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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0027/08 FAT)

rendered on 2 June 2009 by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr Christian Dalmau, c/o Paris Global Sports, P.O. Box 362127, San Juan, Puerto Rico 00936
represented by Mr José F. Paris, Paris Global Sports, P.O. Box 362127, San Juan, Puerto Rico 00936

- Claimant 1 -

and

Mr José F. Paris, Paris Global Sports, P.O. Box 362127, San Juan, Puerto Rico 00936

- Claimant 2 -

- or jointly, the Claimants -

vs.

Ural Great Professional Basketball Club, 11 Popova St. Perm, 614990, Russia

- Respondent -

- together with the Claimants, the Parties -

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1. The Parties

1.1. The Claimants

1. Claimant 1 (hereinafter "Claimant 1" or the "Player") is a professional basketball player domiciled in Puerto Rico. He is represented by his agent, José F. Paris (hereinafter "the Agent"), who, in addition, is Claimant 2. Mr. Paris is a FIBA-licensed agent, also acting under the name “Paris Global Sports”.

1.2. The Respondent

2. Respondent is a basketball club from Perm, Russia. Respondent is represented by Vitaliy Vyugov, General Manager of the Club.

2. The Arbitrator

3. On 8 February 2009, the President of the FIBA Arbitral Tribunal (the FAT) appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").

4. On 10 March 2009, the Arbitrator accepted his appointment and signed a declaration of acceptance and independence provided by the FAT Secretariat. 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

5. In July 2008[1], Claimant 1 and Respondent signed a two-year guaranteed contract for the seasons 2008/2009 and 2009/2010 (the “Player Contract”), whereby Claimant 1 undertook to provide his services as a professional basketball player for the team of the Respondent. Claimant 1 was promised a gross salary of USD 585,714.00 for the 2008/2009 season and USD 657,143.00 for the 2009/2010 season. In addition, the Player Contract provided for certain bonus payments, depending on the sporting results of the team.

6. The Player Contract is titled "Supplementary Agreement" and refers to a "Labour contract" as the primary agreement to which the Player Contract constitutes a supplement. However, no labor contract was produced in these arbitration proceedings and none of the Parties has made any references to it.

7. On 1 July 2008, Claimant 2 and the Respondent signed an agreement, whereby Claimant 2 undertook to procure that Claimant 1 would negotiate and eventually sign a contract with the Respondent on or before 10 July 2008. The Respondent undertook to pay a commission of USD 41,000.00 on or before 10 November 2008 and USD 46,000.00 on or before 20 November 2009 (the “Agent Fee”).

8. On or around 21 November 2008, the Player Contract was terminated; it is disputed

[1] The date of signature is not indicated in the Player Contract.

when and by whom it was terminated. The Parties made an attempt at negotiating a termination agreement, which was unsuccessful.

9. On 27 November 2008, Claimant 1 and his family left Perm and returned home via Spain.

10. Claimant 1 is claiming compensation in the amount of the unpaid salaries, future salaries, bonuses, interest and expenses. Claimant 2 is claiming payment of the Agent Fee. Respondent has submitted a counterclaim for penalties because Claimant 1 allegedly arrived late at Perm at the beginning of the season and missed certain training sessions and games.

3.2. The proceedings before the FAT

11. The Claimants' initial Request for Arbitration, dated 21 December 2008, set forth no specific amount claimed and was defective in several respects. It was then corrected by a second, completed Request for Arbitration which was submitted on 23 January 2009 in accordance with the FAT Rules. The completed Request for Arbitration includes a request for payment of the Player's salaries for 2008/09 and 2009/10, together with bonuses and interest, for reimbursement of the expenses the Player has incurred, and for payment of the Agent Fee plus interest.

12. The non-reimbursable fee of EUR 2,990.00 was received in the FAT bank account on 15 January 2009.

13. By letter of 9 February 2009, the FAT Secretariat confirmed receipt of the completed 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 the Respondent to file its Answer to the Request for Arbitration, until 2 March 2009 (the "First Answer"). The letter also requested the Parties to pay the following amounts as an Advance on Costs by and no later than 23 February 2009.

"Claimant 1 (Christian Dalmau): EUR 6,000
Claimant 2 (José Paris): EUR 2,000
Respondent (PBC Ural Great) EUR 8,000"

14. Upon request of the Respondent, the time limit for its First Answer was postponed until 4 March 2009.

15. On 4 March 2009, Respondent's First Answer was received by the FAT Secretariat.

16. By letter of 2 March 2009, the FAT Secretariat informed the Parties that the 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 until 11 March 2009. The Claimants paid the Respondent's share of Advance on Costs on 13 March 2009.

17. By letter to the Parties dated 24 March 2009, the FAT Secretariat confirmed that the entire Advance on Costs had been received.

18. In the same letter, the Secretariat, on behalf of the Arbitrator, invited the Claimants to answer the following questions until 1st April 2009:

"- What was the reason for non-appearance at the training session of 20 November 2008?

- Did the player attend (or attempt to attend) any further training after the 21 November 2008?

- *How did the player or the agent respond to the Termination Letter of 26 November 2008?*

- *Where is the player playing now? Since when? Please provide the FAT with the Player's employment contract with his new club, if any."*

19. In the same letter, the Secretariat notified the Parties that the Arbitrator did not intend to hold a hearing unless explicitly requested and unless witnesses were called whose testimony was crucial for the award.

20. By letter dated 24 March 2009, the Claimants responded to the above questions.

21. The Arbitrator then set a time limit until 9 April 2009 for Respondent to provide its own answers to the above questions and to comment upon the Claimants' answers (the "Second Answer").

22. By letter dated 7 April 2009, Respondent submitted the Second Answer and simultaneously raised a counterclaim in the total amount of USD 1,054,285.20 constituting the sum of several penalties for Claimant 1's purported breach of contract and "internal regulations" of the Club.

23. By letter of 15 April 2009, the Arbitrator declared that the exchange of documents was now completed and invited the Parties to submit a detailed account of their costs by no later than 24 April 2009.

24. On 22 April 2009, the Claimants submitted the following account of costs:

> *"The fees incurred in preparation and follow up are 40 hours @ 150.00 USD an hour totaling $6,000.000USD."*

25. On the same day, the Claimants submitted further arguments and exhibits. By email of

29 April 2009, the FAT Secretariat informed the Claimants that the Arbitrator had already closed the period for submissions and that, in accordance with Article 12.1 of the FAT Rules, the unsolicited submission would not be taken into account.

26. The Respondent has not submitted its account of costs.

27. Since upon invitation dated 24 March 2009 (see par. 19 above), neither party requested to hold a hearing, the Arbitrator decided in accordance with Article 13.1 of the FAT Rules not to hold a hearing.

4. The Positions of the Parties

4.1. The Claimants' position

28. Claimant 1 submits that the Parties signed a two-year Player Contract and that the early termination by the Respondent was unlawful. Claimant 1 also submits that:

- On 20 November 2008, he did not attend a practice session of the team because his monthly salary, due on 5 November 2008, and his expenses had not been paid, and for the past two weeks he had been blamed for being the very reason of the unsatisfactory performance of the team.

- On the following day, i.e. 21 November 2008, after several emails were exchanged between Claimant 2 and the Respondent, Claimant 1 appeared at the practice session. However, he was then requested to sign a written confirmation

that he had missed the practice of the previous day and was told by the coach to leave the team because his sporting performance was allegedly not sufficient to play in the Russian basketball league. After 21 November 2008, Claimant 1 did not return to the team's practice sessions.

- A termination agreement was then proposed by the Respondent but the Parties could not reach an understanding on the terms of such agreement.

29. In the Request for Arbitration, Claimant 1 mentioned a further incident which allegedly contributed to his discomfort and eventually led to his decision to abstain from further practice with the team: on the Club's trip to Serbia, Claimant 1 was not allowed to board the plane to return to Russia because the Club had not secured his working visa. Respondent suggested to Claimant 1 to fly to the US to properly obtain his working visa while leaving his family in Russia. However, the visa problem was eventually solved by the Club.

4.2. Claimants' request for Relief

30. Claimants request the following relief:

> *"We are requesting payment of the Player's full salary for 2008-09 and 2009-10, reimbursement of the expenses he incurred, bonuses and interest. We are also requesting the payment of the Agent's fee plus interest.*
>
> ***Christian Dalmau:***

1	*Visas*	*$*	*2,630.75*
2	*Trip San Juan to New York*	*$*	*400.00*
3	*Trip New York to Moscow*	*$*	*900.00*

4	*Internet*	*$*	*200.00*
5	*Trip Perm to Spain*	*$*	*1,300.00*
6	*Trip Spain to San Juan*	*$*	*5,811.95*
7	*Salary 2008-2009*	*$*	*410,000.00*
8	*Salary 2009-2010*	*$*	*460,000.00*

Bonuses:

The Club agreed to pay the Player bonuses for the 2008/2009 season as follows:

Victory in any game of:

- *Russian Super league - $500.00*
- *ULEB Cup - $1,000.00*
- *Play-offs - $1,000.00*

Russian Championship:

- *Play-off - $3,000.00*
- *Final Four - $6,000.00*
- *Third place - $8,000.00*
- *Second place - $10,000.00*
- *First place - $12,000.00*

ULEB Cup:

- *Play-off - $3,000.00*
- *Final Four - $6,000.00*
- *Third place - $8,000.00*
- *Second place - $10,000.00*
- *First place - $12,000.00*

Russian Cup:

- *Final Four - $6,000.00*
- *First place - $12,000.00*

Jose F. Paris

1. *Agent's fee 2008-2009* *$41,000.00*
2. *Agent's fee 2009-2010* *$46,000.00"*

4.3. Respondent's position

31. Respondent rejects the above claims for the following reasons:

- According to the Player Contract, Claimant 1 was obliged to arrive at Perm on 5 August 2008. In fact, he arrived only on 27 September 2008 and missed a very important pre-season training camp of the team. Upon his arrival, Claimant 1 refused to sign the Club's internal regulations, which are an essential part of the Contract. Despite this refusal, the Club still continued to fulfill its obligations. Only after Claimant 1 had stopped following the instructions of the coaches, missed the practices and left Perm without notification, did the Club decide to suspend the payment of remuneration to Claimant 1. Such behavior on the part of Claimant 1 has triggered a penalty according to par. 5.2 of the "agreement which the player signed and which was registered with the Russian Basketball Federation 3659 on the 1 October 2008". The penalty was not mentioned in Respondent's First Answer.

- On 20 November 2008, Claimant 1 missed the team's morning and evening practices without providing any explanation about the reason for such absence to the Club's coaching staff and management. In accordance with Russian legislation, a report of absence was made and signed by the head coach, the team manager, the team doctor and by Claimant 1.

- On 21 November 2008, Claimant 1 appeared at the training session but decided to terminate the Player Contract. Respondent offered to the Claimants to sign a termination agreement. However, no such agreement could eventually be reached.

32. The Respondent asserts that the "absence of practice without justifiable reasons (was) not the first violation of the Contract by the Player" (sic). In particular, the Respondent refers to the late arrival of Claimant 1 in Perm, on 27 September 2008 instead of 5 August 2008 as provided in the Player Contract.

33. In its counterclaim, Respondent requests that Claimant 1 be made to pay a penalty based on the "Internal regulations of the Club" because of his (i) "repeated absence […] [from] practice without good reason, (ii) "[…] non-appearance to [a] game without justifiable reason", (iii) "unilateral refusal […] to execute his obligations under the [Player] Contract [and] departure from the Club".

34. Respondent confirms that "[a]ll letters of Clearance are issued on official inquiry from the Russian Basketball Federation." It also recognizes certain claims of the Claimants as set out in more detail below.

35. With regard to the visa issue, Respondent submits that Claimant 1 was provided with an invitation from the Club allowing him to apply for a single-entry visa, which he was able to obtain in time. For the trip to Serbia, another visa was needed which was eventually obtained after an intervention by the Respondent, on 5 November 2008.

4.4. The Respondent's request for relief

36. Respondent's Requests for Relief are as follows:

> *"The Club admits the claims of the Player and his Agent for following payments:*
>
> ***As per item 1:*** *According to the par. 3.5 of the Contract the Club admits the claim of the Claimant to reimburse the cost of visas in the amount of $2,630.75.*
>
> ***As per items 2 and 3:*** *According to the par. 3.4 of the Contract the Club admits the claim of the Claimant for reimbursement of the cost of the airplane trip from San Juan to New York in the amount of $400 and from New York to Moscow in the amount of $900, total amount is $1,300.*
>
> ***Agent's fee for the 2008-2009 season:*** *According to the agreement dated 01.07.2008 between the Club and Agent Jose F. Paris and Report to this agreement the Club admits the claim of the Agent to pay the agent's fee for the 2008-2009 season in the amount of $41,000.*
>
> *The Club does not admit the claims of the Claimant to pay compensations as per items 4, 5, 6, 7, 8 as well as payment of bonuses and interest and considers that the Player will be unjustly enriched.*
>
> ***As per item 4****: According to par. 3.2.2. of the Contract the Player has to pay himself expenses connected with his living in the apartment provided by the Club including payment for internet. The Contract does not provide for the Club obligation to pay the Player compensation for using the internet. Thus, the compensation for internet in the amount of $200 is not due to be paid by the Club.*
>
> ***As per item 5 and 6:*** *Compensation for the airplane trip from Perm to Spain in the amount of $1,300 and from Spain to San Juan in the amount of $5,811.95, total amount for the trips is $7,111.95, is not due to be paid because the Player fundamentally broke the terms of the Contract and after that did not express his wish to perform for the Club, the Contract is terminated.*
>
> *Whereas the Contract is terminated in connection with the Player's culpable conduct, i.e. owing to non-fulfillment by the Player of his obligation to attend the team practices, the Club is not under obligation to reimburse Player's expenses incurred after the date of the termination of the Contract.*
>
> ***As per item 7, bonuses and interest:*** *The Club paid the Player his salary for the three months of the 2008-2009 season and the Player does not have claims to the Club for the*

salary for this period. The salary for the rest of the months of the 2008-2009 season as well as bonuses and interest are not due to be paid to the Player because the Player fundamentally broke terms of the Contract and after that never expressed his wish to perform for the Club, the Contract is terminated.

Moreover, according to par. 6.5. of the Contract if the Player on his initiative stops to perform his obligations under the terms of the Contract, the downtime is not due to be paid.

As per item 8, agent's fee for the 2009-2010 season: *The salary to the Player for the 2009-2010 season and the agent's fee for the 2009-2010 season are not due to be paid because the Agent in his email dated on 26 November 2008 sent at 1:13:59 PM informed the Club that the Player and the Agent agree to terminate the agreement for the next year provided for by the contract as well as in connection to the fact that the Player fundamentally broke the terms of the Contract and the Contract is terminated."*

37. As regards the counterclaim, the Respondent submits the following Requests for relief:

"We request the Claimant to pay sanctions provided for by the Contract in the following amount:

- *for repeated absence (more than 3 times in a season) from practice without justifiable reason in the amount of 30% of the sum of the contract – salary for the 2008-2009 season which amounts to $175,714.2.*
  Calculation: 30% from $585,714 = $175,714.2

- *for one time non-appearance to the game without justifiable reason in the amount of 50% of the sum of the contract – salary for the 2008-2009 season which amounts to $292,857.*
  Calculation: 50% from $585,714 = $292,857.

- *for unilateral refusal of the Player to execute his obligations under the contract, departure from the Club in the amount of 100% of the sum of the contract – salary for the 2008-2009 season which amounts to $585,714."*

5. Jurisdiction and other Procedural Issues

38. 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).

5.1. The jurisdiction of FAT

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

5.1.1 Arbitrability

40. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is therefore arbitrable within the meaning of Article 177(1) PILA.[2]

5.1.2 Formal and substantive validity of the arbitration agreement

41. The existence of a valid arbitration agreement is to be examined separately for each Claimant in light of Article 178 PILA, which reads as follows:

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

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

42. The jurisdiction of the FAT over the dispute between **Claimant 1** and the Respondent results from clause 8 of the Player Contract which reads as follows:

> ***"8. Disputes***
>
> *8.1. Any dispute arising from or related to the present contract may 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) irrespectively of the parties' domicile.*
>
> *Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. The Parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions 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 shall decide the dispute ex aequo et bono.*
>
> *8.2 The parties have also agreed that any dispute can be presented in court in the place of location of the Club (Perm, Russia). The place of the presentation of the dispute is left to discretion of the parties of this agreement."*

43. The jurisdiction of the FAT over the dispute between **Claimant 2** and the Respondent results from clause 7 of the Agent Contract which reads as follows:

> *"7. If any disputes arising from this Agreement cannot be solved by mutual consent of the parties, such disputes have to be presented in court in the place of the Club (Perm, Russia) or in FIBA arbitration tribunal (Geneva).**
>
> **Per section 8.1 of the Player contract" (handwritten footnote, but not initialized or signed)*

44. Both Contracts are in written form and thus the arbitration agreements fulfill the formal requirements of Article 178(1) PILA.

45. With respect to the substantive validity of the arbitration agreements, the Arbitrator considers that there is no indication in the file that could cast doubt as to their validity under Swiss law (referred to by Article 178(2) PILA). In particular, the expression "[a]ny dispute[s] arising from (…) this Agreement", used in similar terms in both the Player Contract and the Agent Contract, clearly encompasses the present dispute.

46. Both the Player Contract and the Agent Contract allow the Parties to initiate proceedings also with the competent court in Perm, Russia. However, the Claimants have opted for dispute resolution by way of arbitration with the FAT, which they are perfectly entitled to do under both contracts.

47. The Arbitrator also notes that in its First and Second Answers, the Respondent has not raised any objection against the jurisdiction of the FAT – neither with regard to the claim of Claimant 1 nor with regard to the claim of Claimant 2.

5.2. Joint claims

48. The Request for Arbitration contains both the claim of Claimant 1 for payment of the salaries under the Player Contract and the claim of Claimant 2 for payment of the Agent Fee. Since (i) the factual circumstances of both claims are identical, (ii) both claims are directed against the same Respondent, (iii) both Claimants are subject to an arbitration agreement in favor of the FAT, and (iv) the Respondent has not raised objections to the adjudication of all the claims in the same arbitral award, the Arbitrator accepts to handle both claims in the same arbitral proceeding.

5.3. Counterclaim

49. The Respondent has raised its counterclaim together with its Second Answer. According to Article 11.2 of the FAT Rules, any counterclaim must be raised together with the Answer to the Request for Arbitration. In addition, the scope of the Second Answer was limited by the Arbitrator to the four questions which he had submitted to the Parties in order to clarify certain issues raised in the Request for Arbitration and the First Answer. Under these circumstances, the Arbitrator will not admit Respondent's counterclaim in this arbitral proceeding since it is obviously belated.

6. Discussion

6.1. Applicable law – *ex aequo et bono*

50. 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".*

51. 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."*

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

53. The concept of *équité* (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the *Concordat intercantonal sur l'arbitrage*[3] (Concordat),[4] under which Swiss courts have held that arbitration *en équité* is fundamentally different from arbitration *en droit* :

> *"When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[5]

54. In substance, it is generally considered that the Arbitrator deciding *ex aequo et bono* receives "a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case".[6]

55. 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

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

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

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

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

any particular national or international law".

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

6.2. Findings

6.2.1 Termination of the Player Contract

57. It is common ground that Claimant 1 did not participate in the training sessions of 20 November 2008, and that he walked away after a conversation with the Club's General Manager before the beginning of the morning training session of 21 November 2008. However, it is Respondent's view that it was the decision of Claimant 1 to terminate the Player Contract, whereas the Claimants submit that it was Respondent that "fired" the Player and terminated the Player Contract early.

58. In its letter dated 20 November 2008, Respondent wrote:

> *"Dear Mr. José Paris*
>
> *Today before the morning practice our team had a meeting with the team-manager after which Christian Dalmau has made a decision to terminate the agreement signed between the Club and him and announced it. He left practice without the head coach's permission.*
>
> *Our club cannot bear such behavior which leads to sanctions. We stop our further relations with the player.*
>
> *Looking forward for our cooperation*
>
> *Regards*
>
> *Vitaly Vuygov*

General manager"

59. On 21 November 2008, Claimant 2 protested in writing against the dismissal of Claimant 1. He wrote:

> *"Dear Viktoriya. Christian does not want to leave Ural Great, but on numerous occasions when he met with staff he asked a simple question: "If you are not happy with my work, contact my Agent and work out an exit, because I do not want to be somewhere where I am not wanted. He was embarrassed when at the last team meeting, he was the only person singled out by the G.M. I asked why and you said, "that the G.M. had instructions from the President to do so". I ask you, does the team want to work out an exit or does the team want to find solution. Please respond to my questions in order to determine what course of action we should take.*
>
> *Regards*
> *Jose F. Paris"*

60. There is no direct evidence which would support Respondent's submission that it was Claimant 1 who orally terminated the Player Contract. In particular, there is no documentary or testimonial evidence about the content of the conversation which took place between Claimant 1 and the Club's General Manager on 21 November 2008. In addition, the email message of Claimant 2 which was sent to Respondent on the same day indicates that Claimant 1 had no intention to leave the Club just like that. He did, however, offer to negotiate an early termination of his employment since it was obvious that he was no longer wanted to play with the Respondent's team.

61. In general, a notice of termination of a labor agreement is final and binding and terminates the employment if the content of the notice is unambiguous and understood by the employee as an expression of the will of the employer to terminate the employment. It is, however, a different question whether or not the termination of the labor agreement was justified and what the consequences of the termination are.

62. The Arbitrator finds that the Player Contract was terminated by the Respondent's

unequivocal written notice quoted in par. 58 above: *"We stop our further relations with the player."* While that letter from Respondent was dated 20 November 2008, the Arbitrator finds that it was most likely incorrectly dated and it should have been dated 21 November 2008, since it refers to the morning practice of that day.

63. In its Second Answer, Respondent refers to its letter of 26 November 2008, which may also be understood as a notice of termination of the Player Contract. However, since (a) the employment was already terminated on 21 November 2008 and (b) the Parties attempted to negotiate the terms of the termination on which they could not find an agreement, this letter rather constituted a confirmation that Respondent was unwilling to continue negotiating a termination agreement.

6.2.2 Consequences of the termination of the Player Contract

64. The early termination of the Player Contract and its consequences are governed by Clause 6 of the Player Contract, which is applicable in case no specific termination agreement has been concluded. Clauses 6.3 and 6.5 are of particular relevance in the present case:

> *"Additional clauses of the pre-term termination of the Contract and transfer of the Player*
>
> *6.1 The Player has the right to terminate the Contract one-sidedly before the appointed time in cases provided by the legislation of the Russian Federation.*
>
> *6.2 In case the Player terminates the Contract one-sidedly (in case the Club fulfils its financial obligations under the terms of this agreement), the Player is obliged to pay the Club a compensation in amount and dates that will be stated in the supplementary agreement. After fulfilment of the above-mentioned obligations the Club is obliged to give the Letter of Clearance to the Player.*
>
> *6.3 The Contract may be terminated on the Club's initiative in case the Player does not fulfil his obligations under this Supplementary agreement as well as in other cases*

specified in the Club's internal regulations.

6.4 If the Player loses his ability to play because of any reasons not connected with him fulfilling his obligations under this Supplementary agreement the Club has the right to terminate the Contract.

6.5 If the Player himself stops to perform his obligations under the terms of the Contract, the time of non-fulfilment isn't compensated by the Club."

65. In its First Answer, Respondent refers to two reasons for the early termination, namely (i) the missed training sessions of 20 November 2008 and (ii) the fact that the Claimant 1 walked away from the training session of 21 November 2008 and eventually left Perm without the Club's permission. In its letter dated 26 November 2008 and also in its Second Answer, Respondent also mentions the late arrival of Claimant 1 at the Club in September 2008 and his absence from the pre-season tournament in Turkey. However, in said letter of 26 November 2008, Respondent made it clear that this "was understood" and did not lead to sanctions and was *not* the reason for Claimant 1's dismissal.

66. Missing training sessions and walking away from the team must be regarded as a substantial breach of Clauses 2.5.1 and 2.5.9 of the Player Contract which, on its own, may entitle the Club to terminate the Player Contract under Clause 6.3. It is obviously essential for a club to have the entire team together for practice and preparation for the upcoming games.

67. The question remains, however, whether Claimant 1 had good reasons not to attend the 20 November 2008 training sessions and to walk away on 21 November 2008. Claimant 1 submits (i) that his salary payment due on 5 November 2008 and his expenses had not been paid until then, and (ii) that he could no longer stand being singled out by the coach and the General Manager as being the very reason for some of the Club's defeats.

Unpaid November 2008 salary

68. With regard to the unpaid November 2008 salary, Respondent submits in its Second Answer that it had complied with its obligations relating to compensation and it had paid *"the salary for the three months of the 2008-2009 season"*. However, it appears from an email from Respondent's Ms Vares of 24 November 2008 that *"[d]ue to the fact of missing the work and Club's internal documents, the staff of the organization is obliged to fine the player in the amount of one salary compensation (i.e. 41 000 US Dollars)."* The Arbitrator concludes that the salaries due in September and October 2008 had actually been paid to the Player, but that on 20 November 2008, the November salary which had fallen due since 5 November 2008 was still unpaid. Until 20 November 2008, Respondent had no right whatsoever to withhold the salary or to deduct a fine from Claimant 1's salary. If at all, it was Claimant 1 who had a reason to withhold his performance until Respondent had complied with its contractual payment obligations. However, the Arbitrator notes that Respondent's delay in payment was not mentioned as a reason why Claimant 1 missed the practice of 20 November 2008 in the emails to the Respondent of 21 and 26 November 2008 and that there is no evidence that Claimant 1 had ever summoned Respondent to pay the outstanding salary.

Respondent's criticism on the performance of Claimant 1

69. With regard to the Respondent's criticism of Claimant 1's performance, the only evidence supporting Claimant 1's justification for his absence from the practice session is his own declaration as quoted in Claimant 2's email to Respondent of 21 November 2008 and in Claimant 1's email to Claimant 2 of 26 November 2008. According to Claimant 1, the discussion on 21 November 2008 culminated in the following sentence:

> *"If you are not happy with me and don't want me here, talk to my agent and solve it because I don't want to be in a place where they don't want me."*

70. Respondent, on the other hand, disputes that Claimant 1 was criticized and blamed for the unsatisfactory performance of the team at all. There is no evidence on record indicating that Respondent rebutted Claimant 1's allegations at the time when they were raised. However, Respondent conceded that there had been repeated arguments between Claimant 1 and the Respondent's head coach. According to the team manager's "explanatory note" dated 6 April 2009 (filed as an Exhibit to Respondent's Second Answer), Claimant 1 was asked several times to be the leader of the team.

71. In the absence of conclusive evidence as to the content of the discussions between the Claimant 1 and Respondent's representatives, the Arbitrator must rely on his own perception of the situation. It seems that Respondent had great expectations of Claimant 1 as a famous and experienced basketball player. Respondent's high hopes even led it to tolerate Claimant 1's late arrival at the Club without any sanctions or warnings. It also seems, however, that these great expectations – whether or not they were justified – were not immediately met. The situation was repeatedly discussed between Respondent's representatives and Claimant 1, who perceived this as an unfair criticism, which caused him to abstain from the training sessions of 20 November 2008 and – after a further discussion with the General Manager – to leave the training session of 21 November 2008 and seek the support of his agent. In turn, this provoked Respondent's sharp reaction of terminating the Player Contract. Respondent's delay in payment certainly added to the discomfort of Claimant 1 but was not the very reason for his decision not to attend the training sessions of 20 November 2008.

72. When it comes to the consequences of the early termination, the Arbitrator must look at all the circumstances of the case and take the behavior of both Parties, which

eventually lead to the termination, into account. Deciding *ex aequo et bono,* the Arbitrator finds that both Claimant 1 and Respondent contributed to the failure of their professional relationship: on the one hand, Claimant 1 decided not to attend the training sessions of 20 November 2008 without any prior complaint, warning or notice. He also "paved the way" for a termination of the Contract by his unfortunate statement at the end of the discussion on 21 November 2008 (see par. 69 above). On the other hand, it was Respondent who was in default with respect to the November 2008 salary, before Claimant 1 decided not to attend the training session. It is also noteworthy that Respondent did not make any serious attempts to calm the situation down but preferred to apply the ultimate sanction, namely the immediate termination of the Player Contract, which seems rather disproportionate under the circumstances, and to disregard Claimant 1's statement that he was still willing to continue playing for Respondent's team.

73. In the Request for Arbitration, Claimant 1 also refers to the somewhat obscure visa history but fails to state how this issue may have contributed to the termination of the Player Contract. On the other hand, Respondent refers to the late arrival of Claimant 1 as a reason for dismissal, but this event was by Respondent's own admission "understood" and did not lead to any sanctions. The fact that Claimant 1 did not participate in the training sessions and games between 21 November 2008 and the date of his departure from Perm must be disregarded as well. After Respondent's notice of termination dated 21 November 2008, Claimant 1 was no longer obliged to provide any services to Respondent.

74. Thus, the Arbitrator finds that both Parties contributed in equal proportions to the failure of their contractual relationship, and it is thus not acceptable for Respondent to simply rely on clause 6.5 and to refuse any compensation to the Player. Instead, it must fairly

compensate Claimant 1 for his financial losses.

6.2.3 Quantum of compensation for Claimant 1

(1) Salary payments

75. Under these circumstances, the Arbitrator determines that Claimant 1 shall be entitled to the full contractual salary for November 2008 which amounts to USD 41,000 (net of taxes and any other deductions).

76. In addition, the compensation to be paid by the Respondent to Claimant 1 for early termination amounts to 50% of the contractually agreed salaries for the remainder of the 2008/2009 season. The remaining salary consists of 7 installments of USD 41,000 each (net of taxes and any other deductions) and amounts to USD 287,000. Accordingly, the compensation amounts to USD 143,500. Since the Player has not yet found a new job and is not very likely to do so for the remaining 2008/2009 season, no alternative income shall be deducted.

77. With regard to the 2009/2010 season, the picture looks different since Claimant is now in a better position to find a new employment. The anticipated income must therefore be taken into consideration as well. Because of the equal degree of fault which led to the termination of the contract, the 50% adjustment would also apply to the compensation for the 2009/2010-salary. As a consequence, Claimant 1 would be entitled to compensation only if it was unlikely that he would find a new employment with a salary of at least 50% of the salary agreed in the Player Contract for the 2009/2010 season. The Arbitrator is however confident that subject to unforeseeable circumstances Claimant 1 will reach that salary level. Deciding *ex aequo et bono*, the

Arbitrator finds that no compensation for the 2009/2010 season shall be paid by Respondent.

78. The amounts of compensation requested by the Claimants do not correspond to the amounts indicated in the Player Contract. Whereas Claimants' Request for Relief indicates salaries of USD 410,000.00 (2008/2009) and 460,000.00 (2009/2010), the salaries in the Player Contract amount to USD 585'714.00 (2008/2009) and USD 657,143.00 (2009/2010). The Arbitrator concludes that the difference results from the taxes (Clause 4.5 of the Player Contract) which are to be withheld and paid by the employer.

Expenses

79. Respondent has already admitted its obligation to reimburse Claimant 1 for certain expenses, namely the visa costs in the amount of USD 2,630.75 (1)[7] and the travelling costs from San Juan to Moscow in the amount of USD 1,300.00 (2 and 3).

80. The internet costs in the amount of USD 200.00 (4) are not specified or documented at all and do not have to be reimbursed by Respondent.

81. Respondent also refuses to reimburse the travelling costs of Claimant 1 and his family from Perm via Spain to San Juan (5 and 6). The Arbitrator disagrees. According to Clause 3.4 of the Player Agreement, Respondent undertook to *"provide the Player with five economy class round-trip air tickets from Puerto Rico to Perm for each season. This very point also spreads on the Player's family. Under this point, the Club carries*

[7] The numbers in brackets refer to the numbering of the items in Claimants' Request for Relief.

the expenses. In case the Player buys the tickets, the Club compensates after receiving the originals of the tickets." This obligation exists independently from the date or the mode of termination of the Player Contract. Under the circumstances, the term "round trip ticket" must be broadly interpreted to include the reasonable travelling costs for the Player's family to return home after the unexpected termination of the Player Contract. The amount of these costs seems reasonable and has not been disputed by Respondent. The fact that the ticket from Madrid to New York also includes a flight back from New York to Madrid does not harm since it is a known fact in this price category that a one way ticket is likely to be more expensive. The flight costs of Claimant 1 and his family from Perm to San Juan in the amount of USD 7,111.95 shall thus be borne by Respondent.

Bonuses

82. Bonus payments are part of the agreed compensation scheme of Claimant 1. They are not contingent upon the active participation of Claimant 1 in the team which achieved the relevant sporting results. As it has been held with respect to the salary payments and due to the fact that both Parties contributed to the termination of the Player Contract, Claimant 1 is entitled only to 50% of the bonuses for the season 2008/2009. For the same reasons which apply to the claim for salary payments for the 2009/2010 season (see par. 75 et seq.), the Arbitrator rejects the request for bonus payments for the 2009/2010 season.

83. The bonuses can be calculated only after termination of the current season 2008/2009. The Arbitrator holds therefore, that Respondent shall submit to Claimant 1, within 30 days after the end of the 2008/2009 season, a detailed schedule of the results of the team together with the respective bonuses according to Clause 4.2 of the Player

Contract, and simultaneously pay the total bonus amount to Claimant 1.

Summary

84. The compensation payable by Respondent to Claimant 1 therefore consists of

Salary for November 2008	USD 41,000
Compensation for loss of salary 2008/2009	USD 143,500
Visa costs	USD 2,630.75
Travelling costs San Juan – Perm	USD 1,300.00
Travelling costs Perm – New York	USD 7,111.95
Total before Bonus Payments	*USD 195,542.70*
Bonus Payments	to be submitted and paid after the end of the 2008/2009 season

6.2.4 The Agent Fee

85. The Agent Fee requested by Claimant 2 has been agreed because of his services which undisputedly led to the conclusion of the contract with Claimant 1. The Agent fee consists of two annual installments payable on November 10, 2008 (USD 41,000.00) and November 10, 2009 (USD 46,000.00). Respondent has acknowledged the right of Claimant 2 to the 2008/2009 Agent Fee in the amount of USD 41,000.00, but has not paid it to date.

86. Obviously, Claimant 1 is still represented by Claimant 2. Because of the early termination of the Player Contract and the necessity to find a new club, it is likely that Claimant 2 has a good chance to earn another agent fee when Claimant 1 is

contracted by another club. The Arbitrator finds therefore that Claimant 2 is not entitled to claim from Respondent an Agent Fee for the 2009/2010 season.

6.2.5 Letter of Clearance

87. The Claimants assert that Claimant 1 *"is unable to be gainfully employed by another club because Ural Great has not released his Letter of Clearance."* The Arbitrator notes that the FAT does not have the authority to issue letters of clearance. Instead, pursuant to the FIBA Internal Regulations governing the international transfer of players, letters of clearance are issued by a club's national federation and, in some circumstances, by FIBA. As Respondent indicated in the Second Answer, such a request was made with the Russian Basketball Federation on 4 April 2009.

7. Costs

88. 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.

89. On 27 May 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:

• *Arbitrator's fees (26 hours at an hourly rate of EUR 300)*	*EUR*	*7,800.00*
• *Arbitrator's costs*	*EUR*	*100.00*
• *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***	*10,500.00**"***

90. In the present case, considering the finding that Claimant 1 and Respondent contributed equally to the failure of the employment relationship and Claimant 2 was granted half of the Agent Fee claimed, the Arbitrator considers it fair and equitable that the costs shall be borne in equal proportions by the Claimants on the one side and the Respondent on the other side.

91. Given that the Claimants paid the totality of the advance of the arbitration costs of EUR 15,652.62, as fixed by the Arbitrator, the Arbitrator decides that:

(i) the FAT shall reimburse EUR 5,152.62 to the Claimants;

(ii) the Respondent shall pay to the Claimants half of the difference between the costs advanced by them and the amount which is going to be reimbursed to them by the FAT, i.e. EUR 5,250.00.

92. Furthermore, the Arbitrator considers it adequate that both Parties bear their own legal costs and expenses (Article 19.3 of the FAT Rules).

8. Interest

93. Claimants have requested payment of interest without specifying the applicable interest rate. Although the relevant agreements do not explicitly provide the obligation of the debtor to pay default interest, this is a generally accepted principle which is embodied in most legal systems. The Arbitrator, deciding *ex aequo et bono*, applies an interest rate of 5% (which corresponds to the Swiss statutory rate) on the amounts due, starting on the day following the termination of the Player Contract, i.e. on 22 November 2008.

94. The starting date for the interest on the Agent Fee shall be 11 November 2008 since the Agent Fee was due on 10 November 2008.

9. AWARD

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

I. Professional Basketball Club Ural Great shall pay to Christian Dalmau the salary due for November 2008 namely USD 41,000.00 (net) plus 5% interest since 22 November 2008.

II. Professional Basketball Club Ural Great shall pay to Christian Dalmau a compensation for loss of salary for the 2008/2009 season in the amount of USD 143,500.00 (net) plus 5% interest since 22 November 2008.

III. Professional Basketball Club Ural Great shall pay to Christian Dalmau USD 11,042.70 (net), in reimbursement of the expenses he incurred in relation to visa and travelling costs plus 5% interest since 22 November 2008.

IV. Professional Basketball Club Ural Great shall submit to Christian Dalmau, within 30 days after the end of the 2008/2009 season, a detailed schedule of the results of the team together with the calculation of the respective bonuses according to Clause 4.2 of the Player Contract, and simultaneously pay 50% of the total amount of bonuses to Christian Dalmau.

V. Professional Basketball Club Ural Great shall pay to José F. Paris USD 41,000.00 (net) plus 5% interest since 11 November 2008.

VI. Professional Basketball Club Ural Great shall pay to José F. Paris (on behalf of José F. Paris and Christian Dalmau) EUR 5,250.00 (net) as a reimbursement of the arbitration costs.

VII. Each Party shall bear its own legal costs.

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

Geneva, 2 June 2009

Stephan Netzle

(Arbitrator)

FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

Notice about Appeals Procedure

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

"**17. Appeal**

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