Arbitration CAS 2010/A/2035 Azovmash Mariupol Basketball Club v. Marc Salyers, award of 27 April 2010

Panel: Mr Mark Hovell (United Kingdom), Sole Arbitrator

Basketball
Non-payment of outstanding salaries
Possibility to implicitly modify an agreement between the parties
Admissibility of counterclaims in appeal procedures according to the CAS Code (2010 version)

1. **As long as there is an explicit clause in the agreement between a club and a player stating that any variations must be agreed in writing, it cannot be deduced from the player's behaviour that there has been a modification of the agreement.**

2. **A request by the respondent that late interests should be granted on all late payments retroactively should be considered as a counterclaim; however, pursuant to Article R55 of the CAS Code, the respondent's counterclaim shall be considered as inadmissible as counterclaims may not be filed in appeals arbitration procedures.**

Azovmash Mariupol Basketball Club (the "Club" or the "Appellant") is a professional basketball club in Ukraine playing in the Ukrainian Superleague.

Mr. Marc Salyers (the "Player" or the "Respondent") is a professional basketball player, who was playing for the Club at the time of the dispute.

The Player and the Club entered into an agreement on 1 July 2008 whereby the latter engaged the Player for the seasons 2008-2009 and 2009-2010 (the "Agreement").

Within the Agreement were the obligations for the Club to pay the Player his salary in monthly instalments of USD 88,000 during the 2008 season on the first day of each month. In addition, clause 3.3 stated, *inter alia:*

> *"...The Club agrees that this Agreement is fully guaranteed agreement. ...If Club is late by more than 10 days on making payment in full then there will be a late fee of 500 USD net per day. 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 in paying by more than 21 days or club has not performed any non-economical obligation for 21 days or more, then Player may terminate this Contract and shall be 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 player the entire agreement in full within 30 days of players departure. Player shall be*

under no obligation to mitigate his damages should he seek employment with another basketball club following termination...".

Further, clause 10.2 stated:

"This Agreement contains the entire Agreement between the parties and no other oral or written, regarding the subject of this Agreement will be deemed to exist or bind either of the parties hereto. This Agreement can be amended only in writing...".

During 2008, the Club began experiencing financial difficulties which resulted in the Player receiving some monthly salaries late.

The Player's October, November and December 2008 salaries were paid late.

On 20 November 2008, the Player's agent addressed a fax letter to the Club with regards to the Player's November 2008 salary being overdue.

On 22 November 2008, the Player's agent sent a second notice by email to the Club stating that the Player, in accordance with the Agreement, will cease to participate in all practices and games.

The Club was scheduled to participate in a Euro Cup game against Kalise G.C. on 25 November 2008.

On 24 November 2008, a representative of the Club gave the Player a copy of a SWIFT transfer message confirming that the Club had effected payment of half of the salary for the month of November 2008, *i.e.* an amount of USD 44,000.

The Player's agent, on 24 November 2008, sent a fax letter to the Club putting the Club on notice to pay the outstanding part of the November 2008 salary and warning that the Player may terminate the Agreement. Despite that, the Player participated in the Euro Cup game on 25 November 2008.

On 26 November 2008, a payment of USD 44,000 was credited to the Player's account.

On 28 November 2008, the second half of the Player's salary was credited to his account.

In accordance with the Agreement, the Player's December 2008 salary became due on 1 December 2008.

Over Christmas time, the Player returned to the United States.

On 26 December 2008, a representative of the Club sent an email message to the Player stating that they wished for the Player to return to the Club and that *"we paid the money and if you don't see it on your account, you will see it on Monday for sure our transaction was done on 23 December, and I hope today we will have the Bank receipts".*

On the same day, the Player's agent replied by email on behalf of the Player to the Club requesting a bank wire receipt to be faxed or emailed over to the Player's agent.

Later that day, the representative of the Club sent to the Player's agent an email containing details of the wire receipt, as opposed to a copy of the SWIFT transfer receipt. The email contained a copy of the instructions given to the Club's bank to transfer an amount of USD 88,000 to the Player's account, such instructions recording the transfer date and value date as being 26 December 2008.

On 30 December 2008 at 12.41 am (US local time), the Player's agent sent an email message to the Club, with a copy to the Player, whereby the Agent terminated the Agreement on behalf of the Player.

On 30 December 2008, as evidenced by the Player's bank statements, the wire instruction was actually executed by the Club's bank and the payment arrived in the Player's account at 16.52 (US time zone).

Thereafter, settlement discussions began regarding the payment by the Club of the 6 outstanding monthly salaries (January to June 2009) for the 2008-2009 season, *i.e.* the balance of the Agreement.

On 3 January 2009, the Club sent an email to the Player's agent, with a copy to the Player, with a settlement offer with regards to the Agreement termination.

On 22 January 2009, the Club, in an email to the Player's agent, stated that they needed more time to make any payment beyond the equivalent of one month's salary.

On 21 April 2009, the Player's lawyer sent an ultimate reminder to the Club for the payment of the outstanding salary and stating that the Player would seek relief with the FIBA Arbitral Tribunal (FAT).

On 22 June 2009, and due to the absence of the salary payment by the Club, the Player filed a request for arbitration dated 25 May 2009 in accordance with the FAT Rules.

On 15 December 2009, the FAT delivered a decision awarding the Player compensation for the salaries outstanding plus interest, costs and an amount as reimbursement for his legal fees and expenses, as follows:

> *"2. Azovmash Mariupol Basketball Club shall pay Mr Marc Salyers an amount of US$ 440,000 as compensation for the salaries still owed to him under their Agreement of 1 July 2008, plus interest at 5% per annum on such amount from 30 January 2009 onwards.*
>
> *3. Azovmash Mariupol Basketball Club shall pay Mr Marc Salyers an amount of EUR 8,300 as reimbursement for the advance on costs paid by him to the FAT.*
>
> *4. Azovmash Mariupol Basketball Club shall pay Mr Marc Salyers an amount of EUR 10,750 as reimbursement for his legal fees and expenses".*

On 15 December 2009, the decision of the FAT (the "Appealed Decision") was notified to the parties.

On 5 January 2010, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (CAS). It challenged the above mentioned Appealed Decision, submitting the following request for relief:

> *"1. to set aside the arbitral award rendered by the FIBA Arbitral Tribunal on 15 December 2009 in case number 0054/09 FAT (Mr. Marc Salyers vs. Azovmash Mariupol Basketball Club).*
>
> *2. to render a new arbitral award holding that (i) the Agreement between the Appellant and the Respondent dated 1 July 2008 was unlawfully terminated by Respondent on 30 December 2008, and that (ii) the Appellant is not liable to pay the Respondent any remaining salaries which the Respondent was entitled to receive under the Agreement after 30 December 2008.*
>
> *3. to hold that the Respondent shall bear all costs of the present arbitration.*
>
> *4. to order the Respondent to pay to the Appellant its reasonable legal fees in connection with the present arbitration".*

The Appellant then filed an appeal brief with the CAS, dated 15 January 2010.

On 12 February 2010, the Respondent filed his answer with the CAS, with the following request for relief:

> *"To dismiss the Appeal introduced by the Appellant's Statement of Appeal and its Appeal Brief.*
>
> *Therefore, to entirely confirm the Award rendered by the FAT Arbitrator in all of its components including the reimbursement of legal expenses, except for the application of late interest which the Respondent requests should be applied as follows:*
>
> *1. either by using the contract penalties contained in article 3.3, either by applying the late interest according to article 104 of the Swiss Code of Obligations; AND*
>
> *2. starting from October 1 2008 for the late payment of the October 2008 salary;*
>
> *3. starting from November 1 2008 for the late payment of the November 2008 salary;*
>
> *4. starting from December 1 2008 for the late payment of the December 2008 salary;*
>
> *5. starting from December 30 2008 for the payment of the severance payment of $440,000.*
>
> *To hold the Appellant liable of the reimbursement of Respondent's legal expenses for the present CAS arbitration procedure, which shall be communicated to the CAS Arbitrator at first request upon closing of the CAS proceedings".*

Article R57 of the Code of Sports-related Arbitration (the "Code") provides that the Sole Arbitrator may, after consulting the parties, decide not to hold a hearing if he deems himself sufficiently well informed. The Sole Arbitrator notes that neither party requested an oral hearing and advised the parties in the order of procedure that he would render the award on the basis of the parties' written submissions.

LAW

CAS Jurisdiction

1. The jurisdiction of the CAS, which is not disputed, derives from article 17 of the FAT Rules as well as article R47 of the Code.

2. The Sole Arbitrator notes that the CAS has jurisdiction to decide the matter at hand. This is further confirmed by the order of procedure duly signed by the parties.

3. Under article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law.

Applicable law

4. With respect to the law governing the merits of the dispute, article 187(1) of the Swiss Federal Code on Private International Law ("PIL") provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PIL adds that the parties may authorize the arbitrators to decide *"en équité"*. Article 187(2) PIL is generally translated into English as "the parties may authorize the arbitral tribunal to decide *ex aequo et bono*".

5. Article R58 of the Code provides the following:

   "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

6. In the present matter, the Sole Arbitrator shall decide this dispute according to the applicable provisions contained in the FAT Rules.

7. Pursuant to article 15.1 of the FAT Rules:

   "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".

8. Pursuant to article 17 of the FAT Rules, *"…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".*

9. In the Agreement, the parties have explicitly directed and empowered the FAT Arbitrator and the Sole Arbitrator to decide the dispute *ex aequo et bono*.

10. Consequently in the present proceedings, the Sole Arbitrator shall adjudicate this present matter *ex aequo et bono*.

11. 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*" (see POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, no 717, pp. 625-626).

Admissibility

12. The appeal was filed within the deadline provided by the FAT Rules and stated in the Appealed Decision. The Appellant complied with all other requirements of article R48 of the Code, including the payment of the CAS Court Office fee.

13. It follows that the appeal is admissible.

The merits

14. The Sole Arbitrator had to determine the following:

- Did the Respondent's (or his agent's) actions in November 2008 vary the Agreement in some way?
- Did the Respondent's (or his agent's) actions in December 2008 entitle the Appellant to a legitimate expectation that the Agreement would not be terminated by the Respondent? In other words, had the Respondent waived his right to terminate the Agreement?
- If "yes" to either of the above, did the Respondent breach the Agreement by issuing a letter of termination on 30 December 2008?
- If "no" to (a) and (b) above, is the Respondent entitled to the interest claimed in his answer?

15. The Sole Arbitrator notes the arguments advanced by the Appellant, that in November 2008 the payment of the Respondent's salary was late, but once the Player received evidence that it was in the banking system, he accepted that evidence and played in subsequent games for the Appellant. The Appellant is claiming that this practice then became some form of variation of the Agreement and was a practice that could and did apply with the December 2008 payment.

16. The Respondent, and indeed the FAT Arbitrator, point to clause 10.2 of the Agreement, which states any variations must be agreed in writing; to the express wording of clause 3.3 of the Agreement which provides a clear process for paying salaries and what happens if there are delays; and that the correspondence post-termination does not refer to the Appellant's arguments that the Agreement has been varied in this way.

17. The Sole Arbitrator agrees with the Respondent that there has not been any variation of the Agreement caused by his actions in November 2008 which would entitle the Appellant to pay the December 2008 salary late.

18. The second issue is whether the request for and the email sending details of the bank transfer in December 2008 should preclude the Respondent from exercising his contractual rights under clause 3.3 of the Agreement, or, to put it another way, had he waived his termination rights?

19. The Appellant claims that in November 2008, once the Respondent had received a copy of the SWIFT transfer, he played in the next game for the Club despite his agent's emails threatening to terminate the Agreement. As such, the Appellant believed that once it had sent details of the transfer in December 2008 to the Respondent, the rights in clause 3.3 were waived or then incapable of being exercised.

20. The Respondent, and again the FAT Arbitrator, points to the mechanism in clause 3.3 of the Agreement; the fact that 21 days had elapsed; that the Respondent was contractually entitled to terminate; that the Appellant had in its email of 26 December 2008 stated the transfer had been made on 23 December 2008 and would be with the Respondent's bank by 29 December 2008 *"for sure*"; that at the end of that day (or first thing in the morning on 30 December 2008) no monies had been received, so the Respondent was entitled to and did terminate the Agreement; and that the Appellant did not advance this argument in the post-termination correspondence.

21. The Sole Arbitrator notes that in November 2008, there was a copy of the SWIFT transfer sent to the Respondent, as opposed to a summary of it in an email as was the case in December 2008; that the Appellant set its own "deadline" by stating the money would be with the Respondent's bank *"for sure"* by 29 December 2008; and that whilst this may have all occurred over the Christmas time and involved the uncertainties of international bank transfers, it was always in the Appellant's domain to decide when to put the money into the banking system.

22. Ultimately, the Sole Arbitrator does not support the Appellant's claim that the Respondent had in some way waived his ability to terminate the Agreement. Rather, the conduct of the Respondent and his agent showed a large element of good faith as the Player could have terminated the contract in November 2008, but did not. When his wages were late again for the third month in a row he could have terminated before Christmas; he was told it would be with him *"for sure"* by 29 December 2008, yet it did not arrive that day; and the Respondent's patience then ended and he exercised his contractual right to terminate.

23. In summary, the Sole Arbitrator agrees with the FAT Arbitrator's position on the termination of the Agreement and concludes it was justifiably terminated by the Respondent and, as a consequence, the Appellant should pay the sum of USD 440,000 to the Respondent along with the costs mentioned in the Appealed Decision.

24. The remaining issue is that of interest/late payment fees due to the Respondent. The Sole Arbitrator notes that the Respondent *"leaves to the appreciation of the Arbitrator whether contract penalties (…) rather than late interests according to Art. 104 of the Swiss Code of obligations need to be applied"*

but that the Respondent *"however disputes the starting point from the application of such late interests as it has been determined by the FAT Award"*. The Respondent therefore requested that late interests should be granted on all late payments since October 2008. Such request is to be analyzed as a counterclaim from the Respondent. Pursuant to Article R55 of the Code, the Respondent's counterclaim shall be considered as inadmissible as counterclaims may not be filed in appeals arbitration procedures.

The Court of Arbitration for Sport rules:

1. The Appeal filed by Azovmash Mariupol Basketball Club on 5 January 2010 is dismissed.

2. The arbitral award rendered by the FAT on 15 December 2010 in case No. 0054/09 FAT (Mr Marc Salyers vs. Azovmash Mariupol Basketball Club) is confirmed in all respects.

3. (…).

4. (…).

5. All other or further claims are dismissed.