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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0014/08 FAT)

rendered on 16 April 2009 by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr Stephan Netzle

in the arbitration proceedings between

Mr Remon van de Hare, C/ Sant Pedro 10, 08340 Vilasar De Mar (BCN), Spain

- Claimant 1-

Mr Kirill Glushkov, Court Side, Parkwijklaan 229, 1326 JT Almere, Holland

- Claimant 2-

Mr Geert Hammink, Court Side, Parkwijklaan 229, 1326 JT Almere, Holland

- Claimant 3-

or jointly referred to as "the Claimants"

vs.

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

- Respondent -

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1. The Parties

1.1. The Claimants

1. Claimant 1 is a professional basketball player domiciled in Spain. He is represented by Messrs Geert Hammink and Kirill Glushkov of Court Side, a company engaged in basketball management and representation of players.

2. Claimants 2 and 3 are FIBA-licensed player's agents and advisers in professional basketball.

1.2. The Respondent

3. Respondent is a basketball club from Mariupol, Ukraine. Respondent is not represented by counsel.

2. The Arbitrator

4. On 31 October 2008, the President of the FIBA Arbitral Tribunal (FAT) appointed Dr. Stephan Netzle as Arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Arbitration Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").

5. On 12 November 2008, the Arbitrator accepted his appointment and signed a declaration of acceptance and independence provided by the FAT Secretariat.

6. 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

7. On 5 July 2007, Claimant 1 and Respondent signed a player agreement whereby Respondent employed Claimant 1 "as an experienced basketball player for three seasons 2007 – 2010" (hereinafter the "Player Agreement").

8. Also on 5 July 2007, Claimant 2, on behalf of Court Side, signed an agreement with Respondent, stipulating the payment of agent fees for the assistance provided "in locating and contracting with Player [sic]" (hereinafter the "Agents Agreement").

9. Claimant 1 played with the Respondent's team during the 2007/2008 season. After that season, Claimant 1 spent the whole summer playing and practicing with the national team of Holland. On 8 October 2008, after Respondent had declined to accept him for the upcoming season, Claimant 1 signed a professional player agreement with AEK Larnacas, Cyprus for the 2008/2009 season.

10. Respondent did not request Claimant 1's services in the 2008/2009 and 2009/2010 season. Respondent also refused to pay the salaries for the 2008/2009 and 2009/2010 seasons, but considered the Player Agreement to be terminated because, in its view, Claimant 1 was not fit to play.

3.2. The Proceedings before the FAT

11. On 25 September 2008, the FAT received the Claimants' incomplete Request for Arbitration. Upon the FAT Secretariat's invitation, the Request was completed and received on 25 October 2008. The non-reimbursable fee of EUR 3,000.00 was received in the FAT account on 1 October 2008.

12. By letter of 31 October 2008, the FAT Secretariat confirmed receipt of the Request for Arbitration and informed the parties of the appointment of the Arbitrator and of the details of the procedure. In the same letter, a time-limit was fixed for Respondent to file the Answer to the Request for Arbitration until 24 November 2008. The letter also requested the parties to pay, by no later than 17 November 2008, the following amounts as an Advance on Costs:

"Claimant 1 (Mr. van de Hare):	*EUR 2,000*
Claimant 2 (Mr. Glushkov)	*EUR 2,000*
Claimant 3 (Mr. Hammink)	*EUR 2,000*
Respondent (BC Azovmash):	*EUR 6,000".*

13. On 20 November 2008, Respondent's Answer was received by the FAT Secretariat.

14. By letter of 5 December 2008, the FAT Secretariat informed the parties that Respondent had failed to pay its share of the Advance on Costs. In accordance with Article 9.3 of the FAT Rules, the Claimants were invited to substitute for the missing payment of the Respondent. A time limit was set until 16 December 2008. The Claimants paid the Respondent's share of the Advance on Costs on 11 December 2008.

15. By letter dated 12 December 2008, the FAT Secretariat informed the parties that the entire Advance on Costs had been received by the FAT. It also indicated that Claimant 3's submission entitled “Response 25-11-2008” had been received by the FAT and admitted into the record. At the same time, Claimants 1 and 2 were given the opportunity to file their own replies by 29 December 2008, thereby specifically addressing Respondent’s claim that Mr. van de Hare was suffering from a pre-existing medical condition.

16. On 28 and 30 December 2008, the replies by Claimants 1 and 2 respectively were received by the FAT Secretariat. By letter of 7 January 2009, the FAT Secretariat acknowledged receipt of the submissions made by Claimants 1 and 2, which were admitted into the record. Respondent was then requested to file a second answer in response to the submissions of the Claimants until 16 January 2009.

17. On 15 January 2009, Respondent submitted its second answer to the FAT Secretariat.

18. On 20 January 2009 Claimant 3 filed a further submission which was not solicited by the FAT and which was not taken into account.

19. By letter of 22 January 2009, the Arbitrator declared that the exchange of documents was completed and that he did not intend to hold a hearing unless explicitly requested by a party. In the same letter of 22 January 2009, the Arbitrator invited the parties to submit a detailed account of their costs by no later than 28 January 2009. The parties did not request the FAT to hold a hearing.

20. On 23 January 2009, the Claimants submitted the following statement of account:

> *"€ 3.000 Court Side (handling fee)*

€ 2.000 Court Side (on behalf of Remon van de Hare)

€ 2.000 Court Side (on behalf of Geert Hammink)

€ 2.000 Court Side (on behalf of Kirill Glushkov)

€ 6.000 Court Side (on behalf of Azovmash)"

21. Respondent did not submit an account of costs.

1. On 22 February 2009, the Arbitrator requested Claimant 1 to submit the player agreement which he had concluded with AEK Larnacas. Claimant 1 complied with the request on 2 March 2009. Respondent was given the opportunity to comment on this agreement until 9 March 2009. Respondent did not file any submissions in this respect.

4. The Positions of the Parties

4.1. The Position of Claimant 1

22. Claimant 1 submits that the parties signed a three-year player contract. However, once the 2007/2008 season started, he got less and less playing time and Respondent communicated to the player's agent that it wanted to terminate the Player Agreement. When the agent reminded Respondent that the parties had signed a guaranteed three-year contract, Claimant 1 got the impression that Respondent tried to find other reasons to "get rid" of him.

23. Claimant 1 further submits that he was always fully fit to play basketball and that he went through a medical examination before the Player Agreement was signed. Claim-

ant 1 played for the Respondent's team during the 2007/2008 season. After that season, he spent the whole summer playing and practicing with the national team of Holland. When he asked Respondent when he should report back in Mariupol for the 2008/2009 season, according to Claimant 1, Respondent replied that he did not need to come back, and if he did, another medical examination would be arranged, which he was not expected to pass, so that Respondent could declare him unfit to play basketball and terminate the Agreement.

24. After Claimant 1's first attempt to return to the Respondent's team had failed, he joined AEK Larnacas, a basketball club in Cyprus for which he has been playing since 9 October 2008.

25. Claimant 1 relies on certain clauses in the Agreement, especially Clause 1.2 which states:

> *"1.2. The Club agrees that this Agreement is fully guaranteed agreement. In regard to all salary monies payable to the Player, the termination or suspension of this Agreement by the Club on account of an injury, illness or disability suffered or sustained by the Player shall in no way affect the Player's right to receive the sums payable under this Agreement at the dates those sums become due."*

26. On the basis of the contentions set out above, Claimant 1 requests the FAT to make an award:

> *"1. that Azovmash is forced to honor the fully guaranteed Agreement they have with me for the 2008/2009 and 2009/2010 season in which I am guaranteed a NET salary of EUR 130.000 and EUR 150.000 respectively.*
>
> *or*
>
> *2. That Azovmash issues me the letter of clearance so I can find another club and that Azovmash guarantees me an income EUR 130.000 NET for the 2008/2009 season and EUR 150.000 net for the 2009/2010 season. In other words; if I find a new club that pays less than the above amounts than Azovmash will pay the difference."*

4.2. The position of Claimants 2 and 3

27. Claimants 2 and 3, who operate their agency under the name "Court Side" request payment of the outstanding agent fees of EUR 14,000 for the 2008/2009 season and EUR 16,000 for the 2009/2010 season. They refer to the Agents Agreement which states:

> "*This Agreement by and between AZOVMASH MARIUPOL BASKETBALL CLUB OF UKRAINE represented by Mr. Aleksander Savchuk ("Club") and Court Side, hereby represented by Kirill Glushkov ('Agents'), is meant to clarify the arrangement, between the parties regarding the contract of Remon van de Hare (player) to play for Club in the 2007-2008, 2008-2009 and 2009-2010.*
>
> *Whereas, Agent assisted Club in locating and contracting with Player, Club promises to pay Agent the net amount, free of taxes of 12.000 EURO on August 30th 2007, 14.000 EURO on August 30th 2008 and 16.000 EURO on August 30th 2009."*

4.3. The Claimants' Request for Relief

28. The Request for Arbitration contains the following joint Request for Relief:

> *"**2. Request for Relief***
>
> *€ 310.000*
>
> *€ 280.000 NET of Ukrainian taxes (€ 130.000 net plus € 150.000 net for the season 2008/09 and 2009/10 respectively) for the claimant Remon van de Hare.*
>
> *€ 30.000 in agent fees for the claimant Court Side (Geert Hammink and Kirill Glushkov)*
>
> *Plus all the FAT costs incurred until the end of this procedure, including the non-reimbursable deposits."*

4.4. The Respondent's Position

29. Respondent rejects the claim of Claimant 1 for the following reasons:

30. It is true that Claimant 1 successfully passed the medical examination before the start of the 2007/2008 season. However, he had not informed the team doctor about the presence of serious health problems, in particular affecting his backbone, which prevented him from sports activities and performance of the contractual obligations.

31. In November 2007, Claimant 1 was suffering from back pains and visited the team doctor. The medical examination indicated the presence of disseminated osteochondrosis with indirect symptoms of disc protrusion in the lumbar section with instability in the segments, osteochondrosis, spondylarthosis, degenerative-dystrophic damage of the vertebrae in the presence of anomaly of L-S section with sacrum deformation. This diagnosis was confirmed by an additional examination performed by a medical board appointed by the Respondent.

32. Respondent submits that this ailment has a chronic character and is characterized by periodic worsening caused by various factors, including significant physical exercise. Such medical condition makes sports activities impossible.

33. In December 2007, Claimant 1 suggested an additional medical consultation by a practitioner of his choice. Claimant 1 was examined by Dr. Félix Gastón Fernández in Spain. From the Respondent’s viewpoint, the final diagnosis by Dr. Fernández dated 20 December 2007 confirms the diagnosis of the Ukrainian doctors. Upon his return from Spain, Claimant 1 underwent treatment, including injections of ozone and dexamethasone as suggested by Dr. Fernández.

34. Claimant 1 continued to play with the team throughout the 2007/2008 season although

he was allegedly not completely fit to play.

35. Respondent submits that it was misled by Claimant 1 about his health conditions and playing capabilities because Claimant 1 concealed his medical condition from Respondent and its medical team. Respondent concludes that under these circumstances it was entitled to terminate the Agreement.

36. Respondent does not specifically address the separate claim of Claimants 2 and 3.

5. Procedural Issues

5.1. Jurisdiction

37. 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).

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

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]

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

> *"**6. Dispute***
>
> *6.1. The parties give priority to non-court settlement of the disputes on the basis of negotiations.*
>
> *6.2. Any dispute arising out of, or in connection with, this Agreement shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved definitively in accordance with the FAT Arbitration Rules. The Arbitrator shall decide the dispute ex aequo et bono. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS) in 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 Sport (CAS) upon appeal shall be excluded."*

39. The jurisdiction of the FAT over the dispute between Claimants 2 and 3 and Respondent results from the arbitration clause in the Agents Agreement which reads as follows:

> *"Any dispute arising out of, or in connection with, this Agreement shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved definitively in accordance with the FAT Arbitration Rules. The Arbitrator shall decide the dispute ex aequo et bono. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS) in 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 Sport (CAS) upon appeal shall be excluded."*

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

40. The Player Agreement and the Agents Agreement are in written form and thus the arbitration agreements fulfill the formal requirements of Article 178(1) PILA.

41. 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 agreements under Swiss law (referred to by Article 178(2) PILA). In particular, the wording "[a]ny dispute arising out of, or in connection with, this Agreement" clearly encompasses the present disputes.

42. In addition, Respondent has explicitly acknowledged the jurisdiction of the FAT in its Answer.

5.2. Consolidation

43. The Request for Arbitration contains both the claim of Claimant 1 for payment of the salaries under the Player Agreement and the claim of Claimants 2 and 3 for payment of the agent fees which were agreed as a compensation for the fact that Claimants 2 and 3 successfully supported the signing of the Player Agreement between Claimant 1 and the Respondent.

44. Since (i) the factual circumstances of both claims are identical, (ii) both claims are directed against the same Respondent, (iii) all Claimants are subject to an arbitration agreement in favour of the FAT, and (iv) Respondent has not objected to the adjudication of both claims simultaneously, the Arbitrator deems it appropriate to handle both claims in one and the same arbitral proceeding.

5.3. Standing of Claimants 2 and 3

45. Mr Glushkov and Mr Hammink have submitted their claim for the agent fees as Claimants 2 and 3. However, the Agents Agreement has been concluded by "Court Side, hereby represented by Kirill Glushkov ('Agents')". Mr Hammink is not explicitly mentioned. Still, there is no indication that "Court Side" is a separate legal entity, nor has any such submission been made by Respondent. The Arbitrator concludes that "Court Side" is rather a trade name for the agency run by Mr Glushkov and Mr Hammink (i.e. the "Agents", as referred to in the Agents Agreement). Therefore, Claimants 2 and 3 have standing to claim the payment of the agent fees.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

46. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the Arbitrators to decide "*en équité*", by opposition to the decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

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

47. 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."*

48. In their agreements to arbitrate, the parties have explicitly directed and empowered the Arbitrator to decide the dispute *ex aequo et bono*. Consequently, the Arbitrator will adjudicate the present matter *ex aequo et bono*.

49. 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]

50. 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]

51. This is confirmed by Article 15.1 of the FAT Rules *in fine,* according to which the

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

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

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

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

Arbitrator applies "general considerations of justice and fairness without reference to any particular national or international law".

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

6.2. Findings

6.2.1 The key issues in the dispute between Claimant 1 and the Respondent

53. It is common ground that:

- Claimant 1 and Respondent signed the Player Agreement;
- before the beginning of the 2007/2008 season, Claimant 1 underwent a primary medical examination arranged by the Respondent, as provided in art. 8.1 of the Player Agreement;
- the primary medical examination did not reveal any injury or illness of Claimant 1;
- Claimant 1 played with the Respondent's team during the entire 2007/2008 season;
- on or before November 2007, Claimant 1 was suffering from back pains requiring medical examination and treatment, which included a visit to a doctor of the Claimant 1's choice in Spain;
- Claimant 1 did not play with the Respondent's team during the 2008/2009 season.

54. In substance, the dispute raises the following issues:

- When Claimant 1 joined the Respondent's team, did he suffer from a pre-existing medical condition which substantially affected his ability to perform his contractual duties as a basketball player and which he failed to disclose to Respondent during the primary medical examination?

- If yes, was Respondent entitled to terminate the Player Agreement unilaterally?

- If not, was the Player Agreement nonetheless terminated?

- What are the consequences of the termination of the Player Agreement?

6.2.2 Did Claimant 1 suffer from a pre-existing medical condition?

55. It has not been disputed that Claimant 1 passed the medical examination before the Player Agreement became effective and that he started to play with the Respondent's team. However, Respondent argues that the Player Agreement became ineffective because Claimant 1 had not disclosed a pre-existing medical condition which prevented him from fully performing his duties as a professional basketball player.

56. Considering the fundamental principle of *pacta sunt servanda* (contracts must be observed), the party who claims a right to terminate a contract or its contractual obligations must prove the facts on which it bases its termination right. The burden is therefore upon Respondent to demonstrate that Claimant 1 failed to disclose the alleged pre-existing medical condition. Such demonstration requires (a) proof of the alleged pre-existing medical condition of a certain severity, and (b) proof of Claimant 1's knowledge of such a pre-existing medical condition.

57. Respondent submits that in November 2007, Claimant 1 suffered from increasing pains which limited his actions. Medical examinations were then carried out by the team doctor and further specialists, which resulted in a diagnosis of osteochondrosis of the lumbar section with numerous protrusions of discs in the lumbar section, spondyloisthesis of bodies L3 and L4 of vertebrae with presence of radicular, vertebral and nerve root syndromes. According to the statements of Mr. Abashyn Gennadiy (Deputy Head of Neurosurgery Department of Donetsk), and Mr. Sergey Kalinkin, the Respondent's team doctor, these symptoms indicated a chronic condition.

58. Respondent further submits that Claimant 1 was allowed to see a doctor in Spain for diagnosis and treatment of these pains, and that this doctor "confirmed in principal [sic] the diagnosis which was set by the Ukrainian doctors".

59. Claimant 1 acknowledges that he "got injured" and suffered "some back problems" during the 2007/2008 season for which he sought medical treatment with Azovmash. He submits, however, that he had never suffered "this pain" before. Claimant 1 also confirms that he visited a doctor in Barcelona and did not dispute the medical report of Dr. Félix Gáston Fernández dated 20 December 2007 which contains the following "Final Diagnosis": "Backbone arthrosis because of overloading, multiple disc degeneration and traces of overloading of joints". Dr. Fernández recommended "to strengthen the muscles of the paravertebral muscular system in the weight-lifting gym with injections of ozone and small dosage of dexamethasone." According to the Respondent's team doctor, the rehabilitation measures turned out to be successful but the pain returned when the measures were interrupted.

60. Claimant 1 also submits that upon his return from Spain, he continued playing with the Respondent's team. After the termination of the 2007/2008 season, when the Respondent's team won the Ukrainian championship, Claimant 1 trained and played with the

National Team of Holland and then with AEK Larnacas, which has not been contested by the Respondent. When joining AEK Larnacas, Claimant 1 was examined by Dr. Giorgos Adamantinos of Larnaca who stated that Claimant 1 was "completed [sic] and thoroughly tested by myself and several colleagues" between 10th and 13th October 2008. […] We found Mr. van de Hare to be completely healthy and fit to perform the sport of basketball at the highest level." Respondent does not dispute the accuracy of Dr. Adamantinos' statement but points to the fact that it reflected only the health status of Claimant 1 in October 2008 but no conclusions could be drawn with respect to the previous health problems.

61. The Arbitrator has no reason to doubt the accuracy of the medical statements submitted by Claimant 1 and Respondent. Accordingly, Claimant 1's backbone has been affected by a certain deformation or attrition which is likely to have caused pain and constrained his athletic performances in November 2007. The nature of the diagnosed impairment may even lead a layman to conclude that it was not the consequence of an accident but developed over a certain period of time. However, no such evidence has been presented by the Respondent.

62. What matters is that, even if a certain deformation or attrition (which can be found in many high level athletes) already pre-existed when Claimant 1 joined the Respondent's team, Respondent failed to demonstrate that Claimant 1 was aware (a) that such a deformation or attrition existed and (b) that the impairment was so severe that it was likely to affect his performance as a basketball player in the period covered by the Player Agreement. Only under these circumstances, would Claimant 1 have had a duty of disclosure.

63. The Arbitrator concludes that even though it may well be (although it is not a proven fact) that Claimant 1's backbone was affected by a certain deformation or attrition at

the time when he joined the Respondent's team, there are no indications that Claimant 1 was aware of such impairment and its possible consequences on his performance and that he concealed such information from Respondent.

6.2.3 Was Respondent entitled to terminate the Player Agreement or the salary payments?

64. Respondent submits that because of the non-disclosure of the pre-existing medical condition by Claimant 1, the Player Agreement was "terminated" and "lacks of force". No formal notice of termination, suspension or cancellation is on record. It is therefore unclear whether the Player Agreement was formally terminated or whether Respondent claims that the Player Agreement was null and void from the beginning due to material error. In any event, it is undisputed that Claimant 1 reported back and offered his services to Respondent for the 2008/2009 season and that Respondent refused to accept Claimant 1 for the 2008/2009 season and stopped the salary payments after the 2007/2008 season.

65. As held above, Respondent's allegation that Claimant 1 had concealed certain material medical information at the beginning of the Player Agreement is unfounded. No other grounds which could have justified Respondent to unilaterally terminate the Player Agreement or stop the salary payments before the agreed term of the Player Agreement have been brought forward. Under these circumstances, Respondent was not entitled to either terminate the Player Agreement or stop the agreed salary payments.

66. When Respondent refused to include Claimant 1 in its team for the 2008/2009 season, stopped the salary payments and turned Claimant 1's services down, it breached the Player Agreement and actually terminated it. Although no exact date is available, such termination must have occurred on or before the end of September 2008. As a conse-

quence, Claimant 1 was thereafter no longer obliged to offer his services to Respondent and free to look for another job.

67. Eventually, Claimant 1 was offered the opportunity to play for another club (AEK Larnacas). Obviously, Respondent did not object to the issuance of the Letter of Clearance. However, this may not be interpreted as a termination of the Agreement by mutual consent but must be regarded only as a consequence of the Respondent's prior unilateral termination in breach of the Player Agreement.

6.2.4 Consequences of the breach of the Player Agreement

68. As a consequence of the Respondent's unilateral termination in breach of the Player Agreement, Claimant 1 is entitled to damages. As a matter of principle and in the absence of any provision about damages, the Arbitrator shall award the sum which would restore the injured party into the economic position that such party expected from performance of the contract. On the other hand, the injured party is obliged to mitigate the damage. In addition, any advantages which the injured party may have gained as a consequence of the breach (e.g. salaries otherwise earned) must be taken into account when calculating the compensation due[6].

69. According to Clause 1.2 of the Player Agreement, Claimant 1 was entitled to salaries of EUR 130,000 for the 2008/2009 season and EUR 150,000 for the 2009/2010 season. In addition, the payment of certain bonuses depending on the success of the team was promised. However, Claimant 1 is nor requesting a compensation for the loss of such

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6 See FAT Decision 0005/08 (Pavic vs. AEK BC), p. 19.

bonuses.

70. According to Clause 3 of the Player Agreement, the salaries became due for payment on a monthly basis, irrespectively of the actual playing time of Claimant 1. The fact that during the 2007/2008 season Claimant 1 may have been unable to play because of back pains and medical treatment did not entitle Respondent to suspend or reduce payment of the salary, as explicitly agreed in Clause 1.2 (see quote of Clause 1.2. at par. 25 above).

71. Respondent did not execute any payments for the 2008/2009 season or the 2009/2010 season. Thus, the unpaid salaries must be considered as a loss suffered by Claimant 1 which resulted from the breach of the Player Agreement by the Respondent. The compensation for damages corresponds to the base salaries for the two remaining seasons as agreed in Clause 3.1 and 3.2 of the Player Agreement (i.e. EUR 130,000.00 + EUR 150,000.00 = EUR 280,000.00), which became due altogether upon termination of the Player Agreement.

72. It might be argued that the present value of the future monthly salaries is less than the amount reached by simple addition of the outstanding annual salaries. However, such discounting is not necessary in the present case, since the compensation for damages is not the result of a mathematical formula but follows from an overall assessment, which also comprises the compensations which Claimant 1 actually earned or may have earned otherwise and which, by nature, includes a considerable margin of imprecision.

73. When it comes to the assessment of the compensation which Claimant 1 was able to earn or failed to earn because he was no longer bound by the Player Agreement with the Respondent, the Arbitrator must primarily look at the contract which Claimant 1

signed with the next club, i.e. AEK Larnacas. This contract covers the 2008/2009 season and provides for a player's salary of EUR 36,000.00.

74. Obviously, there is a substantial gap between the salary agreed with Respondent for the same period of time (EUR 130,000.00). However, there are no indications that (a) the player contract with AEK Larnacas did not reflect the true agreement between the parties of that contract, or (b) Claimant 1 failed to accept the best offer available when Respondent unilaterally terminated the Agreement on short notice. Under the circumstances, the Arbitrator does not deem it appropriate to impose strict requirements on the efforts of Claimant 1 to find a comparable employment. Indeed, just a few weeks or even days before the beginning of the new season, Claimant 1 found himself in a rather hopeless situation to find an employment on terms comparable to the prior Player Agreement.

75. The Arbitrator, deciding *ex aequo et bono,* therefore holds that the compensation owed by Respondent for the 2008/2009 season shall be EUR 94,000.00, i.e. the salary Claimant 1 agreed with Respondent for the 2008/2009 season minus the salary he then agreed with AEK Larnacas for the same period of time.

76. The situation for the next season 2009/2010 must be looked at differently. Firstly, there is no player contract to rely on any more. Secondly, Claimant 1 is now in a better position, with no time constraints to find a new employment on more favorable terms. From publicly available information (e.g. FIBA Players Profiles website), it appears that Claimant 1 is still playing at the international level, both with the national team of Holland and with his current club. There are no indications that Claimant 1 would not be able to pursue his career as a professional player also in the next season. Still, it is an almost impossible task for the Arbitrator to assess the market value of a player and the employment opportunities available for the upcoming season.

77. Under these circumstances, the Arbitrator prefers to determine a flat amount of money as a hypothetical income which Claimant 1 is expected to achieve (the "Expected Income"). That Expected Income shall reflect the expectation of Claimant 1 to find an employment with a higher salary than the current one, but also takes into account the fact that it may be unlikely for Claimant 1 to reach a salary on the level of his prior Player Agreement with Respondent. The Expected Income shall thus constitute an incentive for Claimant 1 not to rest on the compensation for damages awarded by the FAT but to try and find an employment with distinctly more favorable terms than the current one.

78. In order to assess the Expected Income for the 2009/2010 season, the Arbitrator finds it reasonable and fair to fix that amount at 50% of the salary agreed with Respondent for the 2009/2010 season, which *in casu* amounts to EUR 75,000. By doing so, the Arbitrator accepts that Claimant 1 may eventually reach a higher or a lower salary than the Expected Income. However, since the Expected Income results from an *ex aequo et bono* assessment by the Arbitrator which includes a considerable margin of discretion, a deviation of the real income from the Expected Income shall not entitle either party to claim a later adjustment of the arbitral award except for truly extraordinary and unforeseeable circumstances.

79. The overall compensation for breach of contract by Respondent therefore consists of EUR 94,000.00 for the 2008/2009 season plus EUR 75,000.00 for the 2009/2010 season, amounting to EUR 169,000.00 in total.

6.2.5 The agent fees claimed by Claimants 2 and 3

80. The agent fees claimed by the Claimants 2 and 3 have been agreed because of their services which undisputedly led to the conclusion of the Player Agrement with Claimant

1. The agent fees consist of three annual instalments payable on August 30th 2007, 2008 and 2009. It seems that the first instalment was paid, but that the second and third instalments have been retained by Respondent because of the termination of the Player Agreement.

81. According to the Agents Agreement, the agent fees are due because the agents assisted the Club "in locating and contracting with Player". The payments of the three instalments have not explicitly been made contingent upon whether the player was still playing with the club or whether the Player Agreement was still in force on 30 August of each of the relevant years. On the other hand, the fact that the payment dates for the agent fees instalments correspond to the commencement of the new seasons cannot be completely disregarded.

82. The Arbitrator finds that as a principle, the agent fees are due in full because they relate to services already provided in the past. That service consisted in the placement of a player who would be ready to play for a three years term. If the player left the club before the end of the contractual term, Respondent was entitled to reduce the compensation accordingly. However, if the player was willing to fulfill his contractual obligation and if it was the club which terminated the contract early without being entitled to do so, there is no reason why the agents should be held responsible and be penalised with a reduction of their fees.

83. The Agents Agreement is still in force and has not been "terminated" by the termination of the Player Agreement. Respondent is still obliged to pay the agreed compensation to Claimants 2 and 3 on the agreed dates, namely EUR 14,000.00 on 30 August 2008 and EUR 16,000.00 on 30 August 2009.

7. Costs

84. Article 19.2 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and may either be included in the award or communicated to the parties separately. Furthermore Article 19.3 of the FAT Rules provides that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

On 14 April 2009 the President of the FAT rendered the following decision on costs:

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

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

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

- *Arbitrator's fees (28 hours at an hourly rate of EUR 300)* — *EUR 8,400.00*
- *Arbitrator's costs* — ----------
- *Administrative and other costs of FAT* — ----------
- *Fees of the President of the FAT* — *EUR 2,600.00*
- *Costs of the President of the FAT* — ----------

TOTAL — ***EUR 11,000.00****"*

In the present case, the costs shall be borne by Respondent alone in line with Article

19.2 of the FAT Rules. Considering the outcome of the case, the Claimants have been awarded EUR 199,000.00 instead of the total claimed amount of EUR 310,000.00 (i.e. approx. 65%). The cost of the procedure shall be allocated in the same proportion (i.e. EUR 7,150.00 to be paid by Respondent and EUR 3,850.00 to be paid by the Claimants).

Given that the Claimants paid the totality of the advance of the arbitration costs of EUR 12,000.00 fixed by the Arbitrator, the Arbitrator decides that:

(i) the FAT shall reimburse EUR 1,000.00 to the Claimants;

(ii) Respondent shall pay to the Claimants EUR 7,150.00, being the share of the arbitration costs to be borne by the Respondent.

Since the Claimants did not request a contribution towards their legal fees and expenses, the Arbitrator does not award any amount in this respect.

8. Interest

Since the Claimants did not request the awarded amounts to bear interest, the Arbitrator does not award any interest.

9. AWARD

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

1. **Azovmash Mariupol Basketball Club shall pay to Remon van de Hare EUR 169,000.00 as compensation for breach of contract.**

2. **Azovmash Mariupol Basketball Club shall pay to Kirill Glushkov and Geert Hammink EUR 14,000.00 as agent fees.**

3. **The last instalment of the agent fees, in the amount of EUR 16,000.00, shall be paid by Azovmash Mariupol Basketball Club to Kirill Glushkov and Geert Hammink on 30th August 2009.**

4. **Azovmash Mariupol Basketball Club shall pay EUR 7,150.00 to the Claimants as a reimbursement of the advance on the arbitration costs.**

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

Geneva, 16 April 2009

Stephan Netzle

(Arbitrator)

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."