FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0079/10 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Klaus Reichert

in the arbitration proceedings between

Martina Rejchova, Havlickova 392 – Velka, Hledsebe 35301, Czech Republic

- Claimant -

represented by Paolo Ronci, PR Sports srl,
Via Laghi 69/6 – 48018 Faenza (RA), Italy

vs.

ASD Napoli Basket Vomero, Via Caldieri 142 – Palazzo Sirio, 80128 Napoli, Italy

- Respondent -

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1. The Parties

1.1. The Claimant

1. Martina Rejchova ("Claimant") is a professional basketball player who was engaged by ASD Napoli Basket Vomero ("Respondent") to play the season 2009/2010. That engagement was reflected in a written agreement dated 7 August 2009 ("the Agreement").

1.2. The Respondent

2. Respondent is a professional basketball club with its address at Via Caldieri 142 – Palazzo Sirlo – 80128 Napoli, Italy.

2. The Arbitrator

3. On 16 March 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"). 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

4. The Agreement, which was enclosed with the Request for Arbitration dated 26 February 2010, sets out the terms and conditions under which Claimant was to play for

Respondent for the 2009/2010 season. Her salary was set at EUR 22,000.00, net of taxes, being EUR 2,200.00 per month from September 2009 to June 2010. The first payment was payable following the passing of a medical examination and thereafter each monthly payment was due on the last day of the months from October 2009 onwards. The Agreement also provided for the payment by Respondent of an agent's fee of 10% of the contract's value plus VAT.

5. The Agreement expressly provides that it is a "no cut" arrangement (clause 4). Curiously, clause 9 provides that the Agreement is governed by the laws of Italy and the European Community. Clause 10 of the Agreement is a short form arbitration agreement providing for "FIBA arbitration".

6. Claimant says in her Request for Arbitration that she was only paid the first three installments (and these were slow in coming from Respondent) and the remaining seven were not paid at all. Claimant also says that the Agreement was unilaterally broken by Respondent on 9 February 2010, she having been prevented from gaining access to the gym and practice.

3.2. The Proceedings before the FAT and the positions of the Parties

7. Claimant filed a Request for Arbitration dated 26 February 2010 in accordance with the FAT Rules, and on 12 March 2010 the non-reimbursable fee of EUR 3,000.00 was duly paid. The Request for Arbitration sought payment of:

   - EUR 15,400.00 in respect of unpaid salary
   - EUR 2,640.00 in respect of unpaid agent's fee
   - EUR 3,000.00 by way of reimbursement of the non-reimbursable fee

- All legal fees and expenses
- Reimbursement of advances on costs
- Compensation of EUR 2,500.00 for expenses related to moving apartment
- Compensation of EUR 3,000.00 by reason of the fact that Claimant will not be able to sign for another club until the end of the season
- A justification that Respondent's affairs are in order as regards tax and the Claimant.

8. On 24 March 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 3,500*
Respondent	*EUR 3,500"*

9. In addition on 24 March 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 14 April 2010.

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

- 13 April 2010, EUR 3,500.00 by Milan Rejcha on behalf of Claimant (Claimant's share);
- 30 April 2010, EUR 3,500.00 by Milan Rejcha on behalf of Claimant (Respondent's share).

11. Respondent did not deliver its Answer by the deadline of 14 April 2010.

12. On 21 April 2010 Claimant delivered an "Addendum of the Request for Arbitration dated on February 26, 2010" and asked for additional relief of EUR 1,500.00 by way of compensation by reason of the treatment meted out to her by Respondent and interest of 5% on EUR 22,000.00.

13. On 13 May 2010 Respondent submitted its "Statement of defence", having been given an opportunity to do so by the Arbitrator in light of the addendum filed by Claimant. This document makes allegations against Claimant's agent concerning another player, Milka Bjelica. Respondent also says that Claimant went to play for a club in the Czech Republic. Its position is as follows: "[Respondent] *demands to fulfil the terms of the contract with the player Rejchova until the date of the transfer to the other Club, which coincides with and goes not further than the date of the Clearance."*

14. On 2 June 2010 the Arbitrator wrote to the Parties as follows:

> *"After having reviewed the parties' submissions to date, the Arbitrator herewith requests the Claimant to inform the FAT whether she has entered into an employment contract with a club after 9 February 2010; if yes, the Claimant is requested to provide a copy of such contract by no later than Wednesday, 9 June 2010."*

15. In a letter dated 4 June 2010 the President of the Czech club Sokol Hradec Kravlove ("Czech club") confirmed to FAT that Claimant never signed any contract with that team for the 2009/2010 season.

16. Respondent sent, in response, copy documentation from the Czech Basketball Federation, and the Italian Basketball Federation, which contradicted the letter dated 4 June 2010 from the Czech club.

17. 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.

18. On 9 July 2010, Claimant submitted her costs as follows: EUR 3,000.00 for the non reimbursable fee; EUR 3,500.00 as the Claimant's share of costs; EUR 3,500.00 as Respondent's share of the advance on costs by Claimant; EUR 6,480.00 as counsel's fees .

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

4. Jurisdiction

20. 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

21. The Arbitrator will review the issue of jurisdiction notwithstanding the fact that no issue was taken by the Parties in any of their pleadings.

22. 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

23. 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].

5.1.3 Formal and substantive validity of the arbitration agreements

24. 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."*

25. The jurisdiction of the FAT over the present dispute results from the arbitration clause already described above in para.5.

26. The 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.

27. 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).

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

28. 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,

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

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".*

29. 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."*

30. As already noted above, the Agreement provides at clause 9 that the Agreement is governed by the laws of Italy and the European Community. The Agreement also provides for FIBA arbitration. As already noted, the Parties have taken no issue whatsoever in the proceedings to date as to jurisdiction of FAT and of the Arbitrator. It is therefore clear that the parties are *ad idem* that the FAT Arbitration Rules formed part of the Agreement. The FAT Arbitration Rules contain a clear mandate to an arbitrator to determine dispute *ex aequo et bono* unless the parties agreed otherwise. The Arbitrator is of the view that in order to displace *ex aequo et bono* as provided in Article 15.1 of the FAT Arbitration Rules, a clear agreement of the parties must be demonstrated. In the present case the Agreement refers to the laws of Italy and the European Community. However, the Arbitrator notes that neither the Agreement nor the submissions made in this arbitration contain any indication that the Parties have made any specific legal considerations with respect to the application of these laws. Furthermore, there is no indication whatsoever as to how such a combination could possibly work. Thus, the Arbitrator is of the view that clause 9 does not displace Article 15.1 of the FAT Rules.

31. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him

in this arbitration.

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

33. In substance, it is generally considered that an 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]

34. 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*".

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

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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.

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

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

6.2. Findings

6.2.1 Discussion and conclusion on the facts

36. The Arbitrator is entirely satisfied that the factual basis of the claims, in the most part, of Claimant is well founded. Nothing of substance has been put in evidence by Respondent which counters the claims put forward by Claimant. In particular Respondent does not, in any of its submissions, present a positive defence to the fact that it did not pay the money for which it had entered into binding arrangements. Rather, its position is a vague one, unsubstantiated by any evidence, suggesting that Claimant's agent was engaged in double-dealing and Claimant went off to play for another club, therefore, as the Arbitrator understands the argument, Respondent was absolved of liability.

37. The evidence presented by the Parties as regards the subsequent playing by Claimant in the Czech Republic is contradictory. It is not possible for the Arbitrator to conclusively determine one way or the other whether Claimant did or did not play in the Czech Republic. At this point it is sufficient to note that, under the FIBA Internal Regulations (Article H.3.3.1.a) a player's release issued by a national basketball federation (in this case, the Italian Federation) is merely a permission to register with another basketball federation (in this instance, the Czech Federation); it does not automatically amount to the player signing a contract with a new club, participating in games and receiving compensation from this new club. The Arbitrator notes that no contract between Claimant and the Czech club was submitted by Respondent or any

evidence suggesting that the Claimant indeed played for the Czech club[6].

38. Claimant has also satisfied the Arbitrator, by reference to the Agreement, that her costs of moving apartment (claimed in an amount of EUR 2,500.00) are also factually sustained. These have not been countered in any way by Respondent.

39. The Arbitrator does not find, however, that a factual case has been made out in respect of the direction sought in connection with Respondent's handling of tax vis-à-vis Claimant. No suggestion is made that there is any difficulty with tax nor has any evidence been put forward to support this claim for relief.

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

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

41. 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.

42. In respect of Claimant it is unquestionably the case that Respondent was obliged to pay her the agreed salary by way of monthly installments. Respondent was also obliged to pay her apartment costs. These all stem directly out of the Agreement.

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6 In addition, publicly available sources seem to confirm that Claimant did not play for the Czech club during the 2009/2010 season. See http://www.eurobasket.com/Czech-Republic/basketball-Imports.asp?women=1 and http://www.eurobasket.com/player.asp?Cntry=ITA&PlayerID=82288.

43. Respondent is obliged to adhere to the contractual obligations it entered into with Claimant. Respondent signed the 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 stop paying and then, effectively affirm that Claimant may have gone to another club and therefore Respondent would somehow be absolved of responsibility. Such conduct is unacceptable in the light of its contractual obligations and the principle of justice and equity noted above. When a club enters a contract, in particular a fully guaranteed contract, justice and equity require it to adhere to the terms, not just for such time and upon such terms as appear convenient.

44. 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.

45. What remains to be identified is the rate of interest. Claimant seeks 5% on EUR 22,000.00. 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 reasonable and equitable in the present case. However, Claimant's claim to be awarded interest on EUR 22,000.00 is not appropriate. She was paid three months' worth of her salary, so therefore EUR 15,400.00 is, in the Arbitrator's opinion, the correct principal sum. In taking this view the Arbitrator believes that it is appropriate that interest should run from 9 February 2010 on the whole sum of EUR 15,400.00. This is the date upon which Claimant was locked out of the gym and prevented from fulfilling her side of the bargain. The Arbitrator finds that as of that date Respondent treated the contract as at

an end, and therefore all liabilities for the balance of the lifetime of the Agreement were triggered. Thus, a rate of 5% simple interest from 9 February 2010 on EUR 15,400.00 until payment meets the justice of this matter.

46. Furthermore, the Arbitrator does not find the claim for compensation (whether EUR 3,000.00 for the difficulty in finding another club late in the season or EUR 1,500.00 by reason of the handling of Claimant by Respondent) to stem from the principles of *pacta sunt servanda*. Claimant is, by reason of the foregoing findings, being put into the position she would have been in had the Agreement been duly performed.

47. Finally, the issue of the agent fees has to be viewed differently. According to the Agreement, Respondent is liable to pay the agent fees to the FIBA licensed agent Mr. Paolo Ronci, PR SPORTS nrl ("Agent"). The Agreement does not contain any provision according to which the Claimant is entitled to receive (or claim) these fees. Furthermore, the Claimant did not submit that a claim for agent fees against the Respondent was assigned to her by the Agent. To sum up, therefore, the Arbitrator holds that the Claimant has not substantiated on what grounds she is entitled to claim agent fees.[7]

7. Costs

48. 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

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7 See FAT Decisions 0008/08 (Djoiric vs PBC Lukoil) and 0009/08 (Smith vs PBC Lukoil), dated 8 June 2009, p.35, and 0051/09 (Pesic vs Dynamo Moscow) p.36.

contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

49. The legal fees in the amount of EUR 6,480.00 claimed by Claimant have not been challenged by Respondent in any way. Further, in the overall context of this dispute, these fees appear reasonable and appropriate in the circumstances.

50. 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.

51. Considering that Claimant prevailed in most of her claims, it is appropriate that the Respondent should bear the arbitration costs.

52. As the arbitration costs are fixed by the FAT President at EUR 4,830.00 and the total sums paid to FAT (excluding the non-reimbursable fee, which will be taken into account when considering Claimant's legal fees and expenses) were EUR 7,000.00 that leaves a figure of EUR 2,170.00 which can be repaid to Claimant.

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

    (i) FAT shall pay EUR 2,170.00 to Claimant by way of reimbursement;

    (ii) Respondent shall pay to Claimant an amount of EUR 4,830.00 being the difference between the costs advanced by her (EUR 7,000.00) and the amount

she is going to receive in reimbursement from the FAT; and

(iii) Respondent shall pay Claimant an amount of EUR 9,480.00 (EUR 3,000.00 + EUR 6,480.00) 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. **ASD Napoli Basket Vomero shall pay Martina Rejchova EUR 17,900.00 for unpaid salary (EUR 15,400.00) and apartment expenses (EUR 2,500.00).**

2. **ASD Napoli Basket Vomero shall pay Martina Rejchova interest at a rate of 5% from 9 February 2010 until payment of the sum directed at clause 1 above.**

3. **ASD Napoli Basket Vomero shall pay Martina Rejchova an amount of EUR 4,830.00 as reimbursement of arbitration costs.**

4. **ASD Napoli Basket Vomero shall pay Martina Rejchova EUR 9,480.00 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)

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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."