BASKETBALL
ARBITRAL TRIBUNAL

CORRECTED ARBITRAL AWARD

(BAT 1316/18)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Jordan Theodore

- Claimant 1 -

Mr. Eric Fleisher

- Claimant 2 -

both represented by Mr. Juan de Dios Crespo Pérez, attorney at law,
Avenido Reino de Valencia, 19-4a, 46005, Valencia, Spain

vs.

Pallacanestro Olimpia Milano S.S.R.L.
Via Borgonuovo, 11, 20121, Milano, Italy

- Respondent -

represented by Mr. Enrico Cassi, attorney at law,
via Archimede 18, 97100 Ragusa, Italy

1. The Parties

1.1 The Claimants

1. Mr. Jordan Theodore ("Player") is a professional basketball player. His citizenship of the country which is now, as of the date of this Award, named North Macedonia, is a matter which is in issue in this arbitration. Player was born in the USA.

2. Mr. Eric Fleisher ("Agent") is an American FIBA agent.

1.2 The Respondent

3. Pallacanestro Olimpia Milano S.S.R.L. ("Club") is a professional basketball club in Milan, Italy.

2. The Arbitrator

4. On 18 December 2018, Prof. Richard H. McLaren, O.C., President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert SC, as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence or to his conduct of this arbitration.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. On 9 July 2017, Club and Player entered into an agreement ("the Agreement") whereby the former engaged the latter to play professional basketball for the 2017-2018 and

2018-2019 seasons. Agent's name and signature is present at the end of the Agreement. The Agreement is called "Pre-Contract" on its face.

6. The agreed salary for Player, net, for the 2017-2018 season, was USD 693,000.00; for the 2018-2019 season the agreed net salary for Player was USD 750,750.00. The salary for each season was agreed to be paid to Player in eleven instalments.

7. Article 5.2 of the Agreement states as follows:

> *"The validity of this pre-contract is dependent upon:*
>
> *i. The Player maintaining his Makedonian citizenship.*
>
> *ii. The Player's registration at Lega Basket and FIP as Makedonian citizen.*
>
> *In case the Player loses his Makedonia citizenship at any time, Olimpia has the possibility to terminate immediately his Pre Contract."*

8. Article 7 of the Agreement provides for the fees to be paid to Agent who, it is expressly stipulated, acted for both Club and Player. The fees were, as a result, agreed to be paid to Agent equally by both Player and Club. For the 2017-2018 season, Agent was to receive USD 33,000.00 from Club, and USD 33,000.00 from Player (the latter payment was to be deducted by Club from Player's salary and then paid to Agent). For the 2018-2019 season, Agent was to receive USD 35,750.00 from Club and USD 35,750.00 from Player (again, the latter payment was to be deducted by Club from Player's salary and then paid to Agent). All of these payments were to be made in three instalments per season on presentation of invoices.

9. Player played for Club in the 2017-2018 season, and nothing arises in this arbitration from that time. It is in the aftermath of that season that matters became contentious with issues of on-court playing time for the following season being actively debated. Player was not required by Club to attend for the pre-season period (which was stipulated by the Parties in a signed document dated 16 August 2018), and, instead,

contracting with alternative clubs was explored. However, none of the alternatives to remaining under contract with Club were brought to fruition.

10. In November 2018, an issue arose between Club and Player as to whether he was at risk of losing his citizenship of the country then internationally referred to as the former Yugoslavian Republic of Macedonia ("FYROM"). The correspondence of that time (set out below in detail) is said by Claimants to demonstrate that Club wrongfully terminated the Agreement; whereas Club says precisely the contrary, it was Player who wrongfully terminated the Agreement. What is not in dispute between the Parties is that the Agreement was terminated in November 2018; what is in dispute is who terminated it, and whether such termination was justified. The outcome of the arbitration depends (as will be discussed below) on the resolution of those issues.

3.2 The Proceedings before the BAT

11. On 29 November 2018, Claimants filed a Request for Arbitration of that date in accordance with the BAT Rules.

12. The non-reimbursable handling fee in the amount of EUR 7,000.00 was paid on 7 December 2018.

13. On 27 December 2018, the BAT informed the Parties that Mr. Klaus Reichert, SC had been appointed as the Arbitrator in this matter. Further, the BAT fixed the advance on costs to be paid by the Parties as follows:

> *"Claimant 1(Mr. Jordan Theodore) EUR 5,000.00*
>
> *Claimant 2(Mr. Eric Fleisher) EUR 1,000.00*
>
> *Respondent (Pallacanestro Olimpia Milano S.S.R.L.) EUR 6,000.00"*

The foregoing sums were paid as follows: 9 January 2019, EUR 6,000.00 by Club;

9 January 2019, EUR 1.006,94 by Assist Sports Management Inc.; and 11 January 2019, EUR 4,995.00 by Carol Theodore.

14. On 29 January 2019, Claimants filed (with the permission of the Arbitrator) further evidence in support of the Request for Arbitration along with a covering submission.

15. Club filed its Answer on 11 February 2019.

16. Claimants filed their Reply on 26 February 2019.

17. Club filed its Rejoinder on 13 March 2019.

18. On 18 March 2019, the Parties were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules. Further, the Parties were granted a deadline until 25 March 2019 to set out how much of the applicable maximum contribution in respect of costs should be awarded to them and why. Any such submission was directed by the Arbitrator to include a detailed account of their costs, including any supporting documentation in relation thereto.

19. On 25 March 2019, both Parties made their respective submissions on costs.

4. The Positions of the Parties

20. Claimants' position, as set out in the request for relief in their Request for Arbitration, is as follows (in relevant summary):

    a) Club terminated the Agreement without just cause;

    b) Club to pay Player the net amount of USD 715,000.00 as compensation (salary owed for the 2018/19 season minus the portion of the agent fees to be borne by the Player), plus interest at 5% per annum starting from 16

November 2018 until payment in full;

c) Club to pay Agent the net amount of USD 48,000.00 as compensation, plus interest at 5% per annum starting from 16 November 2018 until payment in full;

d) Club to pay costs.

21. Club's request for relief in the Answer is as follows:

A) Rejecting the Claimants claim Mr. Jordan Theodore and Mr. Eric Fleisher;
B) Recognize that Olimpia behaved in compliance with the principles of loyalty and good faith, and instead the Agreement (Pre-Contract) signed between the parties on 9/7/2017 was solved unilaterally and without just cause by Mr. . Jordan Theodore from 16 November 2018, with the letter of his lawyers of 19 November 2018;
C) Consequently to declare that Mr. Jordan Theodore and Mr. Eric Fleisher are not entitled to payment of the sums claimed by Pallacanestro Olimpia Milano;
D) In the alternative, the BAT will limit the compensation of Jordan Theodore in € 136,000.00 and that of Mr. Fleisher in € 12,000.00, as amounts equivalent to the only remuneration accrued at the time of the unilateral termination of the relationship by the Player.
E) In an even more graded way, the BAT still wants to reduce the sums that it should recognize in favor of Jordan Theodore, the total amount of the salary that he has received and will receive from his new team AEK Athens (Greece) under the contract professional sportsman signed for the same season 2018/2019 just interrupted his relationship with Olimpia.

> **F)** In the same sense, it applies to the Agent Mr. Fleischer, whose eventual compensation must be reduced by the commissions he has received or will receive for the stipulation of the sports contract of his player Jordan Theodore with AEK Athens.
> **G)** Asks that the BAT wants to put all the costs of arbitration and defense (the latter indicated at a flat rate of 20,000.00 euros) to charge of the Claimants.

5. The Jurisdiction of the BAT

22. Pursuant to Article 2.1 of the BAT Rules, *"[t]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland*". Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).

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

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

25. The jurisdiction of the BAT over Claimants' claims is stated to result from the arbitration clause at Article 10 of the Agreement, which reads as follows:

> "Any dispute arising from *or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of*

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

the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."

26. The arbitration clauses are in written form and thus fulfil the formal requirements of Article 178(1) PILA.

27. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration clauses under Swiss law (referred to by Article 178(2) PILA).

28. In light of the foregoing and also in light of the fact that Club participated in the arbitration, without reservation and itself sought relief as against Claimants, the Arbitrator holds that he has jurisdiction over the claims made in this arbitration.

6. Discussion

6.1 Applicable Law – ex aequo et bono

29. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the arbitrators to decide "*en équité*" instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

"the parties may authorize the arbitral tribunal to decide ex aequo et bono".

30. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

"Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law."

31. As noted at paragraph 25 above, the arbitration clause in the Agreement expressly provide that the Arbitrator shall decide any dispute *ex aequo et bono*.

32. 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[2] (Concordat)[3], under which Swiss courts have held that arbitration "en équité" is fundamentally different from arbitration "en droit":

> *"When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[4]

33. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives *"a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case."*[5]

34. This is confirmed by Article 15.1 of the BAT Rules *in fine*, according to which the Arbitrator applies "*general considerations of justice and fairness without reference to any particular national or international law*."

35. In light of the foregoing considerations, the Arbitrator makes the findings below.

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2 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

3 P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

4 JdT 1981 III, p. 93 (free translation).

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

6.2 Findings

36. At the outset the Arbitrator notes that the doctrine of *pacta sunt servanda*, which is consistent with justice and equity, namely requiring parties who make a bargain are expected to stick to that bargain, is one which is consistently at the heart of BAT awards. Thus, *pacta sunt servanda* is the principle by which the Arbitrator will examine the merits of the claims.

37. Recalling the requests for relief which the Parties have advanced in this arbitration, it is clear that both sides have placed their respective claims as to who is responsible for the termination of the Agreement at the forefront of their positions. In the Arbitrator's appreciation of the submissions placed before him by the Parties, and in his own discretion as to how he arranges the discussion and analysis of the various allegations, he has decided to examine the issues surrounding the termination of the Agreement first.

38. The starting point is 5 November 2018 which is the date of a document sent by Club which, given its significance, is replicated in full:

> Olimpia has learned last week, by an official publication appeared on their website, that the Macedonian Basketball Federation officially forwarded the formal request for immediate revocation of citizenship to Government Offices.
>
> Since the existence of the Macedonian status of citizenship has been the key element that led Olimpia Milano to agree to a two years pre-contract (it was fundamental both for the choice of the Athlete and for the quantification of economic forecast and duration of the contract), in the past days our Club has asked for clarifications to your Agent Mr. Eric Fleisher without, however, receiving any answers (the Agent has denied the circumstance which, instead, is clearly stated and visible on the official website of the Macedonian Basketball Federation).
>
> Herewith, Olimpia is there forced to formally ask the Athlete Jordan Theodore to provide a **written attestation** from the Macedonian Basketball Federation and the Agency of Sport suitable to guarantee the permanence of your Macedonian status of citizenship until the end of the current season 2018/19, consistent with strict compliance of the Agreement and capable of justifying the release of the necessary annual work visa.

> Given the unexpected uncertainty of your position and awaiting the requested documents, Olimpia informs you that the Club is forced to temporarily suspend the use of the annual visa and every remuneration due, postponing to the completion of the verification of the paperwork asked for, the possibility of terminating the pre-contract for unexpected uncertainty and/or discontinuance of its essential condition (art. Sub lett. A, 5.2 Agreement).
>
> Olimpia, finally, believes you have not behaved in a manner that is respectful of the necessary trust and loyalty to each other and fits the duties of a professional player, having deliberately disregarded the obligation to inform the Club of the activation of the practice of revocation of citizenship, aware of the risk of contract rescission.
> The need for clarity and the need to temporarily suspend the emoluments and the use of the visa also appear prudently inevitable for this reason.

39. Player responded immediately to Club by letter (on the headed paper of his Counsel, but a letter signed by him) of 5 November 2018. Player states, in that letter, that he was unaware of any process by which his Macedonian citizenship was to be putatively taken away, and, further, he demanded that Club reinstate his remuneration and other rights (*i.e.* immediately lift the suspension in that regard by Club).

40. On 13 November 2018, Player's Counsel wrote to Club setting out the following (in relevant part):

> *"*[…] *we have not received any official notification from either the Macedonian Basketball Federation or any other Macedonian competent body regarding the withdrawal of the Player's Macedonian citizenship. Therefore, it is impossible for us to provide any written attestation. As of today, the Player is a Macedonian citizen, as demonstrated by his passport* […]. *Accordingly, the Player is fully complying with the terms of his employment contract and specifically with the condition of the Player being Macedonian citizen.*
>
> […]
>
> *In light of the above, Olimpia Milano has been breaching the Player's employment contract and agreement in force with the Club since 5 November 2018. In case Olimpia Milano does not withdraw the said suspension and pay immediately the outstanding remunerations to both the Player and the Agent (and in any case no later than 15 November 2018, as established by the Professional Players Economic Agreement), we will consider the Player's employment contract terminated without just cause by Olimpia Milano."*

41. On 15 November 2018, Counsel for Club replied in writing as follows (again this is replicated in full due to the importance of the contents of the letter):

> I replay to your communications of November 5th and 13th, as Attorney and on behalf of Pallacanestro Olimpia Milano (hereinafter "Olimpia" and / or "Club"). You have stated a series of inaccuracies that are to be contradicted.
> 1) For the season 2018-2019 there is no "contract" of work between Olimpia and Jordan Theodore (hereinafter also Player), but only a *"pre-contract"*.
> 2) Olimpia has not suspended any *"contract of employment"* (as you have stated), but only - and temporarily - the emoluments (that it's different) of the pre-contract while waiting for the player or his agent to provide the Club with the required clarification documents legitimately on 5 November, given the unexpected procedure for the revocation of Macedonian citizenship that was forwarded by the Macedonian Federation to the local government.
> 3) It should also be clarified that the Player, regardless of this, has not, today, the right to issue a work visa cause of to have renounced it with settlement signed on 16/8/18 until the eventual convening in Milan of the Club, that for this 2018/2019 Season, as you know, there was not.
>
> 4) The problem is not the current possession of the Macedonian passport (sending a photocopy is not very serious and remains a mockery), but rather the suddenly need for Olimpia to have the necessary assurance and confirmation that the condition relating to the status remains all the time in which a work visa in Italy would be valid (necessary for the regular contracting of the relationship), and therefore for a year (or at least until the end of the Season). Necessity derived from an occurrence occurred (ascribable to the player and certainly not to Olimpia) that Theodore and his agent are deliberately hiding from the Club: the official procedure for the revocation of the Macedonian citizenship of the player.
>
> 5) I attached hereto the official document that Jordan Theodore and his agent still are still hiding at the Olimpia Milano, and that the club has had from the Macedonian Basketball Federation only in recent days (**attached 1**): it tries without possibility of denied that the Macedonian Federation in October 2018 - and therefore already since last month! - has definitively renounced the player's citizenship and has already forwarded the revocation procedure to the Government (it is therefore completely false that "Olimpia Milano is relying on unspecified and unproved statements").
>
> It follows that Jordan Theodore is no longer in a condition to fulfill the agreed agreements, ensuring the compliance with the essential contractual terms for which in July 2017 a biennial pre-agreement and the related economic commitment were stipulated. Olimpia reserve to consider the effects also on the image rights and his agent's fee.

6) It is very serious, and it seems really intolerable, that even with the letters of November 5 and 13 the player and his agent wanted to pretend not to know anything (it is not unbelievable, because the news was even published on the site of the Macedonian basketball Federation): the unfair intention to conceal from Olympia the blatant certainty of the next loss of Macedonian status (condition of contract effectiveness), appears contractually very serious and violates the duty of loyalty and trust.

7) Olimpia certainly has the right to demand maximum clarity from the Player, suspending in this waiting - only temporarily - any emolument. Macedonian citizenship is a condition for the validity of the contract: if the Player is able to remedy, documenting the termination of the Macedonian government's revocation practice, Olimpia will have no problem in resuming the currently suspended emoluments.

8) Having clarified this, however, it must remain clear that Jordan Theodore and his agent **have agreed** a partial anticipation of payments of image rights from the head-Company Giorgio Armani SpA, as to be satisfied. Therefore, even apart from the reasons explained above, there would not be conditions today for the Player to assume *terminated the agreement for a just cause of Olimpia* (unlike what was stated in the communication of November 13)

9) Finally, from the beginning of the season, Olimpia has urged Theodore to find another Club, saying that was available to settle the agreements and any remaining emoluments. Jordan Theodore has unilaterally and repeatedly dropped all offers received from other teams, preferring to remain inactive and receive the full payments from Olimpia. If, in November, he suddenly expressed his desire to return to Italy, it is obviously because he knows he is losing Macedonian citizenship, and therefore the validity of the pre-contract of 9 July 2017 will cease.

For all these reasons, I believe that Olimpia has the right to demand from the player any guarantee and to suspend payments. If you have solutions that are different from the instrumental ones that you currently fear without having the right, Olimpia will remain ready to evaluate them. But as long as you are not in a position to deny the results of the successful introduction of the procedure for the revocation of citizenship, the Club will not be able to ignore it.

42. The document referred to by Counsel and which was attached to his letter was a communication from the Macedonian Basketball Federation to an entity called the National Agency for Youth & Sport dated 29 October 2018. That document notes that Macedonian citizenship has been granted to some foreign basketball players who then

had to play for the Macedonian National Basketball team. The document further states that some of those foreign basketball players failed to meet some necessary requirements to maintain their status of citizenship. The document then says:

> *"For such reason, The federal Council of Macedonian Basketball Federation has called a Commission of inquiry for each foreign basketball player who become naturalized for national interest upon request of the Macedonian Basketball federation. The Commission has decided that the following players must give up their status of citizenship and proceed with filing a motion to revoke the status of citizenship, according to the decree of citizenship of the Republic of Macedonia:*
>
> […]
>
> *- THEODOR JORDAN*
>
> *For this purpose, we ask you to start the procedure for communicating to the Macedonian Government in order to start the necessary operations."*

43. The final item of correspondence is the reply by Claimants' Counsel on 19 November 2018, and given its significance, it is replicated in full:

> *"We acknowledge receipt of your letter dated 15 November 2018 by means of which you confirmed the suspension of the employment contract of Mr. Theodore Jordan (hereinafter, the "Player") imposed on 5 November 2018.*
>
> *We specifically define it as employment contact because the so called "Pre-Contract" is just the name of the employment contract before its come into force, which materialized when all its conditions were met. This is confirmed by the same Olimpia Milano (hereinafter, the "Club" or "Olimpia") when saying, in its letter dated 16 August 2018, "For the rest, the original contracts between the parties will remain in full force." It is undisputed that the Player has regularly performed its contractual duties during the 2017-2018 sporting season, being registered with the Lega Basket Serie A. Accordingly, said employment contract may not be now downgraded and considered as a pre-contract.*
>
> *With reference to the said letter (and not settlement) dated 16 August 2018, the Player did not waive its right to issue a work visa, but "It is understood that as long as the Club does not convene the player in Milan, the Club will not be required to prepare the visa and all the benefits relating to the apartment and the use of the car will be suspended". However, "For the rest, the original contracts between the parties will remain in full force" and "Olimpia and Armani spa will continue to be obliged to make all payments of Players,*

Agent and Image Company as provided for in the respective contracts."

The Player's employment contract only provides for the Club the possibility to terminate their working relationship (condition subsequent) "in case the Player loses his Makedonia citizenship", which is not the case, as the Club knows, otherwise Olimpia would have terminated, and not suspended, the Player's employment contract.

The need for Olimpia to have confirmed the Player's Macedonian citizenship does not authorize the Club to suspend the Player's employment contract, which can only be terminated if and once "the Player loses his Makedonia citizenship". Until that point, Olimpia shall fully comply with the terms of said employment contract.

We acknowledge also receipt for the first time of the document issued by the Macedonian Basketball Federation dated 29 October 2018 on which the Club grounds the suspension of the Player's employment contract. However, said document represents a "request to file a motion to revoke the status of citizenship" addressed to the National Agency Youth&Sport and not to the Player, who has never received said document. Accordingly, the Player has never hidden such document provided by the Club (that is not a party directly affected), which surprisingly received a copy of an official document issued by the Federal Council of the Macedonian Basketball Federation, instead of the Player, who has never violated the duty of loyalty and trust.

The above document states that a Commission of Inquiry of the Macedonian Basketball Federation declared that the Player failed to meet some necessary requirements to maintain his status of Macedonian citizen, without specifying which requirements, therefore without providing any valid ground for such request.

In addition, the Macedonian Basketball Federation apparently requested the National Agency Youth&Sport to start a procedure aimed to communicate the above to the Macedonia Government, without notifying the Player, who is the only party affected by this request.

The only governmental body entitled to revoke the Macedonia citizenship is neither the Macedonia Basketball Association, nor the National Agency Youth&Sport, but the Ministry of Internal Affairs of the Republic of Macedonia. More importantly, the Player's Macedonian citizenship could be withdrawn only after the Player's right of defense will be fully guaranteed and we remark that, at date, Mr. Jordan Theodore has not even been notified about the request of the Macedonia Basketball Association.

Finally, until the Ministry of Internal Affairs of the Republic of Macedonia will not withdraw the Player's Macedonian citizenship by means of a definitive decision, Olimpia is not prevented to prepare the visa for the Player and, more importantly, the Club shall fully comply with its obligations, as agreed in the Player's employment agreement.

In view of the foregoing and following our previous communications, Olimpia terminated the employment contract of Mr. Jordan Theodore without just cause on 16 November 2018 and, in this respect, we will resort to the appropriate Bodies in order to defend the legitimate rights of Mr. Jordan Theodore and Mr. Eric Fleisher, requesting the relevant compensation for damages.

We remain at your entire disposal, and if you have any questions or comments, please do not hesitate to contact us.

Waiting for your further news we remain"

44. Starting with Club's letter of 5 November 2018, and also recalling the fact that Article 5.2 of the Agreement states that its validity is dependent on Player maintaining his FYROM citizenship, the enquiry made of Player by Club as to the potential change (putting it no further than that) in his citizenship status is a reasonable one. Whether Player was aware, or not, of the process underway in (now) North Macedonia to potentially strip him of his citizenship, the fact remains that the evidence available to the world at large via the website of that country's Basketball Federation was that there was some potential question mark over Player's citizenship. Club was, therefore, entitled to ask Player as to what was going on given that the Parties had ascribed a condition of validity to his FYROM citizenship. The Arbitrator finds nothing wrong with the Club asking the question it did, and his appreciation of the response of Player that day is that Player did not consider such question to be an illegitimate one.

45. Where the Arbitrator has encountered some difficulty, and has given this point a great deal of consideration in the course of his deliberations on the submissions of the Parties, arises from: (a) the requirement of Club that Player obtain a "written attestation" of the Macedonian Basketball Federation and the Agency of Sport; and (b) a suspension, even temporary, of Player's right to receive payments. Each will be examined in turn.

46. As regards the requirement of Club that Player was to obtain written attestations from the Macedonian Basketball Federation and the Agency of Sport so that he could thereby assure Club of his Macedonian citizenship to the end of the 2018-2019 season, no support can be found in the express terms of the Agreement. There is no requirement on Player's part in the Agreement to furnish such documents, or to procure them. Further, it appears to be placing Player's contractual future with Club in the

uncertain hands of third parties' willingness to even issue such a document. Also, the Arbitrator can readily appreciate that the Macedonian Basketball Federation and the Agency of Sport (even if a governmental body) would have no say in Player's citizenship, and, at best, might advocate for a particular outcome with the relevant authorities. What value then would such documents from such bodies have for the purposes of giving Club the type of exact comfort it demanded? If those two bodies have no control whatsoever over the citizenship of Player, and are, at best, advocates for a particular outcome, whatever document they might be minded to issue would be of no legal value. They might give Club some comfort, but only some; the clear intention of Club's letter of 5 November 2018 was to get certainty, and by demanding that Player ask these two bodies for certainty it was pointing him to the wrong entities. They might well, if they were minded to do so, have expressed their views as to whether Player should retain FYROM citizenship, but their views were only that, their views.

47. Thus, in the Arbitrator's view, the demand for "written attestations" on the part of Club on 5 November 2018 had no support in the Agreement, nor was it a reasonable demand in the circumstances. It was a demand which was completely out of the hands of Player to satisfy, and even if he did manage to do so the value of such documents by comparison to the stated aims of Club were tenuous, at best. Put another way, the demand was all but impossible to satisfy, and all but pointless even if it was satisfied.

48. Turning to the suspension by Club of Player's rights to receive payments pursuant to the Agreement, the Arbitrator can find no support for this approach taken by Club in the text of the Agreement. Undoubtedly the Agreement conditions its validity on Player continuing to have Macedonian citizenship as already noted above. However, what the Agreement does not do is to expressly authorise Club to excuse itself, even temporarily, from performance if there is a putative question mark over the future of Player's citizenship. It can certainly, and rightly, ask Player questions about such a process, but it cannot abrogate to itself a right to suspend performance when the

condition for validity of the Agreement is still unambiguously in place (even if potentially subject to a process) at that time.

49. Thus, in the Arbitrator's opinion, the suspension, even if stated to be temporary, by Club of its obligation to pay Player agreed salary amounts pursuant to the Agreement was something Club had no entitlement to do. It was a clear breach of contract.

50. Having individually examined the two matters, (a) and (b) described above at paragraph 45, the Arbitrator now examines them collectively. The overall effect of what happened on 5 November 2018 was as follows: Club made an all-but-impossible-to-satisfy demand on Player (for an all-but-pointless outcome) as a condition for reinstatement of his right to be paid his contractual salaries. This appears to the Arbitrator to give rise to the unambiguous inference that Club had little, if any, intention, in adhering to its contractual obligations to pay Player his salary henceforth.

51. Claimants' response through Counsel on 13 November 2018 robustly takes issue with Club and presents a copy of Player's Macedonian passport. Club is left in no doubt whatsoever that unless it was to withdraw the suspension then Claimants were going to treat the Agreement as terminated without just cause. In the circumstances of Club's letter of 5 November 2018 as analysed above, the Arbitrator considers that this response is an appropriate one. First, Player's passport (and there does not appear to be any issue over its validity as of 13 November 2018 as the process, of whatever nature, which might have led to Player being stripped of his citizenship had not come to any conclusion at that time) is evidence of his citizenship. Given that Player was born in the USA, presenting a birth certificate was, obviously, not going to be proof of FYROM citizenship. Thus, having acquired FYROM citizenship, a passport in Player's name from that country is, in the Arbitrator's opinion, evidence of such citizenship. Secondly, Player correctly demanded immediate reinstatement of his salary rights as there was, as analysed above, no right whatsoever on the part of Club to temporarily suspend them in the circumstances. Thirdly, given the overall effect of Club's position

(the combination of an illegitimate and all-but-impossible-to-satisfy demand with a suspension of payment obligations), Player correctly saw that termination was the inevitable outcome unless there was a prompt retraction by Club. An unwillingness on the part of a professional basketball club to pay a player a contracted-for salary into the future on the basis of an illegitimate demand is a clear example of an unwillingness to perform in a material manner.

52. Club's response on 15 November 2018 addresses a large number of issues, some of which are peripheral (these will be discussed below), but others go to the core of the then-issue between the Parties.

53. Club says that a photocopy of Player's FYROM passport (which is, on its face, stated to be valid to 2027) is "not very serious and remains a mockery". The Arbitrator has dwelt upon those words over a considerable period of time in his deliberations leading to this Award. No matter how they are read, and noting as well the Italian language version of the same letter which is also before the Arbitrator, it is impossible for the Arbitrator to understand how Club could resort to such deprecatory language about a passport issued by a sovereign state. The issuance of passports, and the respect accorded to such documents, is an inherent aspect of the dignity of a sovereign state. That language as used by Club, through Counsel, is unbecoming.

54. Player's Macedonian passport proves that he was, at the time, a FYROM citizen, and the Arbitrator does not understand how he might have been able to proffer any better evidence in that regard. Presentation of his passport to Club proves that as of that time he was in a position to fulfil the validity requirements of the Agreement as found in Article 5.2 (as noted above). Indeed the Italian visa application process described in the Request for Arbitration (paragraph 127) places no citizenship proof obligation higher than the provision of a FYROM passport. This, in the Arbitrator's opinion, should have been the end of the debate.

55. Club's letter makes a large number of allegations about bad faith, concealment, and so on, yet none of these are substantiated by anything other the speculative pen of the author. Club continues to allege that it must have comfort as to Player's ongoing FYROM citizenship, though for the reasons set out above, that was a position which has no support in the Agreement. Nonetheless, Club made a further, explicit allegation in connection with Player's citizenship which is addressed below at paragraph 57. Additionally, any disciplinary process undertaken by Club to sanction Player for not disclosing the process in Macedonia in connection with his citizenship is unavailable for Club; this presupposes: (a) knowledge on Player's part, and he says he did not know about it; and (b) an obligation to inform Club of such a process.

56. Club also postulates a position the phrase "Pre-Contract" as the heading of the Agreement somehow denudes that document of its contractual effect. However, that is an argument which has no substance. The Agreement contains clear obligation and the label "Pre-Contract" is nothing more than that, a label. It is to the substance of the document to which the Arbitrator looks, and indeed Club is most insistent on the validity clause (Article 5.2) in connection with Player's FYROM citizenship; thus, it is hard to reconcile Club's approbation of the Agreement for validity purposes in order to mount an argument to say that it should suspend payments to Player, yet reprobate the Agreement when that argument is found wanting.

57. Finally, Club's letter makes the allegation that the FYROM Federation (presumably the Basketball Federation) has renounced Player's citizenship and, thus, he is no longer in a position to fulfil the validity of the Agreement. This is an allegation which Club relies for support on the FYROM Basketball Federation communication discussed at paragraph 42 above. That communication, even on its own terms, contains no renunciation of citizenship nor could it even purport to do so as the FYROM Basketball Federation plainly has no authority over citizenship. The Arbitrator finds it all but impossible to understand how Club could have made the allegation it did in its letter of 15 November 2018 based on that communication.

58. In summary, the Arbitrator considers that Player was able to satisfy the requirement of FYROM citizenship at the time of Club's enquiries. The positions it took had no support in the Agreement, and, in the Arbitrator's opinion, evince a clear intention not to be bound by that contract. Thus, when Claimants' Counsel wrote to Club's Counsel on 19 November 2018 stating that Club had not heeded the warnings given as to termination, such wrongful termination had occurred on 15 November 2018. This wrongful termination had occurred due to Club's conduct and positions, and the Arbitrator, having carefully and thoroughly considered the contemporaneous correspondence along with the arguments presented in this arbitration, hereby agrees with Claimants. Club is to blame for the termination of the Agreement.

59. Before turning to compensation for Club's wrongful termination of the Agreement, the Arbitrator does note in passing that it raises a number of arguments which are, essentially, peripheral in nature. It criticises Player for not moving to other clubs for lesser compensation if he wanted more playing time. That argument does not seem to be a good one as it reposes on the proposition that Player must somehow be criticised for not releasing favourable contractual terms for less favourable ones. Club also tries to elevate the document signed by the Parties on 16 August 2018 into something which would allow it to suggest that it had no obligation to Player unless it called him into the squad for the 2018-2019 season. That argument is not well-founded as that document explicitly preserved Player's rights.

60. As regards compensation, Player claims the full amount, without deduction, of his 2018-2019 contracted-for salary in the amount of USD 750,750.00 less the three amounts which the Parties agreed would be deducted by Club for the purposes of payments to Agent. The table of calculations is set out at page 27 of the Request for Arbitration and, having performed his own calculations, the Arbitrator agrees with Claimants' table. Thus, as a starting point, Player was owed USD 715,000.00, net, by

Club for the 2018-2019 season. Had the season run to a conclusion without wrongful termination by Club, Player would have been paid that amount by Club.

61. Club argues that Player's salary at a subsequent club, AEK Athens, in the amount of USD 200,000.00, should be deducted on the principle of mitigation. Player says the contrary and does not wish any amount to be deducted from his claim against Club.

62. The Arbitrator considers the principle of mitigation to be well-established in a long sequence of BAT awards and sees no reason to depart from that approach. The Arbitrator will deduct USD 200,000.00 (a figure alleged by Club, and not contradicted by Player in his Reply) from the aforementioned amount of USD 715,000.00, resulting in an award of USD 515,000.00, net. The Arbitrator notes that Club did not make any submissions based on which the Arbitrator could assume that the Player would have been in a position to command a higher salary than USD 200,000.00 with another club.

63. Turning to Agent's claim against Club, that also reposes for support on the anterior matter of the wrongful termination by Club of the Agreement. Club's wrongful termination seeks to deprive Agent of the fees he would have earned had the Agreement been performed according to its terms to a conclusion. The calculation is presented in the Request for Arbitration by means of a table at page 28. This table's calculations result in a total amount of USD 48,000.00, which represents four instalments of USD 12,000.00 payable by Club (two on behalf of Player which Club deducted from his salary, and two on behalf of Club). Having performed his own calculations, the Arbitrator agrees with Claimants' table. Agent is thereby awarded USD 48,000.00.

64. Finally, as regards interest, it is well established in BAT jurisprudence that the appropriate interest rate on unpaid amounts of money is 5% per annum, and the Arbitrator finds no reason to depart from that established approach.

65. Taking into account the circumstances of this case, the Arbitrator is content to hold that interest at 5% per annum should accrue on Claimants' claims from 16 November 2018, being the date on which wrongful termination occurred. Interest will run until payment in full.

7. Costs

66. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

67. On 20 July 2019 considering that pursuant to Article 17.2 of the BAT Rules "*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT 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 BAT 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 BAT President determined the arbitration costs in the present matter to be EUR 12,001.94.

68. Considering that Claimants are the prevailing parties in this arbitration the Arbitrator finds it fair and consistent with the provisions of the BAT Rules that the fees and costs of the arbitration, as well as their reasonable costs and expenses, be borne by Club.

69. Of specific relevance in this regard is an aspect of Article 17.3 of the BAT Rules ("*[W]hen deciding on the arbitration costs and on the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared*

with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties"). Additionally, the Arbitrator notes the provisions of Article 17.4 of the BAT Rules as follows:

> *"The maximum contribution to a party's reasonable legal fees and other expenses (excluding the non-reimbursable handling fee) shall be as follows:*
>
> | Sum in Dispute
(in Euros) | Maximum contribution
(in Euros) |
> |---|---|
> | up to 30,000 | 5,000 |
> | from 30,001 to 100,000 | 7,500 |
> | from 100,001 to 200,000 | 10,000 |
> | from 200,001 to 500,000 | 15,000 |
> | from 500,001 to 1,000,000 | 20,000 |
> | over 1,000,000 | 40,000 |
>
> "
>
> *In case of multiple Claimants and/or Respondents, the maximum contribution is determined separately for each party according to the foregoing table on the basis of the relief sought by/against this party."*

70. Claimants' claim for legal fees and expenses is EUR 20,000.00 (legal fees) and the non-reimbursable handling fee of EUR 7,000.00 (expenses). The Arbitrator bears in mind that this was a case which encompassed two rounds of submissions of considerable complexity and length. Further, Club made a large number of allegations of bad faith against Claimants, which did not succeed.

71. Thus, taking into account the factors required by Article 17.3 of the BAT Rules, the maximum amount prescribed under Article 17.4 of the BAT Rules, and the specific circumstances of this case, the Arbitrator holds that EUR 27,000.00 is a fair and reasonable contribution to order against Club.

72. The Arbitrator, taking into account the same factors, also holds that Club should be responsible to Claimants for all of the costs of the arbitration.

73. The Arbitrator decides that in application of Article 17.3 of the BAT Rules:

    (i) Club shall pay EUR 6,001.94 to Claimants as reimbursement of the costs advanced by them; and

    (ii) Club shall pay EUR 27,000.00 to Claimants, representing a contribution by it to their legal fees and expenses.

8. AWARD

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

1. **Pallacanestro Olimpia Milano S.S.R.L. shall pay Mr. Jordan Theodore USD 515,000.00, net, as compensation together with interest at 5% per annum from 16 November 2018 until payment in full.**

2. **Pallacanestro Olimpia Milano S.S.R.L. shall pay Mr. Eric Fleisher USD 48,000.00, as compensation together with interest at 5% per annum from 16 November 2018 until payment in full.**

3. **Pallacanestro Olimpia Milano S.S.R.L. shall pay jointly to Mr. Jordan Theodore and Mr. Eric Fleisher EUR 6,001.94 as reimbursement for their arbitration costs.**

4. **Pallacanestro Olimpia Milano S.S.R.L. shall pay jointly to Mr. Jordan Theodore and Mr. Eric Fleisher EUR 27,000.00 as a contribution to their legal fees and expenses.**

5. **Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 30 July 2019

Klaus Reichert, SC
Arbitrator