



FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0108/10 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr Sani Becirovic,

Mr Jasmin Hukic,

Beobasket Ltd.,

All represented by Mr Miodrag Rznatovic,
Strahinjica bana 18, 11000 Belgrade, Serbia

- Claimants -

vs.

KK Union Olimpija Ljubljana,
Celovska 25, 1000 Ljubljana, Slovenia

- Respondent -



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1. The Parties

1.1. The Claimants

1. Mr Sani Becirovic (hereinafter also referred to as “the Player S. Becirovic”) is a Slovenian professional basketball player, who began the 2009-2010 season playing for the basketball club KK Union Olimpija Ljubljana.
2. Mr Jasmin Hukic (hereinafter also referred to as “the Player J. Hukic”) is a Bosnian professional basketball player, who began the 2008-2009 season playing for the basketball club KK Union Olimpija Ljubljana (the Player S. Becirovic and the Player J. Hukic shall hereinafter also collectively be referred to as “the Players”).
3. Beobasket Ltd. (hereinafter referred to as the “Agent”) is a sports agency that represents professional basketball players.

1.2. The Respondent

4. KK Union Olimpija Ljubljana (hereinafter referred to as “the Club”) is a professional basketball club competing in the Slovenian professional basketball league.

2. The Arbitrator

5. On 7 September 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"). None of the Parties have raised any objections 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

6. This case concerns claims made by the two Players and their common Agent against the same Club, with which each Player had an employment contract.
7. More specifically, the dispute has arisen out of the termination agreements whereby each Player ended his respective employment with the Club.
8. Consequently, in order to clarify the nature of the Players' claims, the two termination agreements will be examined in turn.
9. On 30 June 2009 the Player J. Hukic signed a Termination Agreement (hereinafter the "Termination Agreement JH" or the "Termination Agreement of 30 June 2009") with the Club, whereby according to its article 1: *"The contractual parties herewith terminates the employment contract (uniform player contract), signed on the 14th of May 2008, between the Club and the Player with immediate effect" (sic).*
10. According to the heading of the Termination Agreement JH and its signature lines, when entering into that agreement the Club was represented by Mr Igor Dolenc, its General Manager, who according to the text and signature lines of the underlying employment contract of 14 May 2008 was also the person who had represented the Club when signing the employment contract.
11. Under articles 3 and 4 of the Termination Agreement JH, the Club undertook to pay, as outstanding sums due, EUR 46,666 to the Player by 31 July 2009 and EUR 12,500 to the Agent by 15 September 2009.
12. The Player J. Hukic and the Agent contend that the foregoing amounts owed by the



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Club on the basis of the Termination Agreement JH were never paid and must therefore be executed.

13. In its Answer filed in this arbitration, the Club confirmed that it is unwilling to pay such amounts because it deems the FAT to lack jurisdiction over the claims and because the statutory representatives of the Club did not accept the Termination Agreement JH.
14. As to the other termination agreement, it was signed on 8 January 2010 between the Player S. Becirovic and the Club (the "Termination Agreement SB", or the "Termination Agreement of 8 January 2010". The Termination Agreement JH and the Termination Agreement SB shall hereinafter also be collectively referred to as the "Termination Agreements").
15. According to its article 1: *"The contractual parties herewith terminates the agreement, signed on the 14th and 15th of September 2009, between the Club and the Player. The termination come to the force on the 11th of January 2010" (sic).*
16. According to the heading of the Termination Agreement SB and its signature lines, when entering that agreement the Club was represented by Mr. Igor Dolenc, its General Manager, who according to the text and signature lines of the underlying employment contract of 15 September 2009 was also the person who had represented the Club when signing the employment contract.
17. Under articles 3 and 4 of the Termination Agreement SB, the Club undertook to pay, as outstanding sums due, a total amount of EUR 148,200 to the Player (of which EUR 141,750 is indicated as provided in a Promotion rights agreement undertaken by a third party named Mega Basketball LLC) and the entire amount of agents fees stipulated under article 5 of the underlying employment contract to the Agent, i.e. EUR 20,000. Article 5 of the Termination Agreement SB stipulated that both of the foregoing amounts are due in two installments of 50% each, the first to be paid on 28 February



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2010 and the second on 31 May 2010.

18. The Player S. Becirovic and his Agent contend that the foregoing amounts owed by the Club on the basis of the Termination Agreement SB were never paid and must therefore be executed.
19. In its Answer filed in this arbitration, the Club confirmed that it is unwilling to pay such amounts because it deems the FAT to lack jurisdiction over the claims and because the statutory representatives of the Club did not accept the Termination Agreement SB.

3.2. The Proceedings before the FAT

20. On 4 July 2010, the Claimants filed a Request for Arbitration in accordance with the FAT Rules (received by the FAT on 16 July 2010), which covered the dispute subject to these proceedings as well as several other disputes between other claimants and the Club.
21. On 9 August 2010, the FAT informed the named parties that due to the number of Claimants and multiple contracts involved, and subject to the Claimants deciding to re-file six separate requests, the cases covered by the Request for Arbitration would be disjoined into three cases, one of them being the subject matter of these proceedings FAT 0108/10.
22. On 5 October 2010, the FAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

<i>“Claimant 1 (Mr Becirovic)</i>	<i>EUR 2,000</i>
<i>Claimant 2 (Mr Hukic)</i>	<i>EUR 1,000</i>
<i>Claimant 3 (Beobasket Ltd)</i>	<i>EUR 1,000</i>
<i>Respondent (KK Union Olimpija Ljubljana)</i>	<i>EUR 4,000”</i>



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23. On 27 October 2010, the Club filed its Answer.
24. On 2 November 2010, the FAT Secretariat informed the Parties that Claimants had paid more than requested for their combined advances on costs and that the additional EUR 2,000 they had paid would be credited against the EUR 4,000 that the Respondent had failed to pay and which Claimants were required to substitute for in order for the proceedings to continue.
25. On 15 November 2010, the FAT Secretariat informed the Parties that the Claimants had paid the balance of the advance on costs. Under cover of the same letter, the FAT Secretariat forwarded to the Parties the Arbitrator's procedural instructions inviting them to submit a further exchange of submissions.
26. On 22 November 2010, the Claimants filed their Reply to the Respondent's Answer.
27. On 22 November 2010, the FAT invited the Respondent to file its Rejoinder (comments on Claimants' Reply) by 2 December 2010.
28. The Respondent did not file a Rejoinder.
29. On 13 December 2010, the Parties were invited to submit their statements of cost.
30. On 15 December 2010, the Claimants submitted their statement of costs in a total amount of EUR 15.587,50 (EUR 7,587.50 for legal fees and EUR 8,000 for arbitration costs).
31. On 27 December 2010, having submitted no statement of costs, the Respondent was invited by the FAT to comment by 3 January 2011 on the Claimants' statement of costs.
32. The Respondent did not file any comments within the foregoing deadline.



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4. The Positions of the Parties

4.1. The Claimants' Position

33. The Claimants submit that all the payments stipulated under the Termination Agreement JH and the Termination Agreement SB are outstanding and contractually owed.
34. In the relevant parts of the request for relief contained in the Request for Arbitration of 4 July 2010, the Claimants' prayers are as follows:

"Request for Relief

- a) [...]
- b) [...]
- c) *To award claimant Mr Jasmin Hukic with amount of 46,666 Euro plus interest at the applicable Swiss statutory rate started from the 31st of July 2009.*
- d) *To award claimant Sani Becirovic with amount of 148,200 Euro plus interest at the applicable Swiss statutory rate started from the 30th June 2010.*
- e) [...]
- f) *To award claimant BeoBasket LTD with amount 50.500 Euro [32,500 Euro in these proceedings] plus interest at the applicable Swiss statutory rate started from the 30th of June 2010.*
- g) *To award claimant with the full covered the costs of this Arbitration" (sic)*

4.2. Respondent's Position

35. The Club argues and requests relief as follows:

"All the above mentioned claimants are not founded on a valid contractual or other obligation of the respondent. All agreements of early termination of the contracts are not the documents which could establish the obligations of respondent.

They were not accepted from the statutory representatives of the respondent and as such they are not valid.



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Respondent stresses that FIBA Arbitral Tribunal (FAT) has no jurisdiction (sic) for the claims for the compensation of the image rights. The image rights contract has not been made in favor of the player nor the agent and the compensation for the image rights is not the salary for the player nor agent's fee. Therefore the players and the agent are not intitled (sic) to such claims at the FIBA Arbitral Tribunal (FAT).

The respondent requests that FIBA Arbitral Tribunal (FAT) rejects all the claims of the claimants in this matter."

5. The jurisdiction of the FAT

36. 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). The jurisdiction of the FAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
37. 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.
38. With respect to the claims based on the Termination Agreement JH, i.e. the Player Jasmin Hukic's claim for EUR 46,666 and the Agent's claim for EUR 12,500, the jurisdiction of the FAT over the dispute results from the arbitration clause contained in article 5 of the said Termination Agreement, which reads as follows:

"Any dispute arising 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), Lausanne, Switzerland. The parties

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



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expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sports (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.”

39. With respect to the claims based on the Termination Agreement SB, i.e. the Player Sani Becirovic’s total claim for EUR 148,200 and the Agent’s claim for EUR 20,000, the jurisdiction of the FAT over the dispute results from the arbitration clause contained in article 7 of the said Termination Agreement, which reads as follows:

“Any dispute arising 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), 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 Sports (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.”

40. The arbitration agreements are in written form and thus fulfill the formal requirements of Article 178(1) PILA.
41. With respect to their substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreements under Swiss law (referred to by Article 178(2) PILA).
42. The Players’ and the Agent’s claims clearly come within the scope of the foregoing arbitration clauses in the Termination Agreements, since according to their wording these clauses cover “[a]ny dispute arising from or related to the present contract ...”. Accordingly, the Arbitrator finds that the Club’s allegation that the matter in dispute may also have links to another agreement that it refers to as the “image rights contract” does not detract from the fact that the FAT has jurisdiction under the Termination Agreements, and the Respondent’s corresponding jurisdictional objection must fail.
43. As to the Club’s objection that the Termination Agreements (and therefore the



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arbitration clauses contained therein) are not binding upon it because the Club's statutory representatives allegedly did not accept the Termination Agreements, such objection must also fail because the General Manager (Mr. Igor Dolenc) who represented the Club in the conclusion of the said agreements also did so previously when signing the two underlying employment contracts. Thus, the Players and the Agent were entitled to believe in good faith that Mr. Dolenc had the powers to engage the Club in the matters covered by the Termination Agreements.

44. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Players' and the Agent's claims.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

45. 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".

46. 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."

47. Article 5 of the Termination Agreement JH and article 7 of the Termination Agreement



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SB both provide that: “*The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono*”.

48. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.
49. 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

50. 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*”.
51. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2. Findings

52. In defence against the claims made by the Players and the Agent in this arbitration, the Club has essentially raised two arguments which concern the merits of the claims,

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

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

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



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namely:

- (i) that the undertakings/payments envisaged in the Termination Agreements are not binding upon the Club because its statutory representatives did not accept those agreements, and
 - (ii) that, in any event, such payments are related, in part at least, to compensation provided in an image rights contract in favour of a third party, meaning that such compensation cannot be invoked by the Players and the Agent.
53. As already indicated above in para. 43 in relation to jurisdiction, principles of good faith lead to the conclusion that the Players and the Agent were entitled to believe that the Club considered the Termination Agreements to be binding, since the General Manager who represented the Club and signed those agreements was the same person who had signed the underlying employment contracts on behalf of the Club. Consequently, the Arbitrator finds that the Club is bound by the undertakings stipulated in the Termination Agreements.
54. With respect the Club's second argument, basic contractual principles as well as considerations of fairness and justice require that the Club's undertakings in the Termination Agreements be honoured, irrespective of the fact that another party may have been previously the beneficiary of part of the payments under a different contract.
55. Indeed, articles 3-4 of the Termination Agreement JH and articles 3-5 of the Termination Agreement SB leave no doubt as to the intentions of the Parties. Both agreements stipulate the exact amounts that the Club is undertaking to pay the Players and the Agent – which correspond to the amounts being claimed by them in this arbitration – as well as the due dates for each payment. In other words, the Termination Agreements express the existence of a clear meeting of the minds between the parties. Article 4 of the Termination Agreement SB makes reference to



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article 5 of the underlying employment contract when defining the sum to be paid to the Agent. However, that does not detract from the clarity of the Club's undertaking, since article 5 b) and d) of the underlying employment contract unambiguously provides that the total amount to be paid to the Agent in relation to the engagement of the Player Sani Becirovic is EUR 20,000, as the Agent is claiming.

56. For the above reasons, the Arbitrator finds that the Club owes all the principal amounts being claimed by the Players and the Agent on the basis of the Termination Agreements; and the Club shall be required to pay them.
57. The Players and the Agent are also requesting the payment of interest on the sums owed at an annual rate of 5%.
58. Although the Termination Agreements do 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 the payments been made on time. Consequently and despite the Agreements not specifying an interest rate, it is normal and fair that interest is due on the late payments. Since the Claimants have invoked an interest rate of 5%, which in this case seems fair and reasonable and in line with FAT jurisprudence, interest will be awarded at that rate.
59. It is an established principle that interest runs from the day after the date on which the principal amounts are due.
60. Consequently, it is fair that with respect to the unpaid contractual amounts owed to the Players and the Agent, interest on each principal amount stipulated in the Termination Agreements be deemed to run from the day after the contractually stipulated due dates, unless the Claimants have requested interest to run from a later date, as is the case with the Player Sani Becirovic and the Agent. Having considered the Claimants'



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prayers for relief (see para. 34 above), the Arbitrator decides that interest shall accrue

- on the amounts owed to the Player J. Hukic, from 1 August 2009;
- on the amounts owed to the Player Sani Becirovic, from 30 June 2010;
- on the amounts owed to the Agent, from 30 June 2010.

7. Costs

61. 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.
62. On 8 February 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 5,370.00.
63. Considering, that the Claimants entirely prevailed in their claims, it is fair that the fees and costs of the arbitration be borne by the Club and that it be required to cover its own legal fees and expenses as well as those of the Claimants, the latter being reasonable in amount.



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64. Given that the Claimants paid advances on costs of EUR 8,000.00 as well as a non-reimbursable handling fee of EUR 4,000.00, while the Club paid no advances on costs, the Arbitrator decides that in application of article 17.3 of the FAT Rules:
- (i) FAT shall reimburse EUR 2,630.00 to the Claimants being the difference between the costs advanced by them and the arbitration costs fixed by the FAT President;
 - (ii) The Club shall pay EUR 5,370.00 to the Claimants, being the difference between the costs advanced by them and the amount they are going to receive in reimbursement from the FAT;
 - (iii) The Club shall pay to the Claimants EUR 8,000.00 as contribution towards their legal fees and other 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. Jasmin Hukic an amount of **EUR 46,666.00** as compensation under the Termination Agreement of 30 June 2009, plus interest at 5% per annum from 1 August 2009.
2. KK Union Olimpija Ljubljana shall pay Mr. Sani Becirovic an amount of **EUR 148,200.00** as compensation under the Termination Agreement of 8 January 2010, plus interest at 5% per annum from 30 June 2010.
3. KK Union Olimpija Ljubljana shall pay Beobasket Ltd. an amount of **EUR 12,500.00** as compensation under the Termination Agreement of 30 June 2009, plus interest at 5% per annum from 30 June 2010.
4. KK Union Olimpija Ljubljana shall pay Beobasket Ltd. an amount of **EUR 20,000.00** as compensation under the Termination Agreement of 8 January 2010, plus interest at 5% per annum from 30 June 2010.
5. KK Union Olimpija Ljubljana shall pay Claimants an amount of **EUR 5,370.00** as reimbursement for their arbitration costs.
6. KK Union Olimpija Ljubljana shall pay Claimants an amount of **EUR 8,000.00** as reimbursement for their legal fees and expenses.
7. Any other or further requests for relief are dismissed.

Geneva, seat of the arbitration, 22 February 2011.

Quentin Byrne-Sutton
(Arbitrator)