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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0051/09 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Mr. Svetislav Pešić, c/o Interperformances Inc, Via Degli Aceri 14,
Gualdicciolo 47892, Republic of San Marino

represented by Mr. John B. Kern, 180 E. Bay Street, Ste 200,
Charleston, SC 29401 USA

- 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. Mr. Svetislav Pešić (the “Coach” or “Claimant”) is a basketball coach, who was working for the basketball club Enterprise Men’s Basketball Club “Dynamo” Moscow at the time the dispute arose.

1.2. The Respondent

2. Enterprise Men’s Basketball Club “Dynamo” Moscow (the “Club” or “Respondent”) is a professional basketball club in Russia.

2. The Arbitrator

3. On 28 August 2009, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Prof. Dr. Ulrich Haas as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules"). Neither of the Parties has raised objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

4. On 23 June 2007, the Parties entered into an employment contract drafted side-by-side in the Russian and English languages and entitled “Agreement # of refundable rendering of services #22T” (the “Contract”) with three Addenda: Addendum No. 1 entitled “Services cost and payment procedure” (“Addendum No. 1”), Addendum No. 2



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entitled “Additional bonuses Payment procedure” (“Addendum No. 2”) and Addendum No. 3 entitled “Additional obligations of the Parties” (“Addendum No. 3”). Pursuant to the Contract the Club engaged the Claimant as coach for its team for the seasons 2007-2008 and 2008-2009.

5. In its relevant parts the English text of the Contract reads as follows:

“2. Obligations of the Parties

2.1.1 For the purpose foreseen in this contract the following will be responsibilities of the coach: [...]

(f) The Coach must be present at all team practices and games unless he has just cause (diseases causes, injuries, private and force-majeur[e] matters), having club permission. [...]

2.1.7 Not to sign any similar agreements with any other countries and organizations, except contracts with any National Federation of Basketball about National teams of this Federations (sic). [...]

4. Agreement period

4.1 The present agreement is signed between Club and Executor for the period from 23rd of June, 2007 till June 15, 2009.

5. Procedure of Agreement termination

5.1 The present agreement cannot be terminated by any of the Parties unilaterally ahead of time except for the cases mentioned in the present chapter of the agreement.

5.2 Executor has a right to terminate the present agreement unilaterally in case the Club does not fulfil its obligations on terms of service payment provided in Addendum No.1 article 2 for more than 1 (one) month.

5.3 The present agreement can be terminated by one side in case the Executor didn't fulfil his obligations specified in the article 2.1.1 and 2.1.7 of the present agreement. The Club must first hand in the Executor a letter in which is written that termination of the present contract is possible.

[...]

7. Responsibilities of the Parties



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For non-fulfillment of obligations by the present Agreement both parties bear responsibility in accordance with the current legislation of Russian Federation.

8. Force-majeur[e]

8.1 The parties are released of responsibility for non-fulfillment or improper execution of their obligations by the present Agreement under the circumstances of force majeure which are specified as natural calamities, mass riots, prohibiting actions of authorities, military actions, terrorist acts and other force majeure circumstances as referred by international law and legislation of Russian Federation.

9. Disputes

9.1 In case of disputes on the present Agreement the parties will take all measures to solve them by negotiations.

9.2 If the dispute between the parties is not resolved by way of negotiations then it should be resolved in accordance with the current Russian legislation.

9.3 If the dispute between the parties is not resolved by way of negotiations or in case of disagreement with the decision of the Arbitral body according to the article 9.2 of the present agreement of any party then it should be resolved in accordance with the FIBA Arbitral Tribunal (FAT) as follows:

Any dispute arising from or related to the present contract 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 awards of the FAT 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 upon appeal shall decide the dispute ex aequo et bono.

In the event that a party to a FAT Arbitration fails to honor a final award (the "first party") of FAT or of the Court of Arbitration for Sport upon appeal against a FAT award, the party seeking enforcement of such award (the "second party") shall have the right to request



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that FIBA sanction the first party. The following sanctions can be imposed by FIBA:

- a) a monetary fine of up to EUR 100,000.00; this fine can be applied more than once; and or,*
- b) withdrawal of FIBA-license if the first party is a player's agent;*
- c) a ban on international transfers if the first party is a player/coach;*
- d) a ban on registration of new players if the second party is a Club.*

10. Other terms and conditions

10.1 In all the other aspects not stipulated by the present agreement both parties follow current legislation of Russian Federation. [...]

10.4 The present Agreement is made in two fold, in English and Russian languages. The English version is the exact copy of the Russian version. Therefore both versions are considered to be equal."

6. Addendum No. 1 (English text) reads in its relevant part as follows:

"1. Services Cost [...]

1.2 Basic cost of Executor's services:

1.2.1 For the season 2007/08 by the agreement makes 1081138 (one million eighty one thousand one hundred and thirty eight) Euro

1.2.2 For the season 2008-09 by the agreement makes 1081138 (one million eighty one thousand one hundred and thirty eight) Euro [...]

1.4 Season term 2007-2008 is from 23d of June 2007 till June 5, 2008.

1.5 Season term 2008-2009 is from August 1. 2008 till June 5, 2009.

2. Payment procedure

2.1 During the agreement validity the Club effects monthly payments according to the following schedule:

A. Season 2007-2008

[...]

- until April 30, 2008 – 86492 (eighty six thousand four hundred and ninety two) Euro.

- until May 30, 2008 – 86492 (eighty six thousand four hundred and ninety two)



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Euro. [...]

3. *Special terms*

3.1 *In case Executor gets injured during the process of fulfilment of his obligations the Club effects payments stipulated in paragraph 2.1 of Addendum No.1 in full volume until the moment of Executor's full recovery.*

[...]

3.4 *In case of Termination of the present agreement ahead of time according to article 5.2 of the present agreement the Club will have to fulfil their financial obligations until the end of the contract in one instalment at the official termination of the contract.*

3.5 *In case of termination of the contract ahead of time made for reasons stipulated in the article 5.3 of the present agreement either under initiative of the Executor for reasons not specified in the article 5 of the present agreement, the Executor has to fulfil his financial obligations until the end of the contract including immediate payment to the Club a forfeit calculated as the sum of payments done by the Club to the Executor during the season on the date of termination of the contract and the compensation of 400 000 (Four hundred thousand) Euro.*

In case of termination of the contract ahead of time made for reasons stipulated in the article 5.3 of the present agreement either under initiative of the Executor for reasons not specified in the article 5 of the present agreement in the period of June 5 – September 1 2008. The Executor must Pay penalty to the Club as 1 000 000 (One million) Euro. In that case the Club after receiving the above mentioned sums, will not be entitled to resort to any other remedy whatsoever nor may it withhold or deny any transfer or clearance possibly required by the Coach.”

7. Addendum No. 3 (English text) which provides for a number of amenities that the Club had to put at the Coach's disposal, reads in its relevant part as follows:

“1.2 Club is obliged:

[...]

1.2.6 The Club pays for all medical and hospitalization expenses of Executor and his family.”

8. A few days before entering into the Contract, on 15 June 2007, the Club had signed an agreement (“Agency Agreement”) with the basketball agency “Executive Pro Management” (“Agency”) represented by the FIBA licensed agent Dr. Luciano



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Capicchioni (“Agent”). The Agency Agreement reads in relevant part as follows:

“2. DUTIES OF THE PARTIES

2.1 Executor’s Obligations:

2.1.1 *Executor is obliged at his own expense to effect all necessary actions to select coaches on the territory of Serbia, in particular:*

- *To conduct negotiations on behalf of the Club with Svetislav Pesic (Serbia) or other persons representing his interests.*
- *To ensure preparation of signing of the agreement of refundable services Svetislav Pesic with the Club;*
- *To do other actions necessary to fulfil his obligations by the present Agreement.*

[...]

2.2 Club’s obligations

2.2.1 *To pay to Executor for his services in time determined in paragraph 3.2 (sic) of the present Agreement.*

3. SERVICES COST AND PAYMENT PROCEDURE

[...]

3.1.1 *The first payment accounts for 50.000 (Fifty Thousand) Euro and is paid by November 1, 2007 in case Svetislav Pesic signed the contract of Refundable Services with the Club for the season 2007-2008.*

3.1.2 *The second payment accounts for 50.000 (Fifty Thousand) Euro and is paid by April 1, 2008 in case Svetislav Pesic signed the contract of Refundable services with the Club for the season 207-2008.*

3.1.3 *The third payment accounts for 50.000 (Fifty Thousand) Euro and is paid by November 1, 2008 in case Svetislav Pesic and the Club signed the contract of Refundable services for the season 2008-2009 and didn’t terminate it after the season 2007-2008.*

3.1.4 *The fourth payment accounts for 50.000 (Fifty Thousand) Euro and is paid by April 1, 2009 in case Svetislav Pesic and the Club signed the contract of Refundable services for the season 2008-2009 and didn’t terminate it after the season 2007-2008.*



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4. VALIDITY OF THE AGREEMENT

[...]

4.4 In case if after the end of the season 2007-2008 the Club and Svetislav Pesic terminate the contract for Refundable services, the validity of the present agreement stops automatically and the Club is released from its obligations according to the article 3.1.3 and 3.1.4 of the present agreement.

5. RESPONSIBILITIES OF THE PARTIES

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."

9. During the first months of the 2007-2008 season and until mid-April 2008 the Coach performed his duties and was paid by the Club in accordance with the Contract.
10. On 15 April 2008 the Club's team held a win-loss record of 15-9 in the Russian Super League and had just returned from the ULEB Cup Final Eight in Turin, Italy, where it had occupied the third place.
11. On the same day, a meeting took place between the Coach and Club representatives, President Mr. Evgeny Gomelski and General Director Mr. Gennady Drozdov ("Mr. Drozdov"). What exactly happened at this meeting is disputed between the Parties. On the one hand the Coach submits that he was informed that he would no longer be the Club's coach, while the Club argues that the Parties reached an oral agreement to mutually terminate the Contract.
12. Following the meeting, Mr. Drozdov, acting on behalf of the Club, sent the following letter to the Agent:

"Official statement

MBC Dynamo-Moscow agrees, that Svetislav Pesic can fail to hold practices and games of the Club until the mutual agreement about termination settlement of the contract between Dynamo-Moscow and Svetislav Pesic is signed.



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*MBC Dynamo-Moscow
General director
Gennady Drozdov”*

13. The official website of the Club reported also on the same day that

“Dynamo Moscow and head coach Svetislav Pesic parted way on Tuesday – two days after the team placed third at the ULEB Cup Final Eight in Turin, Italy. Pesic’s top assistant, Sergey Bazarevich, takes over the active coaching duties ahead of the Russian League playoffs. Pesic, 59, a Euroleague champion as a player and coach was in his first season with the club. Under Pesic, Dynamo had failed to meet any of its top goals this season. The club lost its ULEB Cup semifinal to eventual winner DKV Joventut and is ranked only fifth in the Russian League.”

14. On 16 April 2008 the Agent acting on behalf of the Coach replied as follows:

“Dear Mr Drozdov,

In reference to your note of April 15th 2008, this letter shall serve as formal notice that coach Svetislav Pesic will comply to your request to refrain from participating in training sessions, games and other Club activities.

However, I am writing to inform you that we intend to protect and enforce all the contractual rights and obligations owed to Mr Pesic as articulated in his agreement with your Club.

While waiting for your reply.

Best Regards,

Luciano Capicchioni”

15. On 18 April 2008 Mr. Drozdov sent another letter to the Agent together with an “Agreement about termination of the Agreement of refundable services No.22-T dated from 18.12.2007 (sic) between MBC Dynamo-Moscow and Svetislav Pesic upon mutual consent” (“Mutual Termination Agreement”) which was already signed and sealed by the Club. The letter reads:

“Dear Mr Capicchioni,

I received your letter dated April 16th 2008 and unfortunately I need to tell you that you misunderstood [the] position of the Club, described in our letter dated from April 15th,



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2008. Here is the chronology of the situation:

On the 15th April there was a meeting where our President Mr Gomelskiy, Mr Pesic and me were present. We discussed the situation in the team and came to the mutual decision that agreement between the Club and S. Pesic is terminated by mutual consent. We offered Mr Pesic to pay the rest of his salary for the season 2007-2008, keeping in mind that there are two more months till the end of the season, and Mr Pesic will not coach the team. After that meeting we sent you the letter where we admitted that the Club agrees that Pesic can not to hold practices and games of the Club until termination of the agreement is settled, also for S. Pesic is being operated. We would like to state one more time that nobody dismissed Mr Pesic from his position of the Head coach of the Club. That decision was made on the basis of mutual wishes of the parties and the situation in the Club, connected with team's results in the season 2007-2008.

We are sending you agreement about termination of the contract by mutual consent and kindly ask you to have it signed by Mr Pesic. [...]"

16. On 21 April 2008 the Agent replied as follows:

"Dear Mr Drozdov,

Reference is made to your letter dated 18th of April whose contents are hereby entirely rejected as very inaccurate and grossly misleading. Please note the following:

1) The decision to terminate Mr Pesic's two-year, guaranteed contract was not at all made by mutual consent between the parties. Actually it was a one-sided decision suddenly adopted by Dinamo (sic) Moscow with no contractual grounds whatsoever nor with any prior consultation/concertation with Mr Pesic;

2) Never did Mr Pesic accept the Club's decision at any of the meetings held since then between him and the Club's management and owner. Actually he attended all these meetings simply to try and understand a bit better what was going on and what could have spurred the early termination move, yet all he managed to gather was useless words of embarrassment, apologies and regret by Mr Mihilowsky, Mr Drozdov and other Club representatives in attendance;

3) Hence your allegation that "... the decision was made on the basis of mutual wishes of the parties and the situation in the Club, connected with team's results in the season 2007-2008" is entirely inaccurate and false;

4) If Dynamo Moscow is not happy with the results achieved by the team under Mr Pesic's lead (which in fact seems to be the only and very reason why they now want to terminate the coach one year earlier than the contract's natural expiry), they should take full responsibility for such decision, confirm it in writing to the coach and in a public statement and, mostly, honour all financial obligations under Mr Pesic's contract through to its natural expiry date;



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5) *Mr Pesic is absolutely not prepared to accept this unilateral early termination and you should be warned that he will challenge immediately it before any appropriate venue as well as make sure that the public opinion and the Dynamo's supporters are made aware of the very ambiguous, awkward and unfair circumstances under which the Club's decision was taken and eventually implemented against Mr Pesic as a done-deal;*

6) *Should Dynamo Moscow wish to avoid the very negative fallback that an inevitable lawsuit brought by Mr Pesic would definitely trigger in terms of both financial charges and bad image repercussions in the face of the Club, we strongly recommend you make immediate contact with us before Mr Pesic issues instructions to his legal counsel, something which will otherwise happen in the next few weeks."*

17. On 24 April 2008 Mr. Drozdov sent another letter to the Agent in the following terms:

"Dear Mr Cappinchioni (sic)

I received your letter dated 21.04.2008, which embarrassed me a little, because I believe the decision about termination of the contract between Pesic and Dynamo was defined by circumstances. We didn't turn Pesic out of the house as some sources of information present it.

Mr Pesic didn't have a guaranteed contract with Dynamo-Moscow, because if you read the contract carefully, you will never see there any reference about guaranteed payments for service not rendered by Executor, except the case when the Club delays payment of his salary for more than a month. Bearing in mind our friendly relations with Mr Pesic, we are ready to pay him 240 000 Euro – the rest of his salary for the season 2007-2008 for services not rendered by him.

The day before yesterday I had a meeting with Mr Pesic where we thanked each other for work and stated that our termination should be a mutual result of our work and as Mr Pesic said it should be "human", but he didn't specify what he meant and said that he should think.

After all that had been said we offer you our variant of contract termination – we pay Mr Pesic the rest 240 000 Euro for the season 2007-2008 and we sign the agreement about mutual termination as there are no other documented reasons which would describe why Pesic doesn't work in Dynamo-Moscow."

18. The Coach did not reply to the above letter either directly or through the Agent.

19. In the meantime, on 16 April 2008 the Coach underwent an operation on his right knee, performed at the Moscow clinic "European Medical Center". The expenses of this medical treatment were covered by the Club.



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20. After the above exchange of correspondence and the Coach's surgery, the Coach did not return to the Club and the latter did not pay his salaries due on 30 April and 30 May 2008.
21. On 20 August 2008 the Coach signed an employment contract with the Serbian club Crvena Zvezda (also known as Red Star) covering the 2008-2009 season and providing for a total salary of EUR 400,000 ("the Red Star Contract").
22. Both before and after the filing of the Request for Arbitration at hand, the Parties attempted to find an amicable solution to the dispute. However, to date, their efforts to reach a settlement have been unsuccessful.

3.2. The Proceedings before the FAT

23. On 5 June 2009, the Claimant filed a Request for Arbitration with fourteen exhibits in accordance with the FAT Rules, and on 12 August 2009 he duly paid the non-reimbursable fee of EUR 7,000.
24. On 28 August 2009, the FAT informed the Parties that Prof. Dr. Ulrich Haas had been appointed as the Arbitrator in this matter and fixed the amount of Advance on Costs to be paid by the Parties as follows:

*"Claimant (Mr. Pesic) EUR 10,000
Respondent (BC Dynamo Moscow) EUR 10,000"*

25. On 17 September 2009, the Club filed with FAT its Answer with five exhibits.
26. On 24 September 2009, the Claimant paid his share of the Advance on Costs in an amount of EUR 10,000.
27. On 29 September 2009, the FAT Secretariat informed the Claimant that he would have to substitute for the Club with respect to the Advance on Costs because the latter had



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not paid its share thereof.

28. On 20 October 2009 the Claimant requested the Arbitrator to *“reconsider the total amount of fees which will be necessary [...] to address the coach's claims in this case. We have not requested a hearing and the matter appears to us to be rather straightforward.”*

29. On 28 October 2009 the Arbitrator forwarded the Answer to the Claimant and informed the Parties that *“in view of the parties' submissions to date, there exist no grounds to reconsider his decision on the amount of the Advance on Costs, as communicated to the parties by FAT's letter dated 28 August 2009.”*

30. On 6 November 2009 counsel for the Claimant wrote to the FAT as follows:

“[...] Now that the pleadings have been circulated in this case, we believe that there exists a basis for the parties to engage in meaningful negotiations and/or a mediation of the dispute with a view toward a prompt and autonomous resolution.

I will be communicating with representatives of Dynamo in an effort to organize a settlement discussion. Depending on the progress of our discussions, we may request that the arbitrator take a role in assisting our negotiations pursuant to Rule 12.3, or recommending to the parties other candidates to serve as a mediator.

If we determine that we are unable to progress this matter towards a resolution, Claimant will submit the requested balance of €10,000.00 as arbitrator's fees otherwise due from the Respondent (or the Claimant as a surrogate) and will ask that the case be recommended. [...]”

31. On 11 November 2009 the Arbitrator informed the Parties that

“In view of the submissions made by the Claimant the Arbitrator has decided to suspend the proceedings in order to help the parties reach a settlement. If no objections are raised by the Respondent until Monday, 16 November 2009, the proceedings will be stayed until 30 November 2009.”

32. No objections were raised by the Respondent within the said time-limit.

33. On 7 December 2009 counsel for the Claimant wrote to the FAT as follows:



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“[...] Please be advised that in spite of our efforts to recommence settlement negotiations with MBC Dynamo Moscow during the past few weeks over the issues in the pending arbitration, the Club has failed to respond to our several entreaties.

Therefore the Coach will forthwith advance the portion of the costs which are otherwise the responsibility of the Club in the amount of €10,000.00 to the FAT. We will anticipate that the Tribunal will proceed with the administration of the case and that the arbitrator will bring the matter to a swift conclusion. [...]”

34. On 1 February 2010 the Arbitrator issued a procedural order whereby he informed the Parties that he had decided to allow a further exchange of submissions exclusively on the issue of jurisdiction and invited them to provide the FAT by no later than 15 February 2010 with:

“1. a certified English translation of the Russian version of clause 9 of the Agreement dated 23 June 2007 (“Agreement”);

2. detailed information about the jurisdiction of the “Arbitral body in accordance with the Russian legislation” referred to in clause 9.2 of the Agreement;

3. any further arguments they wish to raise regarding the issue of FAT jurisdiction in this case.”

35. The Claimant and the Respondent filed their respective replies with exhibits on 15 February and 11 February 2010 respectively.

36. On 24 March 2010 the Arbitrator informed the Parties as follows:

“In view of the translations submitted by the Parties, the Arbitrator has ordered a certified English translation of the Russian version of clause 9 of the Agreement dated 23 June 2007 by a neutral translator. Please find attached the said translation produced on 15 March 2010.

The Parties are invited to provide FAT with their comments on the above-mentioned documents by no later than Wednesday, 7 April 2010.

37. On 7 April 2010 the Claimant filed his reply entitled “Addendum of Claimant’s memorandum in support of the FAT’s exercise of jurisdiction”. The Respondent did not file any comments.



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38. On 19 April 2010 the Arbitrator issued a procedural order whereby he noted that on p. 3 of his Request for Arbitration the Claimant had mentioned that "*Currently, the Coach leads the Red Star team in Belgrade, Serbia.*". Therefore, the Arbitrator invited the Claimant to submit, by no later than Wednesday, 28 April 2010, a copy of his contract with the above-mentioned club and any other employment contract that he concluded with a club, national federation or other legal or natural person after 15 April 2008.
39. On 22 April 2010 the counsel for the Claimant submitted a copy of the Red Star Contract and informed the FAT that
- "I have posed the question to my client and his agent of whether there are "any other employment contract[s] that he concluded with a club, national federation or other legal or natural person after 15 April 2008," and I am advised that there are no other such agreements."*
40. On 27 April 2010 the Arbitrator invited the Respondent to file its comments on the contract produced by the Claimant by no later than Friday, 7 May 2010.
41. On 6 May 2010 the Respondent filed further comments on FAT's jurisdiction, in essence replying to Claimant's submissions of 7 April 2010.
42. On 11 May 2010, considering that neither party had solicited a hearing, the Arbitrator decided in accordance with Article 13.1 of the FAT Rules not to hold a hearing and to deliver the award on the basis of the Parties' written submissions. The Arbitrator accordingly issued a Procedural Order providing that the exchange of documents was completed and inviting the Parties to submit their cost accounts.
43. The Claimant submitted his account of costs after the expiration of the deadline. The submission was forwarded to the Respondent for comments. The Respondent did not object to the late submission by the Claimant nor did it submit an account of costs.



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4. The Positions of the Parties

4.1. The Claimant's Position

44. The Claimant submits the following in substance:

- Article 9.3 of the Contract is language of the Club's drafting which provides the equivalent message in the English version of the Contract as it does in the Russian version. The term "or" within the first sentence of Article 9.3 references the Parties' option under Article 9.2 of either seeking a negotiated resolution or a hearing according to "Russian legislation."
- The reference to an alternative, preliminary or optional referral to "Russian Legislation" which is then suggested to constitute an "Arbitral body" in Article 9.3 indicates that under certain Russian domestic, health and safety or tax and social security laws, Russian nationals (which the Claimant in this matter is not – he holds German and Serb dual citizenship) might be bound to seek recourse through Russian commissions or courts according to domestic law procedures in lieu of procedures agreed under international commitments.
- The Claimant further invokes the doctrine of futility in arguing against the requirement of some preliminary step before a Russian tribunal. Even if such a requirement were applicable, the FAT arbitration clause in Article 9.3 provides that in any event, if either party is dissatisfied with the result of such a preliminary proceeding, the matter is to be brought directly before the FAT. The result, if the Arbitrator finds this to be a necessary step, would be one year or more lost to some unidentified process, the necessity of retaining local counsel to pursue such a claim, the result of which would undoubtedly be sought to be set aside by one side or the other to this dispute.



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- The scope of the arbitration clause in the Contract covers the grounds for the Coach's claims as well as the claims arising from the Agency Agreement.
- Although the Coach offered his services without a complaint being registered concerning the preparation of the team, the Club failed to pay the April and May 2008 salaries and subsequently the salaries for the entire 2008-2009 season without offering an excuse for such non-payment.
- The Club referred only to the win-loss record which does not constitute grounds for early termination under Clause 5.3 of the Contract. Therefore, the Club had no reasons to dismiss the Coach and, in accordance with Clause 5.2 it shall fulfil its financial obligations until the end of the Contract, including all contractual amenities.
- The claim arising from the Agency Agreement is "inextricably intertwined" with the present dispute since it is based on the same set of facts. As in the Ostojic vs PAOK case (FAT 0001/07) the FAT shall exercise jurisdiction over this claim and order the Club to pay the agency fees, which were not contingent upon anything else than the execution of the Contract between the Coach and the Club.

45. In his Request for Arbitration dated 5 June 2009, the Claimant requested the following relief:

"Based upon the foregoing, the Claimant requests the following relief:

- 2.1 *That the FIBA Arbitration Tribunal exercise jurisdiction over the subject matter of the June 23, 2007 Agreement (including three Addenda) and the parties to the Pesic / MBC Dynamo Moscow Agreement.*
- 2.2 *That the FIBA Arbitration Tribunal appoint a suitably qualified arbitrator to preside over this matter.*
- 2.3 *That the arbitration of the Pesic / Moscow Dynamo Agreement incorporate the*



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claims of the Agent of Pesic (Executive Pro Management) which are represented in an Agency Agreement reached simultaneous to the negotiations of the Pesic Agreement and which provide for dispute resolution in accordance with "current international legislation" in the interests of economy and completeness.

- 2.4 *That the Arbitrator find that Pesic (as well as his Agent) has satisfied all conditions precedent and concurrent to the Pesic Agreement.*
- 2.5 *That the Arbitrator hold Dynamo-Moscow liable for breach of the Pesic Agreement by (a) improperly attempting to terminate the Agreement before the end of the first year of the two year term of the Agreement and (b) failing to render payments to Pesic as required under the Agreement.*
- 2.6 *That the Arbitrator hold Dynamo-Moscow liable for breach of the Agency Agreement by failing and refusing to pay the Agency fees mandated therein.*
- 2.7 *That the Arbitrator award damages to the Claimant Pesic to be paid by the Respondent as follows:*
- | | |
|-------------------------|----------------|
| a. Salary Compensation: | € 1,254,112.00 |
| b. Amenities: | € 78,450.00 |
| c. Agency Fees: | € 100,000.00 |
- Grand Total (plus interest, attorney's fees): € 1,432,562.00+*
- 2.8 *That the Arbitrator award the Claimant pre-judgment interest on all amounts determined as due by the Respondent, from the date of the Breach (April 30, 2008) to the date of the Award at a rate of eight and three-quarter (8.75%) percent simple interest per annum, and an award of post-judgment interest at a rate of ten (10.0%) percent simple interest per annum to accrue until such time as all amounts due are paid in full.*
- 2.9 *In addition, Claimant Pesic respectfully requests that the costs of this action and the attorneys' fees related to bringing this action be assessed against the Respondent Dynamo Moscow. Costs of filing the action are to be limited to the initial €3,000.00 (sic) filing fee plus the costs of the administration fees and arbitrator's expenses assessed in this matter. It is estimated that the attorneys' fees shall not be less than €10,000.00 and €15,000.00 if the matter is called to a hearing. (Article 19.2(1) of the FAT Rules states that "the FAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of the FAT and the fees and costs of the FAT President and the Arbitrator."); "Under Swiss law the arbitrators have the obligation to decide on the amount and allocation of the arbitration costs as well as on the contribution towards the parties' legal fees." BERGER/KELLERHALS;*



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Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, No. 1477, p.521.)

- 2.10 *Claimant Pesic further requests that the Secretary General of FIBA, or the Arbitrator as his delegate, maintains jurisdiction over the matter in order following entry of an award against the Club, so that the Claimant may seek further and additional enforcement over the payment of the appropriate arbitration award, including the full authority of FIBA to render monetary fines, restrictions or other sanctions in the event that the Respondent does not comply with all aspects of the FIBA Arbitration Award. (FAT Regulations L2.7, Honouring of FAT Awards.)*
- 2.11 *That the Court provide the Claimant Pesic with any and all other and further relief as justice may require, ex aequo et bono.”*

4.2. Respondent's Position

46. The Respondent submits the following in substance:

- Due to the wording of the arbitration clause in the Contract the FAT does not have jurisdiction to resolve this dispute until the arbitral body according to the Russian legislation considers this case and renders its own decision.
- The Russian version of Clause 9.3 of the Contract provides for an “and” instead of the word “or” that appears in the English version. Thus, the “Arbitral body in accordance with the Russian legislation” is not an alternative but “an obligatory step [...] on the way to FAT”.
- Even if one were to concede that FAT has direct jurisdiction to resolve the present dispute, the Request for Arbitration should be dismissed in its entirety since Dynamo Club did not terminate the Contract.
- The Club proposed to the Coach to temporarily suspend his activities as a head coach and that his salary would be paid as stipulated in the Contract. This proposal was based on the Coach’s health problem and his bad relationship with



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key players of the team. The Coach rejected the proposal and asked the Club officials to prepare a mutual termination agreement.

- The fact that the Club assisted and paid the Coach's medical treatment proves that the Club went on with fulfilling its contractual obligations and had no intention to terminate the Contract. After the end of the medical treatment the Coach left the Club and since 23 April 2008 has never appeared any more in training sessions or official games. Therefore, the Coach "himself escaped from the Club and after 13 April 2008 has never acted as a head coach".
- Even if FAT establishes that the Contract was terminated by the Club, the Coach does not have the right to request a payment of the full amount of the Contract's salary. The Coach chose not to sign a labour agreement but to obtain the status of an "individual businessman" for tax purposes. Further, Russian law is applicable to this case as agreed in Clauses 7.1 and 10.1 of the Contract. Thus, since the Coach was not an employee, pursuant to the Civil Code of the Russian Federation, the Club had the right to refuse to execute the contract for the repayable rendering of services and only pay the Coach's incurred expenses.
- In addition, Clause 3.4 of Addendum No. 1 covers only the cases where the Contract is terminated by the Coach; however, the Coach in his Request for Arbitration argues that it was the Club that terminated the Contract.
- Regarding the agency fees, the Agency Agreement contains no arbitration clause in favour of FAT while the Coach was not authorised to act as a legal representative of the Agency and to defend its rights.

47. In its Answer dated 17 September 2009, the Respondent requested the following relief:



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“40. That the FIBA Arbitration Tribunal does not have jurisdiction to resolve the dispute between Mr Svetislav Pesic and MBC Dynamo Moscow lacking the decision of the Arbitration Court of Moscow pursuant to the Articles 9.2. and 9.3. of the Agreement of refundable rendering services #22T dated 23 June 2007.

41. That the FIBA Arbitration Tribunal does not have jurisdiction to resolve the dispute between Company “Executive Pro Management” and MBC Dynamo Moscow since the Agreement since the Agreement between EPM and Dynamo Club does no[t] contain FAT arbitration clause and Mr Svetislav Pesic is not a proper claimant in this potential dispute.”

5. Jurisdiction

48. 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).
49. The jurisdiction of the FAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

5.1. Arbitrability

50. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA¹.

5.2. Formal and substantive validity of the arbitration agreement

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

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



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52. With respect to substantive validity, the Arbitrator notes that there is a clear discrepancy between the Russian and the English text of Clause 9.3 of the Contract:

“9.3 If the dispute between the parties is not resolved by way of negotiations or in case of disagreement with the decision of the Arbitral body according to the article 9.2 of the present agreement of any party then it should be resolved in accordance with the FIBA Arbitral Tribunal (FAT) as follows: [...]”

(English text, emphasis added)

“9.3 If a dispute between the parties to the present contract cannot be resolved through negotiation and one of the parties to the contract does not agree with the ruling of the arbitration authority pursuant to paragraph 9.2 herein, either of the parties shall have the right to apply to the FIBA Arbitral Tribunal (FAT) in Geneva for a resolution in accordance with FAT regulations as follows: [...]”

(Translation into English of the Russian text prepared by the neutral translator appointed by the FAT, emphasis added)

53. As regards the relation between the English and Russian texts, the Parties agreed in the Contract that:

“10.4 The present Agreement is made in two fold, in English and Russian languages. The English version is the exact copy of the Russian version. Therefore both versions are considered to be equal.”

(emphasis added)

54. Therefore, in view of the Club’s challenge of FAT’s jurisdiction, the Arbitrator shall interpret the Contract and decide whether the FAT is competent to decide the dispute at hand.

55. Firstly, it has remained undisputed (see p.5, para.17 of the Answer) that the Parties have indeed entered into negotiations which were not successful. As a result, the first requirement for FAT’s jurisdiction is undoubtedly met.

56. Secondly, the Club’s objection to FAT’s “direct jurisdiction” in this case is based on the



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argument that the Coach should first seek recourse before the Moscow arbitration court (“Moscow court”) and then to FAT. The Coach submits on the other hand that the Parties provided for two alternatives in case negotiations would fail, i.e. either the Moscow court or FAT, and that he has chosen to file his claim before FAT.

57. With respect to the legal nature of the Moscow court the Arbitrator refers to the following provisions of the Russian legislation:

- In accordance with the Federal Constitutional Law “on the judicial system of the Russian Federation”²:

“Article 23. The Supreme Arbitration Court of the Russian Federation

1. The Supreme Arbitration Court of the Russian Federation is the highest judicial body for the resolution of economic disputes and other cases examined by arbitration courts.

2. The Supreme Arbitration Court of the Russian Federation is the highest court instance in relation to federal arbitration courts of okrugs and arbitration appeals courts and arbitration courts of constituent entities of the Russian Federation.

(according to the text of the Federal Constitutional Law of 04.07.2003 № 3-FKZ)

[...]

Article 24. Federal arbitration court of okrug

1. Within the limits of their competence federal arbitration court shall examine cases as a court of the cassation instance, as well as for newly discovered circumstances.

2. Federal arbitration court of okrug is the superior court instance for arbitration appeals court and arbitration court of constituent entities of the Russian Federation acting in the territory of the corresponding court districts.

(according to the text of the Federal Constitutional Law of 04.07.2003 № 3-FKZ)

[...]

Article 24.1 . Arbitration Appeals Court

(according to the text of the Federal Constitutional Law of 04.07.2003 № 3-FKZ)

1. Arbitration appeals court shall examine in the limits of its competence cases as a court

² The Respondent produced only a selective translation of the said law. The full English text is publicly available on the website of the Russian Supreme Court (<http://www.supcourt.ru/EN/jsystem.htm>). This text is identical, in relevant part, to the translation submitted by the Respondent.



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of appeals instance, as well as for newly discovered circumstances.

[...]

Article 25. Arbitration courts of constituent entities of the Russian Federation

1. With the limits of their competence arbitration court of constituent entities of the Russian Federation shall examine cases as a court of first instances, as well as for newly discovered circumstances.

(emphasis added by the Respondent)

- In accordance with the Russian Federal Constitutional Law “on the arbitration courts of the Russian Federation”:

“Article 1. Arbitration Courts of the Russian Federation

Arbitration courts in the Russian Federation are federal courts and are included in the judicial system of the Russian Federation

[...]

Article 3. System of arbitration courts of the Russian Federation

System of arbitration courts of the Russian Federation consists of:

Supreme Arbitration Court of the Russian Federation;

Federal arbitration district courts (arbitration courts of cassation); [...]

Arbitration courts of appeal; [...]

Courts of first instance in the republics, territories, regions cities of federal significance, autonomous areas and autonomous regions [...]

(emphasis added by the Respondent)

- In accordance with the Russian Federal Constitutional Law “on the arbitration procedural code of the Russian Federation”:

“Article 28. Jurisdiction of economical disputes and other cases arising from civil legal relations

Arbitration courts shall in the manner of action proceedings examine economical disputes and other cases arising from civil relationships that are related to performance of business activity and other economical activity by legal entities and by individual entrepreneurs, and in cases provided by this Code and other federal laws, they should be examined by other organizations and citizens.

[...]



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Article 34. Arbitrability of Cases

1. Cases in jurisdiction of the arbitration courts shall be examined in the first instance by the arbitration courts of republics, territories, regions, cities of federal significance, autonomous areas and autonomous regions [...]

(emphasis added by the Respondent)

58. It follows from the above that the Moscow court, despite the use of the word “arbitration” in its title, is a state court with a *de lege* assignment to resolve commercial disputes. In this framework, it acts as the first instance of a three-tier (or four-tier, in case of “cassation”) judicial system where the final review belongs to the High Arbitration Court of Russia, in accordance with the applicable Russian legislation.
59. Therefore, in case a party “does not agree with the ruling” of the Moscow court (see Clause 9.3), it has the statutory right to file an appeal before the next level of Russian state commercial courts, not FAT. This legal sequence is clear under mandatory Russian law and the Club has failed to show how the Parties could have provided otherwise.
60. Thus, the Arbitrator finds at this point that the Club’s interpretation of Clause 9.3 is not reconcilable with Russian legislation.
61. In addition, in line also with the Club’s submission that “the decision as to what variant of the [Contract] should be applied must be [made] on the basis of common sense, systematic analyze (sic) of the whole text of [the Contract] and [the] true will of the Parties”, the Arbitrator notes that the Club has not provided any evidence supporting such an unusual construction of an arbitration clause: there is no document on file (e.g. correspondence during the Parties’ negotiations) suggesting that the Parties agreed to submit themselves selectively to the first instance Russian state court but thereafter waive their rights to an appeal and rather create an “appellate” process before the FAT which would finally decide on their case. Such derogation of Russian state courts’ competence, if at all possible, is not supported by either the wording of the Contract or



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the facts of this case. In addition it is to be noted that by resorting to arbitration parties – in principle – want to exclude the competence of state courts. A cumulative jurisdiction of state courts and of an arbitral tribunal for the same subject matter is, therefore, hardly reconcilable with the idea of arbitration.

62. Furthermore, it is evident that the Contract, both in its Russian and English version, has been drafted by the Club. The Arbitrator finds this fact to be important for two reasons:
- a) Since the Coach is a Serbian/German and there is no proof – or even allegation – that he can read Russian, the will of the Parties was reflected in the English text which provides for an alternative competence of the Moscow court *or* FAT. The Arbitrator notes that such a dispute resolution system, i.e. an option between the courts of the Club's seat and the FAT, has appeared also in other basketball-related contracts and in FAT jurisprudence, especially in the first 1-2 years after the creation of the FAT, where the FAT clause was added in old contract templates³. Even if one were to accept that the Russian text encompasses the real terms of the agreement and that the English translation contains a mistake (“and” being translated as “or”), then at least the Club – that prepared the translation and whose representative, Mr Drozdov, can apparently write in both Russian and English – should have refrained from signing it.
 - b) However, regardless of the assumption that this discrepancy could be an oversight, a clerical error or a deliberate choice of words, in accordance with the widely recognized⁴ interpretative principle “*contra proferentem*” (also known as “*contra stipulatorem*”), according to which an unclear clause should be interpreted

³ See also FAT Decision 0020/08 dated 19 March 2009, Dimitropoulos vs. Athlitiki Enosis Konstantinoupoleos; FAT Decision 0027/08 dated 2 June 2009, Dalmau, Paris vs. Ural Great BC.

⁴ See UNIDROIT PRINCIPLES ON INTERNATIONAL COMMERCIAL CONTRACTS of 2004, Article 46: “If contract terms supplied by one party are unclear an interpretation against that party is preferred”.



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against the party who drafted it,⁵ the Arbitrator finds that the English text prevails over the Russian equivalent and that the Club's argument must fail.

63. Therefore, under the Contract the Coach had the option to file a Request for Arbitration before the FAT, which he validly did on 5 June 2009. It follows that the FAT has jurisdiction to decide the claims arising from the Contract.
64. Regarding the claim arising from the Agency Agreement, the Arbitrator notes that the Contract and the Agency Agreement are closely linked; in fact, according to Clauses 3 and 4.4 of the Agency Agreement both the validity of this Agreement and the Club's obligations are contingent upon the continuation of the contractual relationship between the Coach and the Club beyond the 2007-2008 season. It is therefore evident that the Contract has a "legal effect"⁶ on the Agency Agreement.
65. In view of the multiple references in the Agency Agreement to the Contract and of the fact that Clause 5 of the Agency Agreement does not provide for a specific forum where disputes should be submitted but contains only a vague reference to the "court in accordance with current international legislation", the Arbitrator finds that the Club and the Agency referred to the Contract which was to be signed (and was indeed signed eight days later) and to the dispute resolution clause contained therein. Bearing in mind that the Club would be released from its obligations under the Agency Agreement if the Contract were terminated, the Arbitrator finds that FAT has jurisdiction to decide on claims so intrinsically linked.

⁵ See Decision of Swiss Federal Tribunal of 22 October 2002 4C.186/2002; Decision of the Swiss Federal Tribunal of 20 December 2000, reported in ATF 126 V 499, at 3b; Decision of the Swiss Federal Tribunal of 7 March 1996, reported in ATF 122 III 118, at 2d. In sports arbitration, see *ex multis* CAS 2004/A/593 FAW v. UEFA, award of 6 July 2004, p. 8 and CAS 2008/A/1518 Ionikos FC v. L., award of 23 February 2009, pp. 19-20, with further references to CAS jurisprudence and Swiss law doctrine.

⁶ See FATdecision 0001/07 dated 16 August 2007, Ostojic, Raznatovic vs. PAOK KAE pp.11-12.



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66. The Arbitrator is comforted in this position by the openly “liberal” case law of the Swiss Federal Tribunal with respect to arbitration agreements by reference⁷ and the predisposition of the Federal Tribunal to take into account the interconnection between different contracts when examining the substantive validity of an arbitration agreement.⁸

6. Discussion

6.1. Applicable Law

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

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

68. 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.”

⁷ Decision of the Swiss Federal Tribunal of 16 October 2003, reported in ATF 129 III 727, 735 using the word “liberal” with reference to ATF 121 III 38, 45 and the decisions 4P.126/2001 of 18 December 2001 reported in ASA Bulletin 2002, p. 482; 4C.40/2003 of 19 May 2003 at 4, reported in ASA Bulletin 2004, p. 344; see also decision 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

⁸ Decision of 8 December 1999, reported in ASA Bulletin 2000, p. 546.



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69. The Claimant contends that the Parties selected Swiss law to govern the dispute but makes no submissions with reference to Swiss law. On the other hand, the Respondent argues that the Arbitrator should instead decide the dispute in accordance with Russian law, in view of the references in Clauses 7.1 and 10.1 of the Contract.
70. The Arbitrator finds that the Parties' selection of the law applicable to the merits is related to the discussion on FAT's jurisdiction: Clause 9.3 of the Contract makes it clear⁹ that, should the Parties elect to submit their dispute to the FAT

“...then it should be resolved in accordance with the FIBA Arbitral Tribunal (FAT) as follows: [...]

The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.”

71. Clause 10.1 of the Contract confirms such interpretation since it clearly states

“In all the other aspects not stipulated by the present agreement both parties follow current legislation of Russian Federation”

72. Bearing also in mind that the reference to Clause 7.1 (“[f]or non-fulfillment of obligations by the present Agreement both parties bear responsibility in accordance with the current legislation of Russian Federation”) in Respondent's Answer is based on the (wrong) assumption that the case shall be first decided by the Moscow court and in line with “the jurisprudence of the Russian arbitration courts” (see pp. 8-9 of the Answer) the Arbitrator finds that the authorization to decide the dispute *ex aequo et*

⁹ See also FAT Decision 0041/09 dated 12 November 2009, Panellinos BC vs Kelley; FAT Decision 0063/09 dated 19 February 2010, Fisher, Entersport vs Vojvodina.



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bono prevails over the isolated reference to Russian legislation¹⁰.

73. Therefore, the Arbitrator will decide the present matter *ex aequo et bono*.
74. In light of the foregoing considerations, the Arbitrator makes the findings below:

6.2. Findings

6.2.1. The terms of the Contract relating to early termination

75. The main issue at dispute is *who* terminated the Contract and for *what reasons*.
76. On the one hand, the Coach submits that the Contract was “breached upon the attempted early termination by the Club including when the Club failed to pay the Coach on April 30, 2008 and thereafter”. On the other hand the Club argues that it never terminated the Contract and that, instead, the Coach “himself escaped from the Club and after 13 April 2008 has never acted as a head coach”.
77. The Arbitrator notes that the Parties have included provisions relevant to the Contract’s termination both in Clause 5 of the Contract and in Clause 3.4 of Addendum No. 1. Although the language of these terms is not always clear, most likely as a result of poor translation from Russian, the Arbitrator finds that the combined reading of the pertinent terms leads to the following conclusions:
- In Clause 5.1 of the Contract the Parties agreed on the principle that early termination is not possible and expressly provided for two exceptions:

¹⁰ See FAT Decision 0030/09 dated 12 May 2009, Vujanic vs. Enterprise Men’s Basketball Club “Dynamo” Moscow; FAT Decision 0031/09 dated 12 May 2009, Misanovic and Ristanovic vs. Enterprise Men’s



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- a) The Coach can terminate the Contract if the Club does not fulfil its obligations under Addendum No. 1 for more than 1 month (“Clause 5.2”), or
 - b) The Club or the Coach can terminate the Contract if the Coach does not perform his services as specified in Clause 2.1.1 and 2.1.7 of the Contract. In such case the Club should deliver a written notice to the Coach (“Clause 5.3”).
- In Addendum No. 1, which incorporates the financial aspects of the Parties’ collaboration, the consequences of an early termination of the Contract were agreed upon as follows:
 - a) If the Contract is terminated under Clause 5.2, the Club shall pay the Coach’s salary for the entire Contract period in one instalment, “at the official termination of the contract” (“Clause 3.4”);
 - b) If the Contract is terminated under Clause 5.3 or if the Coach terminates the Contract for reasons not mentioned in Clause 5, the Coach shall pay to the Club “a forfeit calculated as the sum of payments done by the Club to the Executor during the season on the date of termination of the contract” and an amount of EUR 400,000 as compensation. If such termination takes place in the period 5 June 2008 – 1 September 2008, the compensation payable by the Coach to the Club is EUR 1,000,000 (“Clause 3.5”).

6.2.2. Did the Coach terminate the Contract?

78. At the outset, the Arbitrator notes that, since the present case is decided *ex aequo et*

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bono, emphasis shall be placed on general considerations of justice and the Parties' agreements, not on the fact that the Coach may have selected for tax purposes to register as an "individual businessman" instead of an "employee". The conditions for termination and the consequences thereof are binding and shall apply to the Parties regardless of their legal status towards the Russian tax authorities.

79. Further, in view of the above analysis (see section 6.2.1), in order for the Coach to succeed in his claim he must prove that a) the Club breached the Contract by not paying his salary for a period longer than one month and b) that he terminated the Contract as a result of such breach.
80. Assuming that the Club was obliged to pay the April salary and considering that the March salary was paid in time, a notice of termination should have been issued by the Coach and delivered to the Club at the earliest one month after the due date of the April salary, i.e. on or after 30 May 2008.
81. However, the Arbitrator is unable to find on record any notice or letter of termination according to which the Coach unilaterally put an end to his relationship with the Club due to non-payment. In fact, in his Request for Arbitration the Coach confirms that:

"Based upon the foregoing, Pesic was been entitled to cease his performance obligations under the Agreement effective as of the time of the April 16, 2008 "Official Statement" of the Club and to demand payment in full on the two year contract as of May 29, 2008, thirty days after the Club failed to timely pay the April 2008 salary obligation. He has earnestly sought to settle by way of reaching a private agreement for the payment of the balance of the 2007-08 season and the 2008-09 season but has been unable to achieve any reconciliation with the Club."

(emphasis added)

82. In addition, there is no complaint from the Coach's side that a payment had been delayed or that he would trigger the provisions of Clause 5.2. The Parties discontinued any exchange of written communications on 24 April 2008, six days before the April salary would become due. Before that, the Coach only complained that the Club



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unjustifiably dismissed him, an issue that will be examined *infra* in section 6.2.3.

83. Therefore, the Arbitrator finds that the Coach did not terminate the Contract and that Clause 5.2 of the Contract and Clause 3.4 of Addendum No. 1 do not apply in the case at hand.

6.2.3. Did the Club terminate the Contract?

84. The Arbitrator shall now turn to examine whether the Club terminated the Contract prematurely.
85. As before, there is no communication from the Club to the Coach that could be accepted as a notice of termination. The letter of 18 April 2008 attaching the Mutual Termination Agreement can only be understood as an offer and not as a unilateral act according to which the Club ended the Contract.
86. Further, the Arbitrator has received contradictory and essentially inconclusive evidence regarding the meeting of 15 April 2008 between the Coach and Club representatives. The Coach submits that he was dismissed, but at the same time states that the Club “improperly attempt[ed] to terminate the Contract” (see 2.5 of the Coach’s request for relief). Also, the Coach argues that as a result of the Club’s failure to effect the payments due for April and May 2008, he was the one who had the right to terminate the Contract. Conversely, the Club contends that the Parties mutually agreed to terminate the Contract on 15 April 2008 but then goes on to say that the Coach failed to return to the team after his operation and thus escaped from his duties under the Contract. The Agent was not present at the meeting in question and his affidavit addresses exclusively the value of the Contract’s amenities.
87. The Arbitrator is puzzled by the Parties’ submissions and, at this point, deems it important to highlight certain actions of the Parties *after* 15 April 2008:



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- The Club allowed the Coach to abstain from his duties “until the mutual agreement about termination settlement [...] is signed”;
 - The Coach complied with said request and underwent an operation;
 - The Club covered the costs of the operation as provided in Addendum No. 3, a fact which the Coach accepted;
 - The Coach did not return to the Club’s team after his medical treatment; the Club did not complain for the Coach’s absence since the team was led by the Coach’s assistant until the end of the 2007-2008 season;
 - The Parties entered into negotiations without any agreement being reached;
 - The Coach signed the Red Star Contract on 20 August 2008 and continued his career in Serbia; the Club did not complain.
88. The documentation submitted to the Arbitrator and the above-mentioned facts show that the Parties continued to consider the Contract as valid and binding upon them even after 15 April 2008: the Club allowed the Coach not to exercise his duties and paid for his medical treatment, while the Coach complied with the leave of absence and, through his agent, made clear that he would accept a mutual termination only upon payment of his entire salary for both seasons. Thus, as of 16 April 2008, the Club and the Coach had entered into a negotiations’ phase for the resolution of the Contract which remained, during all this time, valid. This is evidenced by the Club’s offer of 18 April 2008, accompanied by the Mutual Termination Agreement already executed by Mr. Drozdov, which the Coach declined on 21 April 2008. There would be no need for mutual termination and negotiations if the Contract had already been terminated.
89. However, the fact that non-performance was initially acknowledged from both sides as a means to facilitate negotiations (since the Coach accepted payment of the medical



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expenses and the Club accepted his absence also after the end of the medical treatment) this does not mean that non-performance came without legal consequences on the Parties' relationship.

90. The end of the 2007-2008 season was contractually agreed for 5 June 2008 (see Addendum No. 1, Clause 1.4) and the beginning of the 2008-2009 season for 1 August 2008. However, neither of the Parties showed any intention to continue their collaboration for the 2008-2009 season as stipulated in the Contract: the Club through its offer of a Mutual Termination Agreement on 18 April 2008 and the Coach by not appearing on 1 August 2008 at the Club's premises and instead signing a contract with another club for the 2008-2009 season on 20 August 2008.
91. In application of *ex aequo et bono* principles the Arbitrator finds that, upon the Coach's signing the Red Star Contract on 20 August 2008, both Parties had evinced an intention not to be bound by the Contract's terms for the 2008-2009 season and thus, at that moment, the Contract was terminated due to lack of performance¹¹.
92. Therefore, given that the Parties mutually and voluntarily disengaged from their rights and obligations under the Contract for the 2008-2009 season, the Coach's claim inasmuch as it relates to salaries and amenities for the 2008-2009 season must fail.

6.2.4. The 2007-2008 salaries

93. The situation is however different as regards the April and May 2008 salaries. By allowing the Coach not to exercise his duties after 15 April 2008 and until a mutual solution was found, the Club accepted that the Coach would not perform but would receive his agreed payments. This fair interpretation of the Club's leave of absence is

¹¹ See also FAT Decision 0007/08 dated 25 February 2009, Thompson, Stanley vs Women Basketball Club "Spartak" Moscow Region, p.20.



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also reflected in the Mutual Termination Agreement, where the amount offered to the Coach represents the two payments (April, May) due until the end of the 2007-2008 season.

94. Thus, the Arbitrator finds that the Club still owes to the Coach the amount of EUR 172,984 (EUR 86,492 X 2) for the outstanding salary payments of April and May 2008.

6.2.5. The Agency Fees

95. In line with the principle established in previous FAT cases¹², the Coach is not entitled to recover the agency fees. The Contract does not contain any provision according to which the Coach is entitled to claim these fees. According to the Agency Agreement the Club is liable to pay certain amounts as agency fees. However, the Coach is not a party to this contract. It does not follow from the Agency Agreement either that the Coach is a third-party beneficiary to said contract. Furthermore, the Coach did not submit that a claim for the agency fees against the Club was assigned to him by the Agency. To sum up, therefore, the Arbitrator holds that the Coach has not substantiated on what grounds he is entitled to claim the agency fees.

7. Interest

96. In the Request for Arbitration, the Coach requests pre-judgment interest on all amounts determined as due by the Club from 30 April 2008 to the date of the Award at a rate of 8.75% per annum, and an award of post-judgment interest at a rate of 10.0% interest per annum to accrue until such time as all amounts due are paid in full.

¹² See FAT Decisions 0008/08 (Djoiric vs PBC Lukoil) and 0009/08 (Smith vs PBC Lukoil), dated 8 June 2009, p.35.



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97. The Arbitrator notes that the Coach based his request and calculations on Swiss law (in particular Article 104 of the Swiss Code of Obligations) which, as decided by the Arbitrator (see paras. 67-74 above), is not applicable to the case at hand.
98. However, payment of interest is a customary and necessary compensation for late payment and there is no reason why the Coach should not be awarded interest.
99. In line with the constant jurisprudence of the FAT, the Arbitrator holds that an interest rate at 5% p.a. is reasonable and equitable in the present case and shall accrue from the date the two outstanding payments were due, i.e. 30 April 2008 and 30 May 2008 respectively, until the date of payment.

8. Costs

100. Article 19 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings.
101. On 5 July 2010 – considering that pursuant to Article 19.2 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*”, and 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*”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the FAT President determined the arbitration costs in the present matter to be EUR 14,050.00.



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102. Considering that the Coach prevailed on the issue of jurisdiction but was not successful in a major part of his claim, the fees and costs of the arbitration shall be borne by the Parties in equal shares. Further, in view of the circumstances of this case, the Arbitrator decides that, with the exception of the non-reimbursable handling fee, which shall also be paid by the Parties in equal shares, each party shall bear its own legal fees and other expenses.
103. Given that the Coach paid the totality of the advance on costs of EUR 20,000.00 as well as a non-reimbursable handling fee of EUR 7,000.00, the Arbitrator decides that in application of article 19.3 of the FAT Rules:
- (i) FAT shall reimburse EUR 5,950.00 to the Coach, being the difference between the costs advanced by him and the arbitration costs fixed by the FAT President;
 - (ii) The Club shall pay EUR 7,025.00 to the Coach, being 50% of the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the FAT;
 - (iii) The Club shall pay EUR 3,500, i.e. 50% of the non-reimbursable handling fee, to the Coach as a contribution towards his expenses.



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9. AWARD

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

1. Enterprise Men's Basketball Club "Dynamo" Moscow shall pay Mr. Svetislav Pešić an amount of EUR 172,984.00, plus interest as follows:
 - (a) 5% per annum on EUR 86,492 from 30 April 2008 until payment;
 - (b) 5% per annum on EUR 86,492 from 30 May 2008 until payment.
2. Enterprise Men's Basketball Club "Dynamo" Moscow shall pay Mr. Svetislav Pešić an amount of EUR 7,025.00 in reimbursement of half of the advance on costs paid by him to the FAT.
3. Enterprise Men's Basketball Club "Dynamo" Moscow shall pay Mr. Svetislav Pešić an amount of EUR 3,500.00 as a contribution towards his legal fees and expenses.
4. Any other or further requests for relief are dismissed.

Geneva, seat of the arbitration, 7 July 2010

Ulrich Haas
(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."