



FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0100/10 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Mike Taylor, c/o Priority Sports & Entertainment, 325 N La Salle Drive,
Suite 650, Chicago, IL 60610, USA

- Claimant -

Represented by Mr. Brad Ames, Priority Sports & Entertainment,
325 N La Salle Drive, Suite 650, Chicago, IL 60610, USA

vs.

KK Crvena Zvezda, Mali Kalemegdan 2, 11000 Belgrade, Serbia

- Respondent -

Represented by Mr. Mirko Pavlovic, General Manager



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1. The Parties

1.1. The Claimant

1. Mr. Mike Taylor (“the Player”) is a professional basketball player who during the 2009-2010 basketball season was playing for the Serbian club KK Crvena Zvezda.

1.2. The Respondent

2. KK Crvena Zvezda (the “Club”) is a professional basketball club in Serbia.

2. The Arbitrator

3. On 24 June 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.



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3. Facts and Proceedings

3.1. Summary of the Dispute

4. The following facts are not disputed, the Club having submitted in its Answer that “*No factual arguments referring to the contractual issues concerned, existing between [t]he Claimant and the Respondent, stated in the Claimant’s Request for Arbitration are hereby disputed*”:

- Player and the Club entered into an agreement on 16 November 2009 whereby the latter engaged the Player for the season 2009-2010 (the “Agreement”).
- Under the terms of the Agreement, the Player’s salary and any obtained bonuses were fully guaranteed even in the case of an injury during the season.
- The Player was injured during a game on 9 March 2010 and was unable to finish the season for that reason. At that point in time, the Club was late in certain salary payments.
- As a result of those late payments, on 16 March 2010 the Player exercised his option to terminate the Agreement and to thereby accelerate the due date of payment of all outstanding amounts owed under the Agreement. He simultaneously returned to the United States for additional medical examinations.
- In the letter of termination of 16 March, the Player’s agent claimed as follows: “*Per the Agreement, Mike Taylor was scheduled to receive \$175,000.00 USD in base salary and \$10’000 USD as a bonus for qualifying for the Eurocup Round of 16 from your Club. To date, Mike has received \$75,000.00 USD from Club.*”



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Please make a payment immediately to Mike Taylor in the amount of \$110,000.00 USD”.

- At no point in time did the Club dispute that the foregoing amount was due to the Player. It simply indicated it did not have the funds available to make such payment.
5. On the other hand, the Club is disputing its duty to pay late payment penalties claimed as follows by the Player in his Request for arbitration: *“Immediate payment from Club to Player in the amount of Forty Four Thousand Five Hundred US Dollars (\$44,500 USD) in late payment penalties as calculated in the attached spreadsheet and per Paragraph 2 of the Agreement”.*
6. Under Article 2 of the Agreement:
- “[...] It is agreed that any payment to Player pursuant to the above shall be subject to an interest penalty of One Hundred Dollars (\$100.00 USD) per day for each day said payment was due”.*
7. The foregoing provision goes on to state that if the payment in question is more than seven days late the Player is entitled to refrain from practicing and playing games, and that in case of non-payment beyond 15 days from the due date the Player is entitled to terminate the Agreement.
8. According to the Player, the due dates for the outstanding salaries and bonus were as follows:
- 19 January 2010 for a Eurocup bonus of USD 10,000
 - 1 February 2010 for an outstanding salary payment of USD 25,000



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- 1 March 2010 for an outstanding salary payment of USD 25,000
 - 16 March 2010 for remaining salary payments totaling USD 50,000
9. In calculating the late payment penalty being claimed, the Player has counted the number of days of delay between the above alleged due dates for each outstanding amount and the date of filing of his Request for arbitration (8 June 2010).
10. In contesting the application of the foregoing requested penalty, the Club affirms among others, in its Answer, that:

*“Having regards of the nature of contractual parties and the purpose of the contract, and the above said circumstances, the Respondent emphasizes that the **“interest penalty clause”** of the Agreement, as laid down by the Section 2. induces gross disparity between the obligations of the parties, and will give the Claimant an unjustifiably excessive advantage. Applying the contractual terms, gross disparity would soon emerge; due to the Clubs insolvency, the **late payment penalties may soon exceed the base salary sum** [...] Hence, the Respondent hereby claims the Arbitrator deciding *ex aequo [sic] et bono*, to apply annual Swiss statutory rate in awarding the interest and to thus adapt the contract considerations in this respect in order to bring it into accord, with reasonable standards of fairness”.*

11. Invoking the Player’s injury during the season and an alleged negative impact this had on the Club’s final positioning in the Serbian League for the season, the Club further invokes that:

*“**Considering and deliberating** both parties considerations at the time of the contract conclusion, so as at what point they provide such consideration, in a way not to frustrate their reasonable contractual expectations, and the “interest clause” stipulation substantial purpose as well, **will pursue the primary contractual [sic] goal – the equilibrium of the contract”.***

12. In sum, the Club’s contractual obligation to pay the principal amount being claimed by the Player is not being disputed, whereas the duty to pay the claimed late payment penalty is.



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13. Furthermore, in its Answer, the Club has filed evidence of so-called “*compulsory judicial – preliminary bankruptcy proceedings, conducted by the Trade Court Belgrade*”, which are the result of “*persisting insolvency*” and have caused it “*...having its bank account frozen*”, which “*... may lead to the Club reorganization*”.
14. For such reasons, the Club requested that the Arbitrator stay the arbitral proceedings and delay his decision – pending a resolution by the Trade Court in Belgrade – allowing the Parties an opportunity in the meantime to reach an amicable settlement, if necessary with the assistance of the Arbitrator.
15. The Player did not inform the FAT of any willingness on his part to enter into settlement discussions and/or have the arbitral proceedings stayed.

3.2. The Proceedings before the FAT

16. On 8 June 2010, the Player filed a Request for Arbitration in accordance with the FAT Rules.
17. On 24 June 2010, the FAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter.
18. On 13 July 2010, the Player paid his share of the advance on costs in an amount of EUR 3,988.
19. On 16 July 2010, the Club submitted its Answer.
20. On 22 July 2010, the FAT informed the Player that he would have to substitute for the Club with respect to the Advance on Costs because the latter had not paid its portion thereof.
21. On 4 August 2010, the Player made the substitute payment in an amount of EUR



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3,988.

22. On 13 August 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 accounts of costs.

23. On 24 August 2010, the Claimant submitted its account of costs as follows:

<i>3,000.00 EUR</i>	<i>FAT Application Fee paid by Mike Taylor</i>
<i>4,000.00 EUR</i>	<i>Advance on Claimant's Share of Costs paid by Mike Taylor</i>
<i>4,000.00 EUR</i>	<i>Advance on Respondent's Share of Costs paid by Mike Taylor</i>
<i>11,000.00 EUR</i>	<i>Total Costs paid by Mike Taylor"</i>

24. The Club did not submit its account of costs.

25. The Parties did not request the FAT to hold a hearing. The Arbitrator therefore 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.

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.
- He therefore had no other option than to terminate the Agreement for cause and



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to claim all the outstanding and future payments in accordance with the Agreement as well as the contractual penalty for late payments.

- Accordingly, the Club is responsible for paying his entire outstanding salary and the penalty amounts as provided by the Agreement.

27. In his Request for Arbitration of 8 June 2010, the Player requested the following relief:

"Claimant requests:

Immediate payment from Club to Player in the amount of One Hundred Ten Thousand US Dollars (\$110,000.00 USD) in past-due base salary and bonuses.

Immediate payment from Club to Player in the amount of Forty Four Thousand Five Hundred US Dollars (\$44,500 USD) in late payment penalties as calculated in the attached spreadsheet and per Paragraph 2 of the Agreement.

Immediate reimbursement to [sic] from Club to Player for the FAT application fee, plus any additional costs of arbitration, legal fees, and/or expenses related to this FAT case."

4.2. Respondent's Position

28. The Club submits the following in substance:

- Although the Club does not contest that the principal amount of USD 110,000.00 is owed to the Player for the unpaid salaries and bonus, it considers that the contractual penalty clause invoked by the Player was not designed to be applied in circumstances such as those which arose in this case – the Club being forced into insolvency proceedings and the Player not having been able to complete the season due to an injury – and that it would be unfair and contrary to the rationale of the Agreement to apply it.
- The Club therefore objects to the payment of the claimed penalty and deems that



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the Swiss statutory rate of interest for late payments should apply instead.

29. In its Answer of 16 July 2010, the Club submitted the following prayers for relief with respect to cost and for the suspension of the proceedings:

“Arbitration Costs

Having regards for the abovementioned, the Respondent finds the ex aequo et bono principle of a dispute settlement applied to the merits of the award, to be applicable to the final cost determination also, and that hence each party will bear its arbitration costs.

Dispute Settlement

*Due to **all exceptional circumstances of the case at hand**, and the uncertain Clubs legal future developments as well, in the long run significantly depending on the Clubs Creditors taking part in the Trade Court proceedings, we are kindly asking any decision of the Arbitrator to be **delayed** for the time being, which hopefully should not take more than 90 - 120 days for Belgrade Trade Court to pass a respective resolution. We sincerely believe that time would allow us to be able to reach an informed consent with Mr. Mike Taylor under the Agreement, at both parties satisfaction. We hereby undertake to advise the Tribunal accordingly.*

If however the Tribunal does not pursue the proceedings as above, The Respondent hereby confirms its general willingness to settle the dispute amicably.

*The Respondent would hereby have requested the suspension of the arbitral proceedings, and made a fair settlement offer or rescheduling to the Claimant. However, having regards to all unprejudiced obstacles and present circumstances mentioned above, the Respondent, in accordance with Article 12.3. of the FAT Rules, **hereby authorizes the Arbitrator to consider all the points made in this statement of defense, and to attempt to bring about a settlement to the dispute.***

5. The jurisdiction of the FAT

30. 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



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arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA). The jurisdiction of the FAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

31. 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.
32. The jurisdiction of the FAT over the dispute results from the following arbitration clause, contained in Article 11 of the Agreement:

“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 in 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.”

33. 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.
34. 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

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



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(referred to by Article 178(2) PILA). In particular, the wording "*any dispute arising from or related to the present contract*" clearly covers the present dispute.

35. Furthermore, the Club expressly submits under the title "Jurisdiction" in its Request for arbitration that it "... *raises no objection to the appointment of the Arbitrator*".
36. Consequently, the Arbitrator has jurisdiction to rule upon the parties' claims in this arbitration.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

37. 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".

38. The FAT Rules governing the FAT arbitration chosen under Article 11 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."

39. In this case, the Parties expressly agreed under Article 11 of the Agreement that: "*The*



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arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono".

40. Accordingly, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.
41. 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":

*"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

42. 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*".
43. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2. Findings

44. Since, neither the facts underlying the Player's claim to the principal amount of **USD 110,000.00**, nor the allegation that such amount is owed by the Club, are being disputed by the latter, the Arbitrator finds that such amount is due to the Player by the Club.

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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45. The Club does not dispute the respective due dates for the various amounts making up the foregoing total outstanding payment and the due dates are in conformity with the terms of the Agreement, notably with respect to the acceleration of the payment obligations upon valid termination under Article 2 of the Agreement.
46. Consequently, the only disputed question to be decided on the merits is whether the penalty clause for late payments – stipulated in Article 2 of the Agreement – is applicable in the circumstances and, if so, in what manner.
47. The Arbitrator finds that the language and rationale of Article 2 would tend to imply that the daily penalty of USD 100 was meant to apply between the due date(s) of payment and the date of termination of the Agreement – as a dissuasive measure to prevent late payments and as a form of sanction in case of delay together with the Player's right not to participate in practices and games – but not beyond termination because the latter remedy entitles the Player to entirely opt out of his obligations under the Agreement rather than remain under contract and cash-in on the penalties.
48. Furthermore and in any event, in the particular circumstances of this case, considerations of justice and fairness militate in favour of applying the penalty clause in the foregoing more restrictive manner, since (i) the Club admitted from the beginning that the principal amount was owed but that it was provisionally unable to pay for financial/cash-flow reasons, i.e. it was transparent, (ii) it did not try to invent any false excuses for not paying, (iii) it adduced evidence that it has in effect been subject to a form of judicial insolvency proceeding in Serbia, and (iv) it has sought an amicable settlement.
49. Thus, in light of the Club's attitude and the circumstances, the fairest solution is to

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



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allow the Player to claim the contractual penalty for the number of days that payments were delayed prior to termination, and to allow interest from the date of termination on the total amount at the Swiss statutory rate of 5% as proposed by the Club.

50. In that relation, 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.
51. Consequently, 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 Club can be applied in fairness, being reasonable and in line with FAT jurisprudence.
52. It is an established principle that interest runs from the day after the date on which the principal amounts are due.
53. In this case, interest at 5% will be applied from the day after termination for the entire outstanding salary of USD 110,000.00, since, given the rationale of Article 2 of the Agreement and the stipulation that termination shall “... *accelerate all future payments required under this Agreement* ...”, the date of termination is a logical point for interest to begin running on the total outstanding amount after payment of the penalties for the delay period preceding termination.
54. With respect to the penalties to be applied for the late payments preceding the date of termination (16 March 2010), i.e. before the statutory interest begins to run, based on the evidence on record and the content of the Agreement, the periods of calculation and amounts shall be as follows:
 - 55 days relating to the late payment of USD 10,000 - from 19 January (due date)



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to 16 March 2010 - i.e. an amount of **USD 5,500** (55 x USD 100).

- 43 days relating to the late payment of USD 25,000 - from 1 February (due date) to 16 March 2010 - i.e. an amount of **USD 4,300** (43 x USD 100).
- 15 days relating to the late payment of USD 25,000 - from 1 March (due date) to 16 March 2010, i.e. an amount of **USD 1,500** (15 x USD 100).

55. Finally, and for the sake of good order, the Arbitrator points out that: (i) since the Club's offer to the Player to enter into amicable settlement discussions with the assistance of the Arbitrator was not taken up by the Player, such approach to resolving the dispute did not come into consideration, and (ii) the existence of preliminary bankruptcy proceedings in Serbia against the Club did not legally prevent the Arbitrator from proceeding, while at the same time justice and fairness would be better served by not staying this arbitration and reaching a decision which would allow the Player to more easily claim as a creditor within the bankruptcy proceedings in question any monies owed by the Club under the Agreement.

7. Costs

56. Article 17 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.



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57. On 7 July 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 4,000.00.
58. Considering the Player did not prevail in his entire claim and that the Club was transparent about its financial situation, made a good faith proposal to amicably settle the dispute and was subject to preliminary judicial bankruptcy proceedings, the Arbitrator deems it fair that, given the circumstances of the present case, the costs of the arbitration be borne by the Club but that each party bears its own legal fees and expenses.
59. Given that the Player paid the totality of the advance on costs of EUR 7,976.00, the Arbitrator decides that in application of Article 17.3 of the FAT Rules:
- (i) FAT shall reimburse EUR 3,976.00 to the Player, being the difference between the costs advanced by him and the arbitration costs fixed by the FAT President;
 - (ii) The Club shall pay EUR 4,000.00 to the Player, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the FAT.



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8. AWARD

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

- 1. KK Crvena Zvezda shall pay Mr. Mike Taylor an amount of USD 110,000.00, net of taxes, as compensation for the salaries owed to him under their Agreement of 16 November 2009, plus interest at 5% per annum on such amount from 17 March 2010 onwards.**
- 2. KK Crvena Zvezda shall pay Mr. Mike Taylor a total amount of USD 11,300.00, net of taxes, as late payment penalties owed to him under their Agreement of 16 November 2009.**
- 3. KK Crvena Zvezda shall pay Mr. Mike Taylor an amount of EUR 4,000.00 as reimbursement of his arbitration costs.**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 29 October 2010

Quentin Byrne-Sutton
(Arbitrator)