



**FIBA**

We Are Basketball

**FIBA Arbitral Tribunal (FAT)**

**ARBITRAL AWARD**

**(0025/08 FAT)**

rendered on 6 April 2009 by the

**FIBA ARBITRAL TRIBUNAL (FAT)**

**Mr. Raj Parker**

in the arbitration proceedings

**Rosette International Group Limited**, Ostrovnaya Street 7, office 4017, 121552 Moscow,  
Russia,

represented by Mr. Vadim Mikhalevskiy, Ostrovnaya Street 7, office 4017, 121552, Moscow,  
Russia

**- Claimant -**

**vs.**

**Men's Basketball Club "Spartak-Primorje Vladivostok"**, Batareynaya Street 2, 690091  
Vladivostok, Russia.

**- Respondent -**

**together with the Claimant, the "Parties"**



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

### 1. The Parties

#### 1.1. The Claimant

**Rosette International Group Limited** (hereinafter the "Claimant") is a company incorporated in the British Virgin Islands. It has offices situated at Ostrovnaya Street 7, office 4017, 121552 Moscow, Russia. The Claimant is represented by Mr. Vadim Mikhalevskiy, a certified FIBA agent.

#### 1.2. The Respondent

**Men's Basketball Club "Spartak-Primorje Vladivostok"** (hereinafter the "Respondent") is a Russian basketball club with its seat in Vladivostok, Russia. It is domiciled at Batareynaya Street 2, 690091 Vladivostok, Russia. The Respondent is not represented by counsel.

### 2. The Arbitrator

On 14 January 2009, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Mr. Raj Parker as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules"). By email dated 15 January 2009 the Arbitrator accepted his appointment, and he has signed a declaration of acceptance and independence.

Neither Party has raised objections to the appointment of the Arbitrator or to the declaration



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

of independence rendered by him.

### 3. Facts and Proceedings

#### 3.1. Background Facts

On 19 July 2008, Claimant and the Respondent entered into a contract (the "Contract"). Under the Contract the Respondent agreed to pay the Claimant an agency fee of USD 50,000.00 (the "Agency Fee") by 20 September 2008, provided that the Claimant's client, Mr Zeldon Hamilton (the "Player"), successfully passed a medical examination. Article 2 of the Contract states:

**"SEASON 2008-09.**

*a) The amount of the Agency Fee for the 2008-09 season shall be fixed at FIFTY THOUSAND US DOLLARS (\$ 50,000,USD), net of any Russian VAT taxes or any other Russian taxes and charges, to be paid no later than September 20<sup>th</sup> after the PLAYER successfully passing his medical examination."*

#### 3.2. The Proceedings before the FAT

On 9 December 2008 the Claimant filed a Request for Arbitration in accordance with the FAT Rules. The non-reimbursable fee of EUR 3,000.00 was received in the FAT account on 10 December 2008.

By letter dated 2 January 2009, a time limit was fixed until 23 January 2009 for the Respondent to file its Answer to the Request for Arbitration. By the same letter, a time limit of 16 January 2009 was fixed to pay the following amounts as an advance on



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

costs:

*"Claimant: EUR 5,000.00  
Respondent: EUR 5,000.00"*

On 14 January 2009, the Claimant paid his share of the advance on costs.

The Respondent has failed to submit an Answer and to pay its share of the advance on costs. Accordingly, by letter dated 10 February 2009, the FAT Secretariat informed the Parties that the arbitration would not proceed until the full amount of the advance on costs was received. The letter referred to Article 9.3 of the FAT Arbitration Rules which provides that *"If a party fails to pay its share, the other party may substitute for it"*. A time limit until 20 February 2009 was fixed for the Claimant to pay the Respondent's share of the advance on costs.

On 17 February 2009, the Claimant paid the Respondent's share of the advance on costs and, by letter dated 24 February 2009, the FAT Secretariat informed the Parties that the exchange of documents was complete.

The Parties did not request the FAT to hold a hearing.

By letter dated 24 February 2009, the FAT Secretariat invited the Parties to submit their detailed accounts of costs by 2 March 2009. On 25 February 2009, the Claimant submitted the following account:

- "1) Non-reimbursable handling fee – 3000 EUR;*
- 2) Advance on Costs for Claimant (Rosette International Group Ltd.) – 5000 EUR;*
- 3) Advance on costs for Respondent (BC Spartak-Primorje Vladivostok) – 5000 EUR;*
- 4) Legal costs for Attorney – 8000 EUR."*



We Are Basketball

## **FIBA Arbitral Tribunal (FAT)**

The Respondent failed to submit an account of costs.

### **4. The Parties' Submissions**

#### **4.1. The Claimant's Submissions**

The Claimant submits that the amount that it was paid under the Contract was USD 35,040.00 short of the full Agency Fee.

In its Request for Arbitration, the Claimant therefore seeks: (i) payment of USD 35,040.00 as the outstanding portion of the Agency Fee; (ii) interest on the outstanding USD 35,040.00; and (iii) payment of the non-reimbursable handling fee of EUR 3,000.00.

#### **4.2. The Respondent's Submissions**

Despite several invitations, the Respondent has not made any submissions.

### **5. Jurisdiction and other Procedural Issues**

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 Federal Statute on Private International Law (PILA).



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

### 5.1. The jurisdiction of FAT

#### 5.1.1 Review *ex officio*

As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.<sup>1</sup>

#### 5.1.2 Arbitrability

The jurisdiction of the FAT requires 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.<sup>2</sup>

#### 5.1.3 Formal and substantive validity of the arbitration agreement

The existence of a valid arbitration agreement is to 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.*

---

<sup>1</sup> ATF 120 II 155, 162.

<sup>2</sup> Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

*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 particularly the main contract, or to Swiss law”.*

Article 8 of the Contract contains the following arbitration clause:

*“Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties’ domicile. The language of the arbitration shall be English. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against decision of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.”*

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

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.



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

### 5.2. Other Procedural Issues

Article 14.2 of the FAT Rules states that “*the Arbitrator may nevertheless proceed with the arbitration and deliver an award*” if “*the Respondent fails to submit an Answer*”. The Arbitrator’s authority to proceed with the arbitration in the case of default by one of the parties is in accordance with Swiss arbitration law<sup>3</sup> and the practice of FAT<sup>4</sup>. However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

The requirement is met in the current case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in line with the relevant rules. It was also given ample opportunity to respond to the Request for Arbitration. However, the Respondent chose not to respond at all. In light of these circumstances, the Arbitrator considers himself fit to proceed with the arbitration and deliver the award.

---

<sup>3</sup> Swiss Federal Tribunal SJ 1982, 613, 621; see also KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, Bern 2006, No. 483; LALIVE/POUDRET/REYMOND, Le Droit de l’arbitrage interne et international en Suisse, Lausanne, 1989, No. 8 ad Art. 182 PIL; RIGOZZI, L’Arbitrage international en matière de Sport, Basle 2005, No. 898; SCHNEIDER, Basler Kommentar, No. 87 ad Art. 182 PIL.

<sup>4</sup> See for instance FAT Decision 0001/07 (Ostojic, Raznatovic vs. PAOK) and FAT Decision 0018/08 (Nicevic vs. Besiktas JK).



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

### 6. Discussion

#### 6.1. Applicable Law – *ex aequo et bono*

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.”*

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.”*

Article 8 of the Contract states:

*“The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.”*

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

The concept of *équité* (or *ex aequo et bono*) used in Article 187(2) PILA



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

originates from Article 31(3) of the *Concordat intercantonal sur l'arbitrage*<sup>5</sup> (Concordat),<sup>6</sup> 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.”*<sup>7</sup>

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”.<sup>8</sup>

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”.

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

---

<sup>5</sup> That is the Swiss statute that governed international and domestic arbitration before the enactment of the PIL. Today, the Concordat governs exclusively domestic arbitration.

<sup>6</sup> P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PIL.

<sup>7</sup> JdT 1981 III, p. 93 (free translation).

<sup>8</sup> POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

### 6.2. Findings

Under the Contract, the Respondent was obliged to pay the Claimant USD 50,000.00 by 20 September 2008, provided the Player passed a medical examination. It is established fact<sup>9</sup> that the Player has played in at least four games in the 2008/2009 season. The Arbitrator therefore holds that the Player passed the relevant medical examination. Accordingly, the Arbitrator finds that the Agency Fee of USD 50,000.00 has fallen due on 20 September 2008.

In its Request for Arbitration, the Claimant states that the Respondent paid USD 14,960.00 to it and so an outstanding sum of USD 35,040.00 is due. The Claimant has provided a bank statement of the payment made by the Respondent as evidence. However, the bank statement shows that the Respondent in fact paid USD 14,965.00 to the Claimant, i.e. USD 5.00 more than stated in the Request for Arbitration. The Arbitrator has been provided with no explanation for this discrepancy and believes that it is due to a clerical error. The Arbitrator therefore finds that the Claimant is owed USD 35,035.00 by the Respondent in respect of the outstanding Agency Fee.

### 7. Costs

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

---

<sup>9</sup> This is confirmed for instance on the website "Eurobasket.com" which publishes basketball statistics <http://www.eurobasket.com/player.asp?Cntry=RUS&PlayerID=22505>.



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

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 25 March 2009, the President of the FAT rendered the following decision on costs:

*“Considering that under Swiss law the arbitrators have the obligation to decide on the amount and the allocation of the arbitration costs as well as on the contribution towards the parties’ legal fees (BERGER/KELLERHALS, Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, No. 1477, p. 521).*

*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:*

<i>Arbitrator’s fees (18 hours at an hourly rate of EUR 300 plus 15% VAT)</i>	<i>EUR 6,210.00</i>
<i>Arbitrator’s costs</i>	<i>-----</i>
<i>Administrative and other costs of FAT</i>	<i>-----</i>
<i>Fees of the President of the FAT</i>	<i>EUR 1,850.00</i>
<i>Costs of the President of the FAT</i>	<i>-----</i>
<b><i>TOTAL</i></b>	<b><i>EUR 8,060.00”</i></b>

In the present case, the costs shall be borne by the Respondent alone, in line with Article 19.2 of the FAT Rules, as the Claimant has been awarded its claim in its entirety and there is no indication that either the financial resources of the parties or any other circumstance compels otherwise.



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

Moreover, the Arbitrator wishes to note that, given the above allocation, there is no need to take into account the handling fee when allocating the costs of the arbitration to the parties as provided for by Article 19.1(2) of the FAT Rules.

Given that the Claimant paid the totality of the advance on the arbitration costs of EUR 10,000.00 the Arbitrator decides that:

- (i) the FAT shall reimburse EUR 1,940.00 to the Claimant; and
- (ii) the Respondent shall pay to the Claimant EUR 8,060.00, being the difference between the costs advanced by the Claimant and the amount which is going to be reimbursed to him by the FAT.

Furthermore, the Arbitrator considers it appropriate that the Claimant is entitled to the payment of a contribution towards his legal fees and other expenses (Article 19.3 of the FAT Rules). The Arbitrator considers it appropriate to take into account the non-reimbursable fee when assessing the expenses incurred by the Claimant in connection with these proceedings. After having reviewed and assessed the submissions by the Claimant, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at EUR 4,500.00.

## 8. Interest

The Claimant also requests payment of interest on the sums owed. The Claimant has not specified the rate of interest claimed, nor the date from which interest is claimed, simply requesting "*interest rate for not paying the agency fee in time*". Payment of interest is a customary and necessary compensation for late payment and there is no reason why the



**FIBA**

We Are Basketball

## **FIBA Arbitral Tribunal (FAT)**

Claimant should not be awarded interest. In the absence of a specified requested rate and start date, the Arbitrator finds that the Swiss statutory rate of interest of 5% p.a. should be paid on the outstanding sum of USD 35,035.00, starting from 21 September 2008, i.e. the day after the date by which the Agency Fee was due.



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

### 9. Award

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

1. **Men's Basketball Club "Spartak-Primorje Vladivostok" is ordered to pay to Rosette International Group Limited USD 35,035.00 together with interest at 5% p.a. from 21 September 2008.**
2. **Men's Basketball Club "Spartak-Primorje Vladivostok" is ordered to pay Rosette International Group Limited EUR 8,060.00 as a reimbursement of the advance on FAT costs.**
3. **Men's Basketball Club "Spartak-Primorje Vladivostok" is ordered to pay EUR 4,500.00 as a contribution towards Rosette International Group Limited's legal fees and expenses.**
4. **Any other or further reaching claims for relief are dismissed.**

Geneva, place of the arbitration, 6 April 2009

Raj Parker  
(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."