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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0050/09 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr Quentin Byrne-Sutton

in the arbitration proceedings between

Milica Dabovic, c/o Mr Salim Baki

Represented by Mr Salim Baki, Osmaniye Mah Mine Sk., Emre Konutlan A Blok D: 26,
34144 Bakirkoy-Istanbul, Turkey

- Claimant -

vs.

Beşiktaş Jimnastik Kulübü, Süleyman Seba Caddesi, No:48 BJK Plaza, Akaretler,
Beşiktaş 34357, Istanbul, Turkey

- Respondent -



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1. The Parties

1.1. The Claimant

1. Ms Milica Dabovic (the "Player") is a professional basketball player, who was playing for the basketball club Beşiktaş (the "Club") at the time the dispute arose.

1.2. The Respondent

2. Beşiktaş is a professional basketball club in Turkey.

2. The Arbitrator

3. On 12 June 2009, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Mr. Quentin Byrne-Sutton, as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules"). None of the parties has raised objections to the appointment of the Arbitrator or to the declaration of independence issued by him.

3. Facts and Proceedings

3.1. Summary of the Dispute

4. The Claimant and the Club entered into a contract entitled "*Professional Basketball Contract*" on 11 August 2008 (the "Contract").
5. According to Article I.1 of the Contract it was for a fixed-term engagement of the Player beginning on 20 September 2008 and ending on 30 April 2009, i.e. for a period of seven months.



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6. According to Article II.1 of the Contract the Player would receive a total net salary of USD 80,000, payable in eight monthly installments of USD 10,000, beginning in September 2008 and ending in April 2009.

7. Article II.8 of the Contract stipulates that:

“The Club agrees that this agreement is no-cut guaranteed agreement and that the Club shall not have right to suspend or release the Player in the event that the Player does not exhibit skill or competitive ability, or in the event that an injury shall befall the Player. The Club shall continue to pay the Player her guaranteed salary payment and provide the housing provided herein for the full term of this Agreement at the times and amounts as specified above. Only exception to this clause is that the Club has right to terminate this contract for the period after January 20, 2009. If the Club chooses to use its right to terminate the contract, it has to inform the Player or her agent in written form by January 15, 2009. In this case, the Club has not any obligation to make payments dated for January 31, 2009, February 28, 2009, March 31, 2009, April 30, 2009. The Player agrees that she will not have any right to ask for any payment dated for the period after January 20, 2009”

8. According to Article III.1 a)-d): the Player must

*“a) Behave in a manner compatible with the practice of sport at a high level of competition.
b) Participate in a serious and sportive manner in all practices, games and other activities scheduled by the Club.
c) Respect the coach’s and the Club’s Board of Director’s instructions.
d) Respect the disciplinary regulations of the Club which will be given to the Player after the medical check.”*

9. Article IV.1 provides that:

“Under no circumstances other than optional use of Club’s right to terminate the contract for the period after January 20, 2009 or serious professional misconduct (if Player does not comply with rules and regulations of the Turkish Basketball Federation, the team regulations, FIBA regulations and during testing and doping control or if the Player is convicted for the usage and/or trafficking of illegal substances) to be notified to the Player by registered mail within 48 hours, can the Club cut the Player”.

10. Article IV.2 provides, among others, that:

“In the event that payments are not made by the Club within 20 (twenty) work days of the



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scheduled payment, the Player shall immediately be entitled to all moneys in accordance with the Contract, but shall not have to perform in practice sessions or games until all scheduled payments have been made ...”.

11. The Player alleges that between the moment she began playing for the Club and the date of 26 January 2009, when her Contract was terminated by the Club, her conduct as a professional basketball player was irreproachable, that she took part in the practices, obeyed the coaches’ instructions, had a good relationship with her teammates and performed well.

12. The Club contests the foregoing allegations.

13. According to the Club, during that period

“The Player, continuously violated the disciplinary regulations, displayed a living style inconsistent with the Club’s respectability and prestige and also behaved in a way that effect the team’s and the other players’ work tempo and motivation negatively”.

14. As proof for its allegations, the Club filed a series of written declarations entitled “Minutes” – carrying dates between December 2008 and February 2009, signed in large part by the team’s coaches and its manager and one signed by a representative of the Management Board of the building in which the Player’s apartment was situated – recording examples of the various forms of alleged misconduct.

15. The Player contests the authenticity of the dates of the minutes in question, by stating

“We seriously claim that those minutes were prepared after our Request for Arbitration”

and contests their validity as legally binding documents for the Player, since

“None of them [were] sent from the Club to Claimant nor the Claimant was notified by the Respondent”.

16. Moreover, the Player alleges that in any event the reproaches being made on the basis of those minutes are untrue and relate in part to conduct which is not reproachable and



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concerns the Player's private life.

17. Matters came to a head on 26 February 2009, when the Player received a letter from the Club's notary public, informing her that by a decision of 23 February 2009 the Beşiktaş Executive Board had terminated her Contract for the following reasons:

"...[the contracts] have been terminated for just cause and without any compensation, pursuant to Beşiktaş Cola Turka Women's Basketball Team Disciplinary Regulations, and to article 35.c of the section IV of Turkish Basketball Federation's 2008-2009 Contractual Athlete's License, Registration and Transfer Regulations, because of the fact that you are leading an unseemly lifestyle which might do harm to Beşiktaş Sports Club's overall prestige and good standing and that, despite all warnings, you did not give up your such unwarranted acts and that you made it a habit of exhibiting to attitudes and acts running contrary to disciplinary regulations and you are acting in a slack and undisciplined way both during team exercises and contests and that, despite all warnings, you did not make any efforts for positive self-development, thereby having negative impact on efforts and motivation of other teammates and, thus, causing the team lagging behind its targets".

18. Considering the foregoing termination of the Contract to be unjustified and contractual payments in her favor to be outstanding, the Player filed a request for arbitration with FAT on 26 May 2009.

3.2. The Proceedings before the FAT

19. On 26 May 2009, the Claimant filed a Request for Arbitration in accordance with the FAT Rules, and on 3 June 2009 duly paid the non-reimbursable fee of EUR 3,000.
20. On 2 July 2009, the FAT informed the parties that Mr Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the amount of Advance on Costs to be paid by the Parties as follows:

<i>Ms Dabovic (Claimant)</i>	<i>EUR 4'000.</i>
<i>Beşiktaş (Respondent)</i>	<i>EUR 4'000.</i>

21. On 23 July 2009, Beşiktaş submitted its Answer.



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22. On 27 July 2009, the Claimant paid its advance on costs in a total amount of EUR 4,000.
23. On 31 July 2009, the FAT Secretariat reminded the Claimant that it would have to substitute for the Respondent with respect to the advance on arbitral costs because the latter had not paid its portion thereof.
24. On 10 August 2009, the Claimant made the substitute payment in an amount of EUR 4,000.
25. On 23 September 2009, considering that neither party had solicited a hearing, the Arbitrator decided in accordance with Article 13.1 of the FAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions of the parties. The Arbitrator accordingly issued a Procedural Order providing that the exchange of documents was completed and inviting the Parties to submit their cost accounts.
26. On 1 October 2009, both Parties submitted their costs, however the Claimant simultaneously filed an unsolicited letter relating to the merits of the case.
27. On 6 October 2009, the Arbitrator issued a Procedural Order inviting the Respondent to comment on the Claimant's unsolicited letter.
28. On 9 October 2009, the Respondent submitted its comments, requesting that the Claimant's unsolicited letter be struck from the record due to being filed after the exchange of submissions between the Parties was closed.
29. On 12 October 2009, the Arbitrator issued a Procedural Order confirming that the Claimant's unsolicited letter of 1 October 2009 had been struck from the record due to being filed after the exchange of written submissions had been closed.



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4. The Positions of the Parties

4.1. The Claimant's Position

30. The Claimant submits the following in substance:

- The Club was not entitled to terminate the Contract before its first fixed term.
- The Club had no cause for termination of the Contract.
- Consequently, the Club must pay the Player all outstanding amounts due under the Contract.

31. On such basis, the Claimant requests the following relief:

"As the Club terminated the Contract on 26th February 2009, it did not effect "the guaranteed payments" of February 28, March 31 and April 30, that is 30,000-Euros in total, according to the payment schedule stipulated on Article II.

Therefore, as the termination of the Contract by the Club is unfair and unjustified, we demand from the Respondent Club,

1. *as an unfair termination compensation fee, 30'000-Eurs and payment of interest at the applicable Swiss statutory rate from the due date of each payment.*
2. *compensation of arbitration fees;*
3. *a contribution towards the Dabovic's legal fees and the expenses."*

4.2. Respondent's Position

32. The Respondent submits the following in substance:

- The Player was acting in a manner and exhibiting a lifestyle that put the Club's reputation and image in jeopardy. Furthermore, she was behaving in a slack and



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undisciplined manner during training and contests that had a negative impact on her performance, the motivation of her teammates and the team's performance.

- Her conduct in question was in violation of the “Beşiktaş Basketball Branch Discipline and Punishment Regulations” (the “Beşiktaş Regulations”) and of Article 35(c) of the “Directives of Turkish Basketball Association on Licensing, Registration, and Transfer of Players” (the “Directives of the Turkish Basketball Association”) for the season 2008/2009.
- Despite being warned that her behaviour was unacceptable, it did not change.
- Consequently, the Club had no other option than to terminate her Contract and was entitled to do so under the Beşiktaş Regulations and Section IV, article 35 (c) of the Directives of the Turkish Basketball Association.
- Moreover, the Club lived up to all its contractual obligations and paid all amounts due up until the date of termination; meaning that no payments are outstanding.

33. On such basis the Respondent requests

“... the rejection of the Player's appeal/lawsuit and charging the court expense and attorney-fees to the demandant Player...”.

5. The jurisdiction of the 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). The jurisdiction of the FAT presupposes the arbitrability of the dispute and the



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existence of a valid arbitration agreement between the parties.

35. 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) PILA¹.
36. The jurisdiction of the FAT over the dispute results from the arbitration clause in article VII of the Contract, which reads as follows:

“Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitrate Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the Arbitration Rules by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be in Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties’ domicile. The language of the arbitration shall be English. Awards of FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against decisions of the 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.”

37. The Contract is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.
38. 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). In particular, the wording “[a]ny dispute arising from or related to the present contract” clearly encompasses the present dispute. In addition, the Respondent has not challenged the Arbitrator’s jurisdiction.

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



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6. Discussion

6.1. Applicable Law – *ex aequo et bono*

39. 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”.

40. 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.”

41. Article VII of the Contract provides that the arbitrator shall decide the dispute “*ex aequo et bono*”. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

42. 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’arbitrage² (Concordat)³, under which Swiss courts have held that arbitration “*en équité*” is fundamentally different from

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.



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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

43. This is confirmed by Article 15.1 of the FAT Rules *in fine*, according to which the Arbitrator applies “*general considerations of justice and fairness without reference to any particular national or international law*”.
44. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2. Findings

45. The Arbitrator finds that the Contract, the regulations the Respondent itself invoked when terminating the Contract and general considerations of fairness all coincide in preventing the termination notified on 26 February 2009 from being deemed justified and valid.
46. To the extent the termination was based partly on any lack of performance of the Player, this would be unjustified since Article II.9 of the Contract expressly stipulates that: “*... the Club shall not have right to suspend or release the Player in the event that the Player does not exhibit skill or competitive ability ...*”.
47. With respect to discipline, the Player undoubtedly had duties to respect in accordance with Article III.1 a)-d) of the Contract. However, at the same time, both the foregoing provision of the Contract and article 35 (c) of the Directives of the Turkish Basketball Association refer to the Beşiktaş Regulations as the guiding disciplinary rules in determining what precisely constitutes misconduct, what procedure must be followed to

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



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sanction it and what the sanctions are.

48. Section V of the Beşiktaş Regulations contains a list of acts that are deemed to constitute misconduct, and Article VIII a list of related sanctions that depend on the gravity of the breach.
49. Under Sections V and VIII of the Beşiktaş Regulations, the only breaches that may be sanctioned by the Club unilaterally terminating a player's contract are the breaches defined in Sections V.15 (in essence illegal behaviour and doping offences) and V.22 (pregnancy). Offences of such type have not been invoked by the Club and did not form the basis of its termination decision.
50. Fines are the only sanction provided for any other type of disciplinary breach defined in Section V of the Beşiktaş Regulations and for those forms of breach invoked by the Club in this case and relied on in its notice of termination of 26 February 2009. Moreover, the system of fines instituted by Section VIII of the Beşiktaş Regulations addresses the problem of repeated misconduct by providing for increased fines for acts repeated up to four times or more.
51. Thus, the Beşiktaş Regulations did not entitle the Club to terminate the Contract for the reasons it relied on at the time and is invoking in this arbitration.
52. The Club would have been entitled to fine the Player as per Section VIII of the Beşiktaş Regulations, and subsequently to apply additional and higher fines if the Player did not comply.
53. The system instituted by Sections V and VIII of the Beşiktaş Regulations is based on the principle of proportionality – with more serious breaches and repeated breaches being sanctioned more severely – and the notion of warnings (since each fine also serves as a warning, in light of the regulations, that another higher fine can follow for



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the same act if repeated), both of which stem from considerations of fairness.

54. Consequently, by ignoring the content of its own disciplinary regulations, the Club not only breached the regulations and the Contract, but also acted unfairly.
55. In addition, it is not clear from the evidence on record that the minutes filed by the Respondent recording the alleged acts of misconduct of the Player were ever communicated to the Player at the time of the acts in question and could therefore serve as warnings.
56. For the above reasons, the Arbitrator finds that the termination notified to the Player by the Respondent on 26 February 2009 was both unfair and in breach of the Contract.
57. Consequently, the Club shall be required to compensate the Player for the payments still owed under the fixed term of the Contract.
58. Since the Club does not deny that the payments in question being claimed remain unpaid and the evidence on record establishes that it were not paid, the Club shall be ordered to make them.
59. In keeping with the logic of article IV.2 of the Contract, the amounts owed to the Player became due on the date of the wrongful termination, i.e. on 26 February 2009.
60. The Contract does not regulate interest for late payments. However, it is a recognized general principle of contract law, which is underpinned by motives of equity, that late payments give rise to interest – in order that the creditor be placed in the financial position she/he would have been in had due payments been made on time. Consequently and despite the Contract not specifying an interest rate, it is normal and fair that interest is due on the late payments. Furthermore, the interest rate of 5%, corresponding to the Swiss statutory rate invoked by the Claimant, is fair and reasonable.



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61. It is an established principle that interest runs from the day after the date on which the amounts are due. Therefore, in the present case, interest shall run from the day after termination, i.e. 27 February 2009.

7. Costs

62. 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 determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings.
63. On 27 October 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 7,170.00
64. Considering the Claimant prevailed in her argument that the Contract was unjustly terminated and in her claim for compensation, it is fair that the fees and costs of the arbitration be borne by the Respondent and that it be required to cover the Claimant’s legal fees and other expenses, those having been submitted being reasonable in amount.



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65. Given that the Claimant paid the totality of the advance on costs of EUR 8,000 as well as a non-reimbursable handling fee of EUR 3,000, the Arbitrator decides that in application of article 19.3 of the FAT Rules:
- (i) FAT shall reimburse EUR 830.00 to the Claimant, being the difference between the costs advanced by the Claimant and the arbitration costs fixed by the FAT President;
 - (ii) The Respondent shall pay EUR 7,170.00 to the Claimant, being the difference between the costs advanced by her and the amount that is going to be reimbursed to her by the FAT.
 - (iii) The Respondent shall pay to the Claimant EUR 7,500.00, representing the amount of her legal fees and other expenses.



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8. AWARD

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

1. Beşiktaş Jimnastik Kulübü shall pay Ms Milica Dabovic USD 30,000.00 as compensation for wrongful termination of the Professional Basketball Contract of 11 August 2008, with interest at 5% per annum from 27 January 2009.
2. Beşiktaş Jimnastik Kulübü shall pay Ms Milica Dabovic an amount of EUR 7,170.00 as compensation for the advance on costs paid by her to the FAT.
3. Beşiktaş Jimnastik Kulübü shall pay Ms Milica Dabovic an amount of EUR 7,500.00 as compensation for her legal fees and expenses.
4. Any other or further requests for relief are dismissed.

Geneva, the place of arbitration, 29 October 2009

Quentin Byrne-Sutton
(Arbitrator)



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Notice about Appeals Procedure

cf. Article 17 of the FAT Rules

which reads as follows:

"17. Appeal

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