



Arbitration CAS 2009/A/1901 AEP Olympias Patras v. Ante Grgurjevic, award of 8 February 2010

Panel: Mr Stuart McInnes (United Kingdom), President; Mr Guido Valori (Italy); Prof. Petros Mavroidis (Greece)

Basketball

Termination of a contract of employment

Admissibility of counterclaims in cases of payment of the full advance of costs by the appellant

In a case where the appellant paid the full advance of costs for the procedure and pursuant to article R64.2 of the Code (2004 version), the counterclaim filed by the Respondent within his answer is no longer admissible.

AEP Olympias Patras (“the Appellant”) is a Greek professional basketball Club with its seat in Patras, Greece, which currently competes in the A2 Greek Basketball League.

Ante Grgurevic (“the Respondent”) is a Croatian Professional basket ball player represented by his agent Dr Luciano Capicchoni (“Dr Capicchoni”) who has his main place of business in the Republic of San Marino.

On 27 July 2007, the Appellant and Respondent concluded a player contract (the “Contract”) for the 2007/2008 basketball season in which a net salary in the amount of €130,000 was agreed upon for the services of the Respondent as a basketball player. The relevant parts of the Contract read as follows:

I. Employment and duties

The Club hereby employs the Player as a skilled basketball player to perform his exclusive playing services for the club during the term of this contract. The Player agrees to report to the Club in good physical condition to participate in the Club’s practice sessions and to play in the Club’s exhibition, regular season, play-off games and Greek Cup under the direction of the Club. The player further agrees to comply with all reasonable rules established by the Clubs regarding disciplinary conduct of the players (Club rules annexed to this Contract).

II. Term of Contract

The term of this contract should be deemed to have commenced on the date of signature of the contract and shall continue for the period covering the 2007/2008 Basketball Season. The Player will be free to leave the club five (5) days after the end of the club’s regular season, play-outs and/or play-offs.

III. *Guarantee no-cut Contract*

This is a guaranteed no-cut contract. The Club agrees that this contract is no-cut which means that neither the Club nor any assignee thereof nor the league can terminate this contract should any injury or illness befall the Player or in the event that the Player fails to reach an expected level of performance.

IV. *Salary compensation*

The Club agrees to play the player a net salary of €130,000 (Euro one hundred and thirty thousand) payable as follows:

€13,000 (Euro thirteen thousand) at signature of this agreement and upon passing a physical examination.

€13,000 (Euro thirteen thousand) on September 30th 2007

€13,000 (Euro thirteen thousand) on October 30th 2007

€13,000 (Euro thirteen thousand) on November 30th 2007

€13,000 (Euro thirteen thousand) on December 30th 2007

€13,000 (Euro thirteen thousand) on January 30th 2008

€13,000 (Euro thirteen thousand) on February 27th 2008

€13,000 (Euro thirteen thousand) on March 30th 2008

€13,000 (Euro thirteen thousand) on April 30th 2008

€13,000 (Euro thirteen thousand) on May 30th 2008

This last payment of €13,000 (Euro thirteen thousand/00) must be paid no later than 30th March 2008. Payments which are received 5 (five) days later than the dates noted shall be subject to a penalty of €50.00 (Euro fifty/00) per day. In case of scheduled payments not being made by the Club within 10 (ten) days of the scheduled payment, the Player should be entitled to all monies in accordance with the contract, but shall not have to perform in practice sessions or games until all scheduled payments have been made plus appropriate penalties and such non-performance would be considered a breach of contract. In the event that payments are not made by Club, within 15 (fifteen) days of the scheduled payment date, player shall immediately be entitled to the full salary and have no further obligations to the Club. The Club shall retain no rights for the player except for the obligation to pay all salary and bonuses under the terms of this Contract. Upon receipt of a request from the National Federation to issue the Player's Letter of Clearance, the Club must authorize the Federation to do so unconditionally within 24 (twenty four) hours without charging a transfer fee.

VIII. *Amenities*

In addition to the compensation above mentioned the Club agrees to provide the Player with the following amenities at no cost to the Player for the duration of this Contract:

Provide the Player with a fully furnished two-bedroom apartment satisfactory to the Player. Normal use of electricity, water, heat and rent to be paid by Club.

Four (4) round trip tickets (Economy Class) Player's residence/Greece.

Provide the Player with an automobile satisfactory to the Player. Insurance, mechanical repairs, taxes to be paid by Club. Gasoline and oil are to be paid by the Player. Automobile must be returned by Player to Club in good condition.

Insurance and medical care for Player and family. If Player is injured or ill at any time during the term of this contract and unable to continue play, all monies are still due and payable plus any medical expenses incurred because of the injury or illness.

Dental care for the Player and family (Aesthetic dental care not included).

IX. Physical Examination

This will be a fully guaranteed contract which cannot be terminated for injury or lack of skill. Said guarantees shall be in full force and effect after the PLAYER has passed a medical examination. The Club has two days after the PLAYER'S arrival to give the PLAYER said medical examination. Unless the PLAYER and his agent are notified in writing that he has failed to pass the medical examination, all guarantees will be in place two days after arrival and the contract terms will be in full force and effect. Should PLAYER be injured during a practice or game before he has completed his physical examination, this contract shall be fully guaranteed and all terms and conditions shall be in effect as though he has already passed his physical examination.

XII. Arbitration

In the case of disputes on the present agreement the parties will take all measures to solve them by negotiation. If the dispute between the parties is not resolved by way of negotiations then it should be resolved in accordance with the FIBA Arbitral Tribunal (FAT) 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 should 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 should 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 should decide the dispute *ex aequo et bono*. In the event that a party to a FAT arbitration fails to honour a final award (the "first party") of FAT or the Court of Arbitration for Sport upon appeal against the FAT award, the parties seeking enforcement of such award (the "second party") shall have the right to request that FIBA sanction the first party. The following sanctions can be imposed by FIBA:*

- a. *a monetary fine of up to €100,000 (Euro one hundred thousand); this fine can be applied more than once; and/or;*
- b. *withdrawal of FIBA licence if the first party is a player's agent;*
- c. *a ban on international transfers if the first party is a player/coach; or*
- d. *a ban on registration of new players if the second party is a Club.*

XIII. Governing Law

This contract should be interpreted and enforced in accordance with the laws of Switzerland.

XIV. Entire Contract

This contract sets forth the entire Contract between the Club and the Player and cannot be altered or modified except by a Contract in writing signed by both the Club and the Player.

On the same day, the Appellant and Dr Capicchoni (on behalf of executive pro-management AG) concluded an agent agreement (the “Agent Agreement”) of which the relevant parts read as follows:-

3. The Club further agrees as follows:

- (1) That E.P.M shall be paid a commission of €13,000 (Euros thirteen thousand/00) payable at the Player's arrival and upon passing a physical examination.
- (2) That E.P.M. will be paid a commission equal to ten percent (10%) of the Player's salary for each and every season that Mr Ante Grgurevic is with the team. Said commission is payable within seven (7) days of Mr Ante Grgurevic's arriving in Greece for each season.
- (3) That if the Club does not fulfill the obligation indicated in paragraph “3a” of this agreement the Player will be free to leave the Club and the Club shall retain no rights to the Player except for the obligation to pay all salary and bonuses under the terms of this agreement (see Clauses “IV” and “V” of AEP Olympias Patras/ Ante Grgurevic Agreement).

Further the Respondent entered into a Contract with Dr Capicchoni (on behalf of Interperformances Inc/International Basketball Centre (IBC) (the “Representation Agreement”) the relevant parts of which read as follows:-

III. Compensation

The Player shall pay to the Representative for services rendered hereunder in negotiating Contract with a non-NBA team, a sum equal to ten percent (10%) of all monies received by the Player or his designee as the net amount of current and deferred salary including base salary.... the Representative shall use its best efforts to collect the ten percent (10%) commission directly from the team. Any portion of the said ten percent (10%) not paid by the team shall be paid to the Representative by the Player.

V. Legal fees and costs

Representative shall do everything in its power to assist in the collection of the salary and bonuses owed to the Player. However any and all attorneys are the responsibility of the Player. The costs of collecting the Representative's commission from the Player under paragraph 3a above shall be the obligation of the Player.

It was mutually agreed by the Appellant and Respondent that in implementing the terms of the Contract dated 27 July 2007, the Appellant arrived in Greece on 4th September 2007 and was thereafter immediately transferred by the Appellant to its training facility in Metsovo in northern Greece. It is also accepted and agreed between the parties that no physical examination was undertaken within two days of the Player's arrival in Greece as anticipated in Article 9 of the Contract dated 27th July 2007.

No evidence was submitted to the Panel by either party as to the Respondent's physical condition on his arrival in Greece but it is accepted by both parties that on a date between 4th September and 18th September 2007 the Respondent noticed and complained of tightness and swelling in his right knee.

It was mutually agreed by the parties that on or about 21st September the Respondent travelled with the Appellant's team to Munich, Germany, to participate in a three game tournament from the 21st September to 23rd September 2007. Whilst in Munich he was taken to see a German orthopaedic surgeon who took an MRI scan of the Respondent's knee and recommended three days rest for the Player. It is commonly agreed that the Respondent did not play in the three game tournament in Munich for the Appellant.

It was mutually agreed by the parties that upon returning with the Appellant Club to Patras, the Respondent re-commenced training, but, on or about 25th September 2007 the Respondent was taken to the team's doctor who examined and reviewed the images of the MRI scan undertaken in Munich and recommended a further seven additional days' rest.

The Respondent subsequently travelled from Patras in Croatia on or about 26th September 2007 where he visited his own physician who took images of his right knee. The doctor recommended further rest of approximately one week followed by three weeks of physiotherapy. The Appellant consented to this decision and the Respondent remained in Croatia pending his return to full health.

It is accepted by both parties that no payment of salary was made on the Respondent's arrival in Patras as anticipated by Article 4 of the Contract dated 27th July 2007 or that any subsequent payment was made thereafter. It is however admitted that the Appellant provided hotel accommodation for the Respondent for the duration of his stay in Greece and a motor vehicle for his personal use.

It is accepted and agreed by both parties that following his return to Croatia the Respondent did not return to Greece to fulfil his anticipated contractual obligations.

On 8th April 2008 Dr Capicchioni on behalf of the Respondent wrote a letter to the Appellant marked for the attention of Mr. Nikos Bogonikolos the Appellant's president. The letter reads inter alia as follows:

"I am writing one final time to demand payment in full in the amount of €140,000 on the July 27, 2007 Contract entered into by AEP Olympias Patras and Mr Grgurevic. The Club has failed to make any payments on this Contract.

You executed the Contract on behalf of the Club guaranteeing the full value of the 2007-2008 contract two days after Mr Grgurevic's arrival in Patras

[...]

The effect of the term "Guarantee" is not taken lightly by Mr Grgurevic or his agency.

[...]

Since AEP Olympias Patras has failed to make any payments as required under the Contract, the entire amount due under the Contract is accelerated and due at once. Please refer to Paragraph IV....

Consequently we hereby demand your prompt payment in full of the face value of the Contract...".

By letter dated 5th May 2008 Mr. Bogonikolos responded to Dr Capicchioni as follows:

"Dear Sir,

We received your letter of 8th April 2008 and feel very surprised and annoyed about what you are writing and ask from our Club about the Contract of Mr Grgurevic.

You know very well that the Player came in Greece and went straight to Metsoro because our Players for there for their team preparation.

When they came in Patras after four days, he never asked any medical examinations because he had a serious problem in his knee and asked from us to pass the medical examinations after the solve of this problem.

Some days after he travel to his country because his wife was pregnant and she has some problems. From then he never came back. He was spoke with his coach day by day and he said to him that he cannot come in Greece because of the problems of his wife.

That's why Mr Grgurevic never signed any Contract of HEBA, between him and our Club. We remind you that Mr Grgurevic stay in Greece just for a few days and he never take place in any game of AEP OLYMPLAS PAT[R]AS BC in championship, in Greek cup or in any friendly game...

We refuse any demand from you and Mr Grgurevic".

The Respondent filed a request for arbitration dated 7th August 2008 in accordance with the FIBA Arbitral Tribunal Rules (the "FAT Rules"). After some delay the arbitration was held in Geneva, Switzerland, before a sole Arbitrator, Professor Ulrich Haas, pursuant to Article 81 of the FAT Rules who published an Award dated 16 June 2009 (the "FAT Award").

The Appellant did not participate in the Arbitration before the FAT.

The Statement of Appeal (the "Appeal") to the CAS against the Award rendered by the FAT was filed by the Appellant on 7th July 2009.

The following request for relief was made by the Appellant:-

That the FAT Award be reversed and annulled and the request for arbitration filed by Mr Grgurevic on 7th August 2008 in accordance with the FAT Rules be dismissed in all its claims in that the FAT Award is incorrect since it:

- a. wrongly evaluated the real facts of the case;
- b. has weighted some real facts against others, which happen to be extremely important;
- c. has accepted unsubstantiated claims of Mr Grgurevic as real facts;
- d. contains logical and factual gaps and contradictions;
- e. wrongfully interpreted the provisions of the Player contract dated 27th July 2007;
- f. failed to meaningfully comprehend Mr Grgurevic's acts and omissions which have not been granted any comment, but which have been a breach of Contract, which justifies our inactions as described in the letter dated 4th May 2008 signed by our President which contains claims that the FAT Award has not taken into any consideration other than they were known to the Arbitrator;

g. That the procedural rules of the arbitration as set by FAT Arbitration Rules have not been strictly followed;

h. That the FAT Award although normally based on equity (*ex aequo et bono*) has rewarded a Player who showed an unbalanced and unprofessional conduct with a full one year salary, without recognizing that our team only accepted his own request for a late medical examination for which he never showed up. Our humane treatment of Mr Grgurevic has been paid back with a damaged FAT Award.

The Appellant also challenged the FAT Award on the basis that the FAT lacked Jurisdiction to hear the case, since, according to the contract, unless bilateral negotiations had failed to produce a mutually satisfactory result no dispute could be submitted to arbitration.

The Appellant also requested that a stay to any enforcement of the FAT Award be ordered pending the decision of the CAS in the incident case. This request was subsequently withdrawn by letter dated 20 October 2009.

The Respondent's answer was dated and filed on 21st August 2009. The submissions made by the Respondent can be summarised as follows:

- a. The Appellant is wrongly attempting to use the Appellate Tribunal of the CAS not as a Court of Appeal but a Court of First Instance.
- b. That in the proceedings before the FAT the Appellant did not raise objection to the exercise of the FAT's Jurisdiction and that the equity jurisdiction of the CAS is not available to the Appellant, which did not participate in the FAT Arbitration.
- c. That if the FIBA Arbitral Tribunal had no Jurisdiction then it follows that the CAS has no Jurisdiction to hear the appeal.
- d. That if the CAS exercises Jurisdiction and scrutinizes *ex aequo et bono* the facts and law involved in the claim, as it deems appropriate, that the FAT Award should be upheld and confirmed.

The hearing was held on 12 January 2010 at the CAS headquarters in Lausanne, Switzerland.

The Panel decided to determine the question of Jurisdiction before the FAT and the CAS as a preliminary issue and heard submissions from both parties before handing down its decision.

LAW

Preliminary issues on jurisdiction

1. The Panel accepted that, subject to an appeal being lodged within twenty-one days from the date of communication of an award of the FAT, Article 17 of the FAT Rules accorded Jurisdiction to the CAS.
2. The Panel accepted that the Appellant's Appeal was duly filed with the CAS on 7th July 2009, namely within twenty-one days of communication of the FAT Award.
3. The Panel accepted that Article 190 of the Swiss PIL Act did not apply to this claim.
4. The Panel accepted that the proper interpretation of Clause 12 of the Contract required that a condition precedent to the resolution of any dispute by arbitration in accordance with the FAT is that the parties take all measures to resolve disputes by negotiations.
5. The Panel heard evidence from the Respondent and accepted that he had repeatedly requested in oral communication with the Appellant and its officers that the Club complies with its contractual obligations, particularly in relation to the payment of the first and second installment of salary, which requests were made before dispatch of the letter dated 8th April 2008 from Dr. Capicchoni to Mr Bogonikolos. No evidence refuting the Respondent's testimony was offered by the Appellant. In light of such circumstances the Panel accepted that negotiations between the parties had indeed preceded the commencement of an arbitration before the FAT and that as such that Tribunal was properly vested with Jurisdiction to hear the Respondent's claim.
6. No evidence was submitted by the Appellant, justifying why it had not participated in the Arbitration in the FAT and the Panel rejected the Appellant's fourth submission that the Arbitrator in the FAT failed to respect the equality of the parties and the Appellant's right to a hearing in adversarial proceedings.
7. In light of the circumstances the Panel decided that the CAS has jurisdiction to hear the appeal from the FAT Award and that such Jurisdiction derives from Article 17 of the FAT Rules and Article R57 of the Code.
8. Under R57 of the Code, the Panel has the full power to review the facts and the Law and held a hearing de novo, evaluating all facts and legal issues involved in the dispute.

Applicable Law

9. Article.R58 of the Code provides the following:

"The panel shall decide the dispute according to the applicable regulations and the rules chosen by the parties or, in the absence of such choice according to the law of the country in which the Federation, association or sports

related body which has issued the challenge decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case the Panel shall give reasons for its decision”.

10. Clause X111 of the Contract provides as follows:

“This contract shall be interpreted and Governed in accordance with the laws of Switzerland”.

Admissibility

11. The Appeal was filed within the day time limit provided by Article 17 of the FAT Rules and stated in the FAT Award, that is, within twenty-one days from the communication of the award.
12. The parties complied with all other requirements of Article 48 of the Code.
13. The Appeal is therefore admissible. Considering that the Appellant paid the full advance of costs for the procedure and pursuant to article R64.2 of the Code, the counterclaim filed by the Respondent within his answer is not admissible.

Main issue

14. Having decided that the challenges to the Jurisdiction of the FAT and the CAS had Jurisdiction were not upheld, the main issue to be resolved by the Panel is whether or not the FAT Award should be upheld.
15. The Panel heard submissions from the Appellant and Respondent in relation to the Contract, its terms, and whether or not they were varied or breached by either party by express conduct or by implication. The Panel also heard submissions on the applicable rules of construction of contractual terms to be applied by arbitrators in cases heard *ex aequo et bono*. No oral evidence was presented to the Panel on behalf of the Appellant.
16. The Panel concluded that the terms of the Contract were unequivocal and that the only means by which the Contract could be varied was pursuant to Article XIV, namely by a contract in writing signed by both the Club and the Player. There was no evidence that the Contract was so varied.

Conclusion

17. Based on the foregoing, and after taking into due consideration all evidence produced and all arguments made by the parties, the Panel finds that there are no grounds to set aside the FAT Award and that the Appeal must be dismissed.

The Court of Arbitration for Sport rules:

1. The Appeal filed by AEP Olympias Patras against the award of the FIBA Arbitral Tribunal dated 16 June 2009 is dismissed, as far as the Appeal has been declared admissible.
2. (...).
3. (...).
4. All other and further requests for relief are dismissed.