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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0085/10 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Klaus Reichert

In the arbitration proceedings between

Mr. Saso Ozbolt

- 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. Mr. Saso Ozbolt ("Claimant") is a professional basketball player who was engaged by KK Union Olimpija Ljubljana ("Respondent") by an agreement dated 31 August 2009 covering the seasons 2009/2010 and 2010/2011.

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 an agreement dated 31 August 2009 ("Player Agreement") whereby the latter engaged Claimant as a professional player for the 2009/2010 and 2010/2011 seasons.



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5. The relevant parts, for the purposes of this arbitration, of the Player Agreement are as follows (taken out of sequence):

XI. 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.[...]

II. GUARANTEED NO-CUT CONTRACT

This is a guaranteed no-cut contract. The Club agrees that this contract is no-cut, which means that neither the Club nor the League can terminate this contract even if any injury or illness befalls on the Player or in case the Player fails to reach an expected level of performance.

III. TERM OF AGREEMENT

The term of this contract shall be considered available for the period from the date of the execution of this agreement and shall continue for the period which covers the 2009/2010 and 2010/2011 basketball seasons. [...]

IV. SALARY COMPENSATION

For the 2009/2010 basketball season, the Club accepts to pay a guaranteed net salary of € 150,000 (One Hundred and fifty Thousand Euros) Net to the Player [a series of milestones (ten in all) is set out for the staged payment of that sum starting on 15 September 2009 and concluding on 15 June 2010]

The last payment of € 15,000 (Fifteen Thousand Euros) net must be paid not later than on 15th June 2010. Payments which are received 5 (five) days later than the stated dates shall be subject to a penalty of € 50.00 (fifty Euros) per day. In case of scheduled payments not being made by the Club within 10 (ten) days of the scheduled payment, the



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Rules, by 10 May 2010. These documents were sent by fax and by email to the Respondent.

9. On 19 April 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.
10. The Respondent did not deliver an Answer by 10 May 2010.
11. By letter from the FAT dated 14 May 2010 the Claimant was invited to pay the Respondent's share of the advance on costs no later than 25 May 2010.
12. On 19 May 2010, Claimant paid the Respondent's share of the advance on costs in the amount of EUR 3,000.00.
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 4,508.83; 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 21 June 2010 from FAT, the Arbitrator requested, for clarification purposes, certain information from the Claimant: (a) whether Claimant received any payments from Respondent after the commencement of the arbitration; and (b) the request for relief in respect of payments which were due to Claimant after 25 March 2010.



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17. In answer to the request for clarification, Claimant stated by letter dated 22 June 2010 that he did not receive any payments from Respondent after the filing of the Request for Arbitration. The letter set out the following computation for the relief:

- to pay to the Claimant € 104.123,52, net, as his remuneration referred to 2009/2010 sport season until June 23rd 2010, in addition to further amounts occurred until the end of the present proceeding;

- to pay to the Claimant € 41.250,00, as penalty for the delays in the payments of the expired rates, in addition to the other penalties occurred until the end of the present proceeding;

- 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

18. By email dated 26 June 2010, Claimant updated his claim for relief as follows:

- to pay to the Claimant € 100.335,12, net, as his remuneration referred to 2009/2010 sport season until June 25th 2010, in addition to further amounts occurred until the end of the present proceeding;

- to pay to the Claimant € 6.500,00, net, as extra amounts due as bonus;

- to pay to the Claimant € 41.250,00, as penalty for the delays in the payments of the expired rates, in addition to the other penalties occurred until the end of the present



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proceeding;

- *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.*

19. By letter dated 1 July 2010 from FAT, Respondent was offered an opportunity to comment no later than 7 July 2010. No comment was received from Respondent by that date.

4. The Positions of the Parties

4.1. The Position of the Claimant

20. The position of Claimant is very simple. He says he was not paid in due time in accordance with the specific milestones set out in the Player Agreement. These missed deadlines for payment have given rise to certain agreed penalties. Further, and in his last communication, he seeks payment of certain bonuses. Finally he seeks interest, costs and expenses.
21. The claims for relief as finally formulated are recorded in paragraph 18 above.

4.2. Respondent's Position

22. 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



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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

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 *ex officio*

24. 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.
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) PILA².

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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5.1.3 Formal and substantive validity of the arbitration agreement

27. 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."

28. The jurisdiction of the FAT over the present dispute results from the arbitration clause (section XI of the Player Agreement) already described in paragraph 5 above.
29. The Player 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.
30. 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*

31. 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".

32. 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."

33. As already noted above, the Player 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.

34. It is necessary to make reference, at this stage, to section XII in the Player Agreement:

"This contract shall be interpreted and enforced in accordance with the law of Switzerland."

This provision has not been argued by the Parties as displacing or superseding the provisions of section XI of the Player Agreement which expressly provides for a decision by an arbitrator under the principles of equity known as *ex aequo et bono*. Indeed the Request for Arbitration makes it clear that only section XI of the Player Agreement is invoked in respect of the dispute between the Parties. Even if the point had been taken by one of the Parties in this matter, section XII does not, by its terms, displace the express choice of the Parties that the substance of any dispute arising out of their Agreements should be decided *ex aequo et bono*. The Arbitrator therefore finds that the authorization to decide the dispute *ex aequo et bono* prevails over the isolated reference to Swiss law in the Player Agreement.³ The concept of "équité" (or *ex aequo*

³ See also FAT decision 0063/09 dated 19 February 2010 Fisher and Entersport Management Inc. v. KK Vojvodina Srbijagas; FAT Decision 0030/09 dated 12 May 2009, Vujanic vs. Dynamo Moscow, p.11; FAT Decision 0031/09 dated 12 May 2009, Misanovic and Ristanovic vs. Dynamo Moscow.



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et bono) used in Article 187(2) PILA originates 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

35. 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
36. 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*".
37. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2. Findings

6.2.1 Discussion and conclusion on the facts

38. 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. No challenge is made by Respondent to any of Claimant's claims, arguments or exhibits.

39. There is a notable feature of this case. Claimant filed the Request for Arbitration during the course of the 2009/2010 season while continuing to play for Respondent. In many other FAT cases parties had gone their separate ways and claims were for playing services already rendered. In this case Claimant sought, as of the date of the Request for Arbitration, payment of sums apparently yet to fall due by reason of the prescribed milestones. Upon closer inspection of the Player Agreement though there is a specific provision, in section IV, which effectively brings about an accelerated triggering of the liabilities of Respondent: *Payments which are received 5 (five) days later than the stated dates shall be subject to a penalty of € 50.00 (fifty Euros) per day. In case of scheduled payments not being made by the Club within 10 (ten) days of the scheduled payment, the Player shall be entitled to all moneys in accordance with the Contract, but shall not have to perform in practice sessions or games until all scheduled payments have been made plus appropriate penalties and such non-performance will not be considered a breach of contract. In the event that payments are not made by Club, within 15 (fifteen) days of the scheduled payments date, player shall immediately be entitled to the full salary and shall have no further obligations to the Club. The Club shall retain no rights to the Player except for the obligation to pay all salary and bonuses under the terms of this Contract.*
40. Given the failure by Respondent to pay on time, the specific provisions of this Player Agreement triggered a liability to pay Claimant *all moneys in accordance with the Contract*. There is no requirement on the part of Claimant to cease playing in such circumstances, rather it seems to be at his choice whether or not to practice or play. Indeed it is to his credit: (a) that he continued to play notwithstanding the failure by Respondent in large measure to pay him the agreed remuneration; and (b) that he did not claim sums extending into Season 2010/2011.



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41. Therefore, Respondent owes to Claimant a net amount of EUR 100,335.12 as outstanding salaries for the 2009/2010 season.
42. As regards bonus payments for specific achievements by Claimant these are substantiated by the latest submissions put before the Arbitrator, and are not challenged by Respondent.
43. The claim for penalty sums, which claim as presently liquidated totals EUR 41,250.00, presents some initial conceptual difficulties. It is a little unclear from the Player Agreement whether the penalty of EUR 50.00 per day operates independently in respect of each milestone salary payment, or if it is only EUR 50.00 per day which operates even if more than two milestones are missed. The claim as articulated by Claimant in this regard amounts to EUR 41,250.00. This approach of the Claimant suggests a cumulative charging of penalties, so in effect by the end of the first Season, Respondent might be exposed to penalties of EUR 500.00 per day if it had missed paying each of the ten monthly salary milestones. The interpretation of the Player Agreement, upon reflection, seems consistent with that approach. Any other interpretation effectively rewards Respondent for non-payment. The final amount of penalties sought by Claimant is up to the date which represents *the end of the present proceedings*. The claim for EUR 41,250.00 was last stated on 26 June 2010. However, it is not clear what is the relevant penalty sum per day should be after that date. It has not been stated what the appropriate figure is by reference to exact number of missed milestone payments. In such circumstances the claim for penalties as liquidated and ascertained in the amount of EUR 41,250.00 is the extent of the relief which will be ordered in this regard.
44. Finally, this case is confined to its specific facts and circumstances as regards the provisions of the Player Agreement in issue. It is not a precedent for the bringing of an arbitration mid-season.



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

45. The Arbitrator has identified the principal consideration which reflects justice and fairness for the purposes of this Arbitration.
46. 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.
47. In respect of Claimant it is unquestionably the case that Respondent was obliged to pay him a total amount of EUR 150,000.00 by way of ten equal installments for the 2009/2010 Season. Missed or late payments triggered penalties and also, after a certain period of time, a liability for all money due under the Player Agreement. Additionally if certain performance goals were achieved the Respondent was bound to pay bonuses to Claimant.
48. Respondent is obliged to adhere to the contractual obligations it entered into with Claimant. Respondent signed the Player Agreement with Claimant, who commenced playing and continued to play the 2009/2010 Season for it, and in return 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 have part-paid the sums it agreed to pay Claimant. Short-changing Claimant is unacceptable in the light of Respondent's contractual obligations and the principle of justice and equity noted above. Indeed the Parties specifically bargained for penalties in the event of late payments. In that regard and with that in mind, the claim for interest on the part of Claimant falls to be considered. 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



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order for payment of the principal). This is widely referred to as interest. However, in the specific circumstances of this Player Agreement the Parties agreed to penalties in the amount of EUR 50.00 per day for late payment in respect of each missed milestone running concurrently. This appears to be a just and reasonable compensation for late payments under the Player Agreement and any further interest charges would, in the opinion of the Arbitrator, be both overly complex and overly burdensome.

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 in the amount of EUR 4,508.83 claimed by Claimant have not been challenged by Respondent. Further, in the context of the overall value of this dispute and the complexities raised by the specific provisions of the Player Agreement, these fees appear reasonable and appropriate in the circumstances.
51. 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



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President determined the arbitration costs in the present matter to be EUR 3,328.00.

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 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.
54. 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 7,508.83 (EUR 4,508.83 + 3,000.00) in respect of legal fees and expenses.



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8. AWARD

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

1. KK Union Olimpija Ljubljana shall pay Mr. Saso Ozbolt a net amount (salary) of EUR 100,335.12.
2. KK Union Olimpija Ljubljana shall pay Mr. Saso Ozbolt a net amount (bonus) of EUR 6,500.00.
3. KK Union Olimpija Ljubljana shall pay Mr. Saso Ozbolt an amount (penalties) of EUR 41,250.00.
4. KK Union Olimpija Ljubljana shall pay to Mr. Saso Ozbolt an amount of EUR 3,328.00 as reimbursement of arbitration costs.
5. KK Union Olimpija Ljubljana shall pay Mr. Saso Ozbolt an amount of EUR 7,508.83 in respect of legal fees and expenses.
6. 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."