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We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0022/08 FAT)

rendered by

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Raj Parker

in the arbitration proceedings

XL Basketball Agency, Cernička 41, 10000 Zagreb, Republic of Croatia,
represented by Mr. Danko Drakulić, Tomašićeva 3, 10000 Zagreb, Republic of Croatia

- Claimant -

vs.

Beşiktaş Jimnastik Kulubu , Suleyman Seba Caddesi, No. 48, 34357 Akareller, Besiktas, Istanbul, Turkey,
represented by Mr. Kubilay Marangoz

- Respondent -

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1. The Parties

1.1. The Claimant

1. **XL Basketball Agency** (hereinafter the “Claimant”) is a company headquartered in Croatia and an agency for the representation of professional basketball players. It is domiciled at Cernička 41, 10000 Zagreb, Republic of Croatia.

1.2. The Respondent

2. **Beşiktaş Jimnastik Kulubu** (hereinafter the "Respondent") is a Turkish basketball club located in Istanbul, Turkey. It is domiciled at Suleyman Seba Caddese, No. 48, 34357 Akareller, Besiktas, Istanbul, Turkey.

2. The Arbitrator

3. On 16 December 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").

4. By fax dated 16 December 2008, the Arbitrator accepted his appointment and signed a declaration of acceptance and independence. 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

5. The Claimant, the Respondent and Mr. Kaya Peker (the "Player") signed a tripartite agreement dated 30 October 2007 (the "Contract"), by which the Respondent engaged the services of the Player for the 2007 - 2008 basketball season. The Contract also provided for a commission to be paid by the Respondent to the Claimant, in a total amount of USD 40,000, for its services as agent. The key issue in this arbitration is whether this Contract is valid and binding, since its validity will determine whether the Respondent indeed owes such monies to the Claimant. The payments to the Player are not in issue.

6. The most pertinent section of the Contract, which is titled 'Agreement of Agent Commission', states:

> *"At the signature of Contract, Club agrees to pay to Player's representative, the NET amount free of taxes of 40,000 (forty thousand) USD. This amount Club agrees to pay in two rates, 20.000 (twenty thousand) in 7 (seven) days after signing this Contract, and 20.000 (twenty thousand) till January 15, 2008.*
>
> *If any of the payments is not made within [sic] sixty (15)days of the scheduled payment date, the Player and the Agency shall immediately be entitled to full salary and have no further obligations to the Club."*

7. On 30 October 2007, the Claimant issued an invoice for USD 20,000, and sent it to the Respondent by fax on 31 October 2007. On 24 January 2008, the Claimant issued

another invoice for the remaining USD 20,000, and sent it to the Respondent by fax on the same day. Both invoices detailed the appropriate method of payment, giving the Claimant's bank details. The Claimant also states that it reminded the Respondent of its obligation to pay in several phone calls, but does not provide any details in relation to those phone calls. The Respondent has failed to make either payment to the Claimant.

3.2. The Proceedings before the FAT

8. On 24 November 2008 the Claimant filed a Request for Arbitration in accordance with the FAT Rules.

9. By letter dated 15 December 2008, a time limit until 5 January 2009 was fixed for the Respondent to file its Answer to the Request for Arbitration. By the same letter, and with a time limit for payment until 29 December 2008, the following amounts were fixed as the Advance on Costs:

"Claimant (XL Basketall Agency):	*EUR 3,500*
Respondent (Besiktas JK):	*EUR 3,500"*

10. On 19 November 2008, the Claimant paid its share of the Advance on Costs.

11. On 13 January 2009, the FAT Secretariat informed the Claimant that the Respondent had failed to submit an answer and to pay its share of the Advance on Cost. Therefore, the Claimant would have to pay the Respondent's share in the amount of EUR 3,500, which the Claimant did on 22 January 2009.

12. The Arbitrator issued several Procedural Orders requesting, among others, additional

submissions and documents from the parties. The Respondent replied to Procedural Orders No 1, 2, 3 and 4.

13. Since none of the parties filed an express application for a hearing, the Arbitrator decided in accordance with Article 13.1 of the FAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions of the parties.

14. On 10 June 2009, by Procedural Order No 5, the Arbitrator closed the proceedings subject to the parties submitting their accounts of costs.

15. On 24 November 2008, together with the request for Arbitration, the Claimant submitted the following account in respect of costs of the Arbitration:

"Costs of legal representation	
(14.840,00 HRK – rate 1E=7,20 HRK	*2061.11 EUR*
Administrative Costs	*20,00 EUR*
Total	*2081.11 EUR"*

16. On 16 June 2009 the Respondent submitted the following summary of costs:

"The translation invoice dated 25.03.2009 amo[u]nt of 42,48 TL (Turkish Liras)

The translation invoice dated 24.04.2009 amount of 140,42 TL (Turkish Liras)

(182,90 TL Turkish Liras is equal to 85,87 Euro)"

4. The Parties' Submissions

4.1. The Claimant's Submissions

17. The Claimant submits that under the relevant wording within the Contract – as quoted at paragraph 6 above – the Respondent agreed to pay the Claimant USD 40,000, but that it has failed to do so. It is the Claimant's submission that the Contract was signed by the Respondent's President, and that there can be no doubt as to its efficacy.

18. The Claimant submits that this payment should have been made in two instalments. This first instalment was for USD 20,000, to be paid within seven days of the signing of the Contract. There is some confusion in relation to the date on which the first instalment was required. However, it appears that the reference in the Request for Arbitration to 6 October 2007 was intended to be 6 November 2007. This is because the latter date is 7 days after the date of the Contract. The second instalment of USD 20,000 was due on 15 January 2008.

19. The Claimant therefore requests that the Respondent pay to the Claimant:

- USD 40,000;
- Interest on the first instalment of USD 20,000, calculated at a rate of 5% p.a. from 7 November 2007;
- Interest on the second and final instalment of USD 20,000, calculated at a rate of 5% p.a. from 16 January 2008; and
- The advance on arbitration costs, as well as the legal fees and expenses of 2,081.11 EUR.

20. The Claimant submits that the appropriate rate of interest is 5% p.a.

4.2. The Respondent's Submissions

21. The Respondent submits that there is no agreement between the Claimant and the Respondent because the signature on the Contract does not belong to any authorised member of the Respondent's board. The Respondent submits that the only valid agreement between the Respondent and the Player is a Turkish Basketball Federation contract, dated 11 October 2007 (the "TBF Contract"). The Agent is not a party to the TBF Contract.

22. The Respondent submits that, as is evidenced by their "Circular of Signature" dated 11 October 2007, only four members of its Board of Directors have the authority to bind the Respondent in a contract. The Respondent submits that, from the signature alone, the person who appears to have signed the Contract on its behalf is Mr. Şeref Yalçin. The "Circular of Signature" does not list Mr. Yalçin as being one of the four members with the necessary authority. Consequently, the Respondent submits that there is not a valid contract in existence between it and the Claimant, so that it is not required to pay the amounts claimed by the Claimant.

23. The Respondent submits that Mr. Yalçin's duty within the Respondent is to execute the relationship between Beşiktaş JK and the Beşiktaş Basketball Branch.

24. The Respondent submits that the Player, as a Turkish team member of the Respondent, was aware of, and knew, the authorised signatories of the Respondent, and therefore had the necessary ability and knowledge to make such facts known to the Claimant.

5. Jurisdiction and other Procedural Issues

25. 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 (PILA).

5.1. The jurisdiction of FAT

5.1.1 Arbitrability

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

27. 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.[1]

5.1.2 Formal and substantive validity of the arbitration agreement

28. The existence of a valid arbitration agreement is to 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.*

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

> *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."*

29. The jurisdiction of the FAT over the dispute between Claimant and the Respondent results from the section of the Contract entitled 'FIBA Arbitral Tribunal (FAT)' 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 in 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), Lausanna, 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 upon appeal shall decide the dispute ex aequo et bono."*

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

31. With respect to substantive validity, the Arbitrator considers that there is no indication which could cast doubt on the validity of the arbitration agreement under Swiss law (cf. Article 178(2) PILA). In particular, the wording "[a]ny dispute arising from or related to

the present contract" clearly covers the present dispute.[2]

5.2. Other Procedural Issues

32. It should be noted, as discussed below at paragraph 47, that the Respondent did not offer an Answer in reply to the Request for Arbitration but did reply to the Procedural Orders.

33. 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[3] and the practice of FAT[4]. However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

34. 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 given ample opportunity to respond to the Request for Arbitration and in fact has responded to various Procedural Orders. From those responses, the

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

3 Swiss Federal Tribunal SJ 1982, 613, 621; see also KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, Bern 2005, 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.

4 *See* for instance FAT Decision 0001/07 (Ostojic, Raznatovic vs. PAOK) and; FAT Decision 0018/08 (Nicevic vs. Besiktas JK).

submissions of the Respondent are apparent. 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

35. 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 authorise 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 authorise the arbitral tribunal to decide ex aequo et bono".*

36. As contemplated by Article 187(2) PILA, the contract in dispute in the present case stipulated that the arbitrator is to decide the dispute *ex aequo et bono*.

37. 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."*

38. 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*[5] (Concordat),[6] 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."*[7]

39. 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".[8]

40. 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".

41. In light of the foregoing matters, the Arbitrator makes the following findings:

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

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

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

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

6.2. Findings

42. The fundamental issue to be determined in this matter is the validity of the Contract upon which the Claimant bases his claim. As is evident from the Respondent's submissions, it takes issue with the validity of the Contract generally, for the reasons set out in paragraphs 21-24 above. If that Contract is valid, the Claimant succeeds on its claim. If the Contract is not valid, the claim fails.

43. The Arbitrator considers that the issue of the TBF Contract that was raised by the Respondent is not relevant to the current claim. That contract may be relevant to a claim for payment in respect of the Player. However, the Claimant is not a party to the TBF Contract, and the Claimant's claim stands or falls on the validity of the Contract that it has relied upon. Thus, the only relevance that the TBF Contract may have is if it sheds any light on the validity of the Contract dated 30 October 2008 that is relied upon by the Claimant.

44. The Contract relied upon by the Claimant must now be considered.

45. The Arbitrator does not consider that the fact that the representative of the Respondent signed at the bottom of each page, rather than in the allocated signature section is significant. If the representative of the Respondent had the authority to sign the Contract, the Arbitrator considers that the signature shown on the final page of the Contract (and, indeed, every other page) indicates acceptance of the Contract by the signatory.

46. It is apparent from the answer of the Claimant to a Procedural Order dated 9 February 2009 that it had understood that the Contract had been signed by the President of the Respondent. The Claimant also stated that Mr Baruk, a manager at the Respondent

club, had informed it that the Contract would be signed by the Respondent's President. The Contract was then signed and exchanged by fax.

47. According to the evidence put forward by the Respondent, the signature on the Contract is that of Mr Seref Yalçin and not that of the Respondent's President. The evidence before the Arbitrator in relation to Mr Yalçin's position and authority at the Respondent is as follows:

(a) According to the Respondent, Mr Yalçin is one of 3 auxiliary Board of Directors Members of the Respondent. The Respondent states that the duty of Mr Yalçin is to "execute the relationship" between the Respondent and the Respondent's Basketball Branch.

(b) The Respondent submits that Mr Yalçin does not have the authority to bind the Respondent and that his signature on the Contract shows only that the Contract is a draft agreement which has been approved by the person in charge of the Basketball Branch of the Respondent, but does not bind the Respondent. The Respondent has provided a document which states that only four persons have the power to bind the Respondent, and this does not include Mr Yalçin.

48. In relation to point (b), there is nothing in the Contract to indicate that it is not a final agreement. In particular, after reciting the names of the parties, the opening words of the Contract are as follows:

> *"In consideration of the mutual promises hereinafter contained, the parties hereto promise and agree as follows."*

49. Thus, there is nothing on the face of the Contract to indicate to the Claimant that the Contract was anything other than a final and binding agreement.

50. The Arbitrator finds that the signature is that of Mr Seref Yalçin. Thus, it appears that the indication given to the Claimant by the Respondent's Manager, Mr Baruk, about who would sign the Contract on behalf of the Respondent was not correct. The Contract was eventually signed by Mr Yalçin.

51. It appears from the material submitted by the Respondent that according to the internal rules of the Respondent, only certain persons listed in a particular "Circular of Signature" of the Respondent are authorised to execute contracts with third parties on behalf of the Respondent. According to the internal rules of the Respondent, that may be so.

52. On the other hand, the Manager of the Respondent represented to the Claimant that the Contract would be signed by the President of the Respondent. The eventual signatory of the Contract, Mr Yalçin, was, according to the Respondent, an auxiliary board member of the Club with duties in relation to the basketball branch of the club. Because of that, and publicly available information as to Mr Yalçin's role, it appears that Mr Yalçin was held out by the Respondent as someone who had authority to act on behalf of the club in relation to matters involving Basketball. It would ordinarily follow, in the eyes of any third party without knowledge of the internal rules of the Respondent, that such a person had authority to enter into contracts with players and players' agents on behalf of the Respondent. In all the circumstances, and deciding the matter *ex aequo et bono*, the Arbitrator finds that a valid contract between the Claimant, the Player and the Respondent was therefore concluded following the exchange of the Contract by fax. To the extent that Mr Yalçin or Mr Baruk acted otherwise than in accordance with their authority, this is an internal matter for the Respondent.

53. There are three further points raised by the Respondent.

54. First, the question of the TBF Contract. It is a shorter contract that contains some of the terms also found in the Contract relied upon by the Claimant (such as the Player's salary). However, the Arbitrator finds that no matter arises from the TBF Contract that affects the interpretation of the Contract put forward by the Claimant. In particular, the Arbitrator notes again that the Claimant was not a party to the TBF Contract.

55. Secondly, the Respondent submitted that the Player should have informed the Claimant of the position in relation to the authorised signatories of the Respondent. There is not sufficient evidence to establish that the Player knew the position in relation to the Respondent or should have known that position. There is certainly no evidence that this was communicated by the Player to the Claimant. For those reasons, the Arbitrator rejects the Respondent's submission.

56. Thirdly, the Respondent submits that the Respondent itself explained the position to the Claimant. In the Procedural Order No 4, dated 22 May 2009, the Respondent was invited to provide details of such explanation to the Claimant. The Respondent did not provide any such details. The Arbitrator therefore finds that there is not sufficient evidence to establish that the Claimant was aware of the position.

57. The Arbitrator therefore finds for the Claimant in respect of the two instalments of USD 20,000 due under the Contract. The Arbitrator finds that the first of these instalments was due to the Claimant on 6 November 2007 and the second was due on 15 January 2008.

7. Costs

58. 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, as a general rule, the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

59. On 30 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 7,000.

60. The Arbitrator notes that the Respondent's share of the Advance on arbitration costs was paid by the Claimant. The Arbitrator therefore decides that the Respondent shall pay to the Claimant EUR 7,000 being the costs advanced by the Claimant.

61. Furthermore, the Arbitrator considers it appropriate that the Claimant is entitled to the payment of a contribution towards its legal fees and 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. The Arbitrator also wishes to observe, in making this

determination about the level of legal costs that should be awarded, that the Claimant did not respond to Procedural Order number 3 in this arbitration. The Arbitrator's task would have been greatly assisted by a response to that Procedural Order, which went to the most important issue in this arbitration. Hence, in all the circumstances, and after having reviewed and assessed the submission by the Claimant, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at EUR 4,000.

8. Interest

62. The Claimant also claims interest on the unpaid fees. 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 rate is 5% per annum and the Arbitrator considers, in line with the jurisprudence of the FAT, that this is a reasonable rate of interest that should be applied to the outstanding payments, i.e. from 7 November 2007 and from 16 January 2008 respectively.

9. AWARD

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

I. Beşiktaş Jimnastik Kulubu is ordered to pay to XL Basketball Agency USD 40,000.00 together with 5% interest p.a. on USD 20,000.00 from 7 November 2007 and 5% interest p.a. on USD 20,000.00 from 16 January 2008.

II. Beşiktaş Jimnastik Kulubu is ordered to pay to XL Basketball Agency EUR 7,000.00 as a reimbursement of the advance of FAT costs.

III. Beşiktaş Jimnastik Kulubu is ordered to pay to XL Basketball Agency EUR 4,000.00 as a contribution towards XL Basketball Agency's legal fees and expenses.

IV. Any other or further-reaching claims for relief are dismissed.

Geneva, 21 July 2009

Raj Parker

(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."