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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0104/10 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Klaus Reichert

in the arbitration proceedings between

Ms. Sena Pavetic

- Claimant -

represented by Paolo Ronci, PR Sports srl,
Via Laghi 69/6 – 48018 Faenza (RA), Italy

vs.

G.S. Trogylos Basket Priolo

- Respondent -

represented by Prof. Massimo Coccia and Mr. Mario Vigna,
Coccia De Angelis & Associati, Piazza Adriana 15, I-00193 Rome, Italy

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1. The Parties

1.1. The Claimant

1. Ms. Sena Pavetic ("Claimant") is a professional basketball player who was engaged by G.S. Trogylos Basket Priolo ("Respondent") by an agreement dated 22 July 2009 covering the seasons 2009/2010, 2010/2011 and 2011/2012.

1.2. The Respondent

2. The Respondent is a professional basketball club with its address at Contrada San Focà, c/o Pala Acer, 96010 Priolo (SR), Italy.

2. The Arbitrator

3. On 20 July 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. As already noted (para. 1) Claimant and Respondent entered into an agreement dated 22 July 2009 ("Player Agreement").

5. Claimant's salary for the first season was EUR 25,000.00 net divided into ten monthly payments (clause 5). Her salary for the second season was EUR 27,000.00 net divided into ten monthly payments (clause 5). Her salary for the third season was EUR 30,000.00 divided into ten monthly payments (clause 5) net. The Player Agreement provided for the payment of the first of each of these monthly payments following the passing of a medical. Certain bonuses were agreed if particular success was achieved in the Italian basketball competitions. The Respondent also agreed (clause 8) to provide medical insurance, medical assistance, two round-trip tickets between Italy and Croatia per season, an apartment and a car.

6. The Player Agreement also provided for it to be regulated by Italian and European Community law (clause 9). Clause 10 is headed *ARBITRATO FIBA* and provides for disputes to be exclusively dealt with by "FIBA arbitration" with the possibility of appeal to CAS.

3.2 The Proceedings before the FAT – claims advanced

7. Claimant filed a Request for Arbitration dated 23 June 2010 in accordance with the FAT Rules, and on 29 June 2010 the non-reimbursable fee of EUR 2,000.00 was duly paid. The Request for Arbitration and exhibits indicate that Claimant passed a physical and medical, and then commenced playing for Respondent. On 9 February 2010 she had an accident in training and damaged her left knee. This culminated in a letter signed by Claimant on 5 March 2010 seemingly drawing the Player Agreement to an end. She returned to Croatia and had medical attention, including surgery on her knee.

8. The relief sought (section 2) comprises the following:

   - *"To establish that the contract signed on July 22nd, 2009 has always been in effect and valid and as a consequence, establish that the Club's arguments to consider the aforesaid contract to be rescinded are void."*

- Payment of EUR 79,340.00 which is the total of the remaining salary payments for the 2009-2010 season, the entirety of the 2010-2011 season, the entirety of the 2011-2011 season and the agent's fee (10% as per clause 11 of the Player Agreement) plus 20% VAT.
- Interest at 5%.
- Travel Expenses of EUR 128.38.
- Compensation of EUR 4,144.00 in respect of her medical expenses in Croatia.
- Compensation for the FAT non-reimbursable handling fee of EUR 2,000.00.
- Costs.
- Legal fees.
- EUR 2,500.00 for moving and changing of apartment.
- Proof that Respondent is in order with all taxes as regards Claimant.

9. On 22 July 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:

Claimant	EUR 3,500.00 (paid on 29 July 2010)
Respondent	EUR 3,500.00 (paid on 24 August 2010)

10. In addition on 22 July 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 13 August 2010.

11. By letter dated 27 July 2010 Counsel for Respondent requested an extension for the Answer to 30 August 2010. This was confirmed by the Arbitrator on 28 July 2010. An extension to 20 August 2010 for the payment by Respondent of its share of the advance on costs was granted by the Arbitrator on 6 August 2010.

12. Respondent filed its Answer on 30 August 2010.

13. On 8 September 2010 the Arbitrator invited Claimant to comment on the Answer by no later than 29 September 2010. Claimant did so and the Respondent was invited to comment by no later than 15 October 2010. Respondent filed its Reply on 15 October 2010.

14. On 9 November 2010 the FAT forwarded the Reply to the Claimant. The parties were asked whether they wished to file any further documentary evidence or were they content that all such evidence upon which they relied was before the Arbitrator.

15. Respondent, by email to the FAT dated 17 November 2010 enclosed a letter sent by the "Casa di Cura Gretter".

16. Claimant, on 17 November 2010 sent a letter to the FAT setting out arguments and enclosing a copy of a newspaper article (in Italian).

17. By letter dated 18 November 2010 the Arbitrator declared, in accordance with Article 12.1 of the FAT Rules, that the exchange of documents was completed. Costs claims were directed to be submitted by 26 November 2010.

18. By email dated 18 November 2010 Respondent objected to Claimant's letter dated 17 November 2010 stating that it was a brief rather than the provision of any further evidence. On 22 November 2010 the Arbitrator invited Respondent to reply to

Claimant's submissions of 17 November 2010. Respondent did so by way of a "Final Brief" on 29 November 2010 and also enclosed its claim for costs.

19. Claimant submitted her claim for costs on 25 November 2010.

20. Both parties were given the opportunity to comment on the other's claim for costs and to do so by 3 December 2010. No comments were made by Claimant by that deadline. Respondent filed its comments on 30 November 2010.

21. On 21 December 2010 the Arbitrator requested Claimant to submit, by 29 December 2010, whether she found another club to play with after her engagement with Respondent and, if so, from when and what her salary was. On 27 December 2010 Claimant replied and stated that she did not find another club.

22. By email dated 30 December 2010 Respondent was invited to comment on the foregoing (para. 21) by no later than 14 January 2011. Respondent did so on that date.

23. By letter dated 19 January 2011 the Arbitrator invited the parties to submit their final accounts of costs by 26 January 2011. Claimant submitted her account of costs on 21 January 2011 and Respondent on 26 January 2011.

24. Both parties were given the opportunity to comment on the other's account of costs and to do so by 2 February 2011. No comments were made by Claimant by that deadline. Respondent referred to its comments of 30 November 2010.

4. The Arguments of the Parties

25. Claimant's Request for Arbitration puts the matter simply: she passed all the physical and medical examinations conducted by Respondent as soon as she arrived in Priolo

and thereafter commenced playing. She was injured during practice on 9 February 2010, having played in every official game since the beginning of the season (including the game on 7 February 2010 against Livorno). She states that on 17 February 2010 she passed an MRI but did not get a medical report or was not brought to a doctor for a consultation. She then says that the representatives of Respondent approached her to renegotiate the Player Agreement with the intention of (1) suspension of all payments until she had recovered; (2) extension of the Player Agreement for one year; and (3) no further medical treatment, including surgery, until these variations were accepted. She then says that on 5 March 2010 she was told by representatives of Respondent that the Player Agreement was rescinded in "a retro-active way" and they sought reimbursement of salaries already paid. She says she was put under pressure to sign a letter – which, strangely, is dated 5 February 2010 at the top, while her signature is dated 5 March 2010. She was then ordered to leave the apartment which had been provided to her, and she made her own way back to Croatia. In Croatia she had medical treatment which revealed a rupture of the "rear horn of the medial meniscus and a rupture of the cruciate ligament". Surgery was advised.

26. Respondent's opening position in its Answer is as follows:

> *"....it is clear that the Athlete's passing of the medical examination was crucial to determine the entry into force of the nocut guarantee."*
>
> *"As common practice, during the medical examination Ms. Pavetic was requested to inform, extensively and honestly, the medical staff of the Club about her health history, including disclosure of any personal injuries and traumas she had suffered in the past. She did not report to the medical staff any past injuries regarding her left knee."*

27. Respondent then says that the relevant Medical Fitness Certificate was issued by Dr. Matteo Fucile apparently following a routine medical. Respondent then points to the collision during training on 9 February 2010. An MRI was conducted on 17 February 2010 and a Dr. Pardo states in his report: "the above diagnosis make reference to previous and complete injury of the anterior cruciate ligament which was injured in the past." This opinion was sent to other medical specialists for further consideration and

was duly confirmed. Respondent then deals in some detail with its letter of 5 March 2010 (the Arbitrator is presuming that the date at the top of the letter of 5 February 2010 was a typographical mistake) and brings the matter to the core of its position, namely that Claimant's misrepresentation rendered the contract void *ab initio.*

28. Respondent puts its position as follows:

> *"….had the Club be* [sic] *properly aware of the Athlete health history, it would not have proceeded with the hiring of Ms Pavetic. Or, at the very least, being aware of the risk involved, the Club could have renegotiated the Contract in terms either of salary or of duration (for instance, a one-year Contract at a lesser salary with the Club's option of renewal, etc.) or could have requested the Athlete to obtain a specific insurance covering the risk related to the loss of three years of salary in case of injury. In this perspective, the deceptive behaviour of the Athlete clearly deprived the Club of the chance to make an informed assessment of the situation. This situation produced a defect of Trogylos' consent to enter into the contract and vitiated the entire negotiation about the Contract."*

29. Respondent clarifies that the letter of 5 March 2010 was signed by Claimant only to signify her receipt, not acceptance. Thus, that matter of contention between the parties, effectively falls away and does not need to be further considered.

30. Respondent develops its argument (para. 20 of the Answer) by comparing sports employment contracts to those of insurance with the concomitant obligations of *uberrimae fidei*. Specifically Respondent says that Claimant had a duty to disclose a previous injury. It also says that good faith forbade Claimant from concealing an injury. This same argument is formulated (para. 31 of the Answer) in different terms a little later: *misleading lack of disclosure*.

31. Respondent then refers to the provisions of Article 1439 of the Italian Civil Code and annulment of contracts by reason of fraud. An alternative, but effectively identical position is taken if *ex aequo et bono* (the norm in FAT disputes) is applicable. Namely, that fraud annuls a contract. This is, by way of comment, a reasonable approach to

take – under any system of law those who are guilty of fraud will not be rewarded for their wrong-doing.

32. Respondent then asserts its claim for damages as against Claimant which it bases on her misconduct. It asserts a claim for an equitable amount of EUR 25,000.00.

33. Respondent also asserts an alternative defence on the basis of "incidental fraud", namely a partial inducement by fraudulent misrepresentation. This leads, in its submission, to a reduction of Claimant's claim to zero.

34. Finally, Respondent desired that an independent medical expert be appointed to examine Claimant.

35. Respondent formulated its claim for relief as follows:

> *"To adjudge and declare that Trogylos did lawfully terminate the Contract vis-à-vis the Athlete and, accordingly, to declare that its obligations under the Contract are discharged because of Ms. Pavetic's misrepresentation of her real health history consisting in the nondisclosure of a serious past injury to the anterior cruciate ligaments of her left knee; consequently, to declare that Trogylos has no payment obligation whatsoever vis-à-vis Ms. Pavetic under the Contract.*
>
> *To dismiss any other motions for relief submitted by Ms. Pavetic;*
>
> *To adjudge and declare that Trogylos is entitled to receive a compensation for the damages suffered in consequence of Ms. Pavetic's misrepresentation and, accordingly, impose Ms. Pavetic the overall payment of Euro 25.000 or the other amount the FAT considers equitable.*
>
> *Only eventualiter as a subordinate ground, in the event that the FAT were to believe that Ms. Pavetic's misrepresentation is not so relevant to justify the termination of the Contract and in consideration of the damaged* [sic] *suffered by Trogylos, to declare the full discharge – or a substantial reduction – of the Respondent from its obligations.*
>
> *To order the Claimant to pay the costs of this arbitration and the repayment of the Respondent's legal and other costs."*

36. On 3 September 2010 Respondent sent images of Claimant's MRI to the FAT.

37. In her second submission Claimant refuted the allegation of fraud, stated that no questionnaire was put to her during the medical examination, and discussed her frankness with the doctor as to her condition. She also stated that she had always played with a knee brace (and enclosed video footage of her doing so). She also says that in October 2009 she had been sent to a medical therapy centre by Respondent.

38. In its second submission, Respondent is very critical of Claimant, resorting to language such as "bad faith Ms. Pavetic is pouring into these arbitration proceedings." Dr. Fucile, who carried out the medical examination prior to Claimant commencing with Respondent as a player, says in a written statement (exhibit 1): "*On the contrary, I specifically requested Ms. Pavetic to report any past or underway injuries which could have effects on her sports activity and she replied she did not have physical problems neither in the past nor at present."*

39. Respondent states that it has no knowledge of the October 2009 therapy at "Casa di Cura Gretter". It specifically says that it has established that Claimant went to the clinic with her personal doctor, she collected the report in person, and the costs were not invoiced to Respondent.

40. Respondent's answer to Claimant's argument revolving around the use of a knee brace is that she cannot use it as a presumption of knowledge. It then asserts that Claimant has the burden of establishing that Respondent was aware of her problems.

41. Respondent does not pursue its request for an independent examination of Claimant.

42. In her submission of 17 November 2010 Claimant summarises her arguments as follows:

> *"1- The substance of the Medical examination was the entire responsability [sic] of the Club.*
>
> *2- The Club never specified any claim within the two days following the Medical examination as it is scheduled in Clause 13 of the contract signed in July. This is very clear and exhaustive concerning the rights that the Club has toward the medical examination and the validity of the contract.*
>
> *3- The players [sic] played all the games until this collision in February 9, 2010.*
>
> *4- The Club had all the freedom to investigate her past history during the 6 months she spent there."*

43. In its submission of 26 November 2010 Respondent repeats, in substance, its position as already articulated and also provides a written note from Prof. Tamburo.

5. Jurisdiction and Other Procedural Issues

44. 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 Arbitrability

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

46. 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 agreement

47. 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."*

48. The jurisdiction of the FAT over the present dispute results from the arbitration clause (clause 10 of the Player Agreement) already described above. Also, no issue has been taken by either side in their submissions as to the validity or otherwise of the arbitration agreement.

49. 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.

50. 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*

51. With respect to the law governing the merits of the dispute as between Claimant and

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

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".*

52. 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."*

53. As already noted above, clause 9 of the Player Agreement provides for the regulation of its terms by Italian law and European Community law. Respondent advances arguments principally by reference to the Italian Civil Code concerning *Dolus* with no reference to European Community law. It also has a fall-back position asserting that the principles relating to fraud are known also pursuant to principles *ex aequo et bono*. Claimant does not articulate any particular legal provisions and leant, it appeared to the Arbitrator, more towards the FAT norm of *ex aequo et bono*.

54. The Arbitrator finds that although it is unclear how a hybrid choice of law clause such as the one in the Player Agreement could actually function, this may be explicable by Italian law (as indeed all national systems of law in each Member State) being subject to the provisions of "European Community law". As, though, will become clear, this conundrum and the impact of the choice of law clause in the Player Agreement is not determinative of the case. The choice of words in clause 9 is a careful one, namely that the Player Agreement is to be regulated by Italian and European Community law. On the other hand, the parties also specifically elected in clause 10 of the Player

Agreement that disputes would be dealt with by way of FAT Arbitration, which carries with it a particularly well-known, well-established (and universally accepted in the global Basketball community) acceptance of *ex aequo et bono*.

55. The Arbitrator, upon a careful interpretation of the Player Agreement finds that "regulation" does not extend, once a dispute has arisen, to the determination of rights and obligations of the parties vis a vis each other and that for the presumption, reposing in the choice of FAT Arbitration, of *ex aequo et bono* to be displaced would require significantly wider language than that used here. At best the parties seem to have agreed that local, perhaps, mandatory Italian and European Community law in relation to working hours, safety and so on were captured by the "regulation" provision. Whether or not one party owes the other money is a dispute captured by *ex aequo et bono* as found in the FAT Arbitration Rules.

56. In the light of the foregoing it is necessary to make some comment about *ex aequo et bono.*

57. 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*

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2 That is, the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration), and, most recently, of the Swiss Code of Civil Procedure (governing domestic arbitration).

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

those rules."[4]

58. 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]

59. 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*".

60. In light of all of the foregoing considerations, the Arbitrator makes the findings below.

6.2. Findings

61. The first and foremost issue for the Arbitrator is whether or not Claimant was guilty of fraud at the time she presented herself for the medical examination with Respondent. This is a gateway issue as it is clear from this case (and indeed this is common practice throughout the professional sporting world) that a successful passing of a medical examination is a pre-condition to a contract coming into force.

62. Respondent has alleged fraud against Claimant. It bears the burden of that allegation and the Arbitrator does not accept a suggestion or submission to the contrary.

63. Fraud is a most serious allegation, whether advanced under any system of law or under *ex aequo et bono*, it must be approached with the utmost care. This is particularly important given the consequences of a finding of fraud for the guilty party.

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

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

Apart from the potential unraveling of any impugned contractual provisions, damages and, often, costs can be awarded. Significant reputational damage can attach to a person found to be guilty of a civil fraud.

64. The evidence presented by Respondent would need to demonstrate that Claimant intentionally set out to mislead it at the medical examination. It would then need to demonstrate that, in addition, Claimant did in fact mislead by express words or willfully evasive answers. This test appears to the Arbitrator to comport with both the provisions of Italian law, if these were applicable, and what would be a standard required under *ex aequo et bono* principles. Thus, the issue of applicable law is not determinative of this point as on either view of the clause the same legal result is arrived at. On any analysis the Respondent's allegation fails.

65. There is no evidence presented to the Arbitrator which demonstrates an intention on the part of Claimant to mislead. Quite apart from her express denials in this regard, the evidence and arguments presented by Respondent do not discharge the burden of proof in this regard. At best the arguments are founded upon supposition as to the motives of Claimant – that is not a foundation for an allegation of fraud. In fact, this demonstrates that the allegation should not have been made in the first place unless the Respondent had clear and compelling evidence to support it. It does no credit to a party to a FAT arbitration to make such a serious allegation based upon supposition.

66. Turning to the medical examination itself, it is clear to the Arbitrator that how it was conducted, the procedures adopted, the questions posed and so on, were entirely a matter for Respondent. It is a professional basketball club and must be taken to be aware of the importance of the gateway medical examination prior to the final engagement of a player. At best Respondent says that its doctor posed a general question to Claimant as "*to report any past or underway injuries which could have effects on her sports activity"* and she replied *"she did not have physical problems*

neither in the past nor at present". This is a very different question from the one which might have been posed, namely, have you had a specific injury in the past to your knees (or other limbs). The question posed by the Doctor was a generalised one which reposed upon "effects on her sports activity". Claimant's answer, as reported by her, appears to have been truthful as it is clear that she played, without hindrance for several months until the following February.

67. Therefore, Respondent's allegation that Claimant committed a fraud during her initial medical examination is dismissed.

68. It appears, as a consequence, to the Arbitrator, that discussing knee braces, whether Respondent knew about these, or indeed the October 2009 medical treatment, is beside the point and irrelevant. The Player Agreement was duly entered into by the parties and is not vitiated by fraud. It also follows from that finding that Respondent cannot be entitled to any of the relief it seeks from Claimant. Its argument that Claimant's claim for relief should be reduced to zero also must fail.

69. What therefore are the consequences for the relief sought by Claimant? The question posed by the Arbitrator in December 2010 as to whether the Player had secured an alternative club was answered as follows: "*The claimant, Ms. Pavetic, did not found [sic] another club to play with after her engagement with the respondent. As consequence, she did not had [sic] any income."* This struck the Arbitrator with some force.

70. Related to this issue are provisions in the Player Agreement, namely clause 4 (no cut) and clause 5 (staged payments). The interrelationship between these clauses is not entirely straightforward.

71. The parties bargained for the payments in each season in a particular way. Clause 5 sets out monthly payments for each season. In addition the first payment of each

season (not just the first season as might be seen in some other basketball player agreements) refers also to the passing of a medical. It appears clear from the Player Agreement that the parties structured their rights and obligations in a manner which subjected Claimant to an annual medical. However, one has to also take into account the no cut provision in clause 4. It seems to be the case that a failure to pass a medical at the start of a season does not lead to termination. It also seems to be the case that if the medical is passed at the start of a season, then the no cut provision is triggered for the balance of that season. The particular circumstances of this Player Agreement confine consideration of the issues to the specific facts of this case given the interrelationship between clauses 4 and 5.

72. It is the view of the Arbitrator 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. It is also a principle widely known and accepted, and consistent with justice and equity, that an innocent party must mitigate its position. Such a party cannot simply sit on his or her hands and treat the wrong-doer as some sort of insurer.

73. The Arbitrator has sympathy for the arguments, in general, on mitigation posed by Respondent. The contractual arrangements entered into between the parties have a particular resonance with the mitigation point. Each season, prior to being paid any money, Claimant would have to pass a medical. It appears clear to the Arbitrator, given the answer from her as to not finding an alternative club, that she would not have passed a medical in or about September 2010 (or thereabouts) for a second season with Respondent. Respondent wanted her to play for them for three seasons (as evidenced by the Player Agreement), she is not in the twilight of her career, and is

undoubtedly a talented player. The fact that she has not obtained alternative employment some ten months after a collision (even a serious one) *combined with* the annual requirement of a medical, leads the Arbitrator to the conclusion that Claimant's claims for payment of the full amounts for seasons 2 and 3 cannot be sustained.

74. The issue therefore for the Arbitrator is how the claim for monies for seasons 2 and 3 should be assessed. First, consistent with the foregoing findings on applicable law it is appropriate to determine the matter of mitigation *ex aequo et bono*. Secondly, as regards season 2, it seems quite clear that the Claimant would not have passed the medical in or about September 2010. In light of the equity and justice of the matter, taking into account the contractual arrangements, it seems to the Arbitrator that the claim for season 2 should be reduced to zero. Thirdly, as the Player Agreement would not have been terminated by a failed medical at the start of season 2, the Arbitrator has to assess, in light of the equity and justice of the matter what is an appropriate outcome for the claim for season 3. It appear just that 25% of the season 3 payments be awarded to the Claimant

75. Flowing from this analysis is the conclusion that Claimant should succeed on her claim for payment of the balance of the 2009-2010 season in the amount of EUR 12,500.00. Claimant's claim for the 2010-2011 season is not sustained. Her claim for the 2011-2012 season succeeds to the extent of EUR 7,500.00 (25% of EUR 30,000.00).

76. In light of the Arbitrator's finding that Claimant was not guilty of fraud which vitiated the Player Agreement, it also flows from that that she was entitled to enjoy its additional benefits concomitant with the 2009-2010 season. Thus her claims for travel expenses (EUR 128.38), medical expenses (EUR 4,144.00) and expenses for moving apartment (EUR 2,500.00) must succeed. Respondent was not entitled to act as it did in March 2010 and Claimant should not be out of pocket as a result. Finally, it does not appear necessary to the Arbitrator that Respondent provides proof to Claimant that the tax

affairs are in order. No evidence has been submitted that there is any such question mark over her affairs.

77. Interest of 5% is sought on the salary payments. This appears to the Arbitrator to comport with a reasonable rate of interest. Interest shall be payable at 5% on EUR 12,500.00 from 1 July 2010, being the day after the last instalment was due to Claimant for season 2009-2010. Interest shall be payable at 5% on EUR 7,500.00 from the date of this Award in respect of season 3.

78. Lastly, in line with the principle established in previous FAT cases[6], Claimant is not entitled to recover the agency fees. The Contract does not contain any provision according to which the Claimant is entitled to claim these fees. Furthermore, Claimant did not submit that a claim for the agency fees against Respondent was assigned to her by the agent. To sum up, therefore, the Arbitrator holds that Claimant has not substantiated on what grounds she is entitled to claim the agency fees.

7. Costs

79. 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.

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6 See FAT Decisions 0008/08 (Djoiric vs PBC Lukoil), 0009/08 (Smith vs PBC Lukoil) and 0051/09 (Pesic vs. Dynamo Moscow).

80. The legal fees in the amount of EUR 6,815.00 claimed by Claimant have been challenged by Respondent.

81. The Arbitrator bears in mind the fact that Claimant has not succeeded in seeking payment of the full amount for seasons 2 and 3 in the Player Agreement. This may be a factor in determining whether or not full costs should be awarded. A further factor to bear in mind is the allegation of fraud (and bad faith) which punctuated much of Respondent's position in this Arbitration. In light of the dismissal of this allegation it appears just that Claimant should not be out of pocket for her legal fees and these are hereby awarded in full. A party which makes an allegation of such seriousness, and based it upon, in the Arbitrator's view, the flimsiest foundation, cannot escape censure in costs.

82. On 10 March 2011 - 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 7,000.00.

83. Considering the analysis on costs in paragraph 81 above, it is appropriate that Respondent should bear the burden of the arbitration costs and also be similarly responsible for the non-reimbursable fee.

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

    (i) Respondent shall pay to Claimant an amount of EUR 3,500.00 as reimbursement

of arbitration costs;

(ii) Respondent shall pay Claimant an amount of EUR 8,815.00 in respect of legal fees and translation expenses, including the non-reimbursable fee of EUR 2,000.00.

8. AWARD

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

1. **G.S. Trogylos Basket Priolo shall pay Ms. Sena Pavetic a net amount (salary) of EUR 12,500.00. Interest at a rate of 5% shall be payable on that sum from 1 July 2010 being the day after the last instalment due to Claimant for season 2009-2010.**

2. **G.S. Trogylos Basket Priolo shall pay Ms. Sena Pavetic a net amount (salary) of EUR 7,500.00 with interest at a rate of 5% payable on that sum from the date of this Award.**

3. **G.S. Trogylos Basket Priolo shall pay Ms. Sena Pavetic EUR 128.38 for travel expenses, EUR 4,144.00 for medical expenses and EUR 2,500.00 expenses for moving apartment.**

4. **G.S. Trogylos Basket Priolo shall pay Ms. Sena Pavetic an amount of EUR 3,500.00 as reimbursement of arbitration costs.**

5. **G.S. Trogylos Basket Priolo shall pay Ms. Sena Pavetic an amount of EUR 8,815.00 in respect of legal costs and expenses.**

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

Geneva, seat of the arbitration, 15 March 2011

Klaus Reichert

(Arbitrator)