Arbitration CAS 2016/A/4484 OKK Spars Sarajevo v. Fédération Internationale de Basketball (FIBA), award of 10 November 2016

Panel: Mr Jacques Radoux (Luxembourg), President; Prof. Peter Grilc (Slovenia); Mr Alasdair Bell (United Kingdom)

Basketball
International transfer of minor players
Lex specialis for the transfer of minors
Authorisation of transfer and Letter of Clearance
Protection of young players
No discrimination if compensation for national transfers is not determined on the basis of the same criteria

1. **The general provisions describing the transfer process in international basketball are found in articles 3-39 through 3-49 of the FIBA Internal Regulations (IR), stating *inter alia*, that a transfer can only be refused if a player is bound by a contract with another club beyond the scheduled transfer date. However, the FIBA IR make a distinction regarding transfers of players based on age, since FIBA in the FIBA IR created *lex specialis* for the transfer of players under or at the age of 18. Such transfers are covered by articles 3-50 through 3-65 of the FIBA IR and are based on the general principle that international transfers of players under or at the age of 18 are not permitted and that such international transfers can only be permitted by the FIBA Secretary General after the examination of each particular case. The aim of these provisions is, *inter alia*, to ensure that young players are protected and, among other things, offered adequate schooling and training to safeguard the players' further development as professional players.**

2. **The authorisation of the transfer by the FIBA Secretary General cannot be compared to a Letter of Clearance, which would clear a player of all claims related to an existing agreement or contract. It affects neither the club's right to receive compensation for alleged breach of contract, nor the validity of the existing agreement or contract so the rights deriving from such agreement or contract are still intact/complete and any dispute relating to their enforcement can be submitted to the FIBA Arbitration Tribunal (FAT) in Geneva, Switzerland, if the agreement so provides.**

3. **The fact that an existing agreement cannot affect the transfer of a young player and does not oblige the FIBA Secretary General to take into account the *"market value"* of the player when fixing the compensation serves the protection of a young player because it discourages the clubs from taking speculative risks and fosters the young player's freedom to opt for the club that he considers will contribute best to his development as a player.**

4. The fact that the compensation due for national transfers and the compensation due for international transfers are not determined on the basis of the same criteria cannot be considered as a discrimination as the different set of rules governing these two different kind of transfers are adopted by two different entities, i.e. FIBA for the international transfers and the national member federations for the national transfers. In that regard, Article 1-41 of the FIBA IR invites the national federations to prepare similar regulations to the ones of FIBA for their national transfer systems. The fact that a national basketball association chose to base the payable compensation on the *"market value"* of the player instead of the investment made by the club of formation can certainly not be held against the FIBA. Instead, if a club feels it is discriminated by the deliberate deviation, by its national federation, from the FIBA IR provisions on the transfer of young players, it should exercise its statutory rights as member of this national federation and request a change of the national regulations at hand.

I. PARTIES

1. OKK Spars Sarajevo ("OKK Spars" or the "Appellant") is a professional basketball club with its registered offices in Sarajevo, Bosnia and Herzegovina. The Appellant is a member of the Basketball Federation of Bosnia and Herzegovina, which in turn is member of the Fédération internationale de Basketball (FIBA).

2. The Fédération Internationale de Basketball ("FIBA" or the "Respondent") is the International Federation governing the sport of basketball. It was established according to Articles 60 ff. of the Swiss Civil Code (CC). Its headquarters are in Mies, Switzerland.

II. FACTUAL BACKGROUND

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

4. Darko Bajo (the "Player") is a basketball player of Croatian nationality, born on 14 March 1999. In 2012, the Player was transferred from the Bosnian basketball club HOOK Vitez to OKK Spars. In connection, OKK Spars agreed to pay to HOOK Vitez a certain amount of money and 20 % of the Player's future transfer fees. On 29 October 2012, OKK Spars and the Player signed a scholarship agreement (the "Scholarship Agreement"). According to

Article 6 of the Scholarship Agreement in *"case the Player wishes to leave the club, the Player or the Player's new club, shall pay compensation to the Club, the amount of compensation being determined by the Club. After the previously stated the Player becomes a free player and he is entitled to transfer to another club".*

5. During the following years, the Player developed into a very talented basketball player, playing for, inter alia, the Croatian U-16 national team in 2014 and 2015.

6. On 16 September 2015, BC Cedevita, a Croatian professional basketball club and member of the Croatian Basketball Federation, announced the Player's transfer to BC Cedevita. Prior to this announcement, the Player's father and OKK Spars entered into discussions regarding the Player's possible transfer to BC Cedevita, but without reaching an agreement.

7. On 23 September 2015, the Player requested FIBA to determine, in application of Article 3-55 of the FIBA Internal Regulations (the "FIBA IR"), the amount of compensation he owed to OKK Spars, arguing, inter alia, that the Scholarship Agreement was not valid.

8. On 2 October 2015, OKK Spars contended, inter alia, that Article 3-55 was not applicable to the present case because the Player had a valid Scholarship Agreement. Thus, the Player's compensation should be determined by the market value, which was alleged to be EUR 250.000 plus 25 % of the future transfer fees.

9. On 12 October 2015, BC Cedevita submitted its response. In substance, this club argued that the Scholarship Agreement was not valid for formal reasons and that the Player's family had moved from Sarajevo to Zagreb, in part, due to the civil unrest that occurred in Sarajevo in February 2014 and, thus, that the club had not incited the Player to move to Zagreb.

10. On 15 October 2015, and following a request from OKK Spars, the Arbitration Commission of the Basketball Association of the Canton Sarajevo decided that the Scholarship Agreement was valid.

11. On 23 October 2015, the Secretary General of FIBA took the decision (the "Decision") that:

    a) The Player is allowed to register with the Croatian Basketball Federation, subject to payment of three thousand Swiss francs (CHF 3.000) to the Solidarity Fund of FIBA.

    b) The Croatian club BC Cedevita shall pay compensation in the amount of thirty-five thousand euros (EUR 35.000) to OKK Spars.

12. In substance, the Secretary General of FIBA considered that:

    a) It was undisputed that the transfer of the Player is linked to basketball for the purposes of the FIBA IR.

    b) The question of whether or not the Player was under a valid contract with OKK Spars is not one of the six criteria provided in article 3-52 of the FIBA IR for FIBA's decision on the transfer of a young player. These special provisions regulate FIBA's decision regarding the Player's license with a national member federation and not the status of the Player's

contractual relationship with OKK Spars. The financial ramification of the alleged termination or breach of this contractual relationship between the Player and OKK Spars falls within the purview of the Basketball Arbitral Tribunal or any other competent adjudicating body.

c) As, pursuant to article 3-55 of the FIBA IR, the compensation, when fixed by the Secretary General, is determined by primarily looking at the investments made by the club of origin, the compensation is not supposed to reflect the "value" of the player in future transfers or take into account a percentage of future transfers.

d) It is evident from the submissions of the parties that they were unable to reach an agreement regarding the amount of compensation. However, it is noteworthy that the amounts mentioned or offered between the two clubs purported to resolve all aspects of the dispute between them while the Decision centres on the issue of compensation for the development of the Player such compensation to be determined by the Secretary General of FIBA.

e) Taking into account that the Player, who is considered to be a talented athlete for his age, was registered with OKK Spars for a period of approx. 33 months, and taking into account the circumstances of the case, including the representations and documentation made and submitted by the parties, together with the fact that the investments made by clubs in youth programmes normally result in a very low number of players who reach the playing skills required for top level play, it is found that the total investment in the Player by OKK Spars during this period were substantially lower than the amount of EUR 103.110 requested by OKK Spars.

f) In application of article 3-62 of the FIBA IR and in consideration that the transfer fee paid by OKK Spars had been taken into account in the calculation of the compensation, the payment of compensation in accordance with this Decision must be made directly to this club. The payment to the Solidarity Fund must be made to FIBA. The Player is not allowed to play for BC Cedevita until the compensation decided by the Secretary General has been fully paid in accordance with the Decision.

g) The Decision is made without prejudice to any claims that the parties mentioned herein (or other parties involved in the Player's transfer) may have against each other under the various contractual documents or any statutory provisions.

13. On 28 October 2015, the Croatian Basketball Federation informed FIBA that BC Cedevita had paid the amount of CHF 3.000 to FIBA for the Solidarity Fund as well as EUR 35.000 as compensation to OKK Spars. On 3 November 2015, FIBA confirmed that the process was in all aspects completed.

B. Proceedings before the FIBA Appeal's Panel

14. On 5 November 2015, the Appellant submitted an appeal against the Decision before the FIBA Appeal's Panel. By letter of 17 November 2015, FIBA requested that the Basketball

Federation of Bosnia and Herzegovina, the Croatian Basketball Federation, BC Cedevita and Mr Darko Bajo participate in the proceedings as Joined Parties. By order of the Chairman of the Appeals' Panel, a Single Judge was appointed to hear the case. Said Single Judge requested the Appellant and the interested parties to comment on FIBA's request for a joinder The Appellant did not raise any objections to the request and the interested parties failed to make any submissions within the given deadline.

15. In its Appeal brief, the Appellant included a request for the joinder of the Basketball Federation of Sarajevo Canton as a Joined Party.

16. On 2 December 2015, the Single Judge granted FIBA its request for a joinder, allowing the Basketball Federation of Bosnia and Herzegovina, the Croatian Basketball Federation, BC Cedevita and Mr Darko Baja to be Joined Parties in the proceedings.

17. On 10 December 2015, the parties were informed that, for a certain number of grounds, the Appellant's request for a joinder was rejected.

18. On 4 February 2016, after having considered that no further hearing of the parties was necessary, the Single Judge issued a decision (the "Appealed Decision") which dismissed the appeal as unfounded. In the relevant parts on the merits, the Appealed Decision reads as follows:

"1. Initially, the Single Judge notes that the relevant facts of the case are undisputed by the Parties. Thus, the Single Judge finds it undisputed that the Player's transfer from the Appellant to BC Cedevita in 2015 was an international transfer of a young basketball player (16 years old) linked to basketball. Furthermore, it is undisputed that the transfer was authorised by the FIBA Secretary General as a Special Case in accordance with article 3-52 of the [FIBA IR] […]. Furthermore, the Single Judge considers it undisputed that the Player and the Appellant in 2012 signed the Scholarship Agreement to 'expire at the end of the season when the Player comes of adult age, i.e. turns 18' and that, prior to the transfer of the Player, the Appellant and BC Cedevita failed to agree on a compensation […].

2. In the Decision, the FIBA Secretary General fixed, with reference to article 3-55 of the [FIBA IR], the amount of compensation to be paid to the Appellant as compensation for the development of the Player, holding, inter alia, that the said compensation is not supposed to reflect the 'market value' of the Player. The Appellant, in its appeal before the Appeals' Panel, maintains its submission, stating that article 3-55 of the [FIBA IR] is not applicable to this case since the Player was under valid contract with the Appellant-at the time of the transfer, and the compensation to be paid to the Appellant should therefore reflect the "market value" of the Player, which is claimed to be EUR 250.000 plus 25% of the gross amount of the future transfers. […]

3. As already mentioned […], the general provisions describing the transfer process in international basketball are found in articles 3-39 through 3-49 of the [FIBA IR], stating inter alia, that a transfer can only be refused if a player is bound by a contract with another club beyond the scheduled transfer date. However, the Single Judge agrees with FIBA that the [FIBA IR] make a distinction regarding transfers of players based on age, since FIBA in the [FIBA IR] created lex specialis *for the transfer of players under or at the age of 18. Such transfers are covered by articles 3-50 through 3-65 of the [FIBA IR]. The aim of these provisions*

is, inter alia, to ensure that young players are protected and, among other things, offered adequate schooling and training to safeguard the players' further development as professional players.

4. It is essential to emphasise, however, that the [FIBA IR] are based on the general principle that international transfers of players under or at the age of 18 are not permitted and that such international transfers can only be permitted by the FIBA Secretary General as Special Cases and after the examination, of each particular case. Thus, in each individual case of an international transfer of a player under or at the age of 18, a specific deviation has been made from the general provision of the Regulations *currently governing international transfers of adult basketball players. Against the background of these circumstances, the Single Judge finds that FIBA has made a deliberate choice concerning the regulation of international transfers of players under or at the age of 18, which is why such transfers do not fall under the general rules regarding international transfers as set out in articles 3-39 through 3-49 of the [FIBA IR]. In that connection, the Single Judge does not agree with the Appellant that these provisions govern only cases where no existing/valid agreement exists between the parties or the player attains the age of 18 years. The Single Judge further notes that the question of whether a player is bound by a contract with another club beyond the scheduled transfer date is not included in the* lex specialis *provisions (articles 3-50 through 3-65) of the Regulations regarding the international transfer of players under or at the age of 18, whereas it is explicitly stated that an amount of compensation to the paid to the club of origin for the development of the player needs to be agreed or determined.*

5. In view of this, the Single Judge finds that the FIBA Secretary General was right in fixing the compensation to the Appellant not based on the 'market value' of the Player, but 'based primarily, but not solely, on the investments made by the club(s) that have contributed to the development of the player and shall take into account the aspect as per article 3-52 as stipulated in article 3-55'. In addition neither the FIBA Secretary General nor the Appeals' Panel is authorised by the [FIBA IR] to decide on any possible compensation payable to the Appellant for any possible breach of contract committed by the Player, and the Single Judge further points out as a matter of form that the Appellant and the Player have expressly agreed under Artide 7 of the Scholarship Agreement that ' Any disputes which can arise based on this Contract or related to it shall be submitted to FIBA Arbitration tribunal (FAT) in Geneva, Switzerland, and shall be solved pursuant to FAT Arbitration Rules, ... '.

6. This is not against the principle of pacta sunt servanda. *For instance, no conclusion has been reached - neither in the Decision nor in this Award - as to whether the Appellant is entitled to receive compensation for the (alleged) breach of the Scholarship Agreement by the Player, nor has the validity of the said Agreement been finally determined. Accordingly, the Single Judge agrees with FIBA that the authorisation issued by the FIBA Secretary General, allowing the Player to transfer as a Special Case, is not, in content terms, comparable to a Letter of Clearance, which would therefore mean that the Player is cleared of any claims regarding, for example, breach of contract.*

7. Furthermore, and taking into consideration the content of the Appellant's submissions and its reque st for relief, the Single Judge finds no grounds for disregarding or amending the calculation of compensation to the Appellant as set out in the Decision, see article 3-55 of the [FIBA IR]. Moreover, the Single Judge finds no grounds for ruling in favour of the Appellant on the assumption that the content of the [FIBA IR] or its specific application to the international transfer of players under or at the age of 18 would conflict with EU law. Finally, the Single Judge points out that the Appellant has received the requested jurisprudence from FIBA during these proceedings and sees no other grounds for concluding that the standard of due process has not been met in this case".

19. The Appealed Decision contains a notice according to which a further appeal against the Decision by the Appeals' Panel can only be lodged with the Court of Arbitration for Sport (the "CAS") in Lausanne, Switzerland within thirty (30) days following receipt of the reasons for the Decision. The notice provides that CAS shall act as an arbitration tribunal, and there shall be no right to appeal to any other jurisdictional body.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 6 March 2016, the Appellant, relying on Article 1-178 of the FIBA IR, filed a statement of appeal with the CAS against the FIBA with respect to the Appealed Decision. The Appellant proposed that the present case be submitted to a sole arbitrator. The Appellant's request for relief was for the Panel to confirm the Appeal, to overturn the Appealed Decision and to order FIBA to pay the costs of the present procedure.

21. On 16 March 2016, the Respondent pointed out that the Appellant had not addressed its Appeal against the four other parties to the dispute, as listed on page 1 of the Appealed Decision, and that this fact would have serious procedural and substantive repercussions on the case, as at least two of these parties, i.e. the Player and BC Cedevita, are directly affected by this dispute. Further, the Respondent did not agree to the appointment of a sole arbitrator. Finally, in accordance with Article R55 of the Code of Sports related Arbitration (the "Code"), the Respondent requested that the time limit for the filing of its answer be fixed after the payment by the Appellant of its share of the advance on costs.

22. On 18 March 2016, the CAS Court Office informed the parties that, in accordance with Article R50 of the Code, the President of the CAS Appeals Arbitration Division had decided to submit the present matter to a three-member Panel. In view of such decision, the parties were each granted a deadline to nominate an arbitrator.

23. On 28 March 2016, the Appellant nominated Prof. Peter Grilc as an arbitrator.

24. On 14 April 2016, the Respondent nominated Mr Alasdair Bell as an arbitrator.

25. By letter dated 18 May 2016, the CAS Court Office acknowledged receipt of the payment by the Appellant of its share of the advance on costs for the proceedings and of the Appeal Brief. The Respondent was informed that it was granted a deadline of twenty (20) days from receipt of the said letter to file its answer. The parties were furthermore informed that, pursuant to Article R54 of the Code the Panel appointed to decide this arbitration was as follows:

President: Mr Jacques Radoux, Legal Secretary at the European Court of Justice, Luxembourg,

Arbitrator: Prof. Peter Grilc, Professor in Ljubljana, Slovenia,

Mr Alasdair Bell, General Counsel/Director of Legal Affairs of UEFA in Nyon, Switzerland.

26. On 8 June 2016, the Respondent requested an extension of the time limit to file its Answer until 30 June. In the view that the Appellant had agreed to the request, the said time limit was extended until 30 June 2016.

27. On 30 June 2016, the Respondent filed its Answer to the appeal.

28. On 4 July 2016, the parties were requested to inform the CAS Court Office by 11 July 2016 whether they wished a hearing to be held in the present matter.

29. On 11 July 2016, the Appellant informed the CAS Court Office that it preferred the Panel to issue an award solely on the basis of the parties' written submissions. The same day, the Respondent expressed its preference for an oral hearing to be held in the present matter.

30. On 13 July 2016, the Respondent was granted a deadline to inform the Panel with reasonable specificity what witnesses it would propose to present on what points, as well as the issues in matter which required an oral hearing.

31. On 24 July 2016, the parties informed the CAS Court Office that they were currently negotiating a settlement agreement. Accordingly, on 25 July 2016, the present proceedings were provisionally suspended until 24 August 2016.

32. On 25 August 2016, the Respondent informed the CAS Court Office that no settlement between the interested parties had been found but that the parties to the procedure had agreed that no oral hearing should be held in the present matter.

33. On 12 September 2016, the CAS Court Office sent the Order of Procedure to the parties. The Respondent signed the said Order the same day.

34. On 19 September 2016, the Appellant returned the signed Order of Procedure.

IV. SUBMISSIONS OF THE PARTIES

35. The Appellant's submissions, in essence, may be summarized as follows:

- The FIBA Appeals' Panel did an erroneous application of the FIBA IR, by finding that the compensation in this case should not be based on the *"market value"* of the Player, but based primarily, but not solely on the investment made by the clubs that have contributed to the development of the Player and shall take into account the aspects as per Article 3-52 FIBA IR. According to the Appellant, as there was a valid Scholarship Agreement between the OKK Spars and the Player, the wording *"primarily, but not solely"* should be interpreted broadly. Such an interpretation follows from a grammatical and teleological interpretation of the Article in question.

- Even if CAS would not follow such interpretation of the FIBA IR, the argument remains that after FIBA determined the amount of training compensation the transfer automatically took place without any agreement between the clubs regarding the transfer

compensation. As a consequence, the general principle of *pacta sunt servanda* was breached by FIBA, who authorized the transfer nevertheless. The Appellant argues that the FIBA IR provisions regarding *"young players"* (article 3-50 through 3-62) can, without doubt, be considered as *lex specialis* for the purposes of transfer of young players. However, this *lex specialis* does not regulate cases where there is a valid agreement or contract between a club and a player. Thus, in the absence, in the rules governing the transfers of young athletes, of any provision related to cases where there is a *"valid agreement"*, it cannot, as it follows from the FIBA jurisprudence (FIBA AC 2004-4, para. 1, the "Bakic decision), be concluded that such cases have to be dealt with in the same manner as cases where there is no such agreement.

- The Appealed Decision further undermines contractual stability. In addition, the Appealed Decision does not serve the protection of minors; does not provide for a competitive balance between clubs as the wealthy clubs can acquire the best young players for a lower compensation than contractually stipulated, and violates the FIBA Code of Ethics because it interprets the rules in a way which is discriminatory to young players.

- The standard of due process has not been met by the Appealed Decision. In this regard, the Appellant argues that the FIBA Appeal's Panel committed an error when holding that the Appellant had received the Bakic decision during the proceedings whereas, at the time of the appeal before said Appeal's Panel, judge, the Appellant had not received the jurisprudence in question.

36. The Appellant's request for relief was for the Panel:

- to confirm the Appeal;

- to overturn the Appealed Decision;

- to order FIBA to pay the costs of the present procedure.

37. The Respondent's submission may, in substance, be summarized as follows:

- The appeal at hand is flawed because the Appellant named only FIBA as respondent. The failure to name the Player and BC Cedevita — two directly affected parties — as respondents is fatal to the Appellant's case pursuant to constant CAS jurisprudence.

- FIBA has properly interpreted Article 3-55 of the FIBA IR, which governs the determination of compensation for all youth transfers in international basketball. The Appellant's contention that this provision either does not apply to the present case or requires FIBA to take into account the Player's market value as part of the determination of compensation related to a young player is contrary not only to the plain language/wording of that provision but also to its purpose.

- The Appealed Decision does not infringe the principle of *pacta sunt servanda* as it does not rule on the merits of the Appellant's financial dispute with the Player based on their

contractual relationship. The Appellant's rights under the Scholarship Agreement are therefore fully preserved, and the Appellant can seek to enforce its rights through FAT.

- The Appellant's due process rights were not violated as it is uncontested that the FIBA jurisprudence in question had been communicated to the Appellant with the answer to the appeal. On top, the Appellant did not raise any objection regarding the *"timeliness"* of the communication before the FIBA Appeals' Panel.

- The scope of the present dispute must be limited to the Appellant's request for relief. As the request for relief only seeks to have the Appealed Decision overturned, the Decision will continue to apply and produce valid legal effects on all parties involved. In any event, the Panel should limit the scope of the present appeal to the question of whether the Appealed Decision should be overturned. Indeed, no amount of compensation was requested by the Appellant and, thus, the determination of a compensation amount does not fall within the scope of the present proceedings.

38. In the view of the above, the Respondent requests the Panel to:

- dismiss the Appeal in its entirety;

- confirm the Appealed Decision insofar as it has been challenged with the Appeal;

- order the Appellant to pay all costs incurred by the FIBA during the appeal proceedings before the CAS, including attorney's fees.

V. JURISDICTION

39. Article R47 of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".

40. Article 1-178 of the FIBA IR reads:

"A further appeal against the Decision by the Appeals' Panel can only be lodged with the [CAS] within thirty (30) days following receipt of the reasons for the Decision. The [CAS] shall act as an arbitration tribunal, and there shall be no right to appeal to any other jurisdictional body".

41. It follows that the CAS has jurisdiction to adjudicate the present dispute. In addition, the CAS's jurisdiction is not contested between the parties.

42. Under Article R57 of the Code, the Panel has full power to review the facts and the law.

VI. ADMISSIBILITY

43. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".

44. Article 1-178 of the FIBA IR provides that an appeal against a decision from the FIBA Appeals' Panel has to be lodged within thirty (30) days following receipt of the reasons for the decision.

45. The Panel notes that the Appellant's submission that the Appealed Decision has been notified on 5 February 2016 is not contested by the Respondent. The Appellant has filed its statement of appeal on 6 March 2016. Thus, the Appeal was filed within the 30 day time limit fixed provided in Article 1-178 of the FIBA IR. Accordingly, the Appeal is admissible.

VII. APPLICABLE LAW

46. Article R58 of the Code provides as follows:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged 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".

47. In the present case, it is common ground that the applicable regulations at stake are the General Statutes of FIBA and the FIBA IR. In particular, it is the application and interpretation of Articles 3-50 to 3-62 of the FIBA IR that are at dispute.

48. These Articles read as follows:

> *"50. International transfer is not permitted before a player's eighteenth (18) birthday, except in special cases as decided by the Secretary General after examination of the matter with the member federations and, if necessary, with the clubs and the player concerned. The Secretary General may request any documents deemed necessary in order to determine whether the transfer falls under article 3-51 or 3-52 below.*
>
> *Young Players - Special Cases*
>
> *51. If the proposed transfer is not linked to basketball, the transfer may be authorised.*
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> *52. If the proposed transfer is linked to basketball, the following criteria shall be taken into account when making the decision on the authorisation of the transfer:*

a. The player's new club shall guarantee adequate academic and/or school and/or vocational training which prepares him for a career after his career as a professional player.

b. The new club shall provide appropriate basketball training in order to develop and/or further the player's career as a professional player.

c. The new club shall demonstrate that it conducts an appropriate training programme for young players of the nationality of the club's home country.

d. The new club shall make a contribution to a Solidarity Fund established by FIBA to support the development of young players.

e. The young player, his parents, the new club, and the new national member federation shall declare in writing that, until his eighteenth (18) birthday, the player will make himself available for his home country's national team and, if necessary, for the preparation time as well as for training camps provided that they do not interfere with school activities.

f. The transfer does not disrupt the player's schooling.

53. Not more than ten (10) outward transfers of players under the age of eighteen (18) can be approved in any one year from any one national member federation; similarly, not more than twenty (20) such transfers inward can be approved for any one national member federation. These restrictions relate only to transfers linked to basketball, apply separately to male and female players and shall be based on the order in which transfer requests were received by FIBA. National member federations have the right to withdraw a transfer request for a young player before FIBA issues a decision on the matter.

54. In transfer cases linked to basketball where the player lives close to the border, as determined by FIBA on a case by case basis, FIBA may waive the contribution to the Solidarity Fund and not include such transfers in the total inward/outward number of transfers of the national member federations involved. Any subsequent national transfer of the player before his eighteenth (18) birthday, requires approval by FIBA and shall be included in the inward/outward number of transfers.

55. Where the transfer has been approved under article 3-52 the new club and the club of origin shall agree on a compensation for the development of the young player. In case they are unable to agree on such compensation the Secretary General shall fix a reasonable compensation. Such compensation shall be based primarily, but not solely, on the investments made by the club(s) that have contributed to the development of the player and shall take into account the aspects as per article 3-52.

56. At or after the player's eighteenth (18) birthday, the club of origin, i.e. the club or other organisation for which he is licensed at his eighteenth (18) birthday (the 'club of origin'), has the right to sign the first contract with the young player.

57. Such contract shall be in written form and respect the laws of the country and of the federation of origin. It shall have a minimum duration of one (1) year and a maximum duration of four (4) years. A copy of such contract shall be submitted to the Secretary General who shall keep it on a confidential basis.

58. Should the player refuse to sign such contract and elect to move to a new club in another country, the two clubs shall agree on a compensation sum to be paid as per article 3-62 and inform FIBA.

59. In the event that the clubs are unable to agree on the compensation within two (2) weeks of the date on which a letter of clearance for the player in question was first requested by the new club's federation, either club has the right to request that the compensation be determined by FIBA. Such request has to be made in writing within four (4) weeks of the date on which a letter of clearance for the player in question was first requested by the new club's federation.

60. The decision as per article 3-59 shall be taken by the Secretary General who may hear the two clubs and/or federations involved and/or the player if he deems it appropriate.

61. The player shall not be allowed to play for his new club until the compensation agreed upon by the two clubs (article 3-58) or determined by the Secretary General (articles 3-59 and 3-60) has been paid as per article 3-62. In the event that an appeal is filed against the decision of the Secretary General, the player shall be allowed to play for his new club as soon as the sum of compensation determined by the Secretary General has been paid into an account of FIBA or the FIBA Zone where it will be held in escrow until the decision on the compensation is final.

62. The compensation sum shall be based primarily, but not solely, on the investments made by the club(s) that have contributed to the development of the player. It shall be paid to the national member federation of origin which will decide on how to re-distribute the compensation sum among the clubs that have contributed to the development of the player according to specific provisions that the national member federation has officially adopted. Such provisions shall be drafted in a way to respect the principle of protection of clubs forming young players".

49. Further, as the FIBA is domiciled in Switzerland, Swiss law is, subsidiarily, applicable to the present dispute.

50. Accordingly, the Panel will decide the dispute pursuant to the FIBA IR and, additionally, to Swiss law.

VIII. MERITS

51. As an initial matter, it has to be noted that the question of standing to be sued, raised by the Respondent, is a matter related to the merits. This follows from jurisprudence of the Swiss Federal Tribunal [SFT 128 II 50 E.2 b) bb)] as well as from the constant CAS jurisprudence (CAS 2013/A/3047, para. 52, and CAS 2015/A/3910, para. 129 ff.).

52. It appears however, that the legal situation as to the standing to be sued is far from being clear and that there are conflicting decisions of the SFT and that the CAS jurisprudence on this question in the context of horizontal appeal proceedings could be considered contradictory (CAS 2013/A/3910, para. 134).

53. In any event, the Panel is of the view that given that all claims raised by the Appellant have, for the reasons further developed in the following points of this award, to be rejected, the

question whether the present Appeal had to be addressed not only against FIBA but also against the Player and BC Cedevita does not change the outcome of the Appeal. In the end, therefore, the question is immaterial and does not need to be further explored.

A. On the first claim

54. Regarding the Appellant's first claim, related to the erroneous application of the FIBA IR by the FIBA Appeals' Panel, the Panel notes that it follows from the Decision as well as the Statement of Appeal, that before the Secretary General and the FIBA Appeals' Panel, the Appellant argued that Article 3-55 was not applicable to the present case because the Player had a valid Scholarship Agreement and that, thus, the Player's compensation should be determined by his market value, which it argued was EUR 250.000 plus 25% of future transfer fees. In these circumstances, the Appeals' Panel considered that the main issue to be decided was *"whether or not article 3-55 is applicable to this case and, depending on the outcome here, whether this should have any consequences for the Player's transfer and the compensation payable in that respect"*.

55. It follows from the above that contrary to the submissions in the present proceeding, the Appellant has never based its submissions on the premise that as soon as a young player in the sense of the FIBA IR is bound to a club by a valid agreement, the words *"primarily, but not solely"* used in Article 3-52 of the FIBA IR have to be interpreted in such a way as to include the *"market value"* of the player in the compensation to be paid to the club of origin.

56. In the Panels' view, in these circumstances, not only did the FIBA Appeals' Panel not have to interpret the words *"primarily, but not solely"*, used in Article 3-55 of the FIBA IR, but it remained in its role by not proceeding to such an interpretation. Indeed, by finding that the FIBA Secretary General was right in fixing the compensation to the Appellant not based on the "market value" of the Player but based on the elements *"as stipulated in article 3-55"* of the FIBA IR, the FIBA Appeals' Panel simply confirmed this provision was, contrary to what the Appellant had argued, applicable to the case at hand.

57. In this regard, it has to be observed that, as the Respondent rightly pointed out before the FIBA Appeals' Panel as well as before this Panel, the Appellant did not challenge the calculation of the compensation made by the FIBA Secretary General based on the submitted documentation regarding the Appellant's expenses in connection with the Player. Thus, in the view of the Panel, the FIBA Appeals' Panel was right in holding that, in consideration of the content of the Appellant's submissions and its request for relief, there were no grounds for disregarding or amending the calculation of the compensation as set out in the Decision.

58. The Panel further fully adheres to the reasoning developed in points 3 and 4 of the Appealed Decision (see para. 18 above) and leading to the conclusion that Articles 3-50 through 3-65 of the FIBA IR constitute a *lex specialis* for the transfer of players under or at the age of 18 that applies even if such a player is bound by a valid contract. Thus, even if the Scholarship Agreement signed between the Player and the Appellant was valid, Articles 3-50 to 3-65 of the FIBA IR would still apply to the transfer of the Player.

59. Indeed, the Panel considers that the interpretation submitted by the Appellant would deprive the provisions of this *lex specialis* in general and of Article 3-55 of the FIBA IR in particular of their effectiveness as it would be sufficient to bind a young player by any agreement, i.e. a scholarship agreement, to circumvent the transfer regulations for young player set out in the FIBA IR.

60. Finally, regarding the Appellant's submission that, in the presence of a valid contract binding a young player and a club, the words *"primarily, but not solely"* have to be interpreted broadly so as to put the FIBA Secretary General under the obligation to take into account the *"market value"* of the player when fixing the compensation to be paid to the club of origin, the Panel considers that such interpretation has to be rejected.

61. In this connection, first, the Panel holds that if the Respondent's organ that established the FIBA IR had considered that a valid agreement between a young player and a club should be taken into account, it would most certainly have made an explicit reference to such an agreement. Indeed, it follows from Articles 3-52 and 3-56 of the FIBA IR that said organ explicitly specified whenever it considered a written declaration or a contract to be relevant. Thus, in the view of the Panel it is not conceivable that a reference to a valid agreement between a young player and his club of origin would simply have been forgotten in Articles 3-52 and 3-55 of the FIBA IR.

62. Second, the Panel finds that, contrary to the submission of the Appellant, a grammatical approach does not imply that in presence of a valid agreement between a young player and his club of origin the words *"primarily, but not solely"* can only be understood as referring to the *"market value"* of the player. Indeed, even though the wording of Article 3-55 of the FIBA IR could be understood as referring to investments by the club that have not contributed to the development of the player, as such Article 3-55 of the FIBA IR itself contains a reference to the other elements that might be taken into consideration when fixing the compensation, i.e. *"the aspects as per article 3-52"*. As a financial value can easily be attributed to some of these aspects, the grammatical structure of Article 3-55 of the FIBA IR cannot be questioned and the wording of this provision does not leave room for an interpretation according to which the FIBA Secretary General would have to take into account the *"market value"* of a young player when applying Article 3-55.

63. In any event, given the fact that the FIBA Secretary General has, according to Article 3-55 of the FIBA IR to fix a *"reasonable compensation"* and given the circumstance that neither Article 3-55 nor any other provision of the FIBA IR governing the transfer of a young player contains an explicit reference to the *"market value"* of a young player, the Panel considers that the FIBA Secretary General did not have the obligation to take this value into consideration when fixing the said compensation.

64. Thus, the first claim has to be rejected.

B. On the second claim

65. Concerning the Appellant's second claim, based on an alleged violation of the general principle of *pacta sunt servanda*, the Panel reiterates its view that the absence, in the *lex specialis* governing the transfer of a young player created by Articles 3-50 to 3-62 of the FIBA IR, of any reference to a valid agreement or contract between a young player and his club of origin does not imply that this *lex specialis* is inapplicable whenever such an agreement or contract exists.

66. In addition, as the FIBA Appeals' Panel rightly pointed out, neither the Decision nor the Appealed Decision affect the Appellant's right to receive compensation for alleged breach of contract. Further, no decision on the validity of the Scholarship Agreement has been taken by the FIBA Secretary General nor the FIBA Appeals' Panel so the rights deriving from the Scholarship Agreement are still intact/complete and any dispute relating to their enforcement can still be submitted to the FIBA Arbitration Tribunal (FAT) in Geneva, Switzerland, as foreseen in Article 7 of that agreement. Therefore, the authorisation of the transfer by the FIBA Secretary General cannot be compared to a Letter of Clearance, which would clear the Player of all claims related, for example, to the Scholarship Agreement.

67. Regarding the Appellant's argument that the Appealed Decision undermines contractual stability, the Panel considers that is sufficient to recall that the Appealed Decision does not affect the Appellant's right to submit its dispute concerning the compensation for alleged breach of contract by the Player to the FAT.

68. The Panel further observes that the Appellant's argument that the Appealed Decision and the interpretation of the FIBA IR set out in it do not serve the protection of minors is based on the premise that the authorisation of the transfer constitutes a Letter of Clearance. As it follows from para. 66 of the present award, this premise is wrong. Further, the Panel considers that the fact that an existing Scholarship Agreement cannot affect the transfer of a young player and does not oblige the FIBA Secretary General to take into account the *"market value"* of the player when fixing the compensation serves the protection of a young player because it discourages the clubs from taking speculative risks and fosters the young player's freedom to opt for the club that he considers will contribute best to his development as a player.

69. Concerning the argument that the FIBA IR provisions on the transfer of young players, as interpreted and applied in the Appealed Decision, do not provide for a competitive balance between clubs as they allow the wealthy clubs to acquire the best young players for a lower compensation than contractually stipulated, the Panel notes that, as it has been mentioned above, the position adopted by the FIBA Appeals' Panel does not preclude the Appellant from eventually obtaining a compensation for the alleged breach of contract before the FAT. Thus, the interpretation and application of the relevant FIBA IR provisions does not have the effect the Appellant argues it has.

70. In addition, the Panel considers that is doubtful whether the interpretation and application of the said provisions suggested by the Appellant would have the effect of restoring the competitive balance between wealthy and less wealthy clubs. In that regard, the Panel observes

that the Appellant has proven neither that the supposed effect does exist nor that the objective of the transfer compensation set out in Article 3-55 of the FIBA IR is, similarly to the compensation set out in Article 3-62 of the FIBA IR, to protect the smaller or less wealthy clubs.

71. Finally, regarding the argument that the Appealed Decision violates the FIBA Code of Ethics, the Panel finds, first, that for the reasons further developed in para. 67, 68 and 70 of the present award, by no means can the Appealed Decision be read or understood as inciting young players to infringe Article 1-27 of the FIBA IR, according to which basketball parties shall *"[h]onour all contracts related to basketball and not encourage others to break such contracts"*.

72. Second, the fact that the compensation due for national transfers and the compensation due for international transfers are not determined on the basis of the same criteria cannot be considered as a discrimination as the different set of rules governing these two different kind of transfers are adopted by two different entities, i.e. FIBA for the international transfers and the national member federations for the national transfers. In that regard, Article 1-41 of the FIBA IR invites the national federations to prepare similar regulations to the ones of the Respondent for their national transfer systems. The fact that a national basketball association chose to base the payable compensation on the *"market value"* of the player instead of the investment made by the club of formation can certainly not be held against the FIBA. Instead, if the Appellant feels it is discriminated by the deliberate deviation, by the Basketball Federation of Bosnia and Herzegovina, from the FIBA IR provisions on the transfer of young players, it should exercise its statutory rights as member of this national federation and request a change of the national regulations at hand.

73. In the light of the foregoing, the Panel considers that the arguments brought forward by the Appellant in support of its second claim lack any merits.

74. Thus, the second claim has to be rejected as well.

C. On the third claim

75. The third claim of the Appellant, related to a violation of its due process rights, is based on the argument that the FIBA Appeal's Panel committed an error when holding that the Appellant had received the Bakic decision during the proceedings whereas, at the time of filing of the Appeal before the FIBA Appeal's Panel, the Appellant had not received this decision yet. In particular, the Appellant argues that the manner in which the absence of the relevant provisions was considered in the Bakic decision is central for the present dispute as the FIBA IR on the transfer of young players do not contain any provisions regarding a situation like the one at hand in the present case, where a valid agreement exists between a young player and his club of origin. If FIBA had communicated the Bakic decision when requested by the Appellant, i.e. 29 October 2015, the latter could have argued that the FIBA Appeals' Panel had to render its decision in line with already established jurisprudence.

76. In this connection, the Panel observes that from the date on which the Respondent filed its answer before the FIBA Appeals' Panel, i.e. 21 December 2015, the Appellant was in

possession of the Bakic decision and could have submitted a request to supplement its arguments on basis of Article 1-166 of the FIBA IR. However, the Appellant did not prove that it submitted such a request to the FIBA Appeals' Panel. Thus, the Appellant can be considered as having waived its right to contest this issue.

77. The Panel furthermore notes that, in any event, the argument which the Appellant deduces from the Bakic decision and which, according to its own saying, it would have submitted to the Appeals' Panel is irrelevant to the solution of the present dispute. Indeed, as it follows from para. 61 above, the Panel considers that the fact that the *lex specialis* governing the transfer of young players does not foresee a specific compensation in case there is a valid agreement between a young player and his club of origin is the result of a deliberate choice by the competent organ of the Respondent and leaves, contrary to the behaviour of the first petitioners in the Bakic case, no room for legal assessment or interpretation.

78. Thus, this argument has to be dismissed.

79. As a result, the third claim of the Appellant has to be rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by OKK Spars Sarajevo on 6 March 2016 against the decision rendered by the FIBA Appeals' Panel on 4 February 2016 is dismissed.

2. The decision rendered by the FIBA Appeals' Panel on 4 February 2016 is confirmed.

(…)

5. All other motions or prayers for relief are dismissed.