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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0115/10 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Mr. Richard Hendrix,

represented by Mr. Guillermo López Arana,
c/ Maestro Ripoll 9, 28006 Madrid, Spain

- Claimant -

vs.

Club Baloncesto Granada,
Pabellón Avenida Salvador Allende, 18007 Granada, Spain

represented by Mr. Francisco José Bueno Guerrero,
c/ Almona del Campillo 2, 18008 Granada, Spain

- Respondent -

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1. The Parties

1.1. The Claimant

1. Mr. **Richard Hendrix** (the “Player” or “Claimant”) is a US citizen and a professional basketball player.

1.2. The Respondent

2. **Club Baloncesto Granada** (the “Club” or “Respondent”) is a professional basketball club in Granada, Spain.

2. The Arbitrator

3. On 26 August 2010, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Prof. Dr. Ulrich Haas 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. Summary of the Dispute

4. On 26 July 2009, the Parties entered into an agreement ("Player Contract") whereby the Club engaged the Player for the season 2009-2010.

5. According to the clause FIFTH of the Player Contract:

"The Player shall be paid a gross amount as payment for his services, from which, after deducting the percentage corresponding to the fiscal deduction IRPF, the result is:

ONE HUNDRED TWENTY-EIGHT THOUSAND NINE HUNDRED FORTEEN [sic] NET DOLLARS USD (128.914$), as follows:

- 12,891 USD net at the Player's arrival to Granada
- 12,891 USD net on the 5th of September 2009
- 12,891 USD net on the 5th of October 2009
- 12,891 USD net on the 5th of November 2009
- 12,891 USD net on the 5th of December 2009
- 12,891 USD net on the 5th of January 2009 [sic]
- 12,891 USD net on the 5th of February 2009 [sic]
- 12,891 USD net on the 5th of March 2009 [sic]
- 12,891 USD net on the 5th of April 2009 [sic]
- 12,891 USD net on the 5th of May 2009 [sic]

6. Clause SIXTH provides that:

"The Club shall give the player the amount of 10,000 net USD for travelling by plane expenses during and at the end of the season."

7. On 27 July 2009, the Parties signed another employment contract ("Main Player Contract"). According to clause FOURTH of the Main Player Contract:

"The salary to be received for the player's services will be the gross amount, from which the corresponding percentage for Personal Income Tax withholding is deducted, results:

TWO HUNDRED THOUSAND USD DOLLARS NET (200.000$), payable the following manner:

- 12,891 USD net at the Player's arrival to Granada
- 12,891 USD net on the 5th of September 2009
- 12,891 USD net on the 5th of October 2009
- 18,416 USD net on the 5th of October 2009 (Scouting)
- 12,891 USD net on the 5th of November 2009
- 12,891 USD net on the 5th of December 2009
- 17,127 USD net on the 5th of December 2009 (Image)
- 12,891 USD net on the 5th of January 2010
- 18,416 USD net on the 5th of January (Scouting) [sic]
- 12,891 USD net on the 5th of February 2010

- 12,891 USD net on the 5th of March 2010
- 17,127 USD net on the 5th of March 2010 (Image)
- 12,891 USD net on the 5th of April 2010
- 12,891 USD net on the 5th of May 2010".

8. On 19 August 2009, the Club and OROTAVA ROCKY STONE MEDIA, B.V. (hereinafter "OROTAVA"), a company with registered offices at Ceintuurbaan, 326 I, 1072 GM Amsterdam, the Netherlands, entered into a license agreement (the "Image Rights Contract"). The Image Rights Contract (in the English translation provided by the Respondent) reads in relevant part as follows:

"1.-CONSENT. CONTENT OF THE TRANSFER

OROTAVA as holder of the exploitation rights of the image of the player MR. RICHARD HENDRIX, transfer them to the CLUB that, by mean[s] of this contract, acquires them on a worldwide basis.

The transfer granted by mean[s] of this contract entitles the CLUB the exclusive exploitation, by itself of [sic] by mean[s] of transfer to third parties, during the validity of the contract and in concern with the name, image and voice of the player, which are transferred for advertising purposes, of the following rights:

a) Use of the name, voice and image of the player in the media: radio, television, press, magazines, posters, key rings, lighters, exhibitions or any other mean that the CLUB may consider appropriate for its purposes of advertisement, commerce or promotion. Moreover OROTAVA gives the CLUB the right to broadcast any report on the professional activities of the player, as well as the right to be interviewed and broadcast the interviews in the media.

b) Placing of any type of publicity signs, anagrams, logos and/or signs of one or more commercial businesses chosen by the CLUB on sports clothes used by the player in sports competitions, trainings or social events taking part as a player.

c) The right to cancel any type of contract with third parties and be paid as own of the CLUB any payment for image transfer, from the contracts concerning films, advertisements, publicity spots, appearances in tv and/or press campaigns and/or promotion campaigns that the CLUB may agree with third parties in connection with the transfer of rights in sections a) and b) before.

2.-COMPENSATION

In compensation for the transfer of rights carried out in clause 1, the CLUB is obliged to

pay OROTAVA a compensation of THIRTY-FIVE THOUSAND NINE HUNDRED NINETY-SIX DOLLARS (35,966,-USD) [sic] divided in two payments of $17,983, on 5 December 2009 and 5 March 2010. […] "

9. Under the signatures of the Club and OROTAVA, the Image Rights Contract contains the sentence

"With the knowledge, consent and approval of MR RICHARD HENDRIX",

which is followed by an illegible signature.

10. On 23 August 2009, the Club and EANCOTE SERVICES LIMITED (hereinafter "EANCOTE"), a company with address at 31 Donnybrook Castle, Donnybrook, Dublin 4, Ireland, concluded an agreement entitled Scouting Contract (the "Scouting Contract"). In its relevant parts, the Scouting Contract reads as follows (in the English translation provided by the Respondent):

"EANCOTE SERVICES shall provide [to the Club] the following services:

- The search, tracking, supervision and, if that were the case, recruitment of professional or university players of the Leagues of basketball in United States of America.

- The search, tracking, supervision and, if that were the case, recruitment of players usually playing in non-professional Leagues of basketball, organized by public and private institutions, as well as those participating in school and university games.

- The information to the CLUB and its requirement on the establishment of the salary schemes of the professional sportspeople and, in particular, of professional players of basketball.

- Assisting the CLUB at its request, at signing contracts between it and the players recruited by the Company. […]"

2. PRICE. –

The CLUB shall be obliged to pay EANCOTE SERVICES the amount of TWO HUNDRED THIRTY-FIVE THOUSAND FIFTY DOLLARS ($235,050.-) as compensation of the services provided, that shall be paid at the following terms:

- $19,660. - on 5 October 2009

- $63,735. - on 5 November 2009
- $19,415. - on 5 January 2010
- $28,465. – on 15 January 2010
- $63,715. – on 5 March 2010
- $40,060. – on 15 January 2011."

11. It is common ground that the Player played for the Club in the season 2009-2010.

12. The Player alleges that the Club owes to him an amount of 68,750.45 USD under the Main Player Contract, which amount comprises of outstanding salary payments and expenses for airplane tickets.

13. The Club, in turn, argues that the Player owes the Club expenses in the amount of EUR 15,196.49, which ought to be taken into account in case the Claimant is awarded any sum.

3.2. The Proceedings before the FAT

14. On 12 August 2010, the Claimant filed a Request for Arbitration in accordance with the FAT Rules, and on 13 August 2010 he duly paid the non-reimbursable fee of EUR 1,986.

15. On 26 August 2010, the FAT informed the Parties that Prof. Dr. Ulrich Haas had been appointed as the Arbitrator in this matter and fixed the amount of Advance on Costs to be paid by the Parties as follows:

"Claimant (Mr. Hendrix)	*EUR 3,500*
Respondent (CB Granada)	*EUR 3,500"*

16. On 17 September 2010, the Claimant paid his share of the Advance on Costs in an amount of EUR 3,491. On the same day, the Respondent submitted to the FAT its Answer to the Request for Arbitration but failed to pay its share of the Advance on Costs within the set time-limit.

17. On 21 September 2010, the FAT Secretariat informed the Claimant that, according to Article 9.3 of the FAT Rules, he would have to substitute for the Club with respect to the Advance on Costs because the latter had not paid its share thereof. A time limit for the payment was set for 1 October 2010.

18. On 24 September 2010, the Claimant paid the Respondent's share of the Advance on Costs in an amount of EUR 3,486.

19. On 24 November 2010, the Arbitrator requested the Respondent to provide English translations of all Exhibits to the Answer submitted in Spanish by no later than Wednesday, 1 December 2010.

20. On 7 December 2010, the Arbitrator issued a Procedural Order in which he confirmed that he had received from the Respondent English translations of several Exhibits to the Answer which had initially been submitted in Spanish. The Answer to the Request for Arbitration as well as the translations provided by the Respondent were forwarded by FAT to the Claimant on 7 December 2010. With the same correspondence, the Claimant was afforded an opportunity to comment on the Answer by no later than 20 December 2010.

21. On 20 December 2010, the Claimant submitted to the FAT its comments to the Respondent's Answer.

22. By FAT correspondence dated 27 December 2010 and in accordance with the Procedural Order dated 7 December 2010, the Respondent was invited to respond to the Claimant’s comments by no later than 5 January 2011.

23. By Procedural Order dated 12 January 2011, the Arbitrator informed the Parties that the Respondent had failed to submit its response on the Claimant's comments. Furthermore, the Arbitrator asked the Parties whether they wished to file any further documentary evidence or if they were content that all the documentary evidence they

sought to rely upon was already before the Arbitrator.

24. By email dated 14 January 2011, the Claimant stated that there was no further documentary evidence he would like to bring to the case.

25. On 27 January 2011, considering that neither party had solicited a hearing, the Arbitrator 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 Parties' written submissions. The Arbitrator accordingly issued a Procedural Order providing that the exchange of documents was completed and inviting the Parties to submit their cost accounts.

26. On 31 January 2011, the Claimant submitted the following account of costs:

"*- Arbitral fees:*

- *Handling fee:* *2,000.00 €*
- *Advance on costs (Claimant)* *3,500.00 €*
- *Advance on costs (Respondent)* *3,500.00 €*

- Legal report	*3,250.00 €*
- Legal advising during the procedure	*525,00 €*
- Translations	*120,00 €*
- Copies of documents	*25,00 €*
- Other expenses	*20,00 €*

TOTAL: *12,945.00 EUROS*"

27. On 11 February 2011, the Respondent submitted the following account of costs:

"1.- Written reply to the claim made……1,400,00 €.

2.- Legal counsel in the file…….. .500,00 €

Total……1,900,00 €."

4. The Positions of the Parties

4.1. The Claimant's Position

28. The Claimant submits the following in substance:

- The Club has not paid the following amounts owed as salary under the Main Player Contract:

  - 17,127 USD net from December 5th, 2009
  - 18,416 USD net from January 5th, 2010
  - 17,127 USD net from March 5th, 2010

- The Club owes the Player an additional amount of 3,189.45 USD net for airplane tickets for 3 passengers. The tickets fall under the scope of clause FIFTH of the Main Player Contract, as they were bought by the Player for the use of his relatives, and because the flights were from New York (the place of origin of the Player) to Granada.

- With respect to the expenses claimed by the Respondent, such claim must be rejected for lack of supporting evidence of the damages and payments alleged by the Club. Moreover, according to the Main Player Contract, such expenses must be communicated within a period of seven days following the expiry of the contract. As this time-limit has elapsed, the expenses cannot, according to the Main Player Contract, be attributed to the Player.

- In his Request for Arbitration dated 12 August 2010, the Claimant requested the following relief:

  "a) To award the Claimant with amount of 68,750.45 USD net plus interest at the

applicable Swiss statutory rate, starting from the 5th of December 2010. […]

b) To award the Claimant with the full covered the costs of this arbitration. [sic]"

- In his Reply dated 16 December 2010 (and received by the FAT on 20 December 2010), the Claimant acknowledged that a payment of USD 12,891 initially claimed in the Request for Arbitration had in the meanwhile been paid by the Respondent (the Respondent produced a wire confirmation dated 8 September 2010).

4.2. Respondent's Position

29. The Respondent submits the following in substance:

- Although the Main Player Contract provides that disputes shall be resolved by FAT, *"it is not the only document signed by the parties, or which shall govern this claim"*. Due to the wording of the arbitration clauses in the Image Rights Contract and the Scouting Contract, the FAT does not have jurisdiction to resolve any claims relating to those contracts. Under these two contracts, any dispute shall be settled through arbitration in accordance with the statutes and rules of procedure of the London Court of International Arbitration (LCIA). Since those contracts were concluded after the Main Player Contract, the *lex posterior* principle shall apply and FAT does not have jurisdiction to decide on amounts which were to be paid for image rights or scouting services.

- Therefore, FAT would have jurisdiction only insofar as the Player had claimed for an amount of USD 12,891 net. However, this amount has already been paid.

- Regarding the two payments in the amount of USD 17,127 each, which are labelled as "Image" in the Main Player Contract (the "Image payment"), the Player and the Club entered into a new employment contract which did not include those

amounts. Furthermore, the Player signed a contract for the sale of image rights with OROTAVA, and the Parties and OROTAVA signed another contract under which OROTAVA is the creditor with regard to payments by the Club for the transfer of image rights.

- With respect to the payment in the amount of USD 18,416 which is labelled as "Scouting" in the Main Player Contract (the "Scouting payment"), the Player has received the previous "Scouting" payment from EANCOTE, not from the Respondent. Therefore, the player has accepted this "situation" and the Club is not the debtor.

- Regarding the amount of USD 3,189.45, the travel documents name as passengers Mrs. Valarie Andryna Elaine Hendrix and Ms. Andryna Kuzmici, neither of whom are in any contractual relationship with the Respondent. Therefore, in the absence of any arbitration agreement, FAT does not have jurisdiction over this claim. Also, according to the Main Player Contract, travel costs will only be reimbursed by the Club for journeys undertaken by the Player, not by other persons.

- In the event that the Arbitrator decides to award certain amounts to the Player, the Arbitrator is requested to "take into account" the following expenses which the Club has paid for the Player:

"*Telephone Expenses ….. Euro 73.78*
Housing repairs ……Euro 12,125.33 (plus VAT)
Traffic fine ……..Euro 28.00
Messaging Services……..Euro 76.80
'Imagenio' Internet provider…Euro 710
In total 13.013,94 plus 2.182,55 of VAT, equal to EUR 15,196.49."

The Respondent submits that although the Main Player Contract requires the Club to communicate to the Player such expenses within the term of seven days from the expiry of the contract in order to be reimbursable, this cannot apply because such period is too short to determine the exact costs.

30. In its Answer dated 17 September 2010, the Respondent requested the following relief:

> *"[T]o declare the lack of jurisdiction and for the assumption that it [FAT] is competent, they give a decision on the requests made to reject the contrary, and declare the existence of a debt of the player with the club for the items indicated in this paper and the amount of 15,196.49 euros [...]" [sic]*

5. Jurisdiction

31. 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).

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

5.1. Arbitrability

33. 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].

5.2. Formal and substantive validity of the arbitration agreement

34. The jurisdiction of the FAT over the dispute would result from the arbitration clause in clause THIRTEENTH of the Main Player Contract, which reads as follows:

> *"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 languague of the arbitration shall be English. Awards of the FAT can be appealed to the Court of Arbitration for Sports (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."*

35. The Main Player Contract is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.

36. With respect to substantive validity, the Arbitrator takes note that the Club is contesting the jurisdiction of FAT and refers to the arbitration clauses contained in the Image Rights Contract and in the Scouting Contract. In essence, the Respondent is submitting that those amounts still claimed by the Player (after having reduced his claim) are owed for scouting services and the licensing of image rights and that both the Image Rights Contract and the Scouting Contract include arbitration clauses referring to the rules of the London Court of International Arbitration (LCIA). As the Image Rights Contract and the Scouting Contract were signed after the Main Player Contract, the Club effectively argues that the arbitration clauses contained in those contracts are overriding the arbitration clause of the Main Player Contract pursuant to the legal

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

principle of *lex posterior derogat legi priori*.

37. The Arbitrator does not endorse the Club's interpretation.

38. Firstly, as regards the Scouting payment, the arbitration clause in the Scouting Contract cannot have any effect on the Player because he is not a party to the Scouting Contract. In fact, the Scouting Contract does not mention the Claimant's name at all. Thus, it is not even clear whether the scouting services under this contract are referring to the Player.

39. Moreover, even if (as claimed by the Respondent) the Player has received a Scouting payment from EANCOTE instead of the Club, this does not mean that the Claimant has agreed to the arbitration clause in the Scouting Contract. At the very least, acceptance of such payment from EANCOTE does not constitute a *written* arbitration agreement *between the Parties to this arbitration* as required by Article 178(1) PILA.

40. Secondly, regarding the two Image payments in the amount of USD 17,127 each, the Image Rights Contract cannot override the arbitration clause of the Main Player Contract, either. Indeed, it is highly doubtful whether the Claimant, by virtue of his signing the Image Rights Contract under the words "[w]ith the knowledge, consent and approval of", became a party to this contract. This is because the contract does not stipulate any rights or obligations for the Player; it merely contains a typical license agreement between OROTAVA and the Club. In the Arbitrator's view, although OROTAVA and the Club apparently intended to ensure that the Player took knowledge of the Image Rights Contract, the Player was not supposed to and did not become a party to the said contract. Under this premise, the Image Rights Contract cannot amend the Main Player Contract's arbitration clause due to a lack of identity of parties.

41. However, even if the Player was deemed to be a party to the Image Rights Contract, this would still not affect FAT's jurisdiction over the claim for Image Payments in the

Main Player Contract. The reason is that the Main Player Contract and the Image Rights Contract are closely linked, with the Main Player Contract being the primary agreement. In fact, Clause 3 of the Image Rights Contract provides as follows:

> *"This contract shall be in force on 19 August 2009 until 30 June 2010. If for any reason, the player left the CLUB before 30 June 2010, the CLUB then may decide cancelling the contract, and only pay the monthly payments accrued, or continuing it for the same period agreed in this clause"*.

Therefore, the validity of the Image Rights Contract and the Club's obligations thereunder are contingent upon the continuation of the contractual relationship between the Player and the Club; such contractual relationship was established and regulated by the Main Player Contract.

42. It is important to bear in mind that FAT has jurisdiction regarding Scouting payments (see above paras 38 et seq.) as well as – undisputedly – on claims regarding salary payments under the Main Player Contract. Against this background, the Arbitrator cannot accept the argument that the Player has agreed to the jurisdiction of another arbitral institution solely for one category of payments – the Image payments – arising from the Main Player Contract, and that he has done so simply by acknowledging that he took knowledge of, approved and consented to a contract which is effectively a license agreement between OROTAVA and the Club.

43. The Arbitrator is comforted in this position by the openly "liberal" case law of the Swiss Federal Tribunal with respect to arbitration agreements by reference[2] and the predisposition of the Federal Tribunal to take into account the interconnection between different contracts when examining the substantive validity of an arbitration

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[2] Decision of the Swiss Federal Tribunal of 16 October 2003, reported in ATF 129 III 727, *735* using the word "liberal" with reference to ATF 121 III 38, *45* and the decisions 4P.126/2001 of 18 December 2001 reported in ASA Bulletin 2002, p. 482; 4C.40/2003 of 19 May 2003 at 4, reported in ASA Bulletin 2004, p. 344; see also decision 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

agreement.[3]

44. The Arbitrator's interpretation is also in line with FAT jurisprudence, according to which the issue that needs to be determined is whether the claim for payment made by the Player in these proceedings falls within the scope of the above-quoted FAT arbitration clause contained in the Main Player Contract.[4] That is a matter of interpretation of the arbitration clause in light of the content of the Main Player Contract. The Arbitrator finds that for a combination of the following reasons the Player's claim as formulated *does* fall within the scope of the FAT arbitration clause contained in clause THIRTEENTH of the Main Player Contract:

- The Club and the Player are parties to the Main Player Contract containing the FAT arbitration clause.

- The terms of the Main Player Contract include all the essential elements of agreement between the Club and the Player with respect to the latter's right to remuneration for the season 2009-2010, i.e. the total amount net of tax of the Player's salary (USD 200,000) and the details regarding the services that the Player must render to be entitled to his full remuneration, including the timeframe and games involved (2009-2010 season).

- It is clear from those terms of the Main Player Contract that, irrespective of any modalities that would be agreed upon in other agreements as to the mode and schedule of payments, the Parties' common intent under the Main Player Contract was that the Club itself was fully guaranteeing to the Player the payment of a total

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3 Decision of 8 December 1999, reported in ASA Bulletin 2000, p. 546.

4 Compare FAT Decision 0067, dated 31 August 2010, Strawberry, Bill A. Duffy International, Inc. vs. Fortitudo Bologna, paras 64 et seqq.

salary of USD 200,000 by the end of the season 2009-2010.

- It follows that the broad terms of the arbitration clause in the Main Player Contract stating that "*Any dispute arising or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland […]*" necessarily encompass and were intended by the Parties to cover any disputes relating to the non-payment by the end of the season 2009-2010 of any part of the Player's total guaranteed salary of USD 200,000 stipulated in the Main Player Contract.

45. Lastly, the Arbitrator shall also rule on FAT's jurisdiction to decide upon the compensation claimed by the Club in the amount of EUR 15,196.49 under the condition that the Arbitrator finds the Player's claim to be at least partially successful.

46. It is not entirely clear whether such compensation would follow from the Main Player Contract and therefore fall under the FAT arbitration clause contained therein. However, this can remain open because FAT would – following Swiss legal doctrine – in any event have jurisdiction as arbitral tribunals are always competent to decide on set-offs.[5]

47. Although the Respondent does not expressly declare whether it seeks to file a counter-claim or to invoke a set-off, the Arbitrator finds that the Respondent's submission must be interpreted as a set-off. The Respondent in its Answer to the Request for Arbitration asks the Arbitrator to "take into account expenses" if he decides to (at least partially) uphold the Player's claim. Hence, the Respondent's intention is to obtain a reduction of the amounts owed to the Player. The most advantageous procedural way for the

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5 *Kaufmann-Kohler/Rigozzi*, Arbitrage international, 2nd ed. 2010, no. 257 (p. 138); *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland, 2nd ed. 2010, no. 483 seq.; *Poudret/Besson*, Comparative Law on International Arbitration, 2nd ed. 2007, no. 324; see in this respect for domestic arbitration the express provision in Art. 377 (1) Swiss Civil Code of Procedure, cf. *Oberhammer/Dasser*, ZPO, 2010, Art. 377 N. 5 et seq.

Respondent to achieve this goal is the set-off defence, because (unlike a counterclaim) there is no requirement for it to be dealt with in separate proceedings.

48. In addition, and most importantly, the Claimant in his submissions has not contested the jurisdiction of FAT as regards the Respondent's setting-off certain expenses allegedly incurred by the Claimant.

49. Hence, the Arbitrator finds that FAT has jurisdiction to decide upon the Respondent's damage claims, as well.

6. Discussion

6.1. Applicable Law

50. 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".*

51. 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."*

52. The Arbitrator finds that the Parties' selection of the law applicable to the merits is related to the discussion on FAT's jurisdiction: Clause THIRTEENTH of the Main Player Contract makes it clear[6] that

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

53. Furthermore, in its Answer to the Request for Arbitration, the Respondent expressly acknowledged that, in case the FAT would assume jurisdiction, the dispute would be resolved *ex aequo et bono*:

> *"Even if the arbitration is settled "ex aequo et bono", at the outset the Tribunal must analyze your competition". [sic]*

54. Therefore, the Arbitrator will decide the present matter *ex aequo et bono*.

55. 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* of 1969[7] (Concordat),[8] 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*

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6 See also FAT Decision 0041/09 dated 12 November 2009, Panellinios BC vs Kelley; FAT Decision 0063/09 dated 19 February 2010, Fisher, Entersport vs Vojvodina.

7 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).

8 KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 187 PILA N 289.

> *which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[9]

56. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

> *"the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand".*[10]

57. 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".

58. In light of the foregoing developments, the Arbitrator makes the following findings:

6.2. Findings

59. Under clause FOURTH of the Main Player Contract, the Player was guaranteed payment by the Club of a total salary in the amount of USD 200,000 net by the end of the 2009-2010 season.

60. Taking into account the payment of USD 12,891 which was made by the Respondent during the course of these proceedings, the Player has still not received payments in the amount of USD 52,670 for his services rendered throughout the season 2009-2010.

61. Consequently, unless Respondent's objections linked to the validity of clause FOURTH

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9 JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

10 POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

of the Main Player Contract are established and/or reasons of fairness so require, the claims for the outstanding amounts indicated above must be admitted.

62. With regard to the two Image payments in the amount of USD 17,127 each, the Respondent has raised the objection that it is OROTAVA, not the Club that owes these amounts to the Player. The Club argues that the Player signed a new employment contract with the Club which does not include payments for image rights. Furthermore, the Club submits that the Parties and OROTAVA signed another contract according to which OROTAVA is the creditor with regard to any image rights payments by the club.

63. The Arbitrator does not accept this objection. First of all, the only other employment contract between the Player and the Club which was submitted to the Arbitrator is the Player Contract, which was signed on 26 July 2009, i.e. one day *before* the Main Player Contract. Hence, this contract cannot have modified the Main Player Contract as regards the image rights payments.

64. Secondly, with regard to the contract with OROTAVA mentioned by the Respondent (the Arbitrator assumes that the Respondent refers to the Image Rights Contract), the Arbitrator notes that this contract cannot liberate the Club from its payment obligations under clause FOURTH of the Main Player Contract. The provision of a payment schedule in other contracts and the fact that certain payments would be made *via* a third party do not detract from the fact that the Club's main obligation – i.e. to guarantee payment of the total amount of salary by the end of the 2009-2010 season at the latest – remains under the Main Player Contract with respect to whatever sums are unpaid at the end of the stipulated season.[11] This would only be different if the Image Rights Contract contained an agreement between OROTAVA and the Player according

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[11] See also FAT Decision 0067, dated 31 August 2010, Strawberry, Bill A. Duffy International, Inc. vs. Fortitudo Bologna, para 84.

to which the Player's claims against the Club relating to image rights are assigned to OROTAVA. However, the Image Rights Contract does not contain any provision to this effect, neither expressly nor tacitly.

65. With respect to the Scouting payment in the amount of USD 18,416, the Respondent argues that the Claimant has received the other Scouting payment which was due under the Main Player Contract from EANCOTE, not from the Respondent. Therefore, according to the Respondent, the player has accepted "this situation".

66. The Arbitrator does not endorse this argument. Even if the Player did in fact receive the other Scouting payment from EANCOTE, this can hardly be interpreted as a tacit agreement between EANCOTE and the Player according to which EANCOTE replaces the Club as debtor of the Scouting payments under the Main Player Contract. There is no indication whatsoever that the Player had any interest in liberating the Club from its obligations under the Main Player Contract. Accordingly, the acceptance of a payment by EANCOTE can, at the most, be regarded as acceptance of payment by a third party (namely EANCOTE) on the account of the debtor (i.e. the Respondent).

67. Furthermore, since the Arbitrator cannot see any justified reasons of substance not to pay the Player – there is no complaint that the Player did not perform his services and no breach of contract by the Player was ever alleged by the Respondent –, considerations of justice and fairness prevent the Club from invoking the existence of other contracts as a formal pretext for not paying the total remuneration it guaranteed towards the Player under the Main Player Contract.[12]

68. Therefore, the Player's request for payment of USD 52,670 shall be upheld.

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[12] See also FAT Decision 0067/09 dated 31 August 2010, Strawberry, Bill A. Duffy International, Inc. vs. Fortitudo Bologna, para 85.

69. As regards the reimbursement sought for three airplane tickets in the amount of USD 3,189.45, the relevant clause FIFTH of the Main Player Contract provides as follows:

> *"The Club will provide the Player, during each season, with 10,000 USD for travel expenses (airplane tickets) during and at the end of the season. […]"*

70. The Club argues that it does not owe the travel expenses claimed by the Player because the airline tickets were not used by the Player himself. The Claimant submits that the tickets were reserved for himself and his relatives for travelling from New York (the Player's town of origin) to Granada, and that such travel expenses were falling within the scope of clause FIFTH of the Main Player Contract.

71. To begin with, the Arbitrator notes that, contrary to the Claimant's submissions, none of the airline tickets provided to the FAT was issued on the Player's name. One ticket names Mrs. Valarie Andryna Elaine Hendrix and Ms. Andryna Kuzmici, while the other is issued on the name of Mr. Carlton Bridgeforth. Hence, the entire claim for USD 3,189.45 is contingent upon the question whether airplane tickets for relatives of the Player are within the scope of clause FIFTH of the Main Player Contract.

72. In this respect it must be noted that the wording of clause FIFTH of the Main Player Contract does not contain any restrictions as to the purpose for which the travel expenses are incurred, neither with regard to the persons travelling nor with respect to the travel route. Rather, said clause simply obliges the Club to provide the Player with USD 10,000 for "*travel expenses (airplane tickets)*".

73. Moreover, the Arbitrator finds that the Club, at the time of signing the Main Player Agreement, must reasonably have expected that the Player, being a US citizen, might have the wish to have some of his relatives visit him in Spain in the course of the season. Against this background, one would expect the Parties to expressly restrict clause FIFTH of the Main Player Contract for travel expenses related to the Player

himself, had they agreed or intended to do so.

74. In light of the foregoing and deciding *ex aequo et bono*, the Arbitrator finds that clause FIFTH of the Main Player Contract covers also expenses for airplane tickets to/from Granada which are issued for the use of the Player and his relatives. Therefore, since the Club has not contested that the persons named on the tickets are relatives of the player and that those tickets are issued for flights to/from Granada, the Arbitrator decides that the Player shall be awarded USD 3,189.45 as travel expenses.

75. Regarding the set-off invoked by the Respondent, which is based on expenses allegedly incurred by the Player and paid for by the Respondent, clause FIFTH of the Main Player Agreement provides as follows:

> *"[…] The utility expenses (water, light, etc) of the Player's residence will be paid by the Club. However, the repercussions of damages imputable to the Player, the telephone bill and the maintenance of the car will be at Playar's [sic] expense. Nevertheless, if, at the end of the term of this contract, the Player owes to the Club any amount of the aforementioned concepts, the Club shall have to notify the Player and his Agent by burofax and in the term of seven (7) days since the expiration of the contract. Otherwise, the parties must understand that the Club renounces to claim to the Player such amount."*

76. The damages claimed by the Club refer to telephone, internet and messaging expenses, housing repairs and traffic fines. Assuming that telephone and internet expenses are both covered by the term "telephone bill", such expenses would fall under clause FIFTH along with the alleged damages to the Player's residence. For those amounts, it would be necessary to decide whether the time-limit of seven days following the expiration of the contract was respected by the Respondent and, if not, what are the legal consequences. Furthermore, the traffic fine and the expenses for messaging services would *prima facie* not fall within the scope of clause FIFTH of the Main Player Contract.

77. The Arbitrator primarily finds that such questions may be left unanswered to the extent that the Respondent has not provided sufficient proof that the alleged expenses had in

fact been incurred by the Player and paid for by the Club.

78. Indeed, the invoice dated 2 July 2009 which was issued by the Respondent itself and lists all the expenses claimed by the Respondent, can obviously not be regarded as sufficient proof since it is not based on the necessary documentation (e.g. invoices) establishing each and every source of expenses.

79. The same is true for the document labelled “Control Gastos Telefono Temp 09/10”, which is meant to give proof of the telephone expenses claimed in the amount of EUR 73,78. This document was apparently also produced by the Respondent itself, since the header includes the Club’s name. Moreover, it is not even clear if those expenses were paid for and, if so, by whom.

80. As regards the documents related to the traffic fine in the amount of EUR 28,00, it must be noted that the Player’s name does not appear on any of the two documents, but only (handwritten) below the copy of the actual document. It is not clear who wrote the Player’s name on that copy and there is no other information contained in any of the two documents which would allow the Arbitrator to conclude that the traffic fine was indeed imposed on the Claimant. Moreover, the documents do not prove that the traffic fine was paid and, if so, by whom.

81. Lastly, with respect to the expenses in the amount of EUR 76,80 for messaging services, the Respondent has provided an invoice by the company “A.S.M. Transporte Urgente” in the amount of EUR 76,80 EUR. This invoice is addressed to the Club as “cliente”, and the description of the services rendered reads, inter alia, “Valerie Hendrix – USA 1 b. 1 kg.” The Arbitrator finds that this document gives sufficient proof of the fact that the Player made use of a courier service to send a package to one of his relatives and that the Club paid for it or at least accepted the obligation to pay the courier company.

82. Therefore, deciding *ex aequo et bono*, the Arbitrator finds that the Player is obliged to reimburse the Club in the amount of EUR 76,80. As a consequence of the set-off invoked by the Respondent, this amount shall thus be deducted from the amount owed to the Player.

83. As a conclusion, the Club owes to the Player USD 52,670 for outstanding salaries plus USD 3,189.45 for travel expenses, less USD 106.83 (EUR 76.80, converted to USD at a rate of 1.391 on the date of this award) for courier expenses. This leaves a total of USD 55,752.62 owed by the Club to the Player.

7. Interest

84. In the Request for Arbitration, the Claimant requests interest on all amounts determined as due by the Club from 5 December 2010 at the applicable Swiss statutory rate.

85. Payment of interest is a customary and necessary compensation for late payment and Arbitrator finds that there is no reason why the Claimant should not be awarded interest.

86. In line with the constant jurisprudence of the FAT, the Arbitrator holds that an interest rate at 5 % p.a. is reasonable and equitable in the present case.

87. As regards the dates from which the interest shall accrue and despite the fact that one of the payments was due in 2009 and two of them in early 2010, the Arbitrator is bound by the Claimant's request that interest shall run from "5 December 2010", i.e. a date posterior to the expiry of the Main Player Contract. Therefore, the Arbitrator finds it reasonable that interest of 5% p.a. shall accrue on the entire amount of USD 55,752.62

as of 5 December 2010.

8. Costs

88. 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 legal fees and expenses incurred in connection with the proceedings.

89. On 3 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 6,650.00.

90. Considering that the Player prevailed almost entirely with his claim (the only exception being the set-off in the amount of EUR 76.80), it is fair that the fees and costs of the arbitration be borne by the Club and that the latter be required to cover the Claimant's legal fees and other expenses.

91. Given that the Claimant paid the totality of the advance on costs of EUR 6,977.00 as well as a non-reimbursable handling fee of EUR 1,986.00, the Arbitrator decides that in application of Article 17.3 of the FAT Rules:

    (i) FAT shall reimburse EUR 327.00 to the Claimant, being the difference between

the costs advanced by him and the arbitration costs fixed by the FAT President;

(ii) The Club shall pay EUR 6,650.00 to the Claimant, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the FAT.

(iii) Furthermore, the Arbitrator considers it appropriate to take into account the non-reimbursable fee of EUR 1,986.00 when assessing the expenses incurred by the Claimant in connection with these proceedings. Hence, considering also that the amount of EUR 3,940.00 for Claimant's legal fees and expenses is reasonable, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at EUR 5,926.00.

9. AWARD

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

1. **Club Baloncesto Granada, Spain, shall pay Mr. Richard Hendrix an amount of USD 55,752.62 plus interest at 5% per annum from 5 December 2010.**

2. **Club Baloncesto Granada, Spain, shall pay Mr. Richard Hendrix an amount of EUR 6,650.00 as a reimbursement of the arbitration costs paid by him.**

3. **Club Baloncesto Granada, Spain, shall pay Mr. Richard Hendrix an amount of EUR 5,926.00 as a contribution towards his legal fees and expenses.**

4. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 8 March 2011

Ulrich Haas

(Arbitrator)