



The

## **FIVB TRIBUNAL**

herewith issues the following

### **DECISION**

on the Request for Review of CC064/2015,

being filed by

**VK Dinamo Krasnodar (“Claimant”)**

represented by B.V. Simonenko

190 Krasnaya Str.

Krasnodar, 350020, Russia

vs.

**Mr. Avital Selinger (“Respondent”)**

represented by Mr. Vassilios Koutsogiannakis,

For Athletes GmbH, Sports Law & Sportmanagement

Am alten Weinberg 4,

8192 Glattenfelden, Switzerland

## **1. The Parties**

1. The Claimant (hereinafter the “Club”) is a professional volleyball club with its legal seat in Krasnodar, Russia.
2. The Respondent (hereinafter the “Player”) is a professional volleyball coach from the Netherlands.

## **2. The FIVB Tribunal**

3. Article 1.5 of the FIVB Tribunal Regulations in their 2015 edition (hereinafter the “Regulations”), which were in force at the time that the Request for Review was filed, 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 the same Confederation, this Request for Review will be heard by a single judge from the same Confederation. As of 5 June 2015, Mr. Erhard Rubert, the regular member of the FIVB Tribunal from Europe, was no longer a member of the FIVB Tribunal. Given that the Parties are from the Confédération Européenne de Volleyball (hereinafter “CEV”), the substitute member of the FIVB Tribunal from CEV, Mr. Piotr Stolarski from Poland, was appointed as the single judge in the present case (hereinafter “FIVB Tribunal Judge”).

### **3. Facts and Proceedings**

#### **3.1 Background Facts**

5. The following facts are undisputed by the Parties:
  
6. On 20 April 2012, the Coach and the Club signed an employment contract (hereinafter the "Contract"), including the appendix no. 1 to the contract, pursuant to which the Coach agreed to coach the Club's women's first team during the 2012/13 and 2013/14 seasons. The initial term of the Contract ran from 1 July 2012 to 31 May 2013, with the Contract being renewed for another year until 31 May 2014 unless terminated by 31 March 2013.
  
7. The Contract contained, *inter alia*, the following provisions:

#### ***"1. General Provisions***

*1.1. Under the present employment agreement the Employee shall be employed for the position of a Head coach in the women's team, and undertakes to carry out preparations for the sporting events and participation in sporting competitions in volleyball [...]*

#### ***2. Remuneration***

*2.1 In pursuance of his obligations under this agreement the Employer undertakes to remunerate the Employee. The amount of remuneration and its components are defined in Appendix No 1 to this Agreement [...]*

*2.2 The salary shall be paid on a monthly basis in equal installments in the following period: on the 25<sup>th</sup> day of the payment month and on the 10<sup>th</sup> day of the month following after the payment month. [...]*

#### ***Appendix No 1 to the employment agreement dd. 20<sup>th</sup> April 2012***

*1. For the performance of the obligations determined by the employment agreement dd. April 20<sup>th</sup> 2012 the Employer pays the Employee salary at the amount of 800 000 (eight hundred thousand) rubles per month. Total amount of contract from 01<sup>st</sup> of July 2012 to 31<sup>st</sup> March 2013 is 8 800 000 (eight million eight hundred thousand) rubles [...]*

*2. In case of prolongation, [...] the Employer pay the Employee salary from 01<sup>st</sup> of June 2013 to 31<sup>st</sup> of May 2014 at the amount of 733 334 (seven hundred thirty three thousand three hundred thirty-four) rubles per month. Total amount of contract from 01<sup>st</sup> of June 2013 to 31<sup>st</sup> of May 2014 is 8 800 008 (eight million eight hundred thousand eight) rubles [...]*

*7. All the amounts mentioned in the paragraphs 1-6 of the present Appendix are net and shall be paid after deduction of all taxes and duties.*

*10. In compiling this document takes into account the Ruble against the EURO in the following ratio of 40 rubles = 1 EURO. If account the Ruble against the EURO will exceed in the following ratio of 40 rubles, The Employer undertakes to compensate that difference at all not later than 30 days after the end of official competition of each volleyball seasons.”*

8. The Club paid the full amount of Coach’s salary for the 2012/2013 season, i.e. RUB 8,800,000, and an amount of RUB 8,997,631 for the 2013/2014 season. These payments were made in Russian Rubles. As the exchange rate on the dates of payment frequently exceeded the contractually stipulated RUB 40 to EUR 1 rate, the Club was liable to pay an additional compensation pursuant to Article 10 of the Appendix no 1 to the Contract. While the CEV decision found that this additional compensation amounted to EUR 2,115.53 for the 2012/2013 season and EUR 23,179.67 for the 2013/2014 season, the Claimant in its Request for Review even acknowledged a liability of EUR 27,442.17 for the 2013/14 season. However, it is disputed between the Parties if any payments have already been made on those outstanding compensations that were owed because the exchange rate exceeded RUB 40to EUR 1 exchange rate.

### **3.2 The proceedings before the FIVB Tribunal**

9. On 1 February 2016, the CEV Mediation Chamber issued a decision in the present manner in accordance with Article 45.11 of the FIVB Sports Regulations (hereinafter the “Decision”), ruling that the Club owed the Player the amount of EUR 25,295.20 net and the amount of EUR 400 for the handling fee, which the Club was ordered to pay by 2 March 2016. The Parties received an advance copy of the Decision by email on 2 February 2016. The Club was notified of the Decision by mail on 17 February 2016, while the Coach was notified of the Decision on 9 February 2016 by mail.

10. On 19 February 2016, the Club filed its Request for Review with the FIVB and paid the requisite handling fee.
11. On 12 March 2016, the Coach filed his Answer to the Request for Review.
12. On 18 March 2016, the FIVB Tribunal acknowledged receipt of the Coach's Answer and stated that no further submissions would be accepted unless otherwise requested by the FIVB Tribunal.
13. On the same day, the FIVB Tribunal issued a procedural order regarding the admissibility of the Club's Request for Review and the Coach's request for additional compensation beyond the Decision.
14. The FIVB Tribunal found that the Club's Request for Review is admissible since it was filed within the fourteen (14) day deadline pursuant to Article 45.11.2(a) of the FIVB Sports Regulations. According to said Article, 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. The CEV Mediation chamber stated in the Decision that the CEV would send an "advanced copy by email" to the Parties. This language implies that actual notification would not take place until it was sent by another means. Consequently, the appropriate date for the determination of the deadline for the Request of Review must be the notification by mail, i.e. 17 February. Hence, the filing of the Club's Request for Review on 19 February 2016 was within the fourteen (14) day deadline.
15. Furthermore, the FIVB Tribunal found that the Coach's claims for compensation above the amount awarded by the CEV Mediation Chamber were inadmissible. The Coach's counter-claim for Review was not filed within the fourteen (14) day deadline, as it should have been pursuant to Article 20.5 read in conjunction with Article 18.2 of the Regulations. The Coach received the Decision by mail on 9 February 2016 and, thus, had until 23 February to file his counter- Request for Review. He did not file his claim until 12 March 2016, which was after the fourteen (14) day deadline had expired. Hence, the FIVB Tribunal could not decide on the merits of the counter-claim.

#### **4. The Parties' submissions**

16. The following section provides a brief summary of the Parties' submissions and does not purport

to include every contention put forth by them. However, the FIVB Tribunal Judge 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 Claimant's Request for Review**

17. The Club argues that it never received a copy of the Coach's complaint and that the Club was not properly notified about the pending proceeding before the CEV Mediation Chamber. Therefore, the Club was unable to submit relevant counter-arguments. The first time the Club became aware of the Coach's claim was when the CEV notified the Club about the Decision in the CEV proceedings. Further, the notice of the decision was addressed to Mr. Andrey Makarov, an ordinary manager of the Club who is not authorized to receive any official correspondence.
18. The club asserts that it paid the currency compensation for the salary for the 2012/2013 season in the amount of EUR 2,115.53 on 23 September 2013. Further, the Club claims that it paid EUR 11,490.09 out of the acknowledged currency compensation for the 2013/2014 season in the amount of EUR 27,442.17. Hence, the outstanding compensation to be paid by the Club amounts to EUR 15,952.08.
19. Moreover, the Club states that the CEV Mediation Chamber had no jurisdiction in this dispute. Disputes arising from the employment contract shall be subject to the jurisdiction of the Russian Federation. According to Article 6.7 of the Contract all disputes arising from the employment contract shall be settled, *inter alia*, on the basis of labour legislation of the Russian Federation. Article 382 of the Russian Federation's Labour Code provides that individual labour disputes are subject to the jurisdiction of the labour dispute commission or by a court of general jurisdiction of the Russian Federation. The Club argues that the current dispute has to be classified as an individual labour dispute pursuant to Article 381 of the Russian Federation's Labour Code and, hence, only the labour dispute commission or a court of general jurisdiction of the Russian Federation has the jurisdiction.
20. The Club's Request for Relief reads as follows:

*"Considering the foregoing, in accordance with FIVB Tribunal Regulations, you are kindly requested to cancel the CEV decision dated 01 February 2016 on the matter of Avital Haim-Selinger vs ANO "Volleyball Club "Dinamo" Krasnodar" (CC 064/2015)*

*prescribes that the Club is obliged to pay to the Coach 25,295.20 Euro and 400 Euro.”*

#### **4.2. The Coach’s Answer to the Request for Review**

21. The Coach argues that the CEV did properly notify the Club on 20 August 2015, on 4 September 2015 and on 11 September 2011. Further, the Coach states that it is the Club’s duty to provide the CEV with its actual and correct contact details.
22. Moreover, the Coach highlights that the Club acknowledged in its Request for Review that it owes the Coach compensation in the amount of EUR 27,442 for the season 2013/2014. The Coach disputes that the Club has already paid an amount of EUR 11,490 out of said compensation to the Coach. Furthermore, for the 2012/2013 season, the Coach deems compensation in the amount of EUR 2,115 to be still due to the Coach as the Club failed to provide evidence for the payment of said amount.
23. Furthermore, the Club mentions that the certificate dated 10 February 2016 provided by the Respondent has no probative force to support Respondent’s statements. The certificate states that during the period from 20 April 2012 until 9 February 2016 an amount of RUB 7,562,856 has been paid by the Club to the Coach. However, the total amount for this period should have been RUB 18,800,000.
24. Lastly, the Coach contends that the present dispute is not subject to the jurisdiction of the Russian Federation. As the sole international governing body of volleyball worldwide, FIVB’s regulations apply to all its members. According to Article 45.11 of the Regulations, the FIVB has the jurisdiction for financial disputes between a coach and a club. If the dispute involves parties from the same confederation, as it is in the case at hand, the FIVB may delegate its powers to the respective confederation. Hence, the CEV had jurisdiction in this case.
25. As its Request for Relief, the Coach submits the following:

*“The Claimant respectfully seeks the following relief:*

- a) an order declaring that the Request for Review must be dismissed as unfounded and filed late,*
- b) an order and award that Respondent pay to Claimant the amount of EUR 35’152 net within 10 days from the date of the decision of the FIVB Tribunal; in case of*

*failure additional sanctions may be imposed by the FIVB;*

- c) an order and award that Respondent shall reimburse to Claimant the amount of EUR 400 for the handling fee;*
- d) an order and award that Respondent shall compensate Claimant for attorney's fees and other expenses incurred in connection with this proceeding."*

## **5. Jurisdiction**

26. The FIVB Tribunal Judge first has to examine whether he has jurisdiction to hear the present dispute. In order to do so, he has to look at the relevant provisions of the Regulations.

27. Article 2.1. of the Regulations reads, in relevant part, 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 [...]"*

28. 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"*

29. Article 2.3. of the Regulations grants the FIVB Tribunal the power to rule on its own jurisdiction.

30. Thus, in order for the FIVB Tribunal Judge to have jurisdiction over the dispute, he shall examine whether the conditions of both Articles 2.1. and 2.2. are satisfied.

31. The present dispute involves a claim for payment by a Dutch volleyball coach against his former Russian club. The FIVB Tribunal finds that this dispute clearly qualifies as a financial dispute of an international dimension between a coach and a club in accordance with the abovementioned Articles 2.1. and 2.2.1. of the Regulations.



32. Furthermore, the Request for Review at hand is made against the Decision, which was rendered by the Confédération Européenne de Volleyball (CEV). Indeed, the CEV decided the case in the first instance under Article 45.11 of the FIVB Sports Regulations. Therefore, the present Request for Review stems from a decision of a Confederation, and the FIVB Tribunal Judge holds that Article 2.2.2. of the FIVB Tribunal regulations is also satisfied.
33. Based on the above, the conditions of Articles 2.1. and 2.2. are satisfied.
34. The Club contested the FIVB Tribunal's competence to decide the present dispute asserting that the Article 6.7 of the 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 6.7 of the 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"*

35. The FIVB Tribunal Judge 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. Neither party asserted that the Parties failed to negotiate nor that there was any kind of negotiated agreement. 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.
36. Therefore, the FIVB Tribunal has jurisdiction over the present Request for Review pursuant to the Regulations.

## **6. Discussion**

### **6.1. Applicable Law**

37. 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).”*

38. Neither of the parties has contested the applicability of *ex aequo et bono* to the present dispute nor based their arguments on the merits any national law (the Club’s reference to Russian labour law was made solely in the framework of arguing that Russian courts would have exclusive jurisdiction). In light of the above, the FIVB Tribunal Judge will decide the issues submitted to it in this proceeding *ex aequo et bono*.
39. 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*”.<sup>1</sup>
40. In light of the foregoing matters, the FIVB Tribunal Judge makes the following findings.

## **6.2. Admissibility**

41. Pursuant to Article 45.11.2(a) of the FIVB Sports Regulations, any appeal against a decision of a Confederation must be filed within 14 days from notification of such decision. As already decided in its Procedural Order dated on 18 March 2016, the FIVB Tribunal finds that the Club’s Request for Review was timely filed (*see above* Section 3.2, para. 16).
42. In contrast, the FIVB Tribunal found in said Procedural Order that the Coach’s claim for compensation exceeding the amount awarded by the CEV Mediation Chamber is inadmissible (*see above* Section 3.2, para. 17). In this respect, the FIVB Tribunal Judge wishes to add 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

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<sup>1</sup> Poudret/Besson, *Comparative Law of International Arbitration*, London 2007, No. 717, pp. 625-626.

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). Also, there is no provision in the Regulations which would provide otherwise, i.e. depart from this Swiss law principle.

### **6.3. Findings**

43. The Claimant asserts that it was not properly notified of the CEV proceedings but that, instead, it received only the Decision of the CEV Mediation Chamber. The FIVB Tribunal Judge does not need to determine whether the Claimant indeed was not properly notified of the CEV proceedings. Even if this were the case, the resulting violation of the Claimant’s right to be heard would have been cured during the present proceedings, in which the Claimant had a full opportunity to argue its case, and in which the FIVB Tribunal Judge decides *de novo* (see Article 14.1 of the Regulations). Such curing effect of *de novo* appeal proceedings has also been recognised by the Court of Arbitration for Sport (*see, ex multis, CAS 2006/A/1177, para. 19 with further references*).
44. In its Request for Review, the Claimant alleges that it has paid the outstanding compensation for the 2012/13 season in the amount of EUR 2,115.53 on 23 September 2013, and that it has paid a partial amount of the outstanding compensation for the 2013/14 season, namely EUR 11,490.09 out of EUR 27,442.17, in three instalments on 26 September 2014, 30 December 2014 and 27 May 2015. According to the Claimant, therefore, only an amount of EUR 15,952.08 is still outstanding.
45. However, the Respondent has disputed having received those amounts.
46. First, the FIVB Tribunal Judge notes that it is uncontested that the Claimant admits that it still owes EUR 15,952.08. Consequently, the FIVB Tribunal Judge awards this amount. Therefore, the amount disputed between the parties is EUR 9,343.12, i.e. the difference between the EUR 25,295.20 awarded by the CEV Mediation Chamber in the first instance and the EUR 15,952.08 admitted by the Club (the FIVB Tribunal Judge notes that the Club has also challenged the amount of EUR 400 granted to the Respondent for the handling fee paid in the first instance; however, this is an issue that will be dealt with in the costs section below).

47. With respect to the Claimant's arguments about the remaining amount in controversy, the Claimant 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 Claimant must provide concrete proof supporting its allegations.
48. Turning to the evidence provided, the Claimant has asked that the FIVB Tribunal Judge overturn the decision, in essence, based on one document: a certificate issued by the Claimant's bank, listing payments that were purportedly made into the Respondent's bank account. However, this certificate is insufficient to prove the alleged payments. First, as to the alleged payment of EUR 2,115.53 on 23 September 2013, the certificate does not list any payment at all on this date. Hence, the Claimant failed to meet its burden of proof, and this amount is granted. Second, with respect to the three instalments allegedly paid on 26 September 2014, 30 December 2014 and 27 May 2015, the FIVB Tribunal Judge notes that the certificate indeed lists payments for those dates, and that (based on the exchange rates submitted by the Claimant, which were not disputed by the Claimant), those payments do, in fact, translate into the alleged partial payment for the 2013/14 season in the amount of EUR 11,490.09. However, the FIVB Tribunal Judge notes that the certificate only covers the period between 30 December 2013 and the last payment on 27 May 2015. Hence, it does not cover the first part of the 2013/14 season, and, thus, there is no proof for any amount paid during that period of time. It is therefore impossible for the FIVB Tribunal Judge to ascertain whether and to what extent the payments listed in the certificate were payments on the RUB 8,800,008 as owed under the Contract for the 2013/14 season, or whether and to what extent they were payments beyond the Coach's salary designed to compensate him for the exchange rate exceeding RUB 40 to EUR 1. Therefore, the Certificate is not sufficient proof of the Claimant's disputed allegation that this additional compensation was (partially) paid.
49. Accordingly, as the Club failed to meet its burden of proving that it paid the amount of EUR 11,490.09 as partial payment on the outstanding compensation for the 2013/14 season. Therefore, this amount is likewise granted.

#### **6.4. Costs**

50. In its Decision, the CEV ordered the Applicant to pay the full amount of costs of EUR 400 for the proceedings before the CEV. Given that the Decision was upheld in full and the Claimant's Request for Review was dismissed, the FIVB Tribunal finds that the Respondent is entitled to the

EUR 400 awarded in the Decision.

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

### **DECISION**

52. For the reasons set forth above, the Judge decides as follows:

- 1. The Request for Review filed by VK Dinamo Krasnodar is dismissed in its entirety.**
- 2. The decision rendered by the CEV Mediation Chamber dated 1 January 2016 is upheld in full.**
- 3. Each party shall bear its own costs.**
- 4. Any other further-reaching requests for relief are dismissed.**

Lausanne, seat of the proceedings, 4 August 2017.

Piotr Stolarski  
FIVB Tribunal Judge