FIBA

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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0037/09 FAT)

rendered by

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Raj Parker

in the arbitration proceedings

Mr. Sasa Vasiljevic
represented by Mr. Miodrag Z. Raznatovic, Attorney at Law, Strahinjica Bana 14, Belgrade, Serbia.

- Claimant -

vs.

Basketball Club Menorca Basquet SAD, 07703 Mahon, Menorca, Pavello Menorca, Angel Ruiz y Pablo 11, Balearic Islands, Spain.

- Respondent -

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1. The Parties

1.1. The Claimant

1. Mr. Sasa Vasiljevic (hereinafter the “Claimant”) is a citizen of Serbia and a professional basketball player. He is currently domiciled in Rhodes, Greece. The Claimant is represented by counsel.

1.2. The Respondent

2. Basketball Club Menorca Basquet SAD (hereinafter "BC Menorca" or the "Respondent") is a Spanish basketball club in Menorca, Spain. It is domiciled at 07703 Mahon, Menorca, Pavello Menorca, Angel Ruiz y Pablo 11. The Respondent is not represented by counsel but has made submissions on its own behalf.

2. The Arbitrator

3. On 24 March 2009, 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 31 March 2009, 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. On 1 January 2007, the parties entered into a Player Contract (the "Player Contract"). Under the Player Contract, the Claimant was employed "*as a skilled basketball player for the sport seasons 2006/2007 and 2007/2008*".

6. Later that year the parties agreed that the Player Contract should be terminated and the Claimant released from his services to the Respondent. On 27 August 2007 the parties concluded an agreement for early termination of the Player Contract, a document entitled "Agreement for early termination of contract" (the "Termination Agreement").

7. The Termination Agreement provides for two payments to be made by the Respondent to the Claimant:

> *"The Club is obliged to pay 62.000 Euro to the player as follows:*
>
> *a) amount of 31.000 Euro not later than the 15th of October 2007*

b) amount of 31.000 Euro not later than the 15th of December 2007".

8. In addition, the Termination Agreement provides for a single payment to be made to each of the Claimant's two agents. These latter payments, however, are not in issue in these proceedings.

9. The Termination Agreement also sets out the penalty incurred by the Respondent as a result of late payment:

> *"The contractual parties agree that delay in doing payments by the club of 8 days will not be considered as the delay. If the club delays with any payment (to the player or to the agents) for more than 8 days, will be subject of late penalty fee of 200 Euro per each day of delay."*

10. The Respondent made the first payment of EUR 31,000.00 to the Claimant but it has not made the second payment, on the basis that the Termination Agreement is not valid.

3.2. The Proceedings before the FAT

11. On 18 March 2009 the Claimant filed a Request for Arbitration in accordance with the FAT Rules.

12. By letter dated 31 March 2009, a time limit until 21 April 2009 was fixed for the Respondent to file the Answer to the Request for Arbitration. By the same letter, and with a time limit for payment until 14 April 2009, the following amounts were fixed as the Advance on Costs:

"Claimant (Mr. Vasiljevic)	*EUR 5,000*
Respondent (BC Menorca)	*EUR 5,000"*

13. On 7 April 2009, the Claimant paid his share of the Advance on Costs.

14. On 27 April 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 Costs. Therefore, the Claimant would have to pay the Respondent's share in the amount of EUR 5,000, which the Claimant did on 6 May 2009.

15. On 22 May 2009 and 9 June 2009, the Arbitrator issued two Procedural Orders requesting, among others, additional submissions and documents from the parties. The Claimant and Respondent each made submissions in accordance with the said Procedural Orders.

16. 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.

17. By letter dated 28 June 2009, the Arbitrator closed the proceedings subject to the parties submitting their accounts of costs.

18. On 30 June 2009, the Claimant submitted the following account:

> *"1 non reimbursable fee 3.000 Euro*
> *2) advanced costs 5.000 Euro*
> *3) advanced costs in favor of respondent 5.000 Euro*
> *4) lawyers expenses for submitting documents 7.250 Euro*
>
> *TOTAL / 20.725,00 Euro "*

19. The Arbitrator notes that there appears to have been a mistake in the calculation of these figures, as the individual amounts total EUR 20,250.

20. The Respondent did not submit a summary of costs.

4. The Parties' Submissions

4.1. The Claimant's Submissions

21. The Claimant submits that the Termination Agreement is valid and binding, and that he is therefore owed all monies outstanding under the Termination Agreement.

22. The Claimant submits that he does not know who signed the Player Contract and the Termination Agreement on behalf of the Respondent, but that it is the same person, as is evidenced by the handwriting.

23. The Claimant submits that he originally thought that Mr. Jose Luis Sintes Pons, the President of the Respondent, had signed the Player Contract because it is his name that is printed at the start and end of this document.

24. The Claimant submits that, regardless of who actually signed both documents, the Respondent's signatory had the necessary authority to bind it, because the Player Contract was concluded and, under it, the Claimant went on to play basketball for the Respondent for the 2006 – 2007 season, and was remunerated for this accordingly.

25. Moreover, the Claimant then received the first instalment of EUR 31,000 under the Termination Agreement from the Respondent. The Claimant submits that the Respondent would not have made this payment had it not considered the Termination

Agreement to be valid.

26. The Claimant submits that under the relevant wording within the Termination Agreement – as quoted at paragraph 7 above – the Respondent agreed to pay the Claimant a total of EUR 62,000, in two instalments, but that the second instalment is still outstanding.

27. The Claimant submits that both he and one of his agents reminded the Respondent of its duty to pay the EUR 31,000 on numerous occasions, to no avail.

28. The Claimant submits that:

> *"The late penalty fee, started to be enforced, on the 23rd of December 2007, what means for the moment the respondent delays 450 days (8 days in 2007, 366 days in 2008 and 17 days in 2009), what practically means additional 90.000 Euro."*

29. The Claimant has therefore made the following request for relief:

> *"a) To award claimant with amount of 121.000 Euro plus interest at the applicable Swiss statutory rate, starting from the 18th of March 2009.*
>
> *b) To award claimant with the full covered the costs of this Arbitration."*

4.2. The Respondent's Submissions

30. The Respondent submits that the Termination Agreement is not valid and binding, and that it therefore does not owe any further monies to the Claimant under the Termination Agreement.

31. The Respondent submits that the Player Contract and Termination Agreement were signed by Mr. Felix de Pablo, ex-Sports Manager at the Respondent, and that Mr. de Pablo does not have the necessary "*legal power to sign any agreement with the player or coaches*" on behalf of the Respondent.

32. The Respondent argues that Mr. Jose Luis Sintes Pons is the only person with the authority to bind the Respondent, as is evidenced by the Power of Attorney it has submitted.

5. Jurisdiction and other Procedural Issues

5.1. The jurisdiction of FAT

33. 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).

34. The Respondent did not challenge the jurisdiction of FAT. Hence the Arbitrator asserts jurisdiction over the present dispute (Art. 186(2) PILA). For the sake of completeness, the Arbitrator will nevertheless examine the validity of the arbitration agreement contained in the Contract (see 5.1.2 below).

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

5.1.1 Arbitrability

36. 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

37. 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.*
>
> *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."*

38. The jurisdiction of the FAT over the dispute between Claimant and the Respondent would in any event result from clause 7 of the Termination Agreement which reads as follows:

> *"Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved 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.*

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

> *The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile.*
>
> *The language of the arbitration shall be English.*
>
> *Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law.*
>
> *The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

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

40. 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]

41. As an aside, the Arbitrator notes that the Respondent takes issue with the validity of the Termination Agreement for the reasons summarised above. That said, pursuant to Article 178(3) PILA, "[t]he arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen." Hence, the Respondent's arguments regarding the validity of the Termination Agreement will be addressed when dealing with the merits of

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

the case but do not constitute a sufficient ground to challenge the Arbitrator's jurisdiction.

5.2. Other Procedural Issues

42. The Respondent has not provided an Answer in these proceedings but has responded to the Procedural Orders (as has the Claimant).

43. In light of this, the Arbitrator considers himself fit to proceed with the arbitration and deliver the award.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

44. 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",* 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".*

45. 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."*

46. As mentioned above (see paragraph 38), the Termination Agreement contemplates that the FAT arbitrator shall decide the dispute *ex aequo et bono.*

47. 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* :

> *"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]

48. 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]

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

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

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

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

49. 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".

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

6.2. Findings

51. The issue to be determined in this matter is the validity of the Termination Agreement. If it is valid, the Claimant succeeds on his claim for the unpaid principal amount. If the Termination Agreement is not valid, the claim fails.

52. According to the Respondent, Mr. de Pablo signed the Termination Agreement. If that is right, it is apparent from a cursory inspection of the signature on the original Player Contract that Mr. de Pablo also signed that contract. The Respondent's answer to Procedural Order No 2 confirms this.

53. It is also apparent that the Claimant played for the Respondent's team during the 2006-2007 season and was paid for some time prior to the signing of the Termination Agreement. Had the Player Contract not been in force, the Termination Agreement would not have been required.

54. For these reasons, the Arbitrator considers that the parties to the Player Contract were bound by the terms of that contract. It is not open to one party to a contract to act in accordance with the contract and later deny its validity. The fact that the Respondent

made payments to the Claimant under the Player Contract demonstrates that it considered the Player Contract to be binding.

55. If the Player Contract (under which the parties had operated) was signed by Mr. de Pablo, there was no reason for the Claimant to have questioned the fact that Mr. de Pablo also signed the Termination Agreement on behalf of the Respondent. It was reasonable for the Claimant to infer that the person signing the Termination Agreement on behalf of the Respondent had authority to do so. Again, the conduct of the Respondent, in paying the first instalment required under the Termination Agreement, demonstrates that the Respondent considered the Termination Agreement to be valid and binding as between the Respondent and the Claimant. There does not appear to be any other reason that it would make such payment to the Claimant (and no reason was provided by the Respondent to explain that payment). In particular, there is no evidence that the Respondent has questioned or requested repayment of the first instalment by the Claimant.

56. Both parties have acted on the basis that the Termination Agreement was valid. Deciding the matter *ex aequo et bono,* the Arbitrator finds that the Respondent is precluded from denying the truth of that assumption and from denying the validity of the Termination Agreement.

57. The Arbitrator therefore finds that the Claimant is entitled to be paid the amount of EUR 31,000 due under the Termination Agreement. The Arbitrator finds that this sum fell due to the Respondent on 15 December 2007.

58. The Claimant has also claimed an amount of EUR 90,000 in respect of late payment penalties, as provided under the Termination Agreement. As is evident from the figures involved, the claim in respect of late payment penalties is significantly larger than that

relating to the principal amount due.

59. In the circumstances of the present case, the Arbitrator does not consider this to be a reasonable claim. In principle, a contractual penalty should not be disproportionate to the compensation whose payment is secured by the contractual penalty.[7] In the present circumstances, the Arbitrator is not satisfied that, at the time of contracting, the sum of EUR 200 per day represented a genuine pre-estimate of the player's possible loss flowing from any non-payment by the club. In addition, the Arbitrator finds the amount of EUR 90,000 that is claimed to be excessive in light of the fact that the Claimant waited more than 14 months before filing his claim with the FAT.[8] Therefore, the Arbitrator in exercising his powers *ex aequo et bono* finds it just and equitable to reduce the amount due for late payments to EUR 2,000.

60. The Claimant also requests the payment of interest "at the applicable Swiss statutory rate" starting from 18 March 2009 (the date on which the Claimant filed his 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 is 5% p.a.

61. In view of the Arbitrator's decision with respect to the late payment penalty covering the period between the due payment date and the filing of the claim, the above interest rate should apply to the amounts of EUR 31,000.00 and EUR 2,000.00 from 18 March 2009.

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[7] *See* FAT 0036/09, TP Sports vs. WBC St. Petersburg.

[8] *See* FAT 0008/08, Djoric vs. PBC Lukoil Academic Sofia.

7. Costs

62. 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.

63. On 30 July 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 10,000.

64. In the present case, the costs shall be borne by 80% by the Respondent and 20% by the Claimant. The Claimant succeeded in his primary claim for the unpaid payment of EUR 31,000.00 but succeeded in part only of his claim for the "late penalty fee" payments under the Termination Agreement.

65. 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 80% of the arbitration costs, i.e. EUR 8,000.00.

66. Furthermore, the Arbitrator considers it appropriate that the Claimant is entitled to the

payment of a contribution towards his 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. Hence, 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 4,500.

8. AWARD

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

I. Basketball Club Menorca Basquet SAD is ordered to pay to Mr Sasa Vasiljevic EUR 31,000.00 together with 5% interest p.a. on this amount from 18 March 2009.

II. Basketball Club Menorca Basquet SAD is ordered to pay to Mr Sasa Vasiljevic EUR 2,000.00 for late payment penalties together with 5% interest p.a. on this amount from 18 March 2009.

III. Basketball Club Menorca Basquet SAD is ordered to pay to Mr Sasa Vasiljevic EUR 8,000.00 as a reimbursement of the advance on the arbitration costs.

IV. Basketball Club Menorca Basquet SAD is ordered to pay to Mr Sasa Vasiljevic EUR 4,500.00 as a contribution towards his legal fees and expenses.

V. Any other or further-reaching claims are dismissed.

Geneva, 4 August 2009

Raj Parker

(Arbitrator)

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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."