

ARBITRAL AWARD

(BAT 0890/16)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Damian Kulig

c/o Agency Beobasket, Strahinjica bana 18, 11000 Belgrade, Serbia

- Claimant -

represented by Mr. Miodrag Raznatovic, attorney at law

vs.

Trabzonspor Basketbol Kulubu Dernegi

Faith Mah Yavuz Bulvari Sancak Plaza 114, Trabzon, Turkey

- Respondent -

1. The Parties

1.1. The Claimants

1. Damian Kulig (the "Player") is a professional basketball player of Polish nationality. He is represented by Mr. Miodrag Raznatovic, FIBA-licensed basketball agent and attorney at law in Belgrade, Serbia.

1.2. The Respondent

2. Trabzonspor Basketbol Kulubu Dernegi is a professional basketball club located in Trabzon, Turkey.

2. The Arbitrator

3. On 31 October 2016, 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. On 10 May 2015, the Player signed an employment agreement with the Club for the 2015/2016 and 2016/2017 seasons (hereinafter the "Player Contract"). The Parties agreed that the Player would receive a fully guaranteed salary of USD 445,000.00 net for the 2015/2016 season, and of USD 500,000.00 net for the 2016/2017 season. The Player played with the Club from the signing of the Player Contract on 20 May 2015 until 15 June 2016, i.e. the date of the termination of the Player Contract by the Club.

5. During the 2015/2016 season the Club failed to pay the Player a large part of the contractually agreed salary.
6. The Club exercised its contractual option to early terminate the employment relationship at the end of the 2015/2016 season, but it did not pay the fee of USD 50,000.00 which had to be paid within 15 days of service of the termination notice (the "Termination Fee").
7. In this arbitration, the Player claims outstanding salaries in the aggregate amount of USD 217,500.00, the Termination Fee of USD 50,000.00 and a late payment penalty of USD 4,400.00.

3.2. The Proceedings before the BAT

8. On 26 September 2016, the Claimant filed a Request for Arbitration in accordance with the BAT Rules, which arrived at the BAT Secretariat on the same day. A non-reimbursable handling fee of EUR 4,000.00 was received in the BAT bank account on 9 September 2016.
9. By Procedural Order of 7 November 2016, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 28 November 2016. The BAT Secretariat also requested that the Parties pay the following amounts as Advance on Costs by no later than 26 September 2016:

| | |
|--|----------------------|
| <i>"Claimant (Damian Kulig)</i> | <i>EUR 5,000.00</i> |
| <i>Respondent (Trabzonspor Basketbol Kulubu)</i> | <i>EUR 5,000.00"</i> |

10. By letter of 29 November 2016, the BAT Secretariat acknowledged receipt of the Claimant's share of the Advance on Costs and informed the Parties that the Respondent failed to pay its share of the Advance on Costs and to provide an Answer. The Claimant was invited to pay the Respondent's share of the Advance on Costs to

allow the arbitration to proceed. The Respondent was granted a final opportunity to file its answer to the Request for Arbitration by no later than 6 December 2016.

11. By letter of 8 December 2016 the BAT Secretariat acknowledged receipt of the Respondent's share of the Advance on Costs, paid by the Claimant. In the same letter the Parties were informed that the Respondent had again failed to submit an Answer to the Request for Arbitration. Furthermore the Claimant was invited to list the amounts and reception dates of the received payments and to specify his allegation of the Request of Arbitration, according to which he undertook many attempts to *"fix the problems in a peaceful way"* by no later than 19 December 2016.
12. By email of 20 December 2016, the Claimant requested an extension of two weeks for filing an answer to the letter of 8 December 2016. This request was granted and a new time limit was set at 2 January 2017.
13. By letter of 2 February 2017, the BAT Secretariat confirmed receipt of the Claimant's reply to the Arbitrator's questions of 8 December 2016. The Respondent was invited to comment on the Claimant's submission by no later than 13 February 2017.
14. By email of 13 February 2017, the BAT Secretariat informed the Parties of the receipt of Respondent's Answer to the Claimant's submissions.
15. By letter of 23 February 2017, the BAT Secretariat informed the Parties that the Arbitrator had decided to declare the exchange of documents complete and invited the Parties to submit their accounts of costs by no later than 2 March 2017.
16. By email of 6 March 2017, the BAT Secretariat confirmed receipt of the Claimant's account of costs. The Respondent has not submitted an account of costs nor any comments on the account of costs of the Claimant, despite having been granted the opportunity to do so.

4. The Positions of the Parties

4.1. The Claimant's Position

17. The Player and the Club signed a Player Contract which entitled the Player to a base salary of USD 445,000.00 for the 2015/2016 season, and of USD 500,000.00 net for the 2016/2017 season.
18. On 15 June 2015, the Club exercised its contractual option to terminate the employment. Until then, the Club had failed to pay salaries in the total amount of USD 217,000.00. The Club also failed to pay the Termination Fee of USD 50,000.00, which became due upon termination according to Article 1 para. 3 of the Player Contract.
19. The Player claims payment of the outstanding salaries in the amount of USD 217,000.00 and the Termination Fee of USD 50,000.00. In his second submission, the Player listed the salary payments which he received from the Club. These payments amounted to USD 233,000.00.
20. The Player also requests payment of a penalty fee of USD 50.00 for each day of a payment delay of 88 days, amounting to USD 4,400.00.

4.2. The Claimant's Request for Relief

21. *"The Claimant's requests:*

- a) *To award the claimant with amount of 271.400 USD.*
- b) *To award claimant's interest on the amount of 271,400 USD at the applicable Swiss statutory rate, starting from the 1st of July of 2016.*
- c) *To award claimant with the full covered costs of this Arbitration. Having in mind that in case of dispute the Agreement sets the authority of Basketball Arbitral Tribunal (BAT), therefore, the claimant demands arbitrage of BAT."*

4.3. The Respondent's Position

22. Due to the poor sporting results during the past season, the economic situation of the Club has substantially deteriorated, and the Club is no longer in a position to pay the salaries of his players.
23. It should be taken into consideration that the Club supported the Player and accepted that the Player missed a number of games and practices when his child was suffering from heart problems and required him to return to Poland.
24. The Club does not contest the claims but says: "Most of the claims of the claimant are true; but they are not all of the facts."

4.4. The Respondent's Request for Relief

25. The Club did not formulate a specific Request for Relief but the Arbitrator understands that the Club expects a decision from the Arbitrator taking its efforts in support of the Player and the circumstances which led to the termination of the Player Contract into account.

5. Jurisdiction

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.

29. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Article 7 of the Player Contract.

30. Article 7 of the Player Contract reads as follows:

“7. DISPUTE.- 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 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. The Agreement is in writing and thus the formal requirements for an arbitration agreement under Article 178(1) PILA are met. The Arbitrator also considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” in Article 14 of the Player covers the present dispute. In addition, neither party objected to the jurisdiction of BAT. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Claimant’s claims.

6. Applicable Law – ex aequo et bono

32. 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”.

33. 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.”

34. In the arbitration agreement in Article 7 of the 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*.
35. 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 1969¹ (Concordat),² 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.”³

36. 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 case at hand.”⁴

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

¹ 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).

² KARRER, in: Basel commentary to the PILA, 3rd ed., Basel 2013, Art. 187 PILA N 290.

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

⁴ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

7. Findings

7.1. Unpaid salaries

38. It is uncontested that the Club did not pay the full salary amount of USD 445,000.00 for the 2015/2016 season to the Player and that a large part of the salary remained unpaid.
39. The Club explains its payment delay by its poor economic situation. According to consistent BAT jurisprudence, economic difficulties do not justify a breach of contract. Thus, the Club owes the Player the difference between the total salary due according to the Player Contract, and the amount that was paid according to the Player's statement, which amounts to USD 212,000.00 (i.e. the total salary amount of USD 445,000.00 minus the paid salaries of USD 233,000.00) instead of USD 217,000.00 as alleged in the Request for Arbitration, a fact which remained undisputed by the Club.

7.2. Termination of the Player Contract

40. On 15 June 2016, the Club notified the Player that it exercised its termination option according to Article 1 paragraph 3 to bring the Player Contract to an end.
41. Article 1 para. 3 of the Player Contract reads as follows:

"The Club has right unilaterally to terminate the agreement after the last game of the Club at playing season 2015/2016 season but not later than the 15th of June 2016 at 5.00 PM CET, sending the written notice to the Player's agent. If the Club terminates the agreement on that manner, should be obliged to pay to the Player compensation to the early contract termination in the amount of 50,000 ISD, within 15 days upon sending the termination letter. If the Club does not execute compensation payment within 15 days upon sending the letter the termination is not valid, and the Contract becomes guaranteed for the playing season 2016/17."

42. The termination notice was notified to the Player's agent by email on 15 June 2016 at 3:14 pm. The Club therefore met the first condition precedent for the early termination

of the Player Contract. However, the Player did not receive the Termination Fee within 15 days of notice, which was the second condition precedent for the early termination.

43. However, none of the parties contests the validity of the early termination. The Player rather insists of the payment of the Termination Fee while the Club does not dispute that the Termination Fee is due.
44. The Arbitrator respects the corresponding will of the Parties who seem to agree that the Player Contract was terminated as of 15 June 2015 and that the Termination Fee is still due, although that does not fully comply with the text of the termination clause, which stipulates that the termination shall not be valid if the Termination Fee was not paid within 15 days since the termination notice.
45. The termination as of 15 June 2015 can in any event be regarded as consensual dissolution of the Player Contract with a modification of the Club's obligation to pay the Termination Fee: the validity of the termination shall no longer depend on the timely payment of the Termination Fee but that fee remains due until payment. Alternatively, the validity of the termination of the Player Contract despite the non-payment of the Termination Fee may also be understood as the Player's waiver of his right to remain employed by the Club and to obtain the full compensation for the 2016/2017 season.
46. The Arbitrator, deciding *ex aequo et bono*, finds that the Player Contract has been terminated as of 15 June 2015 and the Club remains obliged to pay the Termination Fee of USD 50,000.00 to the Player.

7.3. Daily penalty interest

47. According to Article 5 paragraph 2 of the Player Contract, the Player is entitled to a daily interest penalty of USD 50.00 for each day of default of any payment, irrespectively of the specific amount due. The first payment was due on 15 September 2015 and made only on 9 October 2015. From that day onwards, every payment was made with at least one month delay. Therefore, a daily penalty is due from the 15 September 2015 onwards.

48. According to BAT jurisprudence, late payment penalties are awarded only until the date of the Request for Arbitration, i.e. until 26 September 2016 (376 days). However, the Player only requested the payment of the daily penalty fee for 88 days, allegedly for the time between the termination of the Player Contract and the Request for arbitration. This totals up to a sum of USD 4,400.00. Whether the Player might have been entitled to a higher sum is therefore irrelevant. According to the principle *“ne eat iudex ultra petita”* the Arbitrator must limit his adjudication to the Player’s claim.
49. Default payments that depend on the number of days of default only but not on the principal amount owed constitute a contractual penalty, and as such are subject to review by the Arbitrator and can be reduced if they are considered excessive or disproportionate. However, that is not the case here since the penalty corresponds to an interest rate of approximately 7% p.a. which is acceptable. The arbitrator finds that the penalty fee of USD 4,400.00 is not disproportionate and is therefore accepted.

7.4. Mitigating factors

50. The Club refers to the support that it provided to the Player when his child became ill and expects that its accommodation should somehow be taken into account when it comes to the calculation of the amounts due to the Player. The Arbitrator has great sympathy for the Club’s compassion and understanding when the Player was faced with a difficult family situation. However, this does not justify a reduction of the contractually agreed salary. The Club also benefits from the Player’s acceptance of the early termination of the Player Contract despite the non-payment of the Termination Fee and of his decision to claim only part of the late payment penalties that would have accrued under the Player Contract. The Arbitrator finds therefore that there are no mitigating factors which may affect the Club’s obligation to pay the claimed amounts.

7.5. Summary

51. In summary the Club owes the Player the following amounts:

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|---|----------------------|
| Unpaid salaries 2015/2016: | USD212,000.00 |
| Compensation for the unilateral Contract termination: | USD50,000.00 |
| Daily penalty fee: | USD4,400.00 |
| Total: | USD266,400.00 |

8. Interest

52. The Player also claims interest of 5% on all the due monies (i.e. USD 266,400.00) since 1 July 2016. The Player Contract does not provide for default interest. According to standing BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest.
53. However, late payment penalties and default interests shall serve the same purpose, namely to compensate the creditor for the time value of the money which was not paid on the due date. If not explicitly agreed in the contract, the creditor cannot claim both for the same period of time. In the circumstances of this case, and deciding *ex aequo et bono*, the Arbitrator finds that no interest shall accrue, because the Claimant has been sufficiently compensated for the delay in payment by means of the late payment penalty awarded by the Arbitrator.

9. Costs

54. 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.
55. On 24 April 2017, 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 and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 4,310.00. Since the Claimant predominantly prevailed on his claim, the Arbitrator holds it fair that the fees and the costs of this arbitration shall be borne by the Respondent alone (Article 17.3. of the BAT Rules).

56. The entire Advance on Costs of EUR 10,000.00 was paid by the Player. In application of Article 17.3 of the BAT Rules, the Arbitrator decides that the Club shall reimburse EUR 4,310.00 to the Player. The balance of the Advance on Costs, in the amount of EUR 5,690.00, will be reimbursed to the Player by the BAT.
57. The Player claims the reimbursement of the handling fee of EUR 4,000, and legal fees and costs of USD 14,500, which is an amount difficult to justify taking into account the volume of the legal briefs, the fact that the underlying circumstances have not been disputed, and the straightforwardness of the legal issues at stake. Taking above considerations into account, the Arbitrator finds that the Respondent shall contribute an amount of EUR 7,000.00 (including the non-reimbursable handling fee) to the Player and bear its own legal fees and costs.

10. AWARD

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

- 1. Trabzonspor Basketbol Kulubu Dernegi is ordered to pay to Mr. Damian Kulig the amount of USD 266,400.00 net.**
- 2. Trabzonspor Basketbol Kulubu Dernegi is ordered to pay to Mr. Damian Kulig the amount of EUR 4,310.00 as a reimbursement of his advance on arbitration costs.**
- 3. Trabzonspor Basketbol Kulubu Dernegi is ordered to pay to Mr. Damian Kulig the amount of EUR 7,000.00 as a contribution to his legal fees and expenses.**
- 4. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 4 May 2017

Stephan Netzle
(Arbitrator)