance on Costs. The Player was invited to comment on the admissibility of the delayed documents submitted by the Club's as well as on the Second Player Contract until 4 April 2014.
22. By email dated 1 April 2014, the Player filed her comments to the Club's submissions (the "Reply").
23. By letter of 8 April 2014, the BAT invited the Club to comment on the Player's Reply and to answer four specific questions. By email dated 14 April 2014, the Club filed its comments on the Player's Reply.
24. By letter dated 23 April 2014 to the Parties, the BAT Secretariat requested the Player to provide evidence that the Club had actually paid her a salary for the 2012/2013 season of EUR 105,000.00 under the First Player Contract, and the Club to submit the original of the Second Player Contract, both by 7 May 2014. The original of the Second Player Contract was received on 29 April 2014.
25. By email dated 30 April 2014, the Player filed a further submission including a statement of the Agent and player contracts with six other players represented by the Agent.

26. By letter dated 21 May 2014, the BAT Secretariat informed the Parties that the exchange of documents was complete and that the award would be rendered as soon as possible. Subsequently, both parties submitted their account of costs.
27. By email of 30 May 2014, the Club submitted other player contracts with the players mentioned in the Player's submission of 30 April 2014.
28. By email dated 16 June 2014 to the BAT Secretariat, the Player filed another unsolicited submission.
29. By letter dated 25 June 2014, the BAT Secretariat requested the Parties to pay an additional Advance on Costs of EUR 2,000.00 each by 7 July 2014 at the latest.
30. By email dated 7 July 2014, the Club filed further unsolicited submissions but did not pay its share of the additional Advance on Costs which was eventually substituted by the Player.
31. By letter dated 9 September 2014, the BAT Secretariat asked the Romanian Basketball Federation whether the First or the Second Player Contract had been registered with the federation. On 19 September 2014, the Romanian Basketball Federation replied that, in general, Romanian clubs did "not have an obligation to submit or register the contracts with the players at the federation." Therefore, none of the contracts forwarded by the BAT had been submitted to the Romanian Basketball Federation for registration.
32. On 25 September 2014, the BAT Secretariat informed the Parties about the response of the Romanian Basketball Federation and that it would now seek a handwriting analysis.
33. By letter dated 6 October 2014, the Player argued that in case that the handwriting analysis would come to the conclusion that the Player's signature on the Second Player Contract was hers, she had signed that document "without due care".

34. On 7 November 2014, the Arbitrator asked the Parties whether they would be ready to participate in a phone or video conference in order to find a settlement. However, no agreement on such a settlement conference could be reached by the Parties, and the Arbitrator proceeded by asking an independent hand-writing expert to provide an opinion on the question whether the Second Player Contract had been signed by the Player. The handwriting expert was provided with the original of the Second Player Contract together with 40 further original handwriting samples from the Player.
35. The handwriting analysis was submitted on 15 November 2014. It confirmed that it was “very likely” (~99%) that the front page of the Second Player Contract had been signed by the Player and that it was “predominantly likely” (~95%) that the signatures on the other pages of the Second Player Contract had also been written by the Player.
36. Upon invitation of the Arbitrator, the Parties provided their comments on the handwriting analysis on 10 December 2014 (Player) and 11 December 2014 (Club).

4. The Positions of the Parties

4.1. The Claimants' Position

37. The Player's position can be summarized as follows:
- The Player and the Club signed the First Player Contract for two basketball seasons, namely 2012/2013 and 2013/2014.
 - By refusing to accept the Player's services for the season 2013/2014, the Club breached the First Player Contract without fault of the Player. Consequently, the Player is entitled to her full salary until the end of the agreed contractual term.
 - Due to the Club's late and surprising termination of the First Player Contract, the Player was unemployed and had no chance to play for another club.
 - Therefore, in accordance with the First Player Contract, the Club shall pay the salary amount of EUR 115,000.00 to which the Player is entitled for the season 2013/2014. However, in order to save handling fees, the Player only claims the

amount of EUR 100,000.00.

38. Only after the initiation of this arbitration, the Player could find a new employment.
39. With respect to the Second Player Contract, which was produced by the Club in the course of this arbitration, the Player argues as follows:
- The Second Player Contract is a fake agreement which did not substitute the First Player Contract. Besides, the Club did not prove that the Second Player Contract substituted the First Player Contract (see e.g. BAT case 0155/11).
 - The Player never signed the Second Player Contract.
 - The Parties always acted in accordance with the First Player Contract. For instance, the Claimant received the full agreed salary for the season 2012/2013 (i.e. EUR 105,000.00). According to the Second Player Contract, the salary for the 2012/2013 season would have been lower (EUR 45,000.00).
 - The Club failed to provide an explanation why the Player should have signed the Second Player Contract. Considering the lower salary under the Second Player Contract, the Player would have given up EUR 60,000.00 without reason.
 - No correspondence about the negotiation of the Second Player Contract was submitted by the Club.
 - The First Player Contract contained a binding obligation for a collaboration between the Parties for the 2013/2014 season. This was not questioned by the Club's email of 9 September 2013. The Club's sport manager rather apologized and regretted that the Respondent could not hire the Player any longer because of financial problems.
40. In her response to the Arbitrator's questions of 30 April 2014 which related to the salary payments in the 2012/2013 season, the Player replied as follows:
- The Player does not have any documentary evidence for the payment of EUR 105,000.00 from the Club.
 - However, the Agent confirms in his written statement dated 30 April 2014 that he received an agent fee of 10% of the First Player Contract from the Club, i.e. the

amount of EUR 10,500.00 (and not only EUR 4,500.00 which would have been the agent fee under the Second Player Contract), and that he never heard of (and was never consulted with respect to) the Second Player Contract.

- If the Club had paid only EUR 45,000.00 to the Player for the season 2012/2013, the Player would certainly have filed a claim for the remainder against the Club.
- Even if the handwriting analysis would confirm that she signed also the Second Player Contract, she had signed it “without due care.”

41. In her comments to the handwriting analysis, the Player argues that the expert was not provided with the original of the Second Player Contract and could therefore not validly conclude that it was “very likely” or “predominantly likely” that the signatures on that contract were the Player’s.

4.2. The Claimant’s Requests for Relief

42. In her Request for Arbitration dated 7 November 2013, the Player requested the following reliefs:

“In light of the above, the honorable BAT is requested to condemn the Club to pay the Player EUR 100,000 for her salary of the 2013/2014 season at 5% interest per annum from the payment’s(sic) due date.

In addition, the honorable BAT is requested to condemn the Club to pay the Player EUR 5,000 legal fees in accordance with article 17.4 to the Rules and to fix any additional costs of the arbitration on the Club, who has forced the Player to file this claim in lack of good faith.”

43. In her Reply dated 30 March 2014, the Player formulated the reliefs as follows:

“(…) the Respondent’s arguments should be rejected. The Respondent has breached the First Agreement in lack of good faith, and the honourable BAT is requested to condemn the Respondent to pay the Claimant EUR 100,000 for her salary of the 2013/2014 season at 5% interest per annum from the payment’s due date, and in addition to pay special compensation.

Additionally, and since, with all due respect, the Claimant’s reimbursement for her expenses due to legal fees should not be lower than the arbitrator’s fee, the honourable BAT is requested to condemn the Respondent to pay the Claimant 9,000 EUR legal fees in accordance with article 17.4 to the Rules and to fix any additional costs of the arbitration on the Respondent, who has forced the Claimant

to file this claim in lack of good faith.”

44. In her submission dated 21 May 2014, the Claimant requested the following relief:

“(…) Therefore, the Claimant and her legal counsellor request to determine the amount of contribution to the Claimant’s costs as EUR 7,500. The said amount does not derogate from the Claimant’s merit to receive reimbursement of monies paid by her to the BAT and Arbitrator in the process of these proceedings (EUR 11,000), (…)”

4.3. The Respondent's Position

45. The Club submits the following in substance:

- The Player and the Club signed the First Player Contract for the basketball seasons 2012/2013 and 2013/2014. However, while the Player signed the Second Player Contract, the First Player Contract was not signed by all of the Club’s decision makers. The Player did not sign the First Player Agreement herself, but had her Agent signing for her.
- On 21 August 2012, the Parties entered into the agreement no. 785 (i.e. the Second Player Contract), which replaced the First Player Contract. In 2012, the Club’s budget was substantially cut. After having discussed this issue with the Player, she accepted to sign the Second Player Contract.
- The Player was compensated according to the Second Player Contract which did not contain any duty of the Club to employ the Player during the 2013/2014 season. There is no evidence that the Player was paid according to the First Player Contract.
- The email correspondence between the Parties proves that the Club intended to hire the Player for the season 2013/2014. However the Parties could not agree on a contract for that season.
- The agreements between five other basketball players and the Club have no legal effect, since they were not signed by all decision-makers of the Club.
- The Arbitrator should order a handwriting analysis which would certify that the Claimant signed and was aware of the Second Agreement, that she was paid according to the Second Agreement and that she signed the related payrolls.

- Since the Player claims a forgery of her signature, she should have filed a criminal complaint which she did not.

4.4. The Club's Requests for Relief

46. In the Answer respectively in its submission of 30 January 2014, the Club requested the following reliefs:

"Please reject the claims of Mrs MATIC IVANKA and obligate her to pay the expenses already made by CSM TARGOVISTE (fees paid to BAT for this legal procedure and the attorney's fees)."

47. In its submission dated 14 April 2014, the Club requested the following reliefs:

"We finally hope that the Honored Arbitrator will acknowledge that:

- *the Petitioner signed and undertook all the legal consequences of the contract no. 785/21.08.2012,*
- *she was remunerated for this contract;*
- *there was no understanding between the CLUB and the Petitioner as concerns the 2013/2014 season.*

Considering all the reasons above, please overrule all the Petitioner's claims and order her to pay the CLUB's legal fees contracted in connection with this dispute."

5. Jurisdiction

48. 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).

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

50. 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.

51. The jurisdiction of the BAT regarding this dispute results from the arbitration clause contained in clause THIRTEENTH of the First Player Contract 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 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 (PILA), irrespective(sic) of the parties’ domicile.

The language of the arbitration shall be english(sic).

The arbitrator shall decide the dispute ex aequo et bono.”

52. Article 25 of the Second Player Contract states:

“Any litigation arising from or in relations with this contract, including on its conclusion, execution or cancellation, if cannot be solved amicably by the parties’ representatives shall be settled by the competent court”

53. The Claimant bases her claim on the arbitration clause contained in the First Player Contract. It is in written form. Therefore, the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

54. The Respondent did not contest the jurisdiction of the BAT (see Art. 186(2) PILA: “[A] plea of lack of jurisdiction must be raised prior to any defence on the merits.”).

55. The arbitration clause in a contract is a stand-alone agreement which is independent from the main agreement. According to Article 178(3) PILA, an arbitration agreement “cannot be contested on the grounds that the main contract is not valid.”¹ Thus, the arbitration clause in the First Player Contract is a sufficient legal basis for this arbitration irrespectively of the answer to the question whether or not the First Player Contract was replaced by another contract which did not contain an arbitration clause.

56. The Arbitrator also considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement contained in the First Player Contract under Swiss law (referred to by Article 178(2) PILA). Further, the wording “[a]ny dispute

¹ See also BERNHARD BERGER/FRANZ KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed., N 618.

arising from or related to the present contract” in clause THIRTEENTH of the First Player Contract covers the present dispute.

57. Consequently, the Arbitrator finds that he has jurisdiction to adjudicate the Claimant’s claim based on the arbitration agreement in the First Player Contract.

6. Other procedural issues

6.1. Hearing

58. The parties did not request the BAT to hold a hearing. The Arbitrator therefore decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the award on the basis of the written submissions.

6.2. Late filing and unsolicited submissions

59. During this arbitration, an unusually high – for a BAT arbitration – number of written submissions and evidentiary documents has been filed by both Parties. Some of them were submitted in response to specific questions of the Arbitrator, some were submitted late and some were filed without explicit request of the Arbitrator. Also the Advance of Costs were paid only with delay. This led to an unusual duration of the proceedings. Since both Parties somehow contributed to the flood of documents and the delays, since no complaint about late or unsolicited filing has been raised by either party, and since the principle of due process does not allow the Arbitrator to disregard the parties’ submissions easily, he has taken all submissions into account and not excluded any of them from the file.

7. Applicable Law – ex aequo et bono

60. 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”.

61. 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.”

62. In the arbitration agreement of clause THIRTEENTH of the First Player Contract, the parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to him *ex aequo et bono*.

63. 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 of 1969² (Concordat),³ under which Swiss courts have held that “arbitrage en *équité*” is fundamentally different from “arbitrage 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

64. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

“the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the

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 KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 187 PILA N 289.

⁴ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

*case at hand*⁵.

65. In light of the foregoing matters, the Arbitrator makes the following findings:

8. Findings

8.1. Was the First Player Contract validly concluded?

66. None of the Parties seriously disputes that they validly entered into the First Player Contract which bears the date of 1 May 2012, and there are no indications that the First Player Contract was forged. The Club's argument that not all of its decision-makers had signed that agreement is unsubstantiated. The Club must accept that the First Player Agreement which bears the Club's seal and a number of signatures appears to be validly signed by the Club and there is no evidence to the opposite.

67. On the Player's side, the First Player Contract was signed by her agent Yves Lejeune. Curiously, a signature of the Player can be found only on p. 3. Whether that signature was provided on or after 1 May 2012 does not matter since the Player does not in any way challenge the validity of said contract; instead, she has submitted the First Player Contract in support of her claims, arguing that it is binding on both parties and seeking to derive certain rights and obligations therefrom. The Arbitrator finds therefore that the First Player Contract was validly concluded between the Parties.

8.2. Was the Second Player Contract validly concluded?

68. The Player states that she never signed the Second Player Contract and that her signature on that agreement must have been forged. The Club suggests that the allegation of forgery should be cleared by a handwriting analysis. That is why the Arbitrator appointed an independent expert and asked for a handwriting analysis to answer the question whether the four signatures on the Second Player Contract had

⁵ POUURET/BESSON, *Comparative Law of International Arbitration*, London 2007, N 717, pp. 625-626.

been produced by the Player. No objection against the selection of the expert has been raised by either Party.

69. The independent expert performed a comprehensive analysis of the four signatures of the Player on the Second Player Contract in comparison to 40 samples provided by the Player. 20 of these samples had specifically been produced for the handwriting analysis. The Arbitrator underlines that the handwriting expert delivered her opinion exclusively on the basis of original documents and signatures, including the original of the Second Player Contract. The Player's allegation that only a copy of the Second Player Contract had been submitted to the handwriting expert is not correct.
70. The independent expert concluded:

“Even if one assumes that a potential signature forger who possesses above-average graphic and motor coordination skills, strong observation skills, and handwriting that is similar to that of the person who bears this name had appropriate signature templates at his or her disposal, it is not possible to provide proof of forgery based on clearly assessable analytical findings. This applies even if extensive opportunities for practice are factored in. Based on the movement process that is characteristic of the person who bears this name, and the fact that the details of the course of the movement and shape, the direction of movement and the vertical and horizontal scope and proportionality correspond to the greatest degree, along with the lack of outward indications of manipulation, the assumption that an unknown third party could have attempted to imitate Ms. I. Matic's signing style in producing the signatures in question seems to be very unlikely.

The nature and weight of the configuration of the findings made on the whole lead, with the given restrictions in terms of criticism of the materials, to the following conclusions:

Signature X 1⁶ in question was made with high likelihood by Ms. Matic.

Signatures X 2 - X 4⁷ were made with predominant likelihood by Ms. Matic.”

⁶ Signature X 1 is the signature of the Player on page 1 of the Second Player Contract.

⁷ Signatures X 2 – X 4 are the signatures of the Player on pages 2 and 3 of the Second Player Contract.

71. The result of the handwriting analysis has convinced the Arbitrator to the necessary standard of proof that the Second Player Contract was signed by the Player.

8.3. Did the Second Player Contract replace the First Player Contract?

72. The fact that the same parties have signed two agreements about the same issue does not automatically lead to the invalidity of one of them, except if it was the parties' intention that one contract shall substitute for the other⁸ or if it turns out that one of the contracts had no practical meaning or that it was a simulated agreement which was signed for another purpose while the relationship between the parties was actually governed by the other contract.

8.3.1. Explicit replacement of the First by the Second Player Contract?

73. According to standing BAT jurisprudence, a signed contract is deemed to be replaced by a new contract if that new contract provides explicitly for such a substitution. Article 26 of the Second Player Contract, which was undisputedly signed after the signing of the First Player Contract states:

"This contract represents the will of the parties and removes any verbal and written agreement, before and after its conclusion."

74. Whether a substitution of a *later* agreement is possible at all, is not at stake in this case. What is however possible is the replacement of an *earlier* contract by a later contract between the same parties if they explicitly agree so. That is what has been done when the parties signed the Second Player Contract including article 26.

75. In BAT 0402/13 which has been cited by the Player, the facts have been decisively different: There, after the signing of the Coaching Agreement, the parties signed a League Contract which was intended to be submitted to the Italian League for

⁸ See BAT 0402/13, para. 38.

registration purposes and which contained other terms. The League Contract did not contain any provision according to which the Coaching Agreement would be replaced. In the present case, however, the Parties have agreed in Art. 26 of the Second Player Contract that any prior agreement (which includes the First Player Contract) would be replaced by the Second Player Contract. By signing the Second Player Contract, the Parties agreed to cancel the First Player Contract and to replace it by the Second Player Contract.

8.4. Are there reasons why the Second Player Contract should not be taken into consideration?

76. The Player argues that the Second Player Contract had no effect since she was always paid according to the terms of the First Player Contract throughout the entire 2012/13 season (i.e. EUR 105,000.00). Also the agent fee was paid according to the First Player Contract (i.e. EUR 10,500, corresponding to 10% of the value of the Player's salary in the first year).
77. The salary payment of EUR 105,000 to the Player has been disputed by the Club which leads to a rather unique situation whereby the Player claims having received more money (EUR 105,000) than the Club is ready to confirm (EUR 45,000)! The Player only replies that she would have sued the Club for the difference if a smaller amount than agreed in the First Player Contract had been paid.
78. The Player has not provided any receipt or bank statement which would show which amounts she had received from the Club. She alleges that she obtained all salary payments in cash. However, an invoice and a personal statement of the agent confirming the agent fee of EUR 10,500 was provided.
79. The Club has submitted monthly salary statements from September 2012 – January 2013 bearing the signatures of all players, and monthly bank statements from February 2013 until October 2013. These statements indicate that a salary of approx. EUR 5,000.00 was paid to the Player in cash until (and including) January 2013. From March 2013 on, the salary was transferred by the Club's bank while it seems that some

amounts were paid only sometime after the end of the 2012/13 season. The addition of the amounts listed on these statements results in an amount corresponding approximately to the salary amount agreed in the Second Player Contract. The Player has not put these statements into question.

80. The Arbitrator has no indication, let alone evidence, which would support the Player's version, namely that she was paid according to the First Player Contract. The documentary evidence rather leads to the conclusion that the salaries were paid in accordance with the Second Player Contract. The payment of the agent fee of EUR 10,500 does not matter: the agent was not part of the Second Player Contract, and in the First Player Contract, the agent fee was quantified by a certain amount and not by a percentage of the Player's salary.
81. The Player also indicates that the Second Player Contract may have been signed for another purpose than regulating the relationship between the Player and the Club. This is indeed not the first case before the BAT in which a club and a player (or coach) have signed two contracts with different terms covering the same period of time. The existence of two contracts has sometimes been explained by the requirement of registration of a player or coaching agreement with the respective national league, or by the desire of the club to "optimize" its tax obligations. Thus, and depending on the respective facts and circumstances, it may be that one contract was signed for other purposes and must be considered as a simulated contract, while it was only the other contract which was intended to create mutual rights and obligations between the parties.
82. The plausibility of such a scheme is why the Arbitrator asked the Romanian Basketball Federation whether one or both of the Player Contracts had been submitted and registered there. The Romanian Federation replied however that no such requirement existed and none of the two Player Contracts had been submitted or registered.
83. The Player has not argued (and there are no indications in the file which would lead to the conclusion) that the Second Player Contract could have served a further purpose,

e.g. tax optimization. It must therefore be excluded that the Second Player Contract was signed as a simulated contract with the goal of concealing the very content of the agreement between the parties towards any private or public authority.

84. The Arbitrator therefore finds that the Player has not proven that the Parties disregarded the Second Player Contract and acted according to the First Player Contract, or that the Second Player Contract was a simulated contract which was concluded for a different purpose.

8.5. Have there been other reasons which may render the Second Player Contract wholly or partially invalid?

85. The fact that only a few weeks after the signing of the First Player Contract, the Parties signed a Second Player Contract which contains several provisions which are clearly less beneficial to the Player, raises indeed the question whether that Second Player Contract reflected the true and common intent of both parties.
86. A signed contract may exceptionally be considered entirely or partially invalid if a party demonstrates that the conclusion of the contract was defective, e.g. because of substantial error of a party or willful deception by the other party.
87. The Player argues that there was simply no reasonable motive why she should have signed the Second Player Contract with less favorable terms than the First Player Contract, that her management was not involved in the negotiations and the signature of the Second Player Contract although the Agent had signed the First Player Contract, and that there were no indications of negotiations prior to the signing of the Second Player Contract submitted in this arbitration.⁹

⁹ The Player also refers to BAT 0155/11 where the arbitrator held under allegedly comparable circumstances that he “cannot see any reason why Claimant should have voluntarily waived his rights for salary payments three or four times higher than those stipulated in the Second Player Contract. (...) Hence, the First Player Contract was not terminated or substituted by the Parties entering into the Second Player Contract.” However, the facts in that case are decisively different: In BAT 0155/11, the Club could

88. In response, the Club submits that there was indeed a motive for the Second Player Contract, namely the financial hardship because of substantial budget cuts. That is why the contract with the Player had to be re-negotiated. The Club says *that “[s]he understood the financial conditions of the CLUB and accepted to sign the second contract.”* It is indeed not unusual for clubs facing commercial difficulties to re-negotiate the agreements with their players.
89. The Club has provided certain documents in support of the alleged budget cuts. According to these documents, the Club was confronted in July 2012 with a deficit of ROL 1,566,520 (= EUR 339,037). That is why all or some player and coaching contracts were re-negotiated and eventually replaced by new contracts with lower salaries, including the contract with the Player. The Club submitted a number of contracts with other players whose first contract was replaced by a second agreement with different salaries and with a term of only one season.
90. Not all of the players or staff have accepted the new contracts with lower salaries and shorter terms. The Player submits that in particular the coach George Dikeoulakos refused a new contract and a salary cut which eventually led to an arbitral proceeding before the BAT because the Club nevertheless reduced the payments to the coach.¹⁰ This case proves that the Player could have said no to the Club’s proposal to cut the salary and reduce the term of the employment. That is what the coach did but that is not what happened in the Player’s case.
91. The Arbitrator understands that the Club had a motive to revert to the players and re-negotiate the player contracts, including the Claimant’s. The Player must have realized why the Club asked for a replacement of the First Player Contract by a new agreement with less favorable terms, namely because of its budget restraints. The Arbitrator does therefore not accept that she erred about the purpose of the Second Player Contract,

not provide any plausible explanation for the replacement of the First Player Contract by the Second Player Contract. It rather turned out that agreement of the parties had been split into two contracts, probably for tax reasons, and that the player had still received monthly payments under both contracts.

¹⁰ BAT 0383/13.

especially since she did not explain how else she had understood the purpose and the content of the Second Player Contract.

92. The Player then submits she must have acted carelessly when she signed the Second Player Contract and was not aware what she actually signed. The Player failed however to substantiate her alleged fundamental error. The Second Player Contract contained an English translation of the Romanian original and the Player could have understood its content. Her signature can be found on every single page which indicates that the Player was shown the entire contract and no pages had been replaced later on. All she submits is that she may have signed the Second Player Contract without taking note of its content. Signing an unread document does not constitute a fundamental error but rather constitutes lack of care for which the signatory must bear the consequences. It is not an excuse which would render the signed document unenforceable.
93. However, a comparison of the first and second contracts of the other players leads to the conclusion that between 15 August 2012 and 4 September 2012, at least five player contracts with players represented by Mr. Lejeune had been replaced by new contracts. All of them provided for a new salary of EUR 45,000.00 which resulted in salary reductions between EUR 5,000 and EUR 25,000 per player (except the Claimant, whose salary was cut by EUR 60,000). Curiously, in one case the second contract led to a salary increase by EUR 5,000. Two of the five player contracts had initially been concluded for two seasons but were then reduced to one season. As a result, all five players signed a new player contract with exactly the same content, including the same salary (EUR 45,000.00) and the same term of the contract (the 2012/13 season). Such a uniform salary cut which does not take the individual circumstances into account and leaves one or more players unaffected leads to a disproportionate and unacceptable result.
94. The uniform salary cut is information which the Player has hardly been given before she signed the Second Player Contract. No such argument was raised by the Club. The Arbitrator cannot imagine that the Player would have signed that document if she

had known that her salary cut was by far the biggest, that only two of the players had been asked to waive the second year of employment and that even one player saw her salary raised.

95. The Arbitrator therefore finds that the Player signed the Second Player Contract on the basis of incomplete and undisclosed information, which indeed constitutes a material error attributable to the Club. The Arbitrator also finds *ex aequo et bono* that the error does not invalidate the entire Second Player Contract but can only lead to a partial invalidity of the legal consequences thereof since the agreement was fulfilled in the first year and the Player has repeatedly stated that she was not claiming any payments for the 2012/2013 season. It is however difficult to determine which salary reduction the Player would have accepted if she had been given the full information and whether she would have also accepted a reduction of the term of her employment.
96. Under the circumstances, the Arbitrator finds it just and fair that the Club must pay a compensation to the Player which takes the missing and undisclosed information of the Player when she signed the new agreement into account, but also the fact that the Player did not care what she was signing and that she found a new employment later in the 2013/2014 season. That compensation has to be determined *ex aequo et bono* and amounts to EUR 30,000.00.

8.6. Does the Respondent owe any interests to the Claimant?

97. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. Although neither the First Player Contract nor the Second Player Contract Agreement provide for the payment of default interest, this is a generally accepted principle which is embodied in most legal systems. The Arbitrator finds that an interest rate of 5% p.a. is acceptable and in line with BAT jurisprudence as being the interest rate usually awarded by default if no other interest rate has been agreed by the parties.

98. The total amount awarded to the Player has been fixed at EUR 30,000. The Arbitrator finds *ex aequo et bono* that this amount became due when the Player was informed that her employment had been cancelled, i.e. on 9 September 2013.

9. Costs

9.1 Arbitration Costs

99. 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.

100. On February 2 2015, 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

„[t]he 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, the number of submissions by the parties and the costs of the handwriting analysis, the BAT President determined the arbitration costs in the present matter to be EUR 13,000.00.

101. Considering the circumstances of the present case (Article 17.3. of the BAT Rules), the Arbitrator deems it appropriate that 75 % of the costs of the arbitration shall be borne by the Player (EUR 9,750.00) and 25 % by the Club (EUR 3,250.00).

102. Given that the Advance on Costs of EUR 13,000.00 was entirely paid by the Player, in application of Article 17.3 of the BAT Rules the Arbitrator decides that the Club shall pay EUR 3,250.00 to the Player, being the difference between the amount advanced by her (EUR 13,000.00) and the amount she is ordered to pay (EUR 9,750.00).

9.2 Legal fees and expenses

103. On 21 May 2014, the Player quantified her legal costs at EUR 7,500, whereas the Club indicated on 30 May 2014 that its legal and translation costs amounted to EUR 1,910.00. The proceedings then went on and both parties underwent further legal expenses.

104. However, taking into account the particular circumstances and the outcome of this case, the legal costs and also the limits of Art. 17.4 BAT Rules into account, the Arbitrator holds it adequate not to grant any contributions to the other party's legal costs but that each party shall bear its own legal costs and expenses.

10. AWARD

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

- 1. Club Sportiv Municipal Targoviste is ordered to pay to Ms. Ivanka Matic the amount of EUR 30,000.00 plus interest of 5% since 9 September 2013.**
- 2. Club Sportiv Municipal Targoviste is ordered to pay to Ms. Ivanka Matic the amount of EUR 3,250.00 as a reimbursement of the advance on arbitration costs.**
- 3. Each party shall bear its own legal costs.**
- 4. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 4 February 2015

Stephan Netzle
(Arbitrator)