FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0074/10 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Klaus Reichert

in the arbitration proceedings between

Mr. Vladimer Boisa

- Claimant -

represented by Dr. Špelca Mežnar, Čeferin Law Office,
Taborska 13, 1290 Grosuplje, Slovenia

vs.

Basketball Club "Menorca Basquet SAD"

- Respondent -

represented by Román Gómez Ponti, GP Advocats,
Josep Tarradellas, 157, Pral. 2a, Barcelona 08029, Spain

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1. The Parties

1.1. The Claimant

1. Mr. Vladimer Boisa ("Claimant") is a professional basketball player who was engaged by Basketball Club "Menorca Basquet SAD" ("Respondent") to play the season 2009/2010. That engagement was brought to an end by an agreement dated 23 February 2009 ("Termination Agreement").

1.2. The Respondent

2. The Respondent is a professional basketball club with its address at Pavello Menorca, Angel Ruiz y Pabloe 11, 07703 – Maó, Menorca, Islas Baleares, Spain.

2. The Arbitrator

3. On 12 February 2010, 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"). None 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

4. The Termination Agreement, which was enclosed with the Request for Arbitration dated 15 December 2009, was, in short, the formal parting company of Claimant and

Respondent. Claimant ceased to be a player for Respondent as of the date of the Termination Agreement, and was free as of that moment to play for any other club.

5. The relevant parts, for the purposes of this arbitration, of the Termination Agreement are as follows:

> *"Club agrees to pay Player the amount of €130,200.00 Euro (one hundred and thirty thousand two hundred Euro) in accordance with the following payment schedule:*
>
> *On 24th of February 2009: €38,000.00 Euro*
>
> *On 15th of April 2009: €46,100.00 Euro*
>
> *On 15th of May 2009: €46,100.00 Euro*
>
> *This payment will be made in addition to the payments Player already received from Club. For the payments due on 15th of April and 15th of May Club agrees to issue to Player valid bank guaranties (sic) immediately upon signing of this Termination Agreement*
>
> *In the event Club neglects to pay to Player the abovementioned amount on the abovementioned date, Player and/or Player's legal representative has the unconditional right to hold Club responsible and liable for the entire agreement executed on 13th of August 2009 including all outstanding compensation due to Player in that agreement which shall then become due immediately in its entirety.*
>
> *Any dispute arising or related to the present Agreement shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved definitely in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President.*
>
> *The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties domicile.*
>
> *The seat of the arbitration shall be Geneva, Switzerland.*
>
> *The language of the arbitration shall be English.*
>
> *Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. To the extent legally possible under Swiss law recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sports (CAS) upon appeal shall be excluded.*

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

3.2. The Proceedings before the FAT

6. Claimant filed a Request for Arbitration dated 15 December 2009 in accordance with the FAT Rules, and on 5 February 2010 the non-reimbursable fee of EUR 3,000.00 was duly paid. The Request for Arbitration sought payment of various sums set out in the Termination Agreement as none had been paid and the bank guarantees provided by Respondent were declined when called upon.

7. On 15 February 2010 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 *EUR 4,000*

Respondent *EUR 4,000"*

8. In addition on 15 February 2010, the FAT sent the Request for Arbitration, together with the Exhibits thereto, to the Respondent. In the covering letter the FAT notified the Respondent that the Answer was due, in accordance with Article 11.2 of the FAT Rules, by 9 March 2010.

9. Payments of the advance on costs were made as follows:

2 March 2010, €4,000.00 by Respondent;
30 March 2010, €3,980.00 by Claimant.

10. The Respondent delivered its Answer dated 8 March 2010.

11. The Arbitrator, having considered the documents filed by the Parties, decided that they should be given the right to supplement their submissions. By letter dated 9 April 2010,

Claimant was given until 23 April 2010 to file comments, and the Respondent would thereafter have an opportunity to comment.

12. On 22 April 2010 Claimant filed his further comments.

13. By letter dated 7 May 2010 Respondent (represented at this stage by Mr. Ponti) filed its further comments. Importantly, Respondent raised an issue of jurisdiction, namely arbitrability of the dispute under Spanish law.

14. On 18 May 2010 the Arbitrator invited Claimant to comment, particularly on the jurisdiction issue by no later than 28 May 2010.

15. On 25 May 2010 Claimant filed his comments.

16. On 15 June 2010 the Arbitrator invited Respondent to comment by no later than 25 June 2010.

17. On 25 June 2010 Respondent made its comments.

18. On 2 July 2010 the Arbitrator issued a procedural order providing that the exchange of documents was completed and inviting the Parties to submit their claims for costs.

19. On 12 July 2010, Claimant submitted his costs as follows: Lawyer's Fees EUR 3,500.00; Non-reimbursable handling fee paid to FAT of EUR 3,000.00; advances on costs EUR 4,000.00; Costs of notary and express mail EUR 250.00. The total claimed was EUR 10,750.00.

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

4. The Positions of the Parties

4.1. Claimant's Position

21. The position of Claimant in relation to his claim is very simple. He says he was not paid in due time in accordance with the specific milestones set out in the Termination Agreement. Claimant put forward the following request for relief:

> *"According to Par.3 of the Termination Agreement dated 23.2.2009, the Respondent Basketball Club Menorca is obliged to pay to the Claimant Vladimer Boisa the amount of 130,200.00 EUR (one hundred and thirty thousand two hundred euro) net of taxes plus interests at the applicable rate*
>
> - *since 24.2.2009 for the amount 38.000,00 EUR (thirty-eight thousand euro)*
> - *since 15.4.2009 for the amount 46.100,00 EUR (forty-six thousand one hundred euro)*
> - *since 15.5.2009 for the amount 46.100,00 EUR (forty-six thousand one hundred euro)*
>
> *as a customary and fair compensation for the late payment.*
>
> - *The Respondent shall reimburse the Claimant the costs of these arbitral proceedings, including legal fees and expenses incurred in the connection with the proceedings."*

4.2. Respondent's Position

22. Respondent has impugned the Termination Agreement and also invoked, in its second written submission, Spanish law to question the arbitration clause.

5. Jurisdiction and Other Procedural Issues

23. 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).

5.1. The jurisdiction of FAT

5.1.1 Review

24. In light of the position taken by Respondent in its second submission concerning Spanish law, the Arbitrator will review the issue of jurisdiction.

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

5.1.2 Arbitrability

26. 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].

27. The issue raised by Respondent, in its second submission dated 7 May 2010, is as follows: "*Also, it must be said that labor relations in Spain are specifically excluded from field of arbitration, question seems to forget is that the claimant, bringing the clause of this arbitration would be invalid."* Claimant counters by saying, in effect, that the final whistle was already blown by the time Respondent raised this issue and refers to article 3.2 and 11.2 of the FAT Arbitration Rules. Article 11.2 is quite clear, namely that the Answer shall contain any defence of lack of jurisdiction. The Answer raises no jurisdiction issue. Also, Claimant says that Spanish labour law is inapplicable due to the

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

parties' express choice of FAT arbitration seated in Switzerland. Even if such labour laws were applicable, he suggests that they cannot be used to the worker's detriment. Finally, he makes the telling observation that basketball players engaged by Spanish clubs could never rely on FAT arbitration clauses.

28. Respondent's jurisdictional challenge is without merit. This is so for several reasons:

- It was not raised in the Answer, notwithstanding the clear provisions of article 11.2 of the FAT Arbitration Rules. It was raised too late, after replying on the merits of the dispute, and Respondent has shut itself out from reliance on this jurisdiction issue;

- It was only with the Respondent's submission on 25 June 2010 that any reference to a particular provision of Spanish law was actually identified and specifically relied upon. It transpires that the provision relied upon by Respondent to ground its jurisdictional challenge is the Spanish Arbitration Act, which patently has no relationship whatsoever to an arbitration seated in Geneva and governed by Chapter 12 of the PILA. Respondent's submission in this regard requires the Arbitrator to hold that the arbitration law of the country of one party to a contract can impugn an arbitration agreement with a seat in an entirely different country. This submission only has to be stated to be seen as clearly inconsistent with the Swiss Supreme Court's well established case law that arbitrability of disputes shall be determined exclusively according to article 177(1) PILA.[2]

5.1.3 Formal and substantive validity of the arbitration agreements

29. The existence of a valid arbitration agreement is to be examined in light of Article 178

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[2] ATF 118 II 353, *358*.

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."*

30. The jurisdiction of the FAT over the present dispute results from the arbitration clause contained in the Termination Agreement, already described above in para.5.

31. The Termination Agreement submitted with the Request for Arbitration is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.

32. 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 as between Claimant and Respondent under Swiss law (referred to by Article 178(2) PILA).

33. Respondent's final submission apparently alleges a fraud as against Claimant. An allegation of fraud, submitted late in the proceedings, without a shred of proof, cannot impugn an arbitration agreement. Fraud, under any standard of legal practice known to the Arbitrator, requires highly specific and detailed proof, and cannot simply be stated in the hope that it will become true. Respondent's assertion that a claim advanced fraudulently under a perfectly valid arbitration agreement can somehow then impugn the arbitration agreement is also unstateable.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

34. With respect to the law governing the merits of the dispute as between Claimant and

Respondent, 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".*

35. 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."*

36. As already noted above, the Termination Agreement provides 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 arbitration.

37. 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]

38. In substance, it is generally considered that an arbitrator deciding *ex aequo et bono*

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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.

receives "a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case".[6]

39. This is confirmed by Article 15.1 of the FAT Rules according to which the Arbitrator applies "*general considerations of justice and fairness without reference to any particular national or international law*".

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

6.2. Findings

6.2.1 Discussion and conclusion on the facts

41. The Arbitrator is entirely satisfied that the factual basis of the claim of Claimant is well founded. Claimant has satisfied the Arbitrator that the Termination Agreement was duly entered into, signed and stamped on behalf of Respondent. The attempt by Respondent to impugn the Termination Agreement in its submissions was without any coherence. On the one hand Respondent says that the Termination Agreement did not have the club stamp (though it patently did) and the signature was not that of the club's president of the time. There were also hints, loosely expressed, at falsification of documentation. What is telling is that none of these allegations were backed up by any evidence. Respondent had ample opportunity on several occasions to file evidence with its submissions in order to back up its allegations. It did not do so. The more likely reality underpinning Respondent's position is that it simply did not choose to adhere to

[5] JdT 1981 III, p. 93 (free translation).
[6] POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

the obligations it undertook, or took a dislike after the event to the commercial bargain it struck with Claimant. Neither position can be countenanced.

42. Claimant has presented sufficient evidence in order for the Arbitrator to determine that, as a matter of fact, the Termination Agreement was entered into, bank guarantees were given (Respondent is conspicuously silent as to the reasons for these being declined), and payments were not made on the appointed dates.

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

43. The Arbitrator has identified the principal consideration which reflects justice and fairness for the purposes of this Arbitration.

44. 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.

45. In respect of Claimant it is unquestionably the case that Respondent was obliged to pay him a total amount of EUR 130,200.00 by way of three installments. This is the effect of the Termination Agreement.

46. Respondent is obliged to adhere to the contractual obligations it entered into with Claimant. Respondent signed the Termination Agreement with Claimant. Claimant clearly has the legitimate entitlement to be paid the sums of money agreed between the Parties. It is certainly not good enough for Respondent to have provided bank guarantees which were then declined. Such conduct is unacceptable in the light of its

contractual obligations and the principle of justice and equity noted above.

47. It is well founded as a principle of universal application that a party who is deprived of a due sum of money is entitled to some recompense (in addition to an order for payment of the principal). This is widely referred to as interest. The Arbitrator believes that as a matter of universal application 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.

48. What remains to be identified is the rate of interest. In line with the jurisprudence of the FAT, the Arbitrator holds that an interest rate equal to the applicable Swiss statutory rate which is 5 % p.a., is fair and equitable in the present case.Thus, a rate of 5% simple interest from:

- 25 February 2009 on EUR 38,000.00,
- 16 April 2009 on EUR 46,100.00, and
- 16 May 2009 on EUR 46,100.00

until payment meets the justice of this matter.

7. Costs

49. 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 reasonable legal fees and expenses incurred in connection with the proceedings.

50. The legal fees and expenses in the amount of EUR 3,750.00 claimed by Claimant have not been challenged by Respondent in any way. Further, in the context of the overall value of this dispute, the needless complexities and groundless jurisdiction issues raised by Respondent, these fees appear reasonable and appropriate in the circumstances.

51. On 26 August 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 4,830.00.

52. Considering that Claimant prevailed in the entirety of his claims, it is appropriate that the Respondent should bear a corresponding burden of the arbitration costs and also be similarly responsible for the non-reimbursable fee.

53. As the arbitration costs are fixed by the FAT President at EUR 4,830.00 and the total sums paid to FAT by the Parties (excluding the non-reimbursable fee, which will be taken into account below, together with Claimant's legal fees and expenses) were EUR 7,980.00, that leaves a figure of EUR 3,150.00 which can be repaid to Claimant.

54. The Arbitrator decides that in application of article 19.3 of the FAT Rules:

(i) FAT shall pay EUR 3,150.00 to Claimant by way of reimbursement;

(ii) Respondent shall pay to Claimant an amount of EUR 830.00 being the difference between the costs advanced by Claimant (EUR 3,980) and the amount he is going to receive in reimbursement from the FAT; and

(iii) Respondent shall pay Claimant an amount of EUR 6,750.00 (EUR 3,000.00 + EUR 3,750.00) in respect of legal fees and expenses, including the non-reimbursable fee.

8. AWARD

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

1. **Basketball Club "Menorca Basquet SAD" shall pay Mr. Vladimer Boisa EUR 130,200.00.**

2. **Basketball Club "Menorca Basquet SAD" shall pay Mr. Vladimer Boisa simple interest at a rate of 5% p.a. on the following sums and from the following dates until payment:**

   - **from 25 February 2009 on EUR 38,000.00**
   - **from 16 April 2009 on EUR 46,100.00**
   - **from 16 May 2009 on EUR 46,100.00**

3. **Basketball Club "Menorca Basquet SAD" shall pay Mr. Vladimer Boisa an amount of EUR 830.00 as reimbursement of arbitration costs.**

4. **Basketball Club "Menorca Basquet SAD" shall pay Mr. Vladimer Boisa an amount of EUR 6,750.00 in respect of legal fees and expenses.**

5. **All other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 31 August 2010

Klaus Reichert

(Arbitrator)

FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

Notice about Appeals Procedure

cf. Article 17 of the FAT Rules

which reads as follows:

"**17. Appeal**

Awards of the FAT can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland and any such appeal must be lodged with CAS within 21 days from the communication of the award. The CAS shall decide the appeal *ex aequo et bono* and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure."