FIBA

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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0123/10 FAT)

rendered by

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Nikola Vucurovic

- Claimant -

represented by Mr. Petar Vukotic,
Novaka Miloseva No 37/II, 81000 Podgorica, Montenegro

vs.

KK Bosna ASA BH Telekom
Hamze Hume 2, 71000 Sarajevo, Bosnia and Herzegovina

- Respondent -

represented by Mr. Mehmed Spaho,
Mehmeda Spahe 8, 71000 Sarajevo, Bosnia and Herzegovina

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1. The Parties

1.1. The Claimant

1. Mr. Nikola Vucurovic (hereinafter “the Player” or “Claimant”) is a professional basketball player. He is represented by Mr. Petar Vukotic, attorney-at-law in Podgorica, Montenegro.

1.2. The Respondent

2. KK Bosna ASA BH Telekom (hereinafter “the Club” or “Respondent") is a professional basketball club with its seat in Sarajevo, Bosnia and Herzegovina. Respondent is represented by Mr. Mehmed Spaho, attorney-at-law in Sarajevo, Bosnia and Herzegovina.

2. The Arbitrator

3. On 20 September 2010, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").

4. Neither of the Parties has raised objections to the appointment of the Arbitrator or to the declaration of independence rendered by him.

3. Facts and Proceedings

3.1. Background Facts

5. On 15 June 2008[1], Claimant and Respondent signed a labor contract (hereinafter referred to as the "Player Contract") according to which Claimant was employed by Respondent as a basketball player for the seasons 2008/2009 and 2009/2010. It is undisputed that Respondent has met its obligations relating to the 2008/2009 season.

6. Pursuant to Article 5 of the Player Contract, Respondent undertook to pay to Claimant for the 2009/2010 season a total net salary of EUR 90,000.00, payable in monthly installments as follows:

*"**The amount of 90,000-EUR is paid for a competition season of 2009/2010:***

10 August	*2009*	*9,000-EUR*
10 September	*2009*	*9,000-EUR*
10 October	*2009*	*9,000-EUR*
10 November	*2009*	*9,000-EUR*
10 December	*2009*	*9,000-EUR*
10 January	*2010*	*9,000-EUR*
10 February	*2010*	*9,000-EUR*
10March	*2010*	*9,000-EUR*
10 April	*2010*	*9,000-EUR*
10 May	*2010*	*9,000-EUR"*

[1] The original Player Contract bears the date of "15. juni 2008" which was corrected by hand to "15. juli 2008". The English translation also bears the date of 15th July 2008. The Memorandum on the Fulfillment of Contractual Obligations dated 30 November 2009 refers to a date of the Player contract of 15 June 2008 in both the original language and the English translation. In the legal briefs, the references to the date of the contract are inconsistent. However, the date of the Player Contract has not been questioned by either party and is not relevant for the purposes of this arbitration.

7. Until November 2009 Respondent had not paid the first installments for the 2009/2010 season. On 30 November 2009, Claimant and Respondent signed another agreement, titled "Memorandum on the Fulfillment of Contractual Obligations" (hereinafter "Memorandum"). Article 6 of the Memorandum states that Respondent "*undertakes the obligation of fulfilling the total money claims both towards the Player and his agents in the period of 15 (fifteen) days from the day of the signing*". However, Respondent did not pay any amounts within this time period or afterwards.

8. On 15 February 2010, Claimant and Respondent signed a third agreement, titled "Annex to the Memorandum on the Fulfillment of Contractual Obligations" (hereinafter "Annex"). In Article 1 of the Annex, Respondent agreed to issue a Letter of Clearance to allow Claimant to play for any basketball club in Europe or the world without any impediments.

9. After the issue of the Letter of Clearance, Claimant signed an employment contract with the French basketball club SASP Etendard de Brest 29 for the period from 20 February 2010 until 30 June 2010, which stipulated a monthly salary of EUR 2,601.00.

3.2. The Proceedings before the FAT

10. On 6 September 2010, Claimant filed a Request for Arbitration in accordance with the FAT Rules, which was received by the FAT on 7 September 2010.

11. By letter dated 23 September 2010, the FAT Secretariat confirmed receipt of the Request for Arbitration as well as the payment of EUR 3,000.00 on 1 September 2010

and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for Respondent to file its Answer to the Request for Arbitration, in accordance with Article 11.2 of the FAT Rules by no later than 15 October 2010 (hereinafter the "Answer"). According to Article 17.1 of the FAT Rules, the non-reimbursable handling fee amounted to EUR 2,000.00. Since Claimant had paid EUR 3,000.00, the surplus of EUR 1,000.00 was credited against his share of the Advance on Costs. Thus, the FAT Secretariat requested the Parties to pay the following amounts as an Advance on Costs by no later than 8 October 2010:

"Claimant (Mr. Vucurovic)	*EUR 3,000*
Respondent (KK Bosna)	*EUR 4,000"*

12. By e-mail of 20 October 2010, the FAT Secretariat acknowledged receipt of Respondent's Answer which had been sent to the FIBA headquarters in Geneva on 15 October 2010 and received by the FAT Secretariat on 20 October 2010.

13. On 21 October 2010, the FAT Secretariat acknowledged receipt of Claimant's share of the Advance on Costs and noted that Respondent had failed to pay its share. Furthermore, the FAT Secretariat noted that in accordance with Article 9.3 of the FAT Rules the arbitration would not proceed until the full amount of the Advance on Costs was received. Therefore, Claimant was requested to effect payment of Respondent's share of the Advance on Costs by no later than 1 November 2010.

14. By letter dated 10 November 2010, the FAT Secretariat acknowledged receipt of the full amount of the Advance on Costs and informed the Parties that the Arbitrator declared the exchange of documents complete. The FAT Secretariat invited the Parties to submit a detailed account of their costs until 19 November 2010.

15. By email dated 15 November 2010, Claimant submitted an account of costs as follows:

"Dear Sirs,

In line with your memo dated November 10th I am submiting the account of our costs:

-in the name of the advanced costs EUR 8.000
-in the name of the translation of the authorized court translator EUR 500
-in the name of the attorney-at-law's costs EUR 3.000

In total 11.5000 EUR.

Regards,

Petar Vukovitc" (sic)

16. Respondent did not submit an account of costs.

17. Respondent was invited to submit its comments, if any, on Claimant's account of costs by no later than 10 January 2011. Respondent did not submit any comments.

18. The Parties have not requested the FAT to hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the FAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions of the parties.

4. The Parties' Submissions

4.1. Summary of Claimant's Submissions

19. Claimant requests the payment of outstanding salaries in the amount of EUR 82,197.00 plus interest.

20. Claimant submits that according to the Player Contract, Respondent was obliged to

pay salaries for the 2009/2010 season in the total amount of EUR 90,000.00 net. Claimant joined another club during the 2009/2009 season. The compensation of EUR 7,803.00 which he received from his new club was deducted from the salary claim against Respondent, resulting in an outstanding amount of EUR 82,187.00.

21. Claimant also submits that Respondent repeatedly acknowledged its payment obligations and promised to settle them but to date has failed to do so.

4.2. Claimant's Request for Relief

22. Claimant submits the following requests for relief:

> *"EUR 82.197 with the interest 10 May 2010*
>
> *costs of the arbitration which amount will be determined*
>
> *EUR 3.000 in the name of the fee*
>
> *EUR 300 in the name of the costs of translation of the authorized translator"*

4.3. Summary of Respondent's Submissions

23. In its Answer, Respondent recognizes its obligations towards Claimant. Respondent invokes the *"complex financial situation, which again is caused by the generally poor economical and sport state in the Respondents country"* as an excuse for the delay in payment. Respondent also submits that its bank accounts were blocked but that it intends to pay Claimant as soon as possible.

24. Respondent did not formulate a request for relief.

5. Jurisdiction

25. 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).

26. The jurisdiction of the FAT presupposes the arbitrability of the dispute as well as the existence of a valid arbitration agreement between the parties.

5.1. Arbitrability

27. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.[2]

5.2. Formal and substantive validity of the arbitration agreement

28. The existence of a valid arbitration agreement will be examined in light of Article 178 PILA, which reads as follows:

> *"1 The arbitration agreement must be concluded in writing, by telegram, telex, telefax or any other means of communication which allow proof of the agreement*

[2] Decision of the Swiss Federal Tribunal 4P.230/2000 dated 7 February 2001, cons. 1, reported in ASA Bulletin 2001, p. 523 et seq., with reference to the decision of the Swiss Federal Tribunal dated 23 June 1992, BGE 118 II 353, 356, cons. 3b.

by text.

2 Furthermore, the arbitration agreement shall be valid if it conforms to the law chosen by the parties, to the law governing the dispute, in particular the principal contract, or to Swiss law."

29. The Arbitrator finds that the jurisdiction of the FAT over the dispute between Claimant and Respondent results primarily from Article 11 of the Player Contract which reads as follows:

"For any dispute related to money claims, arising from this Contract or would arise in regard to this, the contractual parties shall agree on the competency of the Arbitral Tribunal of FIBA (FIBA Arbitral Tribunal-FAT) in Geneva, Switzerland, therefore, they have agreed that the Arbitral Tribunal in Geneva shall have the competency for resolving any disputes arising from the Contract. The parties have also agreed the Tribunal Rules shall be applied to the subject of the dispute i.e. that it will be decided in compliance with the Rules, per one arbiter nominated by the President of Arbitral Tribunal of FIBA.

The seat of the arbitration shall be Geneva, Switzerland.

Chapter 12 of the Switzerland Law on international private law shall be applied to arbitration, regardless of the citizenship, place of residence, i.e. or the principal places of the parties.

The language of arbitration shall be English.

An appeal is allowed and made to the Arbitral Tribunal for Sports (Court of Arbitration for Sport-CAS) in Lausanne, Switzerland against the decision of the Arbitral Tribunal of FIBA.

By their statements the Parties have declined the right to contest the decision of Arbitral Tribunal FIBA and second-instance decision of Arbitral Tribunal for sports before the Swiss Federal Court in a way prescribed to Article 192 of the Swiss Law on International private law.

The Arbiter, as well as the Arbitral Tribunal for sports when deciding on an appeal, it will be decided according to the rules of fairness (ex aequo et bono)."

30. The Memorandum which refers to the Player Contract contains also an arbitration clause with the following content:

> *"In case of unfulfillment of money claims obligations arising from the Contract, the whole subject of this dispute shall be send to Arbitral Tribunal FIBA (FIBA Arbitral tribunal – FAT) in Geneva, Switzerland. In Article 11 of the Contract both Contractual parties agree that the Arbitral Tribunal in Geneva shall have the competency for resolving any disputes arising from the Contract. The parties have also agreed the Tribunal Rules shall be applied to the subject of the dispute and after the complete procedures have been implemented the Tribunal shall pass the Decision which shall be final and binding for both parties." (sic)*

31. The Arbitrator finds that there is no material discrepancy in the meaning of the two arbitration clauses.

32. Both the Player Contract and the Memorandum are in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.

33. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (cf. Article 178(2) PILA). In particular, the references made to *"any disputes related to money claims, arising from this Contract or would arise in regard to this"* and *"any disputes arising from the Contract"* in Article 11 of the Player Contract and in the Memorandum clearly cover the present dispute.[3]

34. The jurisdiction of FAT has not been disputed by Respondent.

35. The Arbitrator thus finds that he has jurisdiction to decide the claims of Claimant.

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[3] *See for instance* BERGER/ KELLERHALS: Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, N 466.

6. Applicable Law – *ex aequo et bono*

36. 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",* as opposed to a decision according to the rules of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

> *"the parties may authorize the arbitral tribunal to decide ex aequo".*

37. In their arbitration agreement in Article 11 of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide the dispute *ex aequo et bono*. Consequently, the Arbitrator will decide the present matter *ex aequo et bono*.

38. 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[4] (Concordat),[5] 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*

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4 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).

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

> *contrary to those rules."*[6]

39. 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".*[7]

40. 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".*

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

7. Findings

42. In the Answer, Respondent explicitly recognized its obligations towards Claimant when it said that *"KK Bosna ASA BH Telecom, is well aware of his* (sic) *obligation towards Claimant"* and that *"Respondent is determined to fulfill his* (sic) *obligation towards Claimant to the full extent".* According to Respondent, its delay was excused by financial and economic imperatives. Respondent also promised to pay *"Claimants* (sic) *debt"* as soon as possible.

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

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

43. However, the acknowledgment of Respondent does not refer to the specific amounts claimed by Claimant. The Arbitrator is therefore required to determine whether Claimant is entitled to the amounts he claims.

7.1. Salaries

44. Claimant requests payment of EUR 82,197.00 for outstanding salaries.

45. According to Article 5 of the Player Contract the amounts stipulated in the Player Contract shall be guaranteed. This is confirmed by Article 6 of the Player Contract which says that *"[t]his is a Guaranteed Contract".* The unpaid salaries for the 2009/2010 season amount to a total sum of EUR 90,000.00.

46. Any compensation which Claimant earned because of services provided to a third party during the term of the Player Contract must be deducted from the salary claim[8].

47. It is common ground that from 20 February 2010 on, Claimant was employed by the French club SASP Etendard de Brest 29 for a monthly salary of EUR 2,601.00. Until the end of the 2009/2010 season, the Player earned EUR 7,803.00 under his contract with SASP Etendard de Brest 29. These earnings were deducted from the salary claimed from Respondent, leaving an outstanding salary claim in the amount of EUR 82,197.00.

48. These figures have not been disputed and the Arbitrator has no grounds to question

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8 *See* 0092/10 FAT, Ronci, Coelho vs. WBC Mizo Pecs 2010; 0024/08 FAT, Sakellariou, Dimitropoulos vs. S.S. Felice Scandone Spa. 1948 Avellino.

Claimant's submissions in this respect. In addition, the unpaid monthly salaries have to be calculated on the entire term of the Player Contract: according to Article 3 of the Annex, although Claimant was released by the Respondent and allowed to transfer to another club abroad, the contractual obligations from the Memorandum *"shall not cease to exist"*. Thus, the salaries agreed in the Player Contract until its expiration date, i.e. 15 July 2010, are still due subject to the deduction of the salaries Claimant earned under his other contract.

49. The Arbitrator therefore accepts Claimant's claim in the amount of EUR 82,197.00.

7.2. Interest

50. Claimant requests interest since 10 May 2010 but does not provide an indication as to the rate to be applied.

51. According to FAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest on overdue salaries[9]. Although neither the Player Contract nor the Memorandum or the Annex provides for the obligation of the debtor to pay default interest, this is a generally accepted principle which is embodied in most legal systems. The Arbitrator, deciding *ex aequo et bono*, considers an interest rate of 5% p.a. to be fair and equitable in the present case.

52. Since Claimant claims interest from 10 May 2010, there is no need to determine

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9 *See* 0092/10 FAT, Ronci, Coelho vs. WBC Mizo Pecs 2010; 0069/09 FAT, Ivezic, Draskicevic vs. Basketball Club Pecsi Noi Kosariabda Kft; 0056/09 FAT, Branzova vs. Basketball Club Nadezhda.

whether any earlier commencement dates based on the due dates of every single installment would apply. However, the Arbitrator finds *ex aequo et bono*, that the commencement date for the calculation of the interest must be the first day after the day when the last salary payment became due. i.e. from 11 May 2010.

53. The Arbitrator decides that Respondent has to pay the amount of EUR 82,197.00 plus interest of 5% p.a. since 11 May 2010 to Claimant.

8. Costs

54. 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 states that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

55. On 27 January 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 at EUR 5,150.00.

56. In the present case, in line with Article 17.3 of the FAT Rules and considering that Claimant prevailed in his claims, the Arbitrator finds it fair that the fees and costs of the arbitration be borne by Respondent alone.

57. Given that Claimant paid the totality of the Advance on Costs of EUR 8,000.00, the Tribunal decides that:

(i) The FAT shall reimburse EUR 2,850.00 to Claimant.

(ii) Respondent shall pay the difference between the costs advanced by Claimant and the amount which is going to be reimbursed to him by the FAT, i.e. EUR 5,150.00.

(iii) Furthermore, the Arbitrator considers it adequate that Claimant is entitled to the payment of a contribution towards his legal fees and other expenses (Article 17.3. of the FAT Rules). The Arbitrator holds it adequate to take into account the non-reimbursable handling fee of EUR 2,000.00 and the further legal costs of EUR 3,500.00 when assessing the expenses incurred by Claimant in connection with these proceedings. After having reviewed and assessed all the circumstances of the case at hand, the Arbitrator fixes the contribution towards Claimant's legal fees and expenses at EUR 5,500.00.

9. AWARD

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

1. **KK Bosna ASA BH Telekom is ordered to pay to Mr. Nikola Vucurovic the amount of EUR 82,197.00 plus interest of 5% p.a. on this amount since 11 May 2010.**

2. **KK Bosna ASA BH Telekom is ordered to pay to Mr. Nikola Vucurovic the amount of EUR 5,150.00 as a reimbursement of the advance on arbitration costs.**

3. **KK Bosna ASA BH Telekom is ordered to pay to Mr. Nikola Vucurovic the amount of EUR 5,500.00 as a reimbursement of his legal fees and expenses.**

4. **Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 31 January 2011

Stephan Netzle

(Arbitrator)