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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0010/08 FAT)

rendered by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Mr. Ante Grgurevic, c/o Interperformances, Via Degli Aceri, 14 – Gualdicciolo, 47892 Republic of San Marino
represented by Mr. John B. Kern, John B. Kern International Law LLC, 180 E. Bay Street, Ste 200, Charleston, SC 29401 USA

- Claimant -

vs.

AEP Olympias Patras, Riga Feraiou 93, 26211 Patras, Greece

- Respondent -

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1. The Parties

1.1. The Claimant

1. Ante Grgurevic (hereinafter “Mr. Grgurevic” or the “Claimant”) is a professional basketball player of Croatian nationality. His agent, Dr. Luciano Capicchioni (hereinafter the “Agent”) has his main place of business in the Republic of San Marino. His representative Mr. John B. Kern is an attorney-at-law domiciled in Charleston, South Carolina, USA.

1.2. The Respondent

2. AEP Olympias Patrias (hereinafter “AEP” or the “Respondent”) is a Greek basketball club with its seat in Patras, Greece. AEP is a professional basketball club competing during the 2007/2008 season in the superior (A1) Greek Basketball League and currently in the A2 Greek Basketball League. It is domiciled at Riga Feraiou 93, Patras 26211, Greece. Respondent is not represented by counsel.

2. The Arbitrator

3. On 23 October 2008, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Prof. Ulrich Haas as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").

4. On 24 October 2008 the Arbitrator accepted his appointment and signed a declaration of acceptance and independence provided by the FAT Secretariat.

5. None of the parties has raised objections to the appointment of the Arbitrator or to the declaration of independence issued by him.

3. Facts and Proceedings

3.1. Background Facts

6. On 27 July 2007, the Claimant and the Respondent concluded a player contract (hereinafter the "Contract") for "the 2007/2008 basketball season" in which a net salary in the amount of EUR 130,000.00 was agreed upon for the services of the Claimant as a basketball player. The Contract reads – in relevant part – as follows:

> *"III. GUARANTEED NO-CUT CONTRACT*
>
> *This is a guaranteed no-cut contract. The Club agrees that this contract is no-cut, which means that neither the Club nor any assignee thereof, nor the League can terminate this contract should any injury or illness befall the Player or in the event the Player fails to reach an expected level of performance.*

IV. SALARY COMPENSATION

The Club agrees to pay the Player a net salary of € 130,000,00 (Euro onehundredthirtythousand/00)payable as follows:

€ 13,000,00 (Euro thirteenthousand/00) at signature of this Contract and upon passing of physical examination.

€ 13,000,00 (Euro thirteenthousand/00)	*on September*	*30th 2007*
€ 13,000,00 (Euro thirteenthousand/00)	*on October*	*30th 2007*
€ 13,000,00 (Euro thirteenthousand/00)	*on November*	*30th 2007*
€ 13,000,00 (Euro thirteenthousand/00)	*on December*	*30th 2007*
€ 13,000,00 (Euro thirteenthousand/00)	*on January*	*30th 2008*
€ 13,000,00 (Euro thirteenthousand/00)	*on February*	*27th 2008*
€ 13,000,00 (Euro thirteenthousand/00)	*on March*	*30th 2008*
€ 13,000,00 (Euro thirteenthousand/00)	*on April*	*30th 2008*
€ 13,000,00 (Euro thirteenthousand/00)	*on May*	*30th 2008*

This last payment of € 13,000,00 (Euro thirteenthousand/00) must be paid no later than March 30th 2008. Payments which are received 5 (five) days later than the dates noted shall be subject to a penalty of € 50,00 (Euro fifty/00) per day. In case of scheduled payments not being made by the Club within 10 (ten) days of the scheduled payment, the Player shall be entitled to all moneys in accordance with the Contract, but shall not have to perform in practice sessions or games until all scheduled payments have been made plus appropriate penalties and such non performance will not be considered a breach of contract. In the event that payments are not made by Club, within 15 (fifteen) days of the scheduled payment date, player shall immediately be entitled to the full salary and have no further obligations to the Club. The Club shall retain no rights to the Player except for the obligation to pay all salary and bonuses under the terms of this Contract. Upon receipt of a request from the National Federation to issue the Player's Letter of Clearance, the Club must authorize the Federation to do so unconditionally within 24 (twenty four) hours without charging a transfer fee.

VIII. AMENITIES

In addition to the compensation above mentioned the Club agrees to provide the Player with the following amenities at no cost to the Player for the duration of this Contract:

a) Provide the Player with a fully furnished two-bedroom apartment satisfactory to the Player. Normal use of electricity, water, heat and rent to be paid by Club.

b) Four (4) round trip tickets (Economy Class) Player's residence/Greece.

c) Provide the Player with an automobile satisfactory to the Player. Insurance, mechanical repairs, taxes to be paid by Club. Gasoline and oil are to be paid by the Player. Automobile must be returned by Player to Club in good condition.

d) Insurance and medical care for Player and family. If Player is injured or ill at any time during the term of this contract and unable to continue play, all moneys are still due and payable plus any medical expenses incurred because of the injury or illness.

e) Dental care for Player and family (Aesthetic dental care not included).

IX. PHYSICAL EXAMINATION

This will be a fully guaranteed contract which cannot be terminated for injury or lack of skill. Said guarantee shall be in full force and effect after the PLAYER has passed a medical examination. The CLUB has two days after the PLAYER'S arrival to give the PLAYER said medical examination. Unless the PLAYER and his agent are notified in writing that he has failed to pass the medical examination, all guarantees will be in place two days after arrival and the contract terms will be in full force and effect. Should PLAYER be injured during a practice or game before he has completed his physical examination, this contract shall be fully guaranteed and all terms and conditions shall be in effect as though he already passed his physical examination."

7. On the same day, the Respondent and the Agent (on behalf of Executive Pro Management AG (E.P.M.)) concluded an Agent Agreement (the "Agent Agreement") that reads in its relevant part as follows:

"3. The CLUB further agrees as follows:

a) That E.P.M. shall be paid a commission of €13.000,00 (Euro thirteenthousand/00) payable at Player's arrival and upon passing of physical examination.

[…]

b) *That E.P.M. will be paid a commission equal to ten percent (10%) of the Player's salary for each and every season that Mr. ANTE GRGUREVIC is with the team. Said commission is payable within seven (7) days of Mr. ANTE GRGUREVIC arriving in Greece for each season.*

c) *That if Club doesn't fulfill the obligation indicated in paragraph "3"a) of this Agreement the Player will be free to leave the Club and the Club shall retain no rights to the player except for the obligation to pay all salary and bonuses under the terms of this Agreement (see Clause "IV" and "V" of AEP OLYMPIAS PATRAS /ANTE GRGUREVIC Agreement. …"*

8. In addition, Claimant concluded a contract with the Agent (on behalf of Interperformances Inc/International Basketball Center (IBC)) (the "Representation Agreement") that reads – in relevant part – as follows:

"III. COMPENSATION

A. The Player shall pay to the Representative for services rendered hereunder in negotiating a contract with a non-NBA team, a sum equal to ten percent (10%) of all monies received by the Player or his designee as the net amount of current and deferred salary, including base salary. … The Representative shall use its best efforts to collect the ten percent (10%) commission directly from the team. Any portion of said ten percent (10%) not paid by the team shall be paid to the Representative by the Player.

[…]

V. LEGAL FEES AND COSTS

Representative shall do everything in its power to assist in the collection of the salary and bonuses owed to the Player. However, any and all attorney's fees are the responsibility of the Player. The cost of collecting the Representative's commission from the Player under paragraph III.A above shall be the obligation of the Player."

9. On 8 April 2008 the Agent wrote a letter on behalf of the Claimant to the attention of Mr. Nikos Bogonikolos, the Respondent's President. The letter reads – *inter alia* – as follows:

I am writing one final time to demand payment in full in the amount of € 140.000.00 on the July 27, 2007 Contract entered into by AEP Olympias Patras and Mr. Grgurevic. The Club has failed to make any payments on this Contract.

You executed the contract on behalf of the Club guaranteeing the full value of the 2007-2008 contract two days after Mr. Grgurevic's arrival in Patras.

[…]

The effect of the term "Guarantee" is not taken lightly by Mr. Grgurevic or his agency.

[…]

Since AEP Olympias Patras has failed to make any payments as required under the Contract, the entire amount due under the Contract is accelerated and due at once. Please refer to Paragraph IV ….

Consequently, we hereby demand your prompt payment in full of the face value of the Contract …"

10. With letter dated 5 May 2008, Mr. Bogonikolos wrote back to the Agent as follows:

"Dear Sir,

We received your letter of April 8th 2008 and we feel very surprised and annoyed about what you are writing and ask from our club about the contract of Mr. Grgurevic.

You know very well that the player came in Greece and went strait to Metsovo because our players were there for their team preparation.

When they came in Patras after 4 days, he never passed any medical examinations because he had a serious problem in his knee and asked from us to pass the medical examinations after the solve of this problem.

Some days after he travel to his country because his wife was pregnant and she has some problems. From then he never came back. He was spoke with his coach day by day and he said to him that he can not came in Greece because of the problems of his wife,

That's why Mr. Grgurevic never signed any contract of HEBA, between him and our Club. We remind you that Mr. Grgurevic stay in Greece just for a few days and he never take place in any game of AEP OLYMPIAS PAT[R]AS BC in championship, in Greek Cup or in any friendly game […]

We refuse any demand from you and Mr. Grgurevic."

3.2. The Proceedings before the FAT

11. The Claimant filed a Request for Arbitration dated 7 August 2008 in accordance with the FAT Rules. The non-reimbursable fee of EUR 3,000.00 was received in the FAT account on 10 October 2008.

12. By Procedural Order (No 1) dated 23 October 2008, the FAT Secretariat confirmed receipt of the Request for Arbitration on 21 August 2008 and informed the parties of the appointment of the Arbitrator. Also, the Claimant was invited to provide the FAT with a Power of Attorney confirming that Mr. Kern was entitled to act on his behalf. In the same Procedural Order, a time limit was fixed until 17 November 2008 for the Respondent to file its Answer to the Request for Arbitration. The Order also requested the parties to pay, by no later than 10 November 2008, the following amounts as an Advance on Costs:

"Claimant (Mr. Grgurevic):	*EUR 4,000*
Respondent (AEP):	*EUR 4,000"*

13. With e-mail of 10 November 2008 the Respondent requested an extension of the time limit to answer to the Request for Arbitration. By Procedural Order (No 2) dated 14 November 2008, the Arbitrator granted a new time limit for the Respondent to submit its Answer by no later than 28 November 2008.

14. As by the time limit of 10 November 2008 no payment was received in the FAT account, with the same Procedural Order the Arbitrator extended the time limit, requesting the parties to effect payment until 24 November 2008.

15. Given that the second time limit for payment of the Advance on Costs was again not met by the parties, the FAT fixed a final time limit until 12 December 2008. In his Procedural Order (No 3) dated 1 December 2008, the Arbitrator emphasized that: **"*In the event that FAT has not received any of the shares of the advance of costs by 12 December 2008, the Request of Arbitration shall be deemed withdrawn*."**

16. On the last day of the final time limit, i.e. on 12 December 2008, Mr. Kern sent an e-mail to the FAT Secretariat stating that *"we are wiring the (…) funds today to the FAT"*.

17. Upon expiry of the time limit of 12 December 2008, neither party had paid its share of the Advance on Costs. On 23 December 2008, the Arbitrator issued an order stating: **"*After several reminders, both parties failed to pay the Advance on Costs in the above matter. As announced by FAT in a final reminder dated 1 December 2008 the Request for Arbitration in this matter is herewith deemed withdrawn and the FAT proceedings will be closed forthwith, without reimbursement of any costs.*"** By e-mail of the same day the FAT Secretariat confirmed to Mr. Kern that *"there was no money received in the FAT account as of 22 December 2008"*. In response, Mr. Kern stated that "*there was a delay with the bank handling the transfer"* and that he would *"deliver to (the FAT) the confirmation number for the wire"*. Such evidence was never produced.

18. A payment of EUR 4,000.00 by the Claimant was received in the FAT account on 31 December 2008, showing an "order date" of 29 December 2008.

19. By Procedural Order (No 5) dated 8 January 2009, the FAT Secretariat informed the parties on behalf of the FAT President that: "*Since all the deadlines set by the Tribunal were ignored by the Claimant and taking into consideration that the Tribunal explicitly*

advised the Claimant of the consequences thereof and that the Claimant did not present any valid justification as to why the deadlines were not met, the Tribunal sees no grounds for changing its order dated 23 December 2008 according to which the [claim is] deemed withdrawn. The Claimant is free to file a new request for arbitration. The request for arbitration must be accompanied, however, by a transfer of a non reimbursable fee in the amount of EUR 3,000."

20. In response, Mr. Kern filed a "Claimant's Objection and Request for Reconsideration". On 6 February 2009, the FAT President decided on the basis of the evidence submitted to her to reopen the present arbitration and informed the parties accordingly. It was emphasized that *"the present order is made on a very exceptional basis as it appears that Claimant's bank has contributed to the delay in the payment of the advance on costs. In particular, despite suggestions to the contrary in the Claimant's submission of 22 January 2009, it is undisputable that under the circumstances the FAT Secretary's "Withdrawal" order of 23 December 2008 was compliant with both the FAT Rules and the applicable Swiss arbitration law."*

21. In the same Procedural Order, the FAT President found that "*there is no need to reconfirm the appointment of the Arbitrator, unless so requested within 5 days from receipt of the present order*".

22. By the fixed time limit, neither party had filed a request to the effect that the FAT President reconfirm the appointment of the Arbitrator. In addition, on 13 February 2009, the Claimant sent a letter to the FAT in which he stated that *"I would indeed agree with the (President's) suggestion"*.

23. By Procedural Order (No 7) dated 16 February 2009, the Respondent was given a new time limit to file its Answer to the Request for Arbitration until 2 March 2009. The Respondent was once again advised to pay an Advance on Costs of EUR 4,000.00 by no later than 23 February 2009 in the FAT bank account.

24. On 3 March 2009, the FAT Secretariat informed the parties that the Respondent had failed to submit its Answer to the Request of Arbitration and to pay its share of the Advance on Costs. In accordance with Article 9.3 of the FAT Rules, the Claimant was invited to substitute for the missing payment of the Respondent until 11 March 2009. The Claimant paid the Respondent's share of the Advance on Costs.

25. On 17 March 2009, the FAT Secretariat confirmed receipt of the Claimant's payment and informed the parties that the arbitration would proceed. It also indicated that the Respondent had failed to submit its Answer and as a result, the exchange of documents was complete. The parties did not request the FAT to hold a hearing.

26. In the same Procedural Order, the parties were invited to submit a detailed account of costs by no later than 24 March 2009.

27. On 24 March 2009, the Claimant submitted the following account of costs:

"1. Attorneys' Fees	*€ 10,913.70*
2. Expert Witness Fees: USD 1,750 @ 1.36325	*€ 1,283.69*
3. Arbitration Fees:	
a. Non-reimbursable fee paid by Claimant	*€ 3,000.00*
b. Fee paid by Claimant on 11 December 2008	*€ 4,000.00*
c. Fee paid by Claimant on 9 March 2009	*€ 4,000.00"*

28. The Respondent did not submit any account of costs.

4. The Parties' Submissions

4.1. The Claimant's Submission

29. The Claimant submits that the parties signed a one-year player Contract for the 2007-2008 season dated 27 July 2007 ,whereby the Claimant was provided with a net salary of EUR 130,000.00 payable according to a pre-determined payment schedule.

30. Furthermore, the Claimant submits that he arrived in Greece on 4 September 2007 and was immediately taken to the Club's facility in Metsovo to train with the team. In addition, the Claimant states that the Club did not submit him at any time to a physical examination. According to the Claimant, he stayed in Metsovo for four days and then returned with the Respondent's team to the Club's training premises in Patras on 8 September 2007.

31. In addition, the Claimant submits that he did not receive any payments at any time from the Respondent, but that he was housed in a hotel and provided with a car. The Claimant states that, with the Respondent's permission, he visited his wife from 15 September 2007 until 17 September 2007 in Split, but returned to Patras in the evening of Monday 17 September 2007.

32. The Claimant submits that after recommencing practice on 18 September 2007 he noticed a tightness and swelling in his right knee. He asked to see a doctor, but the

Respondent's medical doctor was not available. According to the Claimant he continued practice and travelled with the Respondent's team to a tournament in Munich on 21 September 2007. Since he still had problems with his knee, he was taken to a German doctor. The latter recommended three days' rest. After his return to Patras, the Claimant resumed training. However, the knee became swollen a second time. The Claimant was then taken, on 25 September, to the Respondent's team doctor who recommended seven days' additional rest.

33. The Claimant states that on 27 September 2007 he left Patras for Split to visit his wife, with the Respondent's permission. While in Split, he went to visit his personal physician. The latter took additional MRI images of his right knee and recommended rest for approximately one week, followed by three weeks of physical therapy. According to the Claimant, he advised the Respondent of these findings. The Claimant submits that the Respondent's coaches consented to this. During the rehabilitation period the Claimant requested that his salary be paid.

34. Eventually, at the beginning of October 2007 the Claimant submits that he requested that his outstanding salary be paid before he returned back to Patras. According to the Claimant the Respondent did not react to his request.

35. On 14 March 2008, the Claimant sought treatment for his injured knee on his own initiative. He was treated by Dr. Alessandro Lelli, an orthopedic surgeon in Bologna who recommended surgery on his knee, which was later on performed. Since the Respondent failed to provide the Claimant with the health insurance provided for in the Contract, the Claimant had to pay out of his pocket the fee for the initial examination in the amount of EUR 180.00 and the fee for the surgery in the amount of EUR 4.296,79.

4.2. The Claimant's Request for Relief

36. On the basis of the contentions set out above, the Claimant requests in particular that the FAT:

> *"2.1. […] exercise jurisdiction over the subject matter of the June[July] 27, 2007 Contract and the parties to the Grgurevic Contract.*
>
> *[…]*
>
> *2.4. […] hold Olympias liable for breach of the Contract as of September 6, 2007 when the Club failed and refused to pay the player, or his agent and to provide further benefits."*

37. and that:

> *"2.5. [The Player] recover from Olympias for the breach of the July 27, 2007 Contract.*
>
> *2.6. [The Player] recover from Olympias for the breach of the Club to the July 27, 2007 Agent Agreement which is integrated with the July 27, 2007 Player's Contract."*
>
> *2.7. [The FAT] award damages to the Claimant Grgurevic to be paid by the Respondent as follows:*
>
> | | |
> |---|---|
> | *a. Salary Compensation:* | *€ 130,000.00* |
> | *b. Penalties on Failure to Pay Salary Compensation:* | *€ [85],950.00* |
> | *c. Tax Effects on Salary and Bonus Compensation:* | *€ 105,067.00* |
> | *d. Amenities:* | *€ 17,681.79* |
> | *e. Agency Fees:* | *€ 13,000.00* |
> | *Grand Total (plus interest, fees, costs, etc.)* | *€ 351,698.79* |
>
> *2.8. [The FAT award] pre-award interest on all amounts determined as due, from the date of the Breach (September 6, 2007) to the date of the Award at the pre-award interest rate of nine (9.0%) percent per annum and an award of post-award interest at twelve (12.0%) percent per annum to accrue until such time as all amounts due are paid in full. Should the arbitrator award pre-award interest as proposed, the amount of interest would total € 30,477.21 as of August 8, 2008 (representing 337 days from the time of the "acceleration of damages" under paragraph IV of the Contract) and continue run at a per diem rate of € 904.37 from August 9, 2008 forward.*

38. The Claimant further requests that:

> *2.9. […] the Secretary General of FIBA or the Arbitrator as his delegate maintain jurisdiction over the matter in order following entry of an award, so that the Claimant may seek further and additional enforcement over the payment of the appropriate arbitration award, including the full authority of FIBA to render monetary fines, restrictions or other sanctions in the event that the Respondent does not comply with all aspects of the anticipated FIBA Arbitration Award.*
>
> *2.10. […] the Costs of this action and the attorneys' fees related to bringing this action be assessed against the Respondent Olympias.*
>
> *2.11. [The FAT] provide the Claimant Grgurevic with any and all other and further relief as justice may require."*

4.3. The Respondent's Submission

39. The Respondent did not engage in the proceedings at hand and did not make any material submissions.

5. Procedural Issues

40. 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 Swiss Act on Private International Law (PILA).

5.1. The jurisdiction of FAT

5.1.1 Review *ex officio*

41. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration, he will examine his jurisdiction *ex officio* on the basis of the record as it stands.[1]

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

5.1.2 Arbitrability

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

5.1.3 Formal and substantive validity of the arbitration agreement

44. The existence of a valid arbitration agreement is to be examined separately for each subject matter in dispute in light of Article 178 PILA, 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."*

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.

a) With respect to the claims arising from the Contract

45. The Claimant requests the Arbitrator to award to him "salary compensation", "penalties on failure to pay salary compensation", "tax effects on salary" and "amenities". The jurisdiction of the FAT to decide on these requests results from Article XII of the Contract 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 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. To the extent legally possible under Swiss law recourses 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 shall decide the dispute ex aequo et bono.[...]"*

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

47. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt as to the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording "[a]ny dispute

arising from or related to the present contract" clearly encompasses the above mentioned requests.[3]

b) With respect to the claim regarding the Agent Fees

48. The Claimant further requests the Arbitrator to award him € 13,000.00 regarding "Agency Fees". This claim does not arise from the Contract since the latter does not mention "Agency Fees" to be paid to the Claimant. An obligation to pay "Agency Fees" by the Respondent is mentioned, however, in the Agent Agreement to which the Claimant is not a party. In addition, an obligation to pay Agency Fees is also contained in the Representation Agreement entered into between the Claimant and E.P.M. The Claimant submits that the Representation Agreement and the Agent Agreement are so closely connected with the Contract that the arbitration clause contained in the latter extends also to the claim for "Agency Fees". The Arbitrator has serious doubts as to this reasoning. The Representation Agreement and the Agent Agreement both incorporate arbitration clauses which are distinct from that contained in the Contract. For instance, Article VI of the Representation Agreement provides as follows:

> *"Any disputes arising with respect to, or in connection with, this Agreement, shall be finally adjudicated according to the laws of Switzerland by one arbitrator to be appointed in accordance with the Lugano Arbitration Rules published by the Chamber of Commerce, Industry and Handicraft of the Canton Ticino, Lugano (Switzerland). The Parties hereby accept and agree to undergo the accelerated procedure. The arbitration venue is Lugano (Switzerland). The relevant award shall be final and binding for both parties which hereby definitively waive any right of appeal or recourse to any court. The prevailing party shall be entitled to recover all the relevant attorney's fees from the succumbing party."*

[3] *See* for instance BERGER/KELLERHALS, Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, No. 466, pp. 160-161.

49. A nearly identical arbitration clause can be found in Article 3 lit. e of the Agent Agreement. Since both agreements (Representation Agreement and Agent Agreement) contain an arbitration clause providing for a seat of the arbitration other than Geneva and applicable procedural rules that are distinct from the FAT Rules, there is – unlike in the case FAT 001/07 (Ostojic/Raznatovic vs. PAOK) – no room to act on the assumption of an implicit will of the parties that the arbitration clause contained in the Contract extends to the claim related to the "Agency Fees". Accordingly, the Arbitrator finds that he does not have jurisdiction to decide the claim for "Agency Fees" in the case at hand.

5.2. Other Procedural Issues

50. Article 14.2 of the FAT Rules, which the Parties have declared to be applicable in the Contract, 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 case of default of one of the parties is in accordance with Swiss arbitration law[4] and the practice of the FAT[5]. However, the Arbitrator must make every effort to enable the defaulting party to assert its rights.[6]

51. This requirement is met in the current case. The Respondent has been informed of the initiation of the proceedings and of the appointment of the Arbitrator in line with the

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4 Swiss Federal Tribunal SJ 1982, 613, *621*; see also KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, Bern 2006, No. 483; LALIVE/POUDRET/REYMOND, Le Droit de l'Arbitrage interne et international en Suisse, Lausanne, 1989, No. 8 ad Art. 182 PILA; RIGOZZI, L'Arbitrage international en matière de Sport, Basel 2005, No. 898; SCHNEIDER, Basler Kommentar, No. 87 ad Art. 182 PILA.

5 FAT Decision 0001/07 (Ostojic, Raznatovic vs. PAOK); FAT Decision 0018/08 (Nicevic v Besiktas JK).

6 KAUFMANN-KOHLER/RIGOZZI, *op. cit*., No. 484.

relevant rules. Furthermore, in Procedural Order (No 1) of 23 October 2008, the Respondent was given a first time limit within which to respond to the Request for Arbitration. With e-mail of 10 November 2008, the Respondent requested an extension of the time limit. By letter of 14 November 2008, the Arbitrator granted a new time limit for the Respondent to submit its Answer until 28 November 2008. The Respondent did not respond to this Order. After the reopening of the present arbitration, the Respondent was given an additional time limit to file its Answer until 2 March 2009. Once again, the Respondent failed to submit its Answer even though it was given more time than the originally requested extension. Therefore, the Respondent was given ample opportunity to respond to the Request for Arbitration. However, the Respondent preferred not to participate in the proceedings. In light of these circumstances, the Arbitrator considers himself fit to proceed with the arbitration and deliver the award.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

52. 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",* by opposition 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".

53. 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 their agreement to arbitrate, the parties have explicitly directed and empowered the Arbitrator to decide the dispute *ex aequo et bono*. Consequently, the Arbitrator will adjudicate the present matter *ex aequo et bono.*

54. 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*[7] (Concordat),[8] 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."*[9]

55. 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

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7 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA. Today, the Concordat governs exclusively domestic arbitration.

8 P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PILA.

9 JdT 1981 III, p. 93 (free translation).

legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case".[10]

56. This is confirmed by the provision in Article 15.1 of the FAT Rules *in fine* that the arbitrator applies "general considerations of justice and fairness without reference to any particular national or international law".

57. In light of the foregoing developments, the Arbitrator makes the following findings:

6.2. Findings

6.2.1 Was there a binding Contract?

58. The Claimant has provided the Arbitrator with a copy of the Contract. The latter bears the signature of the Claimant, the Respondent's seal and the signature of the Respondent's President. After duly considering the evidence submitted to him, the Arbitrator holds that the parties have concluded a contract covering the basketball season 2007/2008. Furthermore, the Arbitrator finds that there are no circumstances indicating that the Contract was invalid or not intended to be binding upon the parties.

6.2.2 Grounds for withholding monies due under the Contract?

59. Since the parties have concluded the Contract, the Respondent is – in principle – liable to pay the monies due in accordance with its contractual obligations. In its letter dated

[10] POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

5 May 2008, the Respondent has raised several grounds for not complying with its contractual duties:

a) Injury of the Claimant

60. It follows from the Request for Arbitration and from Respondent's letter dated 5 May 2008 that the Claimant was injured. The question however is, whether this constitutes a just ground to refuse payment. The Arbitrator holds that this has to be answered in the negative.

61. The Contract is a "guaranteed no-cut contract". Article III of the Contract provides that "neither the Club nor any assignee thereof nor the league can terminate this contract should any injury or illness befall the Player or in the event the Player fails to reach an expected level of performance." Therefore, the full net salary of EUR 130,000.00 is guaranteed even if the Claimant was injured and did not play the entire season with the Respondent's team.

62. According to Article IX of the Contract, this guarantee is in "full force and effect" two days after arrival unless the Claimant and his Agent are notified in writing that the Claimant has failed to pass the medical examination. Should the Claimant be injured during a practice or game before he has completed his physical examination, the contract shall be fully guaranteed and all terms and conditions shall be in effect as though he already passed his physical examination.

63. The purpose of Article IX of the Contract is to protect both parties. On the one hand, the medical examination enables the Respondent to check whether the Claimant possesses the physical abilities needed to fulfill his contractual obligations and – if this

were to be answered in the negative – to terminate the Contract. On the other hand, the Respondent – in the interest of legal certainty – has to provide for the medical examination within two days after the arrival of the player at the club. The purpose of this is that once the deadline has elapsed the Respondent is estopped from invoking pre-existing health problems of the Claimant as a justification for the termination of the Contract.

64. It follows from the submissions of the Claimant and from the letter of the Respondent dated 5 May 2008 that the Claimant after his arrival in Greece was immediately taken to the Respondent's training facilities in Metsovo, that the Claimant stayed there for four days and that during this stay he was not submitted to any physical / medical examination. Hence, it is evident that the medical examination did not take place within the timeframe provided for in the Contract. It does not follow from the submissions of the parties that they have modified Article IX of the Contract by mutual consent, nor that the Claimant waived his rights under said provision, nor that the delay in the examination was attributable to him. The consequences thereof are that the Respondent is estopped from holding the injury against the Claimant. Therefore, the injury of the Claimant is no valid ground to refuse payment to him.

b) Breach of Claimant's obligation

65. In its letter dated 5 May 2008 the Respondent has stated that the Claimant breached his contractual obligation by not staying with the Cclub and (definitively) leaving for Split. It is a key obligation of the Claimant according to the Contract to participate in the Club's practice sessions and to play in the Club's exhibition, regular season and play-off games (cf. Article I of the Contract). Breaching this main obligation constitutes a valid ground for withholding payment of salaries to the Claimant. However, the

Claimant submitted in a credible and substantiated manner that he went to Split twice. The first time, he left – with the consent of the Club – only for the weekend and returned to the Club's facilities on the evening of 17 September 2007. It is only the second time he left that he did not return from Split. However, the Claimant only left for Split the second time – according to his substantiated and plausible submissions – on 27 September 2007. This was 23 days after his first arrival in Greece.

66. The Contract provides in Article IV that an installment in the amount of € 13,000.00 is due at the time of the signature of the Contract and upon passing of the physical examination. Since the latter had to take place within the first two days of the Claimant's arrival at the Respondent's training facilities (i.e. by 6 September 2007), the Respondent was 21 days late for the payment of this installment by the time the Claimant left for the second time to Split.

67. The Contract specifically regulates the consequences of late payment. Article IV provides that in case of scheduled payments not being made by the Club within 10 days the Claimant shall be entitled to all monies in accordance with the Contract, but shall not have to perform in practice sessions or games until all scheduled payments have been made. Furthermore, the Contract provides that in case payments are not made within 15 days of the scheduled payment date, the Claimant shall be entitled to the full salary according to the Contract and shall have no further obligations towards the Respondent.

68. In light of the clear and unambiguous wording of this provision, the Claimant was, at the time of his second trip to Split, contractually entitled to withhold his services. Since the obligation of the Claimant to resume practice and to participate in matches was not due anymore (or was at least suspended) at that moment in time, he did not commit a

breach of his contractual duties by not returning to the Respondent. Hence, since the Claimant did not breach his contractual obligations the Respondent was not entitled to withhold payments to the Claimant.

c) Summary

69. To sum up, therefore, the Arbitrator holds that the Respondent is – in principle – liable for all monetary obligations under the Contract.

6.2.3 Outstanding salaries

70. According to the Contract, the Claimant is entitled "to the full salary". Since the Respondent did not effect any payments, the amount to be paid corresponds to the salaries for the entire 2007/2008 season as agreed in Article IV of the Contract (i.e. EUR 130,000.00). Article IV of the Contract is a sort of "liquidated damages" clause. The question arises, therefore, whether the Claimant has an (implied) duty under the Contract to mitigate the damage suffered, which would prevent him from being in a better position as a consequence of the Respondent's breach than in the absence of said breach. As held in FAT Decision 0014/08 (van de Hare vs. Azovmash Mariupol Basketball Club, at 72-73):

> *"It might be argued that the present value of the future monthly salaries is less than the amount reached by simple addition of the outstanding annual salaries. However, such discounting is not necessary in the present case, since the compensation for damages is not the result of a mathematical formula but follows from an overall assessment, which also comprises the compensations which [the Claimant] actually earned or may have earned otherwise and which, by nature, includes a considerable margin of imprecision.*
>
> *When it comes to the assessment of the compensations which [the Claimant] was able to earn or failed to earn because he was no longer bound [by the Contract] with the Respondent, the Arbitrator must primarily look at the contract which [the Claimant] signed*

with the next club […]"

71. In the case at hand, the Arbitrator is of the view that there is no room for an implied duty to mitigate the "damage", since – in any case – the Claimant was injured and, therefore, was not in a position to find another employment for the 2007/2008 basketball season.

6.2.4 Claim for Late Payment Penalties

72. The salary payment schedule contained in the Contract states the dates on which the Respondent was obliged to pay the ten monthly installments of EUR 13,000.00. According to Article IV of the Contract, payments which are received 5 (five) days later than the dates noted shall be subject to a penalty of EUR 50.00 per day.

73. The Claimant requests such penalty payments from the first installment due on 6 September 2007 to the last installment due on 30 May 2008, until 8 August 2008, at a daily rate of EUR 50.00 in a total amount of EUR 85,950.00.

74. Firstly, the calculation of the late payment penalties on p. 8 of the Request for Arbitration is not comprehensible as the amounts mentioned there add up to EUR 102,750.00 and not EUR 85,950.00 (or EUR 58,950.00, as set out – in the Arbitrator's opinion, due to a clerical error – in the Request for Relief on p. 14). Secondly, it cannot be the meaning of the agreed late payment penalties that they can be calculated starting on the due date for each installment separately, when the whole amount of EUR 130,000.00 was due – at the latest – on 21 September 2007 (i.e. 15 days after 6 September 2007). Article IV par. 2 of the Contract states that *"payments which are received five days later than the dates noted shall be subject to a penalty of € 50,00 per day".* The Arbitrator is of the view that the late payment penalties are owed for due

payments only. As no payment at all was made, late payment penalties are owed from 11 September (i.e. 5 days after due date), until 8 August 2008, i.e. the date of the Request for Arbitration as requested by the Claimant, but can only be taken into account once at a daily rate of EUR 50.00. This amounts to a total of EUR 16,650.00 for 333 days.

75. However, the Arbitrator finds this amount to be excessive in view of the fact that the Claimant waited about 11 months before filing his claim with the FAT. The Arbitrator in exercising his powers *ex aequo et bono* finds it, therefore, just and equitable to reduce the amount due for late payments by half, i.e. to $ 8,325.00.

6.2.5 Claim regarding "Tax Effects"

76. The Contract provides that all payments to the Claimant are to be made *"net of Greek income taxes"*. The Claimant has submitted evidence in the form of an affidavit of the tax expert Robert Nagy. According to the calculations of Mr. Nagy, the income tax to be borne by the Respondent according to Greek law for all monies due to the Claimant would amount to EUR 105,067.00.

77. The calculations submitted by the Claimant are not conclusive. First of all the figures used by Mr. Nagy do not correspond to the figures in the Claimant's Request for Arbitration. In addition, the Arbitrator finds it unclear from the record how the calculation of the Greek income tax was effected. Mr. Nagy did not elaborate on the relevant legal provisions or the applicable tax rate. It is not comprehensible why the expert holds that tax effects on the Claimant's salary amount to EUR 105,067.00.

78. The Claimant is entitled in the present case to damages because of non payment of the salaries. Whether or not the Claimant has to pay taxes on his salary does not depend on Greek tax law, since the Claimant is no longer a resident of Greece and Greek tax law only provides for the taxation of income which the employee actually received while being a resident of that country. Therefore, whether or not the Claimant may request to be awarded tax effects as part of the damage suffered by him depends on the law of the country where he is now personally liable for income tax. No evidence has been submitted by the Claimant in this respect. Consequently, the claim regarding tax effects is not substantiated and must be dismissed.

6.2.6 Claim for Amenities

79. Claimant was not provided with the amenities listed under Article VIII of the Contract except for the car which he used for the period of approximately one month. According to the submissions and evidence provided by the Agent, the value of lost or missing amenities relating to the rent of an apartment, the use of an automobile and the fixed cost items such as health insurance, airline tickets and medical expenses amount to EUR 17,681.79.

80. The Arbitrator finds this claim to be excessive. First of all, the Claimant was provided with lodging – at the very least – until he left for Split on 27 September 2007. The Claimant has not submitted that the hotel provided by the Respondent was not satisfactory or that he advised the Respondent that this situation was non compliant with the Contract. Therefore, the Claimant may not request any amenities in relation to housing for the period of time he stayed with the Respondent in Patras. In addition, while being in Split (and as long as he was still planning to come back) no damage was suffered by the Claimant, since the Respondent during this time was only obliged to

provide housing in Patras, which the Claimant was not willing to use. The same is true for the use of the car. The Respondent was only obliged to provide a car in Patras, i.e. in the city of the Respondent's team. As long as the Claimant stayed in Split (and was still planning to return) no damage could arise, since the Claimant was not in a position to use the car or any housing provided in Patras anyways. The Claimant only suffered damage once he – legitimately – decided not to return to Greece. It is not quite clear at what point in time he took the initiative and communicated his decision to the Respondent's representatives. Furthermore, the amenities claimed in relation to the flight tickets seem excessive, since it is a known fact that round trip (Economy Class) tickets from Athens to the Player's Residence in Split are available already at a lower price. As for the amenities claimed in relation to insurance and medical care, the Arbitrator observes that it is impossible to provide the Claimant *ex post* with the respective insurances for elapsed periods of time. Therefore, the Claimant may only request to liquidate the damage he actually suffered by not being insured by the Respondent. This damage may be equivalent to the costs for replacement insurance or to medical expenses the Claimant incurred during the time when he was not covered by insurance. The Claimant has submitted two invoices for medical treatment in a total amount of EUR 4,476.79 that he paid out of his pocket. He may claim monies only for these invoices.

81. Considering all of the above the Arbitrator finds it just and equitable to award the Claimant EUR 13,000.00 for lost amenities. This amount is determined as follows: EUR 1,400 for the tickets, EUR 4,476.79 for the medical costs and EUR 7,123.21 being an amount determined discretionally (using as starting point the amount of EUR 9,900 submitted by Claimant minus an amount corresponding to the time he was able to use the housing and the car).

6.2.7 Summary

82. To sum up, the Claimant is entitled to:

-	outstanding salaries in the amount of	EUR 130,000.00
-	late payment penalty in the amount of	EUR 8,325.00
-	amenities	EUR 13,000.00
Total		EUR 151,325.00

7. Interest

83. The Claimant requests interest at an annual rate of 9% starting from 6 September 2007 (the date of the alleged breach of the contract) and post-award interest at 12% per annum, to accrue until such time as all amounts due are paid in full.

84. Payment of interests is a customary and necessary compensation for late payment and there is no reason why Claimant should not be awarded interest. However, the Arbitrator finds it unclear from the record how the interest calculation was made and why an interest rate of 9% or 12% per annum should be applicable. The Arbitrator notes that the claim for a rate of 12% is totally unsubstantiated and is unconvinced by Claimant's explanation as to why he should be entitled to a rate of 9% which is substantially higher than that normally applied by FAT. No such rates ensue from the Contract. In the absence of any agreement by the parties to the contrary the Arbitrator holds that in line with the constant jurisprudence of the FAT an interest rate of 5% p.a.

is reasonable and equitable in the present case. No distinction shall be made between pre- and post-award interest rates.

85. Furthermore, the Arbitrator holds that the Claimant is only entitled to interest as of 8 August 2008, as opposed to the date of the alleged breach of contract. There is no room to claim interest during a period for which late payment penalties are already awarded to the Claimant because this would constitute an inadmissible double compensation for damages due to late payment. Therefore, the Arbitrator finds that interest at a rate of 5% p.a. is due as of 8 August 2008 on the amount of EUR 151,325.00.

8. Costs

86. 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 reasonable legal fees and expenses incurred in connection with the proceedings.

87. On 12 June 2009, considering that pursuant to Article 19.2 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", and 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", 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 FAT President determined the arbitration costs in the present matter at EUR 7,600.00.

88. In the present case, the costs shall be borne by the Claimant and the Respondent in proportion to the amounts claimed and the amounts awarded. Considering the outcome of the case, the Claimant has been awarded EUR 151,325.00 instead of the requested EUR 351,698.79, and thus, has succeeded by about 43%. In view of the circumstances of the case the Arbitrator nevertheless deems it just and equitable that the Claimant and the Respondent shall bear the costs of the arbitration in equal shares.

89. Given that the Claimant has paid the totality of the Advance on Costs of EUR 8,000.00 as fixed by the Arbitrator, the Arbitrator decides that:

(i) the FAT shall reimburse EUR 400.00 to the Claimant;

(ii) the Respondent shall pay to Claimant 50% of the difference between the costs advanced by the Claimant and the amount which is going to be reimbursed to him by the FAT. This amount corresponds to EUR 3,800.00, being the share of the arbitration costs to be borne by the Respondent.

90. Furthermore, the Arbitrator considers it 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). In the case at hand the payment by the Claimant of the non-reimbursable handling fee was not taken into account when allocating the costs of the arbitration. Therefore, the Arbitrator considers 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 and having regard to the outcome of the proceedings, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at EUR 1,500.00.

9. AWARD

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

1. **AEP OLYMPIAS PATRAS shall pay to Mr. Ante Grgurevic EUR 151,325.00 together with 5% interest p.a. from 8 August 2008.**

2. **AEP OLYMPIAS PATRAS shall pay to Mr. Ante Grgurevic EUR 3,800.00 as a reimbursement of the advance on the arbitration costs.**

3. **AEP OLYMPIAS PATRAS shall pay to Mr. Ante Grgurevic EUR 1,500.00 as a contribution towards his legal fees and expenses**

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

Geneva, 16 June 2009

Ulrich Haas

(Arbitrator)

FIBA

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."