



FIBA

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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0018/08 FAT)

rendered on 10 February 2009 by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Raj Parker

in the arbitration proceedings

Mr. Sandro Nicevic, Treviso, Italy

represented by Mr. Miodrag Raznatovic, Strahinjica bana 18, Belgrade, Serbia

- Claimant -

vs.

Beşiktaş JK, Süleyman Seba Caddesi, No: 48 BJK Plaza, Akaretler, Beşiktaş,
34357, Istanbul, Turkey

- Respondent -

together with the Claimant, the "Parties"



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1. The Parties

1.1. The Claimants

Sandro Nicevic (hereinafter the "Claimant") is a citizen of Croatia and a professional basketball player. He is domiciled in Treviso, Italy. The Claimant is represented by counsel.

1.2. The Respondent

Beşiktaş JK (hereinafter the "Club" or the "Respondent") is a Turkish basketball club with its seat in Istanbul. It is domiciled at Süleyman Seba Cad. No: 48 Akaretler, Beşiktaş 34357 Istanbul. The Respondent is not represented by counsel.

2. The Arbitrator

On 12 November 2008, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Raj Parker as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").



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3. Facts and Proceedings

3.1. Background Facts

On 24 July 2007, the Claimant and the Respondent entered into a player contract (the “Contract”) under which the Respondent agreed to pay to the Claimant certain salary and bonus payments in return for the Claimant playing for the Club for the 2007–2008 season.

In relation to salary payments, Article IV of the Contract states:

“The Club accepts to make the following payments, provided that the Player has fulfilled any and all of his contractual and external obligations and undertakings, in full and in a timely manner;

A) The total fee to be paid to the Player for the season 2007/2008 by the Club amounts to 650.000 USD (seven thousand [sic] United States Dollars) as follows:

USD 150.000, which is a part of the seasonal fee for 2007-08 will be paid after the Player has passed the health and physical controls and his Health and Physical Control Report has been approved by the Club (not later than the 31st of July 2007), as well the Club receives the Letter of Clearance, and the remaining part of the seasonal fee will be paid in 10 equal monthly instalments as follows:

- a) 31st August 2007 amount of 50.000 USD*
- b) 30th September 2007 amount of 50.000 USD*
- c) 31st October 2007 amount of 50.000 USD*
- d) 30th November 2007 amount of 50.000 USD*
- e) 31st December 2007 amount of 50.000 USD*
- f) 31st January 2008 amount of 50.000 USD*
- g) 28th February 2008 amount of 50.000 USD*
- h) 31st March 2008 amount of 50.000 USD*
- i) 30th April 2008 amount of 50.000 USD*
- j) 31st May 2008 amount of 50.000 USD”*

In relation to bonus payments, Article IV of the Contract states:



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"B) The club will also pay to Player the following bonuses which will be cumulative, as follows:

TEAM BONUSES

For each winning game against Efes Pilsen, Fenerbahce Ulker and Turk Telecom amount of 500 USD

*Reaching Turkish Cup Final 10.000 USD
Winning Turkish Cup Final 20.000 USD*

*Reaching final of Turkish championship Play off 20.000 USD
Winning Turkish championship Play off 30.000 USD*

*Reaching top 32 in ULEB Cup 10.000 USD
Reaching top 16 in ULEB Cup 10.000 USD*

*Reaching final tournament in ULEB Cup 15.000 USD
Reaching final game of ULEB Cup 25.000 USD
Winning ULEB Cup 50.000 Euro"*

3.2. The Proceedings before the FAT

On 30 October 2008 the Claimant filed a Request for Arbitration in accordance with the FAT Rules. The non-reimbursable fee of EUR 3,000.00 was received in the FAT account on 24 October 2008.

By email dated 13 November 2008, the Arbitrator accepted his appointment and signed a declaration of acceptance and independence.

By letter dated 13 November 2008, a time limit was fixed for 8 December 2008 for the Respondent to file the Answer to the Request for Arbitration. By the same letter, a time



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limit of 1 December 2008 was fixed to submit the following amounts as the advance on costs:

*"Claimant: EUR 4,000.00
Respondent: EUR 4,000.00"*

On 3 December 2008, the Claimant submitted his share of the advance on costs.

The Respondent failed to submit an Answer and failed to submit its share of the advance of costs. Accordingly, and by letter dated 29 December 2008, the FAT Secretary informed the Parties that the arbitration would not proceed until the full amount of the advance on costs was received. The letter referred to Article 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 of 9 January 2009 was fixed for the Claimant to pay Respondent's share of EUR 4,000.

The Claimant paid Respondent's share of the advance on costs and by letter dated 19 January 2009, the FAT Secretary informed the Parties that the exchange of documents was complete. The FAT Secretary also invited the Parties to submit their detailed accounts of costs by 23 January 2009.

On 20 January 2009, the Claimant submitted the following account:

"The costs of claimant

*a - initial 3000 E
b - fee 4000 E
c - fee instead of respondent 4000 E
d - lawyers expenses 4250 E*

Total request 15.250 Euro"

The Respondent failed to submit an account of costs.



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4. The Parties' Submissions

4.1. The Claimant's Submissions

The Claimant submits that his final salary payment under the Contract was USD 45,000 short, and that none of the bonus payments due under the Contract were paid by the Respondent. The Claimant further submits that every salary payment made by the Respondent, with the exception of the initial USD 150,000 payment, was made late.

In its Request for Arbitration, the Claimant therefore seeks: (i) payment of USD 45,000 as outstanding salary; (ii) payment of USD 26,500 as outstanding accrued bonuses; (iii) payment of USD 42,400 as late payment penalties in relation to the salary payments; and (iv) interest on these sums at the applicable Swiss statutory rate, from 29 October 2008.

Adding together the three sums claimed gives a total claim of USD 113,900, before interest. However, the Claimant's Request for Arbitration contains the following request for relief:

- “a) To award claimant with amount of 108.900 USD plus interest at the applicable Swiss statutory rate, starting from the 29th of October 2008.*
- b) To award claimant with the full covered the costs of this Arbitration.”*

The Arbitrator considers that the stated request of USD 108,900 is a clerical error, and should in fact read "USD 113,900".



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4.2. The Respondent's Submissions

Despite several invitations, the Respondent has not made 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 Swiss Act on Private International Law (PILA).

5.1. The jurisdiction of FAT

5.1.1 Review *ex officio*

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

5.1.2 Arbitrability

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

¹ ATF 120 II 155, 162.



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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) PILA.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 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."

Article XI of the Contract contains the following arbitration clause:

"Any dispute 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. 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.

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



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

Article XI of the Contract fulfils the requirements of Article 178 PILA and is therefore valid.

5.2. Other Procedural Issues

Article 14.2 of the FAT Rules states 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 law and the practice of FAT. 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. 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.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

With respect to the law governing the merits of the dispute, Article 187(1) PILA



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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*”, as opposed to a 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.”

Article XI of the Contract states:

“The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono”

The Arbitrator will therefore decide the present matter *ex aequo et bono*.

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*³ (Concordat),⁴ under which Swiss courts have held that arbitration *en équité* is fundamentally different from arbitration *en droit* :

³ That is the Swiss statute that governed international and domestic arbitration before the enactment of the PIL. Today, the Concordat governs exclusively domestic arbitration.

⁴ P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PIL.



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*“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.”⁵*

In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives “a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case”.⁶

This is confirmed by Article 15.1 of the FAT Rules *in fine* according to which the arbitrator applies “general considerations of justice and fairness without reference to any particular national or international law”.

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

6.2. Findings

6.2.1 Salary payments

Under the Contract, the Respondent was obliged to pay the Claimant a total salary of USD 650,000 for the 2007 – 2008 season, comprised of a one off payment of USD 150,000 and ten consecutive monthly payments of USD 50,000. The Claimant has produced bank statements which show that the USD 150,000 payment was made, but that only nine of the ten monthly payments were made.

⁵ JdT 1981 III, p. 93 (free translation).

⁶ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.



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Furthermore, the monthly payment made on 2 April 2008 was for USD 80,000; USD 30,000 more than required. The monthly payment made on 24 June 2008 was for USD 25,000; USD 25,000 less than required. The Respondent has therefore, in effect, paid USD 5,000 more than required for the first nine monthly payments. The Arbitrator finds that this sum should be set off against the tenth monthly payment and that the Respondent therefore owes the Claimant USD 45,000 in salary payments.

6.2.2 Late payments

The salary payment schedule contained within the Contract clearly states the dates on which the Respondent was obliged to pay the ten monthly installments of USD 50,000. The bank statements submitted by the Claimant show that of each of the nine salary payments that were made, all nine were made late. Article VI, paragraph 2 of the Contract states:

"It is agreed that any payment to Player pursuant to the above shall be subject to an interest penalty of 100 (one hundred) USD per day for each day said payment was due."

The Claimant is claiming such interest penalties in respect of each of the nine late payments, totaling USD 42,400. The Arbitrator finds that each of the nine penalty payments were made late and so the Claimant is entitled to invoke the above clause regarding interest penalties. On the basis of the documentary evidence submitted by the Claimant, the Arbitrator finds that the Claimant is entitled to interest penalty payments totaling USD 42,400.

6.2.3 Bonus payments

The Contract provides that the Respondent shall pay the Claimant a bonus of



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USD 10,000 in the event that the Club reaches the top 32 in the Uleb Cup and a further bonus of USD 10,000 in the event that the Club reaches the top 16. The Claimant has provided evidence in the form of a print-out of the Uleb Cup official website which shows that the Club reached the top 16. The Contract also provides that the Respondent shall pay the Claimant a bonus of USD 15,000 in the event that the Club reaches the final tournament in the Uleb Cup. The Claimant has provided evidence in the form of a print-out of the Uleb Cup official website which shows that the Club reached the final tournament in the Uleb Cup.

The Contract provides that the Respondent shall pay the Claimant a bonus of USD 500 for each game that the Club wins against Efes Pilsen and against Fenerbahce Ulker. The Claimant has provided evidence in the form of a print-out of the Beko Turkish Basketball League which shows that the Club beat Efes Pilsen twice and Fenerbahce Ulker once in the 2007-2008 season.

In total, the Claimant therefore achieved bonuses totaling USD 36,500. The bank statements provided by the Claimant show payment of only USD 10,000 in respect of bonus payments. The Arbitrator therefore finds that the Claimant is entitled to bonus payments totaling USD 26,500.

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



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expenses incurred in connection with the proceedings.

On 9 February 2009, the President of the FAT rendered the following decision on costs:

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 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 (18 hours at an hourly rate of EUR 300 plus 15% VAT)</i>	<i>EUR 6,210.00</i>
<i>Arbitrator’s costs</i>	<i>-----</i>
<i>Administrative and other costs of FAT</i>	<i>-----</i>
<i>Fees of the President of the FAT</i>	<i>EUR 1,300.00</i>
<i>Costs of the President of the FAT</i>	<i>-----</i>
<i>TOTAL</i>	<i>EUR 7,510.00”</i>

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 his 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.



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Given that the Claimant paid the totality of the advance of the arbitration costs of EUR 8,000 fixed by the Arbitrator, the Arbitrator decides that:

- (i) the FAT shall reimburse EUR 490.00 to the Claimant;
- (ii) the Respondent shall pay to the Claimant the difference between the costs advanced by the Claimant and the amount which is going to be reimbursed to the Claimant by the FAT, i.e. EUR 7,510.00.

Furthermore, the Arbitrator considers it is appropriate 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). The Arbitrator considers it appropriate 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 3,500.

8. Interest

The Claimant also requests payment of interest at the applicable Swiss statutory rate starting from 29 October 2008 (the date on which the Claimant sent its Request for Arbitration). Payment of interest is a customary and necessary compensation for late payment and there is no reason why the Claimant should not be awarded interest. The requested Swiss statutory rate amounts to 5% p.a. However, the Arbitrator considers the appropriate date for the interest to become payable from is the date on which the FAT received the Claimant's Request for Arbitration, as opposed to the date on which the Claimant sent his Request for Arbitration. The Arbitrator therefore finds that interest at the applicable Swiss statutory rate



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becomes payable from 30 October 2008.

9. AWARD

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

1. **Beşiktaş JK is ordered to pay to Sandro Nicevic USD 113,900.00, together with 5% interest p.a. from 30 October 2008.**
2. **Beşiktaş JK is ordered to pay to Sandro Nicevic EUR 7,510.00 as a reimbursement of the advance of FAT costs.**
3. **Beşiktaş JK is ordered to pay to Sandro Nicevic EUR 3,500.00 as a contribution towards Sandro Nicevic's legal fees and expenses.**
4. **Any other or further-reaching claims for relief are dismissed.**

Geneva, place of the arbitration, 10 February 2009

Raj Parker
(Arbitrator)



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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."