FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(FAT 0041/09)

rendered by

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Stephan Netzle

in the arbitration proceedings

Panellinios KAE Basketball Club, 2 Evelpidon Str., 11362 Athens, Greece
represented by Mr. Sofoklis P. Pilavios, 29 Irodotou Str., 10673 Athens, Greece

- Claimant -

vs.

Mr. Alfrie Eugene Kelley, c/o BC Eldan Ashkelon, 38 Ben Gurion Av., Ashkelon
c/o C.A.A. Sports, Mr. André Buck
represented by Mr. Solly Laniado, Zysman, Aharoni, Gayer & Ady Kaplan & Co. Law Offices, 41-45 Rotshild Blvd., 65784 Tel Aviv, Israel

- Respondent -

FIBA Arbitral Tribunal (FAT)

1. The Parties

1.1. Claimant

1. Panellinios KAE Basketball Club (hereinafter "Claimant" or the "Club") is a professional basketball club with its seat in Athens, Greece. It is domiciled at 2 Evelpidon str., 11362 Athens, Greece. Claimant is represented by Mr. Sofoklis P. Pilavios, attorney-at-law in Athens, Greece.

1.2. Respondent

2. Mr. Alfrie Eugene Kelley (hereinafter "Player" or "Respondent") is a professional basketball player of US nationality. He is represented by Mr. Solly Laniado, an attorney-at-law from Tel Aviv, Israel.

2. The Arbitrator

3. On 12 May 2009, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Dr. Stephan Netzle as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").

4. On 25 May 2009 the Arbitrator accepted his appointment and signed a declaration of

acceptance and independence.

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

3. Facts and Proceedings

3.1. Background Facts

6. On 28 February 2008, the Parties signed an Entire Player's Agreement (hereinafter referred to as the "Agreement") by which Respondent was employed by Claimant for the basketball seasons 2007/2008 and 2008/2009, subject to an opt-out/buy-out clause. For the 2007/2008 basketball season, Claimant undertook to compensate Respondent with a base salary of USD 90,000. Respondent was also entitled to receive certain bonuses if the team would win the Greek League.

7. Regarding the 2008/2009 season the Parties agreed the following:

> *"2. Opt outs –Buy outs*
> *Club has the right to* ***select to opt out*** *of the 2nd year of the Agreement by paying to Player the amount of* ***$ 25,000.00 USD*** *as compensation on top of his salaries for the 2007-2008 season, until the 15th of July, 2008. In such case, player becomes an unrestricted free agent throughout the world. In case Club selects to continue Agreement, Player has the right to buy out of his 2nd year obligation, by paying to the Club the amount of* ***$ 50,000.00 USD****, until the 15th of July 2008. In case opt out of Club or buy out of Player are not exercised on proper dates, Agreement for 2nd year becomes fully valid and*

guaranteed the 16th of July, 2008.
[…]
***3.B. 2008-2009 basketball season:** In case Club and player elect to retain Contract under full force and effect for season 2008-2009, the **Club** agrees to pay the **Player** for rendering services to the Club for the 2008-2009 basketball season, a fully guaranteed Greek net salary of **$ 250,000.00 USD** or the equivalent in Euros to be paid in ten equal monthly instalments of **U.S. Dollars twenty five thousand ($ 25,000.00 USD)** net each, payable on the last day of each month, commencing with September, 2008 and concluding with June, 2009.*

***Bonuses 2008-09** Provided Club and Player elect to retain contract in full force and effect during 2008-2009 season hereunder, in which **Player** participates in the Greek League, Greek Cup and European Competition, and additionally to the fully guaranteed, net salary set forth above, **Club** shall pay the **Player** net bonuses that will be discussed and set upon Club and Player elect to keep this present Agreement in effect for season 2008-2009 as set forth and agreed in paragraph 2 above.*

This Agreement is a no-cut guaranteed contract and the Club shall not have the right to suspend or release the Player should the Player not exhibit skill or competitive ability. Should an injury befall the Player rendering the Player incapable of performing in some or all of the team's remaining games, or in the event of Player's death, Club agrees to meet all payment obligations as though Player had performed in all games and to pay all remaining compensation and bonuses due to the Player to his estate or beneficiary as though Player had fully performed. Should the Club elect to replace the Player with another foreign player at any time during the term of this Agreement the Club shall continue to pay the Player his guaranteed salary payment for the full term of this Agreement at the times and amounts specified above. The Player agrees to make himself available for insurance examinations in order to allow the Club to purchase a policy of disability insurance."

8. On 11 August 2008, Claimant granted Respondent a twenty days leave of absence in order to negotiate and secure a contract with a new team for the 2008/2009 season. The respective letter reads as follows:

"With this letter, KAE GS PANELLINIOS grants basketball Player Mr. Alfrie "Tre" Kelley a twenty (20) days leave of absence in order for him to act pursuant to negotiating and securing a contract with a new team/club to offer his services for the 2008-2009 basketball season."

Such leave of absence is valid from 11 August 2008 until 31 August 2008, after which

> *period of time, Player, having not agreed with a new team/club, shall return to team in order to participate normally to all team scheduled activities."*

9. Respondent did not return to Claimant's team, neither before 31 August 2008 nor thereafter.

10. On 26 September 2008, Respondent signed a non-guaranteed employment contract with Miami Heat, a professional basketball club competing in the National Basketball Association ("NBA").

11. On 29 September 2008, FIBA informed the Hellenic Basketball Federation ("HBF") that an NBA team intended to enter into a player contract with Respondent and asked whether or not Respondent was under a valid employment contract with a Club in Greece.

12. As the HBF did not reply after two reminders sent on 3 and 6 October 2008, FIBA finally issued a letter of clearance on 7 October 2008.

13. By email dated 9 October 2008, the HBF informed FIBA that it was aware that a letter of clearance for Respondent had already been issued but as an obligation to Claimant, it had to inform FIBA about the Agreement between the Club and the Player that contained a buy-out clause for the transfer of the Player.

14. It turned out later, that already on 3 October 2008, Respondent had been released from Miami Heat and that the letter of clearance was no longer required.

15. On 16 October 2008, Respondent entered into an agreement with the Israeli basketball

club Eldan Ashkelon. Respondent played his first game with Eldan Ashkelon on 25 October 2008 against the team of Jerusalem.

16. To date, neither Respondent nor Claimant have made any payments in application of Clause 2 (“Opt outs – Buy outs”) of the Agreement. Furthermore, neither Respondent nor Eldan Ashkelon have made any payments related to Respondent’s transfer to Eldan Ashkelon.

3.2. The Proceedings before the FAT

17. On 9 April 2009, Claimant filed a Request for Arbitration in accordance with the FAT Rules.

18. By letter dated 29 May 2009, the FAT Secretariat confirmed receipt of the Request for Arbitration as well as the non-reimbursable handling fee and informed the Parties of the appointment of the Arbitrator. In the same letter, a time limit was fixed for Respondent to file its Answer to the Request for Arbitration until 19 June 2009 (the “Answer”). The letter also requested the Parties to pay the following amounts as an Advance on Costs by no later than 13 June 2009:

“Claimant (Panellinios KAE Basketball Club):	*EUR 4,000*
Respondent (Alfrie Eugene Kelley):	*EUR 4,000"*

19. By letter dated 15 June 2009, Respondent requested the Arbitrator to extend the time limit for filing the Answer until 10 July 2009, and the time limit for the payment of his share of Advance on Costs until 24 June 2009. By letter dated 20 June 2009, the

Arbitrator granted Respondent an extension of the time limit for the Answer until 2 July 2009 and for the payment of his share of Advance on Costs until 25 June 2009.

20. On 25 June 2009 Respondent asked for another extension of the time limit for the payment of the Advance on Costs, which was granted by the Arbitrator with the proviso:

    "The Arbitrator has decided to accept such an additional extension and set a final time limit for the payment of Respondent's share of the advance on costs by no later than Monday, 13 July 2009."

21. On 2 July 2009 Respondent filed his Answer and a Counterclaim with FAT.

22. By letter dated 7 July 2009, the FAT Secretariat confirmed the receipt of Respondent's Answer and Counterclaim and stated that the final time limit for the payment of Respondent's share of the Advance on Costs was by no later than 13 July 2009.

23. By letter dated 30 July 2009, the FAT Secretariat sent a final reminder to Respondent informing him that

    "(i)n accordance with Article 9.3 of the FAT Rules, the Arbitrator herewith invites Respondent to pay his share of the Advance on Costs (EUR 4,000) by no later than Tuesday, 4 August 2009. In the event that FAT has not received the above payment by 4 August 2009, Respondent's Counterclaim <u>shall be deemed withdrawn.</u>"

24. By letter dated 25 August 2009, the FAT Secretariat informed the Parties that:

    "Since all the deadlines to pay [his] share of the Advance of Costs were ignored by Respondent and taking into consideration that the Tribunal explicitly advised Respondent of the consequences thereof and Respondent did not present any valid justification as to why the deadlines were not met, the Arbitrator decides that the Counterclaim dated 2 July

2009 is herewith deemed withdrawn".

25. Furthermore and in accordance with Article 9.3 of the FAT Rules, Claimant was invited to substitute for the missing payment of Respondent's share of the Advance on Costs relating to Claimant's claim until 4 September 2009. Claimant paid Respondent's share of the Advance on Costs on 8 September 2009.

26. By letter dated 25 September 2009 the FAT Secretariat confirmed receipt of the full amount of the Advance on Costs, declared the exchange of documents completed and invited the Parties to submit a detailed account of their costs by no later than 2 October 2009. It emphasized that pursuant to the Arbitrator's decision communicated to the Parties on 25 August 2009, the Counterclaim had been deemed withdrawn.

27. By email of 27 September 2009, Respondent submitted the following account of costs:

> *"Further to the Decision dated September 25th 2009 detailed hereunder Respondent's costs with regard to this case:*
> *7,500 € representing legal fees cost of Claimants [sic] with regard to the undersigned legal services with regard to this claim.*
> *1,000 € representing estimated expenses (long distance calls, documentations deliveries, photocopies etc.)"*

28. By letter dated 1 October 2009, Claimant submitted the following statement of costs:

"Non reimbursable fee	*EUR 3,000*
Claimant's share	*EUR 4,000*
In lieu of Respondent	*EUR 4,000*
Legal fees and expenses	*EUR 5,000"*

29. The Parties did not request the FAT to hold a hearing. The Arbitrator therefore 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.

4. The Parties' Submissions

4.1. Claimant's Submissions

30. Claimant submits that on 28 February 2008 the Parties signed the Agreement which covered the sporting seasons 2007/2008 and 2008/2009. Clause 2 of the Agreement allowed Claimant to opt out of the second year of the Agreement by paying Respondent Claimant a compensation of USD 25,000.00. On the other hand, Respondent was entitled to buy out of the second year of the Agreement by paying to Claimant an amount of USD 50,000.00. These options had to be exercised until 15 July 2008 (see full text quoted in par. 7 above).

31. According to Claimant, neither Claimant nor Respondent exercised their rights to opt out or buy out of the Agreement within the time limit set in Clause 2 of the Agreement. Accordingly, the Agreement continued to be valid until the end of the 2008-2009 season.

32. Nevertheless, before the beginning of the training sessions for the 2008/2009 season, Respondent requested a 20-days leave of absence in order to negotiate and secure a contract with a new team for said season. Claimant did not want to retain the Player against his will and therefore granted the requested leave of absence from 11 to 31

August 2008. In case Respondent had not managed to conclude an Agreement with a new club by 31 August 2008, he had to return and continue playing with Claimant's team for the 2008/2009 season (see full text of the respective letter in par. 8 above).

33. By 31 August 2008, Respondent had not managed to conclude a contract with a new club for the 2008/2009 season. However, he did not return to the Club thereafter but, on 26 September 2008, signed a non-guaranteed contract with Miami Heat and, after this contract was cancelled on 3 October 2008, signed another employment contract with Eldan Ashkelon.

34. Claimant submits that Respondent breached the Agreement by not respecting the obligation to return to the Club after the leave of absence and eventually terminated the still valid Agreement by signing a new employment contract without paying the buy-out compensation of USD 50,000.00.

35. Claimant also submits that Respondent acted in bad faith when he utilized the confusion which occurred when FIBA had requested the HBF to issue a letter of clearance, since this request (and also the issuance of this letter of clearance) was brought to Claimant's attention only after the employment contract with Miami Heat had already been dissolved.

36. Claimant submits that it would have been the contractual duty of Respondent to inform the Club of his intention to conclude an employment agreement with Eldan Ashkelon and to exercise his right to opt out of the Agreement which triggered the payment of USD 50,000.00. However, despite several reminders and various attempts to solve the matter, Respondent had refused to make any payment to Claimant.

37. Claimant therefore requests the payment of the buy-out compensation of USD 50,000.00 according to Clause 2 of the Agreement. In addition, Claimant claims from Respondent payment of the non-amortized part of the EUR 20,000.00 which it had paid to Respondent's former club (Cibona Zagreb) "for the acquisition of the athlete's rights" [sic]. Finally, Claimant claims a compensation to be determined by the Arbitrator for the sporting damage caused by the Respondent's failure to provide his services to the Club during the remaining duration of the Agreement.

4.2. Claimant's Request for Relief

38. On the basis of the contentions set above, Claimant requests that the FAT:

> *"a. Establishes the arbitrability of the dispute and the admissibility of this request.*
>
> *b. Accepts the claim of Claimant in its entirety.*
>
> *c. Establishes and confirms that Respondent breached the employment contract concluded on 28.02.2008 without just cause and is thus liable for compensation.*
>
> *d. Orders Respondent, as the party in breach, to pay to the Claimant the amount of 50.000,00 USD, as per buy-out of the remainder of the Employment Contract for the sporting season 2008-2009 pursuant to art. 2 of the said agreement, otherwise as adequate compensation mutually agreed by the parties thereto for the release of Respondent.*
>
> *e Orders the Respondent, to pay to the Claimant any amount considers appropriate as compensation related to non-amortised expenses paid to the former club of Respondent with regard to the acquisition of the latter's rights from Cibona Zagreb.*
>
> *f. Specifies the level of any other additional and adecuate [sic] compensation ex aequo et bono in consideration to the sports related damage caused to the Claimant by the Respondent in the light of the specificity of sport and the impact of the serious disrespect of the principle of good faith, which is of outstanding importance in*

contractual law.

g. *Orders the payment of the amount assessed with an interest rate of 5% or in the alternative with the interest rate decided by FAT Arbitrator ex aequo et bono.*

h. *Orders the Respondent to pay all costs and expenses incurred by the Claimant in connection with the proceedings before the FAT."*

4.3. Respondent's Submission

39. Respondent rejects the claim submitted by Claimant. He submits that while he performed his duties in conformity with the Agreement, it was the Claimant that breached its contractual obligations. After the end of the 2007/2008 season during which a specific dispute between the Parties had occurred, Claimant's representatives told Respondent and his US agent that Claimant did not want to continue the Agreement and engage Respondent for the 2008/2009 season and recommended that Respondent find an alternative team. Claimant's statements had to be deemed as Claimant's exercise of the opt-out option which triggered Claimant's obligation to pay Respondent the amount of USD 25,000.00 as set out in Clause 2 of the Agreement. It was only after such statements had been made by the Club that Respondent's agents began to look for alternative engagement options. These activities were a reaction to the Club's statements and did not constitute Respondent's exercise of the buy-out option.

40. However, when the time limit of 15 July 2008 indicated in Clause 2 of the Agreement elapsed without Respondent entering into another agreement with an alternative club, the Agreement continued to be effective for the 2008/2009 season. Claimant then made another attempt to get rid of the Respondent without paying the opt-out

compensation: it granted the Respondent a leave of absence from 11 to 31 August 2008, hoping Respondent would find another club, then exercise the buy-out option and eventually pay Claimant the respective compensation of USD 50,000.00. Claimant's dishonest intention was demonstrated by its denial of Respondent's return to the Club by not providing the required flight tickets, and also by the fact that Claimant had meanwhile exhausted its maximum foreign players' quota which prevented Respondent's registration for the 2008/2009 season.

41. Furthermore, when Claimant failed to notify FIBA of an existing valid contract in order to grant the letter of clearance and to pay Respondent's salary in September 2008 it demonstrated that it had no intention to engage Respondent in the 2008/2009 season and thereby breached the Agreement.

42. Respondent also rejects Claimant's claim related to the transfer sum paid to Respondent's former club (Cibona Zagreb) because of lack of any legal or contractual basis. That transfer agreement was concluded exclusively between Claimant and Cibona Zagreb and did not bind the Parties to the Agreement in dispute.

43. Finally, in his counterclaim Respondent submits that as a consequence of Claimant's breach of contract, he is entitled to USD 145,000.00 net, being the difference between his actual income for the 2008/2009 season and the salary to which he was entitled under the Agreement. Alternatively, Respondent claims that he is entitled to the opt-out compensation of USD 25,000.00 because Claimant encouraged Respondent to look for a new club and demonstrated in many other ways that it had lost its interest in the Player's services, thereby exercising the opt-out option according to Clause 2 of the Agreement which triggered the obligation to pay the respective compensation to

Respondent.

4.4. Respondent's Request for Relief

44. Respondent requests the following:

> *"11.1 To fully dismiss the claimant's claim.*
>
> *11.2 To determine the club has breached the agreement and commitments towards Respondent and accordingly award Respondent the following reliefs:*
>
> *11.2.1. To pay Respondent the sum of 145,000 USD net representing the difference between the original agreement payment and the actual payment Respondent earned during the 2008/09 season.*
>
> *11.2.2. Alternatively and without derogating from the above relief, the order the claimant to pay Respondent the sum of 25,000 USD representing the opt out sums the club was committed to pay according to the agreement terms.*
>
> *11.3. To order the club to pay Respondent's legal expenses."*

5. Jurisdiction

45. 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).

46. The jurisdiction of the FAT presupposes the arbitrability of the dispute and the

existence of a valid arbitration agreement between the parties.

5.1. Arbitrability

47. 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]

5.2. Formal and substantive validity of the arbitration agreement

48. 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."*

49. The jurisdiction of the FAT over the dispute between Claimant and Respondent results from Clause 11 of the Agreement which reads as follows:

> ***"11. Jurisdiction in Case of Dispute:***
>
> *This Agreement will be executed under the official rules of the law in Greece. Any disputes arising with respect to or in connection with this Agreement shall be submitted to the relevant Greek League Committee for Financial Disputes.*

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

> *Any dispute arising from or related to the present contract can also 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. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

50. There is no indication that a claim is pending before the Greek League Committee for Financial Disputes. On 9 April 2009, Claimant filed its Request for Arbitration with the FAT and therefore elected to submit the dispute to the FAT.

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

52. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (cf. Article 178(2) PILA). In particular, the wording *"any disputes arising from or related to the present contract"* clearly covers the present dispute.[2]

53. Moreover, Respondent addressed the merits of the dispute without objecting to FAT's jurisdiction (cf. Article 186(2) PILA).

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

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

54. 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".*

55. 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."*

56. The first paragraph of Clause 11 of the Agreement, quoted above, provides that:

> *"This Agreement will be executed under the official rules of the law in Greece."*

57. The last sentence of Clause 11 then makes it clear that, should the Parties elect to submit their dispute to the FAT (as opposed to the "relevant Greek League Committee for Financial Disputes"),

"The arbitrator *[and CAS upon appeal] shall decide the dispute ex aequo et bono."*

58. Furthermore, the Parties did not refer to Greek law in their submissions, but explicitly authorized the Arbitrator to decide *ex aequo et bono* (see Claimant's request for relief quoted in par. 38 above).

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

6.1.1 The statutory concept of *ex aequo et bono* arbitration

60. 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]

61. 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

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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 PILA.

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

circumstances of the case".[6]

62. 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".

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

6.2. Findings

6.2.1 The issues

64. The question the Arbitrator has to decide is whether Claimant is entitled to the claimed compensation

- of USD 50,000.00 because (i) Respondent exercised the buy out-option in Clause 2 of the Agreement, or (ii) because this was the adequate and agreed compensation for unilateral termination of the Agreement by Respondent, and/or

- of an amount to be determined by the Arbitrator for the non-amortized expenses paid part of the payment made by Claimant to Respondent's former club, and/or

- of an amount to be determined by the Arbitrator for the sports-related damage suffered by Claimant as a consequence of Respondent's conduct.

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

65. The converse question whether Respondent is entitled to compensation from Claimant is not a matter to decide in this proceeding since, failing payment of the respective Advance on Costs, Respondent's counterclaim was deemed withdrawn.

6.2.2 Is Claimant entitled to compensation because Respondent exercised the buy out-option?

66. Clause 2 of the Agreement indicates how the buy out-option was to be exercised, namely by payment of the respective compensation of USD 50,000.00 on or before 15 July 2008. There were no other formal requirements to be observed by the Player as long as it was evident for the Club that such payment was made for the purpose of exercising the buy out-option. In other words, it was not by a notice of termination or another declaration but by timely payment of the respective amount itself that the buy out-option was to be exercised.

67. It is undisputed that Respondent did not pay USD 50,000.00 to Claimant on or before 15 July 2008 in order to exercise the buy out-option. Nor did Claimant exercise the opt-out option by paying the respective amount of USD 25,000.00 within the same time limit. The Parties thus remained bound by the Agreement also after the expiration of the 15 July 2008 time limit.

68. There is no evidence that the Parties mutually agreed to extend the time period for the exercise of the buy out-option or otherwise amended Clause 2 with regard to the modalities for the exercise the buy out-option.

69. The Arbitrator thus concludes that Clause 2 of the Agreement cannot serve as a legal

basis for Claimant's claim of USD 50,000.00.

6.2.3 Is Claimant entitled to compensation because of unilateral termination of contract by Respondent?

70. Alternatively, Claimant argues that when Respondent did not return to the Club but signed an employment agreement with another club, the amount of USD 50,000.00 became due because this was the adequate compensation mutually agreed for the release of the Respondent from his contractual duties.

71. After the expiration of the buy out-option (15 July 2008), Respondent was granted a temporary leave of absence until 31 August 2008 to find another club. No conclusive evidence has been submitted which would demonstrate whether this leave of absence was granted on the Player's or the Club's initiative or which would support Respondent's allegation that he was forced to accept such leave of absence. Both Parties have submitted copies of emails exchanged between Respondent's agent André Buck and Mr. Kostas Papadakis of FCM, a FIBA-licensed players' agent located in Greece, who seemingly advised Respondent with regard to his activities in Greece. However, these emails reflect the discussions between the agents and do not allow any reliable conclusions to be drawn with respect to Claimant's behavior at that time.

72. The letter by which the leave of absence was granted did not address the question of what would happen if Respondent was successful in finding an alternative club for the 2008/2009 season. In particular, that letter did not say that in such case, Respondent would be released only against a buy out-compensation of USD 50,000.00. There is also no other evidence which would support Claimant's submission that the Parties had

agreed on a compensation of USD 50,000.00 against which Respondent was entitled to leave the Club either during the leave of absence-period or thereafter, or which would become due if Respondent simply left the Club.

73. Failing any evidence to the contrary, the Arbitrator finds that when Claimant issued the letter by which the leave of absence was granted, it was to be understood by Respondent as a permission to stay away from the Club until end of August 2008 and to sign an employment contract with another club. However, although not explicitly mentioned in the letter granting the leave of absence, the correspondence submitted by both Parties indicates that it was common understanding between them that if a new club was found, it was still necessary to obtain Claimant's consent to terminate the Agreement and to issue a formal letter of clearance. The correspondence also indicates that it was the Parties' understanding that such consent would be subject to a compensation payable by the Player.

74. The correspondence between the agents further indicates that the agents discussed various options for Respondent's sporting future, including continuing "searching the market" also after the expiration of the leave of absence. Apparently, Mr. Papadakis approached Claimant to obtain an extension of the leave of absence. However, these emails do not prove that Claimant actually granted such an extension or agreed to an early termination of the Agreement. They rather demonstrate that the agents assumed that the Club would insist on the payment of compensation before releasing the Player from the Agreement. That said, there is no evidence that the Parties actually agreed on the amount of such compensation.

75. Upon expiration of the leave of absence, the Respondent had not found an alternative

employment and was therefore obliged to resume his duties under the Agreement as explicitly stated in the letter granting the leave of absence. It is undisputed that Respondent did not return to the Club but there is no evidence why Respondent decided not to do so. In particular, there is no evidence which would support Respondent's allegation that Claimant refused or prevented Respondent's return to the Club.

76. On 26 September 2008, Respondent signed another employment contract with Miami Heat while he was still bound by the Agreement. Claimant submits that it learned of this new employment contract only when the letter of clearance was requested. Claimant did not object to the new employment and did not call Respondent back but was ready to agree to the termination of the Agreement upon signing certain unspecified documents "for the protection of the Claimant's lawful rights" and a payment corresponding to the buy out-compensation. The employment with Miami Heat ended before an agreement on the terms of a termination agreement with Claimant was reached. Still, Respondent did not return to the Club, and there is no evidence whether any attempts have been made by either party to resume their employment relationship. A few days later, Respondent joined Eldar Ashkelon.

77. The Arbitrator concludes from these facts that Respondent failed to resume his contractual duties towards Claimant and breached the Agreement when he signed a new employment contract with Miami Heat, walking away from his employment and thereby unilaterally terminating the Agreement. Respondent is therefore liable for the damage suffered by Claimant because of such breach.

78. In line with the constant jurisprudence of FAT, the claimant must prove the existence

and the quantum of the damage claimed. The only substantiated damage suffered by Claimant is the unamortized part of the amount which it paid to Respondent's former club Cibona Zagreb Basketball Club to obtain Respondent's services for the remaining half of the season 2007/2008 and the full season 2008/2009.

79. When Respondent terminated the Agreement after the season 2008/2009 and before the start of the season 2008/2009, he had actually provided his services only for the remaining three months of the season 2007/2008, i.e. about 30% of his entire commitment. When calculating the unamortized part of the amount paid by Claimant to Respondent's former club, the Arbitrator finds that only the playing seasons but not the period between the seasons shall be taken into consideration. Thus, when Respondent left the Club, the Arbitrator finds that 70% of the amount paid by Claimant to Respondent's former club were still unamortized, which corresponds to USD 14,000.00.

80. The unpaid buy out-compensation of USD 50,000.00 cannot be considered as damage suffered by Claimant. That amount was the price due for an early termination of the Agreement by the Player within a clearly defined time-window. The Player had no duty to exercise this option, and there is no evidence that he avoided exercising the buy out-option in bad faith e.g. because he had already decided to leave the Club.

81. When determining the compensation for the damage suffered, the Arbitrator must take the behaviour of both parties and also the circumstances into account. However, the Parties' representations of the circumstances which led to the termination of the Agreement diverge quite substantially and are not supported by conclusive evidence. No circumstances have been shown to exist which would justify a reduction of the

compensation claimed with respect to the unamortized part of the payment made by Claimant to Respondent's previous club. The Arbitrator therefore finds *ex aequo et bono* that Respondent shall compensate Claimant for the unamortized part of the expenses sustained by the latter in the amount of USD 14,000.00.

6.2.4 Is Claimant entitled to compensation for sporting damages?

82. Claimant can only request damages actually suffered. It has to prove the damage claimed and the causal connection. The Agreement does not contain any provision on which a claim for compensation for sporting damages could be based. Claimant does not specify the sporting damages allegedly suffered. Nor does it provide any guidance as to how a compensation for such sporting damages should be calculated. The Arbitrator thus finds that this claim does not reach the minimum standard of substantiation and is therefore dismissed.

6.2.5 Default interest

83. Claimant requests payment of default interest of 5% or in the alternative, the application of the interest rate decided by FAT Arbitrator *ex aequo et bono*. Although the Agreement does not explicitly provide that the debtor is to pay default interest, this is a generally accepted principle which is embodied in most legal systems. The Arbitrator, deciding *ex aequo et bono* and in line with the jurisprudence of the FAT decides that an interest rate of 5% per annum is to be applied on the amounts due, starting on the day Respondent terminated the Agreement by joining another club, i.e. from 26 September 2008.

6.2.6 Counterclaim

84. In his Counterclaim, Respondent argued that Claimant was the party in breach of contract and requested FAT to award Respondent (i) the sum of USD 145,000.00 being the difference between the salary provided for under the Agreement and the actual income Respondent earned during the 2008/2009 season, and (ii) USD 25,000.00, representing the opt-out payment due by Claimant. However, according to the Arbitrator's decision of 25 September 2009, the Counterclaim has been deemed withdrawn and is no longer within the scope of this arbitration.

7. Costs

85. On 10 November 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 8,000.00

86. Taking the outcome of the arbitral proceeding into account, i.e. the reduction of the claimed amount on the one side and the fact that the counterclaim was deemed

withdrawn on the other side, the costs shall be borne by both Parties in equal shares.

87. Given that Claimant has paid the totality of the Advance on the arbitration costs of EUR 8,000.00, as fixed by the Arbitrator, the Arbitrator decides that Respondent shall pay to Claimant 50% of the Advance on arbitration costs, i.e. EUR 4,000.00.

88. Furthermore, the Arbitrator considers it adequate that Claimant is entitled to the payment of a contribution towards its reasonable legal fees and other expenses (Article 19.3 of the FAT Rules). Since in the case at hand the payment by Claimant of the non-reimbursable handling fee was not taken into account when allocating the costs of the arbitration, the Arbitrator considers it adequate to take into account the non-reimbursable fee when assessing the expenses incurred by Claimant in connection with these proceedings. After having reviewed and assessed the submissions by Claimant, the Arbitrator fixes the contribution towards the legal fees and expenses of Claimant at EUR 4,000.00.

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8. AWARD

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

1. **Mr. Alfrie Eugene Kelley is ordered to pay to Panellinios KAE Basketball Club USD 14,000.00 together with 5% interest p.a. from 26 September 2008.**

2. **The counterclaim of Mr. Alfrie Eugene Kelley is deemed to be withdrawn.**

3. **Mr. Alfrie Eugene Kelley is ordered to pay to Panellinios KAE Basketball Club EUR 4,000.00 as a reimbursement of the advance of FAT costs.**

4. **Mr. Alfrie Eugene Kelley is ordered to pay to Panellinios KAE Basketball Club EUR 4,000.00 as a contribution towards Panellinios KAE Basketball Club's legal fees and expenses.**

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

Geneva, seat of the arbitration, 12 November 2009

Stephan Netzle

(Arbitrator)

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."