ARBITRAL AWARD

(BAT 0252/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

ProStep Sport Agency,
Koseska cesta 8, Ljubljana 1000, Slovenia

- Claimant -

represented by Mr. José Lasa Azpeitia

vs.

Mr. Vitaly Fridzon,

- Respondent -

BASKETBALL
ARBITRAL TRIBUNAL

1. The Parties

1.1 The Claimant

1. ProStep Sport Agency (hereinafter also referred to as “the Agency” or “the Claimant”) is an agency that provides services to professional basketball players.

2. Mr. Boris Gorenc (hereinafter “the Agent” or “Mr. Gorenc”) is a FIBA-certified players’ agent who represents the Agency.

1.2 The Respondent

3. Mr. Vitaly Fridzon (hereinafter also referred to as “the Player” or “the Respondent”) is a professional basketball player of Russian nationality, who is currently playing for “Basketball Club Khimki” (Moscow) (hereinafter the “Club”).

2. The Arbitrator

4. On 21 February 2012, the President of the Basketball Arbitral Tribunal (the "BAT") Prof. Richard H. McLaren appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. The Player was playing for the Club during the 2010-2011 season when on **10 January 2011**, they allegedly signed a new agreement (hereinafter the “New Employment

Agreement"), whereby the Club engaged the Player for a further two seasons (the 2011-2012 and 2012-2013 seasons).

6. During these arbitral proceedings and at the request of the Arbitrator, the Player and the Club produced a copy of the alleged New Employment Agreement, together with an English translation containing, under clause 11, a reference to arbitration under the rules of the "BAT".

7. The Agency submitted that the New Employment Agreement filed appeared to be a falsified document since it could not have been signed in January 2011 and contain a reference to BAT arbitration, given the fact that on that date, the BAT was still referred to as the "FAT", including in its standard arbitration clause, and no information had circulated regarding the envisaged change of name/acronym of the FAT.

8. Upon being questioned on this point, the Player and the Club replied in essence that the latter had made the English translation itself only for the needs of this arbitration (when requested to file a copy of the New Employment Agreement) and in doing so had negligently inserted its current standard dispute-resolution clause under clause 11 of the translation (which refers to the "BAT") rather than an exact translation of the original text in Russian that does not refer to the BAT or to FAT.

9. In support of the foregoing allegation, the Player and the Club subsequently submitted several affidavits.

10. In relation to the period of time and the circumstances in which the parties discussed the possibility of the Agency representing the Player, and concerning the content of their discussions, the Agency alleges the following:

    - General discussions about the possibility of the Claimant wishing to represent the Respondent (given that the agent was a former teammate and a friend of the

Player) occurred as early as November 2009 in Milano and continued in 2010.

- Since the encounter in Milano, "*Respondent and Claimant did see each other very often, at least thirty (30) times. Claimant would be visiting him in Russia (practices, games, etc..) or meeting him in abroad games in Europe […] Concretely, months before the Agent's Agreement was entered into, Claimant often went to see his games in Khimki and after the game Claimant and Respondent would go to dinner together, sometimes by themselves sometimes with another teammates […] Usually, in those dinners Claimant and Respondent would talk endlessly about the latter's options for his future career. Respondent wanted to be aware of, since he was finishing his contract, his actual options in Europe, the way Claimant could help him to build a market in Europe and, as well, his actual chances in CSKA since this team would be his only option in Russia in the event he would consider to definitely leave the Club*".

- In early November 2010, an associate of the Agency and former employee of CSKA, Vera Varulenko, met with the Player in Moscow and during their dinner "… *Respondent was very clear regarding the expiration of his employment agreement after the current season and was interested to fully understand all his market options*. *[…] His main interest at the time was to discern the economic possibilities to remain in Russia as first option, (the renewal with Club under much better economic terms and CSKA) and therefore most of the discussion rely on his actual chances to sign a contract with CSKA while he was aware that Khimki would like to keep him and the economic status that any of those decisions would imply*".

- In the period between the first talks with the Player and the signature of the Agency Agreement on 19 March 2011 (see below para.13), he never indicated having renewed his contract with the Club. "*On the contrary, Respondent told me very specifically that his contract was terminating after season 2010-11*."

"*Claimant and Respondent talked several times […] about this issue and it was made very clear to me that the Respondent's employment agreement was finishing at the end of season 2010/2011 and it was only when the termination of this employment agreement was getting closer when Respondent finally decided to enter into an Agreement with Claimant to represent him before the Club and any other third party*".

- The Player also "… *told Claimant that he was currently earning USD 1.100.000 (season 2010/2011) and USD 1.000.000 the year before (season 2009/2010)*".

- In February 2011, the Claimant contacted the Respondent directly regarding the possibility of helping him find employment offers for the following seasons.

11. According to the Player, the Agent approached him to propose signing a representation agreement and because the Player liked the idea of giving a chance to this relatively young agent who had played on the same team as him, "… *he agreed to sign with him, to look for another team when his contract with BC Khimki expires, or to renegotiate prolongation, to look for sponsorship contracts …*".

12. More specifically, in relation to the period of time and the circumstances in which the parties discussed the possibility of the Agency representing the Player, and concerning the content of their discussions, the Player alleges the following:

- "*Some time before Claimant, I assume few months before (I don't remember exactly) his associate from agency, partner I guess, Mrs. Vera Vakulenko (lady who used to work as secretary/translator in CSKA Moscow basketball club) approached and met with me in Khimky, in the restaurant. She explained the benefits of being represented by their agency and what they will do for me. She briefly explained about agency agreement, that it has to be signed, but she never explained of any sanctions or repressive measures that they (Claimant) might*

undertake in case if I want to breach this agreement earlier than it is prescribed. I did not ask about it since I never had agent in my life. It was completely new to me. But she spoke very colorfully and explained that she is very influential and powerful woman in the world of basketball. She didn't ask from me any documents like my contract. Just the main goal of her story was that we sign first and than they rise my career on the highest level, according to her."

- "*Don't really remember the first time when Claimant came up to me […] We met few times on different occasions mostly after games or practices or so (if I knew it is going to be important I would wrote it down, but I can't remember when, where)*."

- Also "*Clamant called by telephone several times*, *trying to explain to me why he is good agent for me, to persuade that it is very important to sign representation agreement with him, recalled few times that we know each other for long time, played on same team, and it is best for me. He also never discussed agency agreement, his appearance was always friendly and his attitude like we are best palls from old days when Claimant used to be a player as well. Also he never tried to explain rules of the Agreement or something alike. Only thing he did explain it is formality that has to be done. And that when I sign, it will tight off his hands and he will take top care of me and my career."*

- "[…] *This led me to think that since I wanted to have an agent and Claimant was going to be the one, I should do this because it is formality. So to be precise, Claimant never really discussed the terms with me. Lady Vakulenko did, but briefly and mentioned no bad sides for me back than. Otherwise I am not sure I would have signed it to be frank. Please understand that I can not recall all conversations by dates, I travel all the time, most of my pro career life spent in traveling, it is impossible mission. We play hundreds of games, sometimes twice per day, not to mention practices. Also I keep meeting dozens of people on daily*

basis. I agreed to work with Claimant because I knew him and he was friendly back than. Before there were more than 15 agents approaching to me trying to get me as a client. It's hard to remember after such long period of time."

- "*And than Claimant approached to me after the Triumph game in city of Liubertsy next to Moscow (it was away game for us) in March 2011. He invited me to meet later in Restaurant "Goodmans" in Moscow, there was present also another basketball player - Sani Becirovic. And there we have signed agency agreement. He never asked to see any contract of mine with the club*."

- "*Claimant knew that I am under contract with Club (which is obvious thing). In one conversation I told him that I am going to renew my contract for next season because my Club is interested. […] I told him about contract and he never asked from me to see any contract*." *[sic]*

13. It is undisputed that on **19 March 2011,** the Player and the Agency signed a form of agency agreement (the "Agency Agreement"), whereby the Agency was given, among others, the exclusive right to negotiate employment contracts for the Player. In that respect, clause 1 provides: "*The Player grants the Agent the exclusive right to act in his name in all countries worldwide, for the purposes of negotiating and enforcing contracts related to his activity as a professional basketball player*."

14. Under the terms of the Agency Agreement, the exclusivity covered both the renewal of a contract with the Club and the negotiation of a contract with any new club or sporting organization worldwide.

15. In that connection, clause 4 (a) of the Agency Agreement stipulates that the Player agrees to "*Use the services of the Agent in an obligatory and exclusive manner in the case of deciding whether to renew a contract or to lend his services to a different club or sporting organization in any country worldwide*" and clause 6, paragraph 2, specifies

in relation to the Agent's fees that "*Furthermore, this percentage shall be applied to any improvements or extensions made to any contracts the Player may have upon the signing of this Contract*."

16. The Player submits that in fact, before signing and subsequently terminating the Agency Agreement, he never suggested to the Agent to renegotiate any of the terms of his existing contract with the Club: "*Also as I mentioned before, thing that he could have done, and I was about to suggest to Claimant back when we were signing "Agency Agreement" but I didn't manage to do it since I quit on his services, that Claimant might have renegotiated conditions of my Contract signed between me and Club. Even if Claimant wasn't involved in it when it was signed*".

17. The Agency Agreement was concluded for a period of two years (clause 7) and stipulated that the Agency would be entitled to a fee representing 10% of the gross amount of remuneration the Player would receive under any contract negotiated by the Agency (clause 6).

18. On **30 March 2011**, the Player sent the Agency a letter of termination (the "Termination Letter") stating: "*With this letter I am terminating the agreement signed between us on 19th March 2011. I still have a valid contract with my current team, and accord to it I can't sign agent until it is valid. Please understand that contract between us is void. Please take my name from your client list on your and any other web page. Do not offer my services to any Club in Russia or world wide*".

19. The Termination Letter was sent to the Agency in the form of an attachment to an email of 30 March 2011 from a representative of the Club, named Elena Nazarova, who identified herself as "*BC KHIMKI International Director*". The caption of the email included the word "*fridzon*" and the message contained one word: "*Sorry*".

20. On **6 April 2011**, the Agency wrote a letter to the Player to state in essence that it

deemed the unilateral termination to be invalid and a breach of contract since it was based on a false pretext. The letter also put the Player on notice that he was not entitled to negotiate any contracts without the assistance of the Agency, the latter remaining entitled to the full fees contractually stipulated.

21. By letter of **13 April 2011**, the Agent wrote to the Club informing it of the existence of the exclusive Agency Agreement with the Player and adding: "*The present contract of Mr. Vitaly Fridzon with your club expires after the end of the 2010-11 season. With the abovementioned, I would like to stay updated from your club if you are interested in extending the contract of the player and in case of your interest in Vitaly Fridzon for the next season(s) to arrange the negotiations on his future contract through the ProStep agency exclusively*".

22. Neither the Agency nor the Agent received any response to either letter.

23. On **28 September 2011**, the Agency's lawyers sent a second notice letter to the Player - addressed via Ms. Elena Nazarova at the Club, stating, among others, that: "*In order to avoid any eventual conflicts against the player and which would involve BC KHIMKI in virtue of the contract renewal with him, my client communicated to both of you the unfairness and groundless of the termination and the eventual liabilities generated*" and that "*It is our client's intention to resolve this in an amicable manner. This communication is addresses to the Player, as your email account has been his last mechanism of communication with him, and BC KHIMKI as a final BAT award might as well have an effect on the Club*". The letter concluded that "… *this communication constitutes a last attempt to solve this issue amicably*" and that in the absence of an answer the Agency would have no option but to file a claim.

24. The Player denies that he committed any **material** fault by terminating the Agency Agreement in the circumstances and contends that it was only after having being harassed by the Agent to sign the agreement that he realized his contract with the Club

"… forbids him to negotiate or sign any new agreement with agents or different clubs in time of duration of that contract". In that connection he submits, "… *At the time he was not aware that agreement collides with his contract with the Club neither Claimant asked to check what his contract says and he should since he is acting under FIBA's licence*" and also that the Agent "… *[k]new about it*".

25. In conclusion on this point, the Player submits that "*Respondents [his] breach should formally be considered as violation in deed but in face of circumstances Respondent described, it should not be major breach since no money was involved as Claimant as Respondents new signed agent is concerned* …" and he goes on to submit that there was no loss of opportunity or damage caused to the Agency.

26. Based on its version of the facts – which includes the contention that the Player and the Club negotiated and concluded the New Employment Agreement for the 2011-2012 and 2012-2013 seasons without the Agency or the Agent ever being informed thereof and most probably after the Player had signed and subsequently terminated the Agency Agreement – the Agency is claiming payment of the fees which would have accrued to it under the Agency Agreement had the New Employment Agreement been negotiated by the Agency.

3.2 The Proceedings before the BAT

27. On 19 October 2011, the Claimant filed a Request for Arbitration in accordance with the BAT Rules and on 23 January 2012 duly paid the non-reimbursable handling fee of EUR 4,000.

28. On 7 March 2012, the BAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the Advance on Costs to be paid by the Parties as follows:

"Claimant (ProStep Sport Agency) *€ 6,000.00*

Respondent (Mr. Vitaly Fridzon) *€ 6,000.00."*

29. On 12 April 2012, the BAT acknowledged receipt of the Claimant's share of the Advance on Costs and informed the latter that, due to the Respondent having failed to advance his share of the Advance on Costs, the arbitration would only proceed if the Claimant substituted for the Respondent.

30. On 14 May 2012, the BAT acknowledged receipt of the Claimant's payment of the entire Advance on Costs in an amount of EUR 12,000 and on behalf of the Arbitrator, requested the Club file a copy of any and all contracts of any nature it had signed with the Player since 1 January 2011.

31. On 22 May 2012, the Club filed with the BAT, a copy of the New Employment Agreement as well as the Player's Answer to the Request for Arbitration, together with a letter indicating what circumstances surrounding the season calendar had caused some delay in replying.

32. On 25 May 2012, the BAT informed the Claimant that it was being provided with a deadline to comment on the Respondent's Answer and to calculate the amount of agency fees it was claiming.

33. By procedural order of 18 June 2012, the BAT acknowledged receipt of the Claimant's comments and informed the Parties and the Club that the latter and the Respondent were requested by the Arbitrator to reply to various questions and to submit any related documentary evidence.

34. On 4 July 2012, the Respondent submitted a reasoned request for extension to file its replies to the questions.

35. By procedural order of 9 July 2012, the extension was granted.

36. On 3 September 2012, the Respondent and the Club submitted their replies to the Arbitrator's questions and filed related evidentiary documents.

37. By procedural order of 6 September 2012, the Claimant was invited to comment on the Respondent's and Club's replies and all three were requested to answer various additional questions from the Arbitrator and to file certain documents.

38. On 28 September 2012, the Claimant filed its further submission and on 1-2 October 2012, the Respondent and the Club filed their answers to the additional questions together with evidentiary documents.

39. By procedural order of 4 October 2012, the proceedings were closed and the Parties invited to submit their statements of costs.

40. Both Parties submitted their statement of costs.

41. By correspondence of 22 October 2012, the BAT invited the Parties to submit their comments on the other Party's statement of costs by 26 October 2012. The Arbitrator further informed the Claimant as follows: "*Because the subject matter of section I of the submission is outside the scope of the submission the Claimant was requested and entitled to file, the Arbitrator has decided to not accept that part on record. Consequently only section II of the submission is admitted on record*"

42. The Parties did not submit any comments within the above time limit.

4. The Positions of the Parties

4.1 The Claimants' Position

43. The Agency submits the following in substance:

- The BAT has jurisdiction to entertain the claim based on clause 9 of the Agency Agreement, which mistakenly refers to the BAT under its former name "FAT".

- Because the Player's contract with the Club was expiring at the end of the 2010-2011 season, the Player was thinking about seeking a new contract, possibly with a different club, with better remuneration for the oncoming seasons.

- The Agent and the Player had discussed the latter's future in a non-formal manner on a number of occasions in 2010, and in November 2010, an associate of the Agency and former employee of CSKA, Vera Varulenko, met with the Player in Moscow to offer the possibility of the Agency representing him.

- In February 2010, the Agent contacted the Player directly regarding the possibility of helping him find employment offers for the following seasons and, as a result, they entered into an exclusive Agency Agreement on 19 March 2011, whereby the Agency would be paid a fee of 10% of any remuneration obtained by the Player under a renewed contract with the Club or new contract with a different club.

- On the faith of this agreement, the Agency began searching in Russia and worldwide for clubs that might be interested in engaging the Player for an annual remuneration ranging between 1.5 and 2 million USD.

- However, on 30 March 2011, unexpectedly and without prior warning, the Agency received a unilateral termination of the Agency Agreement by the Player.

- The Player's letter of termination was sent via the Club and was accompanied by a message from the Club's "International Director" (Ms Elena Nazarova) saying "*Sorry*", which indicated that it was aware of the Agency Agreement.

- The Player's termination of the Agency Agreement was without valid justification and in reality, was no doubt prompted by the fact that the Club had been incited by the existence of the agreement to begin negotiations with the Player behind the Agency's back. This undisclosed negotiation between the Player and the Club led to the renewal of his contract with the Club by means of the New Employment Agreement.

- The evidence adduced as well as the circumstances, indicate that the renewal of the Player's contract with the Club took place after the Agency Agreement was signed and that the alleged New Employment Agreement of 10 January 2011 is a falsified document.

- In any event, the termination of the Agency Agreement is invalid due to the lack of justified grounds, and further, represents a breach of contract causing damage to the Agency.

- The Agency and the Agent immediately put the Player and the Club on notice that the termination was deemed invalid, and subsequently sent a further notice and proposed to discuss the possibility of seeking an amicable resolution of the dispute. However, those communications were to no avail, since the Agency never received any replies.

- Meanwhile, the Agency discovered that the Player had apparently engaged the services of another agent.

- Due to this unjustified termination of the Agency Agreement, the Agency lost the opportunity to seek a renewed or new contract for the Player for the 2011-2012 and 2012-2013 seasons.

- The Agency is therefore entitled to receive, as loss of profit, at least 10% of the

remuneration the Player negotiated with the Club under his New Employment Agreement, whenever it was signed. Basic principles of contract such as *pacta sunt servanda* as well as the BAT precedents justify the Agency's claim for breach of contract and damages.

- The Player's excuse that he terminated the Agency Agreement due to discovering that under his existing contract with the Club, he was not entitled to sign with an agent during the life of his contract is legally unfounded. Neither the law, nor the FIBA regulations prohibit a Player from engaging an agent; the FIBA regulations only prohibit agents from inciting a player to breach his duties under an existing contract. The Player's excuse for terminating the Agency Agreement is in bad faith.

- In accordance with BAT precedents, the Agency is also entitled to 5% interest per annum on the fees owed; and the Player should be ordered to bear all the costs of the proceeding.

44. In its Request for Arbitration dated 19 October 2011, the Claimant requested the following relief:

"III. Claimant seeks relief whereby BAT would rule ex aequo et bono (as concretely settled between the Parties in the Agreement) as follows:

- *As a previous step, Respondent and Euroleague shall be ordered to present to this Tribunal, the employment contract renewed between Respondent and the Club and any sponsorship contract concluded by Respondent after the Agreement, and we kindly request this Tribunal to provide it to Claimant, in order for this party to be able to adequately discern the economic assessment of the damages generated to Claimant and consequently satisfy the non-reimbursable fee according to the amount Claimant is entitled.*
- *To a further plea of submissions to be incorporated to the present Request for Arbitration once the employment contract, image contracts and, if that is the case, any other contract that has been concluded between Claimant and Respondent to Claimant.*

- *Respondent is held liable for breach of the Agreement signed in March 19th, 2011 without just cause.*
- *Respondent is ordered to pay the sum corresponding to the 10% of the total gross amount of Respondent from his employment contract, as being this amount, the one agreed by the parties for the commission of Claimant in the Agreement.*
- *In the event, he had signed a sponsorship contract, Respondent is ordered to pay the amount corresponding to 20% of the total gross amount of Respondent from contract, as being this amount, the one agreed by the parties for the commission of Claimant in the Agreement.*
- *Respondent is ordered to pay the interest rate of 5% of the preceding amount.*
- *Respondent is ordered to pay expenses and reasonable legal fees on a net amount of EIGHT THOUSAND FIVE HUNDRED EUROS (8,500€) concretely related to the execution of the present Request for Arbitration and Respondent's lack of fulfillment of his obligations to which he committed in the Agreement*
- *Respondent, additionally, is ordered to pay the legal costs effectively incurred to have access to BAT proceedings, i.e., the non-reimbursable handling fee, and it should be considered when assessing the Claimants' legal fees and expenses.*
- *Respondent is, as well, ordered to disburse the advanced of costs eventually determined by BAT."*

45. In its submission of 1 June 2012, the Agency updated its prayers for relief as follows:

"5. REQUEST FOR RELIEF

In accordance with the Request for Arbitration already presented within this proceeding, Claimant seeks relief whereby BAT would rule as follows:

a) Respondent to be held liable for breaching the Agreement signed in March 19th 2011 without just cause for termination.
b) Respondent is ordered to pay the 10% of the gross sum of Respondent's employment agreement, which under the parameters (Krstic contract) herein provided, amounts to: ***SIX HUNDRED TWENTY FOUR THOUSAND EIGHT HUNDRED AND NINETY EUROS*** *(EUR 624,890.00), corresponding to:*

- *THREE HUNDRED AND SIX THOUSAND TWO HUNDRED AND THIRTY EURO (EUR 306,230.00) for season 2011/12 and*
- *THREE HUNDRED AND EIGHTEEN THOUSAND SIX HUNDRED AND SIXTY EURO (EUR 318,660.00) for season 2012/13.*

c) *As a **subsidiary option**, and put forward for Arbitrator's consideration, Respondent is ordered to pay the 10% of the gross sum of Respondent's employment agreement, which under the parameters (professional expertise and given the contacts already initiated with the Clubs) herein provided, would amount to TWO HUNDRED AND TWENTY SIX THOUSAND EURO (EUR 226.000.00) for season 2011/12 and TWO HUNDRED AND FIFTY FOUR THOUSAND TWO HUNDRED AND FIFTY EURO (EUR 254.250.00) for season 2012/13 which finally amounts to **FOUR HUNDRED AND EIGHTY THOUSAND TWO HUNDRED AND FIFTY EURO (EUR 480.250.00)**.*

d) *Respondent is ordered to pay the interest rate of 5% of the preceding amount.*

e) *Respondent is ordered to pay expenses and reasonable legal fees on a net amount of EIGHT THOUSAND FIVE HUNDRED EUROS (EUR 8,500) concretely related to the execution of the present Request for Arbitration and Respondent's lack of fulfillment of his obligations to which he committed in the Agreement.*

f) *Respondent, additionally, is ordered to pay the legal costs effectively incurred to have access to BAT proceedings, i.e., the non-reimbursable handling fee, and it should be considered when assessing the Claimants' legal fees and expenses.*

g) *Respondent is held liable for breach of the Agreement signed in March 19th, 2011 without just cause.*

h) *Respondent is additionally ordered to pay the sum of THREE THOUSAND EURO (EUR 3.000) due to the legal expenses generated by the conclusion of this new document.*

i) *Additionally, this Party concretely requests from the Arbitrator to impose an important sanction on Respondent due to the enclosing into this proceeding of a false contract, deliberate and purposely manufactured to damage Claimant's interest and to mislead this Court of Arbitration.*

j) *Notwithstanding the Club is not a Party of this proceeding this Party request for this Court of Arbitration to address to FIBA indicating the presentation of false documentation into this proceeding and its deep implication in the manufacturing thereof. This Party requests for the Club to be severely sanctioned."*

4.2 The Respondent's Position

46. The Player submits the following in substance:

- The BAT lacks jurisdiction because the arbitration clause under clause 9 of the Agency Agreement is based on an outdated standard clause that refers to the FAT, the prior name of the BAT.

- The Agent made contact with him, not vice versa, and did so in a harassing manner.

- He decided to give the Agent a chance but did so without realising that his New Employment Agreement with the Club provided under clause 8 that: "*CLUB bares exclusively all rights on the PLAYER. PLAYER has no rights to conclude or sign any kind of agreements with other clubs, agents or any other organizations during the term of this Agreement*".

- Furthermore, clause 10 of the New Employment Agreement provides for sanctions in case of a breach of its clause 8 by the Player.

- The Agent should have asked to see his existing contract with the Club to check his duties and failed to do so simply out of self interest.

- The Agent's actions were also in violation of the FIBA regulations prohibiting agents from inciting players to breach their existing duties vis-à-vis a club.

- Even if it was formally a breach of contract, the termination was given for a just cause because the existence of the Agency Agreement was in conflict with the Player's duties under the New Employment Agreement and the Agent should have verified the situation before signing. Such termination for just cause was fair

and is valid under Swiss law.

- The Agency is reading meaning, without any evidence, into the word "Sorry" contained in the email from the Club's International Director (Elena Nazarova). It was simply a statement of compassion and sympathy.

- After the termination, the Agent acted in a legally threatening and aggressive manner and even flew to Moscow to confirm he would file an arbitration suit, while at the same time asking "*why don't you give me the chance*?".

- Factually and legally, the Agency's claim makes no sense since the Club had already renewed his employment contract when the Agency Agreement was signed.

- In practice, the scope of the Agency's possible representation would have been limited to attempting to renegotiate certain conditions (such as the salary) of the New Employment Agreement or seeking opportunities for the period beyond the 2012-2013 season.

- BAT case 0065/09 confirms that agents should not be entitled to claim compensation when they have not acted in good faith.

- The Agent should be sanctioned and fined for using "… *false evidence or trying to misinterpret or fabricate ones*".

47. In his Answer, the Player submitted the following request for relief:

1. *"Respondent had just cause to terminate agreement with Respondent since he wasn't familiar to law neither he is FIBA expert contrary to Claimant which is FIBA licensed agent and should be aware of not breaching any other contract his client has signed already, and Claimant never asked and therefore never got acquainted to Respondents contract with Club.*

2. *All cost should Claimant bare himself since he is using false or misinterpreted information, persuading his own interests regardless of any other circumstance and despite of his own incompetence as agent.*

3. *Respondent kindly requests from Arbitrators to impose sanctions and fine on Claimant in order to prevent this kind of ignorant and ruthless behaviour, using false evidence or trying to misinterpret or fabricate ones. It would help for sure in creating more professional attitude of agents to their jobs and comprehension of duties as mutual and amicable.*

4. *Also Respondent would like to ask Arbitrators to order Claimant to reimburse reasonable legal fees on a amount of 4500 € spent by Respondent.*

5. *Also should be educative as explanation that institution of BAT arbitration is not any party's leverage to use in negotiations between sides unless there are real premises for it. This would positively impact on professional relations between agents and players."*

48. In its submission of 3 September 2011, the Player completed his prayers for relief as follows:

"- Claimant should bear all legal costs, arbitration costs, legal advisors costs by himself only since he treated Respondent and Club as good opportunity of easy money with some investment into filing the case to BAT.
- *Claimant should be punished according to BAT Arbitrator's finding, for attempt to misinterpret circumstances under which he signed Agreement with Respondent by claiming that he did not know Respondent had a valid signed contract and he moved further on with claim that Respondents employment contract with the Club was about to expire that summer of 2011. This claim he confirmed as showed in Exhibits attached in Application and Answer to Respondents answer and from his own words.*
- *Another attempt by Claimant is to interpret signed Agreement only in ways convenient for him, putting the Player (Respondent) on the same level in the terms of legal knowledge and that he was fully aware of every aspect of this agreement.*
- *Respondent's Party considers this for non-sportive, definitely not fair behaviour from a side of the Claimant. Neither he did any job for the Respondent nor he was in situation to act as negotiator since Respondents contract is and was (back at the time Agency Agreement was signed) valid."*

5. The Jurisdiction of the BAT

49. Pursuant to Article 2.1 of the BAT Rules, "[t]*he seat of the BAT and of each arbitral*

proceeding before the Arbitrator shall be Geneva, Switzerland". Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).

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

51. 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) PILA.[1]

52. The arbitration clause contained under clause 9 of the Agency Agreement reads as follows:

> *"Any disputes arising with respect to, or in connection with should be negotiated between the parties of this Contract. If the parties do not find any settlement, this Contract should 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 Court 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."*

53. The foregoing arbitration agreement is in written form and thus it fulfils the formal requirements of Article 178(1) PILA.

54. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).

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

55. The Player has challenged the jurisdiction of the BAT on the basis that the above-referenced arbitration clause refers to "FAT" rather than to BAT and that its wording does not correspond in all respects with the wording of the currently applicable standard BAT arbitration clause.

56. The Arbitrator finds that the Player's challenge lacks merit for several reasons.

57. An arbitration agreement is valid if it clearly sets out the parties' common intent to resolve their dispute via arbitration in a given place of arbitration and according to chosen procedural rules.

58. In the present case, the arbitration agreement constituted by clause 9 of the Agency Agreement leaves no doubt that the parties intended their contractual disputes to be resolved under the aegis of the "*FIBA Arbitral Tribunal*" created by the *Fédération International de Basketball* ("FIBA"), which is now referred to with the acronym "BAT" but under the previous version of its procedural rules was named the "FAT".

59. The modified name and acronym for the arbitral tribunal were adopted in 2011, however the institution remains the same, as do its procedural rules except for their updating on various points. The standard BAT (previously FAT) arbitration clause was amended accordingly.

60. Moreover, article 18.1 of the updated applicable BAT (previously FAT) Arbitration Rules stipulates that "*These Rules enter into force on 1 April 2011 and are applicable to Requests for Arbitration received by the BAT Secretariat or by FIBA on or after such date*", while article 18.2 specifies that "*Any reference to BAT's former name "FIBA Arbitral Tribunal (FAT)" shall be understood as referring to the BAT*".

61. Consequently and given the fact that the Request for arbitration was filed in October 2011, the reference to the "FAT" and its arbitration rules under clause 9 of the Agency

Agreement must have been intended by the parties thereto as a reference to the arbitral tribunal currently named the "BAT" and to the version of its Arbitration Rules applicable from 1 April 2011 onwards.

62. For the above reasons, the Arbitrator finds he has jurisdiction to entertain the dispute between the parties, except in relation to their respective prayers for relief seeking to have the other party sanctioned for alleged misbehaviour.

63. In that connection, the Claimant is requesting in substance that the Respondent be sanctioned for participating in the alleged falsification of the New Employment Agreement and that the Club also be denounced to the FIBA (Prayers i and j of June 2012), whereas the Respondent is requesting that the Arbitrator "… *impose sanctions and a fine on Claimant*" and that "*Claimant should be punished"* (Prayer n° 3 and updated prayers).

64. Neither the BAT Arbitration Rules nor Chapter VII of the FIBA Internal Regulations whereby the BAT was established provide Arbitrators nominated under the BAT Rules with the authority to issue fines or sanctions. Furthermore, the parties have not included in the Agency Agreement any wording or any reference to any law or set of rules that would bring the issuance of fines and sanctions within the material scope of the arbitration clause constituted by clause 9 of the Agency Agreement.

65. Thus, the Arbitrator finds that ordering fines and/or sanctions does not come within the scope of the "disputes" that the parties intended to submit to arbitration and which are covered by the arbitration agreement.

66. Furthermore, the Arbitrator clearly has no jurisdiction over the Club in relation to this dispute since it was not a signatory of the Agency Agreement.

67. Consequently, the Arbitrator declines jurisdiction with respect to the Claimant's and the

Respondent's requests that the other party be sanctioned, fined and punished, and with respect to the Claimant's request that the Club be denounced to FIBA by the Arbitrator.

6. Discussion

6.1 Applicable Law – ex aequo et bono

68. 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.

69. Article 187(2) PILA adds that the parties may authorize 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*".

70. Under the heading "Applicable Law", Article 15.1 of the BAT 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."*

71. Clause 9 of the Agency Agreement provides that "*The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono*".

72. Consequently, the Arbitrator shall decide the dispute *ex aequo et bono*.

73. 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[2] (Concordat)[3], 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."*[4]

74. 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."*[5]

75. This is confirmed by Article 15.1 of the BAT Rules in fine, according to which the Arbitrator applies "… *general considerations of justice and fairness without reference to any particular national or international law*".

76. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2 Findings

77. The first question that needs resolving in this case is whether or not the Player validly terminated the Agency Agreement for a just cause or, alternatively in that connection, whether the Player has established that the Agency Agreement was invalid or void for any reason due to the circumstances in which it was signed.

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2 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

3 P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

4 P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

5 Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717. pp.625-626.

78. If not, the next question is whether the Agency is entitled to any damages due to an unjustified termination of the Agency Agreement and, if so, in what amount.

79. In relation to the first question, the Player denies that he committed any **material** breach by terminating the Agency Agreement in the circumstances, and contends that it was only after having being harassed by the Agent to sign the agreement that he realized his contract with the Club *"… forbids him to negotiate or sign any new agreement with agents or different clubs in time of duration of that contract*". In that connection he states, "… *At the time he was not aware that agreement collides with his contract with the Club neither Claimant asked to check what his contract says and he should since he is acting under FIBA's licence*" and also the Agent "… *[k]new about it*".

80. More specifically, in conclusion on this point, the Player submits that "*Respondents [his] breach should formally be considered as violation in deed but in face of circumstances Respondent described, it should not be major breach since no money was involved* …" and he goes on to submit that there was no loss of opportunity or damage caused to the Agency.

81. The Arbitrator finds that no evidence has been adduced which indicates that the Player was harassed by the Agency or the Agent during the discussions leading up to the signature of the Agency Agreement on 19 March 2011, i.e. that any undue or unfair pressure of any sort was put on the Player to sign the agreement.

82. Although it appears the Player's English is not fluent and that he had little or no knowledge of legal matters and/or contract negotiations, the Arbitrator finds that the Player cannot be deemed to have been in a vulnerable position or on unequal footing in the sense that his capacity to evaluate and understand the pre-contractual discussions and/or the draft contract was insufficient or was impaired due to unfair circumstances. Being an adult, relatively senior professional player with a very good salary, the Player had the choice of relying on himself or of obtaining whatever

professional assistance from a lawyer or any other service provider he felt was necessary. Furthermore, the Agency Agreement was drafted in both English and Russian (two columns), i.e. in bilingual form.

83. Also, the Player obviously felt there was some benefit for him in signing the Agency Agreement or he would not have entered into it and he submitted that he wished to give the Agent an opportunity.

84. For similar reasons, the Arbitrator finds that it was the Player's responsibility to examine and understand (again, if necessary, with the support of an independent advisor) whether his existing contract with the Club permitted him to enter into an agency agreement at that point in time and with what scope.

85. The Arbitrator finds there is no convincing evidence on record that the Agency or the Agent were aware of the exact content of the Player's employment contract with the Club, and the Arbitrator considers there is no reason why they should have been particularly preoccupied by its content beyond knowing when it was expiring and what remuneration the Player was receiving, since, providing they did not induce him to breach his contractual obligations in any manner, they could, in good faith believe that they had nothing to worry about.

86. In that regard, the Arbitrator also finds that clause 8 of the alleged New Employment Agreement that the Player is invoking to explain and justify his turnabout and his decision to terminate the Agency Agreement, does not prevent him from engaging an agent providing the latter does not incite him to violate his contractual obligations.

87. Furthermore, there is no evidence that the Agency Agreement is illegal or void *ab initio* for any other reason.

88. It is possible that the Player simply acted too hastily when entering into the Agency

Agreement – since this does appear to have occurred rather quickly, and without much negotiation as to the content of the contract. However, if, attracted by potential advantages he could gain, the Player acted impulsively, the Agency and the Agent cannot be blamed for his decision, providing their behaviour was fair; and, as mentioned above, there is no evidence indicating that they acted unfairly.

89. For the above reasons, the Arbitrator finds that the Agency Agreement is valid and was validly concluded and that when, on 30 March 2011, the Player unilaterally terminated the Agency Contract, he did so without just cause and thereby committed a material breach of contract.

90. The Arbitrator considers that because the Player terminated the Agency Agreement unilaterally and without notice or just cause, it is fair that the Agency be indemnified in such manner that it be placed in the position it would have enjoyed had the contract remained in force, providing the Agency could believe legitimately and in good faith that the Player remained free to seek a new employment at the end of the 2010/2011 season.

91. In that regard, the Arbitrator finds that even if the Player did enter into the New Employment Agreement with the Club on 10 January 2011 before signing the Agency Agreement, it is sufficient and relevant to determine whether the Agent or the Agency were told, or could and should have known in good faith, that this was the case; since, if the Agent and Agency did not know and in good faith had no reason to believe that this was the case, there is, in fairness no reason why the Claimant should not be indemnified for the lost opportunity.

92. It is therefore unnecessary to determine whether, as the Player and the Club allege, the New Employment Agreement was concluded on 10 January 2011, or whether, as the Respondent contends, the produced version of the New Employment Agreement contains a falsified date and was in fact signed at some later stage, near the close of

the 2010/2011 season and after the Agency Agreement.

93. With respect to the question of whether or not the Player informed the Agent that he had entered into the New Employment Agreement on 10 January 2011, and assuming for sake of reasoning that the contract was signed on that date, the burden of proof lies on the Player, since he is alleging and invoking in his defence that he disclosed this fact to the Claimant whereas the latter is contesting it.

94. The Arbitrator finds for a number of reasons that the Player has not met that burden of proof.

95. First, it is difficult to understand why the Agent would have entered into an agency agreement for a period during which, for the most part, it would have had no opportunity to seek a new contract for the Player, especially since the Player himself submits as follows that he omitted to mention the theoretical possibility of trying to re-negotiate better terms with the Club: "*Also as I mentioned before, thing that he could have done, and I was about to suggest to Claimant back when we were signing "Agency Agreement" but I didn't manage to do it since I quit on his services, that Claimant might have renegotiated conditions of my Contract signed between me and Club. Even if Claimant wasn't involved in it when it was signed*".

96. Second, it is noteworthy that in a document contemporary to the facts in question, i.e. in the Agent's letter of 13 April 2011 to the Club, the Agent made the following request that tends to demonstrate that he was not aware of any prior renewal of the Player's employment contract by the Club: "*With the abovementioned I would like to stay updated from your club if you are interested in extending the contract of the player and in case of your interest in Vitaly Fridzon for the next season (s) to arrange the negotiations on his future contract through the ProStep Agency exclusively*".

97. Third, it is uncontested that neither the Club, nor the Player responded in any manner

to the foregoing letter.

98. The Arbitrator finds for the above reasons that, even if one assumes for sake of argument that on 10 January 2011 the Player renewed his employment contract with the Club for two further seasons, he has not established that he ever informed the Agency or the Agent that such was the case before signing the Agency Agreement.

99. The Arbitrator also finds that if the Agency and Agent were not expressly informed by the Player that he had renewed his employment contract with the Club, they had no reason to believe that this was or might be the case. On the contrary, given the wording of the Agency Agreement, a reasonable agent would, in good faith, be entitled to believe that the Player was offering the opportunity for it to seek a new contract for the next season(s) and earn a fee on such basis, and to a certain degree it would have defied commercial logic for the Claimant to believe otherwise.

100. It is therefore fair that the Claimant be entitled to compensation for the opportunity that it missed due to the Player not providing it with the expected possibility, as foreseen in the Agency Agreement, of negotiating a new employment contract on his behalf and being paid the agreed commission for that service.

101. Insofar as the amount of indemnification is concerned, it is relevant that the Agency Agreement did not make the payment of the Claimant's 10% commission contingent upon any specified amount of services (in terms of time and effort) or on a particular result, e.g. concerning the salary to be obtained for the Player, while in practice a successful brokerage is not necessarily linked to the amount of time spent by the intermediary.

102. In addition, given the fact that the Player unilaterally terminated the Agency Agreement without notice, and less than two weeks after its signature, the Agency did not in any event benefit from much opportunity to seek and negotiate a new employment contract

for the Player.

103. Consequently, the Arbitrator finds that in the circumstances of this case, the amount of time spent by the Claimant in seeking opportunities for the Player is not a relevant factor in determining the amount of commission which is due.

104. In light of the foregoing, the Arbitrator finds that in this case the fairest measure of the lost opportunity corresponds to a commission calculated on the basis of salary the Player is earning under his New Employment Agreement with the Club, since logically and in all probability the Agent would have achieved at least the same result if it had negotiated with the Club instead of the Player and had been able to negotiate with other clubs in addition.

105. The Arbitrator notes that the Claimant is alleging that the Player's salary in question may not be correctly or fully indicated in his New Employment Agreement and that, in any event, on the open market, the Agency would have managed to obtain a much higher salary for him.

106. However, there is no evidence adduced which establishes that the Player's salary is in fact higher, and the Arbitrator finds that the assertion that the Claimant would have been able to achieve a higher salary for the Player is based on contentions and evidence which are too speculative to be relied on.

107. For the above reasons, the Arbitrator shall award indemnification to the Agency for the unjust termination and breach of the Agency Agreement by the Player, in an amount representing 10% of the latter's salary as specified in clause 2 of his New Employment Agreement for the seasons 2011/2012 and 2012/2013 (respectively USD 1 million and USD 1 million and fifty thousand), which overlap with the period for which the Claimant had obtained an exclusive right under the Agency Agreement to represent the Player and negotiate a new employment contract on his behalf.

108. Consequently, the Player shall be ordered to pay the Agency a total amount of **USD 205,000** (two hundred and five thousand), made up of USD 100,000 (10% of USD 1 million) for the 2011/2012 season and USD 105,000 (10% of USD 1 million and fifty thousand) for the 2012/2013 season.

109. Given the amount of compensation thus obtained by the Agency, and the fact that the Player may simply have been negligent and poorly advised in his handling of the signature and termination the Agency Agreement, the Arbitrator finds it fair that no interest for late payment or form of financial penalty be added to the foregoing amount.

7. Costs

110. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT 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 reasonable legal fees and expenses incurred in connection with the proceedings.

111. On 26 October 2012 - considering that pursuant to Article 17.2 of the BAT Rules "*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT 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 BAT 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 BAT President determined the arbitration costs in the present matter to be EUR 12,000.00.

112. Considering the Claimant prevailed in its claim, it is fair that the fees and costs of the arbitration be borne by the Respondent and that he be required to cover his own legal

fees and expenses as well as make a contribution to those of the Claimant.

113. Given that the Claimant paid advances on costs of EUR 12,000 as well as a non-reimbursable handling fee of EUR 4,000 (which will be taken into account when determining the Claimant's legal fees and expenses), while the Player failed to pay any advance on costs, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

- The Respondent shall pay to the Claimant EUR 12,000, being the amount of arbitration costs advanced by the latter;

- The Respondent shall pay to the Claimant EUR 14,000 (4,000 for the non-reimbursable fee + 10,000 for legal fees) representing the amount of his contribution to the latter's legal fees and other expenses.

8. AWARD

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

1. **Mr. Vitaly Fridzon shall pay ProStep Sport Agency an amount of USD 205,000.00 as damages for breach of contract.**

2. **Mr. Vitaly Fridzon shall pay ProStep Sport Agency an amount of EUR 12,000.00 as reimbursement for its arbitration costs.**

3. **Mr. Vitaly Fridzon shall pay ProStep Sport Agency an amount of EUR 14,000.00 as reimbursement for its legal fees and expenses.**

4. **Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 5 November 2012.

Quentin Byrne-Sutton
(Arbitrator)