We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0059/09 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr Klaus Reichert

in the arbitration proceedings between

Ms. Katarina Mrcela, Medaśna 12, 10040 Zagreb, Croatia

- Claimant 1-

Ms. Elmira Draskicevic, Kalipi Sok. No. 70 Ova Apt. D:3, Teşvikiye, Istanbul, Turkey

- Claimant 2-

both represented by Mr. Salim Baki, Baki Law Firm, Osmaniye Mah. Mine Sok. Emre Konutlari A Blok D:26 34144 Bakirkoy, Istanbul, Turkey

vs.

BC Dunav, 30 Mutkurova Str., 7000 Rouse, Bulgaria

- Respondent -

Av. Louis Casaï 53
P.O. Box 110
1216 Cointrin / Geneva
Switzerland

Tel: (+41-22) 545 0000
Fax: (+41-22) 545 0099
info@fiba.com
www.fiba.com

1. The Parties

1.1. The Claimants

1. Ms. Katarina Mrcela (“the Player” or “Claimant 1”) is a professional basketball player, who was playing for the basketball club BC Dunav at the time the dispute arose.

2. Ms. Elmira Draskicevic (“the Agent” or “Claimant 2”) is a FIBA-certified agent and Claimant 1’s agent.

1.2. The Respondent

3. BC Dunav (“the Club” or “Respondent”) is a professional basketball club in Bulgaria.

2. The Arbitrator

4. On 20 September 2009, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Mr. Klaus Reichert as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules"). Neither of the Parties has raised objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1. Background Facts

5. Claimant 1 and Respondent entered into an agreement entitled “Professional Basketball Contract” on 17 December 2008 whereby the latter engaged Claimant 1 for the remaining of the 2008-2009 season (the “Player Contract”).

6. On the same day Claimant 2 and Respondent entered into an agreement entitled “Fee Agreement” whereby the latter undertook to pay Claimant 2 a fee of EUR 2,200 not later than 11 January 2009 for her services in connection with the Player Contract (the “Agent Contract”, both contracts being hereinafter collectively referred to as the "Contracts").

7. The relevant parts of the Player Contract provide as follows:

> *“ARTICLE I – DURATION AND PRELIMINARY CONDITIONS*
>
> *1. The present contract has a duration of five (5) months, beginning on January 10, 2009 and ending on May 31, 2009 (finish Championship)*
>
> *2. If one single of the preliminary conditions are not fulfilled, the contract will not take effect:*
>
> *a) The Player will arrive in Rouse (Bulgaria) no later than January 10, 2009 in good health and without hidden injuries. The Player has to pass the medical tests asked for by the relevant Bulgarian and FIBA regulations.*
>
> *b) The Club will pay for a round trip airplane ticket from Zagreb (Croatia) to Rouse (Bulgaria). Player will pick up the prepaid ticket on [sic] the airport in Zagreb (Croatia).*
>
> *ARTICLE II – THE CLUB’S OBLIGATIONS*
>
> *1. The Club will pay to the Player a net salary (after taxes) of 22,000 Euro to be paid according to the following payment schedule:*
>
> *After passing the medical examinations no later than January 11, 2009 the player will receive 2,000 Euro.*
>
January 25, 2009	*2000 euro*
February 10, 2009	*4000 euro*
March 10, 2009	*4000 euro*
April 10, 2009	*4000 euro*
May 10, 2009	*4000 euro*
May 30, 2009	*2000 euro*
>
> *The money are [sic] guaranteed and will be paid in Euro only.*
>
> *[…]*
>
> *4. The Club will pay for one additional round trip plane ticket for the Player’s husband*

(Croatia-Bulgaria-Croatia)

[…]

ARTICLE IV – BREACH OF PREMATURE ENDING OF THE CONTRACT

1. Under no circumstances other than serious professional misconduct (if Player does not comply with rules and regulations of the Bulgarian League Federation, the team regulations, FIBA regulations and during testing and doping control) to be notified to the player by registered mail within 48 hours, can the Club cut the Player.

2. In the event that the Club is more than 10 (ten) working days late on any payment to the Player, the Player will be entitled to receive all outstanding payments and the Player's release without any terms of obligations from the Club to be free to sign with any other team in Bulgaria or abroad."

8. By letter dated 28 April 2009 Claimant 2 complained to the Respondent that no payment under the Contracts hade been made and stated the following:

"We kindly ask the Club to pay all debts to the Player and her representative in following seven (7) days – until May 5, 2009.
Otherwise we will be pushed to use our rights that Player will not participate on the practices and the games after May 5, 2009.
As the last, we inform you that if the Club again no respect [sic] their obligations we will inform FIBA and FIBA Arbitrate [sic] Tribunal (FAT)."

9. By letter dated 13 May 2009 Claimant 2 informed the Respondent of the following:

"After my previous letter from April 28, 2009, I was asked from your side to extend per[i]od for the payments until May 10-12. I got promises from you that KATARINA MRCELA will be paid in full until that date. We (Player and I) decided to give you one chance more and she keep playing official games for the Club as well as she practiced.
On May 12, 2009 she played last semi final play offs game even she was not payed [sic].
From today KATARINA MRCELA will not participate on any practice and any game more for the Club, at least until the Club realize all payments to her and her agent.
Be sure that if the club do not realize all payments to her and her agent in the following seven days, this time all necessary documents will be sent to FIBA and FAT."

10. It is uncontested that the Player did not participate in the last four games of the Respondent for the 2008-2009 season.

3.2. The Proceedings before the FAT

11. On 1 September 2009, the Claimants filed a Request for Arbitration dated 26 August 2009 in accordance with the FAT Rules, and on 28 August 2009 they duly paid the non-reimbursable fee of EUR 3,000.

12. On 21 September 2009, the FAT informed the Parties that Mr. Klaus Reichert had been appointed as the Arbitrator in this matter, and fixed the amount of advance on costs to be paid by the Parties as follows:

"Claimant 1 (Ms. Mrcela)	*EUR 3,000*
Claimant 2 (Ms. Draskicevic)	*EUR 500*
Respondent (BC Dunav)	*EUR 3,500"*

13. On 29 September 2009, the Claimants paid their shares of the advance on costs in a total amount of EUR 3,500.

14. On 10 and 19 October 2009, the Respondent submitted its Answer in two parts.

15. On 22 October 2009, the FAT Secretariat informed the Claimants that they would have to substitute for the Respondent with respect to the advance on costs because the latter had not paid its portion thereof.

16. On 30 October 2009, the Claimants made the substitute payment in an amount of EUR 3,500.

17. On 17 November 2009, the Claimants submitted a Reply to the Respondent's Answer.

18. On 2 December 2009, the Respondent submitted a Rejoinder ("Second Answer") albeit this was dated 1 November 2009.

19. By letter dated 7 December 2009 the Arbitrator asked the Parties whether they wished to file any further documentary evidence or if they were content that all such evidence

was before him.

20. On 14 December 2009 the Claimants replied to the above procedural order confirming that they did not wish to file any further documentary evidence and that they were content that all evidence was before the Arbitrator.

21. By letter dated 22 December 2009 the Respondent reaffirmed its positions in reply to the Claimants' case and did not include any further documentary evidence.

22. On 7 January 2010, considering that neither party had solicited 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 Parties' written submissions. The Arbitrator accordingly issued a procedural order providing that the exchange of documents was completed and inviting the Parties to submit their cost accounts.

23. On 15 January 2010, the Claimants submitted their costs as follows:

"Non-reimbursable handling fee	*EUR 3,000.00*
Advance on costs	
Katarina Mrcela	*EUR 3,000.00*
Elmira Draskicevic	*EUR 500.00*
Advance on costs (Respondent's share)	*EUR 3,500.00*
Legal fees	*EUR 4,500.00"*

24. The Respondent did not submit its account of costs.

4. The Positions of the Parties

4.1. The Claimants' Position

25. The Claimants submit the following in substance:

- In Article II of the Player Contract it is made clear that the payments are guaranteed and that the Respondent expressly agreed to a no-cut guaranteed agreement.

- Claimant 1 did not participate in the last four games but Article IV(2) of the Player Contract makes it clear that if the Club is more than ten working days late on any of the periodic payments to Claimant 1 (see Article II) then all outstanding payments become due. Claimant 1 would also be entitled to be released to join any other team either in Bulgaria or abroad. The Claimants point out that Claimant 1 participated in games up to 13 May 2009 but not after. They also say that the statistics demonstrate that Claimant 1 performed well.

- No evidence has been put forward by the Respondent to substantiate the allegation of fines imposed on the Player during March and April 2009.

- The Claimants dispute the allegation that EUR 10,000.00 was in fact paid to Claimant 1 and point out that the Respondent proffered no evidence of such payments.

- The Claimants hypothesize that even if EUR 10,000.00 had been paid to Claimant 1, the Player Contract did not absolve the Respondent from an obligation to pay the balance of EUR 12,000.00. The Claimants also deny that there was a salary offer in May 2009 and point to the absence of detail in relation

thereto in the Answers.

- No evidence has been put forward by the Respondent to substantiate its position that it had paid for the two round-trip air-tickets.

- The Claimants deny the allegations concerning an alleged failure by Claimant 1 to discuss her behaviour with the Chairman of the Respondent and also alleged public statements about negotiations with rival clubs. Again the Claimants point to the absence of supporting evidence.

- Finally, the Claimants join issue with the Respondent's position on the Agent Contract and refer to that contract as expressly providing that an agency fee of EUR 2,200.00 was to be paid no later than 11 January 2009.

26. In their Request for Arbitration dated 26 August 2009, the Claimants request the following relief:

"*Claimant 1 requests:*

1- 22,000 Euro for the non-paid salary and interest payment at the applicable Swiss statutory rate from the due date of each payment,

2- 700 Euro for two round trip airplane tickets

3- Compensation of arbitration fees and costs

4- A contribution towards her legal fees and expenses.

Claimant 2 requests:

1- 2,200 Euro for her agency fee and interest payment at the applicable Swiss statutory rate from the due date of each payment,

2- Compensation of arbitration fees and costs

3- A contribution towards her legal fees and expenses."

4.2. Respondent's Position

27. The Club (which was not represented by external counsel in this Arbitration) submits the following in substance:

- Claimant 1 has already been paid EUR 10,000.00.

- Claimant 1 breached the Club's Internal Regulations: firstly, she did not participate in the last four games, practice sessions or other activities during April and May 2009; secondly, she refused to travel with the team on 17 May 2009 for two important games; thirdly, during March and April 2009 a fine was imposed by the coach many times for breach of the Internal Regulations for indiscipline and lack of respect; fourthly, she refused to discuss her bad behaviour with the Chairman of the Respondent; and fifthly, she announced in public that she was negotiating with two rival clubs.

- Importantly, in its Second Answer the Respondent stated as follows:

  "Having in mind all facts and details submitted in our two answer[s], our statement is that Claimant's 1 request is not admissible and non-credible. According to Article II of the Contract and the Fee Agreement, the Club effect salary payment to the Claimant 1 – 10 000 euro for correct execution of Player's obligations. The rest of 12 000 euro, we decide not to pay because of luck [sic[of execution her obligations as a player – Article - III of the professional basketball Contract, dated 17 December 2008" (emphasis added by the Arbitrator).

- In its Second Answer the Respondent gave further details of the allegation that it had offered Claimant 1 a sum of EUR 2,500.00 on 14 May 2009 to take part in the final play-off and that she had refused that offer. In support of that allegation the Respondent enclosed three written orders for sanctions based upon the Respondent's Internal Regulations imposing financial sanctions on the Player for EUR 8,200.00. These documents are dated 6, 12 and 14 May 2009 respectively.

- In respect of Claimant 2, the Respondent should only pay 10% of the salary which it actually paid to Claimant 1.

5. Jurisdiction

28. 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). 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

29. The Arbitrator finds that the dispute referred to him is 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

30. 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."*

31. The jurisdiction of the FAT over the present dispute results from the following

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

arbitration clause which is contained in both the Player Contract (Article VII) and the Agent Contract (Paragraph 2):

> *"Any dispute arising from or related to the present contract shall be submitted to the FIBA [sic] Arbitrate Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the Arbitration Rules by a single arbitrator appointed by FAT President.*
> *The seat of arbitration shall be in Geneve, Switzerland.*
> *The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrispective [sic] of the parties's [sic] domicile.*
> *The language of the arbitration shall be English [sic].*
> *Awards of 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 decisions of the CAS upon appeal, as provided in article 192 of the Swiss Act on Private International Law ("PILA")*
> *The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

32. Both Contracts are in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.

33. In addition, both Parties have acknowledged the jurisdiction of FAT in their written submissions. In particular, the Respondent confirmed in its Answer dated 10 October 2009 that

> *"We agree this dispute shall be submitted to the FAT rules in accordance with arbitration agreement, dated 17 December 2008 – Article VII of Professional Basketball Contract."*

34. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).

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 authorize the Arbitrators to decide "*en équité*" instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

> *"the parties may authorize the arbitral tribunal to decide ex aequo et bono".*

36. 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."*

37. Article VII of the Player Contract and Paragraph 2 of the Agent Contract provide that the arbitrator shall decide the dispute "*ex aequo et bono*". Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

38. For the sake of completeness, the Arbitrator notes that the Respondent in its Answer dated 19 October 2009 stated the following:

> *"Having in mind our statement we would like to ask the appointed arbiter – Mr. Klaus Reichert to decide the dispute ex aequo et bono applying general considerations of justice and fairness."*

39. 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[2] (Concordat)[3], 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*

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

[3] P.A. KARRER, Basler Kommentar, No. 289 ad Art. 187 PILA.

> *not inspired by the rules of law which are in force and which might even be contrary to those rules."*[4]

40. 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".[5]

41. 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*".

42. In light of the foregoing considerations, the Arbitrator makes the findings below:

6.2. Findings

6.2.1 Discussion and conclusion on the facts

43. For reasons explained at the end of this introductory paragraph, the prism through which the Arbitrator has viewed the merits of the factual case of Claimant 1 is whether or not the defences raised by the Respondent stand up to scrutiny. There is no doubt, from a factual point of view, that Claimant 1 did in fact play for the Respondent for a considerable period of time. There is no suggestion that she did not, in fact, ever play for the Respondent, and a discussion of when she played and when she ceased to play, is not relevant. There is also no doubt of the fact of the Player Contract and its terms have not been challenged by either side. As a final introductory comment,

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

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

Claimant 1 has, through counsel, asserted that she has not been paid. Proof of a negative is a difficult concept. The Arbitrator does however, as a threshold factual matter, accept that Claimant 1 has discharged her *prima facie* burden of proof that she has not been paid.

44. First, the Respondent says that it has made payments totaling EUR 10,000.00 to Claimant 1. It says, with its very last written communication, that these payments were made in cash. That method of payment is not referred to in any of the previous documents, particularly in the declaration of Mr. Padalski (stated to be the Chairman of the Board of Directors of the Respondent) which accompanied the Respondent's letter received on 2 December 2009.

45. The Arbitrator does not accept this allegation of payments in cash totaling EUR 10,000.00 particularly as it requires belief in the fact that a professional basketball club did not record anywhere in its documentation the fact of such payments over several months to one of its players. This lack of documentation on an alleged cash payment also does not sit well with the apparent careful adhesion to written records of participation in games by players and careful documentation of fines for alleged indiscipline. The Respondent cannot have things both ways; for issues which suit its purposes it documents matters carefully, and for issues which do not suit its purposes, no documentation exists. Further, in its Second Answer the Respondent clearly stated its rationale for not paying Claimant 1 the full EUR 22,000.00 provided for in the Player Contract, namely that EUR 12,000.00 was withheld for alleged breach of obligations. This is clearly a reference to the position which the Respondent takes, namely that it imposed fines upon Claimant 1. However, the documented fines which were submitted in this Arbitration total only EUR 8,200.00 and not EUR 12,000.00. The credibility of the allegation that EUR 10,000.00 was paid to Claimant 1 is inextricably linked to the credibility of the allegation that EUR 12,000.00 in fines were imposed upon Claimant 1.

Given the clear disparity in the Respondent's case and the evidence it proffered in respect of fines (simply put, the documented fines fall well short of EUR 12,000.00 so as to lend support to an allegation that EUR 10,000.00 was paid to Claimant 1), this fatally undermines the credibility of the Respondent's position on cash payments allegedly made. Therefore, the Arbitrator finds, as a matter of fact, that no payments were made by the Respondent to Claimant 1. The Arbitrator rejects the defence of the Respondent that payments totaling EUR 10,000.00 were made to Claimant 1.

46. Secondly, the Respondent says that Claimant 1 was guilty of breaches of the Internal Regulations which led to the imposition of fines. The Respondent's Second Answer makes it clear that the Respondent's position was that fines were imposed by the coach during the months of March and April 2009. The documentary evidence proffered to support that position, however, makes no reference to that time-frame as each *Order* (enclosed with the Second Answer) is plainly dated in May 2009, emanates from the Chairman of the Respondent (and not the coach), does not indicate (nor enclose) any documentation which would show the procedures provided for in Article 15 of the Internal Regulations as having been followed in each case. It is particularly striking that Article 15 of the Internal Regulations makes very clear that when any sanction above a reprimand is contemplated, then a specific, careful and detailed procedure must be followed with a right of representation accorded to the accused party. Had such a procedure been followed by the Respondent in respect of each *Order*, then plainly the trail of documentation upon which they were founded would have been put forward in this Arbitration in order to satisfy the burden of proof. No such documentation was put forward and the total absence of documentation to show that Article 15 of the Internal Regulations had been followed is both telling and factually devastating for the Respondent's position.

47. As already noted, there is a clear disparity between the figures asserted by the

Respondent. On the one hand it suggests that only EUR 10,000.00 was paid to Claimant 1 on foot of the Player Contract out of a total obligation of EUR 22,000.00 by reason of fines for indiscipline and the like. However, when the documentary evidence to substantiate those fines is examined, they fall well short of EUR 12,000.00 and indeed only amount to EUR 8,200.00. This glaring disparity further demonstrates the difficulty with the Respondent's position.

48. The clear factual inference which the Arbitrator can only draw from the foregoing is that the Respondent's allegation that Claimant 1 was the subject of legitimate fines (whether totaling EUR 8,200.00 or EUR 12,000.00) pursuant to the Internal Regulations has no substance. The Respondent's factual case in this regard is wholly inconsistent, is founded upon documentation which has no corroborative evidential value, and has notable gaps (such as a total absence of documentation showing adherence to Article 15 of the Internal Regulations). Thus, as a matter of fact, the Arbitrator holds that there was no legitimate fine or sanction directed against Claimant 1 present in this matter.

49. Finally, in respect of the two round-trip air-tickets, the Respondent says that these were paid for; however, it did not provide any documentary evidence to substantiate this position. It would have been a matter of particular ease to have provided receipts as all air-travel gives rise to documentation – that is a trite fact associated with travel. The fact that no documentation was proffered by the Respondent to back-up its position leads the Arbitrator to the factual conclusion that no air-tickets were in fact purchased for Claimant 1 and her husband, notwithstanding the clear provisions in the Player Contract [Article I(2)(b) and Article II(4)]. Claimant 1 asserts in the Request for Arbitration that EUR 700.00 represents such costs and nowhere in the documentation is this estimate factually contested. Thus, the Arbitrator finds as a matter of fact that the Respondent did not purchase two round-trip air-tickets for Claimant 1 and her husband.

The Arbitrator also finds as a matter of fact that the costs of such round-trip air-tickets amounts to EUR 700.00. The evidence at Annex VI attached to the Request for Arbitration supports this factual conclusion.

50. With respect to Claimant 2, the Arbitrator notes that at no stage in this Arbitration has the validity of the Agent Contract been disputed, nor has any question been raised as to the authenticity of the copy provided with the Request for Arbitration.

51. Further, there is nothing in the evidence before the Arbitrator which shows that the Respondent paid Claimant 2 any money at all. Thus, as a matter of fact, the Arbitrator holds that Claimant 2 has received no money from the Respondent.

6.2.2 Discussion of *ex aequo et bono* and the relevant principles for this Arbitration

52. The Arbitrator has identified two principal considerations which reflect justice and fairness for the purposes of this Arbitration.

53. It is a matter of universal acceptance that *pacta sunt servanda*, i.e., that parties who entered into contracts are bound by their terms. Observance of obligations entered into is a fundamental and integral matter common throughout all civilized nations and legal systems. Without such a principle, commerce, honesty, and the integrity of dealings would all but vanish. It is just and fair that when parties enter into the sort of contracts which they did in this matter, then the provisions of such contracts should be observed.

54. Secondly, it is an established principle common to many nations (indeed it is supportive of the previous principle) that interest runs from the day after the date on which the principal amounts are due. Indeed, it appears just and fair that when one party is deprived of a sum of money after the date upon which it is due, interest accrues to alleviate the situation.

55. In respect of Claimant 1, it is unquestionably the case that the Respondent is obliged to pay her a total amount of EUR 22,000.00. The Respondent is obliged to adhere to the contractual obligations it entered into with Claimant 1 particularly when one notes the express use of the word guaranteed on the face of the Player Contract. The Respondent signed this agreement with Claimant 1, she played matches for it, and in return she clearly has the legitimate entitlement to be paid the sums of money agreed between the Parties. Thus, the Arbitrator finds and holds that *ex aequo et bono* and in light of the factual findings, the Respondent must pay EUR 22,000.00 to Claimant 1. A similar finding applies to the sum of EUR 700.00 claimed by Claimant 1 in respect of round-trip air-tickets.

56. Turning to interest, it is clear to the Arbitrator that Claimant 1 has been deprived of the sums lawfully due to her under the Player Contract. The question is from when were those sums due. The answer is to be found in Article IV(2) of that contract, namely that if the Respondent was ten working days late on any payment to Claimant 1, all outstanding payments would thereupon become due. In light of the findings made by the Arbitrator in this Award, it appears that as no money was paid to Claimant 1, the trigger date for Article IV(2) becomes ten working days after 11 January 2009 (being the first payment date in the Player Contract). According to the Arbitrator's calculations, that date is 26 January 2009 at which time the entire sum of EUR 22,000.00 became due to Claimant 1. In accordance with the principle *ex aequo et bono* concerning interest identified in the previous section, interest therefore runs on this amount as and from 27 January 2009. What remains to be identified is the rate of interest. Since the Claimants have referred to the Swiss statutory rate and given that article 104 of the Swiss code of obligations sets the statutory interest rate at 5% per annum, which in this case seems fair and reasonable, interest will be awarded at that rate. Thus, a rate of 5% simple interest on the sum of EUR 22,000.00 as and from 27 January 2009 until payment meets the justice of this matter.

57. With regard to interest on the sum of EUR 700.00 found to be due in respect of air-tickets, for ease of calculation the Arbitrator fixes the relevant date from which simple interest will run until payment as 27 January 2009, at a rate of 5% (consistent with the discussion in paragraph 56 of this Award).

58. Turning to Claimant 2, *ex aequo et bono* principles viewed through the factual findings make it abundantly clear that the Respondent is obliged to pay EUR 2,200.00 to that claimant. The Agent Contract is crystal-clear in its provisions and there is no doubt but that the agreed fee was due on 11 January 2009. Similarly in respect of interest, the same principles apply and therefore the relevant date is 12 January 2009 from which simple interest at 5% will run until payment.

7. Costs

59. Article 19.2 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and may either be included in the award or communicated to the parties separately. Furthermore, Article 19.3 of the FAT Rules provides that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, it shall grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings.

60. On 8 February 2010 - 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 to be EUR 6,867.50.

61. Considering that the Claimants prevailed in the entirety of their claims, it is appropriate that the Respondent should bear the burden of the arbitration costs and also the legal costs.

62. Given that the Claimants paid the totality of the advance on costs of EUR 7,000.00, the Arbitrator decides that in application of article 19.3 of the FAT Rules:

    (i) FAT shall reimburse EUR 132.50 to the Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the FAT President;

    (ii) The Respondent shall pay EUR 6,867.50 to the Claimants, being the difference between the costs advanced by them and the amount they are going to receive in reimbursement from the FAT;

63. Furthermore, the Arbitrator considers it appropriate to take into account the non-reimbursable fee of EUR 3,000.00 when assessing the expenses incurred by the Claimants in connection with these proceedings. Hence, and after having reviewed and assessed the submission by the Claimants, which the Arbitrator finds reasonable, he fixes the contribution towards the Claimants' expenses at EUR 7,500.00.

8. AWARD

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

1. BC Dunav shall pay Ms. Katarina Mrcela an amount of EUR 22,700.00, plus interest at a rate of 5% per annum on such amount from 27 January 2009 until payment.

2. BC Dunav shall pay Ms. Elmira Draskicevic an amount of EUR 2,200.00, plus interest at a rate of 5% per annum on such amount from 12 January 2009 until payment.

3. BC Dunav shall pay Ms. Katarina Mrcela and Ms. Elmira Draskicevic an amount of EUR 6,867.50 as reimbursement for the advance on costs paid by them to the FAT.

4. BC Dunav shall pay Ms. Katarina Mrcela and Ms. Elmira Draskicevic an amount of EUR 7,500.00 as reimbursement for their legal fees and expenses.

5. All other requests for relief are dismissed.

Geneva, seat of the arbitration, 8 February 2010

Klaus Reichert

(Arbitrator)

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."