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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0080/10 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr Quentin Byrne-Sutton

in the arbitration proceedings between

Ms. Dubravka Dacic, Ernesta Skrinjara, 3, 52470 Imag, Croatia

- Claimant -

Represented by Mr. Paolo Ronci, PR Sports srl, Via Laghi 69/6,
48018 Faenza (RA), Italy

vs.

Beşiktaş Jimnastik Kulübü Derneği, Süleyman Seba Cad. BJK Plaza
B Blok, Kat:3, 34357 Beşiktaş, Istanbul, Turkey

- Respondent -

Represented by Av. Kubilay Marangoz, Attorney-at-law



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1. The Parties

1.1. The Claimant

1. Ms. Dubravka Dacic (“the Player”) is a professional basketball player, who during the 2009-2010 season was playing for the club Beşiktaş Jimnastik Kulübü Derneği, in Turkey.

1.2. The Respondent

2. Beşiktaş Jimnastik Kulübü Derneği (the “Club”) is a professional basketball club in Turkey.

2. The Arbitrator

3. On 31 March 2010, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Mr. Quentin Byrne-Sutton 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 any objection to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

4. The Player and the Club entered into an agreement on 5 August 2009 whereby the latter engaged the Player for the season 2009-2010 (the “Agreement”).
5. Article VIII of the Agreement provides that the “*Club agrees that this Agreement will be*



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honoured in full under all circumstances, including Player injury or illness ...". There follows a list of exceptions that are not relevant to the dispute according to the Parties' respective allegations on record.

6. According to the schedule of monthly salary payments under article IV of the Agreement, the Player was to receive, by means of nine installments, a total remuneration of EUR 110,000 between August 2009 and April 2010. This provision also confirms that:

"During the contractual period, all compensation are (sic) considered guaranteed to the Player by the Club. In the event the Player cannot perform as a professional player due to diminished skills, sickness, injury, should in no way affect her right to receive all amounts and compensation ..."

7. Article X of the Agreement provides that the Player may terminate the Agreement among others if the Club is more than 30 days late in making any payment and fails to pay despite a written notice of seven days. In such case:

"... any unpaid balance remaining [...] and any other compensation provided herein shall become immediately due and payable".

8. Article VII of the Agreement provides that:

"The Club will guarantee the Player free medical insurance through its own medical services or those it might have arrange (sic) with a third party, public or private [...] If Player is injured or illness (sic), then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary, and will continue to receive her monthly salary so long, during the season of injury or illness and for subsequent period as long as she follows all treatments prescribed by the Club's physicians".

9. The Club acknowledges that it only paid the Player her first two monthly salaries and part of the third, amounting to a total of EUR 40,000 and that such payments were made late.

10. The late payments resulted in an exchange of written communications between a



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representative of the Player and the Club, that lasted from early January 2010 to 9 March 2010, during which the Player first put the Club on notice to pay the late salaries and then, in the end, gave the Club a final notice of 7 days to perform from 1st March onwards, before terminating the Agreement by a letter of 9 March 2010 due to the absence of payment within the notice period.

11. In response to the initial complaints of the Player, the Club's representative responded as follows on 5 January 2010:

"As you know that along with all world, sometimes we experience hard times. But next week we will make one payment to the Player Dubravka Dacic. And in the end of the January after our club's presidency election to be held on January 31st we will make all payments which became due".

12. During one of the communications, on 21 January 2010, the Player's representative also asked for information regarding an injury suffered by the Player, in the following terms:

"By the way, I would like that the Club communicate me a medical report informing about Dubi's state of health as since she got injured on January 7th in Kursk, we still don't know exactly what she has and it is very important to adapt the according therapy".

13. In the final letter of notice of 1 March and in the letter of termination of 9 March 2010, the Player indicated that the outstanding salaries owed to her at that point represented EUR 50,000, that she was also owed the reimbursement of EUR 800 in travel expenses and that the total outstanding salaries owed under the Agreement amounted to EUR 70,000. The Player concluded that:

"If by Monday March 15, 2010 I didn't receive (sic) the total amount of 70,800 euros (Seventy thousand eight hundred euros) I will ask for a FIBA Arbitration".

14. The Club having made no further payments to the Player as demanded, she filed a Request for Arbitration with the FAT.



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3.2. The Proceedings before the FAT

15. On 16 March 2010, the Player filed a Request for Arbitration in accordance with the FAT Rules.
16. On 31 March 2010, the FAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter.
17. On 16 April 2010, the Player paid her advance on costs in a total amount of EUR 4,000.
18. On 22 April 2010, the Club submitted its Answer.
19. On 27 April 2010, the FAT informed the Player that she would have to substitute for the Club with respect to the Advance on Costs because the latter had not paid its portion thereof.
20. On 14 May 2010, the Player filed with the FAT an Addendum (dated 30 April) to her Request for Arbitration, which was forwarded by the FAT to the Club for it to comment on.
21. On 17 May 2010, the Player made the substitute payment in an amount of EUR 4,000.
22. On 8 June 2010, the Club submitted its observations on the Addendum to the Request for Arbitration.
23. Considering neither of the Parties requested 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 written submissions of the Parties.
24. On 16 June 2010, the FAT informed the Parties that the Arbitrator had decided to close the proceedings in accordance with the FAT Rules and requested that they submit their



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accounts of costs. On 25 June 2010, the Respondent submitted its account of costs as follows:

“- Translation Costs 297,36 TL

- Legal Representation costs 2.000,00 USD

- Miscellaneous expense cost 100 USD

(297,36 TL Turkish Liras is equal to 191,84 USD-1 USD rate = 1.55 TL)”

25. On 28 June 2010, the Claimant submitted her account of costs as follows:

“A total amount of 14.240 EUR, including 3.000 EUR as the non reimbursable fee, 4.000 EUR as the Claimant’s share on costs, 4.000 EUR as the Respondent’s share on costs paid by the Claimant, 3.240 EUR as the counsel’s fee, and any other additional costs of the arbitration that the arbitrator may fix.”

4. The Positions of the Parties

4.1. The Claimant's Position

26. The Player submits the following in substance:

- The Club breached its obligations by first paying salaries late and then defaulting.
- She therefore had no other option than to terminate the Agreement for cause and to return home.
- Accordingly, the Club is responsible for paying her entire outstanding salary as provided by the Agreement.
- The Club is also responsible for non-reimbursed travel expenses owed under the Agreement, for certain costs of moving to and lodging in Turkey and for medical expenses she will incur as a result of her injury which would normally have been



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covered by the Club under the terms of the Agreement.

- She is entitled to a declaration from the Club that her taxes have been properly handled, to 5% interest on all the late payments and to be reimbursed for all her costs deriving from this arbitration.

27. In her Request for Arbitration of 16 March 2010, the Player requested the following relief:

"With reference to all the factors mentio[n]ed above, the Claimant asks the Respondent to pay the following:

- *an overdue amount of the contract makes up **70.000 Euros** (Seventy thousand Euros);*
- *an overdue amount of the travel expen[s]es in the amount of **676,74 Euros** (Six hundred seventy-six Euros and seventy-four cents) (see attached documents 12,13,14);*
- *considering the fact that the Claimant got injured while being under the responsibility of the Respondent and she had not fully recovered when she had to leave the Respondent due to non-fulfilment of his commitments, the Claimant asks for a compensation in the amount of **5.000 Euros** (Five thousand Euros). This amount is defined by the Claimant so that she could cover all the costs of the therapy that she will have to undergo in order to recover from her injury on her right knee and to be ready to fulfil her obligations towards the Italian national team next summer;*
- *a compensation of the "non-reimbursable handling fee" for the FAT request in the amount of **3.000 Euros** (Three thousand Euros);*
- *a reimbursement of all the advance on costs which will be fixed by the Arbitrator and which will be paid by the Claimant;*
- *a reimbursement of all the legal fees and expenses which will be paid by the Claimant;*
- *a compensation of **2.500 Euros** (two thousand five hundred Euros) for the expen[s]es related to the movement and changing of the a[p]artment, as according to the Clause IV) B) of the contract signed on August 5, 2009, the Respondent had to provide the Claimant with an a[p]artment and pay all the*



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charges related to it;

- *a justification proving that the Respondent is in order with all the taxes related to the Claimant's activity in terms of salaries (as stipulated in the Clause V) of the contract signed on August 5, 2009) or to other advantages mentio[n]ed in the aforesaid contract, such as accom[m]odation."*

28. In the Addendum of 30 April 2010 to the Request for Arbitration, the Player requested the following additional relief:

*"Consequently, as the Respondent's share of costs in the amount of 4.000 Euro is another big sum to pay for the Claimant (who obviously didn't have such amount on her bank account) and as the continuation of the Arbitration is the only way for her to have her contract and honor as a person respected, the Claimant asks **for the pa[y]ment of 5% interest of the amount of 110.000 Euro (One hundred and Ten thousand Euro) as a compensation.**"*

4.2. Respondent's Position

29. The Club submits the following in substance:

- Although the Club paid the salaries late due to cash flow problems, the Player did not raise any objections at the time, meaning she implicitly accepted the situation and was not entitled in fairness to terminate the Agreement for reasons of delay.
- Between 10 and 12 March 2010, the Player failed to attend various training sessions, thereby violating her own contractual duties, and was fined as a disciplinary sanction. She also left Turkey without prior notification or consent or a valid excuse, thereby breaching the applicable disciplinary regulations.
- The above breaches of the Player, for which she was fined and which were notified to her in April 2004 via a notary public, prevent her from blaming the Club for the termination; and because she unfairly terminated the Agreement her claims must be rejected.



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- At the time of the facts and while still under contract, the Player received full and adequate treatment for her injury in a local hospital and in addition was able to consult a specialised sports doctor, as established by reports of the Club's physician. She cannot therefore turn to the Club today for compensation.
- Similarly, the Player is not entitled to invoke travel expenses (airline tickets not previously claimed) or costs of lodging because the Club covered both those sets of costs at the time of the facts, in conformity with the Agreement.

30. In its Answer of 22 April 2010, the Respondent submitted the following prayer for relief:

"Under light of the reasons noted above, it is required to reject the application / action of the Player, and to impose trial charges and attorney fees on the Player."

31. In its submission of 8 June 2010, the Respondent objected to the content of the Player's Addendum to the Request for Arbitration, invoking in essence that the request for additional compensation contained therein was groundless since the Club was entitled under the FAT Rules not to participate in the advance on arbitration fees – and thus could not be blamed – while no other motive existed or had been invoked to justify this new claim or the 5% interest linked to it, the latter being exorbitant in any event. The Respondent concluded such submission as follows:

"We hereby kindly ask based on the foregoing reasons that claims made by the claimant in her petition of action of 26.03.2010, as well as her additional claims, be denied/dismissed and that attorney's fees and trial costs be charged on the claimant".

5. The jurisdiction of the FAT

32. 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



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

33. 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) PILA¹.
34. The jurisdiction of the FAT over the dispute results from the following arbitration clause, contained in article XIV of the Agreement:

“Any dispute arising out of or in connection with this Agreement shall be settled exclusively by arbitration by FIBA with possibility to appeal the award to CAS in Lausanne (Switzerland).”

35. The Arbitrator finds that the foregoing clause constitutes without doubt a reference to the FIBA Arbitral Tribunal, i.e. to the FAT. The clause is in written form and thus fulfils the formal requirements of Article 178(1) PILA.
36. With respect to substantive validity, the Arbitrator considers that there are no elements on record that cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording "*any dispute arising out of or in connection with this Agreement*" clearly covers the present dispute.
37. Furthermore, it bears emphasizing that the Respondent addressed the merits of the dispute without objecting to FAT's jurisdiction (see Article 186(2) PILA).
38. Consequently, the Arbitrator has jurisdiction to rule upon the claims.

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



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6. Discussion

6.1. Applicable Law – *ex aequo et bono*

39. 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”.

40. The FAT Rules governing the FAT arbitration chosen under article XIV of the Agreement, contain the following rule (Article 15.1):

“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.”

41. Since the Parties have not agreed otherwise, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

42. 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’arbitrage² (Concordat)³, under which Swiss courts have held that arbitration “*en équité*” is fundamentally different from arbitration “*en droit*”:

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.



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“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

43. 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*”.
44. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2. Findings

45. It is clear from the evidence on record and from the chronology of events that although the Player may have tolerated the initial delay in payment of her salaries in 2009, from early January 2010 onwards she began seriously and systematically to claim the salaries due and then, faced with unfulfilled promises by the Club that it would be paying, decided to put the Club on formal notice on 1 March 2010, in conformity with the procedure provided in the Agreement (7 days written notice), before terminating the Agreement on 9 March 2010.
46. Furthermore, the Player’s absences at trainings between 10-12 March 2010 invoked by the Club are subsequent in time to the notice of 1 March served on the Club by the Player and to her letter of termination of 9 March 2010.
47. By the date of termination, the outstanding amount of salary due to the Player represented a large sum of money, corresponding to half of her entire salary for the season; and her notice of termination was clear, indicating the notice period, the amounts allegedly owed and the fact that in case of termination her entire salary for the

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



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season would become due.

48. For the above reasons, the Arbitrator finds that both the contractual terms of the Agreement and principles of fairness and justice justify the Player's termination of the Agreement on 9 March 2010 and her decision to depart from Turkey to return home.
49. For the same reasons and as a result, it is also fair and in keeping with the unambiguous terms of the Agreement that the Player's entire outstanding salary for the 2009-2010 season became due upon the date of termination.
50. It is also noteworthy in terms of fairness that during the period between January and March 2010 when the Player was seeking payment of the outstanding salaries, in her letters to the Club the Player showed signs of considerable patience and remained both polite and friendly in the requests for payment, obviously trying within reasonable limits to take into account the fact that the Club appeared to be having cash flow problems.
51. In view of the above, the Arbitrator holds that the Player is entitled to the EUR 70,000.00 being claimed.
52. On the other hand, on the face of the evidence on record it would neither be fair nor in keeping with the terms of the Agreement for the Club to be required to cover the costs of future and unspecified medical treatment for the Player, since the Club did take all the necessary steps to address her injury at the relevant time in January 2010 and the Player then decided to leave the Club. The corresponding claim for EUR 5,000 is therefore rejected.
53. With respect to the claim for airfare (EUR 676.74) and for moving expenses (EUR 2,500) there is insufficient evidence that the Club did not meet its duties regarding lodging and travel expenses, and unclear evidence as to the costs being claimed.



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Principles of justice therefore prevent the corresponding claims from being admitted.

54. Concerning the Player's request that the Club provide a declaration with regard to the Player's tax situation in Turkey, neither the terms of the Agreement nor principles of fairness warrant requiring a declaration of the sort, since there is no allegation or evidence that the Player has asked the Club for any form of tax receipt or is faced with a tax claim in Turkey. That being said, the holding of this award, whereby the Club is being ordered to pay the Player's outstanding salaries net of taxes, implies that if and when the Player requests an official tax receipt from the Club on the basis of article V of the Agreement, the Club shall be obliged to provide one.
55. With respect to Player's request for additional compensation formulated in the Addendum to her Request for Arbitration, in which she increased her principal claim from EUR 70,000 to EUR 110,000, the mere fact that the Respondent did not pay its part of the advance on arbitration costs is not a sufficient reason to consider any damage has been caused and she has not invoked any other motive or adduced any evidence of the damage. Consequently, principles of fairness and justice cannot justify allowing the increased claim and it shall be dismissed.
56. Although the Agreement does not regulate interest for late payments, it is a generally recognized principle embodied in most legal systems, which is underpinned by motives of equity, that late payments give rise to interest – in order that the creditor be placed in the financial position she/he would have been in had payments been made on time.
57. Consequently and despite the Agreement not specifying an interest rate, it is normal and fair that interest is due on the late payments. The Arbitrator finds that an interest rate of 5% per annum as invoked by the Player can be applied in fairness, being reasonable and in line with FAT jurisprudence.
58. It is an established principle that interest runs from the day after the date on which the



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principal amounts are due. Consequently, interest at 5% will be applied from the day after the due date for the entire outstanding salary of EUR 70,000, which according to article X of the Agreement is the day after termination since it states that upon termination for breach of contract “... *any unpaid balance remaining of the sum per IV)A), and any other compensation provided herein shall become immediately due and payable*”.

7. Costs

59. Article 19 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
60. On 7 July 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 5,150.00.
61. Considering the Player prevailed in her main claim, it is fair that the fees and costs of the arbitration be borne by the Club and that the latter be required to cover the Player’s legal fees and other expenses, those having been submitted being reasonable in amount.



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62. Given that the Player paid the totality of the advance on costs of EUR 8,000.00 EUR as well as a non-reimbursable handling fee of EUR 3,000.00, the Arbitrator decides that in application of article 19.3 of the FAT Rules:
- (i) FAT shall reimburse EUR 2,850.00 to Player, being the difference between the costs advanced by her and the arbitration costs fixed by the FAT President;
 - (ii) The Club shall pay EUR 5,150.00 to the Player, being the difference between the costs advanced by her and the amount she is going to receive in reimbursement from the FAT.
 - (iii) The Club shall pay to the Player EUR 6,240.00 (3,000 + 3,240) representing the amount of her legal fees and other expenses.



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8. AWARD

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

1. **Beşiktaş Jimnastik Kulübü Derneği shall pay Ms. Dubravka Dacic an amount of EUR 70,000.00, net of taxes, as compensation for the salaries owed to her under their Agreement of 5 August 2009, plus interest at 5% per annum on such amount from 10 March 2010 onwards.**
2. **Beşiktaş Jimnastik Kulübü Derneği shall pay Ms. Dubravka Dacic an amount of EUR 5,150.00 as reimbursement for her arbitration costs.**
3. **Beşiktaş Jimnastik Kulübü Derneği shall Ms. Dubravka Dacic an amount of EUR 6,240 as reimbursement for her legal fees and expenses.**
4. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 13 July 2010

Quentin Byrne-Sutton
(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."