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**FIBA Arbitral Tribunal (FAT)**

**ARBITRAL AWARD**

**(0042/09 FAT)**

rendered by

**FIBA ARBITRAL TRIBUNAL (FAT)**

**Mr Stephan Netzle**

in the arbitration proceedings

**Ms Anda Jelavic,**

**- Claimant 1 -**

**Mr Itzhak (Huky) Nir, Data Plus,**

**- Claimant 2 -**

**Mr Boris Lelchitski, Sport International Group**

**- Claimant 3 -**

represented by

Mr Solly Laniado, Zysman, Aharoni, Gayer & Ady Kaplan & Co. Law Offices, 41-45 Rotshild Blvd., 65784 Tel Aviv, Israel

vs.

**WBC Dynamo Moscow, Krylatskaya 2/4, 121552 Moscow, Russia**

**- Respondent -**



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### **1. The Parties**

#### **1.1. The Claimants**

1. Ms. Anda Jelavic (hereinafter “Ms. Jelavic” or “Claimant 1”) is a professional basketball player of Croatian nationality. Mr. Itzhak (Huky) Nir (“Mr. Nir” or “Claimant 2”) and Mr. Boris Lelchitski (“Mr. Lelchitski” or “Claimant 3”) are certified FIBA agents. Claimants are represented by Mr. Solly Laniado, attorney-at-law from Tel Aviv, Israel.

#### **1.2. The Respondent**

2. WBC Dynamo Moscow (hereinafter "the Club" or "Respondent") is a professional basketball club with its seat in Moscow, Russia. It is domiciled at Krylatskaya 2/4, 121552 Moscow, Russia. Respondent is not represented by counsel.

### **2. The Arbitrator**

3. On 5 May 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 8 May 2009, the Arbitrator accepted his appointment and signed a declaration of acceptance and independence.



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5. 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**

6. On 14 August 2008, Claimant 1 and the Respondent signed an employment agreement (the "Agreement") by which Respondent employed Claimant 1 as a basketball player for the 2008/2009 season. In Addendum 1 to the Agreement, Respondent undertook to pay to Claimant 1 a basic salary of EUR 152,180.00. Addendum 2 provided for certain bonus payments.
7. Clause 2 of Addendum 1 reads as follows:

*"2. Payment procedure*

*2.1. Within the validity period of the agreement the Club effects monthly payments according to the following schedule:*

*-Till October 20, 2008 – 21 740 (Twenty one thousand seven hundred forty) Euros,  
-till Novemb[er] 20, 2008 – 21 740 (Twenty one thousand seven hundred forty) Euros,  
-till Decemb[er] 20, 2008 – 21 740 (Twenty one thousand seven hundred forty) Euros,  
-till January 20, 2009 – 21 740 (Twenty one thousand seven hundred forty) Euros,  
-till February 20, 2009 – 21 740 (Twenty one thousand seven hundred forty) Euros,  
-till March 20, 2009 – 21 740 (Twenty one thousand seven hundred forty) Euros,  
-till April 20, 2009 – 21 740 (Twenty one thousand seven hundred forty) Euros*

*2.2. Final amount is calculated with consideration of additional bonuses in accordance with Addendum No. 2 to the present Agreement and is payable within three working days after the date of signing the act for Agreement Execution.*

*2.3. The payments foreseen in paragraph 2.1 are calculated by the Club with*



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*consideration of provisions in article 3 of the present Appendix.”*

8. By letter dated 9 December 2008, Respondent informed Claimant 2 that the Agreement with Claimant 1 had been terminated on 4 December 2008.
9. By letter dated 26 February 2009, Claimants' counsel advised Respondent that the Club's right of early termination of the Agreement was subject to the payment of 3 months' salary and that Claimant 1 had only been paid the salary for one month. The salary for two more months (EUR 43,480) was therefore still outstanding. In addition, Claimants' counsel claimed agent fees of 10% of Ms Jelavic's basic salary for the entire season, i.e. EUR 15'218. Claimants' counsel advised Respondent that in the event payment was not received within 7 days, he had been instructed by his clients *“to address all relevant bodies and tribunals (FIBA-FAT etc) in order to secure clients' rights”*.
10. During the proceedings before FAT and by emails dated 17, 20 and 24 July 2009, Respondent informed the FAT Secretariat that it had effected the transfer of EUR 18,500 and EUR 19,900 to an Austrian bank account of Claimant 1.

### **3.2. The Proceedings before the FAT**

11. On 15 March 2009, Claimant filed a Request for Arbitration in accordance with the FAT Rules.
12. By letter dated 8 May 2009, the FAT Secretariat confirmed receipt of the Request for Arbitration as well as the non-reimbursable handling fee and informed the Parties of the appointment of the Arbitrator. In the same letter, a time limit was fixed for Respondent



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to file its Answer to the Request for Arbitration until 29 May 2009 (the "Answer"). The letter also requested the Parties to pay the following amounts as an Advance on Costs by no later than 22 April 2009:

<i>"Claimant 1 (Ms Jelavic)</i>	<i>EUR 2,000</i>
<i>Claimant 2 (Mr. Nir)</i>	<i>EUR 1,000</i>
<i>Claimant 3 (Mr. Lelchitski)</i>	<i>EUR 1,000</i>
<i>Respondent (WBC Dynamo Moscow):</i>	<i>EUR 4,000"</i>

13. On 15 May 2009, Respondent filed its Answer to the Request for Arbitration.
14. By letter dated 3 June 2009, Claimants confirmed payment of their share of the Advance on Costs (EUR 4,000) and requested the Arbitrator to proceed with the arbitration according to Art. 14.2 of the FAT Rules, without waiting for Respondent's payment of its share of the Advance on Costs, and to deliver an award.
15. By letter to the parties dated 20 June 2009, the FAT Secretariat acknowledged receipt of Claimants' share of the Advance on Costs on 25 May 2009 in the amount of EUR 1,985.00 received from Data Plus Ltd., Israel for Claimants 2 and 3 and on 19 May 2009 in the amount of EUR 2,000.00 received from Claimant 1. It informed the parties that Respondent had submitted an Answer to the Request for Arbitration that was under review by the Arbitrator and that Respondent had failed to pay the Advance on Costs. In accordance with Article 9.3 of the FAT Rules, Claimants were invited to substitute for the missing payment of the Respondent until 1 July 2009. Claimant 1 paid Respondent's share of the Advance on Costs on 29 June 2009.
16. By letter to the parties dated 14 July 2009, the FAT Secretariat confirmed receipt of Claimants' payment to cover the Respondent's share of the Advance on Costs and forwarded Respondent's Answer to the Claimants. The Arbitrator declared the



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exchange of documents complete and invited the Parties to submit a detailed account of their costs by no later than 22 July 2009.

17. By letter dated 14 July 2009, Claimants requested the Arbitrator to grant them the right to respond to Respondent's Answer of 15 May 2009.
18. By email dated 17 July 2009, Respondent informed the FAT Secretariat that on 26 June 2009, it had effected a payment of RUB 881,524.63 to an account in the name of Claimant 1 with the Bank RCI in Moscow.
19. On 20 July 2009, Respondent sent another email to the FAT Secretariat which indicated a money transfer on 2 July 2009 of EUR 18,500 from Bank RCI to an Austrian bank account in the name of Claimant 1.
20. By letter to the Parties dated 21 July 2009, the FAT Secretariat acknowledged receipt of Respondent's emails dated 17 and 20 July 2009 and forwarded them to Claimants. On behalf of the Arbitrator, it invited Claimants to submit their comments, and in particular to confirm until 28 July 2009 whether or not they received the payments mentioned in Respondent's emails.
21. By email of 22 July 2009, Claimants sent their comments and submitted the following account of costs:

*"10. Further to the Decision dated July 14<sup>th</sup> 2009 detailed hereunder the Claimants' costs with regard to this case (FAT File no. 0042/09) proceedings totaling up to date 25,213€:  
10.1 3,000€ representing the non-refundable preliminary fees paid on behalf of the Claimants. [...]  
10.2 4,000€ representing the advance on costs paid by the Claimants. [...]  
10.3 4,000€ representing the advance on costs imposed on the Respondent but eventually paid by the Claimant 1.*



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*10.4 13,048€ representing legal fees cost of the Claimants with regard to the undersigned legal attendance up to date.  
(32 Hours multiply the hourly rate of 350€ equal to 11,200€ plus V.A.T. (16.5%) totaling 13,048€).  
10.5 1,165€ representing estimated expenses (long distance calls, documentations deliveries, photocopies etc.)”*

22. In the same letter, Claimants amended their requests for relief and added further exhibits.
23. Respondent did not submit any account of costs.
24. By email of 24 July 2009, Respondent informed FAT that on 23 July 2009, another payment of EUR 19,900.00 had been made to Claimant 1. The email was accompanied by a bank statement indicating a transfer of EUR 19,900 from an account in the name of Claimant 1 with Bank RCI to the Austrian bank account of Claimant 1.
25. By email of 26 July 2009, the Claimants submitted an unsolicited comment on Respondent's email of 24 July 2009 with further exhibits which indicated two money transfers from Bank RCI to the Austrian bank account of Claimant 1 in the amounts of EUR 18,500 on 2 July 2009 and EUR 19,900 on 23 July 2009.
26. By letter to the Parties of 28 July 2009, the FAT Secretariat acknowledged receipt of the Claimants' emails dated 22 and 26 July 2009 as well as the Respondent's email dated 24 July 2009 and declared the exchange of documents to be complete.
27. The Parties did not request the FAT to hold a hearing. The Arbitrator therefore 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.



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### 4. The Parties' Submissions

#### 4.1. The Claimants' Submissions

28. Claimants acknowledge that according to Art. 5.3.3 of the Agreement, Respondent was entitled to early terminate the employment by no later than 1 December 2008. However, upon such early termination, Claimant 1 was still entitled to all monthly salary payments due until 20 December 2008. When Respondent actually terminated the Agreement on 4 December 2008, it had paid to Claimant 1 only one monthly salary of EUR 21,740, Claimant 1 was thus entitled to the remaining two monthly payments amounting to EUR 43,480.
29. Claimants further submit that the agent fees for the services rendered in connection with the engagement of Claimant 1 had not been paid. Therefore, Claimants 2 and 3 were entitled to agent fees in the amount of 10% of the seasonal salary of Claimant 1 of 152,180 EUR, i.e. EUR 15,218.
30. In their reply to Respondent's emails of 17, 20 and 24 July 2009 with regard to the payments of EUR 18,500 and EUR 19,900 to Claimant 1, Claimants contended that it was only after submission of the arbitration request and the Claimants' payment of the full advance on costs that the Respondent eventually paid a part of the recognized debt of EUR 43,480. In Claimants' letter of 22 July 2009, the receipt of EUR 20,000.00 in June 2009 was confirmed. However, Claimants submit that, even if Respondent's allegation that it had transferred to Claimant 1 an amount of EUR 38,500 (as in Claimants' letter of 22 July 2009) or EUR 39,900 (as in Claimants' letter of 26 July 2009) was true, there was still an open balance in favor of Claimant 1 in the amount of EUR 4,980 or EUR 3,580 respectively.





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31. Claimants then submit that Claimants 2 and 3 were entitled to agents fees totaling to EUR 15,182. Claimants argue that Respondent sent a draft of an agent agreement to Claimants 2 and 3 confirming its approval to pay agent fees; however, said draft agreement was never signed. According to Claimants, Respondent never denied its duty to pay agent fees but refused its payment obligation based on the formal argument of lack of a signed document. However, according to the FIBA ruling in the dispute of player Shay Doron, such agreements do not need to be in written form but can also be concluded through implied consent. Thus, Claimants 2 and 3 were entitled to agent fees in the amount of EUR 15,182 but in any case of no less than EUR 6,000.00 representing the first installment due on 31 January 2009 as provided in the draft agreement.
32. Claimants further ask for an additional monetary sanction of no less than EUR 10,000.00 because of Respondent's misconduct by deliberately refusing or delaying payment to the Claimants.

### **4.2. Claimants' Request for Relief**

33. The Request for Arbitration contains the following Request for Relief:

*"7.2. Therefore, the claimants hereby claim for the following reliefs and remedies  
7.2.1. 2008/2009 payments balances – 43,480 €.  
7.2.2. Agent fees full payment of 15,182 €.  
7.2.3. Legal fees and expenses."*

34. In the Claimants' letter of 22 July 2009, the Request for Relief was modified as follows:

*"15. The honorable Arbitrator is hereby requested to rule in favor of the Claimants the following:*



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- 15.1. *The Respondent's obligation to pay the Claimant 1 the 2008/09 payments balances of 23,480€.*
- 15.2. *The Respondent's obligation to pay the Claimant 2 and 3 Agent fees full payment of 15,182€ and no less than 6,000€.*
- 15.3. *The Respondent's obligation to pay the Claimants expenses of 25,213€ representing legal fees and expenses plus reimbursement of the full advance costs paid by the Claimants.*
- 15.4. *To impose monetary sanction of the Respondent in favor of the Claimants of no less than 10,000€."*

### 4.3. Respondent's Submission

35. Respondent disputes the jurisdiction of FAT contending that FAT was not mentioned in the Agreement.
36. Respondent acknowledges its debt to Claimant 1 in the amount of EUR 43,480. It asserts that the non-payment is to be attributed to the default of a Russian corporate sponsor of the Club, as a consequence of the global financial crisis. Under these circumstances, the Club decided to early terminate the Agreement with Claimant 1. The outstanding salaries were eventually paid to Claimant 1 on 26 June 2009 and 2 July 2009.
37. Respondent rejects the claim regarding the agent fees because no agent agreement was signed with Claimants 2 and 3.

### 4.4. Respondent's Request for Relief

38. Respondent has not submitted a formal Request for Relief.



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### 5. Jurisdiction and other Procedural Issues

39. 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

40. Since Respondent objects to the jurisdiction of FAT, the Arbitrator will first examine whether he is competent to decide on the matter.

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

##### 5.1.1 Arbitrability

42. 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>1</sup>

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

43. The existence of a valid arbitration agreement will be examined in light of Article 178 PILA, which reads as follows:

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



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*"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"*

44. According to Claimants, the jurisdiction of FAT is based on clause 9 of the Agreement which reads as follows:

*"9. Disputes*

*9.1. In case any disputes on the present agreement (sic) the Parties will take all measures to solve them by negotiations.*

*9.2. If the dispute between the two Parties is not solved by means of negotiations then any dispute arising out of or in connection with this Agreement shall be settled exclusively by arbitration by FIBA with possibility to appeal the award to CAS Lausanne (Swz)."*

45. Clause 9.2 does not correspond to the arbitration clause suggested by the FAT, and it does not explicitly refer to the FAT. However, an incorrect wording does not harm if the interpretation of the clause indicates that it was still the intent of the Parties to submit their dispute to the FAT. The true meaning of clause 9.2 must thus be identified by applying the general rules of interpretation of contracts. In the first place, the actual common intent of the parties shall prevail to the extent that it can be established by evidence. If it is not possible to determine a real common intent of the parties, the arbitration agreement has to be interpreted according to the principle of good faith, as the addressee could and should understand it in good faith under the circumstances<sup>2</sup>.

46. The Arbitrator finds that it was the clear intent of the parties to exclude the dispute from the jurisdiction of state courts and to submit it to arbitration. They also chose a two-

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<sup>2</sup> Decision of the Swiss Federal Tribunal, BGE 130 II 66, p. 71.



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tiered arbitration system, with a first instance consisting of “arbitration by FIBA” and the appellate instance being the “CAS in Lausanne (Swz.)” (i.e. the Court of Arbitration for Sport, CAS, having its seat in Lausanne, Switzerland). “Arbitration by FIBA” cannot reasonably be understood otherwise than as proceeding with the “FIBA Arbitral Tribunal” or “FAT.” In fact, there is no other arbitration system which corresponds more closely to the description in clause 9.2 of the Agreement.

47. The Agreement is in written form and thus, the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.
48. Therefore, the Arbitrator finds that he has jurisdiction to adjudicate the claim regarding the outstanding salaries of Claimant 1.
49. The situation appears to be different with respect to the claim for agent fees. Claimants 2 and 3 are not parties to the Agreement which contains the agreement to arbitrate. Clause 9.2 explicitly refers to “(...) the dispute between the two Parties” [emphasis added] which means Claimant 1 and Respondent. No written agreement between Claimants 2 and 3 and Respondent has been produced. Even if an agent agreement was concluded orally or by implied consent (as asserted by Claimants), such oral agreement would not be sufficient to establish the jurisdiction of FAT since arbitration requires consent in writing. The Arbitrator has therefore no jurisdiction to decide the dispute between Claimants 2 and 3 and Respondent.

### 5.2. Claimants’ motion to an *ex parte* decision

50. On 3 June 2009, Claimants filed a motion to the effect that the Arbitrator decide the dispute *ex parte*, since Respondent had not submitted its answer nor paid its share of the Advance on Costs. In the event, Respondent had timely filed its Answer on 15 May



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2009 but the Answer had not yet been forwarded to Claimants.

51. According to the FAT Rules, the fact that a respondent has not paid its share of the Advance of Costs does not entitle the claimant to proceed *ex parte*; however, the proceedings may only continue if the claimant pays the share of the respondent within a certain time period. This was so ordered and Claimants eventually paid also Respondent's share of the Advance on Costs. The motion for an *ex parte* decision has therefore become moot. In any event, the Arbitrator wishes to point out that the FAT arbitration system does not allow for *ex parte* decisions of the kind requested by Claimant. Even when the respondent fails to appear, the arbitration will proceed by default but not *ex parte*, in the sense that, as a matter of principle, the respondent remains free to join the proceedings if he so wishes.

### 5.3. Claimants' letter of 22 July 2009

52. By letter dated 21 July 2009, the FAT Secretariat, on behalf of the Arbitrator, invited Claimants to comment on Respondent's emails (with attachments) dated 17 and 20 July 2009 by which Respondent intended to demonstrate that its debt towards Claimant 1 had actually been paid. Claimants did, however, not only comment on this issue but also made additional submissions (together with new exhibits) with respect to the claims of Claimants 2 and 3 and also added a further request for relief. In accordance with Article 12 of the FAT Rules, since these additional submissions exceeded the scope of the Arbitrator's order, they are considered belated and shall therefore be disregarded for the purposes of this proceeding.



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### 6. Discussion

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

53. 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”.*

54. 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.”*

55. In the present case the Parties have not agreed otherwise. Consequently, the Arbitrator shall adjudicate the claims *ex aequo et bono*.<sup>3</sup>

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<sup>3</sup> See FAT Decision 0005/08 (Pavic vs. AEK BC).



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### 6.1.1 The statutory concept of *ex aequo et bono* arbitration

56. 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*<sup>4</sup> (Concordat),<sup>5</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>6</sup>

57. 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>7</sup>

58. 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”.

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

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<sup>4</sup> That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA. Today, the Concordat governs exclusively domestic arbitration.

<sup>5</sup> P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PILA.

<sup>6</sup> JdT 1981 III, p. 93 (free translation).

<sup>7</sup> POUURET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.





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### **6.2. Findings**

#### **6.2.1 Claim regarding outstanding salaries of Claimant 1**

60. Claimants do not dispute the lawfulness of the early termination of the Agreement by Respondent, despite the fact that the respective notification was made after 1 December 2008.
61. Respondent has acknowledged its obligation to pay to Claimant 1 two monthly payments of EUR 21,470 each, i.e. EUR 43,480. In fact, it asserts that it has already done so. The burden of proving payment is upon Respondent, being the debtor in this case. The documentary evidence submitted to the Arbitrator indicates the following:
- Payment of RUB 881,524.63 from Respondent to a bank account bearing the name of Claimant 1 with Bank RCI, Moscow. This amount corresponds approx. to EUR 20,000 depending on the applied currency rate. The respective form is dated 26.06.2009 and bears the title "The Payment Commission".
  - Transfer of EUR 18,500 from a bank account with Bank RCI, Moscow bearing Claimant 1's name to a bank account in the name of Claimant 1 with Austria Creditanstalt AG, Graz. The respective form is dated 2 July 2009 and has been signed by Claimant 1.
  - Transfer of EUR 19,900 from a bank account with Bank RCI, Moscow bearing Claimant 1's name to the above-mentioned Austrian bank account in the name of Claimant 1 with Austria Creditanstalt AG, Graz. This form is dated 23 July 2009. It also bears a signature by Claimant 1 and two stamps in Cyrillic letters.
62. In their letter dated 22 July 2009, the Claimants confirmed "receipt of EUR 20,000 during June 2009", but questioned the payment of a further amount of EUR 18,500 whereas in the letter of 26 July 2009, Claimants confirmed that Claimant 1 had signed the bank form referring to Respondent's payment of EUR 18,500 but not the bank form



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referring to a payment of EUR 19,900. However, in her email to her counsel dated 24 July 2009, which was attached to the letter of 26 July 2009, Claimant 1 stated:

*"I get this email from Val from Dynamo Moscow and I check my account and they pay me 19900 euros. Probably they arranged with bank and they probably scanned my signature on this paper from bank because I sent you only signed papers from bank on 18000 euros.  
anda jelavic*

63. The Arbitrator's conclusion drawn from these documents is that Respondent transferred certain amounts in RUB to the bank account in Claimant 1's name with Bank RCI in Moscow and then effected on two different dates two payments of EUR 18,500 and EUR 19,900 from this Bank account to Claimant 1's Bank account in Austria. The fact that there is evidence of a transfer in RUB from Respondent to Bank RCI, and on two other dates, two amounts in EUR have been transferred from Bank RCI to Bank Austria Creditanstalt in Graz, may have led to certain confusion on Claimants' side. However, the information provided by the Parties indicates that finally, by the end of July 2009, Respondent had caused the transfer of a total of EUR 38,400 to the Austrian bank account of Claimant 1.
64. The Agreement provided "net" payment in Euros. The payment process must be deemed completed as of the moment when Claimant 1 was in a position to freely access the funds. Respondent's payments to bank RCI in Moscow were made in RUB and there is no evidence whether Claimant 1 could freely access her account with bank RCI in Moscow. Thus, the Arbitrator finds that the payment process was completed only when the amounts eventually arrived in Euros on the account of Claimant 1 with Austria Creditanstalt. Accordingly, of the due EUR 43,480, Claimant received no more than EUR 38,400 and the initial payment in RUB is not considered as payment to Claimant 1.



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65. To sum up, Claimant 1 was entitled to receive EUR 43,480 from Respondent. There is evidence that she received EUR 19,900 and EUR 18,500, i.e. a total amount of EUR 38,400. The Arbitrator holds therefore that Respondent is obliged to pay to Claimant 1 the difference between EUR 43,480 and the amount actually received from Respondent, such difference amounting to EUR 5,080.
66. In their unsolicited submission of 26 July 2009, the Claimants complained that the bank certificates attached to the Respondent's filings were not identical and referred to a different amount of money and a different date. Obviously, Claimants were confused by the fact that Respondent had actually made two partial payments of different amounts and on different dates. Claimants also complain that one of the banking transfers from bank RCI to Claimant 1's account with Austria Creditanstalt was effected without Claimant 1's signature. How the transfer of the payments was effected is irrelevant in this arbitral proceeding. The Arbitrator is not mandated or empowered to investigate the circumstances of the banking transfers.

#### **6.2.2 Monetary sanction of no less than EUR 10,000.00**

67. In their submission of 22 July 2009, Claimants also requested the Arbitrator to impose a monetary sanction upon the Respondent in favor of the Claimants of "no less than EUR 10,000.00" because Respondent acknowledged the claim of Claimant 1 and made payments only after being informed of the arbitral proceeding initiated and financed by Claimants.
68. Firstly, the request was not included in the Request for Arbitration and was therefore belated (see also par. 33 and 51 above). Secondly, in accordance with Article L.2.7.1 of the FIBA Internal Regulations, FIBA (and only FIBA itself) can impose a monetary fine of up to EUR 100,000, in the event that a party to a FAT Arbitration fails to honor a



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final award of FAT or of the Court of Arbitration for Sport upon appeal against a FAT award. By contrast, the Arbitrator has no power to impose a sanction on a party to the arbitration proceeding because of such party's conduct during the proceeding. Claimants' request must therefore be dismissed. The Arbitrator will however take the parties' conduct into consideration when determining which party shall bear the arbitration costs and in which proportion (Art. 19.3 FAT Rules).

### 7. Costs

69. On 22 September 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 7,350. Claimants fully succeeded on the issue of the salary payment, but did not succeed on the issue of the agent fees and of the monetary sanction. Since Respondent paid EUR 38,400 only after being informed of the arbitral proceeding initiated by Claimants, such payment is not to be taken into account when determining the outcome of the proceeding. The Arbitrator therefore finds that the costs shall be borne by 2/3 by Respondent (EUR 4,900) and 1/3 by Claimants (EUR 2,450).
70. Given that Claimants have paid the totality of the Advance on the arbitration costs of EUR 7,985.00, as fixed by the Arbitrator, the Arbitrator decides that:



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- (i) the FAT shall reimburse EUR 635.00 to Claimants;
- (ii) Respondent shall pay to Claimants the difference between the total costs of the arbitration retained by the FAT from the costs advanced by the Claimants and the costs to be borne by the Claimants, i.e. EUR 4,900.

71. Furthermore, the Arbitrator considers it adequate that Claimant 1, being the prevailing party in this arbitration, is entitled to the payment of a contribution towards her reasonable legal fees and other expenses (Article 19.3 of the FAT Rules). After having reviewed and assessed the submissions by Claimant 1 and having regard to the outcome of the proceedings, the Arbitrator fixes the contribution towards the legal fees and expenses of Claimant 1 at EUR 7,000.



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**8. AWARD**

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

1. **The Arbitrator declines jurisdiction over Mr Itzhak (Huky) Nir's and Mr Boris Lelchitski's claims.**
2. **WBC Dynamo Moscow is ordered to pay to Ms. Anda Jelavic, EUR 5,080.00 for outstanding salary payments.**
3. **WBC Dynamo Moscow is ordered to pay jointly to Ms Anda Jelavic, Mr Itzhak (Huky) Nir and Mr Boris Lelchitski EUR 4,900.00 as a reimbursement of the Advance on Costs of the arbitration.**
4. **WBC Dynamo Moscow is ordered to pay to Ms Anda Jelavic EUR 7,000.00 as a contribution to her legal fees and expenses.**
5. **Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 1 October 2009

Stephan Netzle  
(Arbitrator)



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## 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."