



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0479/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Andre Smith

- Claimant -

Represented by Mr. Benjamin J. Pensack, 1000 Shelter Bay Avenue,
Suite 1109, Mill Valley, 94941 California, USA

vs.

Basketball Club Krasnye Krylya Samara
Ul. Soviet Army 253-A, office 340, 443011 Samara, Russia

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Andre Smith ("Player") is a professional basketball player who was retained by Basketball Club Krasnye Krylya Samara for the 2012-2013 season.

1.2 The Respondent

2. Basketball Club Krasnye Krylya Samara ("Respondent") is a professional basketball club in Samara, Russia.

2. The Arbitrator

3. On 19 December 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

4. On 4 July 2012, Player and Respondent entered into an agreement ("the Agreement") whereby the latter engaged the former to play basketball for the 2012-2013 season. The salary of Player was agreed at USD 500,000.00 net of tax, payable in differing monthly instalments on the 25th of each month from August 2012 to June 2013 inclusive. Respondent also agreed to pay Player certain bonuses in the event of prescribed on-court successes of the team.

5. At the time of the filing of his Request for Arbitration (17 October 2013), Player says that he had not been paid a portion of his final salary instalment and the bonus payments due to him due to on-court successes of the team.

3.2 The Proceedings before the BAT

6. On 17 October 2013, Player filed a Request for Arbitration dated 15 October 2013 in accordance with the BAT Rules. At the time of the filing of the Request for Arbitration Player was represented by Doug Neustadt and Brett Friedmann, The Neustadt Group, LLC, 9107 Gaither Road, Suite B, Gaithersburg, Maryland 20877, USA. Subsequently Player changed representation to Mr. Benjamin J. Pensack.
7. The non-reimbursable handling fee in the amount of EUR 2,000.00 was paid on 21 October 2013.
8. On 7 January 2014, 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 (Mr. Andre Smith) EUR 4,000

Respondent (Basketball Club Krasnye Krylya Samara) EUR 4,000”

The foregoing sums were paid as follows (all on behalf of Player): 21 January 2014 EUR 3,956.82; and 7 February 2014, EUR 4,011.46.

9. Respondent did not participate in the arbitration and did not file an Answer, despite several invitations by the BAT to do so.
10. On 13 February 2014, the Parties were invited to submit their statements of costs by 19 February 2014 and were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.

11. On 15 February 2014, Player submitted his statement of costs.
12. Respondent did not submit any costs.
13. On 20 February 2014 Respondent was invited to comment on the claim for costs of Player by 25 February 2014. Respondent did not do so.

4. The Positions of the Parties

14. Player says that his case is a simple one. Respondent was obliged to pay him all agreed monthly salaries and any applicable bonuses for on-court successes. An amount of USD 25,000.00 was not paid by Respondent to Player as part of the last monthly salary instalment payable on 25 June 2013 (the full amount of that instalment was USD 30,000.00). Secondly, Respondent has not paid two bonus amounts to Player (USD 10,000.00 in respect of winning the Cup of Russia; USD 20,000.00 in respect of winning the EuroChallenge). Player also seeks interest and costs.
15. As already noted, despite several invitations by the BAT, Respondent did not participate in this arbitration.

5. The Jurisdiction of the BAT

16. As a preliminary matter, the Arbitrator wishes to emphasize that, since Respondent did not participate in this arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.
17. 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).

18. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
19. 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
20. The jurisdiction of the BAT over Player's claims is stated to result from the arbitration clause in Clause XI of the 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 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."
21. This arbitration clause is in written form and thus it fulfils the formal requirements of Article 178(1) PILA.
22. 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).
23. The language of the arbitration clause is quite clear, the parties have opted for BAT arbitration.
24. For the above reasons, the Arbitrator has jurisdiction to adjudicate Player's claims.

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

6. Other Procedural Issues

25. Article 14.2 of the BAT Rules specifies that “*the Arbitrator may [...] proceed with the arbitration and deliver an award*” if “*the Respondent fails to submit an Answer.*” The Arbitrator’s authority to proceed with the arbitration in case of default by one of the parties is in accordance with Swiss arbitration law and the practice of the BAT.² However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
26. 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 Player’s Request for Arbitration, and to his Account on Costs. Respondent, however, chose not to participate in this Arbitration.

7. Discussion

7.1 Applicable Law – *ex aequo et bono*

27. 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”.

² See *ex multis* BAT cases 0001/07; 0018/08; 0093/09; 0170/11.

28. 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."

29. As noted in paragraph 20 above, Clause IX of the Agreement expressly provides that the Arbitrator shall decide any dispute *ex aequo et bono*.

30. 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'arbitrage³ (Concordat)⁴, under which Swiss courts have held that arbitration "en équité" is fundamentally different from arbitration "en droit":

"When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."⁵

31. 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

32. 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."

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.

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

7.2 Findings

34. 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.

35. First, Player's claim has not been disputed by Respondent, notwithstanding the several opportunities granted to it to participate in this arbitration.

36. Secondly, the Agreement is abundantly clear – Player has a guaranteed, no cut (as per Clause III), salary of USD 500,000.00 payable in differing monthly instalments. Respondent had to pay Player this money in this manner; that is what Respondent agreed to. Player legitimately expected that he would receive this money. In particular, Player was entitled to have all payments due to him duly discharged from beginning to end. Hence, when Respondent did not pay the final monthly instalment of USD 30,000.00 (as per Clause IV) in full and left Player short by a sum of USD 25,000.00, that was a breach of contract.

37. Thirdly, Clause VI of the Agreement expressly provides that Respondent will pay bonus amounts to Player (net of tax) in the event of certain prescribed on-court successes. The Arbitrator accepts that Respondent won the Cup of Russia and the Eurochallenge Final Four in the 2012-2013 season, as presented by Player. In respect of both those on-court successes, Clause VI provides for a bonus payment to Player of USD 10,000.00 and USD 20,000.00 respectively. These have not been paid by Respondent to Player. Respondent's failure to make those bonus payments to Player was a breach of contract.

38. Turning to interest which is sought by Player, the Arbitrator finds that. as a matter of

justice and equity, and also consistent BAT jurisprudence, interest shall be awarded to a person to whom money is outstanding. The question which arises in the present case is as to when interest should start to run.

39. As regards the partly unpaid final salary installment (the amount due being USD 25,000.00), the due date for payment in full of that installment was 25 June 2013. As payment in full was not made, the Arbitrator holds that interest at 5% per annum (consistent with BAT awards to date) is applicable to USD 25,000.00 from 26 June 2013.
40. As regards the two bonus payments which were not made to Player by Respondent, Clause VI of the Agreement provides that such payments are to be made with seven business days of being earned.
41. The Cup of Russia, according to the proof presented by Player, was won on 17 April 2013. Seven business days after that date was 26 April 2013. As payment in full was not made of the USD 10,000.00 of the applicable bonus amount, the Arbitrator holds that interest at 5% per annum is applicable to USD 10,000.00 from 27 April 2013.
42. The Eurochallenge Final Four, according to the proof presented by Player, was won on 28 April 2013. Seven business days after that date was 7 May 2013. As payment in full was not made of the USD 20,000.00 of the applicable bonus amount, the Arbitrator holds that interest at 5% per annum is applicable to USD 20,000.00 from 8 May 2013.

8. Costs

43. 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.

44. On 6 March 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 3,930.00
45. Considering that Player prevailed in his claim, it is fair that the fees and 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.
46. Player’s claim for legal fees and expenses amounts to EUR 2,000.00, namely the non-reimbursable handling fee and, USD 7,000.00 for legal fees. The Arbitrator notes that the present representative for Player is not the representative which prepared and filed the Request for Arbitration. That work was done prior to the present representative for Player taking over as counsel. Based upon the chronology of this arbitration, the vast bulk of the work done on behalf of Player is to be found in the Request for Arbitration. Almost no step of any substance (save for the filing of the claim for costs) was done thereafter. Furthermore, it does not appear from Player’s claim for costs that any sum is being sought in respect of his previous representatives and that the entire amount of USD 7,000.00 by way of legal fees is for the present representative. A figure of USD 7,000.00 appears to the Arbitrator to be far in excess of what might be reasonable for the modest amount of work done from the moment the case was taken over to its conclusion. Further, even if the present representative of Player had been involved from the beginning, the Arbitrator considers USD 7,000.00 to be more than would be

reasonable for the limited scope of the claim and the relative brevity of the Request for Arbitration. In the circumstances, the Arbitrator finds that an amount of EUR 3,000.00 in total represents a fair and reasonable amount for which Respondent should be responsible to Player in relation to his legal costs and expenses.

47. Given that Player paid advances on costs totalling EUR 7,968.28, as well as a non-reimbursable handling fee of EUR 2,000.00 (which, as noted above, is taken into account when determining Player's legal expenses), the Arbitrator decides that in application of article 17.3 of the BAT Rules:
- (i) BAT shall reimburse EUR 4,038.28 to the Player, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President;
 - (ii) Respondent shall pay EUR 3,930.00 to the Player, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT;
 - (iii) Respondent shall pay EUR 5,000.00 to Player, representing a contribution by it to his legal fees and expenses.

9. AWARD

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

- 1. Basketball Club Krasnye Krylya Samara must pay Mr. Andre Smith USD 25,000.00 net as outstanding salary together with interest at 5% per annum from 26 June 2013.**
- 2. Basketball Club Krasnye Krylya Samara must pay Mr. Andre Smith USD 10,000.00 net as an outstanding bonus together with interest at 5% per annum from 27 April 2013.**
- 3. Basketball Club Krasnye Krylya Samara must pay Mr. Andre Smith USD 20,000.00 net as an outstanding bonus together with interest at 5% per annum from 8 May 2013.**
- 4. Basketball Club Krasnye Krylya Samara must pay Mr. Andre Smith EUR 3,930.00 as reimbursement for his arbitration costs. The balance of the Advance on Costs, in the amount of EUR 4,038.28 will be reimbursed to Mr. Andre Smith by the BAT.**
- 5. Basketball Club Krasnye Krylya Samara must pay Mr. Andre Smith EUR 3,000.00 as a contribution to his legal fees and expenses.**
- 6. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration 13 March 2014

Klaus Reichert
(Arbitrator)