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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0084/10 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Klaus Reichert

in the arbitration proceedings between

World Sport Agency S.r.l.

- Claimant -

represented by Avv. Stefano Vitale, Via de' Fusari N.3, 40123 Bologna, Italy

vs.

KK Union Olimpija Ljubljana, Celovska Cesta N. 25, 1000 Ljubljana, Slovenia

- Respondent -

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1. The Parties

1.1. The Claimant

1. World Sport Agency S.r.l. ("Claimant") is an Italian registered company with its address at Via Guelfa N. 5, 40138 Bologna. Its President, Mira (Mirsada) Poljo, is a FIBA licensed agent. Claimant entered into two agreements with KK Union Olimpija Ljubljana ("Respondent") on 3 September 2009 in respect of services rendered relating to the retention of two players (Mr. Vlado Ilievski and Mr. Saso Ozbolt) by Respondent.

1.2. The Respondent

2. The Respondent is a professional basketball club with its address at Celovska Cesta N. 25, 1000 Ljubljana, Slovenia.

2. The Arbitrator

3. On 7 April 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. Claimant and Respondent entered into two agreements dated 3 September 2009 in



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respect of services rendered by Claimant relating to the retention by Respondent of two professional basketball players (as noted in paragraph 1 above) ("Agent Agreements").

5. The relevant parts, for the purposes of this arbitration, of the Agent Agreements are as follows (Ilievski first, then Ozbolt):

1. The Club will provide W.S.A. with the compensation for its services of commission on the contract of the player Vlado Ilievski for the basketball seasons: - 2009/2010 equivalent to € 35.000, (thirty-five thousand Euros) Net, - 2010/2011 equivalent to € 35.000, (thirty-five thousand Euros) Net. These amounts are due each season on the 30th Day of September. Invoices will follow.

2. The present contract shall be constructed (sic), interpreted and enforced in accordance with the Italy and Slovenian laws and in accordance with the regulations of the International Basketball Federation (FIP). Any disputes arising with respect to, or in connection with this Agreement, shall be finally determined by the accelerate procedure of Arbitration of the Court of Justice of Bologna (Italy). [...]

4. ARBITRATION

In case of disputes on the present Agreement the parties will take all measures to solve them by negotiations. If the dispute between the parties is not resolved by way of negotiations then it should be resolved in accordance with the FIBA Arbitral Tribunal (FAT) as follows: Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the (FAT) Arbitration Rules by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), Irrespective of the parties domicile. 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. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.[...]

6. In respect of the Ozbolt Agent Agreement it is in identical terms save that the sums provided for in clause 1 were EUR 15,000.00 for each season instead of EUR 35,000.00.



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3.2. The Proceedings before the FAT

7. Claimant filed a Request for Arbitration dated 25 March 2010 in accordance with the FAT Rules, and on 29 March 2010 the non-reimbursable fee of EUR 3,000.00 was duly paid. The Request for Arbitration sought payment of various sums stated to be then due from the Respondent to the Claimant. In short, Claimant states that it had not been paid by Respondent under both Agent Agreements in respect of the 2009/2010 season.
8. On 12 April 2010 the FAT informed the Parties that Mr. Klaus Reichert had been appointed as the Arbitrator in this matter, and fixed the amount of the advance on costs to be paid by the Parties as follows:

<i>"Claimant (World Sport Agency)</i>	<i>EUR 3,000</i>
<i>Respondent (KK Union Olimpija Ljubljana)</i>	<i>EUR 3,000"</i>
9. In addition on 12 April 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 7 May 2010. These documents were sent by fax and by email to the Respondent.
10. On 19 May 2010 Claimant paid EUR 3,000.00 as directed in respect of the advance on costs. The Respondent did not pay its share of the advance on costs. By letter from FAT dated 18 May 2010 the Claimant was invited to pay the Respondent's share of the advance on costs no later than 27 May 2010.
11. On 20 May 2010, Claimant paid Respondent's share of the advance on costs in the amount of EUR 3,000.00.



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12. The Respondent did not deliver an Answer by 21 May 2010.
13. On 1 June 2010, considering that neither of the Parties had solicited a hearing, the Arbitrator decided not to hold a hearing and to deliver the award on the basis of the written submissions. The Arbitrator accordingly issued a procedural order providing that the exchange of documents was completed and inviting the Parties to submit their cost accounts no later than 10 June 2010.
14. On 3 June 2010, Claimant submitted his costs as follows: Legal Fees totalling EUR 3,381.43; Non-reimbursable handling fee paid to FAT of EUR 3,000.00; advances on costs EUR 6,000.00.
15. The Respondent did not submit its account of costs.
16. By letter dated 23 June 2010 from FAT, the Arbitrator requested, for clarification purposes, certain information from the Claimant, namely, whether Claimant received any payments from Respondent after the commencement of the arbitration.
17. In answer to the request for clarification, Claimant stated by letter dated 23 June 2010 that it did not receive any payments from Respondent after the filing of the Request for Arbitration. The Respondent was offered the opportunity to comment by no later than 29 June 2010. Subsequently the opportunity to comment was extended by the Arbitrator, upon his own initiative, to 7 July 2010.
18. No comment was received from Respondent by that date.



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4. The Positions of the Parties

4.1. The Position of the Claimant

The position of Claimant is very simple. It says it was not paid in due time in accordance with the very clear provisions of each Agent Agreement. It also seeks interest, costs and expenses. The relief sought is articulated by the Claimant as follows:

World Sport Agency S.r.l. asks that KK Union Olimpija Ljubljana, checked the contractual default above described, is condemned:

- *to pay to the Claimant € 50.000,00, net, as him agent fees referred to 2009/2010 sport season, regarding the contracts signed by Mr. Saso Ozbolt and Mr. Vlado Ilievski;*
- *to pay to the Claimant the interests since expired day of every due payment;*
- *to pay the arbitration proceeding total costs and to refund the costs anticipated by the Claimant;*
- *to pay the legal fees and expenses paid by the Claimant to do the arbitration.*

4.2. Respondent's Position

19. The Respondent has not participated in this arbitration. It is clear from the record in this case that all emails and faxes sent by FAT have not been returned, bounced back or otherwise give any indication that Respondent did not receive them. It is therefore clear that Respondent did not participate in this arbitration at its own election.

5. Jurisdiction and Other Procedural Issues

20. Pursuant to Article 2.1 of the FAT Rules, "[t]he seat of the FAT and of each arbitral



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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 *ex officio*

21. As a preliminary matter, the Arbitrator wishes to emphasize that he will examine his jurisdiction *ex officio*, on the basis of the record as it stands¹. This is an important step to take given the non-participation of Respondent.
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 disputes referred to him are of a financial nature and are thus arbitrable within the meaning of Article 177(1) PILA².

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

¹ ATF 120 II 155, 162.

² Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.



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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 clauses (section 4 of the Agent Agreements) already described above in paragraph 5. One has to take into account what is an apparently contradictory clause agreeing to arbitration in Bologna as opposed to FAT. At best this may give rise to a choice for a claimant under the Agent Agreements, namely to go down the route of arbitration in Bologna or FAT arbitration. In any event this is not an issue, nor a contradiction which deprives FAT of jurisdiction. Claimant has clearly elected to have its disputes dealt with by FAT by the filing of the Request for Arbitration. That choice is to be respected.
26. Both Agent Agreements submitted with the Request for Arbitration are in written form and thus the arbitration agreements fulfill the formal requirements of Article 178(1) PILA. 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 agreements as between Claimant and Respondent under Swiss law (referred to by Article 178(2) PILA).

6.1. Applicable Law – *ex aequo et bono*

27. 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:



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

28. 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."

29. As already noted above, the Agent Agreements provide that the Arbitrator shall decide the dispute "ex aequo et bono". Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this arbitration.

30. It is necessary to make reference, at this stage, to clause 2 in the Agent Agreements:

The present contract shall be constructed (sic), interpreted and enforced in accordance with the Italy and Slovenian laws and in accordance with the regulations of the International Basketball Federation (FIP)³.

The Arbitrator finds that this provision does not, on its face, to supplant the express and clear provision of the Agent Agreements that the Arbitrator shall decide the dispute *ex aequo et bono*. Indeed for this clause to function properly it would require an assessment of Italian and Slovenian substantive law read together with the regulations of the International Basketball Federation. This is impractical, and perhaps even impossible. What is abundantly clear is that the parties have adopted the unequivocal and, now standard in FIBA agreements, approach of *ex aequo et bono* as to the law applicable to the merits in case of disputes brought before the FAT.

31. The concept of "équité" (or *ex aequo et bono*) used in Article 187(2) PILA originates

³ The Arbitrator presumes this to mean FIBA.



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from Article 31(3) of the Concordat intercantonal sur l'arbitrage⁴ (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

32. 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".⁷
33. 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*".
34. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2. Findings

6.2.1 Discussion and conclusion on the facts

35. The Arbitrator is entirely satisfied that the factual basis of the claims of Claimant is well

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

⁶ JdT 1981 III, p. 93 (free translation).

⁷ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.



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founded. There appears to be no fact or piece of evidence which could contradict this finding. Claimant has duly established the facts of the case.

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

36. The Arbitrator has identified the principal consideration which reflects justice and fairness for the purposes of this Arbitration.
37. 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.
38. In respect of Claimant it is unquestionably the case that Respondent was obliged to pay it a total amount of EUR 50,000.00 as of 30 September 2009 in respect of both Agent Agreements (Ilievski and Ozbolt) for the 2009/2010 Season.
39. Respondent is obliged to adhere to the contractual obligations it entered into with Claimant. Respondent signed the Agent Agreements with Claimant concerning services relating to the retention by Respondent of two professional basketball players, and in return Claimant clearly has the legitimate entitlement to be paid the sums of money agreed between the Parties. It is certainly not good enough for the Respondent to simply not have paid the sums it agreed to pay Claimant.
35. Turning to interest, 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). Interest runs from the day after the date on which the principal amounts are due. Indeed, it appears just and fair that when one



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party is deprived of a sum of money after the date upon which it is due, interest accrues to alleviate the situation. A rate of 5% simple interest, which is in line with FAT jurisprudence, appears to the Arbitrator to be fair and reasonable.

6. Costs

36. 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.
37. The legal fees in the amount of EUR 3,381.43 claimed by Claimant have not been challenged by Respondent in any way. Further, in the context of the overall value and complexity of this dispute, these fees appear reasonable and appropriate in the circumstances.
38. On 21 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 3,328.00.
39. Considering that Claimant prevailed in the entirety of its claims, it is appropriate that the



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Respondent should bear a corresponding burden of the arbitration costs and also be similarly responsible for the non-reimbursable fee.

40. As the arbitration costs are fixed by the FAT President at EUR 3,328.00 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 6,000.00, that leaves a figure of EUR 2,672.00 which can be repaid to Claimant.
41. The Arbitrator decides that in application of article 19.3 of the FAT Rules:
 - (i) FAT shall pay EUR 2,672.00 to Claimant by way of reimbursement;
 - (ii) Respondent shall pay to Claimant an amount of EUR 3,328.00 (EUR 6,000.00 – EUR 2,672.00) as reimbursement of arbitration costs;
 - (iii) Respondent shall pay Claimant an amount of EUR 6,381.43 (EUR 3,381.43 + 3,000.00) in respect of legal fees and expenses.



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7. AWARD

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

- 1. KK Union Olimpija Ljubljana shall pay World Sport Agency S.r.l. a net amount of EUR 50,000.00, plus interest at a rate of 5% per annum on such amount from 1 October 2009 until payment.**
- 2. KK Union Olimpija Ljubljana shall pay to World Sport Agency S.r.l. an amount of EUR 3,328.00 as reimbursement of arbitration costs.**
- 3. KK Union Olimpija Ljubljana shall pay World Sport Agency S.r.l. an amount of EUR 6,381.43 in respect of legal fees and expenses.**
- 4. All other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 23 July 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."