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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0091/10 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Klaus Reichert

in the arbitration proceedings between

Antonio D. Graves,
526 Bowman street, Mansfield, OH 44903, USA
represented by
Mr. Alexandros C. Saratsis, Octagon, Inc., 1751 Pinnacle Drive Suite 1500,
McLean, VA 22102, USA

- Claimant -

vs.

KK Cibona,
Savska 30, 10000 Zagreb, Croatia
represented by
Mr. Jurica Reberski, Mamic Peric Reberski Rimac Law firm,
Radnicka cesta 82, 10000 Zagreb, Croatia

- Respondent -

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1. The Parties

1.1. The Claimant

1. Antonio D. Graves (“Claimant”) is a professional basketball player who was engaged by the club KK Cibona (“Respondent”) to play the season 2009/2010. That engagement was reflected in a written agreement dated 21 July 2009 (“the Agreement”).

1.2. The Respondent

2. Respondent is a professional basketball club with its address at Savska 30, 10000 Zagreb, Croatia. The contact person within Respondent is Mr. Bozo Milicevic, Club Director.

2. The Arbitrator

3. On 24 May 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 11 May 2010, sets out the terms and conditions under which Claimant was to play for Respondent for the 2009/2010 season. His salary was set at USD 425,000.00, net of

taxes, being USD 42,500.00 per month from September 2009 to June 2010.

5. The Agreement expressly provides that it is a "no cut" arrangement (clause "*THIRTEENTH*").

6. Claimant says in his Request for Arbitration that he was only paid the first instalment and the remaining nine were not paid at all. Claimant also later produced an agreement dated 19 December 2009 by which he agreed to take three instalments of USD 42,500.00 (payable in December 2009, January and February 2010). This later agreement was stated to replace the Agreement. It is common case between the parties that no money was paid on foot of that later agreement.

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

7. Claimant filed a Request for Arbitration dated 11 May 2010 in accordance with the FAT Rules, and on 10 May 2010 and 14 May 2010 (in two unequal instalments) the non-reimbursable fee of EUR 3,984.56 was duly paid. The Request for Arbitration sought payment of:

   - USD 382,500.00 in respect of unpaid salary instalments
   - Interest at 5% from 20 October 2009
   - All costs (legal and arbitration)

8. On 26 May 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 5,000*
Respondent	*EUR 5,000"*

9. In addition, on 26 May 2010, the FAT sent the Request for Arbitration, together with the

Exhibits thereto, to Respondent. In the covering letter the FAT notified Respondent that the Answer was due, in accordance with Article 11.2 of the FAT Rules, by 16 June 2010.

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

    - 3 June 2010, EUR 4.930,29 paid by Claimant (Claimant's share);
    - 28 June 2010, EUR 4.930,29 paid by Claimant (Respondent's share);

11. Respondent delivered its Answer on 15 June 2010.

12. On 18 June 2010 Claimant delivered, by email, a copy of the agreement dated 19 December 2009.

13. On 16 July 2010 Claimant delivered his Reply to the Answer (having been afforded the opportunity to do so by the Arbitrator's Procedural Order dated 2 July 2010).

14. Respondent did not submit a second submission notwithstanding the opportunity afforded to it by the Arbitrator.

15. On 10 August 2010 the Arbitrator wrote to the parties as follows (in part): "*After reviewing the parties' submissions to date, the Arbitrator would like to know whether the parties wish to file any further documentary evidence or if they are content that* ***all*** *the documentary evidence they seek to rely upon is already before the Arbitrator. The parties shall file their answer* ***by no later than Friday, 20 August 2010****."*

16. On 30 August 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. No further submissions were made by that time notwithstanding the opportunity afforded to the parties to do so by way of the Arbitrator's letter dated 10 August 2010.

17. On 1 September 2010, Claimant submitted his costs as follows: EUR 4,000.00 for the non reimbursable fee; EUR 5,000.00 as the Claimant's share of costs; EUR 5,000.00 as Respondent's share of the advance on costs paid by Claimant; EUR 3,000.00 as counsel's fees.

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

19. By letter dated 5 October 2010, the Arbitrator requested, for clarification purposes, certain information from the Claimant: (a) whether the Claimant had entered into an employment contract with another club after 19 December 2009 and until the end of the 2009/2010 season, (b) if so, Claimant was requested to provide FAT with a copy of such contract by no later than Monday, 11 October 2010.

20. In answer to the Arbitrator's request for clarification, Claimant submitted a contract with the club Hapoel Holon BC in Israel ("the Hapoel Agreement") which covered the period from 15 January 2010 and until the last game of the 2009/2010 season and provided for a total remuneration of 474,670 NIS.

4. Jurisdiction

21. 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

22. The Arbitrator notes that the Agreement provides for the following under clause "TWELFTH":

> *"Any dispute arising from or related to the present contract can also 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), 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. The present contract shall be considered as the main one and has the priority above any other signed between the parties."*

23. The later agreement dated 19 December 2009 provided that Respondent agreed to "*FIBA-FAT jurisdiction"* (clause 5).

24. 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].

5.1.2 Formal and substantive validity of the arbitration agreements

25. 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."*

26. The jurisdiction of the FAT over the present dispute results from the arbitration clause already described above in paragraph 22.

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

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

28. 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). Further, at no stage was the validity of the arbitration agreement called into question by Respondent.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

29. With respect to the law governing the merits of the dispute as between Claimant and Respondent, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the arbitrators to decide "*en équité*" instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

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

30. 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."*

31. As already noted in paragraph 20 above, the Agreement provides that the Arbitrator shall decide *ex aequo et bono*.

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.

6.2. Findings

6.2.1. Discussion and conclusion on the facts

36. The Answer demonstrates clearly that there is no factual dispute between the parties. Respondent does not counter or dispute anything which Claimant says, namely:

- that no payments were made to Claimant beyond the first monthly salary; and

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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.

- that no payment at all was made on foot of the later agreement dated 19 December 2009. Notwithstanding that fact Respondent seeks to stand on the lesser sums reflected in that document.

6.2.2. Discussion of *ex aequo et bono* and the relevant principles for this Arbitration including their application

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

38. 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.

39. In respect of Claimant it is unquestionably the case that Respondent was obliged to pay him the agreed salary by way of monthly instalments.

40. 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 pay the first of the agreed monthly salaries and then not pay any more monies. It is even worse to then enter into a later agreement which purports to displace the obligations of the Agreement and not adhere to those in any manner whatsoever.

41. Respondent's contractual argument, namely that it wishes to stand on the later agreement of 19 December 2009, actually cuts against it. That document specifically provides that only upon full compliance with its terms will Respondent's obligations to Claimant be released:

> *"7. Subject to the club full payment and occurrence of the above the club shall be released from all obligations toward the player according to the previous agreements between the parties."*

42. It appears appropriate to the Arbitrator, based upon the principle of *pacta sunt servanda*, that Respondent will be kept to the bargain it struck, namely that only if and when there was compliance with the later agreement of 19 December 2009 could the Agreement's provisions and liabilities be extinguished. Given that there was no compliance at all, the later agreement cannot, on the Arbitrator's interpretation of its terms, operate to defeat the claims of Claimant.[6]

43. On the other hand, by virtue of the agreement dated 19 December 2009 the Claimant was entitled to seek alternative employment and mitigate his damage caused by the Respondent's breach of the Agreement. Indeed in mid-January 2010 Claimant signed the Hapoel Agreement and continued playing professional basketball in Israel. Deciding *ex aequo et bono* and in line with the FAT jurisprudence the Arbitrator finds that Claimant should not receive two salaries (one from Respondent and one from Hapoel Holon BC) for the same period of time, i.e. January – May 2010. Therefore, considering also that the Hapoel Agreement provides for a basic conversion rate of 1 USD = 3,66 NIS under which payments should be calculated, the amounts to be paid by Respondent to Claimant are the following:

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[6] See also FAT decision 0046/09 dated 26 February 2010 Mahoric, Jakse vs BC Kyiv, paras. 47-51.

Salary (month)	(Cibona) Agreement	Hapoel Agreement	Amount owed
October 2009	USD 42,500.00	-	USD 42,500.00
November 2009	USD 42,500.00	-	USD 42,500.00
December 2009	USD 42,500.00	-	USD 42,500.00
January 2010	USD 42,500.00	USD 25,938 (NIS 94,934)	USD 16,562.00
February 2010	USD 42,500.00	USD 25,938 (NIS 94,934)	USD 16,562.00
March 2010	USD 42,500.00	USD 25,938 (NIS 94,934)	USD 16,562.00
April 2010	USD 42,500.00	USD 25,938 (NIS 94,934)	USD 16,562.00
May 2010	USD 42,500.00	USD 25,938 (NIS 94,934)	USD 16,562.00
June 2010	USD 42,500.00	-	USD 42,500.00
			Total = USD 252,810.00

44. It is also necessary to discuss certain other matters put forward by Respondent, namely an inability to pay and a wish to solve the dispute amicably. There is no principle which is known to the Arbitrator, nor would such a principle comport with *ex aequo et bono*, which elevates an inability to pay into a proper defence to a lawfully due debt. Secondly, the parties plainly bargained for arbitration under the FAT Rules and that bargain is, as with other contractual provisions, meant to be adhered to rather than put off for indeterminate negotiations. The observation that "*According to present legal practice, it is usual to try to solve any dispute arising from agreement amicably, before submitting it to the agreed authority*" (see p.3 of the Answer) is not a rule or maxim which blocks the path of a claimant wishing to vindicate his rights. Of course if

parties expressly provide for stages (*e.g.* negotiations, mediation, arbitration) then that is different; this was not done by these parties.

45. 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). 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.

46. What remains to be identified is the rate of interest. Claimant seeks 5%. 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% per annum, is reasonable and equitable in the present case. Also what needs to be identified is from when interest will run. It appears to the Arbitrator that the appropriate time is one day after each instalment was due. Thus, Respondent must pay interest at 5% per annum as follows:

- on USD 42,500.00 from 21 October 2009
- on USD 42,500.00 from 21 November 2009
- on USD 42,500.00 from 21 December 2009
- on USD 16,652.00 from 21 January 2010
- on USD 16,652.00 from 21 February 2010
- on USD 16,652.00 from 21 March 2010
- on USD 16,652.00 from 21 April 2010
- on USD 16,652.00 from 21 May 2010
- on USD 42,500.00 from 21 June 2010

7. Costs

47. Article 17.2 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 17.3 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.

48. The legal fees in the amount of EUR 3,000.00 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.

49. On 10 October 2010 - considering that pursuant to Article 17.2 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 5,706.00.

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

51. As the arbitration costs are fixed by the FAT President at EUR 5,706.00 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 9,860.58, that leaves a figure of EUR 4,154.58 which can be repaid to Claimant.

52. The Arbitrator decides that in application of article 17.3 of the FAT Rules:

(i) FAT shall pay EUR 4,154.58 to Claimant by way of reimbursement;

(ii) Respondent shall pay to Claimant an amount of EUR 5,706.00 being the difference between the costs advanced by him (EUR 9,860.58) and the amount he is going to receive in reimbursement from the FAT; and

(iii) Respondent shall pay Claimant an amount of EUR 6,984.56 in respect of legal fees and expenses;

8. AWARD

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

1. **KK Cibona shall pay Antonio D. Graves USD 252,810.00 in respect of unpaid salary.**

2. **KK Cibona shall pay Antonio D. Graves interest as follows:**

   - **on USD 42,500.00 from 21 October 2009**
   - **on USD 42,500.00 from 21 November 2009**
   - **on USD 42,500.00 from 21 December 2009**
   - **on USD 16,652.00 from 21 January 2010**
   - **on USD 16,652.00 from 21 February 2010**
   - **on USD 16,652.00 from 21 March 2010**
   - **on USD 16,652.00 from 21 April 2010**
   - **on USD 16,652.00 from 21 May 2010**
   - **on USD 42,500.00 from 21 June 2010**

3. **KK Cibona shall pay Antonio D. Graves an amount of EUR 5,706.00 as reimbursement of arbitration costs.**

4. **KK Cibona shall pay Antonio D. Graves EUR 6,984.56 in respect of legal fees and expenses.**

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

Geneva, seat of the arbitration,11 October 2010

Klaus Reichert

(Arbitrator)