FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0039/09 FAT)

rendered by

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Aleksandar Capin, Sumatovacka 86/6, 11000 Belgrade, Serbia
represented by Mr Socrates Lambropoulos, 17 Pyrrou Str., 145 64 Athens, Greece

- Claimant -

vs.

Azovmash Mariupol Basketball Club, Mashinostroiteley squ. 1, 87535 Mariupol, Ukraine

- Respondent -

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1. The Parties

1.1. The Claimant

1. Mr. Aleksandar Capin (hereinafter “Mr. Capin” or “Claimant”) is a professional basketball player of Slovenian nationality. He is represented by Mr. Socrates Lambropoulos, attorney-at-law in Athens, Greece.

1.2. The Respondent

2. Azovmash Mariupol Basketball Club (hereinafter "BC Azovmash" or "Respondent") is a professional basketball club with its seat in Mariupol, Ukraine. It is domiciled at Mashinostroiteley squ. 1, 87535 Mariupol, Ukraine. Respondent is represented by Sayenko Kharenko, attorneys-at-law in Kiev, Ukraine.

2. The Arbitrator

3. On 25 March 2009, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").

4. On 26 March 2009, the Arbitrator accepted his appointment and signed a declaration of acceptance and independence.

5. None of the Parties has raised objections to the appointment of the Arbitrator or to the declaration of independence rendered by him.

3. Facts and Proceedings

3.1. Background Facts

6. On 28 May 2008, the Parties signed an employment agreement (hereinafter referred to as the "Contract") according to which the Claimant was to be employed by Respondent for the 2008/2009 basketball season. According to the Contract, Respondent undertook to pay to Claimant a base salary of EUR 250,000 according to the following schedule:

"Upon successful passing medicals	*10.000 EURO*
On August 31st 2008	*15.000 EURO*
On September 30th 2008	*25.000 EURO*
On October 31st 2008	*25.000 EURO*
On November 30th 2008	*25.000 EURO*
On December 31st 2008	*25.000 EURO*
On January 31st 2009	*25.000 EURO*
On February 28th 2009	*25.000 EURO*
On March 31st 2009	*25.000 EURO*
On April 30th 2009	*25.000 EURO*

On May 31st 2009 *25.000 EURO"*

7. Claimant was also entitled to receive certain bonuses, e.g. if the team would win the Ukraine Championship, the ULEB Cup or the Ukraine Cup.

8. On 21 September 2008, during a game in the city of Rostov, Russia, Claimant got injured.

9. On 25 and 26 September 2008, Claimant underwent medical examinations which resulted in the following diagnosis:

> *"[P]artial injury of capsule of the left hip at the insertion to the body of the flank bone, secondary to degenerative-dystrophic processes, osteoarthrosis deformans of the left hip."*

10. On 4 October 2008, the Claimant was given permission to undergo additional medical examination and surgery at the Orthopedic Center SPM, Antwerpen, Belgium ("SPM Orthopedic"), where the first diagnosis was confirmed.

11. On 13 October 2008, an operation was performed on the left hip of Claimant at SPM Orthopedic.

12. On 5 November 2008, the Claimant's agent, Mr. Angelakis, sent an email to Respondent and requested immediate payment of all due installments. This email reads as follows:

> *"Dear gentlemen,*
>
> *Please be advised that according to the contract that we signed with Azovmash on May 26th of 2008, it is clearly stated in paragraph 2.3 that:*
>
> *"If payment is still not made and Club is 15 days late then player will refrain from all team*

functions including practices and games with no penalty to the player. If for some reason club is late by more than 21 days then player may be deemed a free agent and receive his basketball license immediately from the club to play anywhere else in the world while Club is still responsible to pay entire agreement in full within 30 days of players departure."

Today November 5th of 2008 the player has been unpaid for 55 days which of course constitutes a breach of contract. We don't want to leave the team but also you have to follow your obligation and pay the player as the contract indicates. I am very sorry to say that if such payment are not made according to the contract you are not giving us no other option but to go to FIBA court.

All these previous years, my cooperation with your Club has been great, that's why I am asking you to pay immediately the salaries owed to Alex until today, to avoid any uncomfortable situations in the future.

I am looking forward to your cooperation.

Best regards

Tom Angelakis"

13. On 14 November 2008, Respondent sent the following letter to Claimant's agent:

"Dear Mr Angelakis,

We are sorry to inform you that your unsatisfactory sports shape which Aleksandr Capin has now doesn't let us use him as a player.

We are not blaming him in breaking the contract, according to which he is obliged to keep his best sports shape, and we have to inform you that the Club decided to terminate the contract on the basis of the clause 8.2. of the contract.

Since the present moment the Parties are free from any mutual obligations.

We are thanking you for cooperation.

Best regards,

Logvinenko A.A.

BC Azovmash Mariupol"

14. On 6 February 2009, Claimant signed an employment agreement with Lokomotiv Rostov na Donu, a professional basketball club in Rostov, Russia. This employment

agreement provides for a fully guaranteed base net salary of EUR 60,000 for the 2008/2009 season.

3.2. The Proceedings before the FAT

15. On 25 March 2009, Claimant filed a Request for Arbitration in accordance with the FAT Rules.

16. By letter dated 17 April 2009, the FAT Secretariat confirmed receipt of the Request for Arbitration as well as the non-reimbursable handling fee and informed the Parties of the appointment of the Arbitrator. In the same letter, a time limit was fixed for Respondent to file its Answer to the Request for Arbitration until 8 May 2009 (the "Answer"). The letter also requested the Parties to pay the following amounts as an Advance on Costs by no later than 4 May 2009:

> *"Claimant (Mr. Capin): EUR 4,000*
> *Respondent (BC Azovmash): EUR 4,000"*

17. On 15 May 2009, Respondent submitted its Answer together with three exhibits.

18. By letter dated 27 May 2009, the FAT Secretariat erroneously confirmed receipt of Claimant's payment in order to cover the Respondent's share of the Advance on Costs.

19. By letter dated 28 May 2009, Respondent requested the Arbitrator to order Claimant to disclose his new employment agreement with BC Lokomotiv Rostov na Donu. The Arbitrator accepted Respondent's motion and requested Claimant to produce by no later than 10 June 2009 a copy of his employment agreement with BC Lokomotiv Rostov na Donu or any other player agreement with the same or other club covering

any period between 1 August 2008 until 1 June 2009, together with any explanation which the Claimant deemed appropriate.

20. By letter dated 10 June 2009, Claimant submitted his agreement with Lokomotiv Rostov na Donu together with an explanatory letter.

21. By letter dated 20 June 2009, the Arbitrator confirmed receipt of the copy of the employment agreement and invited Respondent to comment on Claimant's submissions by no later than 30 June 2009. By letter dated 30 June 2009, Respondent submitted a "rejoinder to the Claimant's reply" to the FAT Secretariat.

22. By letter dated 16 July 2009 the FAT Secretariat informed the Parties that Respondent had failed to pay the Advance on Costs. In accordance with Article 9.3 of the FAT Rules, Claimant was invited to substitute for the missing payment of the Respondent until 29 July 2009. Claimant paid Respondent's share of Advance on Costs on 30 July 2009.

23. By letter dated 29 July 2009, Claimant submitted a detailed account of his costs as follows:

Draw up of lawsuit regarding the arbitration before FAT (study of the contract for the provision of athletic services with Azovmash BC (800 euros), meetings with agent and player (550 euros), telephone conversations with player and exchange of e-mails (230 euros)	*1.580 euros*
Draw up of request for arbitration	*4.000 euros*
Telephone conversations and exchange of e-mails with FAT Secretariat plus response to the respondent	*1.500 euros*
Payment of non-refundable fee to FAT	*3.000 euros*
Payment of arbitration fee	*4.000 + 4.000 euros today's payment*
Total legal fees *Arbitration fees*	*7.080 euros* *11.000 euros*

24. By letter dated 5 August 2009, Respondent submitted its account of costs. Respondent's letter reads in relevant part as follows:

> *"[...] please be informed that the costs borne by the Respondent in the present arbitration consist only of the legal fees paid to its legal counsel. The fee arrangement between the Respondent and its legal counsel contemplated a fixed fee of EUR 20.000 irrespective of the outcome of the arbitration."*

25. The Parties did not request the FAT to hold a hearing. The Arbitrator therefore 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 written submissions of the Parties.

4. The Parties' Submissions

4.1. Claimant's Submissions

26. Claimant submits that under the Contract, Respondent was obliged to pay monthly installments to Claimant until the end of May 2009. However, Claimant received only EUR 25,000, namely EUR 10,000 upon successful passing of medical examinations and EUR 15,000 on 31 August 2008.

27. According to clause 2.3 of the Contract, Claimant would be entitled to refrain from all team functions including practices and games with no penalty if Respondent was more than 15 days late with the salary payments. In addition, Claimant would be deemed a free agent and entitled to play anywhere else in the world while Respondent was still responsible to pay the full salary if it was late with the salary payments by more than 21 days.

28. Claimants submits that the termination letter dated 14 November 2008 by which Respondent allegedly terminated the contract on the basis of clause 8.2 with immediate effect was not valid because (a) Claimant was not suffering from a chronic disease and (b) the termination letter did not mention “the existence of a chronic disease” as the reason for termination, but referred only to Claimant’s unsatisfactory sports shape which “doesn’t let us use him as a player.”

4.2. Claimant's Request for Relief

29. The Claimant requests the FAT to:

> *"1) Hold that the Contract was not justly terminated by the Respondent due to the exclusive fault of the Respondent.*
>
> *2) Order the Respondent to pay to the Claimant the amount of 225.000 euros for rendered services, with interest rate of 5% or, in the alternative, with the interest rate decided by the FAT Arbitrator ex aequo et bono.*
>
> *3) Hold that the costs of the present arbitration be borne by the Respondent alone.*
>
> *4) Order the Respondent to reimburse the Claimant the arbitration fee of 3.000 euros as well as his legal fees and other expenses, to be ascertained."*

4.3. Respondent's Submission

30. Respondent submits that Claimant had not disclosed his medical condition at the medical examination in August 2008 before the Contract became effective. However, the medical examination of 21 September 2008 revealed that Claimant was suffering from a degenerative-dystrophic change and osteoarthrosis deformans of the left hip. The Claimant had even explicitly confirmed to the doctors in Belgium on or before 6 October 2008 that he had suffered "hip pain since several months".

31. Further, Respondent argues that according to clause 8.2 of the Contract, the Claimant had the following obligation:

> *"During medical examination the Player is obliged to inform the club about presence of chronic disease including one in the form of remission. In case of revelation of chronic disease worsening his physical abilities during the course or the agreement, this fact will be the reason for one-side annulment of the present agreement from the side of the Club."*

32. Respondent submits that it was therefore entitled to unilaterally terminate the Contract and that it was not obliged to make any further payments after the date of termination.

4.4. Respondent's Request for Relief

33. Respondent submits the following request for relief:

> *"Respondent requests the Arbitral Tribunal to hold that the Contract was properly terminated by Respondent on 14 November 2008 in full conformity with the provisions of the Contract.*
>
> *Respondent requests the Arbitral Tribunal to hold that Respondent is not liable to pay Claimant any remaining salaries which Claimant was entitled to receive under the Contract after 14 November 2008.*
>
> *If the Arbitral Tribunal finds that Respondent should be liable to pay Claimant any remaining salaries which Claimant was entitled to receive under the Contract after 14 November 2008, Respondent requests the Arbitral Tribunal to decrease any amount of such salaries by the amount of salaries Claimant otherwise gained.*
>
> *Respondent requests the Arbitral Tribunal to hold that Claimant shall bear all costs of the present arbitration.*
>
> *Respondent requests the Arbitral Tribunal to order Claimant to pay to Respondent its reasonable legal fees in connection with the present arbitration."*

5. The Jurisdiction of FAT

34. 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).

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

6. Arbitrability

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

6.1. Formal and substantive validity of the arbitration agreement

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

> *"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.*
>
> *2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law."*

38. The jurisdiction of the FAT over the dispute between Claimant and Respondent results from Clause 6.2 of the Contract which reads as follows:

> *"6.2 Any disputes arising from or related to the present Agreement shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved*

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

> *definitely in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President.*
>
> *The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile.*
>
> *The seat of the arbitration shall be Geneva, Switzerland*
>
> *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. To the extent legally possible under Swiss law recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sports (CAS) upon appeal shall be excluded.*
>
> *The arbitrator and CAS shall decide the dispute ex aequo et bono."*

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

40. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (cf. Article 178(2) PILA). In particular, the wording "[a]ny dispute arising from or related to the present contract" clearly covers the present dispute.[2]

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[2] *See* for instance BERGER/KELLERHALS, Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, No. 466, pp. 160-161.

7. Discussion

7.1. Applicable Law – *ex aequo et bono*

41. 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",* as opposed to a decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

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

42. 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."*

43. Clause 6.2 of the Contract reads:

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

44. The Arbitrator will therefore decide the present matter *ex aequo et bono*.

7.1.1 The statutory concept of *ex aequo et bono* arbitration

45. 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*[3] (Concordat),[4] 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."*[5]

46. 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".[6]

47. This is confirmed by Article 15.1 of the FAT Rules *in fine* according to which the arbitrator applies "general considerations of justice and fairness without reference to any particular national or international law".

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

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

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

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

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

7.2. Findings

7.2.1 Termination of the Contract

49. It has remained undisputed that Claimant got injured during the warm-up for a game in Rostov on 21 September 2008. It has also remained undisputed that the medical examinations which took place a few days later revealed a partial injury of capsule of the left hip at the insertion to the body of the flank bone, secondary to degenerative-dystrophic processes, osteoarthrosis deformans of the left hip, and that this diagnosis was confirmed by the medical examination at SPM Orthopedic. Furthermore, Claimant has not contested the statement in the medical report of the SPM Orthopedic centre dated 6 October 2008, according to which he had suffered from hip pains since several months. The medical reports by SPM Orthopedic as well as the witness statement of Mr. S.G. Kalinkin, the Respondent's team doctor, lead to the conclusion that Claimant was indeed suffering from a chronic disease which existed already before the initial medical examination in August 2008.

50. Respondent submits that Claimant had not revealed his chronic disease; this fact is not contested by Claimant. According to the medical report of SPM Orthopedic dated 6 October 2008, Claimant suffered from hip pain "since several months" which leads to the conclusion that he must have been aware of his chronic disease already at the time of the medical examination when he joined Respondent in August 2008.

51. Finally, it has remained undisputed that the injury which led to the surgery at SPM Orthopedic was directly linked to –if not a simple consequence of– the chronic disease.

52. Claimant submits that the fact that he was hired by Lokomotiv Rostov na Donu in February 2009 demonstrates that he was not suffering from a chronic disease.

Although it is true that the agreement with Lokomotiv Rostov also provided for a medical examination upon joining the team, there is no evidence that such examination actually took place or that Claimant revealed his medical condition to the doctors who examined him in Rostov. Even if Claimant did inform his new club about the diagnosis of the team doctor of Respondent and the doctors of SPM Orthopedic, it may well be that he was nevertheless accepted by the new club. The Arbitrator finds therefore that the fact that Claimant was hired by another club is no convincing argument which could rebut the diagnoses of Respondent's team doctor and the doctors of SPM Orthopedic.

53. Claimant also submits that the termination was invalid since Respondent did not explicitly mention "the existence of a chronic disease" as the very reason for termination. The Arbitrator finds that there is no obligation of the employer to use a specific formula to describe the reason for termination. In view of the circumstances of this case and given that the termination letter contains an explicit reference to clause 8.2 of the Contract, which stipulates Claimant's obligation to reveal a pre-existing medical condition, Respondent left no doubt as to why it terminated the Contract.

54. The Arbitrator finds that Clause 8.2 of the Contract does not entitle Respondent to immediately dismiss a player for *any* chronic disease detected during the employment. The principle of proportionality requires that only a *serious* disease preventing the player from exercising basketball on a competitive level over a *substantial* part of the term of the Contract may lead to the termination of the Contract.

55. However, the Arbitrator concludes that Claimant breached the Contract by not revealing to Respondent a chronic disease which substantially impaired his physical abilities requiring surgical treatment and a rehabilitation period covering approximately 1/3 of the Contract's duration. Respondent was therefore entitled to rely on clause 8.2 and terminate the Contract.

56. The termination letter of 14 November 2008 explicitly refers to "the present moment" which Respondent considered to be the date of termination of the Contract. In the absence of evidence indicating otherwise, the Arbitrator concludes that the Contract was terminated only for the future on 14 November 2008. On that day, the Parties' mutual rights and obligations ceased to exist. Respondent tacitly concedes that it paid the agreed salary installments only until the end of August 2008. Indeed, Respondent's Request for Relief *("…to hold that Respondent is not liable to pay Claimant any remaining salaries which Claimant was entitled to receive under the Contract after 14 November 2008")* implies that Respondent is well aware of its payment obligations for the period until 14 November 2008. Accordingly, Respondent must pay to Claimant the salary installments due for the months of September 2008 (EUR 25,000), October 2008 (EUR 25,000) and for 14/30 of the month of November 2008 (until termination on 14 November 2008, i.e. EUR 11,667). These installments amount to EUR 61,667 in total.

8. Interest

57. Claimant has requested payment of default interest of 5%. Although the Contract does not explicitly provide that there is an obligation for the debtor to pay default interest, this is a generally accepted principle which is embodied in most legal systems. The Arbitrator, deciding *ex aequo et bono* and in line with the jurisprudence of the FAT decides that the interest rate of 5% per annum shall be applied on the amounts due, starting on the day following the date when each of the outstanding salary installments fell due, i.e. on 1st October 2008, 1st November 2008 and 15 November 2008.

9. Costs

58. On 11 August 2009, 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 at EUR 4,700.00. In view of the outcome of the present case, the costs shall be borne by 1/3 by Respondent and 2/3 by Claimant.

59. Given that Claimant has paid the totality of the Advance on the arbitration costs of EUR 8,000.00, as fixed by the Arbitrator, the Arbitrator decides that

(i) the FAT shall reimburse EUR 3,300.00 to Claimant;

(ii) Respondent shall pay to the Claimant EUR 1,566.60.

60. Furthermore, in the present case, the Arbitrator considers it adequate that each party pays its own costs and expenses (Article 19.3 of the FAT Rules).

10. AWARD

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

1. **Azovmash Mariupol Basketball Club is ordered to pay to Mr. Aleksandar Capin EUR 61,667.00 together with:**

   (a) **5% interest p.a. on EUR 25,000.00 from 1 October 2008;**

   (b) **5% interest p.a. on EUR 25,000.00 from 1 November 2008;**

   (c) **5% interest p.a. on EUR 11.667.00 from 15 November 2008.**

2. **Azovmash Mariupol Basketball Club is ordered to pay to Mr. Aleksandar Capin EUR 1,566.60 as a reimbursement of the Advance on FAT costs.**

3. **Each party shall bear its own legal fees and expenses.**

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

Geneva, 17 August 2009

Stephan Netzle

(Arbitrator)

FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

Notice about Appeals Procedure

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

"**17. Appeal**

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