

**ARBITRAL AWARD**

**(BAT 1906/23)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Clifford J. Hendel**

in the arbitration proceedings between

**Mr. Nemanja Gordic**

**- Claimant -**

represented by Ms. Nevena Simovic, attorney at law,

vs.

**Basketball Club Mornar Bar**  
Bulevar Revolucije 85, SC Topolica  
85000 Bar, Montenegro

**- Respondent -**

## **1. The Parties**

### **1.1 The Claimant**

1. Mr. Nemanja Gordic ("the Player") is a professional basketball player from Bosnia and Herzegovina.

### **1.2 The Respondent**

2. Basketball Club Mornar Bar ("the Club", and together with the Claimant, "the Parties") is a professional basketball club competing in the Montenegro professional basketball league.

## **2. The Arbitrator**

3. On 9 February 2023, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Clifford J. Hendel as arbitrator (hereinafter the "Arbitrator") pursuant to Articles 0.4 and 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 January 2022 (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 Dispute**

4. The relevant facts and allegations presented in the written submissions and evidence are summarised below. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows.

5. Although the Arbitrator has considered all the facts, allegations and evidence submitted in the present proceedings, he refers in this Award only to those necessary to explain its reasoning.

### 3.1.1 The Agreement

6. On 14 November 2022, the Player and the Club entered into an agreement, executed in the Serbian language, by means of which the Club acknowledged it owed certain amounts to the Player for the 2020/21 and the 2021/22 basketball seasons, and agreed on a payment schedule (the "Agreement").<sup>1</sup>

7. According to the preamble of the Agreement:

*"The Contracting Parties agree as follows:*

*- The PLAYER, Nemanja Gordić, born on September 25, 1988, performed as a player for the Basketball Club Mornar Bar in the basketball seasons 2020/21 and 2021/22.*

*- The debt that the CLUB owes on all grounds amounts to a total of 153,000 EUR (one hundred and fifty-three thousand euros)*

*- By this Debt Settlement Agreement (hereinafter referred to as: AGREEMENT) shall be regulated the debt repayment dynamics and mutual rights and obligations between the CLUB and the PLAYER."*

8. Article 1 of the Agreement provides:

*"Signatories of this one AGREEMENT acknowledge that the debt that the CLUB owes on all grounds amounts to a total of 153,000 EUR (one hundred and fifty-three thousand euros) at the moment of signing of this AGREEMENT.*

*The Contracting Parties agree that the repayment dynamics of the amount referred to in the previous paragraph shall be executed in the following way:*

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<sup>1</sup> Exhibits 1 and 2 to the Request for Arbitration ("RfA").

- Installment amounting to EUR 53,000 (fifty-three thousand euros) to be paid no later than November 25, 2022
- Installment amounting to EUR 10,000 (ten thousand euros) to be paid no later than December 15, 2022
- Installment amounting to EUR 10,000 (ten thousand euros) to be paid no later than January 15, 2023
- Installment amounting to EUR 10,000 (ten thousand euros) to be paid no later than February 15, 2023
- Installment amounting to EUR 10,000 (ten thousand euros) to be paid no later than March 15, 2023
- Installment amounting to EUR 10,000 (ten thousand euros) to be paid no later than April 15, 2023
- Installment amounting to EUR 10,000 (ten thousand euros) to be paid no later than May 15, 2023
- Installment amounting to EUR 10,000 (ten thousand euros) to be paid no later than June 15, 2023
- Installment amounting to EUR 10,000 (ten thousand euros) to be paid no later than July 15, 2023
- Installment amounting to EUR 10,000 (ten thousand euros) to be paid no later than August 15, 2023
- Installment amounting to EUR 10,000 (ten thousand euros) to be paid no later than September 15, 2023"

9. According to Article 2 of the Agreement:

*"If the CLUB fulfills all obligations towards the PLAYER in accordance with the deadlines specified in Article 1 of this AGREEMENT, all obligations of the CLUB towards the PLAYER on all grounds shall cease.*

*If the CLUB is more than 15 days late with the payment to the PLAYER of any of the installments referred to in the Article 1 of this AGREEMENT, all remaining installments to be paid under this AGREEMENT shall immediately become due in full and the CLUB shall have to pay it to the PLAYER within 7 days from the notification thereof sent by the PLAYER."*

### 3.1.2 Factual background of the dispute

10. On 12 December 2022, the Claimant sent a warning letter to the Club, through counsel, requesting the payment of the first instalment of the debt under the Agreement (due on 25 November 2022), in the amount of EUR 53,000, giving the Club a new deadline until 16 December 2022 to make such payment:<sup>2</sup>

*“Dear [Name Club Representative],*

*I am writing to you regarding the debt that BC Mornar Bar has towards my client, Nemanja Gordić, in connection to which you concluded the Debt Settlement Agreement on November 14, 2022, according to which you undertook to pay Nemanja Gordić the amount of EUR 153,000 (one hundred and fifty-three thousand euros).*

*According to the aforementioned Debt Settlement Agreement, the first installment, amounting to EUR 53,000, was to be paid no later than November 25, 2022.*

*According to the article 2, paragraph 2 of the Agreement, the contracting parties agreed that “if the CLUB is more than 15 days late with the payment to the PLAYER of any of the installments referred to in the Article 1 of this AGREEMENT, all remaining installments to be paid under this AGREEMENT shall immediately become due in full and the CLUB shall have to pay it to the PLAYER within 7 days from the notification thereof sent by the PLAYER”.*

*My client, Nemanja Gordić, has not yet received any amount from the BC Mornar, and the second installment, amounting to EUR 10,000, is due in three days.*

*Bearing in mind the more than good will and patience that Nemanja Gordić has shown so far, as well as his desire to resolve the debt issue peacefully, without initiating the BAT procedure, I hereby inform you that we are giving you an additional deadline for the payment of the first installment amounting to EUR 53,000, which should be paid no later than December 16, 2022.*

*If the first installment, amounting to EUR 53,000, is not paid by then, we will be forced to activate the clause from the article 2, paragraph 2 of the Agreement, according to which the entire amount of the debt shall be due within 7 days, as well as to initiate proceedings before the Basketball Arbitral Tribunal, which will result in an increase in the debt due to the costs of the BAT procedure and interests, which could eventually amount to over 20,000 EUR.”*

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<sup>2</sup> Exhibits 3 and 4 to the RfA.

11. There is no evidence on the record of any reply from the Club.
12. On 16 December 2022, Mr. Gordic sent a final request to the Club, through counsel:<sup>3</sup>

*“Dear All,*

*Bearing in mind that the first installment, amounting to EUR 53,000, was not paid to my client, Nemanja Gordić, by December 16, 2022, we are unfortunately forced to activate the clause from the article 2, paragraph 2 of the Debt Settlement Agreement dated on November 14, 2022. Therefore, we hereby inform you that the entire debt, amounting to EUR 153,000, is due, and it must be paid within 7 days from the date this notice was sent, i.e. no later than Monday, December 26, 2022.”*

13. There is no evidence on the record of any reply from the Club or any payments made to the Claimant in respect of the amounts claimed in the correspondence cited above.

### **3.2 The Proceedings before the BAT**

14. On 6 January 2023, the Claimant filed a Request for Arbitration dated the same day, in accordance with the BAT Rules, and the non-reimbursable handling fee in the amount of EUR 4,000 was received in the BAT bank account.
15. On 9 February 2023, the BAT informed the Parties that Mr. Clifford J. Hendel had been appointed as the Arbitrator in this matter, invited the Respondent to file its Answer by 2 March 2023, and fixed the advance on costs to be paid by the Parties as follows:

*“Claimant (Mr. Nemanja Gordic) EUR 4,500.00  
Respondent (BC Momar Bar) EUR 4,500.00”*

16. On 14 February 2023, the BAT received an advance on costs paid by Claimant in the

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<sup>3</sup> Exhibits 5 and 6 to the RfA.



amount of EUR 4,500.

17. On 7 March 2023, the BAT informed the Parties that the Respondent had failed to submit its Answer to the Request for Arbitration and to pay its share of the advance on costs. The Respondent was given a final opportunity until 14 March 2023 to pay its share of the advance on costs and to file an Answer to the Request for Arbitration. The Respondent was informed that, in accordance with Article 14.2 of the BAT Rules, if the Respondent failed to submit an Answer, the Arbitrator may nevertheless proceed with the arbitration and deliver an award.
18. On 16 March 2023, the BAT informed the Parties that the Respondent had failed to submit its Answer to the Request for Arbitration and to pay its share of the advance on costs within the extended time-limit, and invited the Claimant to substitute for Respondent's share by 27 March 2023. In accordance with Article 9.3.1 of the BAT Rules, the BAT Secretariat decided to adjust the advance on costs to EUR 7,000.00 from the originally-established EUR 9,000.00 as follows:  
  

*"Claimant (Mr. Nemanja Gordic) EUR 3,500.00  
Respondent (BC Momar Bar) EUR 3,500.00"*
19. On 17 March 2023, Claimant paid the amount of EUR 2,500, thus (taking into account the Claimant's initial payment of EUR 4,500.00) settling Respondent's share of the advance on costs in full.
20. On 22 March 2023, the Parties were notified that (i) the Respondent had failed to submit its Answer to the Request for Arbitration; and that (ii) the exchange of submissions was closed in accordance with Article 12.1 of the BAT Rules. The Claimant was granted a deadline until 29 March 2023 to set out how much of the applicable maximum contribution to costs should be awarded to him and why, and to include a detailed account of his costs, including any supporting documentation in relation thereto.

21. The Claimant filed his costs submission on the same day.

#### 4. The Positions of the Parties

##### 4.1 The Claimant' Position

22. In his Request for Arbitration, the Claimant requested the following relief:

*"Claimant(s) request(s):*

*a) To award claimant **Nemanja Gordic** with amount of 153.000 EUR (one hundred fifty three thousand Euro) and additionally to award claimant's interest at the applicable Swiss statutory rate, starting from 27th of December 2022, which equals to 234 EUR (two hundred thirty four Euro), at the time the present Request for BAT Arbitration was filed.*

*b) To award claimants [sic] with the full covered costs of this Arbitration and Legal fees and expenses. Having in mind that in case of dispute the agreements set the authority of Basketball Arbitration Tribunal (BAT), therefore, the claimant demand arbitrage of BAT.*

*Total amount in dispute: 153.234 EUR (one hundred fifty three thousand two hundred thirty four Euro)"*

##### 4.2 Respondent's Position

23. The Respondent has not participated in this proceeding, but has been duly notified of its existence and has received copies of all submission of the Claimant and all communications of the BAT.

#### 5. The jurisdiction of the BAT

24. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.
25. 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).

26. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
27. The dispute is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA<sup>4</sup>.
28. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under Article 3 of the Agreement, which read as follows:

*"In the event that it is not possible to resolve the dispute peacefully, the Contracting Parties agree that all possible disputes related to this AGREEMENT shall be resolved before BAT (Basketball Arbitral Tribunal) in Geneva, Switzerland. The dispute shall be resolved by a single judge chosen by the President of the Tribunal. The procedure shall be conducted in English, and the dispute shall be resolved by applying the ex aequo et bono principle."*

29. The Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
30. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA) - the pre-arbitration settlement requirement in the first sentence of Article 3 has been sufficiently met by the Claimant's attempt to make the Club comply with its payment obligations under the Agreement.
31. The jurisdiction of BAT over the Claimant' claims arises from the Agreement. The

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

wording “*all possible disputes related to this AGREEMENT [...]*” clearly covers the present dispute.

32. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimant’s claim.

## **6. Other Procedural Issues**

33. 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.<sup>5</sup> However, the Arbitrator must make every effort to allow the defaulting party to assert its rights. 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 Claimant’s Request for Arbitration. The Respondent, however, chose not to participate in this Arbitration.
34. Neither of the Parties requested a hearing. In accordance with Article 13.1 of the BAT Rules, the Arbitrator will decide the Claimant’s claims based on the written submissions and the evidence on record.

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<sup>5</sup> See *ex multis* BAT cases 0001/07; 0018/08; 0093/09; 0170/11.

## 7. Discussion

### 7.1 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 “*Law Applicable to the Merits*”, Article 15 of the BAT Rules reads as follows:

*“15.1 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.*

*15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead.”*

37. Article 3 of the Agreement expressly provides that the Arbitrator shall decide the dispute *ex aequo et bono*.
38. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.
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*<sup>6</sup> (Concordat),<sup>7</sup> 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.”<sup>8</sup>*

40. 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*”.
41. In light of the foregoing considerations, the Arbitrator makes the findings below.

## **7.2 Findings**

### **7.2.1 Claimant’s unpaid compensation**

42. Claimant requests the amount of EUR 153,000, for his compensation due under the Agreement.
43. As set out above (Section 3.1.1), pursuant to Article 1 of the Agreement, “[s]ignatories of this AGREEMENT acknowledge that the debt that the CLUB owes on all grounds amounts to a total of 153,000 EUR (one hundred and fifty-three thousand euros) at the

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<sup>6</sup> That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

<sup>7</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

<sup>8</sup> JdT 1981 III, p. 93 (free translation).

*moment of signing of this AGREEMENT”.*

44. Such total amount would be payable according to the schedule agreed in Article 1 – the first installment, *“amounting to EUR 53,000 (fifty-three thousand euros) to be paid no later than November 25, 2022”.*
45. Additionally, Article 2 of the Agreement provides in its second paragraph that *“[i]f the CLUB is more than 15 days late with the payment to the PLAYER of any of the installments referred to in the Article 1 of this AGREEMENT, all remaining installments to be paid under this AGREEMENT shall immediately become due in full and the CLUB shall have to pay it to the PLAYER within 7 days from the notification thereof sent by the PLAYER”.*
46. The Respondent not having participated in the proceeding, it is not disputed – and it appears indisputable – that the first installment, in the amount of EUR 53,000 was not paid by the Club by the agreed date (25 November 2022) or the further deadline given by the Claimant (16 December 2022). Thus, pursuant to Article 2 of the Agreement the Claimant is entitled to claim the full amount due under the Agreement.
47. Therefore, the Club shall pay EUR 153,000 to the Player.
48. The Claimant has not specified in his Request for Arbitration whether the amount of EUR 153,000 is claimed net or gross. The Agreement is also silent on this point. The Arbitrator therefore concludes that the Club shall pay the EUR 153,000 owed to the Player gross.

#### **7.2.2 Interest**

49. Claimant has further requested *“interest at the applicable Swiss statutory rate”* on the amount claimed starting from 27 December 2022 (the day after the full amount of

EUR 153,000 was due under Article 2 of the Agreement).

50. Not having participated in the proceedings, the Respondent has not disputed the Claimant's request for interest.
51. The Agreement does not provide for interest. However, in accordance with consistent BAT jurisprudence, and deciding *ex aequo et bono*, the Arbitrator considers it fair and reasonable to award interest at the rate of 5% per annum, starting from 27 December 2022, until complete payment.

## **8. Costs**

52. In respect of determining the arbitration costs, Article 17.2 of the BAT Rules provides as follows:

*"At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4). [...]"*

53. On 12 May 2023, the BAT President determined the arbitration costs in the present matter to be EUR 4,000.
54. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 of the BAT Rules provides as follows:

*"The award shall determine which party shall bear the arbitration costs and in which proportion. [...] When deciding on the arbitration costs [...], the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties."*

55. Considering that the Claimant was the prevailing party in this arbitration, it is consistent with the provisions of the BAT Rules that costs of the arbitration be borne by the



Respondent alone. Given that the Claimant paid the entire Advance on Costs in the amount of EUR 7,000 (of which EUR 3,000 will be reimbursed to the Claimants by the BAT), Respondent shall reimburse EUR 4,000 to the Claimant.

56. In relation to the Parties' legal fees and expenses, Article 17.3 of the BAT Rules provides that

*"as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding [...] on the amount of any contribution to the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties."*

57. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses (in this case, up to EUR 10,000).

58. The Claimant claims legal fees in the total amount of EUR 8,500. They also claim for the expense of the non-reimbursable handling fee (EUR 4,000).

59. Taking into account that the Claimant has succeeded in full with his prayers for relief, that the Respondent has not intervened in the proceeding, and that the case is relatively straightforward, the Arbitrator considers it fair and reasonable to award the amount of EUR 3,000 in legal fees, as well as the payment of the non-reimbursable handling fee in the amount of EUR 4,000.

60. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:

- (i) The BAT shall reimburse EUR 3,000 to the Claimant, being the difference between the costs advanced by them and the arbitration costs fixed by the BAT President;
- (ii) The Club shall pay EUR 4,000 to the Claimant, being the difference between the

costs advanced by him and the amount he is going to receive in reimbursement from the BAT;

- (iii) The Club shall pay to the Claimant EUR 3,000 as a contribution to his legal fees, as well as EUR 4,000 for the non-reimbursable handling fee.

## **9. AWARD**

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

- 1. Basketball Club Mornar Bar shall pay Mr. Nemanja Gordic EUR 153,000, together with interest at a rate of 5% *per annum* on any outstanding balance (as may be the case from time to time) thereof from 27 December 2022 until payment in full.**
- 2. Basketball Club Mornar Bar shall pay Mr. Nemanja Gordic an amount of EUR 4,000 as reimbursement of his arbitration costs.**
- 3. Basketball Club Mornar Bar shall pay Mr. Nemanja Gordic an amount of EUR 7,000 as contribution to his legal fees and expenses (including the non-reimbursable handling fee).**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 16 May 2023

Clifford J. Hendel  
(Arbitrator)