Arbitration CAS 2010/A/2234 Basquet Menorca SAD v. Vladimer Boisa, award of 18 January 2011

Panel: Mr Romano Subiotto QC (United Kingdom), President; Mr José Juan Pintó (Spain); Judge Vesna Bergant Rakočević (Slovenia)

Basketball
Termination of a contract of employment
Point in time for raising the defence of lack of jurisdiction
Determination of the arbitrability of the dispute according to Swiss law
Burden of proof for the existence of a valid arbitration agreement

1. **Under the FIBA Arbitral Tribunal Rules, the Answer shall contain any defence of lack of jurisdiction. Any defence raised afterwards is deemed as having been raised too late. The appeal to the CAS does not restart the deadline.**

2. **The arbitrability of a dispute where the seat of the arbitration is Switzerland shall be determined exclusively pursuant to Article 177(1) of the Swiss Act on Private International Law (PILA). There is no space for the application of any other national legislation. Article 177(1) PILA provides that *"all pecuniary claims may be submitted to arbitration"*. It could also be translated as *"any dispute involving an economic interest"* or *"any dispute involving property"*. Howsoever translated, it is clear that a claim for payment falls within Article 177(1) PILA.**

3. **As long as the existence of a valid arbitration agreement is sufficiently established, at a *prima facie* basis, the burden of proof is shifted to the party that disputes the validity of the arbitration clause. Vague and incoherent assertions that the arbitration agreement is invalid and fraudulent, not accompanied by submitted evidence, cannot suffice.**

Vladimer Boisa ("Boisa") is a Slovenian professional basketball player.

Basquet Menorca, SAD ("Basquet Menorca" and, together with Boisa, the "Parties") is a professional basketball club, based in Maó, Menorca, Islas Baleares, Spain.

In August 2008, the Parties entered into an agreement by which Boisa agreed to play basketball for Basquet Menorca during the 2008/2009 season. That arrangement was terminated, according to Boisa, by the agreement dated February 23, 2009 (the "Termination Agreement"). The effect of the Termination Agreement is the principal substantive issue under dispute.

The Termination Agreement provides, *inter alia*:

"Club agrees to pay Player the amount of €130,200.00 Euro (one hundred and thirty thousand two hundred Euro) in accordance with the following payment schedule:

On 24th of February 2009: €38,000.00 Euro

On 15th of April 2009: €46,100.00 Euro

On 15th of May 2009: €46,100.00 Euro

This payment will be made in addition to the payments Player has already received from Club. For the payments due on 15th of April and 15th of May Club agrees to issue to Player valid bank guaranties immediately upon signing of this Termination Agreement.

In the event Club neglects to pay to Player the abovementioned amount on the abovementioned date, Player and/or Player's legal representative has the unconditional right to hold Club responsible and liable for the entire agreement executed on 13th of August 2009 (sic) including all outstanding compensation due to Player in that agreement which shall then become due immediately in its entirety.

Any dispute arising or related to the present Agreement shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved definitely in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President.

The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' (sic) domicile.

The seat of the arbitration shall be Geneva, Switzerland.

The language of the arbitration shall be English.

Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. To the extent legally possible under Swiss law recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sports (sic) (CAS) upon appeal shall be excluded.

The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono".

Boisa filed a Request for Arbitration with the FIBA Arbitration Tribunal (FAT) dated December 15, 2009, in accordance with the FAT Arbitration Rules (the "FAT Rules").

The Request for Arbitration sought payment of the sums set out in the Termination Agreement, on grounds that the sums had not been paid and the bank guarantees provided by Basquet Menorca had been declined by the bank when called upon.

Basquet Menorca filed its Answer dated March 8, 2010.

As to the substance of the dispute, Boisa submitted to the Arbitrator that he was not paid in due time in accordance with the Termination Agreement. He submitted that Basquet Menorca was required pursuant to paragraph 3 of the Termination Agreement to pay him € 130,200, net of taxes, plus interest at the applicable rate: since February 24, 2009 on the sum of € 38,000; since April 15, 2009 on the sum of € 46,100; and since May 15, 2009 on the sum of € 46,100. He also requested the Arbitrator to order Basquet Menorca to pay Boisa his costs in the arbitral proceedings.

Basquet Menorca questioned, in its second written submission, the arbitrability of the dispute pursuant to Spanish law. Its principal substantive submission was that the Termination Agreement was invalid or fraudulent.

First, the Arbitrator found that the arbitration clause was valid. Basquet Menorca's jurisdictional challenge was out of time. Article 11.2 of the FAT Arbitration Rules provides that the Answer shall contain any defence of lack of jurisdiction, and Basquet Menorca's Answer contained no such defence, replying on the merits of the dispute. The Arbitrator also found that the arbitrability of the dispute was governed by the Swiss Act on Private International Law ("PILA"), and Basquet Menorca's challenge was in any event without merit.

Second, deciding the merits *ex aequo et bono*, the Arbitrator found that the Termination Agreement was duly entered into, signed, and stamped on behalf of Basquet Menorca, rejecting the arguments of Basquet Menorca to the contrary. The sums required pursuant to the Termination Agreement had not been paid by Basquet Menorca, and the bank guarantees had been declined.

Accordingly, the Arbitrator ordered Basquet Menorca to pay Boisa the sum of € 130,200, plus interest at the applicable Swiss statutory rate of 5% (from February 24, 2009 on the sum of € 38,000, from April 15, 2009 on the sum of € 46,100, and from May 15, 2009 on the sum of € 46,100) until payment in full (the "Decision"). The Arbitrator also ordered Basquet Menorca to pay Boisa's costs in the proceedings, amounting to € 830 in arbitration costs and € 6,750 in respect of legal fees and expenses, and ordered FAT to reimburse Boisa the sum of € 3,150 (i.e., the sums advanced by the Parties less the FAT's costs as determined by the President of the FAT). The Decision was notified to the Parties on August 31, 2010.

Basquet Menorca filed a Statement of Appeal against the Decision with the Court of Arbitration for Sport (CAS) by correspondence dated September 11, 2010 (received on September 15, 2010). Pursuant to Article R29 of the Code of Sport-related Arbitration (the "Code"), Basquet Menorca selected English as the language of the proceedings.

By letters of September 22, 2010, Counsel to the CAS informed Boisa and the FIBA of the appeal, enclosing the Statement of Appeal. The FIBA did not, within 10 days of receiving the letter, notify the CAS that it intended to participate as a party to the arbitration.

Basquet Menorca filed its Appeal Brief by fax dated September 29, 2010. Basquet Menorca requested that the Panel annul the Decision, on three principal grounds:

> *"Breach of the character of the arbitration to reject a basic procedural point as the non-arbitrability of the issue, a purely procedural grounds";*
>
> *"Improper shifting the burden of proof to support the mere manifestation of the existence of an agreement to accept it as a proven fact"; and*
>
> *"Violation of the right of [Basquet Menorca] to a justification of the dismissal of his claims, since [the Decision] completely ignores the opposition raised the award in due course based on the nonexistence of an agreement of contract determination".*

By letter dated October 18, 2010, the CAS notified the Appeal Brief to Boisa. Boisa filed his Answer by letter dated November 5, 2010, requesting the Panel to reject Basquet Menorca's Appeal and to confirm the Decision.

By letter dated November 15, 2010, Boisa informed the CAS of his view that it was not necessary to conduct a hearing in this matter. Basquet Menorca did not express a view as to whether a hearing should be conducted. The Panel decided that it was unnecessary to conduct a hearing.

On 23 December 2010, the President of the Panel issued an Order of Procedure, which was duly signed by the Respondent, but not by the Appellant.

LAW

CAS Jurisdiction

1. The jurisdiction of the CAS derives from Article 17 of the FAT Rules and Article R47 of the Code, as well as from paragraph 7 of the Termination Agreement. It is not disputed that the CAS has jurisdiction to decide on the present dispute (as reflected by the Respondent's signature of the Order of Procedure).

Admissibility

2. The CAS received Basquet Menorca's Statement of Appeal on September 15, 2010, within 21 days of notification of the Decision on August 31, 2010, as required under Article R49 of the Code and Article 17 of the FAT Rules. The Appeal Brief was filed with the CAS within 10 days following the expiry of the time limit for the Statement of Appeal, as required under Article R51 of the Code. Basquet Menorca had exhausted the legal remedies otherwise available. Accordingly, the appeal was filed in due time and is admissible.

Applicable law

3. Article R58 of the Code provides that the Panel *"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 Panel deems appropriate"*.

4. Article 187(1) PILA provides that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected"*.

5. Article 187(2) PILA provides that *"the parties may authorize the arbitral tribunal to rule according to equity"*.

6. Article 15.1 of the FAT Rules provides that *"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. As noted above, the Termination Agreement provides that *"the arbitrator and CAS shall decide the dispute ex aequo et bono"*.

8. Accordingly, the Panel shall decide the dispute *ex aequo et bono*. Neither of the parties has submitted otherwise. Deciding a case *ex aequo et bono* may be aptly summarised as follows: *"a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules,* [the arbitrator] *must stick to the circumstances of the case"* (POUDRET/BESSON, *Comparative law of International Arbitration*, London 2007, No. 717, pp. 625-626).

Analysis

A. Jurisdiction of the FAT at First Instance

a) Submissions of the Parties Concerning the Jurisdiction of the FAT

10. Basquet Menorca challenges the validity of the arbitration clause in the Termination Agreement. It submits that *"a) the submission to arbitration clause FAT is null and void in Spain since it goes against a mandatory rule such as Article 1.4 of the Arbitration Law 60/2003 which explicitly excludes this area and b) that Mr. Boise to go to the FAT in these conditions is committing a fraud law to the claim before an international arbitration amounts in which it knows will not be entitled to claim their action required in the jurisdiction work"* (sic).

11. The consequence, according to Basquet Menorca, will be *"an award which cannot be executed in Spain in any way, and moreover, the coercive measures to be taken by the FIBA in this case may be challenged before the Court of Human Rights in Strasbourg"*.

12. Basquet Menorca also submits that *"labour issues cannot be arbitrated in private home, and pretend that the link allows that question is that Mr. Boisa does not reside in Spain, it seems very solid to be taken into consideration"* (sic), that the Arbitrator failed to recognise that *"any labor dispute must be forced through an employment tribunal Spanish, because if there are serious doubts about the ability to run the foreign award in Spain"* (sic), and that *"it is possible to agree to submit to arbitration clauses FAT, but not strictly business aspects (if it could be subject to arbitration a dispute over image rights)"* (sic).

13. Boisa submits that the FAT had exclusive jurisdiction to rule on the dispute pursuant to the Termination Agreement. He submits that *"the question of arbitrability is to be decided according to the laws of the country of the seat of the arbitration and certainly not according to the laws of the country where one of the parties* […] *is domiciled. It is therefore beyond any doubt that the arbitrability of the present dispute shall*

be determined exclusively according to Swiss Law, more precisely according to Art 177(1) PILA. The present dispute is clearly and indisputably of financial nature and thus arbitrable within the meaning of Art 177(1) PILA".

14. Boisa also submits that Basquet Menorca failed to raise the objection regarding lack of jurisdiction in due time: *"As provided by Art 11.2 of the FAT Arbitration Rules, the Answer to the Claim shall already contain any defence of lack of jurisdiction. Instead the issue was only raised in the letter dated 7 May 2010, after* [Basquet Menorca] *has* (sic) *already replied on the merits and has consequently shut itself from reliance on the jurisdiction issue".*

b) Assessment Concerning the Jurisdiction of the FAT

15. The Panel finds (a) that Basquet Menorca failed to raise the objection regarding lack of jurisdiction in time, and (b) that, in any event, the arbitrability of the dispute is determined by Swiss Law, *i.e.*, Article 177(1) PILA.

16. Article 11.2 of the FAT Rules provides that *"the Answer shall contain: Any defence of lack of jurisdiction"*. Basquet Menorca's Answer before the FAT did not contain a defence of lack of jurisdiction, and accordingly the defence, first raised in the letter dated May 7, 2010, was raised too late. Basquet Menorca's appeal to the CAS does not restart the clock, and therefore Basquet Menorca's jurisdictional challenge is still out of time.

17. In any event, the Termination Agreement provides that *"the seat of the arbitration shall be Geneva, Switzerland*", and *"the arbitration shall be governed by Chapter 12 of* [PILA]*, irrespective of the parties' domicile"*. This is consistent with the Swiss Supreme Court's well-established case law that the arbitrability of a dispute where the seat of the arbitration is Switzerland shall be determined exclusively pursuant to Article 177(1) PILA (ATF 118 II 353, at 358). The Spanish legislation upon which Basquet Menorca apparently relies is therefore irrelevant.

18. Article 177(1) PILA provides that *"all pecuniary claims may be submitted to arbitration"*. It could also be translated as *"any dispute involving an economic interest"* or *"any dispute involving property"*. Howsoever translated, it is clear that the present claim for payment pursuant to the Termination Agreement falls within Article 177(1) PILA.

19. Article 178 PILA provides:

> *"1. As to form, the arbitration agreement shall be valid if it is made in writing, by telegram, telex, telefax, or any other means of communication that establishes the terms of the agreement by a text.*
>
> *2. As to substance, the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law.*
>
> *3. The validity of an arbitration agreement may not be contested on the grounds that the principal contract is invalid or that the arbitration agreement concerns a dispute which has not yet arisen".*

20. The Termination Agreement, and the arbitration agreement contained therein, are made in writing and therefore satisfy the requirements of Article 178(1) PILA.

21. As the arbitration agreement is contained in a Termination agreement filed, together with a notarised copy, by Boisa, and that bears Boisa's signature, a signature of Mr Jose Luis Sintes Pons for Basquet Menorca and a stamp of this club, Boisa has sufficiently established, at least on a prima facie basis, the existence a valid arbitration agreement.

22. The burden of proof has therefore shifted to Basquet Menorca, who has to prove the invalidity (for lack of representation, or anything else) of this arbitration agreement.

23. Basquet Menorca has submitted no evidence to support its vague and incoherent assertion that the Termination Agreement is in any way invalid or fraudulent (see below cons. 52 ff). According, the Panel finds that the arbitration agreement meets the requirements of Article 178 PILA.

24. Basquet Menorca's indication that it would resist enforcement of the award in Spain before the Spanish courts is irrelevant.

B. The Substance of the Claim

a) Submissions of the Parties Concerning the Substance of the Claim

25. Basquet Menorca submits:

a. There was no written agreement between the player and our club.

b. Boisa has failed to establish, to the required standard of proof, that (1) there was an original contract between the Parties, (2) there was a Termination Agreement between the Parties, and (3) Basquet Menorca failed to pay the sums required.

c. The Termination Agreement *"cannot be accepted because they do not have the team stamp, and the firm's is not club president at the time"* (sic).

d. On a copy of the Termination Agreement *"the signatures of this document is a black line appears to signal a document assembly to place there a signature and a seal that were not previously"*.

e. A termination agreement that involved paying 435% of the amount owed under the original contract would be *"against the principle of balance of contractual obligations between the parties, and goes against all logic"*.

f. There was instead an oral termination agreement between the Parties that Basquet Menorca would pay Boisa € 38,000 *"as of February 17"* (it is not clear whether this means that the payment was due on February 17 or that the oral termination agreement was concluded on February 17). The promissory note for € 38,000 is evidence of this agreement.

g. *"The construction of an improper relationship between the validity or otherwise of the original contract, and the settlement agreement, its validity by applying the same rules of fairness that govern the resolution of this arbitration"*.

26. As to the existence of the Termination Agreement, Boisa submits that the Termination Agreement (the original version of which was submitted to the FAT, and a notarised copy of which has been submitted to the Panel) establishes that (1) the Termination Agreement is in writing; (2) the Termination Agreement is duly signed by both Parties, Boisa and (on behalf of Basquet Menorca) Mr. Sintes Pons; (3) the Termination Agreement is duly stamped by Basquet Menorca's official stamp; (4) the Termination Agreement contains no unusual contract clauses; and (5) the Termination Agreement contains a clear FAT arbitration clause.

27. Boisa submits that he has therefore met the required standard of proof, and Basquet Menorca has failed to present any evidence that the Termination Agreement does not exist and the only termination agreement was oral and for the sum of € 38,000, or that the Termination Agreement was made fraudulently. Regarding the argument that the promissory note for € 38,000 is evidence of the alleged oral agreement, Boisa submits that this promissory note is only one of three, which together correspond to the sums in the Termination Agreement.

28. As to the argument that the Termination Agreement was *"against the principle of balance of contractual obligations*", Boisa submits that (1) the remuneration under the original contract was € 285,000 (net of taxes), and (2) the Termination Agreement *"is an independent agreement governing rights and duties of the parties in case of the termination. Its validity is not dependent upon the reasonableness of the sum agreed nor upon its proportionality with regard to the salary agreed for the full season"*.

b) Assessment Concerning the Substance of the Claim

29. The Panel finds that Boisa has met the required standard of proof to establish the existence of the Termination Agreement by submitting a notarised copy of the Termination Agreement. The Panel is satisfied that the Termination Agreement was duly entered into, signed by an authorised representative of Basquet Menorca, and stamped with Basquet Menorca's stamp.

30. Basquet Menorca has submitted no evidence that Mr. Sintes Pons was not a duly authorised representative of Basquet Menorca at the time of signing the Termination Agreement, nor that the stamp evident on the face of the Termination Agreement is not, in fact, the stamp of Basquet Menorca, nor that the Termination Agreement was in any other way fabricated (the "black line" referred to in the Statement of Appeal is not evident in the notarised copy of the Termination Agreement).

31. The Panel also finds that Boisa has established to the required standard of proof that (1) there was an original contract of employment (which has, in any case, not been contested by Basquet Menorca), and (2) the payment required pursuant to the Termination Agreement has not been made. Boisa is not logically capable of "proving a negative", whereas it is within the power of Basquet Menorca to submit evidence that the payments to Boisa have been made (*e.g.*, most

simply, by submitting a bank statement showing the payment). Basquet Menorca has not submitted any such evidence, and therefore the Panel is entitled to find that the payments have not been made.

32. The Panel therefore rejects the arguments of Basquet Menorca listed in paragraph 25 above.

33. As to the argument that the Termination Agreement involved paying 435% of the amount owed under the original contract and would therefore be *"against the principle of balance of contractual obligations between the parties, and goes against all logic"*, the Parties disagree on the remuneration due pursuant to the original contract. Neither party has submitted a copy of the original contract. The precise remuneration due pursuant to the original contract is, however, irrelevant; even if Basquet Menorca agreed to a "bad bargain" (as would be the case if it agreed to a termination agreement paying the player more than he would have received by seeing out the original playing contract) there is no reason *ex aequo et bono* why it should be allowed to escape the Termination Agreement on this ground alone. The Panel therefore rejects the argument of Basquet Menorca listed as (e) in paragraph 25 above.

34. As to the argument that there was instead an oral termination agreement between the Parties that Basquet Menorca would pay Boisa € 38,000, Basquet Menorca has submitted no evidence of any oral agreement (either witness testimony or written evidence). There is no ground for inferring that the promissory note for € 38,000 is evidence of this agreement. As Boisa rightly points out, this promissory note is only one of three, which together correspond to the sums in the Termination Agreement. Accordingly, the Panel has no evidential basis on which to find that there was an oral agreement, and must reject the argument of Basquet Menorca listed as (f) in paragraph 25 above.

35. The Panel also sees no merit in the argument of Basquet Menorca listed as (g) in paragraph 25 above.

36. Accordingly, the Panel finds that Basquet Menorca and Boisa agreed, pursuant to the Termination Agreement, that the original contract of employment would be terminated in exchange for a specified payment from Basquet Menorca to Boisa. It is a universally accepted principle that parties who enter into contacts are bound by their terms. Basquet Menorca is therefore required, *ex aequo et bono*, to make the payment as agreed.

37. It is also a universally accepted principle that if a person is deprived, for a period of time, of a sum of money to which he was contractually entitled, that person should be recompensed for being deprived of that sum for that period. This is done, in all legal systems of which the Panel is aware, by means of the interest that could have accrued on that sum of money during that period of time. The justification *ex aequo et bono* is that even if the party had done nothing with the money but leave it in a bank account, he would have earned interest on that sum.

38. The Panel finds that payment was due from Basquet Menorca to Boisa of € 38,000 on February 25, 2009, € 46,100 on April 16, 2009, and € 46,100 on May 16, 2009. Boisa has been deprived

of each of those sums for the period from the date on which they were due, and will continue to be so deprived until the date on which they are paid.

39. As to the rate of interest, the Arbitrator identified the interest rate equal to the applicable Swiss statutory rate, *i.e.*, 5% *per annum*, in line with the jurisprudence of the FAT. In the opinion of the Panel this is a fair and equitable rate in the circumstances. The Panel therefore finds that Boisa should be entitled to interest on each of the sums identified above at the rate of 5% *per annum*, from the date on which it fell due until the date on which it is paid in full (including such interest).

40. Accordingly, the Panel agrees with the conclusions of the Arbitrator at first instance and dismisses Basquet Menorca's appeal in its entirety.

The Court of Arbitration for Sport rules:

1. The appeal filed by Basquet Menorca against the decision issued on 31 August 2010 by the FIBA Arbitration Tribunal is dismissed in its entirety.

2. (…).

3. (…).

4. All other prayers for relief are dismissed.