

## **ARBITRAL AWARD**

**(BAT 0532/14)**

by the

### **BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Klaus Reichert SC**

in the arbitration proceedings between

**Mr. Sani Becirovic**

**- Claimant 1 -**

**ProStep Sport Agency**

Koseska cesta 8, 1000 Ljubljana, Slovenia

**- Claimant 2 -**

**Mr. Balazs Radic**

**- Claimant 3 -**

all represented by Mr José Lasa Azpeitia & Ms Patricia Fraile,  
Calle Serrano 33, 2º planta, 28001 Madrid, Spain

vs.

**Foolad Mahan Sepahan Sport Club**

Masoud 3 Building, next to Shajareh Mosque, Sharif Vaguefi Street, Isfahan, Iran

**- Respondent -**

## **1. The Parties**

### **1.1 The Claimants**

1. Claimant 1, Mr. Sani Becirovic ("Player"), is a Slovenian professional basketball player. Claimant 2, ProStep Sport Agency ("Agent 1"), is a sports agency represented by Mr. Boris Gorenc, a Slovenian national. Claimant 3, Mr. Balazs Radic ("Agent 2"), is a sports agent, of Iranian nationality, resident in Budapest, Hungary.

### **1.2 The Respondent**

2. Foolad Mahan Sepahan Sport Club ("Respondent") is a professional basketball club in Isfahan, Iran.

## **2. The Arbitrator**

3. On 1 April 2014, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert SC as arbitrator ("Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal ("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. Player was contracted to play for Respondent for the 2013-2014 Asian Club Championship and the 2013-2014 season of the Iranian Basketball Supra League.
5. For the Asian Club Championship, Player was retained by Respondent by an

agreement signed in August 2013 ("Asian Agreement"). Respondent agreed to pay Player USD 100,000.00 net by way of salary, and USD 30,000.00 by way of bonus if the Asian Club Championship was won. Subsequently, though it is not clear as to exactly when, the due dates for payment were amended by a further agreement. The Asian Agreement also provided for payment of agency fees to Agent 1 and Agent 2 of USD 6,500.00 and USD 3,500.00 respectively. These agency fees were paid by Respondent.

6. For the 2013-2014 season of the Iranian Basketball Supra League, Player was retained by Respondent by an agreement signed in September 2013 ("Iranian Agreement"). Respondent agreed to pay Player USD 335,000.00 net by way of salary. The Iranian Agreement also provided for payment of agency fees to Agent 1 and Agent 2 of USD 23,500.00 and USD 10,000.00 respectively.
7. Player was paid USD 40,000.00 by Respondent, and submits that he was paid no further sums.
8. In December 2013 Player left Iran, and was cleared to play with a Slovenian team, KRKA-Telekom, for the remainder of the season and was paid a salary of EUR 15,000.00.
9. Player says that he is owed USD 90,000.00 net by Respondent in respect of the Asian Agreement and has limited his claim pursuant to the Iranian Agreement to USD 314,651.00 net (being the USD 335,000.00 noted in paragraph 6 above less the USD equivalent of EUR 15,000.00 which he earned with KRKA-Telekom noted in paragraph 8 above).
10. Agent 1 and Agent 2 say that they are owed their agency fees of USD 23,500.00 and USD 10,000.00 respectively pursuant to the Iranian Agreement.

11. Claimants say that they have been in lengthy negotiations with Respondent over several months, including a meeting in Teheran in November 2013, but to no avail and promises of payment were not fulfilled.

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

12. On 3 March 2014, Player filed a Request for Arbitration dated 2 March 2014 in accordance with the BAT Rules.
13. The non-reimbursable handling fee in the amount of EUR 4,000.00 was paid on 28 January 2014.
14. On 9 April 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 1 (Mr Sani Becirovic) EUR 4,000*

*Claimant 2 (ProStep Sport Agency) EUR 1,000*

*Claimant 3 (Mr Balazs Radic) EUR 1,000*

*Respondent (Foolad Mahan Sepahan Sport Club) EUR 6,000"*

The foregoing sums were paid as follows: 10 July 2014, EUR 4,000.00, by Agent 1; 27 July 2014, EUR 2,000.00, by Agent 1; and 4 August 2014, EUR 6,000.00, by Player.

15. On 12 April 2014, the Respondent confirmed receipt of the BAT's correspondence by email and facsimile.
16. On 22 April 2014, Claimants sent a request to postpone the arbitration by reason of an email they had received from Respondent. The text of that email is reproduced below in full:

*"From: rey san <rey\_san10@yahoo.com>  
Date: Fri, 18 Apr 2014 23:48:51 -0700  
To: Balazs Radics<radicsbazsi@hotmail.co.uk>  
ReplyTo: rey san <rey\_san10@yahoo.com>  
Cc: Sani Becirovic<sani.becirovic@gmail.com>  
Subject: respond to your complaint*

*Dear Balazs, Dear Sani*

*Hi. I hope you are doing fine.*

*We have received all documents of Basketball Arbitral Tribunal.*

*At first we want to thank you for your patience in this long period but as you may know the situation of our club hasn't got better and we are facing serious financial problem, and even our Iranian players haven't received their salaries.*

*We owe you and other players and we gave a long list of our debts to Governmental officials .*

*We have not forgiven our debts , but I think in this situation ,the way you have chosen is not a good way to get your salaries.*

*Our holding is doing its best to solve the problem and find a solution to pay off all debts.*

*It would be appreciated if you could wait more and stop this process for a while.*

*Again we thank you for your patience and understanding.*

*Sincerely,*

*R.Sanatgar - International Affairs - Foolad Mahan Sport Club - Tell:0098-311-2665730-9 (ext : 203) - Fax:0098-311-2656132 - Mobile:0098-9131054188 - Email:[rey\\_san10@yahoo.com](mailto:rey_san10@yahoo.com)"*

17. On 23 April 2014, the Arbitrator suspended the arbitration until 13 May 2014.
18. On the same day, Respondent acknowledged receipt of BAT's email and stated that *"we will do our best to solve this problem in this period."*
19. On 14 May 2014, Respondent sent the following email, the text of which is reproduced in full below:

*"Von: rey san [[mailto:rey\\_san10@yahoo.com](mailto:rey_san10@yahoo.com)]"*  
*Gesendet: Mittwoch, 14. Mai 2014 10:10"*  
*An: Guillon, Cendrine"*  
*Cc: Sani Becirovic; Balazs Radics"*  
*Betreff:*  
*Re: WG: BAT 0532 - Becirovic, Prostep Sport Agency, Radic vs. Foolad Mahan Sepahan Club [I-BAT.FID3158]*

*Dear sirs,*

*Greetings from Foolad Mahan Club !*

*Regarding to above subject,at frist we want to thank you and the player - Mr.Sani Becirovic - for this time and for his good faith .*

*Although the govenmental unities promised us to help this organization in paying off its debts to the players ,till now they have done nothing for us .During this period we tried hard to find a way to solve the situation but as the situation of principal managers of Foolad Mahan Holding has not become clear yet ,we could not pay the salaries of our players including Sani .*

*We kindly ask you to give us more time (at least 8 days ) , that The government will inform us about their final desicion regarding to our managers and we will be known weather they will set our manager free or not .*

*We know it's a big request and Sani gave us many times and oportunities already but please consider this fact that in current situation and by the limitations that govermental unities imposed on us,many things are not in our hands and we should wait to see what will be their final desicion in these period ( till the end of this Iranian Month ) .*

*We hope you agree with this request.We appreciate your kind understanding and patience .*

*Sincerely,*

*R.Sanatgar" International Affairs" Foolad Mahan Sport Club"*  
*Tell:0098-311-2665730-9 (ext : 203)"*  
*Fax:0098-311-2656132"*  
*Mobile:0098-9131054188"*  
*Email:[rey\\_san10@yahoo.com](mailto:rey_san10@yahoo.com)"*

20. On 19 May 2014, the Arbitrator extended the suspension of the arbitration until 2 June



2014.

21. On 21 May 2014, Respondent sent the following email, the text of which is reproduced below:

*“Von: rey san [[mailto:rey\\_san10@yahoo.com](mailto:rey_san10@yahoo.com)] □  
Gesendet: Mittwoch, 21. Mai 2014 16:46 □  
An: Guillon, Cendrine □  
Cc: Sani Becirovic; [bgorenc@prostepagency.com](mailto:bgorenc@prostepagency.com) □  
Betreff: Re: BAT 0532 - Becirovic, Prostep Sport Agency, Radic vs. Foolad Mahan Sepahan Club [I-BAT.FID3158]*

*Dear sirs,*

*We have received your email. We appreciate your kind understanding and consideration.  
May we could conclude this matter in a friendly way.*

*Sincerely*

*R.Sanatgar  
International Affairs □ Foolad Mahan Sport Club  
Tell: 0098-311-2665730-9 (ext : 203)  
Fax: 0098-311-2656132  
Mobile: 0098-9131054188  
Email: [rey\\_san10@yahoo.com](mailto:rey_san10@yahoo.com)”*

22. On 3 June 2014 the Arbitrator lifted the suspension of the arbitration and directed that Respondent file an Answer by 24 June 2014.
23. Respondent did not file an Answer.
24. On 11 August 2014, the Parties were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules. The Parties were invited to submit their respective claims for costs. No claims for costs were submitted thereafter as Claimants had already provided details of such costs in the Request for Arbitration.

#### **4. The Positions of the Parties**

25. Claimants' position is described in section 3.1 above. Their claims are simply expressed as money which is due and owing. They point out in their Request for Arbitration that they have been repeatedly promised payment, or some sort of satisfaction, by Respondent and that these promises never led anywhere.
26. The Respondent's participation in this arbitration has been confined to the four emails which are reproduced above. However, its position as regards Claimants' claims emerges clearly. First, it acknowledges it owes money. Secondly, it does not in any way seek to dispute any matter in the Request for Arbitration. Thirdly, no issue is taken with the appointment of the Arbitrator, or jurisdiction.

#### **5. The Jurisdiction of the BAT**

24. 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).
25. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
26. 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.<sup>1</sup>

27. The jurisdiction of the BAT is stated by Claimants to result from Article 13 of the Asian Agreement and Article 13 of the Iranian Agreement, both of which read as follows in relevant part:

*“Any dispute arising out of, or in connection with this Agreement shall be brought to the Club Disciplinary Committee to be mediated and in case the dispute remains unsolved, it shall be submitted to the Iran Basketball Federation for mediation. If the dispute still remains unsolved, the parties agree to resolve any such remaining dispute arising from or related to this contract through 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 Sport (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 Sport (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.”*

28. This arbitration clause is in written form and thus it fulfils the formal requirements of Article 178(1) PILA. The reference to FAT is understood to be a reference to BAT (Article 18.2 of the BAT Rules). Claimant has submitted that the matter was referred to the “mediation” of the Iran Basketball Federation (“IBF”) and a meeting of the Claimants with Respondent’s and IBF’s officials on 27 November 2013 did not resolve the dispute. Respondent has not disputed the fact that such meeting did take place.
29. 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).
30. Finally, Respondent did not call into question the BAT’s jurisdiction when submitting its

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

emails as recorded above, and rather sought more time to solve the matter. In particular on 14 May 2014 it specifically engaged with this arbitration by requesting more time from the Arbitrator.

31. For the above reasons, the Arbitrator has jurisdiction to adjudicate upon the claims.

## **6. Discussion**

### **6.1 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. As noted above (paragraph 27) the arbitration agreements specifically empower the Arbitrator to rule ex aequo et bono.
35. Therefore, the Arbitrator will decide the dispute at hand ex aequo et bono.

36. 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>2</sup> (Concordat)<sup>3</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>4</sup>*

37. 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.”<sup>5</sup>
38. 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.”
39. In light of the foregoing considerations, the Arbitrator makes the findings below.

## 6.2 Findings

40. The claim has been admitted by Respondent. Its email of 18 April 2014 could not be clearer. It admits that it owes Player, and the sole reason for non-payment is Respondent’s financial situation. Its email to the BAT on 14 May 2014 is also to the

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<sup>2</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>3</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

<sup>4</sup> JdT 1981 III, p. 93 (free translation).

<sup>5</sup> Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717. pp.625-626.

same effect. The Arbitrator notes that Claimants go into considerable detail in the Request for Arbitration on the history of their contractual dealings with Respondent, and their eventual parting of the ways when, in December 2013, Player was released to play in Slovenia. However, in light of the stance taken by Respondent in its emails following service of the Request for Arbitration, it is not necessary to engage in any lengthy analysis thereof. The Arbitrator has, however, perused all of the materials put before him in the Request for Arbitration and the stance taken by Respondent in its emails is entirely unsurprising. It does not seem possible for the Respondent to have sought to deny the claims made – it engaged Player, had the benefit of his services (with particular success in the Asian Championship), and then failed to pay its clear and unequivocal contractual debts.

41. The Arbitrator holds and finds that Respondent is liable to Player in the amount of USD 90,000.00, net pursuant to the Asian Agreement, and further holds and finds that Respondent is liable to Player in the amount of USD 314,651.00 pursuant to the Iranian Agreement.
42. The Arbitrator holds and finds that Respondent is liable to Agent 1 in the amount of USD 23,500.00 pursuant to the Iranian Agreement. The Arbitrator holds and finds that Respondent is liable to Agent 2 in the amount of USD 10,000.00 pursuant to the Iranian Agreement.
43. As regards penalties, the Arbitrator is referred by Claimants to part of Article 4 of the Asian Agreement which trigger a penalty of USD 100.00 per day in the event of late payment. Player restricts his claim for penalties to a short period of 85 days from 7 November 2013 to 31 January 2014. In light of the circumstances of this case, particularly the manner in which Player was continually strung along by Respondent as regards hopes of payment, the Arbitrator finds that it is just and equitable that contractual penalties of USD 8,500.00 be awarded.

44. As regards interest, Claimants seek interest at 5% per annum on all sums from 13 December 2013. The Arbitrator does not accede to awarding interest from 13 December 2013, particularly as Player has the benefit of being awarded USD 8,500.00 in penalties. Rather, the Arbitrator awards interest at a rate of 5% on the principal sums due to Claimants as and from the date of receipt of the Request for Arbitration by the BAT, being 3 March 2014, until payment in full.

## **7. Costs**

45. 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.
46. On .22 September 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 6,620.00.
47. Considering that Claimants prevailed in their claims (but for a small portion of the interest claimed), 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 (none were advanced in this case) and expenses as well as those Claimants.



48. Claimants' claim for legal fees and expenses amounts to EUR 13,000.00 inclusive of the EUR 4,000.00 non-reimbursable handling fee (though there appears to be some internal confusion within the Request for Arbitration as to the exact figures – the Arbitrator takes the figures set out in the table on page 32 thereof as the correct amounts sought).
49. The Arbitrator notes that Claimants divide the figure of EUR 9,000.00 into two parts. First, there is a claim for EUR 3,500.00 for meeting with Player, studying the agreements, drawing up the law suit, and so on. Secondly, there is a claim for EUR 5,500.00 for drawing up the Request for Arbitration. There appears to be some overlap between the two parts. Also, while the Request for Arbitration does analyse the case at considerable length, the dispute was not particularly complex. The Arbitrator considers that the circumstances of this case do not warrant costs of EUR 9,000.00, and awards EUR 7,000.00 instead. In addition, EUR 4,000.00 will be awarded arising from the non-reimbursable handling fee.
50. Given that Claimants paid advances on costs of EUR 12,000.00, as well as a non-reimbursable handling fee of EUR 4,000.00 (which, as noted above, is taken into account when determining Claimants' legal expenses), the Arbitrator decides that in application of article 17.3 of the BAT Rules:
- (i) BAT shall reimburse EUR 5,380.00 to Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the BAT President;
  - (ii) Respondent shall pay to Claimants EUR 6,620.00, being the difference between the arbitration costs advanced by them and the amount they will receive as reimbursement from the BAT.
  - (iii) Respondent shall pay EUR 11,000.00 to Claimants, representing a contribution to their legal fees and expenses.



## **8. AWARD**

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

- 1. Foolad Mahan Sepahan Sport Club must pay Mr. Sani Becirovic USD 404,651.00 net for unpaid salary together with interest at 5% per annum from 3 March 2014 until payment.**
- 2. Foolad Mahan Sepahan Sport Club must pay Mr. Sani Becirovic USD 8,500.00 by way of penalty sums for late payment of salaries.**
- 3. Foolad Mahan Sepahan Sport Club must pay ProStep Sport Agency USD 23,500.00 net for unpaid agency fees together with interest at 5% per annum from 3 March 2014 until payment.**
- 4. Foolad Mahan Sepahan Sport Club must pay Mr. Balazs Radic USD 10,000.00 net for unpaid agency fees together with interest at 5% per annum from 3 March 2014 until payment.**
- 5. Foolad Mahan Sepahan Sport Club must pay Mr. Sani Becirovic, ProStep Sport Agency, and Mr Balazs Radic EUR 6,620.00 as reimbursement for their arbitration costs.**
- 6. Foolad Mahan Sepahan Sport Club must pay Mr. Sani Becirovic, ProStep Sport Agency, and Mr Balazs Radic EUR 11,000.00 as a contribution to their legal fees and expenses.**
- 7. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 23 September 2014

Klaus Reichert  
(Arbitrator)