FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0066/09 FAT)

rendered by

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Alfonso Albert, C/ Pescara 2, Bloque 1, Prta. 1, 03730 Javea/Xàbia (Alicante), Spain

represented by Mr. José Lasa Azpeitia, LAFFER ABOGADOS, C/ Yerma 10 7˚ D, 28033 Madrid, Spain

- Claimant -

vs.

AEP Olimpias Patron, 93 Riga Feraiou Str., 26221 Patras, Greece

represented by Mr. George V. Gesoulis, attorney at law, Leoforos Nikis 3, 45624 Thessaloniki, Greece and Mr. George S. Sferopoulos, attorney at law, Syggrou 5, 45624 Thessaloniki, Greece

- Respondent -

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1. The Parties

1.1. The Claimant

1. Mr. Alfonso Albert (hereinafter “the Player” or “Claimant”) is a professional basketball player of Spanish nationality. He is represented by Mr. José Lasa Azpeitia of the law firm LAFFER ABOGADOS, Madrid.

1.2. The Respondent

2. AEP Olimpias Patron (hereinafter "the Club" or “Respondent") is a professional basketball club with its seat in Patras, Greece. Respondent is represented by two counsels, namely Messrs. George V. Gesoulis and George S. Sferopoulos, both attorneys in Thessaloniki, Greece.

2. The Arbitrator

3. On 2 December 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 the same day, 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 26 July 2009, Claimant and Respondent signed an employment contract (hereinafter referred to as the "Contract") according to which Claimant was to be employed by Respondent for the entire basketball season 2009/2010. According to Clause 2 of the Contract, the term of the employment started on 26 July 2009 and was to end on 01 June 2010.

7. Clause 3 of the Contract reads as follows:

> *"Club agrees that this contract is a fully guarantee no cut contract / agreement which means that neither Club nor any assignee thereof nor the League can terminate this contract / agreement for any reason. This clause will even operate in case of illness or injury of the Player which means that if Player stops playing for any reason related to illness or injury all moneys contracted in this contract must be irrevocably paid to Player within the terms".*

8. Clause 4 of the Contract obliged the Club to pay EUR 5,000.00 to the Player upon his "passing medicals and drug test". Furthermore, the Player was entitled to the following monthly payments:

"30 September 2009	*EUR 4,000*
30 October 2009	*EUR 4,000*
30 November 2009	*EUR 4,000*

30 December 2009	*EUR 4,000*
30 January 2010	*EUR 4,000*
28 February 2010	*EUR 4,000*
30 March 2010	*EUR 4,000*
30 April 2010	*EUR 4,000*
30 May 2010	*EUR 4,000*
30 June 2010	*EUR 4,000"*

9. According to Clause 5, the Player was therefore entitled to receive EUR 45,000.00 net for the 2009/2010 season from the Club. Additionally, the Player was entitled to a bonus of EUR 5,000.00 if the team would end first or second of the championship of the Greek A2-league in the 2009/2010 season.

10. The Club also undertook to provide the Player with a fully equipped apartment and a car, and to bear certain costs as listed in Clause 4 of the Contract.

11. Claimant arrived in Patras on 15 August 2009. A few days later, he began to practice with the team. In the first week of September 2009, he travelled with the team to the city of Trikala for a friendly tournament. However, Claimant did not play in this tournament.

12. During the first days of September 2009, Claimant was allegedly examined by Respondent's team doctor and found to be "unqualified", i.e. unfit to play.

13. On 15 September 2009, Respondent submitted to Claimant a document titled "Expiry of Collaboration" in which the Club declared that the Contract with the Claimant was canceled, in the following terms:

> *"The AEP OLYMPIAS B.C., declares her expiry of collaboration with the athlete Alfonso Albert. As consequence, the contract between the AEP OLYMPIAS B.C. and the athlete Alfonso Albert, is cancelled, without any obligation by both sides.*
>
> *AEP OLYMPIAS B.C."*

14. On 17 September 2009, the Club served by bailiff on Claimant a document written in the Greek language only, dated 16 September 2009 and entitled "Out of Court Complaint-Deposition-Summons-Reservation" and setting out the reasons for the termination of the Contract. According to Claimant, he never received an English translation of this document.

15. By letter dated 21 September 2009, Claimant described to Respondent the conditions under which he was prepared to terminate the Contract in an amicable way. However, no such settlement was reached between the Parties.

16. Eventually, Claimant travelled back to Spain. In January 2010, he joined the basketball club of Assossiació Esportiva Centre Catòlic Mataró for the rest of the 2009/2010 season.

17. Claimant is requesting from Respondent the payment of the guaranteed amount of EUR 45,000.00 and certain amenities in the amount of EUR 23,400.00 plus EUR 16,184.06, corresponding to the presumed Spanish taxes on the guaranteed amount.

18. Respondent is not willing to make any payments to Claimant but, in turn, is asking FAT to award EUR 4,000.00 to it for alleged damages to its prestige.

3.2. The Proceedings before the FAT

19. On 19 November 2009, Claimant filed a Request for Arbitration (together with nine exhibits) in accordance with the FAT Rules.

20. By email and letter dated 8 December 2009, the FAT Secretariat confirmed receipt of the Request for Arbitration. In the said letter, the FAT Secretariat also confirmed the payment of the non-reimbursable handling fee of EUR 3,000.00 by Claimant and informed the Parties of the appointment of the Arbitrator. Furthermore, a time limit was fixed for Respondent to file its Answer to the Request for Arbitration, in accordance with Article 11.2 of the FAT Rules, until 5 January 2010 (hereinafter the "Answer"). The letter also requested the Parties to pay the following amounts as an Advance on Costs by no later than 29 December 2009:

"Claimant (Mr. Albert)	*EUR 3,500*
Respondent (AEP Olimpias Patron)	*EUR 3,500"*

21. On 4 January 2010, Respondent asked for an extension of the time limit to submit the Answer until 25 February 2010. By letter dated 7 January 2010, the FAT Secretariat informed the Parties of the Arbitrator's decision to grant an extension for filing the Answer until 25 January 2010 and for paying the Advance on Costs until 15 January 2010.

22. Claimant paid his share of the Advance on Costs on 12 January 2010.

23. On 25 January 2010 Respondent submitted its Answer. Together with its Answer, Respondent also raised a counterclaim in the amount of EUR 4,000.00 with respect to the damage allegedly caused by Claimant's behavior to Respondent's prestige. However, Respondent failed to pay its share of the Advance on Costs as set forth in FAT's letter dated 7 January 2010. Accordingly, the FAT Secretariat informed the Parties that pursuant to Article 9.3 of the FAT Arbitration Rules, the Arbitration would not proceed until the full amount of the Advance on Costs was received. Claimant was given a time limit until 10 February 2010 to pay Respondent's share of EUR 3,500.00.

24. By letter dated 3 March 2010, the FAT Secretariat wrote to the Parties that meanwhile Claimant had paid Respondent's share of the Advance on Costs. It also informed the Parties that the Arbitrator had decided that Respondent's counterclaim in the amount of EUR 4,000.00 was deemed withdrawn because Respondent had failed to pay its share of the Advance on Costs.

25. In the same letter, the FAT Secretariat asked Claimant whether he had meanwhile signed another employment contract for the remainder of the 2009/2010 season; if so, Claimant was requested to provide FAT with a copy of such contract by no later than 10 March 2010. In addition, Respondent was invited to provide FAT, within the same time limit, with a copy of the CAS award in the matter of AEP Olimpias Patron v. Grgurevic, to which Respondent had referred in its Answer.

26. By letter dated 16 March 2010, the FAT Secretariat confirmed that it had received the labour contract between Claimant and his new club Assossiació Esportiva Centre Catolic Mataró, and invited Respondent to submit its comments (with supporting documentation, if any) regarding this contract by no later than 23 March 2010. Respondent filed such comments on 23 March 2010 and also submitted further exhibits.

27. By letter dated 22 April 2010 the Arbitrator declared the proceedings closed and invited the Parties to submit their detailed accounts of costs until 30 April 2010.

28. Claimant did not submit a separate account of costs. The Arbitrator has however noted that the Request for Arbitration contains a request for the payment of costs in the amount of EUR 15,000.00 plus the payment of the non-reimbursable handling fee of EUR 3,000.00.

29. By facsimile dated 30 April 2010, Respondent submitted the following account of costs:

"1.2 The Costs of the Arbitration for the Club are shown in the following Table.

Required Task	***Legal Fee in Euros***
Study of the Request for Arbitration and the supporting documents	*1,500*
Preparation and submission of the "Answer of the Respondent" with documents	*2,500*
Study of the various Procedural Orders issued in the Pending case and the submitted documents	*600*
Preparation and submission of the "Submission of Document and Notice of Objection" dated 8 March 2010	*1,100*
Preparation and submission of the "Comments and Submission of New Documents" dated 23 March 2010	*1,300*
Costs of translation of 3 documents from Greek into English	*500*
Preparation and submission of present "Summary of Costs"	*500*

1.3 Therefore the Summary of the Costs of the present arbitration for the Respondent amounts to 7.500 Euros."

30. In accordance with Article 13.1 of the FAT Rules, the Arbitrator decided not to hold a hearing and to deliver the award on the basis of the written submissions on file.

4. The Parties' Submissions

4.1. Summary of the Claimant's Submissions

31. Claimant requests the payment of EUR 45,000.00 corresponding to the amount agreed by the Parties as remuneration for the Claimant's services as a professional basketball player, EUR 23,400.00 for certain amenities which Respondent had undertaken to pay

in Clause 4 of the Contract and EUR 16,184.06 for the prospective Spanish tax on the salary of EUR 45,000.00.

32. Claimant submits that on 26 July 2009, he and Respondent signed an agreement which constituted a guaranteed contract, as set out in Clause 3 of the Contract (see para. 7 above).

33. The Contract also provided for the payments by Respondent as set out in para. 8 above.

34. Claimant submits that on 15 August 2009, Claimant arrived in Patras and moved into the apartment provided by Respondent and started to exercise. In the first week of September 2009, he travelled with the team to the city of Trikala for a friendly tournament. However, the Claimant did not play in this tournament.

35. Claimant submits that on 9 September 2009, he was told by Respondent that the coach no longer wanted him in the team for the current 2009/2010 season.

36. On 15 September 2009, Respondent handed out to Claimant the letter entitled “Expiry of Collaboration” (see para. 13 above).

37. According to Claimant, Respondent asked him to counter-sign this letter to demonstrate his agreement. However, Claimant refused to do so.

38. On 17 September 2009, the document written in Greek and entitled “Out of Court Complaint-Deposition-Summons-Reservation”, was handed to Claimant.

39. On 21 September 2009, Claimant wrote a letter to Respondent in which he described

the actual situation and complained about the non-payment of his salary. He also asked for an English translation of the document mentioned above (cf. par. 38). Respondent never replied to Claimant's letter of 21 September 2009.

40. According to the labour contract with Assossiació Esportiva Centre Catõlic Mataró which was submitted to the FAT upon request of the Arbitrator, Claimant is entitled to a compensation of EUR 6,000.00 payable in four monthly installments of EUR 1,500.00 each, starting in February 2010.

4.2. The Claimant's Request for Relief

41. The Claimant requests the following relief:

- *"Claimant seeks relief whereby FAT would rule as follows:*
  - *Respondent is ordered to pay the amount of **FORTY FIVE THOUSAND EUROS (45.000 €)** as being this sum the amount settled by the parties as main remuneration for the Claimant services as a basketball player*
  - *Respondent is ordered to pay an additional amount **TWENTY THREE THOUSAND FOUR HUNDRED EUROS (23.400€)** as Amenities lost by the termination without cause of the Contract.*
  - *Respondent is ordered to pay an additional amount of **SIXTEEN THOUSAND ONE HUNDRED EIGHTY FOUR EUROS AND SIX CENTS OF EURO (16.184.06 €)** as been (sic) the actual tax sum which necessarily would be held be the Spanish Tax Authorities for Claimant to earn the agreed salary of FORTY FIVE THOUSAND EUROS (45.000 €)*
- *Claimant is ordered to pay penalty for legal interest at five percent (5%) per annum, in accordance to the terms and conditions expressed ut supra.*
- *Claimant is ordered to pay costs and reasonable legal fees on amount of FIFTEEN THOUSAND EUROS (15.000 €) concretely related to the*

execution of the present request for arbitration.

- *Claimant, additionally, is ordered to pay the legal costs effectively incurred to have access to FAT proceedings, i.e., the non-reimbursable handling fee of THREE THOUSAND EUROS (3,000€) as well as the advanced of costs eventually determined by FAT."*

4.3. Summary of Respondent's Submissions

42. On 15 August 2009, Claimant arrived in Patras where he was furnished with an apartment, a car and an amount of money for his out-of-pocket expenses.

43. Already after his arrival, Claimant complained of an earlier injury and pains which made it impossible for him to participate in any of the Respondent's practices and preparatory, friendly and official games. On the first days of September 2009, Claimant was examined by Respondent's medical team and found "unqualified" to play although he had passed the doping tests.

44. The finding of the medical team made it impossible for Respondent to enter into an employment relationship with Claimant. Claimant was informed of the negative results of the medical examination.

45. Respondent denies having told Claimant that "*the coach does not longer want him in the team for the current season 2009/2010"*, or *"did not allow or deny him every option to practice with the team"*, as stated by the Claimant in his Request for Arbitration.

46. On 17 September 2009, Respondent sent to Claimant, via a judicial bailiff, a letter dated 16 September 2009 by which Respondent explained to Claimant that he had not passed his medical examination. Thus, the Contract did not enter into effect. Claimant

was therefore ordered to evacuate the apartment and to return the car within two days. Respondent also reserved any right for seeking damages.

47. Claimant protested against the termination of the Contract by letter of 21 September 2009. Still, Claimant flew back to Spain a few days later. The flight tickets were paid by Respondent.

48. With regard to the legal issues, Respondent submits that Claimant was represented by a licensed agent who happened to be a Greek national and a native speaker of Greek. Therefore, Claimant would have been able, via his agent, to fully understand the content of Respondent's letter dated 16 September 2009. According to Articles 9.1[1] and 4.2[2] of the FAT Rules, it was up to Claimant to submit an English translation of the letter in these proceedings. However, an English translation was submitted by Respondent later in the course of the arbitration.

49. Respondent also submits that due to his pre-existing injury, Claimant was unable to find a new club and to play basketball after Respondent had refused to accept him as a player.

50. Respondent explicitly denies Claimant's request for the award of amenities (such as a further airplane ticket, medical and dental expenses, and the costs for the apartment

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1 "A FAT arbitration shall commence on the date of receipt by FIBA of a Request for Arbitration, which shall contain the following: […] All written evidence on which the Claimant intends to rely."

2 "Documents provided to FAT in a language other than English must be accompanied by a certified translation unless the Arbitrator decides otherwise."

and the car). Respondent also opposes Claimant's request for reimbursement of the taxes due on the settlement amount.

51. Respondent has objected to the Arbitrator's decision to deem its counterclaim withdrawn due to non-payment of its share of the Advance on Costs, by pointing out that Article 9.3 of the FAT Rules provides that failure to pay the Advance on Costs results in a withdrawal of the Request for Arbitration, but not of any counterclaim.

4.4. The Respondent's Request for Relief

52. The Respondent requests the FAT the following relief:

> *"G.1. The Respondent requests the Tribunal to hold that the Request is inadmissible, as violating Article 9.1. of the Rules and dismissed*
>
> *G.2. Alternatively, the Respondent requests the Tribunal to hold that the Contract never got into effect, that the Request is unfounded and without merit and dismissed.*
>
> *Or, alternatively that the Contract was properly terminated by Respondent in full conformity with the provisions of it, that the Request is unfounded and without merit and dismissed.*
>
> *G.3. In any case, the Respondent requests the Tribunal to hold that Respondent is not liable to pay the Claimant any salaries, amenities or tax effects.*
>
> *G.4.The Respondent requests the tribunal to hold that the presented by the Claimant case damages, without just cause, its prestige and to award it 4.000 euros, that will be spent in charity.*

G.5. Alternatively, if the Tribunal finds that the Respondent should be liable to pay the Claimant any damages, the Respondent requests the Arbitral Tribunal to award damages only up to 15 September 2009 or 21 September 2009, due to failure of the Claimant to mitigate damages.

G.6. The Respondent requests the arbitral Tribunal to hold that the Claimant shall bear all costs of the present arbitration. The Respondent requests the Arbitral Tribunal to order the Claimant to pay to Respondent its legal fees in connection with the present arbitration. In any case to hold that the Claimant is entitled to no more than 3.000 euros as a contribution towards his legal fees."

5. Jurisdiction and other Procedural Issues

5.1. The jurisdiction of FAT

53. 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).

54. The jurisdiction of the FAT presupposes the arbitrability of the dispute as well as the existence of a valid arbitration agreement between the parties.

5.1.1 Arbitrability

55. 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.[3]

5.1.2 Formal and Substantive Validity of the Arbitration Agreement

56. The existence of a valid arbitration agreement will be examined in light of Article 178 PILA, which reads as follows:

> *"1 The arbitration agreement must be concluded in writing, by telegram, telex, telefax or any other means of communication which allow proof of the agreement by text.*
>
> *2 Furthermore, the arbitration agreement shall be valid if it conforms to the law chosen by the parties, to the law governing the dispute, in particular the principal contract, or to Swiss law."*

57. The Arbitrator finds that the jurisdiction of the FAT over the dispute between the Claimant and Respondent results from Clause 8 of the Contract, which reads as follows:

> *"8. Arbitration. Both Parties agree that any dispute arising out of or in connection with this Agreement shall be settled exclusively by [arbitration by F.A.T of FIBA with a possibility to appeal the award to CAS] [sic]. The parties have signed [their] names below as evidence of [their] willingness to be bound by the terms of this Agreement which they enter into of their own free will."*

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[3] Decision of the Swiss Federal Tribunal 4P.230/2000 dated 7 February 2001, cons. 1, reported in ASA Bulletin 2001, p. 523 et seq., with reference to the decision of the Swiss Federal Tribunal dated 23 June 1992, BGE 118 II 353, 356, cons. 3b.

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

59. 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 (Article 178 (2) PILA). Although the arbitration agreement does not fully correspond to the template arbitration clause provided in the preamble of the FAT Rules, it seems to be sufficiently clear that the Parties agreed to have any dispute related to the Contract settled exclusively by FAT arbitration, in accordance with the procedural rules of the FAT.

60. The jurisdiction of the FAT has further been confirmed by the Parties: Claimant has chosen, without any reservation, to submit the present dispute to FAT, and Respondent has acknowledged the jurisdiction of the FAT in paragraph A.3. of its Answer.

61. The Arbitrator thus finds that he has jurisdiction to decide the claim.

5.2. Other Procedural Issues

5.2.1 The admissibility of further submissions

62. In principle, the FAT Rules provide for one exchange of submissions, namely the Request for Arbitration and the Answer (Articles 11.1 and 11.2 of the FAT Rules). If the Arbitrator deems it necessary, he may invite the parties to make further submissions (Article 12.1 of the FAT Rules).

63. In the present case, after the exchange of the Request for Arbitration and the Answer, the Arbitrator asked the Parties to submit certain documents (see letter dated 3 March 2010), which they did, and allowed the Respondent to comment on Claimant's contract with the Assossiació Esportiva Centre Católic Mataró until 23 March 2010. In its submission of 23 March 2010, Respondent did not only comment on the said contract but also took the opportunity to make further arguments in support of its counterclaim. The Arbitrator does not accept but disregards these additional arguments.

5.2.2 The withdrawal of the counterclaim

64. In its Answer, Respondent raised a counterclaim in the amount of EUR 4,000.00 because Claimant's behavior allegedly damaged the Club's athletic and social prestige. Respondent added that it would forward such payment to the victims of the Haiti earthquake.

65. In his letter to the Parties dated 3 March 2010, the Arbitrator stated that Respondent had failed to pay its share of the Advance on Costs. Therefore, in accordance with Article 9.3 of the FAT Rules, Respondent's counterclaim of EUR 4,000.00 was deemed withdrawn.

66. In its submission of 10 March 2010, Respondent objected to the Arbitrator's decision whereby its counterclaim was deemed withdrawn. As stated above, Respondent mainly held that Article 9.3 of the FAT rules speaks only of the withdrawal of the Request for Arbitration in case a claimant does not pay the advance on costs, but there is no explicit reference to the withdrawal of a counterclaim if a respondent fails to pay its share of the Advance on Costs. By letter of 16 March 2010, the Arbitrator confirmed his decision to consider the counterclaim withdrawn. He stated:

> *"A counterclaim is itself a claim to which Art. 9.3 of the FAT Rules applies. Said interpretation is consistent with FAT's jurisprudence and practice (see ex multis FAT 0041/09 Panellinios vs Kelley)."*

67. This decision of the Arbitrator still stands and does not need further explanations.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

68. 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 rules 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".*

69. 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."*

70. In the present case the parties have not agreed otherwise. The Contract does not contain a choice of law clause, but refers explicitly to "arbitration by FAT" which is

governed by the FAT Rules. Therefore, the Arbitrator finds that Article 15.1 of the FAT Rules applies and that the merits of this dispute shall be decided *ex aequo et bono*.

71. 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*[4] (Concordat),[5] 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."*[6]

72. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

> *"the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand".*[7]

73. 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".

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

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

5 KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 187 PILA N 289.

6 JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

7 POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

6.2. Findings

6.2.1 The Contract

75. Claimant's claim is based on the Contract which was signed on 26 July 2009. However, Respondent argues that this was just a preliminary agreement and the Player was only on trial, and a final agreement would be signed if the Player would pass the medical tests (see, e.g. par. B.9 of the Answer and Respondent's Exhibit B, first par.).

76. The Arbitrator finds however, that there is no language in the Contract which would indicate that this was meant to be only a preliminary agreement and that a final agreement would be signed later subject to certain conditions being met. To the contrary, the Contract explicitly says in Clause 1 that the *"Club hereby employs Player"*. The wording "hereby" shows the immediate and entire validity of the Contract upon signing. Furthermore, the Contract contains all elements necessary for the Parties to define their employment relationship. The Arbitrator therefore considers the Contract to be the decisive document by which the Parties defined their mutual rights and duties.

6.2.2 The medical examination as a condition precedent to the validity of the Contract

77. Respondent justifies its refusal to pay any consideration to Claimant by stating that Claimant has failed the medical test, which test according to Respondent was a condition precedent to the validity of the Contract.

78. Good health and playing condition is an essential basis for every player's contract, even if such condition is not explicitly mentioned in the player's contract itself. The employer may rely on the expectation that a new player can be fielded according to the

information provided by the player about his health prior to the signing of the contract and the needs of the team. It is the primary duty of any new player to disclose to the employer, prior to the signing of a player's contract, any pre-existing medical condition which would prevent him from fulfilling his contractual obligations and playing with the team as provided by the agreement. If a new player is hiding a pre-existing medical condition, he is deceiving the employer and the employment agreement lacks of an essential condition. Under such circumstances and subject to the terms of the employment agreement, the employer may step down from the contract if such withdrawal is communicated in a timely manner[8].

79. The employer may also provide for medical exams to find out more about the health of the new player. Such medical examination may lead the employer to the conclusion that the new player was not fit for playing with the team in which case the employer is entitled not to accept the player. However, the medical exam must result in objective and comprehensible medical reasons for the employer not to engage a new player. The fact that a new player may be subject to medical exams is not a free pass for the employer to withdraw from a signed contract.

80. The question whether the right to conduct a medical exam and to make the employment agreement subject to the successful passing of such medical exam must be explicitly stated in the employment agreement or whether there exists an implied right of the employer to do so can be left open since according to Clause 4 of the Contract, the first payment of EUR 5,000 was indeed subject to *"Player's passing medical and drug tests"*.

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8 See FAT decision 0039/09 dated 17 August 2009 Capin vs Azovmash BC, para. 55.

81. Considering that it is customary for professional sports clubs to check the health of new players and to engage them only if such medical examination does not reveal any pre-existing medical condition the Arbitrator finds the above-mentioned reference to constitute a sufficient *proviso* which entitled the Club (a) to request the Player to undergo a medical exam and (b) to withdraw from the Contract if there were objective and comprehensible medical reasons not to engage the Player. It would make no sense at all if just the first payment of EUR 5,000 was subject to the "Player's passing medical and drug tests" but not the remaining payments and, thus, the entire contract.

6.2.3 The Claimant's health issue

82. According to Claimant, he got injured during the first training sessions with the Club: he sprained his ankle which did not allow him to continue to practice and to participate in one friendly match. However, he recovered in the first week of September 2009 and travelled together with the team to a friendly tournament in the city of Trikala, although he did not play there. He was then not allowed to practice or play with the team on the 9, 10 and 11 September 2009. On 11 September 2009 he was told by the coach that he was no longer a member of the team. Claimant does not submit any evidence for either his injury or the behavior of the Club's representatives on 9, 10 and 11 September 2009.

83. Respondent submits that Claimant complained about an earlier injury and pains already upon his arrival in Patras. The medical examination was carried out in the first days of September 2009. The result of this examination and the subsequent termination of the Contract were immediately communicated to the Player. His inability to perform his duties as a professional basketball player was further demonstrated *"in every practice and in a visit to Trikala, in the first days of September, where he could*

not play for a single minute in a friendly game." Whereas it seems to be common ground that Claimant joined the team for the Trikala tournament but that he did not play, Respondent does not submit any evidence demonstrating the date and the result of the medical examination and the exact reasons why Claimant was eliminated from the team.

84. According to the legal principles applied by the FAT, the burden of proof for an alleged fact rests on the party who derives rights from the fact. In addition, the principle of *pacta sunt servanda* is of paramount significance for the Arbitrator when assessing the behavior of the parties.

85. Although Claimant admits that he was injured it is up to Respondent to demonstrate that the conditions under which an extraordinary cancellation of the Contract would be admissible, were met, namely that (1) there was a pre-existing injury of the Player which was not disclosed prior to the signing of the Contract, (2) that this injury was significant and serious and would have led Respondent not to sign the Contract had it been aware of the injury, and (3) that the Contract was immediately terminated when the inability to play became known, e.g. on the occasion of a medical exam. However, Respondent fails to provide any evidence which would support its decision to dismiss the Player. Instead, Respondent appeals to the common sense of the Arbitrator and claims that it would not make sense to sign an employment agreement and to dismiss the Player before the latter ever had a chance to demonstrate his sporting skills, if there were no compelling reasons for Respondent to do so.

86. Under the circumstances the Arbitrator finds *ex aequo et bono* that Respondent has failed to demonstrate that there was a pre-existing injury of the Player which was so serious that made it unacceptable for Respondent to include Claimant in its team and that this injury was discovered on the occasion of the medical exam which took place

upon arrival of the Player in Patras. As a consequence, the Arbitrator also finds that Respondent terminated the Contract without cause and thus becomes liable for the loss Claimant suffered because of this termination.

6.2.4 The loss suffered by the Claimant

a) Salary

87. FAT's practice is to the effect that in cases of an unjustified termination of the player's contract by the club, the indemnification due to the player corresponds to the agreed salary minus any payments which a player earned otherwise during the term of the contract. According to the Contract, Claimant is entitled to a net salary of EUR 45,000.00 of which he has received nothing at all. Claimant has however concluded a new player's contract with the Spanish club Assossiació Esportiva Centre Catolic Mataró for the rest of the season 2009/2010 by which he earned EUR 6,000.00 in total. Thus, this amount is to be deducted from the salary due under the Contract, which leads to an outstanding salary due to Claimant of EUR 39,000.00.

b) Bonus

88. Claimant does not ask for any bonus payments.

c) Additional Compensation, Amenities

89. Claimant requests the payment of EUR 23,400.00 corresponding to the costs, for nine

months, of the following amenities: 1) housing (including utility costs), in the amount of EUR 13,500.00, 2) a car, in the amount of EUR 9,000.00, and 3) health insurance, amounting to EUR 900.00.

90. The Arbitrator finds that the Contract does not entitle the Claimant to claim specific amounts which Respondent should pay to Claimant but it was the Club which had to take care of the housing, the car and the medical treatment of Claimant and pay the costs thereof directly to the relevant service providers or to the Claimant, subject to Claimant's and Respondent's further agreement. No such further agreement has however been submitted to the FAT.

91. In FAT's practice, damages are compensatory in nature and whoever claims damages must prove the damage. With regard to the amenities, Claimant does not prove any damage at all. While it is comprehensible that Claimant must have had expenses for housing, transportation and medical care also when he played in Matarofór, Spain, he has not demonstrated the costs relating to these items, nor given any concrete indication which would allow the Arbitrator to determine the amount of compensation due in respect of such costs. This claim must therefore be dismissed.

d) Tax Effects

92. According to Clause 5 of the Contract, Respondent shall pay the base salary to Claimant “net as described above”. Only in Clause 6, which deals with the Agent’s fee, the “net amount” is specifically described as being “free of taxes.” The Arbitrator finds however that the term “net” in Clause 5 has the same meaning as in Clause 6, namely “free of taxes”, which means that the Claimant should receive the full amount of the agreed salaries without any deductions or withholdings for taxes. In addition, the

Arbitrator finds that the term "taxes" must also include any mandatory social security contribution payable by either the employer or the employee.

93. When speaking of taxes, it is evident for the Arbitrator that Respondent is liable for the taxes which were foreseeable when the Contract was signed. The Player was employed by a Greek employer, had to deliver his services for a Greek club and his salary was to be paid in Greece. There is no submission or evidence to the contrary. Respondent was therefore responsible for the taxes on the salary due in Greece.

94. Since Respondent is obliged to pay the compensation net of taxes, it shall (1) pay the amount owed to Claimant as compensation net of Greek taxes and social security contributions and (2) as promptly as possible thereafter, provide Claimant with an original receipt showing payment thereof, together with such additional documentary evidence as Claimant may from time to time reasonably require. However, such payment duty of the Club shall not exceed the claimed amount of EUR 16,184.06 since this is the maximum amount requested by Claimant as a reimbursement for taxes.

95. Claimant submitted a legal opinion in support of his claim for the payment of the taxes payable in Spain. Indeed, it is possible that the payment of EUR 39,000.00 to Claimant will also trigger the attention of the Spanish (or other) tax authorities. However, the Arbitrator finds that it is not Respondent's obligation to deal with taxes imposed by the Spanish (or other) tax authorities. It is rather for Claimant to submit the appropriate declarations to the Spanish (or other) tax authorities and to take care based on the applicable double taxation-treaties that double taxation is avoided. However, if there is an additional tax to be paid in Spain (or another country than Greece) it is up to Claimant to pay this additional amount.

6.3. Interest

96. On the claimed amounts, the Claimant requests interest of 5 % per annum on EUR 5,000.00 starting from 1 September 2009 (i.e. the alleged date of the medical and drug test) and 5 % per annum on the rest amount starting from 15 September 2009 (i.e. the date of the written notification that the Contract was terminated).

97. Payment of interest is a customary and necessary compensation for late payment and there is no reason why Claimant should not be awarded interest. In line with the constant jurisprudence of the FAT, the Arbitrator holds that an interest rate of 5 % p.a. is reasonable and equitable in the present case. Besides, the Arbitrator finds that 1 September 2009 (concerning the claim for EUR 5,000.00) and 15 September 2009 (i.e. the date of termination of the Contract) respectively are appropriate dates for interest to become payable.

7. Costs

98. 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 states that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

99. The Claimant's arbitration costs include the non-reimbursable handling fee of EUR 3,000.00, counsel fees (EUR 15,000.00), the Advance on Costs paid by the Claimant (EUR 3,500.00) as well as the Advance on Costs of Respondent, also paid by the

Claimants (EUR 3,500.00). Such costs amount to EUR 25,000.00 in total.

100. On 24 May 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 at EUR 7,000.00.

101. In the present case, the costs shall be borne by the Parties in line with Article 19.3 of the FAT Rules, namely 60% by Respondent and 40% by Claimant as Claimant has been awarded the reduced base salary plus taxes due in Greece but not the amenities. There is no indication that either the financial resources of the Parties or any other circumstance compel otherwise.

102. Given that the Claimant paid the totality of the Advance on Costs of EUR 7,000.00 the Tribunal decides that Respondent shall reimburse Claimant 60% of the costs advanced by the latter i.e. EUR 4,200.00.

103. Furthermore, the Arbitrator considers it adequate that the Claimant is entitled to the payment of a contribution towards his legal fees and other expenses (Article 19.3. of the FAT Rules). The Arbitrator holds it adequate to take into account the non-reimbursable fee when assessing the expenses incurred by the Claimant in connection with these proceedings. After having reviewed and assessed all the circumstances of the case at hand, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at EUR 9,000.00.

8. AWARD

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

1. **AEP Olimpias Patron is ordered to pay to Mr. Alfonso Albert EUR 5,000.00 together with interests of 5% p.a. from 1 September 2009 and EUR 34,000.00 together with interests of 5% p.a. from 15 September 2009.**

2. **AEP Olimpias Patron is ordered to pay any Greek taxes (including social security contributions) due on the amounts mentioned under point 1 above, up to the amount of EUR 16,184.06.**

3. **AEP Olimpias Patron is ordered to pay to Mr. Alfonso Albert the amount of EUR 4,200.00 as a reimbursement of the Advance on Costs.**

4. **AEP Olimpias Patron is ordered to pay to Mr. Alfonso Albert the amount of EUR 9,000.00 as a contribution towards his legal fees and expenses.**

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

Geneva, seat of the arbitration, 27 May 2010

Stephan Netzle

(Arbitrator)

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."