We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0031/09 FAT)

rendered by

FIBA ARBITRAL TRIBUNAL (FAT)

Mr: Stephan Netzle

in the arbitration proceedings

Mr. Nenad Misanovic, c/o Olsta d.o.o. Zvecanska 60, 11000 Belgrade, Serbia
represented by Mr. Goran Ristanovic., Olsta d.o.o., Zvecanska 60, 11000 Belgrade, Serbia

- Claimant 1 -

Mr. Goran Ristanovic, Olsta d.o.o., Zvecansa 60, 11000 Belgrade, Serbia

- Claimant 2 -

or jointly referred to as "the Claimants"

vs.

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

- Respondent -

Av. Louis Casaï 53
P.O. Box 110
1216 Cointrin / Geneva
Switzerland

Tel: (+41-22) 545 0000
Fax: (+41-22) 545 0099
info@fiba.com
www.fiba.com

1. The Parties

1.1. The Claimants

1. Claimant 1 is a professional basketball player. His representative and also Claimant 2, Mr. Goran Ristanovic, is a FIBA-licensed players agent domiciled in Belgrade, Serbia. Claimant 2 is the general manager and owner of Olsta d.o.o., Basketball Agency, Belgrade.

1.2. Respondent

2. 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. 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.

3. Facts and Proceedings

3.1. Background Facts

6. On 18 February 2008, Claimant 1 and Respondent signed a so-called "Agreement of refundable services" (the "Player Agreement") whereby Claimant 1 undertook to play in the first team of Respondent during the 2007-2008 season and Respondent promised to compensate Claimant 1 for his services. The parties agreed on a "basic price" (sic) of USD 150,000. The compensation scheme was set out in the "Addendum #1 'Service Cost and payment procedure'" also dated on 18th November 2007 (the "Addendum 1").

7. On 12 February 2008, Claimant 2 and Respondent signed a so-called "Agreement of refundable services No 16-A (the "Agent Agreement"). Claimant 2 undertook, among other obligations, to "effect all necessary actions to select players on the territory of Serbia (and) to conduct negotiations on behalf of the Club with the Player Nenad Misanovic (Serbia) or other persons representing his interests." Respondent agreed to pay to Claimant 2 a service fee in the amount of USD 11,000 on or before 1 March 2008 and USD 11,500 before 1 April 2008.

3.2. The Proceedings before the FAT

8. On 26 January 2009 the Claimants 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 was received in the FAT account on 5 February 2009.

9. 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:

"Claimant 1 (Mr Misanovic)	*EUR 4,000*
Claimant 2 (Mr Ristanovic)	*EUR 2,000*
Respondent (MBC Dynamo Moscow)	*EUR 6,000"*

10. No answer was received from Respondent, within the above-mentioned time limits.

11. By letter of 13 March 2009, the FAT Secretariat informed the parties that 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 Claimants were invited to substitute for the missing payment of Respondent until 25 March 2009. The Claimants paid Respondent's share of the Advance on Costs on 24 March 2009.

12. By letter dated 31 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. The parties did not request the FAT to hold a hearing.

13. 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.

14. On 1 April 2009, the Claimants submitted the following statement of account:

> *"1. Non-reimbursable handling fee per Request for Arbitration for the player Nenad Misanovic and the agent Goran Ristanovic – 3.000 € - 5th February 2009*
>
> *Advance on Costs for FIBA Arbitral Tribunal for the player Nenad Misanovic and the agent Goran Ristanovic – 6.000 € - 26th February 2009*
>
> *Advance on Costs for FIBA Arbitral Tribunal for the Club Dynamo Moscow – 6.000 € – 24th March 2009*
>
> ***Total on costs: 15.000 €"***

15. Respondent failed to submit an account of costs.

4. The Positions of the Parties

4.1. The Claimants' Position

16. Claimant 1 submits that the parties signed a Player Agreement and the three Addendums, all dated 18 February 2008. The Player Agreement covered the rest of the season 2007/2008 which lasted from 18 February 2008 until 5 June 2008.

17. According to Addendum 1, a basic salary of USD 150,000, payable in three equal monthly installments 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 Mach 10th, 2008 – 50000 (fifty thousand) USD net

Until April 10th, 2008 – 50000 (fifty thousand USD net

Until May 10th, 2008 – 50000 (fifty thousand) USD net"

18. Claimant 1 submits that Respondent failed to pay the second and third instalments of USD 50,000 each, i.e. a total sum of USD 100,000.

19. Claimant 2 submits that Respondent failed to pay the service fee as agreed in clause 3 of the Agent Agreement:

*"3.**SERVICES COST AND PAYMENT PROCEDURE***

3.1Services cost by the present Agreement is payable net of Russian taxes and is paid in two portions:

3.1.1 The first payment the Club pays to the Executor in the amount of 11 000 (Eleven thousand) US dollars before March 01, 2008;

3.1.2 The second payment the Club pays to the Executor in the amount of 11 500 (Eleven thousand five hundred) US dollars before April 1, 2008."

20. On the basis of the contentions set out above, the Claimants request for the following relief:

"a) To award claimant Nenad Misanovic with amount of 100.000 USD net plus interest at the applicable Swiss statutory rate, starting from the 10th April 2008 (for one instalment of 50.000 USD net) and starting from the 10th May 2008 (for the second instalment of 50.000 USD net).

b) To award claimant Goran Ristanovic with amount of 21.500 USD net (sic) plus interest at the applicable Swiss statutory rate, starting from the 1st March 2008 for the first instalment and starting from the 1st April 2008 for the second instalment

c) To award claimants with the full covered the costs of this Arbitration.(sic)"

4.2. Respondent's Position

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

5. Jurisdiction and other Procedural Issues

22. 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

23. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration, he will examine his jurisdiction *ex officio,* on the

basis of the record as it stands.[1]

24. 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

25. 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 agreements

26. 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."*

27. The jurisdiction of the FAT over the dispute between **Claimant 1** and the Respondent results from Clause 9 of the Player Agreement which reads as follows:

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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.

> *"**9. Disputes***
>
> *9.1In 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."*

28. Clause 9.3 of the Player Agreement contains the standard FAT arbitration clause by which the jurisdiction of the FAT is established.

29. 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.

30. The Request for Arbitration does not indicate whether “all measures to solve [the dispute] by means of negotiations” as requested by Clause 9.3 have been utilized

before the arbitration proceeding has been commenced. However, the Arbitrator holds that it is up to Respondent to object if it finds that this requirement was not met. Respondent did not raise such an objection.

31. At first sight there seems to be a conflict with Clause 9.2 according to "dispute[s] […] not solved by means of negotiations then it should be resolved in accordance with the current Russian legislation." However, the reference to "the current Russian legislation" must be understood as a choice of law provision (see also clause 10.1). In a broader sense, it may also be understood, when read in the context of Clause 9.3, also 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 aside the agreement to arbitrate in Clause 9.3.

32. The arbitration agreement is in written form and thus fulfills the formal requirements of Article 178(1) PILA.

33. With regard to the claim of **Claimant 2**, the Arbitrator notes that the Agent Agreement has been concluded between "Olsta" and Respondent. However, the Agent Agreement was signed by Claimant 2 without any reference to "Olsta". In addition, the FIBA license for certified agents has been issued to the Claimant 2 and not to "Olsta". The Arbitrator is therefore satisfied that it was actually Claimant 2 who was a party to the Agent Agreement, and not "Olsta".

34. The jurisdiction of FAT results from Clause 5 of the Agent Agreement which says:

> *"5.1 All disputes, discords, requirements arising on the basis or in connection with the present Agreement should be solved by means of negotiations with maximum attempt of the parties to resolve the matter peacefully, if otherwise, then in court in accordance with current international legislation.*

> *5.2 The Club and the Executor agree that any dispute arising from or related to the present agreement shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved definitively in accordance with the FAT Arbitration Rules by a single arbitrator appointed by 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) in Lausanne, Switzerland. The parties expressly waive recourse to 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."*

35. This clause corresponds to the standard FAT arbitration clause. It is also in written form and thus fulfils the material and formal requirements of Art. 178(1) PILA.

5.2. Other Procedural Issues

36. 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 accordance with Swiss arbitration law[3] and the practice of FAT.[4]

37. This requirement is met in the current case. 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.

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[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).

However, 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*

38. 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 translated into English as follows:

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

39. 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."*

40. 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 the vague references to Russian legislation. Consequently, the

Arbitrator will adjudicate the present matter *ex aequo et bono.*

41. 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*[5] (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 those rules."*[7]

42. 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]

43. 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".

44. In light of the foregoing developments, the Arbitrator makes the following findings:

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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.

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

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

6.1. Findings

45. Claimant 1 has produced with FAT the Player Agreement pursuant to which Respondent owes him the amount of USD 100,000 (net). Claimant 1 submits that Respondent has, up to now, not effected the payment of the second and third instalments. According to Addendum 3 to the Player Agreement, this is considered to be the net amount which the Player shall actually receive after tax and fees for the auditing firm had been paid (i.e. "net").

46. Claimant 2 has produced with FAT the Agent Agreement pursuant to which Respondent owes him USD 21,500 (net of Russian tax), payable in two instalments of which USD 11,000 were due "before 1 March 2008" and USD 11,500 were due "before 1 April 2008. By analogy to the above finding, the Arbitrator concludes that the amount of USD 21,500 corresponds to the amount which shall actually be transferred to Claimant 2.

47. There are no circumstances which would create doubts as to the validity and enforceability of the Player Agreement and the Agent Agreement or to the accuracy of the Claimants' statement regarding the Respondent's failure to pay the second and third instalments of the price for the Player's services and the two instalments of the service fee for the agent.

48. In light of the aforementioned principles, the Arbitrator concludes, deciding *ex aequo et bono* that Claimant 1 is entitled to claim USD 100,000 from Respondent and that Claimant 2 is entitled to claim USD 22,500 from Respondent.

49. The Arbitrator's conclusions rest on the record as it stands and not on the mere fact that Respondent has defaulted. Under these circumstances, the Arbitrator does not

deem it necessary to call for further evidence.

7. Costs

50. 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.

51. 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:

• *Arbitrator's fees (7 hours at an hourly rate of EUR 300)*	*EUR*	*2,100.00*
• *Arbitrator's costs*	*EUR*	*100.00*
• *Administrative and other costs of FAT*	*EUR*	*---*

• *Fees of the President of the FAT*	*EUR*	*910.00*
• *Costs of the President of the FAT*	*EUR*	*---*
TOTAL EUR	***EUR***	***3,110.00***

52. In the present case, the entire costs shall be borne by Respondent in line with Article 19.2 of the FAT Rules, as Claimants have been awarded their claims in full and there is no indication that either the financial resources of the parties or any other circumstance compels otherwise.

53. 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.

54. Given that the Claimants have 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 8,890.00 to the Claimants;

(ii) Respondent shall pay to the Claimants EUR 3,110.00, being the difference between the costs advanced by the Claimant and the amount which is going to be reimbursed to him by the FAT.

(iii) Furthermore, the Arbitrator considers it adequate that Claimant 1 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 1 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 1 in connection with these proceedings. After having reviewed and assessed the submissions by Claimant 1, the Arbitrator fixes the contribution towards the legal fees and expenses of Claimant 1 at EUR 5,000.00.

8. Interest

55. Claimants also request payment of interests at the "applicable Swiss statutory rate", starting from the dates on which the second and third instalments of the player's compensation and first and second instalment of the agent fee became due:

56. The Agreement does not contain an obligation to pay default interests if a payment is due. However, payment of interests is a customary and necessary compensation for late payment and there is no reason why Claimants should not be awarded interest. Failing any explicit indication on the applicable interest rate, deciding *ex aequo et bono*, the Arbitrator concurs with Claimants and takes recourse to the legal interest rate at the place of arbitration which amounts to 5%[9].

57. The Arbitrator considers that the appropriate date for the interest to become payable as follows:

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[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.

5% on USD 11,000 beginning on 1 March 2008 (agent's service fee)

5% on USD 11,500 beginning on 1 April 2008 (agent's service fee)

5% on USD 50,000 beginning on 10 April 2008 (player's compensation)

5% on USD 50,000 beginning on 10 May 2008 (player's compensation)

9. AWARD

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

1. **MBC Dynamo Moscow shall pay to Nenad Misanovic USD 100,000.00 plus interests of 5% p.a. on USD 50,000 since 10 April 2008 and 5% p.a. on 50,000 since 10 May 2008.**

2. **MBC Dynamo Moscow shall pay to Goran Ristanovic USD 22,500.00 plus interests of 5% p.a. on USD 11,000 since 1 March 2008 and 5% p.a. on 11,500 since 1 April 2008.**

3. **MBC Dynamo Moscow shall pay jointly to Nenad Misanovic and Goran Ristanovic EUR 3,110.00 as a reimbursement of the Advance on Costs for the arbitration.**

4. **MBC Dynamo Moscow shall pay to Nenad Misanovic EUR 5,000.00 as a contribution towards Nenad Misanovic's legal fees and expenses.**

Geneva, 12 May 2009

Stephan Netzle

(Arbitrator)

FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

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."