Arbitration CAS 2009/A/1921 Non-Profit Partnership Women Basketball Club "Spartak" St. Petersburg v. Tigran Petrosean, award of 5 March 2010

Panel: Mr Mark Hovell (United Kingdom), Sole Arbitrator

Basketball
Agency contract
Arbitration according to the principle ex aequo et bono
Admissibility of email communication in CAS proceedings

1. **It is generally considered that the arbitrator deciding *ex aequo et bono* receives a mandate to give a decision based exclusively on equity, without taking into consideration specific legal rules. Instead of applying general and abstract rules, the arbitrator should look at the specific circumstances of the case.**

2. **Email communication has become standard practice across sport and all businesses. Emails should in principle be admissible in CAS proceedings.**

Non-Profit Women Basketball Club "Spartak" St. Petersburg ("Spartak" or the "Appellant") is a professional basketball club with its seat in St. Petersburg, Russia. It is domiciled at 66 Maliy Prospekt, 199406 St. Petersburg, Russia.

Mr Tigran Petrosean (the "Agent" or the "Respondent") is a licensed FIBA agent registered with FIBA. He operates his business under the name of "TP Sports" and is domiciled in St. Petersburg, Russia.

On 8 April 2008, the Appellant and the Respondent entered into a Standard Agency Contract (the "Main Agency Contract") according to which the Respondent was appointed to represent the Appellant in connection with the engagement of basketball players. In turn, the Appellant undertook to compensate the Respondent with a fee for each player engaged calculated as a percentage of each player's salary.

On 9 April 2008, the Respondent introduced two players to the Appellant (Z. and B.), which the Appellant duly signed as players to its team. In both cases, an addendum to the Main Agency Contract ("Addendum 1" and "Addendum 2" respectively) was signed detailing the exact amount of the commission due to the Respondent and when it was to be paid by. It was noted by the Sole Arbitrator that both Addendum 1 and Addendum 2 had been signed by the Appellant and stamped with the Appellant's seal.

On 26 May 2008, the Appellant sent the Respondent an email expressing Spartak's interest in M. (the "Player") and stating a willingness to acquire her registration for a total sum of RUB 3,700,000 (including transfer fees, salary and bonuses).

On 27 May 2008, an agreement was signed between the Appellant and Basketball Club Dynamo Kursk ("Kursk"). Under the terms and conditions of the agreement, Kursk agreed to transfer all the rights of the Player to the Appellant on payment of the consideration of RUB 1,500,000 before 1 August 2008 to Kursk (the "First Transfer Agreement").

On 28 May 2008, the Appellant and the Player signed an agreement (the "First Player's Contract") that provided that the Player undertook to provide services to the Appellant as a basketball player during the 2008-2009 season, participate in all competitions, training sessions, and matches. The Sole Arbitrator noted that both parties had advanced a copy of the First Player's Contract as part of these proceedings; however the Appellant's version was without the Appellant's seal, whereas the Respondent's version had been sealed by the Appellant.

On 28 May 2008, the Appellant and the Respondent signed a further addendum to the Main Agency Contract. According to this addendum ("Addendum 3"), the Appellant agreed to pay RUB 370,000 to the Respondent for the services rendered in connection with the Player. This amount was to be paid in two instalments, namely RUB 185,000 by no later than 15 June 2008 and the balance of RUB 185,000 by no later than 1 December 2008.

Within the Player's "passport", which logs her employment records, was the entry dated 1 July 2008 stating that her employment with Kursk had ended that day as she had been dismissed.

On 7 July 2008, the Appellant emailed the Respondent stating that it needed to save money (35%) as its budget for the year had been reduced.

On 28 July 2008, the Appellant sent a correspondence to Kursk confirming that it would send the RUB 1,500,000 on 20 August 2008.

Despite that correspondence, the Appellant did not pay the transfer fee to Kursk on the due date and on 22 September 2008, the Appellant wrote to the Basketball Superleague of Russia to enquire whether the Player was still registered with Kursk.

Upon discovering that the Player was still registered with Kursk, the Appellant and Kursk, over a number of weeks, sought to renegotiate the transfer of the Player.

On 11 November 2008, the Appellant and Kursk entered into a second agreement concerning the transfer of the Player from Kursk to the Appellant (the "Second Transfer Agreement").

On 12 November 2008, the Appellant, in accordance with the terms and conditions of the Second Transfer Agreement, paid Kursk the amount of RUB 300,000.

On 13 November 2008, the Appellant entered into a second contract with the Player (the "Second Player's Contract").

On 14 November 2008, the Second Player's Contract was registered in the Unified Player Contract Register of the Russian Basketball Federation (the "Federation") under No. 2019.

On 10 March 2009, the Respondent filed a Request for Arbitration in accordance with the FIBA Arbitral Tribunal (FAT) Rules, claiming his agent's fees for services rendered to Spartak in relation to the players Z., B. and M., together with the contractually agreed service charge for late payment and his costs and expenses.

On 3 July 2009, the decision of the FAT (the "Appealed Decision") was notified to the Appellant and to the Respondent, stating:

> *"1. WBC "Spartak" St. Petersburg is ordered to pay to Mr Tigran Petrosean, TP Sports RUB 370,000 for agent fees.*
>
> *2. WBC "Spartak" St. Petersburg is ordered to pay to Mr Tigran Petrosean, TP Sports RUB 820,000 for late payment penalties.*
>
> *3. WBC "Spartak" St. Petersburg is ordered to pay to Mr Tigran Petrosean, TP Sports RUB 5,440 as a reimbursement of the Advance on Costs of the arbitration.*
>
> *4. WBC "Spartak" St. Petersburg is ordered to pay to Mr Tigran Petrosean, TP Sports RUB 160,000 as a contribution to Tigran Petrosean's legal fees and expenses.*
>
> *5. Any other or further-reaching claims for relief are dismissed".*

On 21 July 2009, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (CAS). It challenged the above mentioned Appealed Decision, submitting the following request for relief:

> *"(i) That the award of the FIBA Arbitral Tribunal dated 3 July 2009, be annulled to the extent that the Respondent is ordered to pay to the Claimant RUB 370,000 as payment for engagement of M. …*
>
> *(ii) That the Award of the FIBA Arbitral Tribunal dated 3 July 2009, be annulled to the extent that the Respondent is ordered to pay to the Claimant RUB 370,000 of late payment penalties for services related engagement of M. so as to eliminate them from the total amount of RUB 820,000 for late payment penalties …".*

On 31 July 2009, the Appellant filed an appeal brief, containing a statement of the facts and legal arguments accompanied by supporting documents.

On 14 August 2009, the Agent filed an answer, with the following request for relief:

> *"1. To dismiss the Appellant's appeal against the decisions issued on 3 July 2009 by the FAT.*
>
> *2. To establish that the costs of the Arbitration shall be borne by the Appellant.*
>
> *3. To order the Appellant to pay the Respondent the amount of RUB 450,000 as a contribution to the Respondent's legal fees and expenses incurred in connection with this Arbitration proceedings.*

4. *To order the Appellant to pay the Respondent a fee equal to 10% of the Player's total net salary in the event that the Appellant obtains the services of the Player in the season 2009-2010 and in any subsequent year, in accordance with the clause 3 of the Standard Agency Contract dated from 8 April 2008".*

By way of letter of 31 August 2009 to the CAS, the Appellant requested that the CAS *"when considering the appeal, do not take into account of and consider the Respondent's claims for acknowledgement of its rights to receive a fee from the Appellant for the services rendered in connection with engagement of the Player during the sports season 2009-2010"*, as it submitted the Respondent's counterclaim was inadmissible.

By letter of 5 October 2009, the CAS, pursuant to Articles R57 and R44.3 of the Code of Sports-related Arbitration, requested from the parties the following information and/or documents:

i) the Player's playing records and Player's passport. Further, the CAS requested that if the parties were not in possession of such documentation then they should state in what games the Player participated and for whom over the 2007 and 2008 period.

ii) Whether the First Player's Contract had been registered or not, and if registered, when.

The Respondent, by letter dated 8 October 2009, provided the CAS with the following submissions:

i) That from the beginning to the end of sports season 2007-2008, the Player was a player of Kursk.

ii) In season 2008-2009, the Player participated in the games for no other club but only for the Appellant.

iii) *"That unfortunately, I am not informed of the Contract between the Appellant and the Player dated from 28 May 2008 was registered and if yes, I don't know the date of its registration because it is the club who is responsible for registration of playing contracts".*

iv) *"Further in case the Appellant did not register this contract it does not discharge them from obligations regarding the contract (including the Agent's Contract). Indeed the validity of the Contract does not depend on the fact if it is registered or not. Neither the Player, nor the Agent cannot be responsible for such Appellant actions. Otherwise, it would have been too easy for the clubs not to bear any responsibility regarding contracts which they initially did not register".*

v) *"Also, I would like to mention that the Player was at the disposal of the Appellant's club during the season 2008-2009, and consequently, had a paying licence as she participated for the Appellant's team in the official games and during the whole period got her salary exclusively from the Appellant".*

The Appellant, by letter dated 21 October 2009, provided the CAS with the following submissions:

i) That there was no contractual relation between Spartak and the Player during the season of 2007-2008.

ii) That the Appellant has no reliable information about the teams and matches the Player played during the season 2007-2008.

iii) That the First Player's Contract was not registered and neither party took steps towards registration of the same *"as the parties had not made this contract and it had not been accepted by the Appellant in compliance with the law of the RF and RBF Regulation (it was not affixed with the*

seal of NPP WBC "Spartak" and the form was not consistent with the model form established by the RBF)".

A hearing was held on 14 January 2010 at the CAS offices in Lausanne.

At the hearing, the following preliminary issues were dealt with:

(a) the Respondent withdrew his claim to be paid any agency fees for the 2009-2010 season, i.e. his counterclaim;

(b) although the Player was available to be heard by videoconference and although both parties had included in their submissions to the CAS written witness statements from the Player, neither party claimed her as a witness and wished to call her to give evidence, so no oral witness or expert evidence was relied upon during the hearing;

(c) the Appellant was allowed, with the Respondent's agreement, to file at the hearing missing pages and translations from exhibits to its statement of appeal; and

(d) the Appellant was allowed, again with the Respondent's agreement, to file a letter dated 21 December 2009 addressed to the Appellant from the Federation, stating that it would only register player contracts in its standard format and that the First Player's Contract did not meet its requirements.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS derives from Article 17 of the FAT Rules as well as Article R47 of the Code of Sports-related Arbitration (the "Code").

2. Under Article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law. The parties confirmed this position by both signing the Order of Procedure in this matter.

Applicable law

3. With respect to the law governing the merits of the dispute, Article 187(1) of the Swiss Federal Code on Private International Law ("PIL") provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PIL adds that the parties may authorize the arbitrators to decide "en équité". Article 187(2) PIL is generally translated into English as *"the parties may authorize the arbitral tribunal to decide ex aequo et bono".*

4. Article R58 of the Code provides the following:

"The Sole arbitrator shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Sole arbitrator deems appropriate. In the latter case, the Sole arbitrator shall give reasons for its decision".

5. In the present matter, the Sole Arbitrator shall decide this dispute according to the applicable provisions contained in the FAT Rules.

6. Pursuant to Article 15.1 of the FAT Rules:

"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".

7. Pursuant to Article 17 of the FAT Rules, *"(…) The CAS shall decide the appeal ex aequo et bono and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure".*

8. In the Main Agency Contract and Addendum 3, the parties have explicitly directed and empowered the FAT Arbitrator to decide the dispute *ex aequo et bono.*

9. Consequently, in the present proceedings, the Sole Arbitrator shall adjudicate the present matter *ex aequo et bono.*

10. 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"* (see POUDRET/BESSON, "Comparative Law of International Arbitration, London 2007, no 717, pp. 625-626).

Admissibility

11. The appeal was filed within the deadline provided by the FAT Rules and stated in the Appealed Decision. The Appellant complied with all other requirements of Article R48 of the Code, including the payment of the CAS Court Office fees.

The merits

12. The Sole Arbitrator had to determine the following:

(a) Was the Respondent duly instructed by the Appellant to sign the Player or was he acting on his own accord?

(b) What was the legal position of the First Transfer Agreement, Addendum 3 and the First Player's Contract?

(c) Were all or any of these draft contracts?

(d) Could any of these have been completed and registered – would they have left the Appellant in breach of FIBA Regulations?

(e) Was the Respondent involved in the Second Transfer Agreement and the Second Player's Contract?

(f) If not, was the Respondent entitled to any fee from the Appellant?

(g) If the Respondent is entitled to any fee, should the service charge or late payment penalty be awarded too?

13. The Sole Arbitrator noted that email communication has become standard practice across sport and all businesses and that emails should be admissible in CAS proceedings. During examination of the Respondent, he stated that the email of 26 May 2008 had been sent to him by the General Manager of the Appellant. The Respondent also stated that, having acted upon these email instructions to approach the Player and Kursk, the Appellant duly signed the First Transfer Agreement, Addendum 3 and the First Player's Contract, confirming those email instructions. The Sole Arbitrator noted that the Respondent was following the Appellant's instructions.

14. The Appellant submitted that the First Transfer Agreement was a conditional contract – if payment was not made by a certain date, as opposed to being in breach, that agreement simply ended. If that agreement ended, then so did Addendum 3 and the First Player's Contract.

15. The Respondent argued that there was no reference in either Addendum 3 nor the First Player's Contract that they were conditional upon the First Transfer Agreement. The Respondent submitted that the first Transfer Agreement was not conditional upon the payment of RUB 1,500,000 being made by 1 August 2008; rather it was concluded on 27 May 2008 and the only event that could cause it to be terminated would be failure to register the Player before 5 August 2008.

16. The Sole Arbitrator noted that the Player seemed to be released or dismissed by Kursk in July 2008. The Appellant had a contract that the Player had signed (the First Player's Contract) and the first Transfer Agreement, so should have been able to register her, but chose not to. It appears that such decision was based on its own financial position at the time. On the face of it, these three agreements were legally binding on the parties, subject to the Appellant's claims that Addendum 3 and the First Player's Contract were drafts.

17. During the hearing, the representative of the Appellant was unable to answer how there were two versions of the First Player's Contract, one of which was sealed or stamped by the Appellant. As such, the Sole Arbitrator had no reason to question its legitimacy and concluded that this was not a draft contract.

18. Further, the Sole Arbitrator determined Addendum 3 was not a draft either. The addendums were variations to the Main Agency Contract. Paragraph 4 of that agreement anticipated changes being made to it, but it *"cannot be changed orally, but only by written changes signed by both parties"*. The Sole Arbitrator noted there was no requirement for it to be sealed or stamped. During the hearing, the Appellant referred to Article 434 of the Civil Code of the Russian Federation, but the Sole Arbitrator noted there was no reference to contracts having to be sealed or stamped.

19. The Appellant argued that if it had tried to register the First Player's Contract, it would have been in breach of various FIBA Regulations as the Player was already registered with another club, Kursk. It also produced a letter from the Federation stating that the latter would not have registered that contract. The Respondent confirmed that he drafted the contract and argued that it would have been registered.

20. The Sole Arbitrator noted that Kursk had consented to release (and did release) the Player pursuant to the First Transfer Agreement. If the Appellant had paid the transfer fee, then it could have sought to register the Player. It chose not to. Would the First Player's Contract have been registered? If not, would the Player and the Appellant have signed a new contract in the proper format? One cannot say, but in this case the Appellant chose not to register it.

21. It was common ground between the parties that the Appellant renegotiated by itself with Kursk and the Player and reduced the transfer fee from RUB 1,500,000 to RUB 300,000. Spartak further delayed the signing of the Player and reduced the sums paid to her under the Second Player's Contract. The Appellant submitted that it had done the work to bring the Player to Spartak without the services of the Respondent, that the sums claimed by the Respondent were greater than the total amount that the Appellant paid for the Player in wages and transfer fee, and that the Respondent should in any event have tried to strike a better deal with Kursk and the Player as it ultimately managed.

22. The Respondent stated that his job under the Main Agency Contract was to *"… assist and represent the Club in connection with the engagement of basketball players by the Club …"*. He had carried out his duties and agreed the fee and the timing of payment of that fee in Addendum 3. The fact that after he had concluded his part of the contract the Appellant looked to renegotiate, as it had financial issues, was not his concern. He also stated that his instructions were to offer the global sum of RUB 3,700,000 – he did this and all three parties (Appellant, Kursk and the Player) were happy.

23. Whilst the Sole Arbitrator can see that the Appellant, now with the benefit of hindsight, may feel it offered too much remuneration to Kursk and to the Player, the Appellant instructed the Respondent to make the offers on its behalf and entered into binding contracts with Kursk, the Player and the Respondent. Whilst it has renegotiated the agreement with Kursk and the contract with the Player, the Appellant has not renegotiated with the Agent and, instead, the Respondent has sought to enforce his entitlement under the Main Agency Contract, as amended by Addendum 3. The Sole Arbitrator finds in favour of the Respondent and upholds that part of the Appealed Decision.

24. The Sole Arbitrator noted from the hearing that the parties were in agreement with the FAT arbitrator's method of calculating late payment penalties and the Appellant confirmed it had not made these payments relating to the Z. or B. transfers either. As such, the Sole Arbitrator upholds the entire Appealed Decision, and dismisses the Appellant's appeal completely.

The Court of Arbitration for Sport rules:

1. The appeal filed by Non-Profit Partnership Women Basketball Club "Spartak" St. Petersburg against the decision of the Arbitrator of the FIBA Arbitral Tribunal dated 3 July 2009 is dismissed.

2. (…).

3. (…).

4. All other motions or prayers for relief are dismissed.