BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0152/10)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Carlos Eduardo Cabezas Jurado

Represented by Mr. Miguel Jesus Maldonado Gonzalez,
Avda. Manuel Agustin Heredia n°2, 5º-2, 29001 Mala ga, Spain

- Claimant -

vs.

Basketball Club Khimki Moscow,
Kirova Str. 27, 141400 Khimki, Moscow Region, Russia

Represented by Mr. Art Koshel, Company lawyer, and Mr. Victor Bychkov, President

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Carlos Eduardo Cabezas Jurado (hereinafter referred to as "the Claimant" or “the Player”) is a professional basketball player.

1.2 The Respondent

2. The Basketball Club Khimki Moscow (hereinafter referred to as "the Respondent" or “the Club”) is a professional basketball club in Khimki, Russia.

2. The Arbitrator

3. On 25 January 2011, the President of the Basketball Arbitral Tribunal (hereinafter "BAT"), appointed Mr. Quentin Byrne-Sutton 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 Dispute

4. The Player and the Club entered into an employment contract (hereinafter the “Contract”) dated 30 June 2009, whereby the latter engaged the Player for the following two seasons: 2009-2010 and 2010-2011.

5. According to article 4 of the Contract, the Player’s salary is fully guaranteed even in the

case of an injury or if the Club removes the Player from the team and:

> *"Should the club desire that the PLAYER departs prior to the scheduled termination of the agreement, such a desire must be given to the player in writing, and is recognized that the fulfillment by the player of such a request by the CLUB in no way relieves the CLUB of any responsibilities for payments called for in this agreement".*

6. Article 2 of the Contract provides that the Player's total salary (net of Russian taxes) is EUR 800,000 for the 2009-2010 season and EUR 900,000 for the 2010-2011 season.

7. The Player submits that during the course of the summer of 2010, the Club informed him that they did not wish to maintain him under contract for another season and that, further to him replying that he intended to honour his Contract, in August 2010 the Club proposed to negotiate an early termination of his Contract.

8. In that connection, the Club submits the following:

> *"The contract between BC KHIMKI and Mister Cabezas was signed for 2 seasons (2009/2010, 2010/2011) because of the Head Coach Sergio Scariolo's decision. Once the season 2009/10 was concluded, Mr. Scariolo made a statement that he saw no place for Mr. Cabezas in the following season. So we had had a situation that player had a valid contract till the season of 2010/11 but had no opportunity to continue playing for the club. In order to discuss the situation both player and his agent were invited to the club. The decision was taken to seek for a new team for the player. At the same time it was accepted that a salary at this new team must be no less than the sum he got playing for BC KHIMKI. Club made its offers but player did not accept them. So in that case when … First****, the majority of the clubs had their teams completed and their transfer activities finished****. Second, player himself rejected all offers made for him by the club. Third, there still was no place in the team for this player, so the decision was taken to reach the Termination Agreement (dated August 27 2010)." (sic)*

9. On 27-28 August 2010, the Player and the Club signed a termination agreement in Moscow (hereinafter the "Termination Agreement").

10. Article 1.a. of the Termination Agreement provides that the Club will pay the Player an outstanding amount of compensation of EUR 18,600 pertaining to the 2009-2010 season, and – in four installments between September-December 2010 – an additional total amount of EUR 400,000 "… *as compensation for the termination of the labor contract* …".

11. Article 1.b. of the Termination Agreement stipulates that upon its signature: "… *the*

Club shall have no rights over or with respect to the Player, and Club will not be entitled to request or receive any payments pertaining to the Player playing basketball anywhere in the world", whereas article 1.d. stipulates in essence that upon the performance of the Termination Agreement the parties shall have no further claims against one another.

12. It is not contested that out of the total amount of EUR 418,600 that the Club agreed to pay the Player as outstanding compensation for the 2009-2010 season and compensation for termination, it only paid him a total amount of EUR 100,000 (EUR 30,000 on 28 September 2010, EUR 20,000 on 11 October 2010 and EUR 50,000 on 7 February 2011).

13. Meanwhile, on 21 October 2010, the Player signed a new contract with "Basket Zaragoza 2002 S.A.D." ("Basket Zaragoza") whereby he would be paid a total amount of remuneration of EUR 266,000 for the 2010-2011 season.

14. The Club submits that it learnt about the existence of the Player's new contract "*in October from Spanish press*".

15. The only point in dispute between the parties in this arbitration is whether, despite the Player having signed the new contract with Basket Zaragoza in October 2010, the Club nevertheless has the duty to pay him the entire amount of EUR 418,600 stipulated in the Termination Agreement (of which EUR 318,600 are currently outstanding), or whether his remuneration deriving from that new contract (EUR 266,000) must be deducted from the amount to be paid by the Club.

16. Concerning the question of whether the remuneration deriving from the Player's new contract should be deducted, each party's allegations are in direct contradiction to those made by the opposing party.

17. In that relation, the Club alleges that the

> *"Parties made it very clear whilst negotiating that if either club itself or player himself found some new team for the player, the sum of compensation would be far less than one*

> *contained in the Termination agreement. This condition was agreed upon by BC KHIMKI General manager Mister Victor Bychkov and Sportsman's Agent, at BC KHIMKI office".*

18. Furthermore, the Club alleges that the above condition was not written into the Termination Agreement because

> *"Whilst Termination Agreement (August 2010) was being prepared, both sides saw it so that it would be very difficult to find some new team for the player before the season of 2010-2011 started, and that was why this condition was not added to the Termination Agreement".*

19. In support of the two foregoing allegations, the Club produced a written statement by Mr. Jose Cobo, who is one of the agents forming part of the "SG group" that negotiated the Player's Contract and the Termination Agreement.

20. The Player contests that any such condition was ever discussed and agreed. In that connection, he submits that the agents of the SG group whom he was dealing with did not travel to Moscow for the final negotiation and signature of the Termination Agreement. Instead, his lawyer, Mr. Miguel Maldonado González, went to the meeting and represented him on that occasion. In support of those allegations, the Player produced a statement by his lawyer providing details and proof of his presence in Moscow between 27-30 August 2010 for the signature of the Termination Agreement. In his declaration, Mr. Maldonado González states in essence that during his stay in Moscow and in his discussions with Mrs. Elena Nazarova (the Director of the Club), it was never mentioned in any manner that any sums subsequently earned by the Player from another Club would be deducted from the compensation provided in the Termination Agreement.

3.2 The Proceedings before the BAT

21. On 23 December 2010, the Player filed a Request for Arbitration in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 4,000.00.

22. On 2 February 2011, the BAT informed the parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter.

23. On 17 February 2011, the Player paid his advance on costs in a total amount of EUR 4,000.00.

24. On 22 February 2011, the Club paid its advance on costs in a total amount of EUR 4,000.00.

25. On 1 March 2011, the Club filed its Answer to the Request for Arbitration.

26. By Procedural Order of 7 March 2011, the parties were invited to simultaneously reply to distinct questions addressed to them by the Arbitrator.

27. On 17 March 2011, the Player filed his answers to the questions.

28. On 21 March 2011, the Club filed its answers to the questions.

29. On 24 March 2011, each party was invited to respond to the other party's answers.

30. On 31 March 2011, the Player filed his response.

31. On 1 April 2011, the Club filed its response.

32. By letter dated 4 April 2011, the BAT Secretariat informed the Parties that the FIBA Arbitral Tribunal (FAT) had been renamed into Basketball Arbitral Tribunal (BAT) and that, unless one of the Parties objected by 11 April 2011, the new name would be applied also to the present proceedings. None of the Parties raised any objections within the said time limit.

33. By Procedural Order of 5 April 2011, the exchange of documents was declared completed and the parties were invited to submit their statements of costs.

34. On 11 April 2011, the Player submitted his statement of costs.

35. On 13 April 2011, the Club was given leave to comment on the Player's statement of costs.

36. On 18 April 2011, the Club submitted its observations on the Player's statement of

costs.

4. The Positions of the Parties

4.1 The Claimant's Position

37. The Player submits the following in substance:

- Between the 2009-2010 and 2010-2011 seasons for which he had been engaged, the Club desired him to depart although he wished to honour the Contract to its term.

- As a result, the Club ended up proposing a termination agreement whereby he would be compensated by means of a fixed sum for accepting to depart.

- The payment of the entire fixed sum was never subject to the condition that it would be reduced by any amount he earned by signing a contract with a new club for the season 2010-2011.

38. In his Request for arbitration, the Claimant requested the payment of an outstanding principal amount of EUR 368,600 and "… *compensation for late payment, costs of arbitrations, legal interests in Switzerland for late payments and legal fees of his Counsel*."

39. However, it being uncontested that since the date of the foregoing prayer for relief the Club has paid the Player an additional EUR 50,000 (on 7 February 2011), the principal amount being claimed by the Player now amounts to EUR 318,600 (368,600 – 50,000).

4.2 The Respondent's Position

40. The Club submits the following in substance:

- When negotiating the Termination Agreement the parties agreed that any amount the Player earned under a contract with a new club for the season 2010-2011 would be deducted from the compensation provided for in the Termination Agreement.

- The foregoing condition was not written into the Termination Agreement because it was negotiated at a point in time when it seemed improbable the Player would find a new club for the 2010-2011 season.

- In any event, it would be unfair not to deduct from the compensation owed under the Termination Agreement any amount earned by the Player with a new club for the 2010-2011 season, and "*Practices of FAT hold it so that upon defining, which sum is to be paid by the former club to the player, the new salary in his new team must be taken into consideration*".

41. In its Answer, the Club submits as its main prayer for relief that: "…*The remaining sum (to be paid in accordance with the termination agreement) to be lessened by the sum of the Claimant's new salary*."

5. Jurisdiction

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

43. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus

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arbitrable within the meaning of Article 177(1) PILA[1].

44. The dispute between the Parties arises out of the Termination Agreement, which under article 2 contains the following arbitration clause in favour of the BAT:

> *"Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT 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 (PIL), irrespective of the parties' domicile.*
>
> *The language of the arbitration shall be English.*
>
> *Awards of the FAT can be appealed to the Court of Arbitration for Sports (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sports (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law.*
>
> *The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

45. The agreement to arbitrate is in written form and thus fulfills the formal requirements of Article 178(1) PILA.

46. With respect to its 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).

47. Furthermore, the Club has not raised any jurisdictional objections relating to the Player's claim.

48. For the above reasons, the Arbitrator has jurisdiction to decide the present dispute.

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

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

49. 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".*

50. 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."*

51. Article 2 of the Termination Agreement stipulates that: "*The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono*".

52. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

53. The concept of "*équité"* (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage[2] (Concordat)[3], under which Swiss courts have held that arbitration "*en équité"* is fundamentally different from arbitration "*en droit"*:

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[2] That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, of the Swiss Code of Civil Procedure (governing domestic arbitration).

[3] P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

> *"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]

54. This is confirmed by Article 15.1 of the BAT Rules *in fine*, according to which the Arbitrator shall apply "*general considerations of justice and fairness without reference to any particular national or international law*".

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

6.2 Findings

56. As already mentioned, the only question to resolve on the merits in this case is whether the remuneration the Player has earned for the 2010-2011 season with his new club Basket Zaragoza must be deducted from the amount owed to him by his former Club under the Termination Agreement.

57. In that respect, the Arbitrator finds for the following reasons that the Club has not proven that the parties to the Termination Agreement agreed that the Player's remuneration by a new club would be deducted from his compensation for termination:

- The declarations of the parties in that connection are contradictory as is the testimony contained in the written statements the Club and the Player respectively filed.

- At the same time, the wording and the logic of the Termination Agreement very clearly speak in favour of the Player's allegations since (i) it contains no provision indicating that subsequent remuneration from a new club would be deducted, (ii) article 1.b. tends to indicate the opposite and (iii) the Player had no contractual, legal or other reason to renounce the EUR 900,000 he was entitled to under the Contract for the 2010-2011 season and therefore would not logically have

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

accepted to subject the compensation that he had already accepted to substantially reduce (by more than 50%) to another possible reduction.

58. Furthermore, the facts of this case are not comparable to those of the BAT cases in which subsequent remuneration from a new club was deducted from a player's claim: in those cases this was done to prevent the player from being unjustly enriched and no termination agreement of the nature of the one involved here had been signed.

59. Indeed, in this case, when receiving his compensation for termination (EUR 418,600) combined with the remuneration from his new club for the 2010-2011 season (EUR 266,000), the Player is not being "enriched". On the contrary, he is still consenting a “sacrifice” of over EUR 200,000 to the total remuneration he would have enjoyed (EUR 900,000) if he had remained with the Club for the 2010-2011 season, as he would have been entitled to according to the Club’s own admission.

60. Consequently, the wording and logic of the Termination Agreement, the principle “*pacta sunt servanda*” as well as principles of fairness and justice all coincide in requiring that the Player be paid his entire compensation for termination as agreed under the Termination Agreement, and the Club shall be ordered to pay him the outstanding amount of EUR 318,600.

61. Finally, the Player has requested that the Arbitrator award "*legal interests in Switzerland for late payments*". Although the Termination Agreement does not regulate interest for late payments, it is a generally recognized principle embodied in most legal systems, which is underpinned by motives of equity, that late payments give rise to interest – in order that the creditor be placed in the financial position she/he would have been in had payments been made on time.

62. Therefore and despite the Termination Agreement not specifying an interest rate, it is normal and fair that interest is due on the late payments. In the circumstances of this case, the Arbitrator finds it fair and reasonable to award interest at a rate of 5% per annum.

63. It is an established principle that interest runs from the day after the date on which the principal amounts are due.

64. In this case, the Arbitrator finds it fair that interest at 5% be applied on EUR 368,600 from the day after the Club should have paid its last instalment to the Player as compensation for termination under the Termination Agreement, i.e. on 15 December 2010 as stipulated under clause 1.a. of the Agreement, until 7 February 2011. From 8 February onwards, interest at 5% shall be applied to the amount of EUR 318,600 only, given that on 7 February 2011 a payment was made by the Club to the Player in the amount of EUR 50,000.

65. Accordingly, the Club shall be ordered to pay the Player the principal amount of EUR 318,600, plus interest of 5% per annum

- on EUR 368,600.00 from 16 December 2010 until 7 February 2011; and

- on EUR 318,600.00 from 8 February 2011 onwards.

7. Costs

66. 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 legal fees and expenses incurred in connection with the proceedings.

67. On 20 May 2011 - 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 5,250.00.

68. Considering the Player entirely prevailed in his claim, it is fair that the fees and costs of the arbitration be borne by the Club and that the latter be required to contribute to the Player's legal fees and other expenses. Bearing in mind that such contribution should only be to the Player's legal fees relating to this arbitration, i.e. not to any fees charged by his lawyer for services during the negotiation of the Termination Agreement, and considering the content of the proceedings, the amount of the Player's statement of costs and the non-reimbursable fee of EUR 4,000, the arbitrator finds it fair that such contribution should be in an amount of EUR 9,000.

69. Therefore, given that the Claimant and the Respondent each paid an advance on costs of EUR 4,000.00, the Arbitrator decides that in application of article 17.3 of the BAT Rules:

(i) BAT shall reimburse EUR 2,750.00 to the Claimant, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President;

(ii) The Respondent shall pay EUR 5,250.00 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 Respondent shall pay to the Claimant EUR 9,000.00 as a contribution to his legal fees and other expenses.

8. AWARD

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

1. **Basketball Club Khimki Moscow shall pay Mr. Carlos Eduardo Cabezas Jurado an amount of EUR 318,600.00, as compensation for the termination of the contract dated 30 June 2009, plus interest at 5% per annum on EUR 368,600.00 from 16 December 2010 until 7 February 2011 and on the amount of EUR 318,600.00 from 8 February 2011 onwards.**

2. **Basketball Club Khimki Moscow shall pay Mr. Carlos Eduardo Cabezas Jurado an amount of EUR 5,250.00 as reimbursement for the advance on arbitration costs paid by him.**

3. **Basketball Club Khimki Moscow shall pay Mr. Carlos Eduardo Cabezas Jurado an amount of EUR 9,000.00 as a contribution to his legal fees and expenses.**

4. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 24 May 2011

Quentin Byrne-Sutton
(Arbitrator)