



The

FIVB TRIBUNAL

herewith issues the following

DECISION

on the Request for Review of CF 45/2015 filed by

Volleyball Club Dinamo Krasnodar (“Applicant”)

represented by Ms. Yana Dracheva,
Lawyer, Volleyball Club Dinamo Krasnodar
190, Krasnaya St., Krasnodar, Russia 350020

vs.

Mr. Marcelo Ricardo Fronckowiak (“Respondent”)

represented by his Agent, Rogério Teruo Hangai,
R. Marques de Olinda, 64-70SB, Botcfage, RJ-22251-040, Brazil

1. The Parties

1. The Applicant is a professional volleyball club with its legal seat in Krasnodar, Russia.
2. The Respondent is a professional volleyball coach from Brazil.

2. The FIVB Tribunal Panel

3. Article 1.5 of the FIVB Tribunal Regulations (hereinafter the “Regulations”) provides as follows:

“1.5 Cases before the FIVB Tribunal shall be heard by the Chairperson and two (2) other members, appointed by the Chairperson. If one or more of the members is unavailable or ineligible due to reasons of conflict (see Article 9) the Chairperson shall appoint another member. However, in the event that a case only involves parties from the same Confederation, that case shall be heard by the judge from that Confederation as a single judge unless a hearing by a three (3)-member FIVB Tribunal is requested by one of the parties. If that member has the same nationality as one of the parties, is unavailable or ineligible due to reasons of conflict (see Article 9) he/she shall be replaced by the substitute member from the same Confederation. If both the member and the substitute member from the Confederation in question have the nationality of one of the parties, the FIVB President shall appoint ad-hoc a neutral judge from the same Confederation provided that he/she possesses the qualifications set out in Article 1.3 above”.

4. Because the parties come from different confederations, this Request for Review will be heard by a Panel appointed by the Chairman. Because the Chairman of the FIVB Tribunal was no longer sitting on the FIVB Tribunal when this case was initiated, the Vice Chairman of the FIVB Tribunal, Mr. Liu Chi from China, is acting Chairman (hereinafter “Chairman”) on the present case.
5. On 8 April 2016, the Chairman appointed Mr. Piotr Stolarski from Poland and Lic. Carlos J. Beltran from Puerto Rico as members of the FIVB Tribunal Panel (hereinafter the “Panel”) for the present case.

3. Facts and Proceedings

3.1 Background Facts

6. On 1 July 2014, the Applicant and the Respondent entered into a pre-contract in which the Respondent agreed to offer his services to the Applicant’s team for the 2014/2015 and 2015/16 seasons in exchange for a salary of EUR 280,000 net total (hereinafter the “Pre-

Contract”).

7. The Contract contained the following relevant provisions:

“3. SALARY COMPENSATION

The Club Agrees to pay the coach as follows:

EU 280,000 euro net of taxes

4. CURRENCY OF PAYMENT

Compensation for the Agreement shall be made in euros” [sic]

8. On the same day, the Applicant and the Respondent entered into a contract in which the Respondent agreed to offer his services to the Applicant’s team for the 2014/2015 and 2015/16 seasons in exchange for a salary of EUR 50,000 net, amongst other benefits, per season (hereinafter the “Employment Contract”).

9. The Employment Contract contained the following relevant provisions:

“6.6 All disputes arising from this agreement shall be settled by direct negotiations with the Employer’s and the Employee’s participation on the basis of labor legislation of Russian Federation, sport law as well as regulations and rules of Russian Volleyball Federation.

[...]

APPENDIX No 1

To the employment agreement dd. «01» july 2014

[...]

1. For the performance of the obligations determined by the employment agreement dd. 1st of July 2014 the Employer pay the Employee salary at 5 000 (five thousand) euro per month. During the periods with 01.08.2014 on 31.05.2015 and with 01.07.2015 on 31.05.2016. Total amount of contract 50 000 (fifty thousand) euro, holidays payments included in the total amount of the contract.

2. The following bonus payments are approved for the Employee:

1st place in the Championship of Russia: 35 000 (thirty five thousand) euro.

2nd place in the Championship of Russia: 25 000 (twenty five thousand) euro.

4th place in the Championship of Russia: 15 000 (fifteen thousand) euro.

5th place in the Championship of Russia: 5 000 (five thousand) euro.

1st place in the European Cup: 15 000 (fifteen thousand) euro.

2nd place in European Cup: 5 000 (five thousand) euro.

1st place in the Cup of Russia: 25 000 (twenty five thousand) euro.

2nd place in the Cup of Russia: 15 000 (fifteen thousand) euro.

4th place in the Cup of Russia: 5 000 (five thousand) euro.

5. All the amounts mentioned in paragraphs 1,3 of the present Appendix shall be paid after deduction of all taxes and duties, payments are carried out in rubles at a Central Bank rate of Russia on the date of payment;” [sic]

10. Additionally, on the same date, the Applicant and the Respondent’s Agent signed a “Contract for Agent’s Services” in which the Respondent’s Agent would select an international coaching for the Club in exchange for EUR 238,000.
11. Starting in October 2014, the Applicant fell behind in its payments to the Respondent due to lack of funding.
12. On 18 December 2015, the Applicant and the Respondent agreed to an agreement to terminate the Employment Contract (hereinafter the “Termination Agreement”).
13. The Termination Agreement contained the following relevant provisions:

“1. The Parties have agreed to terminate concluded between the Employee and the Employer Labor contract dated «01» September, 2014 No no reference (further - Labor contract) in accordance with item 1 part one Article 77 of the Labor Code of the Russian Federation (by agreement between the Parties) dated « 18 » December 2014.

[...]

3. The Employer undertakes to perform full settlement with the Employee (pay salary to the Employee for hours actually worked).

4. The Employer undertakes to perform additional payment in favour of the Employee in amount of two monthly wages.” [sic]

14. The amount of payments made by the Applicant after the Termination Agreement is in dispute.

3.2 The Proceedings before the FIVB Tribunal

15. On 29 January 2016, the FIVB issued a decision in the present manner in accordance with Article 45.11 of the FIVB Sports Regulations (hereinafter the “Decision”) ruling that the

Applicant owed the Respondent the amounts of EUR 27,276 and CHF 250, which the Applicant was ordered to pay by 29 February 2016. The Applicant was notified of the Decision on 1 February 2016.

16. On 5 February 2016, the Respondent's Agent requested information from the FIVB Legal Department as to how to proceed with a review of the FIVB's decision in the present case.
17. On 8 February 2016, the FIVB Legal Department provided the Respondent's Agent with the relevant information regarding proceedings before the FIVB Tribunal and directed him to the publicly available FIVB Tribunal Regulations.
18. On 11 February 2016, the Applicant informed the FIVB Legal Department that it had prepared a Request for Review and requested the relevant account information in order to pay the handling fee.
19. On the same day, the FIVB Legal Department provided the Applicant with the same information that it provided to the Respondent's Agent, which included the requested account information.
20. On 12 February 2016, the Respondent's Agent requested a five day extension to file its Request for Review due the Respondent's Agent's travel schedule and a national holiday in Brazil.
21. On the same day, the FIVB Legal Department responded with the following:

"Thank you for your email.

Article 45.11.2(a) of the FIVB Sports Regulations states that a Request for Review be submitted within fourteen (14) days from notification of the decision to the FIVB Tribunal. Consequently, neither the FIVB administration nor the FIVB Tribunal have the authority to grant an extension to the above mentioned deadline. Please note that a failure to comply with the requirements of Article 45.11.2 of the FIVB Sports Regulations and the FIVB Tribunal Regulations will result in the Request for Review being declared inadmissible

Thank you very much for your attention in this matter."

22. On 15 February 2016, the Applicant filed its Request for Review, which included its "Request

for Review”, a Certificate from the Applicant’s bank regarding the payments allegedly made to the Respondent, the Employment Contract, and proof of payment of the handling fee.

23. On 17 February 2016, the FIVB Tribunal acknowledged receipt of the Request for Review and invited the Respondent to submit his Answer by no later than 9 March 2016.
24. On 19 February 2016, the Respondent submitted his Answer and Request for Review with accompanying documentation.
25. On 11 March 2016, the FIVB Tribunal acknowledged receipt of the Respondent’s Answer and Request for Review and stated that the Respondent’s Answer would be forwarded to the FIVB Tribunal for its review. Regarding the Coach’s Request for Review, the FIVB issued the following Procedural Order:

“PROCEDURAL ORDER

in the matter

Mr. Fronckowiak (BRA) v. Dinamo Krasnodar (RUS)

[RfR 2016/2 - CF 45/2015]

WHEREAS, according to Article 45.11.2(a) of the FIVB Sports Regulations, an affected party may request that his/her case be reviewed by the FIVB Tribunal by filing a Request for Review within fourteen (14) days from notification of the decision;

WHEREAS, the Coach was notified of the decision on 1 February 2016 and, thus, the Coach had until 15 February 2016 to file a Request for Review;

WHEREAS, on 12 February 2016, the Coach requested a five (5) day extension of the deadline to file his Request for Review with the FIVB;

WHEREAS, on the same day, the FIVB responded by informing the Coach that neither it nor the FIVB Tribunal had the authority to grant an extension of the deadline and that a failure to comply Article 45.11.2 of the Sports Regulations and the FIVB Tribunal would result in the Request for Review being declared inadmissible;

WHEREAS, on 19 February 2016, the Coach filed his Request for Review;

DECISION

The FIVB Tribunal finds that the Coach's Request for Review must be declared inadmissible because it was filed on 19 February, which was after the 15 February 2016 deadline. The FIVB explicitly informed the Coach that the deadline could not be extended and that his Request for Review would be declared inadmissible if he did not comply with Article 45.11.2(a). The Coach made the conscious decision, despite this warning, to file the claim after the deadline provided based on Article 45.11.2(a). Thus, the Coach has to bear the responsibility for this decision. Consequently, the FIVB Tribunal shall not [admit] the Coach's Request for Review."

26. On 25 May 2016, the Respondent's Agent provided an unsolicited submission in which he challenged the authenticity of the Applicant's documentation and business practices and objected to the fact that the Respondent's Request for Review was declared inadmissible.

4. The Parties' Submissions

27. The following section provides a brief summary of the Parties' submissions and does not purport to include every contention put forth by the Parties. However, the Panel has thoroughly considered all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference has been made to those arguments in this section.

4.1 The Applicant's Request for Review

28. First, the Applicant noted that the Employment Contract provided that the Respondent would be paid in Russian Rubles based on the exchange rate with the Euro on the last day of the month. It concluded an agreement with KrayInvest Bank (hereinafter "Bank"), which required the Bank to transfer the individual amounts owed to each of the Applicant's employees, including the Respondent. Thus, in the first instance, the Club did not have any evidence of the payments made to the Respondent. In the present proceedings, the Applicant obtained a certificate from the Bank (hereinafter "Bank Certificate") proving the amounts transferred to the Respondent. Taking into account the exchange rate as provided in the Employment Contract and based on the taxes that it was required to withhold in accordance with Russian law, the Applicant claimed that the Respondent was entitled to a total of EUR 34,901 in salary and bonuses under the Termination Agreement. After reviewing the Bank Certificate, the Applicant contended that it only owed EUR 125.62 to the Respondent as demonstrated by the difference between the total salary that the Respondent was entitled to and the payments proven by the Bank Certificate.

29. Second, the Applicant contended that the FIVB Tribunal did not have competence to decide the present dispute because the Respondent was engaged in labour activities within the territory of Russia and, thus, this dispute was governed by Russian law. The Employment Contract provided that any dispute between the Parties had to be settled by direct negotiations between the Parties on the basis of Russian law, sports law, and the rules of the Russian Volleyball Federation. Article 381 of the Russian Federation Labour Code establishes that all individual labour disputes between an employer and employee on the application of Russian labour law, including the present dispute, must be submitted to a labour dispute commission or a court in Russia.
30. The Applicant requests the following relief:

“Considering the foregoing, in accordance with FIVB Tribunal Regulations, you are kindly requested to cancel the FIVB decision dated 29 January 2016 on the matter of Marcelo Ricardo Fronckaviak vs. ANO “Volleyball Club “Dinamo” Krasnodar” (CF 45/2015), particularly concerning the obligation of the Club to pay to the Coach 27,276.00 Euro and 250 CHF.” (sic)

4.2 The Respondent's Answer

31. The Respondent first noted that he filed a complaint for EUR 63,276 on behalf of himself and his Agent and noted that the FIVB's decision should be revised to include EUR 36,000 that was requested as the Agent's claim because that amount also belongs to the Respondent. The Employment Contract and the Contract for Agent Services were interconnected. The Employment Contract would not exist without the Contract for Agent Services but the value from the Contract for Agent Services also belongs to the Respondent which was demonstrated by the signed declaration provided by the Respondent, the Pre-Contract, and the payment vouchers signed in the Agent's name for the Respondent.
32. The FIVB cannot refuse the Respondent's request regarding the amounts owed to his Agent because this type of arrangement in which payments are split into an employment contract and an image rights contract is common in international volleyball in order to economically ensure full payment. The practice is that the payments under the Employment Contract are made to the coach in an account in the coach's name within the territory where the coach is providing his services and payments under a separate image rights contract are made to an account in the coach's home country in an account in the name of the agent, who then passes along said amount to the coach. FIVB cannot close its eyes to this reality and deny protection to the Respondent in this case.

33. According to FIVB Regulations, the FIVB Tribunal shall apply general principles of justice and equity. Additionally, the FIVB Tribunal should honour the principle of *“pacta sunt servanda”*, i.e. that the Parties should honour the agreements that they have signed. In the present case, the FIVB Tribunal should condemn the Applicant to pay its obligations under both contracts because the Respondent is a creditor under both agreements based on the Pre-Contract.
34. In his request for relief, the Respondent requested that:

“Thus, it requires that the FIVB, before the presented documents, review your decision and determine the Volleyball Club Dinamo Krasnodar must pay the amount of EUR 63,276.00 to Mr. Marcelo Froncokwiak, and if does not pay, the FIVB should impose sanctions the club described in the regulation.” (sic)

5. Jurisdiction

5.1 In general

35. The FIVB Tribunal must first examine whether it has jurisdiction to hear the present dispute. In order to do so, it must first look at the relevant provisions of the Regulations.
36. Article 2.1 of the Regulations reads as follows:

“[t]he FIVB Tribunal is competent to decide financial disputes of an international dimension between clubs, players and coaches from within the world of volleyball”.

37. Article 2.2 of the Regulations stipulates that the FIVB Tribunal can only resolve disputes:

“2.2.1 arising between the natural and legal persons/entities mentioned in Article 2.1;

and

2.2.2 decided previously by the FIVB/ a Confederation or referred by the FIVB/ a Confederation to the FIVB Tribunal”

38. Article 2.3 of the Regulations grants the FIVB Tribunal the power to rule on its own jurisdiction.
39. Thus, in order for the FIVB Tribunal to have jurisdiction over the dispute, the Panel shall examine whether the conditions of both Articles 2.1 and 2.2 are satisfied.
40. The present dispute involves a claim for damages by a Brazilian coach against a Russian club.

The FIVB Tribunal finds that this dispute clearly qualifies as a financial dispute of an international dimension between a player and a club in accordance with Articles 2.1 and 2.2.1.

41. Furthermore, the Request for Review at hand is made against the Decision, which was rendered by the FIVB. Indeed, the FIVB was competent and decided the case in the first instance under Article 45.11 of the FIVB Sports Regulations. The Panel notes that neither party objected to the FIVB's competence in the initial proceedings. Therefore, the present Request for Review stems from a decision of the FIVB, and the Panel holds that Article 2.2.2 is also satisfied. Based on the above, the conditions of Articles 2.1 and 2.2 are satisfied.
42. The Club contested the FIVB Tribunal's competence to decide the present dispute asserting that the Article 6.6 of the Employment Contract as well as Russian labour law dictates that employment disputes may be decided only by the Russian labour dispute commissions or Russian state courts. The FIVB first notes that Article 6.6 of the November 2014 Contract states the following:

"All disputes arising from this agreement shall be settled by direct negotiations with the Employer's and the Employee's participation on the basis of labor legislation of Russian Federation, sport law, as well as regulations and rules of Russian Volleyball Federation."

43. The Panel finds that the abovementioned clause is not sufficient to prevent the FIVB Tribunal from retaining competence over the present dispute. The abovementioned clause merely requires the Parties to engage in direct negotiations in compliance with the labour legislation of Russia, sport law, and the Volleyball Federation of Russia's Regulations. However, it fails to confer competence to another organisation in the event that said negotiations fail, as they did in this case. Thus, without an alternative grant of competence, the Employment Contract does not conflict with the FIVB Tribunal's competence provided under the relevant FIVB Regulations.
44. Even if Article 6.6. of the November 2014 Contract applied also to the phase after unsuccessful negotiations, it expressly refers to the regulations and rules of the Russian Volleyball Federation. The Russian Volleyball Federation is a member of the FIVB and, as such, is bound to FIVB's rules and regulations, including those granting competence to the FIVB in financial disputes. Therefore, even if Article 6.6. of the November 2014 Contract could be interpreted to confer jurisdiction to the Russian labour courts (by itself or read in conjunction with Article 382 of the Russian Labour Code), said contractual provision would at the same time refer to the

FIVB's competence to decide financial disputes. Hence, at best, Article 6.6 of the November 2014 Contract would provide for two potential paths, one being the FIVB (and a review by the FIVB Tribunal) and one being Russian labour courts.

45. Therefore, the Club has failed to demonstrate that FIVB Tribunal's competence to hear this dispute is excluded on the basis of Article 6.6 of the November 2014 Contract.

6. Admissibility

46. Before turning to the merits, the Panel would like to discuss the admissibility of the Respondent's Request for Review in a little more detail in light of the fact that the Respondent failed to provide a direct answer to the Applicant's Request for Review and continued to insist that the Panel review the amount awarded by the FIVB.

47. The Panel would first like to emphasize that the findings of the Procedural Order were correctly decided. First, the Panel would like to note that the application of *ex aequo et bono* principles is limited to the decision on the merits based on the plain language of Article 13 of the Regulations, which is titled "Law Applicable to the Merits", and is, thus, not applicable to procedural matters. However, the Regulations fail to mention what law is applicable to procedural matters before the FIVB Tribunal. As a body with its seat in Lausanne, Switzerland (see Article 3 of the Regulations), the FIVB Tribunal must, therefore, interpret the procedural provisions of the Regulations bearing in mind the principles of Swiss procedural law in civil matters. Under Swiss law, a state judge cannot – in principle – extend or reinstate a deadline to review a decision if it has been missed (see BGE [Decisions of the Swiss Federal Tribunal] 101 II 86 E. 2; see also Haas, Ulrich, *The "Time Limit for Appeal" in Arbitration Proceedings before the Court of Arbitration for Sport (CAS)* in CAS Bulletin 2/2011, p.13, fn 87).

48. Moreover, this practice that the deadline to submit an appeal or, in this case, a Request for Review cannot be extended is in line with the practice of the Court of Arbitration for Sport. This practice is demonstrated in Article R32 of the Code for Sports-Related Arbitration, which in relevant part, that:

"Upon application on justified grounds and after consultation with the other party (or parties), either the President of the Panel or, if he/she is not yet appointed, the President of the relevant Division, may extend the time limits provided in these Procedural Rules, with the exception of the time limit for the filing of the statement of appeal, if the circumstances so warrant and provided that the initial time limit has not already expired. With the exception of the time limit for the

statement of appeal, any request for a first extension of time of a maximum of five days can be decided by the CAS Secretary General without consultation with the other party (ies)." (emphasis added)

49. The Respondent's Agent was made aware of this practice that the deadline to file the Respondent's Request for Review could not be extended. Despite this notification from the FIVB, the Respondent's Agent chose to file the Request for Review late. Unfortunately, for the Respondent, he must bear the responsibility for his Agent's late filing.
50. Hence, the Panel finds that the Respondent's Request for Review must be declared inadmissible in the present proceedings because it was not filed within the deadline provided in Article 45.11.2 of the FIVB Sports Regulations.

7. Discussion

7.1 Applicable Law

51. Under the heading "Law Applicable to the Merits", Article 13 of the Regulations reads as follows:

"Unless otherwise agreed by the parties, the Tribunal shall apply general considerations of justice and fairness without reference to any particular national or international law (ex aequo et bono)."

52. Neither of the parties has contested the applicability of *ex aequo et bono* to the present dispute nor based their arguments on any national law as it relates to the merits of this dispute. In light of the above, the Panel will decide the issues submitted to it in this proceeding *ex aequo et bono*.
53. In substance, it is generally considered that an 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".¹
54. In light of the foregoing matters, the Panel makes the following findings.

7.2 Findings

¹ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

55. In its Request for Review, the Applicant seeks to argue that it has paid all of the amounts outstanding under the Termination Agreement with the exception of EUR 125.62. In support of its proposition, it provides a chart purportedly demonstrating the total amount owed under the Employment Contract and a Certificate alleged proving the payments made pursuant to the Employment Contract.
56. First, the Panel notes that it is uncontested that the Applicant admits that it owes EUR 125.62. Consequently, the Panel awards this amount.
57. Regarding the remainder of the Applicant's arguments, the Applicant bears the burden of proof for its argument that it paid the remainder of the outstanding salaries. In order to satisfy its burden of proof, the Applicant must provide concrete proof supporting its allegations.
58. Turning to the evidence provided, the Applicant has asked that the Panel overturn the decision, in essence, based on one document: the Certificate. The Certificate purports to prove the payments made to the Respondent. However, this document while coming from the Applicant's bank is merely a secondary source of evidence, i.e. it is a summary document described payments rather than actual proof of payments made. The Panel notes that the Decision expressly provided the Applicant with guidance as to the type of evidence that it could provide in order to meet its burden of proof: bank SWIFT payment records or bank transfer documents. The Certificate is neither of these. Moreover, the Panel is also not convinced when looking at the "Purpose" section of the payments described in the Certificate. When looking at this section, it appears as if payments were only made on the September 2014, December 2014, March 2015, and May 2015 salaries, with no reference made to the other salaries. Due to the termination of the Employment Contract, the Respondent was not entitled to salaries for the month of March and May. These inaccuracies further undermine the Certificate as concrete proof of payment. Finally, the Certificate contradicts the Applicant's own evidence before the FIVB. While the Panel recognises that it has full power to examine the facts and the law of the dispute according to the Regulations, the Panel finds it hard to believe that the Applicant would have represented that it owed EUR 5,000 in the first instance when it, in fact, owed only EUR 125.62, especially given the fact that it provided an extract from its own records allegedly showing that it owed EUR 5,000. Based on the above, the Panel finds that the Applicant has not met its burden of proof regarding the alleged payments made to Respondent.
59. For the sake of completeness, the Panel also noted that the Respondent requested its initial

request for relief before the FIVB in its Answer. However, the FIVB awarded the Respondent less than its initial request, and the Respondent did not file a Request for Review within the time limit (*see above* Section 6). Therefore, the Panel cannot award more than the amount awarded in the Decision because the Respondent failed to file a Request for Review within the time limit. Consequently, the Panel upholds the Decision and awards the Respondent EUR 27,276.

6.4 Costs

60. In its Decision, the FIVB ordered the Applicant to pay the full amount of costs of CHF 250 for the proceedings before the FIVB. Given that the Decision was upheld in full and the Applicant's Request for Review was dismissed, the FIVB Tribunal orders that the Respondent is entitled to the EUR 250 awarded in the Decision.

61. The Respondent made no additional requests for costs or expenses.

DECISION

62. For the reasons set forth above, the Panel decides as follows:

- 1. The Request for Review filed by Volleyball Club Dinamo Krasnodar is dismissed in its entirety.**
- 2. The decision rendered by the FIVB on 29 January 2016 is upheld in full.**
- 3. Any other requests for relief are dismissed.**

Lausanne, seat of the proceedings, 8 December 2016.

Liu Chi

Acting Chairman of the FIVB Tribunal

Piotr Stolarski
CEV Substitute Member

Lic. Carlos J. Beltran
NORCECA Member