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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0030/09 FAT)

rendered by

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Stephan Netzle

in the arbitration proceedings

Mr. Milos Vujanic, Ščerbinova Street 6, 11000 Belgrade, Serbia

represented by Goran Ristanovic, Olsta d.o.o., Zvecanska 60, 111000 Belgrade, Serbia

- Claimant -

vs.

Enterprise Men's Basketball Club "Dynamo" Moscow, Leningradsky Ave. 36/21, 125167

Moscow, Russia

- Respondent -



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1. The Parties

1.1. The Claimant

1. The Claimant is a professional basketball player. His representative Mr. Goran Ristanovic is a FIBA-licenced players agent domiciled in Belgrade, Serbia.

1.2. The Respondent

2. The Respondent is a basketball club from Moscow, Russia, competing in the superior Russian Basketball League. It is domiciled at Leningradsky Ave. 36/21, 125167 Moscow, Russia. The Respondent is not represented by counsel.

2. The Arbitrator

3. On 9 February 2009 the President of the FIBA Arbitral Tribunal (the "FAT") appointed Dr. Stephan Netzle as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Arbitration Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").
4. On 10 February 2009 the Arbitrator accepted his appointment and signed a declaration of acceptance and independence provided by the FAT Secretary.
5. None of the parties has raised objections to the appointment of the Arbitrator or to the declaration of independence rendered by him.



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3. Facts and Proceedings

3.1. Background Facts

6. On 27 November 2008, Claimant and Respondent signed a so-called "Agreement of refundable services No. 49" (the "Agreement") whereby the Claimant undertook to play in the first team of the Respondent during the 2007-2008 season and the Respondent promised to compensate the Claimant for his services. The parties agreed on a "basic price" (sic) of EUR 648,690. The compensation scheme was set out in the "Addendum #1 'Service Cost and payment procedure'" also dated on 27th November 2007 (the "Addendum").

3.2. The Proceedings before the FAT

7. On 26 January 2009 the Claimant filed a Request for Arbitration in accordance with the FAT Rules, which was received by the FAT on 27 January 2009. The non-reimbursable fee of EUR 3,000.00 was received in the FAT account on 26 January 2009.
8. By letter of 18 February 2009, the FAT Secretariat confirmed receipt of the Request for Arbitration and informed the parties of the appointment of the Arbitrator. In the same letter, a time limit was fixed for Respondent to file the Answer to the Request for Arbitration until 12 March 2009. The letter also requested the parties to pay by no later than 5 March 2009 the following amounts as an Advance on Costs:

<i>"Claimant (Mr Vujanic)</i>	<i>EUR 5,000</i>
<i>Respondent (MBC Dynamo Moscow)</i>	<i>EUR 5,000"</i>



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9. No answer was received from the Respondent, within the above-mentioned time limits.
10. By letter of 13 March 2009, the FAT Secretariat informed the parties that the Respondent had failed to submit its Answer to the Request for Arbitration and to pay its share of the Advance on Costs. In accordance with Article 9.3 of the FAT Rules, the Claimant was invited to substitute for the missing payment of the Respondent until 25 March 2009. The Claimant paid the Respondent's share of the Advance on Costs on 24 March 2009.
11. By letter dated 30 March 2009, the FAT Secretariat informed the parties that the entire Advance on Costs had been received by the FAT and that the arbitration would proceed. It also indicated that the exchange of documents was complete. The parties did not request the FAT to hold a hearing.
12. In the same letter of 31 March 2009, the Arbitrator invited the parties to submit a detailed account of their costs by no later than 6 April 2009.
13. On 1 April 2009, the Claimant submitted the following statement of account:

"1. Non-reimbursable handling fee per Request for Arbitration for the Player Milos Vujanic – 3.000 € - 23rd January 2009

2. Advance on Costs for FIBA Arbitral Tribunal for the player Milos Vujanic – 5.000 € - 26th February 2009

3. Advance on Costs for FIBA Arbitral Tribunal for the Club Dynamo Moscow – 5.000 € - 24th March 2009

Total on costs: 13.000 €"

14. The Respondent failed to submit an account of costs.



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4. The Positions of the Parties

4.1. The Claimant's Position

15. The Claimant submits that the parties signed an Agreement and the Addendum, both dated 27 November 2007. The Agreement covered the remaining season 2007/2008, i.e. from 27 November 2007 until 5 June 2008.
16. According to Clause 2.1 of the Addendum, a basic salary of EUR 648,690.00, payable in six equal monthly instalments was agreed.

"2.1 Within the validity period of the agreement the Club effects monthly payments according to the following schedule:

A. Season 2007-08

- *until _____ , 2007 – 108115 (one hundred and eight thousand one hundred and fifteen) Euro*
- *until _____ , 2008 – 108115 (one hundred and eight thousand one hundred and fifteen) Euro*
- *until _____ , 2008 – 108115 (one hundred and eight thousand one hundred and fifteen) Euro*
- *until March 20th, 2008 – 108115 (one hundred and eight thousand one hundred and fifteen) Euro*
- *until April 20th, 2008 – 108115 (one hundred and eight thousand one hundred and fifteen) Euro*
- *until May 20th, 2008 – 108115 (one hundred and eight thousand one hundred and fifteen) Euro"*

17. The Claimant submits that the Respondent failed to pay the last instalment of EUR 108,115.00, which was due on 20 May 2008.



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18. On the basis of the contentions set out above, the Claimant requests for the following relief:

“a) To award claimant Milos Vujanic with amount of EUR 108 115 plus interest at the applicable Swiss statutory rate, starting from the 20th May 2008.

b) To award claimants with the full covered the costs of this Arbitration.(sic)”

4.2. The Respondent's Position

19. Despite several invitations, the Respondent did not engage in the proceedings at hand and did not make any submissions.

5. Jurisdiction and other Procedural Issues

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

5.1. The jurisdiction of the FAT

5.1.1 Review ex officio

21. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent



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did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.¹

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

5.1.2 Arbitrability

23. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.²

5.1.3 Formal and substantive validity of the arbitration agreement

24. The existence of a valid arbitration agreement is to be examined in light of Article 178 PILA, which reads as follows:

"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law."

25. The jurisdiction of the FAT over the dispute between Claimant and the Respondent results from Clause 9 of the Agreement which reads as follows:

¹ ATF 120 II 155, 162.

² Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.



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"9. Disputes

9.1 In case of any dispute on the present agreement the parties will take all measures to solve them by negotiations.

9.2 If the dispute between the two Parties is not solved by means of negotiations then it should be resolved in accordance with the current Russian legislation.

9.3 If the dispute between the two Parties is not solved by means of negotiations, then any dispute arising or related to the present agreement shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile.

The language of the arbitration shall be English.

Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against of the FAT [sic] and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law.

The arbitrator and CAS shall decide the dispute ex aequo et bono."

26. Clause 9.3 of the Agreement contains the standard FAT arbitration clause by which the jurisdiction of the FAT is established.
27. The Agreement is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.
28. With respect to substantial validity, the Arbitrator considers that there is no indication in the file that could cast doubt as to the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording "[a]ny dispute on the present agreement" clearly encompasses the present dispute.
29. The Request for Arbitration does not indicate whether "all measures to solve [the



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dispute] by means of negotiations” as requested by Clause 9.3 have been utilized before the arbitration proceeding was commenced. However, assuming that the Claimant would not incur the time and costs of an arbitral proceeding if there was a chance of a settlement, it is up to the Respondent to object if it finds that no reasonable attempt to find a solution by negotiation was made. The Respondent did not raise such an objection.

30. At first sight there seems to be a conflict with Clause 9.2 which also addresses “dispute[s] [...] not solved by means of negotiations.” However, the reference to “the current Russian legislation” must be understood as a choice of law (see also Clause 10.1). In a broader sense, it may also be understood, when read in the context of Clause 9.3, as a general authorization to resolve disputes by arbitration as a dispute resolution method recognized by Russian law. In any event, Clause 9.2 does not set the agreement to arbitrate in Clause 9.3 aside.

5.2. Other Procedural Issues

31. Article 14.2 of the FAT Rules, which the Parties have declared to be applicable in the Agreement, specifies that: “the Arbitrator may nevertheless proceed with the arbitration and deliver an award” if “the Respondent fails to submit an Answer”. The Arbitrator's authority to proceed with the arbitration in the case of default of one of the parties is in



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accordance with Swiss arbitration law³ and the practice of FAT.⁴

32. This requirement is met in the current case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator, in line with the relevant rules. It was also given ample opportunity to respond to the Request for Arbitration. However, the Respondent preferred not to respond at all. In light of these circumstances, the Arbitrator considers himself fit to proceed with the arbitration and deliver the award.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

33. 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*”, by opposition to the decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally

³ Swiss Federal Tribunal SJ 1982, 613, 621; see also KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, Bern 2006, No. 483; LALIVE/POUDRET/REYMOND, Le Droit de l'arbitrage interne et international en Suisse, Lausanne, 1989, No. 8 ad Art. 182 PIL; RIGOZZI, L'Arbitrage international en matière de Sport, Basle 2005, No. 898; SCHNEIDER, Basler Kommentar, No. 87 ad Art. 182 PIL.

⁴ FAT Decision 0001/07 (Ostojic, Raznatovic vs. PAOK); FAT Decision 0018/08 (Nicevic vs. Besiktas JK).



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translated into English as follows:

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

34. Under the heading "Applicable Law", Article 15.1 of the FAT 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.”

35. In their agreement to arbitrate, the parties have explicitly directed and empowered the Arbitrator to decide the dispute ex aequo et bono. Considering the explicit reference to the FAT Rules, the Arbitrator finds that the authorization to decide the dispute ex aequo et bono prevails against the vague references to Russian legislation. Consequently, the Arbitrator will adjudicate the present matter ex aequo et bono.

36. 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'arbitrage⁵ (Concordat),⁶ 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

⁵ That is the Swiss statute that governed international and domestic arbitration before the enactment of the PIL. Today, the Concordat governs exclusively domestic arbitration.

⁶ P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PIL.



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*those rules.*⁷

37. 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”.⁸
38. This is confirmed by Article 15.1 of the FAT Rules *in fine* according to which the arbitrator applies “general considerations of justice and fairness without reference to any particular national or international law”.
39. In light of the foregoing developments, the Arbitrator makes the following findings:

6.2. Findings

40. The Claimant has produced with FAT the Agreement pursuant to which the Respondent owes him the amount of EUR 108,115.00. As Claimant now submits, the Respondent has, up to now, not effected the payment of this last instalment.
41. There are no circumstances which would create doubts as to the validity and enforceability of the Agreement or to the accuracy of the Claimant’s statement regarding the Respondent’s failure to pay the last instalment.

⁷ JdT 1981 III, p. 93 (free translation).

⁸ POUURET/BESSON, *Comparative Law of International Arbitration*, London 2007, No. 717, pp. 625-626.



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42. Hence, in light of the aforementioned developments, the Arbitrator concludes, deciding *ex aequo et bono*, that the Claimant is entitled to claim EUR 108,115.00 from the Respondent.
43. The Arbitrator's conclusions rest on the record as it stands and not on the mere fact that the Respondent has defaulted. Under these circumstances, the Arbitrator does not deem it necessary to call for further evidence.

7. Costs

44. Article 19.2 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and may either be included in the award or communicated to the parties separately. Furthermore Article 19.3 of the FAT Rules provides that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
45. On 4 May 2009 the President of the FAT rendered the following decision on costs:

"Considering that pursuant to Article 19.2(1) of the FAT Rules "the FAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of FAT and the fees and costs of the FAT President and the Arbitrator".

Considering that Article 19.2(2) of the FAT Rules adds that "the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the FAT President from time to time".

Considering all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and of the procedural questions raised, the President of the FAT determines the arbitration costs as follows:



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• <i>Arbitrator's fees</i> <i>(5 hours at an hourly rate of EUR 300)</i>	<i>EUR</i>	<i>1,500.00</i>
• <i>Arbitrator's costs</i>	<i>EUR</i>	<i>100.00</i>
• <i>Administrative and other costs of FAT</i>	<i>EUR</i>	<i>---</i>
• <i>Fees of the President of the FAT</i>	<i>EUR</i>	<i>800.00</i>
• <i>Costs of the President of the FAT</i>	<i>EUR</i>	<i>---</i>
TOTAL EUR	EUR	2,400.00

46. In the present case, the costs shall be borne by the Respondent alone in line with Article 19.2 of the FAT Rules, as the Claimant has been awarded its claim in its entirety and there is no indication that either the financial resources of the parties or any other circumstance compels otherwise.

47. Moreover, the Arbitrator wishes to note that, given the above allocation, there is no need to take into account the handling fee when allocating the costs of the arbitration to the parties as provided for by Article 19.1(2) of the FAT Rules.

48. Given that the Claimant has paid the totality of the Advance on Costs of EUR 10,000.00 as fixed by the Arbitrator, the Arbitrator decides that:

- (i) the FAT shall reimburse EUR 7,600.00. to the Claimant;
- (ii) the Respondent shall pay to the Claimant EUR 2,400.00, being the difference between the costs advanced by the Claimant and the amount which is going to be reimbursed to him by the FAT.



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- (iii) Furthermore, the Arbitrator considers it adequate that Claimant is entitled to the payment of a contribution towards his legal fees and other expenses (Article 19.3 of the FAT Rules). Since in the case at hand the payment by Claimant of the non-reimbursable handling fee was not taken into account when allocating the costs of the arbitration, the Arbitrator considers it adequate to take into account the non-reimbursable fee when assessing the expenses incurred by Claimant in connection with these proceedings. After having reviewed and assessed the submissions by Claimant, the Arbitrator fixes the contribution towards the legal fees and expenses of Claimant at EUR 5,000.00.

8. Interest

49. Claimant also requests payment of interests at the “applicable Swiss statutory rate, starting from the 20th May 2008”.
50. The Agreement does not contain an obligation to pay default interests if a payment is due. Payment of interests is a customary and necessary compensation for late payment and there is no reason why Claimant should not be awarded interests. Failing any explicit indication on the applicable interest rate, deciding *ex aequo et bono*, the Arbitrator concurs with the Claimant and takes recourse to the legal interest rate at the



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place of arbitration which amounts to 5%⁹.

51. The Arbitrator considers that the appropriate date for the interest to become payable from is 20 May 2008 and therefore finds that interest at the applicable rate of 5% on the amount of EUR 108,115.00 becomes payable from 20 May 2008 on.

⁹ Art. 104.1 Swiss Code of Obligation: If an obligor is in default as to the payment of a financial debt, he shall pay default interest at five percent per annum, even if the contract provides for a lower rate.



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9. AWARD

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

- 1. MBC Dynamo Moscow shall pay to Milos Vujanic EUR 108,115.00 plus interests of 5% p.a. since 20 May 2008.**
- 2. MBC Dynamo Moscow shall pay to Milos Vujanic EUR 2,400.00 as reimbursement of the Advance on Costs for the arbitration.**
- 3. MBC Dynamo Moscow shall pay to Milos Vujanic EUR 5,000.00 as a contribution towards Milos Vujanic's legal fees and expenses.**

Geneva, 12 May 2009

Stephan Netze
(Arbitrator)



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Notice about Appeals Procedure

cf. Article 17 of the FAT Rules
which reads as follows:

"17. Appeal

Awards of the FAT can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland and any such appeal must be lodged with CAS within 21 days from the communication of the award. The CAS shall decide the appeal *ex aequo et bono* and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure."