



FIBA

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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0111/10 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Klaus Reichert

in the arbitration proceedings between

Mr. Giovanni C. Funicello

Mr. Happy Walters

- Claimants -

vs.

KK Cibona

Savska 30, 10000 Zagreb, Croatia

- Respondent -



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FIBA Arbitral Tribunal (FAT)

1. The Parties

1.1. The Claimant

1. Giovanni C. Funiciello and Happy Walters (“Claimants”) are agents. A player, Antonio Graves, for whom they performed representation services was engaged by KK Cibona (“Respondent”) to play the season 2009/2010. That engagement was reflected in a written agreement dated 21 July 2009 (“the Agreement”) and signed on 22 July 2009.

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 9 August 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 is principally concerned with the retention by Respondent of



We Are Basketball

FIBA Arbitral Tribunal (FAT)

Antonio Graves, also sets an obligation on the part of Respondent to pay, amongst others, Claimants certain sums described as “Agent’s Commission”. The relevant sums involved and the prescribed dates are: (a) USD 21,250.00 on 20 September 2009; and (b) USD 21,250.00 on 20 January 2010. This total of USD 42,500.00 is confirmed in a letter dated 21 December 2009.

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

5. Claimants filed a Request for Arbitration dated 30 June 2010 in accordance with the FAT Rules, and on 5 July 2010 the non-reimbursable fee of EUR 2,000.00 was duly paid. Claimants paid a total of EUR 3,989.99 to FAT on 5 and 6 July 2010. The Request for Arbitration sought payment of:
 - USD 42,500.00
 - Interest at 5%
 - All costs and legal fees
6. On 9 September 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 at EUR 3,000.00 each. Since Claimants had already made advance payments the amount directed in respect of the first Claimant (Funciello) was EUR 166.71 and the amount in respect of the second Claimant (Walters) was EUR 843.30. Respondent was directed to pay EUR 3,000.00.
7. In addition on 9 September 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 1 October 2010.



We Are Basketball

FIBA Arbitral Tribunal (FAT)

8. Given that Respondent failed to pay its share of the Advance on Costs, the Claimants were invited by the FAT to effect the substitute payment. The Claimants thus paid the entire advance on costs in the total amount of EUR 5.989.20.
9. Respondent delivered its Answer on 30 September 2010. The Law Firm of Mamić Perić Reberski Rimac in Zagreb submitted this Answer on Respondent's behalf. Most notably it contains the statement "[I]t is undoubted that the respondent is obliged to pay to the claimants the amount of \$ 42,500.00 according to the Agent's Commission Page, which amount is being calculated as determined therein." Further, Respondent stated that the "only reason why the respondent has not paid yet the claim of the claimants is its current financial situation."
10. On 16 November 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 Wednesday, 1 December 2010.**"*
11. On 30 November 2010, the second Claimant (Walters) made observations by email. No further observations or evidence were put before the Arbitrator on or before 1 December 2010.
12. On 20 December 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.
13. On 30 December 2010 the Claimants submitted their account of costs which consists exclusively of payments corresponding to the non-reimbursable fee and the advance on arbitration costs.
14. The Respondent did not submit its account of costs.



We Are Basketball

FIBA Arbitral Tribunal (FAT)

4. Jurisdiction

15. 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).
16. The jurisdiction of the FAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties

4.1. Review – the arbitration agreement

17. 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.”

4.2. Arbitrability

18. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus



We Are Basketball

FIBA Arbitral Tribunal (FAT)

arbitrable within the meaning of Article 177(1) PILA¹.

4.3. Formal and substantive validity of the arbitration agreement

19. 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."

20. The jurisdiction of the FAT over the present dispute results from the arbitration clause already described above in paragraph 17.
21. 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.
22. 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 Claimants 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.

5. Discussion

5.1. Applicable Law – *ex aequo et bono*

23. With respect to the law governing the merits of the dispute as between Claimants 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.



We Are Basketball

FIBA Arbitral Tribunal (FAT)

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”.

24. 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.”

25. As already noted in paragraph 17 above, the Agreement provides that the Arbitrator shall decide *ex aequo et bono*.

26. 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

27. In substance, it is generally considered that an arbitrator deciding *ex aequo et bono*

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).



We Are Basketball

FIBA Arbitral Tribunal (FAT)

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

28. 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*”.
29. In light of the foregoing considerations, the Arbitrator makes the findings below.

5.2. Findings

5.2.1. Discussion and conclusion on the facts

30. The Answer demonstrates clearly that there is no factual dispute between the parties. Respondent, in fact, admits the claim and only seeks time to negotiate a resolution.

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

31. The Arbitrator has identified the principal consideration which reflects justice and fairness for the purposes of this Arbitration.
32. 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

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



We Are Basketball

FIBA Arbitral Tribunal (FAT)

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.

33. Respondent is obliged to adhere to the contractual obligations it entered into with Claimants. Respondent signed the Agreement with Claimants. Claimants clearly have the legitimate entitlement to be paid the sums of money agreed between the Parties.
34. 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.
35. 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.
36. What remains to be identified is the rate of interest. Claimants seek 5%. In line with the



We Are Basketball

FIBA Arbitral Tribunal (FAT)

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 originally due. Thus, Respondent must pay interest at 5% per annum as follows:

- on USD 21,250.00 from 21 September 2009; and
- on USD 21,250.00 from 21 January 2010.

5.2.3. Costs

37. 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.
38. On 2 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 3,400.00.



We Are Basketball

FIBA Arbitral Tribunal (FAT)

39. Considering that Claimants prevailed in their claims, it is appropriate that Respondent should bear the arbitration costs and be required to cover its own legal fees and expenses as well as those of the Claimants.
40. As the arbitration costs are fixed by the FAT President at EUR 3,400.00 and the total sums paid to FAT (excluding the non-reimbursable fee of EUR 2,000 which will be taken into account when determining the Claimants' legal fees and expenses) were EUR 5,989.20 that leaves a figure of EUR 2,589.20 which can be repaid to Claimants.
41. The Arbitrator decides that in application of article 17.3 of the FAT Rules:
 - (i) FAT shall pay EUR 2,589.20 to Claimants by way of reimbursement; and
 - (ii) Respondent shall pay to Claimants an amount of EUR 3,400.00 being the difference between the costs advanced by them (EUR 5,989.20) and the amount they are going to receive in reimbursement from the FAT.
 - (iii) Respondent shall pay to Claimants EUR 2,000 representing the amount of their legal fees and other expenses.



We Are Basketball

FIBA Arbitral Tribunal (FAT)

6. AWARD

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

1. **KK Cibona shall pay Mr. Giovanni C. Funciello and Mr. Happy Walters the amount of USD 42,500.00.**
2. **KK Cibona shall pay Mr. Giovanni C. Funciello and Mr. Happy Walters interest at 5% per annum as follows:**
 - **on USD 21,250.00 from 21 September 2009; and**
 - **on USD 21,250.00 from 21 January 2010.**
3. **KK Cibona shall pay Mr. Giovanni C. Funciello and Mr. Happy Walters an amount of EUR 3,400.00 as reimbursement of arbitration costs.**
4. **KK Cibona shall pay Mr. Giovanni C. Funciello and Mr. Happy Walters an amount of EUR 2,000 as reimbursement of their legal fees and expenses.**
5. **All other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 4 February 2011

Klaus Reichert
(Arbitrator)