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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(FAT 0047/09)

rendered by

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Raj Parker

in the arbitration proceedings

**Mr. Darius Myron Vashington (also known as Washington), 6409 Castlewood Lane,
Orlando, FL 32818, USA**

- Claimant 1 -

and

Mr. Obrad Fimic, Zlota 11/2 Street, 00-019 Warsaw, Poland

- Claimant 2 -

vs.

Professional Basketball Club Ural Great, 13 Lebedeva Street, 614107, Perm, Russia

- Respondent -

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1. The Parties

1.1. The Claimants

1. Claimant 1, Mr. Darius Myron Vashington (hereinafter, the "Player") is a dual citizen of the Former Yugoslav Republic of Macedonia and the USA. His surname is Vashington in his FYROM passport and Washington in his US passport. He is currently domiciled in the USA. In these proceedings, the Player is represented by Claimant 2.
2. Claimant 2, Mr. Obrad Fimic (hereinafter, the "Agent") is a basketball players' agent based in Warsaw, Poland.

1.2. The Respondent

3. Professional Basketball Club Ural Great (hereinafter the "Club" or the "Respondent") is a Russian basketball club based in Perm, Russia. The Respondent is not represented by counsel but has made submissions signed by its general manager, Mr. Vitaliy Viugov.

2. The Arbitrator

4. On 5 June 2009, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Raj Parker as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of



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the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").

5. By fax dated 5 June 2009, the Arbitrator accepted his appointment and signed a declaration of acceptance and independence. None of the parties has raised objections to the appointment of the Arbitrator or to the declaration of independence issued by him.

3. Facts and Proceedings

3.1. Background Facts

6. On 25 October 2008, the Player and the Club entered into a contract entitled "Supplementary Agreement" (the "Supplementary Agreement"), under which the Club agreed to pay the Player certain salary and bonus payments in return for the Player playing basketball for the Club during the 2008/2009 basketball season. At or around the same time the Player and the Club also executed a document entitled "Labor Contract of professional basketball player".
7. On 13 October 2008, the Agent and the Club entered into a contract entitled "Agreement" (the "Agent Contract") under which the Club agreed to pay a commission to the Agent in respect of services rendered by the Agent in providing the Club with information about the Player and negotiating the contract between the Club and the Player for the 2008/2009 basketball season.



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8. The Player played for the Club during the 2008/2009 season and received some salary payments from the Club (although the Player says that some of these payments were received late). During the 2008/2009 season the Club stopped making salary payments.
9. The 2008/2009 season has now finished and according to the Claimants, the Club owes the Player salary for the months of March, April, May and June 2009 (amounting to a total of USD 225,000). In addition, the Player also claims that the Club owes him a total of USD 10,717 in bonuses. The Player also claims some other expenses under the Contract, plus amounts in respect of late payments.
10. The Club has not made any payments to the Agent and the Agent claims an amount of USD 45,000 in outstanding agency fees.

3.2. The Proceedings before the FAT

11. On 14 May 2009 the Claimant filed a Request for Arbitration in accordance with the FAT Rules.
12. By letter dated 10 June 2009, a time limit until 1 July 2009 was fixed for the Club to file the Answer to the Request for Arbitration. By the same letter, and with a time limit for payment until 24 June 2009, the following amounts were fixed as the Advance on Costs:

<i>"Claimant 1 (Mr. Washington)</i>	<i>EUR 5,000</i>
<i>Claimant 2 (Mr. Fimic)</i>	<i>EUR 1,000</i>
<i>Respondent (Ural Great)</i>	<i>EUR 6,000"</i>

13. On 1 July 2009 the Club filed its answer to the Claimants' Request for Arbitration, along



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with a counterclaim for amounts said to be owed to it by the Player.

14. The parties did not pay their Advance on Costs within the set time limit. By letter dated 9 July 2009, FAT extended the time limit for payment to 17 July 2009.
15. At the end of July 2009 the Claimants requested that the FAT proceedings be suspended. In view of this request, by letter dated 29 July 2009, the Arbitrator suspended the proceedings until 15 September 2009 unless the Respondent expressed its disagreement on or before Wednesday, 5 August 2009. The Respondent did not raise any objections in this respect.
16. In October 2009, the Claimants requested that the FAT proceedings be resumed. The Arbitrator set a further deadline for payment of the Advance on Costs by the parties to 21 October 2009. On 20 October 2009, the Claimants paid their share of the Advance on Costs in an amount of EUR 5,970.
17. On 3 November 2009, the Arbitrator noted that the Club had not paid its share of the Advance on Costs and set a further deadline for payment by the Club until 11 November 2009. The Arbitrator indicated that if the Club's share of the Advance on Costs was not paid by that date, the Club's counterclaim would be deemed withdrawn.
18. The Club did not pay its share of the Advance on Costs. On 17 November 2009, the Arbitrator wrote to the parties noting that the Club's counterclaim was deemed withdrawn and inviting the Claimants to pay the Respondent's share of the Advance on Costs, in accordance with Article 9.3 of the FAT rules.
19. The Club's share of the Advance on Costs was paid by the Claimants on 27 November 2009.



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20. The parties did not request a hearing. The Arbitrator decided in accordance with Article 13.1 of the FAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions of the parties.
21. The Arbitrator issued two further procedural orders in this matter. Those orders required further information from the parties. The Claimants responded to both of these orders. The Respondent did not respond to either order.
22. By letter dated 12 March 2010, the Arbitrator closed the proceedings and asked the parties to submit their accounts of costs.
23. In their Request for Arbitration, the Claimants made the following claim in respect of legal costs:

"Club should compensate expenses for our legal advisor of 4,500 (four thousand five hundred) EURO"
24. This amount was confirmed by email dated 22 March 2010 as being for

"... the services of legal advisor Mr. Marcin Maminski".
25. The Club did not submit a summary of costs.



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4. The Parties' Submissions

4.1. The Player's Submissions

26. The Player submits that due to non-payment of salary for the months of March – June 2009, he was entitled under the Supplementary Agreement to stop playing for the Club and continue to receive salary payments. The Player says that although he was entitled to do this (and the Agent sent a significant amount of correspondence to the Club about this), as a matter of fact he kept playing for the Club except for when the Club prevented him from playing. The Player claims the amount of the unpaid salaries, as well as “delinquency fees” under the Supplementary Agreement arising from non payment of the salaries.
27. The Player also says that towards the end of the season, the Club attempted to have him sign a new agreement in which he would have accepted that the Supplementary Agreement was terminated by reason of his actions, but that he refused to do so.
28. In respect of past payments, the Player submits that the payments that he did receive were not made on time so that he is entitled to a “delinquency fee” under clause 7.3 of the Supplementary Agreement in respect of those payments.
29. Finally the Player submits that he is entitled to reimbursement for the costs of obtaining a visa for his fiancée, pursuant to clause 3.5 of the Supplementary Agreement.



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4.2. The Agent's Submissions

30. The Agent submits that no agency fees have been paid to him and that he is entitled to those fees under the Agent Contract.

4.3. The Club's Submissions

31. The Club admits that it has not paid the Player salary in respect of March – June 2009. The Club says that a mistake in the contract means that the payments that were made were made on time so that no delinquency fees are payable. In particular, the Club submits that payments were intended to be paid to the Player in the month following the month in which services were rendered by the Player.
32. In respect of the fee for the Player's fiancée's visa, the Club submits that she is not a member of the Player's family, so the Player is not entitled to reimbursement under the Supplementary Agreement.
33. The Club's primary submission is that the Player owes it money in respect of unpaid fines attributable to the Player's conduct, which outweigh the debts owed by it.



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5. Jurisdiction and other Procedural Issues

5.1. The jurisdiction of FAT

34. Pursuant to Article 2.1 of the FAT Rules, "[t]he seat of the FAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland". Hence, this FAT arbitration is governed by Chapter 12 of the Federal Statute on Private International Law (PILA).
35. The Respondent did not challenge the jurisdiction of FAT. Hence the Arbitrator asserts jurisdiction over the present dispute (Art. 186(2) PILA). For the sake of completeness, the Arbitrator will nevertheless examine the validity of the arbitration agreement contained in the Supplementary Agreement and the Agent Contract (see 5.1.2 below).

5.1.1 Arbitrability

36. The jurisdiction of the FAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
37. 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.¹

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



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5.1.2 Formal and substantive validity of the arbitration agreement

38. 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.

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."

39. The jurisdiction of the FAT over the dispute between the Player and the Club results from clause 8.1 of the Supplementary Agreement which reads as follows:

"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 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 upon appeal shall decide the dispute ex aequo et bono."

40. The jurisdiction of the FAT over the dispute between the Agent and the Club arises from clause 7 of the Agent Contract which reads as follows:

"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 location of the Club (Perm, Russia) or in FIBA arbitration tribunal (Geneva)."



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41. Both contracts are in written form and thus the arbitration agreements fulfill the formal requirements of Article 178(1) PILA.
42. With respect to substantive validity, the Arbitrator considers that there is no indication which could cast doubt on the validity of either arbitration agreement under Swiss law (cf. Article 178(2) PILA). In particular, the wording "[a]ny dispute arising from or related to the present contract" clearly covers the present dispute between the Player and the Club. The wording "any disputes arising from this Agreement" covers the dispute between the Agent and the Club.
43. In his request for arbitration, the Player also seeks a letter of clearance from the Club. However, the Arbitrator notes that FAT does not have jurisdiction to make such an order, since letters of clearance are issued by national basketball federations and, in case of dispute, by FIBA (see Article H.3 of the FIBA Internal Regulations).
44. With respect to the arbitration agreement in the Agent Contract, the Arbitrator notes that it also allows the parties to initiate proceedings before the competent court in Perm, Russia. However, the Claimants have opted for dispute resolution by way of arbitration before the FAT, which they are equally entitled to do under the Agent Contract.

5.2. Other Procedural Issues

45. The Club submitted an Answer and Counterclaim, but did not take any further part in these proceedings. Because the Club did not pay its share of the Advance on Costs (and as noted in the letter to the parties dated 17 November 2009), the Arbitrator treats the Counterclaim as withdrawn, applying Article 9.3 of the FAT Rules by analogy.



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However, to the extent that the Counterclaim contains material that might be said to be a defence to the claims of the Claimants, the Arbitrator considers that he is entitled to take this material into account, and has done so.

46. In light of the above, the Arbitrator considers himself fit to proceed with the arbitration and deliver the award.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

47. 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".

48. 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."



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49. As mentioned above (see paragraph 40), the Supplementary Agreement contemplates that the FAT arbitrator shall decide the dispute *ex aequo et bono*. With respect to the Agent Contract, the Arbitrator finds, in accordance with Article 15.1 of the FAT Rules, that since the parties have not agreed otherwise, he shall decide the dispute submitted to him *ex aequo et bono*.

50. 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*² (Concordat),³ 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."*⁴

51. 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".⁵

52. 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".

53. In light of the foregoing matters, the Arbitrator makes the following findings:

² That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA. Today, the Concordat governs exclusively domestic arbitration.

³ P.A. KARRER, *Basler Kommentar*, No. 289 *ad Art. 187 PIL*.

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

⁵ POUURET/BESSON, *Comparative Law of International Arbitration*, London 2007, No. 717, pp. 625-626.



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6.2. The issues to be determined

54. The following are the issues to be resolved in this case:

- I. Whether the Player remained entitled to be paid for the months of March – June 2009 (including any relevant bonus payments) in light of his conduct during that period;
- II. Whether the Player is entitled to any amounts as compensation for what the Player says was late payment of his salaries in earlier months;
- III. Whether the Player is entitled to reimbursement for fees paid for a Visa purchased for the Player's fiancée;
- IV. Whether the Agent is entitled to agency fees under the Agent Contract.

6.3. Factual findings

55. The central issue in these proceedings is whether the Player was entitled to act as he did during 2009, under the terms of the Supplementary Agreement. It is therefore necessary to consider the factual position in 2009 in some detail.

56. The Player arrived in Perm at the end of October 2008, passed a medical exam and started to play for the Club. The Contract, on the face of clause 4.1.1, provided for payment on the 5th of each month (other than January, on which the relevant date was the 15th), beginning on 5 November 2008. However, the Player received payments on various dates. There is some confusion in the Request for Arbitration and the Club's



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Answer about the dates on which payments were received by the Player. However, it is common ground between the parties that four salary payments were made. The dates of those payments are set out below (the dates being taken from a certificate of the dates on which payments were received, signed by the Player):

Payment date according to contract (clause 4.1.1)	Date payment received
5 November 2008	2 December 2008
5 December 2008	9 December 2008
15 January 2009	24 February 2009
5 February 2009	25 March 2009
5 March 2009	-
5 April 2009	-
5 May 2009	-
5 June 2009	-

57. It is common ground between the parties that the monthly payments stated in the Supplementary Agreement are "gross" figures such that the total monthly payment (after tax) was USD 56,250.
58. During 2008 and early 2009, there was correspondence between the Agent and the Club about the late payment of the Player's salary in 2008.
59. On 16 February 2009, the Agent sent a letter to the Club in respect of the Player which stated:

"I would like to inform you that due to the financial problems of Ural Great and the breach



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*of Article 7.3 and 7.4 of the contract with my client, and your player **Darius Washington**, he is no longer obligated to participate in practices or games and other schedules of Club.*

[...]

Player will practice or play games under his own wish. As soon as your Club pay[s] all his debts towards Darius Washington, he will be back on regular team schedule."

60. At around this time, the Club proposed a new agreement to be signed by the Player owing to a change in owner of the Club. No new agreement was signed, and nothing turns on this correspondence.
61. On 23 February 2009, the Club sent a letter guaranteeing to pay the salary "for December 2008 and January 2009" on 24 February 2009. As can be seen from the table above, one payment was made on 24 February 2009.
62. As a matter of fact, despite the letter referred to above, the Player continued playing all games for the Club.
63. Non-payment of the Player's salary by the Club continued. The Agent continued to write to the Club seeking payment for his client, the Player. The Agent had difficulty contacting representatives of the Club.
64. In April 2009, the entire team went on strike due to non-payment of salary. This included the Player missing three practice matches. It appears that this led to the Club promising the players that payments would be made on 21 April. Certain players in the team were paid on that date, but this did not include the Player.
65. The Agent then sent another letter (dated 23 April 2009) to the Club in similar terms as the letter of 16 February 2009. That letter stated:

"I would like to inform you that due to the financial problems of Ural Great and the breach



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of Article 7.3 and 7.4 of the contract with my client, and your player Darius Washington, he is no longer obligated to participate in practices or games and other schedules of Club. We are in full right to break the contract and seek LOC immediately and demand the remaining of Darius paymentst [sic] and agent's fee at FAT

[...]

Hopefully you will get in contact with me and your Club will find a better solution of this problem. Darius will not play in the following games. Thank you for your unde[r]standing."

66. The two final games of the season were held on 24 and 25 April 2009. The Player travelled with the team but was not allowed to sit on the bench with the team because he was not in uniform.
67. On 27 April 2009 (after the final game of the season), the Player met with the management of the Club. The Agent also spoke to the Club's management by phone during that meeting. During that meeting the Player was presented with an agreement to sign in respect of the circumstances of his departure from the Club. The Player did not sign that agreement. The Player was also presented with a number of documents setting out alleged breaches of the team rules, which he was also asked to sign, but did not. The Claimants assert that representatives of the Club made certain threats to the Player. The Club denies making such threats.
68. The Club later paid for a ticket for the Player to return to the USA, but did not pay any further salary payments.
69. There are various other factual matters mentioned in the Request for Arbitration in relation to the Player's accommodation when he arrived in Russia and fines received while travelling to games for the Club. However no request for relief is made in respect of these matters so that they are not relevant to the current proceedings.



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6.4. Dates for payment

70. The Supplementary Agreement provided for payment on the dates shown in paragraph 56. It is those dates that are the basis of the Claimants' claim that salary was paid late.
71. The Club submits that the dates shown in the Supplementary Agreement were a mistake, and that it was intended by the parties that payment be made in the month following the provision of services by the Player.
72. There is no support for this reading of the Supplementary Agreement in the terms of the document itself, which clearly states the dates on which payments were due. The Club, in its submissions, has stated that there was a conversation between the Agent and a representative of the Club where it was agreed that *"the Club pays the Player's salary compensation on time and that it will be paid the next month for the hours worked in the previous month"*. Such an argument may be said to be consistent with a letter from the Club to the Agent at the time where the Club states:

"With this very letter Perm Regional Public Organisation PBC Ural Great guarantees Darius Vashington to pay the salary compensation for December 2008 and January 2009 on February 24th 2009."

73. However, this submission is contrary to the submissions of the Claimants. More importantly, it is also contrary to documents from the relevant time. For example, the letter from the Agent to the Club dated 16 February 2009 referred to the "February payment" being due on 5 February and mentioned that the payment was, therefore, 11 days late. If the Club considered that the agreement had been amended to provide dates for payment other than those in the Supplementary Agreement, one would expect a reply to this letter to that effect.
74. Apart from the statement in the Club's answer to these proceedings, there is no evidence of any amendment to the Supplementary Agreement. The Club's submission



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is contrary to contemporaneous documents. For these reasons, the Arbitrator finds that clause 4.1.1 of the Supplementary Agreement operates in accordance with its terms so that the payments due to the Player fell due on the dates shown in clause 4.1.1 and set out in column 1 of the table contained in paragraph 56.

6.5. Central issue: actions of Player

75. The central issue in the proceedings is whether the letters dated 16 February 2009 and 23 April 2009 sent by the Agent to the Club amounted to a renunciation of the contract by the Player so that the Player is no longer entitled to payment of salary from the Club.

76. Clause 7.4 of the Supplementary Agreements states:

"After more than 28 days of the delinquency of salary compensation, the Player has the right to terminate the Contract one-sidedly (the Player is free to fulfil his obligations under the Labour contract and the Club gives him the Letter of Clearance). Club still owes for full amount of the contract, minus any new compensation earned from signing with another FIBA or NBA club."

77. It appears that the "Labour contract" referred to in this clause is a separate document that is signed by the parties and provided to the Russian Basketball Federation. The parties have not produced a copy of that document, but the Claimant has produced a document that the Claimant says is a "sample" of this type of Labour Contract. The Arbitrator is prepared to accept this document as an accurate indication of the "Labour contract" signed by the parties, for the purpose of this Award.

78. Under the Labour contract, the parties agree that the Player will provide basketball services and the Club will pay the Player. The Labour contract states that wages and bonuses to be paid to the Player in respect of the services provided will be set out in a



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supplementary agreement. This is the Supplementary Agreement that has been discussed above.

79. Clause 4.4 of the Labour contract states that "*Upon early termination of this contract the player is paid with monthly payments for actual time worked*". This contradicts clause 7.4 of the Supplementary Agreement, referred to above, which provides that the Club "*still owes for full amount of the contract*".
80. The Arbitrator considers that in the circumstances of this case it appears that the parties intended, at the time of signing the various agreements, that the Supplementary Agreement was to govern the financial terms of the Player's employment. To the extent that there is any conflict between the contracts in respect of these issues, the parties intended that the Supplementary Agreement would prevail. Thus, where termination was for reason of non-payment or late payment, the Player is entitled to payment of all salary that would have fallen due under the Supplementary Agreement, in accordance with clause 7.4 thereof.
81. Indeed, the Club recognises that the Player had a right to terminate the Supplementary Agreement. However, it submits that the Player was not entitled to practice or play according to his will.
82. In respect of both the letters of 16 February 2009 and 23 April 2009, the condition in clause 7.4 had been met. As of 16 February 2009, salary due to be paid on 15 January had not been paid and so had been outstanding for more than 28 days. At the date of the letter of 23 April 2009, the payment due on 5 March 2009 had been outstanding for more than 28 days.
83. The Arbitrator finds that the Player was entitled to act as he did in communicating his position to the Club, yet continuing to play. Following the February 2009 letter, the



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Player was promised payment by the Club and one payment was made. In those circumstances, it was reasonable for the Player to continue playing (in the hope of securing the further payments owed by the Club). It also cannot be said that the Player terminated the Supplementary Agreement at that point, since he continued to play for the Club.

84. There is a dispute between the parties as to the reason that the Player did not play the final two games of the season, following the April 2009 letter. Because the Player did not play the final two games of the season, it is arguable that he terminated the Supplementary Agreement. If the Club prevented the Player from playing, it could not be said that the Player terminated the Supplementary Agreement, as he continued to make himself available to play for the Club.

85. However, it is not necessary to resolve this factual issue. In the circumstances of this case, taking into account the terms of the Supplementary Agreement and the Club's repeated delay in making payments, there can be no doubt that if the Player did not terminate the Agreement, he was entitled to be paid, including in respect of the final two games. If the Player terminated the Supplementary Agreement, he would remain entitled to payment, by reason of clause 7.4 of the Supplementary Agreement, subject only to questions of mitigation of damage by seeking alternative employment. In the current situation, no issue of mitigation arises: it would not be reasonable to expect the Player to find a new Club for the final two days of the season.

86. Therefore, the Arbitrator concludes that the Player was entitled to payments in respect of the full season.



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6.6. The Club's internal regulations

87. The Club, in its counterclaim, refers to various breaches of the Club's internal regulations by the Player: for example, not practicing with the team. As mentioned above (para. 45), since the Club did not pay its share of the advance on costs, the counterclaim was deemed withdrawn. The Arbitrator therefore makes no findings on whether any internal regulations of the Club were breached by the Player and whether the Club would have been entitled to payment of fines in respect of those breaches.

6.7. Bonus payments

88. The Club admits that it owes the Player a total amount of USD 10,500 in respect of bonus payments. Although the Player claimed payments of USD 10,717, he has not provided clear evidence of the calculation of this amount. Indeed, a Procedural Order sought clarification of this amount from the Player, which was not forthcoming. The Arbitrator therefore finds that an amount of USD 10,500 is owing to the Player in respect of bonus payments.

6.8. Visa expense – the Player's fiancée

89. Clause 3.5 of the Supplementary Agreement provides for the Club to pay visa and travel expenses of the Player and his family. The Club accepts the effect of this clause but argues that the Player is not entitled to reimbursement for this fee, as the fee was in respect of his fiancée, who is not part of his family. The Player has claimed for the payment of a USD 405 fee.



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90. The question for the Arbitrator is what a reasonable person with the background knowledge of the parties at the time of the contract would have considered the word "family" to mean in clause 3.5. One argument is that "family" can only mean those related by birth or by marriage. However, the Arbitrator considers that a more modern approach should be taken to the word "family", so that a fiancée should also be considered part of the family. The Player is therefore entitled to reimbursement of the USD 405 fee by the Club.

6.9. Agent's fees

91. The Club, in its answer, expressly admits the debt owed to the Agent. The only matter that appears to have been raised by the Club in opposition to this is that it is not able to pay its debt. This is no answer to a claim for payment of a debt.⁶ The Arbitrator finds that the Club owes the Agent USD 45,000.00 in agency fees.

6.10. Interest/delinquency payments

92. In respect of all unpaid amounts, the Player seeks an amount calculated pursuant to clause 7.3 of the Supplementary Agreement, which states:

"The Club should compensate the Player the amount on the basis of 0.035% of the amount of the delinquency for the period of delinquency in case the delinquency of salary compensation occurs for more than 14 days."

⁶ See FAT 0052/09 Biggs, Lugtenburg v Perm Regional Public Organisation Professional Basketball Club "Ural Great".



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93. The rate of 0.035% per day equates to a per annum percentage of 12.775%. A contractual penalty should not be disproportionate to the compensation whose payment is secured by the contractual penalty.⁷ In the present circumstances, the Arbitrator is not satisfied that, at the time of contracting, a rate of 12.775% per annum represents a genuine pre-estimate of the Player's possible loss flowing from any non-payment by the Club. The Arbitrator in exercising his powers *ex aequo et bono* finds it just and equitable to apply a rate of 5% per annum to the outstanding debts, from the date that relevant debt fell due, as set out in the first column of the table in paragraph 56.⁸
94. In respect of the Agent's fees, the Arbitrator has not been provided with a "Report of Services Rendered", which triggers the payment obligation of the Club in respect of Agent's fees. However, the Club admits that it owes the Agent an agency fee. In a letter dated 28 November 2008, the Club referred to the "delay in payment of the agent's fee". The Arbitrator is satisfied that the payment obligation from the Club to the Agent arose prior to this date, and finds that interest on that amount should apply from 28 November 2008. The Agent requested in the Request for Arbitration that clause 7.3 of the Supplementary Agreement also be applied to the amount owed to the Agent. The Arbitrator does not consider this to be appropriate, as the Agent Contract does not contain a clause such as clause 7.3. However, as for the Player, the Arbitrator in exercising his powers *ex aequo et bono* finds it just and equitable to apply a rate of 5% per annum to the outstanding debts, from the date that the debt to the Agent fell due.
95. In respect of the bonus payments, the Arbitrator finds that those payments fell due on the next payment date following the date on which they were earned (clause 4.3 of the

⁷ See FAT 0036/09, TP Sports vs. WBC St. Petersburg.

⁸ See FAT 0052/09 Biggs, Lugtenburg v Perm Regional Public Organisation Professional Basketball Club "Ural Great"



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Supplementary Agreement). For this purpose, the Arbitrator adopts the dates that bonuses were earned shown in the table prepared by the Club. These are:

Date of match	Amount (USD)	Payment date
28 November 2008	500	5 December 2008
2 December 2008	1000	5 December 2008
5 December 2008	500	15 January 2009
9 December 2008	1000	15 January 2009
7 January 2009	1000	15 January 2009
13 January 2009	1000	15 January 2009
17 January 2009	500	5 February 2009
27 January 2009	1000	5 February 2009
31 January 2009	500	5 February 2009
3 March 2009	1000	5 March 2009
10 March 2009	1000	5 April 2009
14 March 2009	500	5 April 2009
17 March 2009	1000	5 April 2009
Total	10,500	

96. The Player has also claimed "delinquency" payments for those monthly payments that were eventually paid by the Club, but that were paid late. The Arbitrator does not consider that such a claim should succeed. Following payment of those amounts in December 2008 and February and March 2009, there is no further correspondence from either of the Claimants about the Player continuing to be entitled to compensation in respect of delay of payments. In these circumstances, the Arbitrator does not



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consider that it is appropriate for any interest or "delinquency" payments to be ordered in respect of those monthly payments that were paid by the Club.

7. Costs

97. 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, as a general rule, the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
98. On 20 April 2010, 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 11,970.00.
99. In the present case, the costs shall be borne by the Club. The Player and Agent were each substantially successful on their claims.
100. The Arbitrator notes that the Club's share of the Advance on arbitration costs was paid by the Claimants. The Arbitrator therefore decides that the Club shall pay to the



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Claimants EUR 11,970 as reimbursement of the Advance on Costs.

101. Furthermore, the Arbitrator considers it appropriate that the Claimants are entitled to the payment of a contribution towards their legal fees and 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 Claimants in connection with these proceedings. Hence, and after having reviewed and assessed the submission by the Claimants, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at EUR 6,000. The Arbitrator leaves it to the Claimants to share the amount in order to reflect their respective expenses.

8. AWARD

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

- I. Professional Basketball Club - Ural Great is ordered to pay to Mr. Darius Vashington the following amounts in respect of salary and bonuses, together with 5 % interest p.a. on those amounts from the date shown:

Amount	Date from which interest should be calculated
USD 1,500	5 December 2008
USD 3,500	15 January 2009
USD 2,000	5 February 2009
USD 56,250	5 March 2009
USD 1,000	5 March 2009
USD 56,250	5 April 2009



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USD 2,500	5 April 2009
USD 56,250	5 May 2009
USD 56,250	5 June 2009

- II. **Professional Basketball Club - Ural Great is ordered to pay to Mr. Darius Vashington USD 405 in respect of the Visa fee for Mr Vashington's fiancée.**
- III. **Professional Basketball Club - Ural Great is ordered to pay to Mr. Obrad Fimic USD 45,000.00 together with 5 % interest p.a. on that amount from 28 November 2008.**
- IV. **Professional Basketball Club - Ural Great is ordered to pay to the Claimants EUR 17,970.00 as reimbursement of the Advance on Costs and a contribution towards legal fees and expenses.**
- V. **Any other or further-reaching claims are dismissed.**

Geneva, seat of the arbitration, 28 April 2010

Raj Parker
(Arbitrator)



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Notice about Appeals Procedure

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

"17. Appeal

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