



FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0003/08 FAT)

rendered on 30 April 2008 by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Beobasket Ltd, Gibraltar, Suite 4, 4 Giro's passage, Gibraltar,
represented by

Mr. Miodrag Raznatovic, 18 Strahinjica Bana, Belgrade, Serbia

- Claimant -

vs.

Basketball Club **Besiktas Gimnastics**, Süleyman Seba Cad. No: 48
Akaretler, Besiktas 34357 Istanbul, Turkey

- Respondent -



We Are Basketball

FIBA Arbitral Tribunal (FAT)

1. The Parties

1.1. The Claimant

Claimant is a player's agency with its legal seat in Gibraltar and representation offices in Belgrade, Serbia. Its representative Miodrag Raznatovic is an attorney-at-law and a FIBA–licensed player agent. He is a citizen of Serbia and domiciled at 18 Strahinjica Bana, Belgrade, Serbia.

1.2. The Respondent

The Respondent is a Turkish basketball club with its seat in Istanbul. It is domiciled at Süleyman Seba Cad. No: 48 Akaretler, Besiktas 34357 Istanbul. Respondent is not represented by counsel.

2. The Arbitrator

On 5 February 2008, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Dr. Stephan Netzle as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").



We Are Basketball

FIBA Arbitral Tribunal (FAT)

3. Facts and Proceedings

3.1. Background Facts

On 24 July 2007, Respondent, player Sandro Nicevic (hereinafter "the Player") and Claimant signed a player agreement, by which the Respondent employed the Player "as a skilled player for the sport season 2007/2008" (hereinafter the "Agreement"). In the Agreement, the amount of USD 65,000 was stipulated for the services of Claimant (hereinafter the " Agents Fee"). The Agreement reads – inter alia – as follows:

"IX.- Agents Fee

The club is bound to pay agents fee to the player's agent, BeoBasket LTD in the total amount of 65'000 USD, immediately upon the player successfully passes medical exam.

If the payments of the agents fee are not made on the time, the player will sit out of practices and games until said payments have been made in full, without penalty to the player.

A 10% agents fee should be OBLIGATORY paid to the agents in any future contract between the club and the player.

In the event that for any performance or injury add or illness related reasons, the club decides to terminate at any time the agreement between the club and the player, excluding exercising the option after the conclusion season 2007-08, the financial responsibility towards the agent remains valid and should be fulfilled. Any necessary local taxes (including VAT) that have to be paid are responsibility of the Club and should be paid on the top of the above mentioned payments. This payment will be paid in agent bank account against submission of an invoice to the club.

In case the contract is terminated or cancelled for any reason whatsoever, the commission determined above will be cancelled and the representative will not claim such payments from the club."



We Are Basketball

FIBA Arbitral Tribunal (FAT)

Claimant repeatedly requested the Agents Fee according to this provision. In particular, on 5 December 2005, Mr. Raznatovic informed Respondent on behalf of Claimant that :

As you are very well informed, my Agency still didn't receive [the] agents fee, supposed to be gotten in August.

I called you so many times, as well as sent letters, and event talked in Belgrade, about the problem. Unfortunately, no solutions.

I decided instead of taking the player out of the Court, to start FIBA procedure:

Herewith [...] a request for arbitration, WHICH WILL BE SENT TO FIBA ON THE 20TH OF DECEMBER 2007, if you don['] execute the payment. [...]

3.2. The Proceedings before the FAT

On 4 February 2008, FAT received Claimant's undated Request for Arbitration in accordance with the FAT Rules. The non-reimbursable fee of EUR 3,000.00 (minus banking fees) was received in the FAT account on 7 February 2008.

On 5 February 2008 the President of FAT appointed Dr. Netzle as the Arbitrator in this matter.

By letter of 7 February 2008, the FAT Secretary confirmed receipt of the Request for Arbitration and informed the parties of the appointment of the Arbitrator and of the details of the procedure. In the same letter, a deadline until 20 February 2008 was fixed for the Respondent to file the Answer to the Request for Arbitration.

By letter dated 20 February 2008, Respondent asked for a "reasonable" extension of the



We Are Basketball

FIBA Arbitral Tribunal (FAT)

deadline to submit an Answer to the Request for Arbitration to allow Respondent *"to determine whether the indicated amount was paid to the Claimant. If it becomes evident to us that such amount was not paid to the Claimant, then the payment shall be satisfied in accordance with a payment plan to be agreed by the Claimant. The result of the examination shall be notified to the Arbitral Tribunal."*

By letter dated 7 March 2008, the FAT Secretary set a final deadline for the Respondent until 12 March 2008 to either show that the amount in dispute had been paid in full or to submit the Answer to the Request for Arbitration. No answer was received from Respondent, within this deadline or thereafter.

On 26 March 2008, the FAT Secretary, on behalf of the Arbitrator, issued the Procedural Order No. 1 which stated that Respondent had failed (i) to submit its Answer to the Request for Arbitration and (ii) to provide the FAT with evidence that the amount in dispute had been paid in full. The parties were requested to pay by no later than 3 April 2008 the following amounts as the Advance on Costs:

"Claimant Beobasket Ltd. Gibraltar: EUR 3,000.00
Respondent Basketball Club Besikta Gimnastic Kulubu: EUR 3,000.00"

Considering the fact that neither party had requested a hearing, the Arbitrator indicated that he would evaluate the merits of the case on the basis of the Request for Arbitration.

By the deadline of 3 April 2008, only the Claimant had paid its share of the advance on costs.

By letter dated 4 April 2008 the FAT Secretary informed the Parties that the arbitration proceeding would not proceed until the full amount of the Advance on Costs was received,



We Are Basketball

FIBA Arbitral Tribunal (FAT)

and referred to Section 9.3 of the FAT Arbitration Rules which stipulates: "If a party fails to pay its share, the other party may substitute for it." A deadline until 9 April 2008 was fixed for the Claimant to pay Respondent's share of EUR 3,000.

After Claimant had paid Respondent's share, the Arbitrator declared the proceedings closed. By letter of the FAT Secretary dated 10 April 2008, the parties were informed accordingly and invited to submit their detailed accounts of costs until 14 April 2008.

On 15 April 2008, the Claimant submitted the following account:

"Herewith the detailed account of costs from the case Beobasket vs Besiktas Cola Turka

- | | | |
|----|---|----------------------|
| 1) | <i>Initial [non reimbursable handling] fee</i> | <i>3,000 Euro</i> |
| 2) | <i>Paid fee according to decision of arbitrator</i> | <i>3.000,00 Euro</i> |
| 3) | <i>Paid fee instead of Besiktas</i> | <i>3.000,00 Euro</i> |
| 4) | <i>The costs of Lawyer</i> | |
| | <i>(356.700 Serbian dinar – rate 1E – 82,00 dinars)</i> | <i>4.350,00 Euro</i> |

Total 13.350,00 (thirteen thousand three hundred fifty) EURO

The Respondent did not submit any determination within the deadline indicated in the letter of the FAT Secretary of 10 April 2008.

4. The Positions of the Parties

4.1. The Claimants' Position

Claimant submits that, according to Section IX ("Agents Fee") of the Agreement, the



We Are Basketball

FIBA Arbitral Tribunal (FAT)

Respondent was obliged to pay the Agents Fee in the amount of USD 65,000 to the Claimant immediately upon the successful passing of the medical examination of the Player,

Claimant further submits that the Player passed the medical exam on 20 August 2007. Since then, the Player was a regular player of the club. However, the Respondent did not pay the Agents Fee despite several reminders by phone, emails and letters. Even a personal meeting of a representative of Claimant with a representative of the Club did not help.

4.2. The Respondent's Position

Besides the above mentioned letter of 20 February 2008 requesting an extension of the time limit to file an answer, the Respondent did not enter an appearance and, in particular, did not make any submissions.

5. Jurisdiction and other Procedural Issues

Pursuant to Article 2.1 of the FAT Rules, “[t]he seat of the FAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland”. Hence, this FAT arbitration is governed by Chapter 12 of the Federal Statute on Private International Law (PIL).

5.1. The jurisdiction of FAT

5.1.1 Review *ex officio*

As a preliminary matter, the Arbitrator wishes to emphasize that, since the



We Are Basketball

FIBA Arbitral Tribunal (FAT)

Respondent did not participate in the arbitration, he will examine his jurisdiction *ex officio* on the basis of the record as it stands.¹

5.1.2 Arbitrability

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

The Arbitrator notes that the dispute referred to him is clearly of financial nature and is thus arbitrable within the meaning of Article 177(1) PIL.²

5.1.3 Formal and substantive validity of the arbitration agreement

The existence of a valid arbitration agreement will be examined in light of Article 178 PIL, which reads as follows:

"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law."

The arbitration agreement has been included in the Agreement between the Respondent on the one side, and the Player and the Claimant on the other side.

¹ ATF 120 II 155, 162.

² Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.



We Are Basketball

FIBA Arbitral Tribunal (FAT)

The Claimant must be regarded as an autonomous party to a tri-partite Agreement and not only as a legal representative acting in the name and on behalf of the Player as the following facts demonstrate:

- Section I ("Parties") of the Agreement addresses the Player and the Claimant separately.
- Section II ("Object") para. 1 of the Agreement says:

"The object of this Agreement is to regulate the relations between the Player and the Representative and the Club." (Emphasis added)

- The very last paragraph of the Agreement states:

"This Agreement consisting of (XI) articles, has been signed on the 24th of July 2007 in Istanbul, Turkey in 3 (three) original copies, 1 (one) for each party." (Emphasis added)

- The Agreement has been signed by the Respondent, the Player and the Claimant.

Also, when it comes to the individual rights and obligations of the Parties, the Agreement distinguishes between the Player and the Representative (e.g. Section II A ["Each of the Player and the Representative..."] and para. B ["The Player accepts, declares and undertakes:"]). This is particular true with respect to the obligation of the Respondent to pay the Agents Fee (Section IX of the Agreement) which constitutes an independent claim of the Claimant under the Agreement.

The Arbitrator finds that both Claimant and Respondent are autonomous parties



We Are Basketball

FIBA Arbitral Tribunal (FAT)

to the Agreement and bound by the arbitration agreement in Section XI of the Agreement.

The jurisdiction of the FAT over the dispute between Claimant and the Respondent results from Section XI ("Settlement of the Disputes") of the Agreement which reads as follows:

"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 definitely in accordance with the FAT Arbitration Rules.

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 shall decide the dispute ex aequo et bono."

The Contract is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PIL.

With respect to substantial 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) PIL). In particular, the wording "[a]ny dispute arising from or related to the present contract" clearly encompasses the present dispute.



We Are Basketball

FIBA Arbitral Tribunal (FAT)

5.2. Other Procedural Issues

Article 14.2 of the FAT Rules, which the Parties have declared to be applicable in the Agreement, specifies that: “the Arbitrator may nevertheless proceed with the arbitration and deliver an award” if “the Respondent fails to submit an Answer”. The arbitrator’s authority to proceed with the arbitration in the case of default by one of the parties is in accordance with Swiss arbitration law³ and the practice of FAT.⁴ However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

This requirement is met in the current case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in line with the relevant rules. It was also given ample opportunity to respond to the Request for Arbitration. Even more, upon request, the Arbitrator granted the Respondent an additional deadline to find out whether the Agents Fee had already been paid. However, the Respondent chose not to respond at all. In light of these circumstances, the Arbitrator considers himself fit to proceed with the arbitration and deliver the award.

³ Swiss Federal Tribunal SJ 1982, 613, 621; see also KAUFMANN-KOHLER/RIGOZZI, *Arbitrage international*, Bern 2006, No. 483.

⁴ FAT Decision 0001/07 Ostojic and Raznatovic vs. PAOK



We Are Basketball

FIBA Arbitral Tribunal (FAT)

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

With respect to the law governing the merits of the dispute, Article 187(1) PIL 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) PIL adds that the parties may authorize the arbitrators to decide “*en équité*”, as opposed to the decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

“the parties may authorize the arbitral tribunal to decide ex aequo et bono”.

Under the heading “Applicable Law”, Article 15.1 of the FAT 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.”

In essence, 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”.⁵ This is confirmed by the provision in Article 15.1 of the

⁵ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.



We Are Basketball

FIBA Arbitral Tribunal (FAT)

FAT Rules *in fine* that the arbitrator applies “general considerations of justice and fairness without reference to any particular national or international law”.

When the parties authorize the arbitrator to decide *ex aequo et bono*, the arbitrator is required to do so.⁶ That said, this duty does not prevent the arbitrator from referring to the solution which arises from the application of the law before reaching a decision *ex aequo et bono*,⁷ in particular to “guide or reinforce” his/her own understanding of fairness.⁸

6.2. Findings

Claimant presented the FAT with the Agreement pursuant to which the Respondent owes him the amount of USD 65,000. It also follows from Section IX of the Agreement that this debt is due “*upon the player successfully passes medical exam.*” Since the Player is obviously a regular player with Respondent's team (as confirmed by a cursory search on the internet⁹), there can be no doubt on Claimant's submission that the Player successfully passed the medical examination and that the condition under which the Agents Fee became due was met.

The second to last sentence of Section IX of the Agreement stipulates that “*[t]his payment will be paid in agent bank account against submission of an invoice to the*

⁶ P.A. KARRER, Basler Kommentar., No. 302 *ad* Art. 187 PIL, p. 1725.

⁷ ATF 110 Ia 56, 58.

⁸ JdT 1981 II 93.

⁹ See, e.g. <http://www.euroleague.net/item/29143>



We Are Basketball

FIBA Arbitral Tribunal (FAT)

club." Although this sentence is part of a paragraph which deals with the Agents Fee in case of early termination of the Agreement, the Arbitrator has no doubt that "[t]his payment" refers to the payment of any Agents Fee under Section IX of the Agreement, as this is also true with respect to the reference to the "necessary local taxes (including VAT)" as addressed in the preceding sentence.

No formal invoice of the Agents Fee has been submitted by the Claimant to the FAT. In its Request for Arbitration, the Claimant refers more generally to phone calls, emails and fax letters which were sent to the Respondent and by which the Agents Fee was claimed. Claimant also submitted a letter dated 5 December 2007 which clearly reflects the unmistakable request to the Respondent to pay the Agents Fee by 20 December 2007, at the latest (see above at 3.1). The Arbitrator finds that the reference to an invoice in Section IX of the Agreement must be understood as a mere declaration by the Claimant to the Respondent of when and how the Agents Fee should be paid, irrespective of the form of such declaration. The Arbitrator is satisfied that at least the above mentioned letter of the Claimant dated 5 December 2007 was sufficient to meet that requirement. Since Respondent never raised the objection of lack of information of the respective banking account and since the payment of the Agents Fee was also the subject of phone calls and personal discussions, the Arbitrator has no doubt that Respondent was in possession of the necessary information of where the payment was to be made.

The condition for the payment of the Agents Fees provided in the Agreement, namely the passing of the Player's medical examination, has been met. The Claimant had repeatedly requested the Respondent to pay the Agents Fee, and there is no indication that the Respondent actually complied with its obligation. The Arbitrator therefore concludes that Respondent is obliged to pay to the Claimant the Agents Fee in the



We Are Basketball

FIBA Arbitral Tribunal (FAT)

amount of USD 65,000.

The Arbitrator bases this conclusion on the record and not on the mere fact that the Respondent has defaulted. Under these circumstances, the Arbitrator does not deem it necessary to call for further evidence.

7. Costs

Article 19.2 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and may either be included in the award or communicated to the parties separately. Furthermore Article 19.3 of the FAT Rules provides that the award shall grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings.

On 25 April 2008, the President of the FAT rendered the following decision on costs:

“Considering that under Swiss law the arbitrators have the obligation to decide on the amount and the allocation of the arbitration costs as well as on the contribution towards the parties’ legal fees (BERGER/KELLERHALS, Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, No. 1477, p. 521).

Considering that pursuant to Article 19.2(1) of the FAT Rules “the FAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of FAT and the fees and costs of the FAT President and the Arbitrator”.

Considering that Article 19.2(2) of the FAT Rules adds that ‘the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the FAT President from time to time’.

Considering all the circumstances of the case, including the time spent by the Arbitrator, the



We Are Basketball

FIBA Arbitral Tribunal (FAT)

complexity of the case and of the procedural questions raised, the President of the FAT determines the arbitration costs as follows:

• <i>Arbitrator's fees (14 hours at an hourly rate of EUR 300)</i>	<i>EUR 4.200</i>
• <i>Arbitrator's costs</i>	<i>-----50</i>
• <i>Administrative and other costs of FAT</i>	<i>-----</i>
• <i>Fees of the President of the FAT</i>	<i>EUR 900</i>
• <i>Costs of the President of the FAT</i>	<i>-----</i>
TOTAL	EUR 5.150"

In the present case, the costs shall be borne by the Respondent alone in line with Article 19.2 of the FAT Rules, as the Claimant has been awarded its claim in its entirety and there is no indication that either the financial resources of the parties or any other circumstance compels otherwise.

Moreover, the Arbitrator wishes to note that given the above allocation there is no need to take into account the handling fee when allocating the costs of the arbitration to the parties as provided for by Article 19.1(2) of the FAT Rules.

Given that the Claimant paid the totality of the advance of the arbitration costs of EUR 6,000 fixed by the Arbitrator, the Arbitrator decides that:

- (i) the FAT shall reimburse EUR 850 to the Claimant;
- (ii) the Respondent shall pay to the Claimant the difference between the costs advanced by him and the amount which is going to be reimbursed to him by the



We Are Basketball

FIBA Arbitral Tribunal (FAT)

FAT, i.e. EUR 5'150. Furthermore, the Arbitrator considers it is adequate that the Claimant is entitled to the payment of a contribution towards his legal fees and other expenses (Article 19.3 of the FAT Rules). Since in the case at hand the payment by Claimant of the non reimbursable handling fee was not taken into account when allocating the costs of the arbitration, the Arbitrator thinks it adequate to take into account the non reimbursable fee when assessing the expenses incurred by the Claimant in connection with these proceedings. After having reviewed and assessed the submissions by the Claimant, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at EUR 2,500;

8. Interest

Claimant also requests payment of interests at the applicable Swiss statutory rate. Payment of interests is a customary and necessary compensation for late payment and there is no reason why Claimant should not be awarded interests. The requested Swiss statutory rate amounts to 5% p.a.

The Agreement stipulates that the Agents Fee was due "immediately upon the player successfully passes medical exam". It also requires the Claimant to invoice the Respondent. In its letter of 5 December 2007, the Claimant requested payment of the Agents Fee of USD 65,000 (without further reference to any interests) until 20 December 2007. This is the only exact reference to a date of default, and it is appropriate to impose interests from the following day on.



We Are Basketball

FIBA Arbitral Tribunal (FAT)

9. AWARD

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

1. **Besiktas Gimnastics shall pay to Beobasket Ltd. USD 65,000.00 plus interests of 5% since 21 December 2007.**
2. **Besiktas Gimnastics shall pay EUR 5,150 to Beobasket Ltd. as a reimbursement of the advance of arbitration costs.**
3. **Besiktas Gimnastics shall pay EUR 2,500 to Beobasket Ltd. as a contribution towards Beobasket Ltd's legal fees and expenses.**

Geneva, place of the arbitration 30 April 2008

Stephan Netzle
(Arbitrator)



We Are Basketball

FIBA Arbitral Tribunal (FAT)

Notice about Appeals Procedure

cf. Article 17 of the FAT Rules
which reads as follows:

"17. Appeal

Awards of the FAT can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland and any such appeal must be lodged with CAS within 21 days from the communication of the award. 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."