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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0067/09 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Darryl Eugene Strawberry, 2425 N Altadena Dr., Alta Dena,
CA 91001, USA

- Claimant 1 -

Bill A. Duffy International Inc., 507 N Gertruda Avenue,
Redondo Beach, CA 90278, USA

- Claimant 2 -

Both represented by Avv. Giovanni Imbergamo, Avv. Laura Maddalena,
Studio Legale, IMBERGAMO – LORETI, Via Guido Reni, 56 – 00196
Rome, Italy

vs.

Fortitudo Pallacanestro Societa' Sportiva Dilettantistica a R.L.,
(formerly Fortitudo Pallacanestro SRL), Via San Felice 103, 40122
Bologna, Italy (registered office) and Via Nannetti 1, 40122, Bologna, Italy
(for the purpose of notifications)

- Respondent -



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1. The Parties

1.1. The First Claimant

1. Mr. Darryl Eugene Strawberry (hereinafter referred to as “the Player”) is an American professional basketball player, who during the 2008-2009 season of the Italian “Serie A” Championship was playing for the basketball club Fortitudo Pallacanestro.

1.2. The Second Claimant

2. Bill A. Duffy International Inc. (hereinafter the “Agent”) is a Californian Corporation, which acted as the Player’s representative and agent in negotiating and signing the agreements entered into between the Player and Fortitudo Pallacanestro.

1.3. The Respondent

3. Fortitudo Pallacanestro Societa’ Sportiva Dilettantistica a R.L. (the “Club”), formerly named Fortitudo Pallacanestro SRL, was - during the 2008-2009 season of the Italian “Serie A” Championship - an Italian professional basketball club.
4. The Club changed its name and modified its statutory goals by a decision notarized on 15 September 2009, in order to account for the fact that during the season 2009-2010 it would be taking part in the Italian amateur basketball championship and to keep the entity in conformity with the applicable Italian regulations in that connection.

2. The Arbitrator

5. On 2 December 2009, the President of the FIBA Arbitral Tribunal (the “FAT”) appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the “Arbitrator”) pursuant to Article



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8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

6. On 28 October 2008, the Player, the Agent and the Club entered into an agreement whereby the latter engaged the Player for the season 2008-2009 (the "Main Agreement"), providing among others under article 2.2 that:

"The PLAYER's fully guaranteed salary shall be \$ 500,000 USD (five hundred thousand Dollars) net of all Italian taxes

[...]

Any payment received with a delay of 30 days or more with respect to the scheduled payment date shall be subjected to a late fee of USD 100 per day starting from the 31st day after the due date of such payment".

7. Under its article 6.1.1, the Main Agreement provided, among others, that:

"For the 2008-2009 season the Club shall pay the REPRESENTATIVE [the Agent] the following: \$50,000 USD net of any Italian taxes. This amount is payable to the REPRESENTATIVE by bank wire transfer on February 10, 2009. The wire transfer is payable to: "Bill A. Duffy International, Inc ...".

8. On the same date, the Player and the Club entered into a short Side Agreement (the "Side Agreement") with the following content:

"[R]eference is made to the agreement entered into between you and our club as of today's date (the "Agreement") and we agree to split your net compensation as follows:

- (i) 50,000 USD net as signing bonus to be paid on November 20, 2008, provided that by that date you have passed the medical examination provided for in the*



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Agreement and that, consequently, the Agreement shall have entered into effect;

- (ii) 150,000 USD net by means of an Italian league contract; and*
- (iii) 300'000 USD net by means of an image contract to enhance your image as a professional player playing for the Club; the relevant payments shall be made as follows: USD 75,000 net on December 15, 2008; 75,000 USD net on January 15, 2009; 75,000 USD net on March 15, 2009 and 75,000 USD net on May 15, 2009.*

Also Payment of the amounts sub (ii) and (iii) is conditional upon your passing the medical examination to be conducted as provided for in the Agreement.”

9. Article 2.2 of the Main Agreement also stipulated that:

“It is agreed that the Italian league contract to be entered between Club and Player shall be deposited and registered according to the rules of the Italian Basketball Federation (FIP) and of the Italian League.”

10. The Player and the Club signed the Italian League contract on 21 November 2008 (the “League Contract”).

11. Article 2 of the League Contract stipulated that the Player would receive for the 2008-2009 season a total remuneration “before tax” of EUR 220,000, made up of EUR 210,000 in salary and EUR 10,000 in costs to be met by the Club. No schedule of payments was included in the League Contract.

12. The League Contract refers to certain provisions of the Italian Civil Code and under article 6 stipulates the following with regard to dispute resolution:

“All disputes regarding the interpretation and execution of the collective agreement and of the present individual labour contract, including those relating to disciplinary measures, are deferred to the Permanent Board of Conciliation and Arbitration ruled by article 29 and following of the “Professional Players 2003” collective Labour Agreement”.

13. On 28 November 2008, the Player entered into an exclusive license agreement (the “License agreement”) with a third party named “Krisken Management SA” (“Krisken”), a company having its seat in Geneva, Switzerland, whereby he licensed all his image rights to Krisken for the duration of 2008-2009 season.



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14. According to article 9 of the License agreement, as consideration for the use of the Player's image rights, Krisken would pay the Player the amount of USD 300,000 stipulated in the Side Agreement in four installments of USD 75,000, on the dates stipulated in the Side Agreement.
15. Article 7 of the License agreement stipulated that Krisken

"... is authorized to sublicense to third parties, including to Fortitudo Pallacanestro SrL, the rights under the Agreement".
16. Article 11 of the License agreement provided that Swiss law governs the agreement and that any disputes relating thereto would be submitted to the exclusive jurisdiction of the courts of Switzerland.
17. On the same day of 28 November 2008, the Club entered into a sublicense agreement with Krisken (the "Sublicense"), which in content was largely back-to-back with the License agreement, whereby Krisken sublicensed the Player's same image rights to the Club for the season 2008-2009.
18. As consideration for the sublicensing of the Player's image, article 3 of the Sublicense provided that the Club would pay Krisken four installments of USD 79,500 on the same dates as Krisken had undertaken to pay the Player under the License agreement.
19. According to article 12 of the Sublicense, Italian law governs the agreement and any disputes relating thereto are subject to the exclusive jurisdiction of the courts of Bologna, Italy.
20. Also, on 28 November 2008, the Player signed a side letter whereby he declared

"... reference is made to the agreement entered into as of October 28, 2008 between myself and your Club (the "Agreement") and I hereby acknowledge that the contract between Fortitudo Pallacanestro SrL and Krisken Management SA has been entered into in execution of the Agreement and that the consideration of USD 300.000 provided for in such contract between Fortitudo Pallacanestro SrL and Krisken Management SA, dated



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November 28, 2008 is part of the global salary compensation provided in the Agreement”.

21. The Player joined the team in November 2008 and played 19 of the officially-scheduled championship games between 30 November 2008 (game against *Carife Ferrera*) and 15 April 2009 (game against *Premiata Montegranaro*), but had to stop playing after the latter game due to suffering an injury of the meniscus which obliged him to return immediately to the United States for surgery and rehabilitation. In that connection, article 4.1 of the Main Agreement stipulates among others that:

“The CLUB agrees that this Agreement and all of the payments required to be made to the PLAYER are fully and unconditionally guaranteed, provided that PLAYER passes the medical examinations administered by CLUB as provided above. Therefore, such payments shall be made even in the event of death, injury (whether permanent or non-permanent and regardless of whether the injury is basketball related, provided that Injury or death are not due to negligence or misconduct of PLAYER), mental disability or lack of skill”.

22. The Claimants allege that already before the Player suffered the injury the Club was late in paying amounts due, and that as a result the Player’s agent sent a first notice letter to the Club on 5 February 2009 requesting payments as follows:

“Please be advised that this agency represents DJ Strawberry and [...] with respect to the Agreement entered by these two players and our agency, BDA Sports Management, with BC Fortitudo Bologna for professional basketball services (the "Agreement"). Mssrs. Strawberry, [...], and BDA have satisfied all conditions required under the Agreement.

As of the present time, Mr. Strawberry is owed \$150,000 USD for two (2) image payments of \$75,000 USD each which were due December 15, 2008 and January 15, 2009, respectively, plus \$40,000 USD for two (2) league payments of \$20,000 USD each [of] which were due in December 2008 and January 2009, respectively, plus late fees. As of the present time, BDA is owed a \$50,000 USD agency fee plus late fees [...]

We are aware of no circumstances that would allow BC Fortitudo Bologna to withhold payment from Mssrs. Strawberry and [...], or BDA under the Agreement.”

23. In that relation, the Claimants submit that: “... neither during the performance of the services on the part of the Player nor after his coming back to the USA, FORTITUDO raised objections regarding the Agreement or the services rendered by the PLAYER or



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both” and that more generally “*There are no circumstances we are aware of that would allow FORTITUDO to withhold payments due from the PLAYER and from the REPRESENTATIVE under the Agreement*”.

24. The Claimants further submit that: “ ... *Mr. Rade Filipovich* [the representative of the Agent] ... *contacted several times the management of FORTITUDO and Mr. Sacrati [Fortitudo’s President] himself during 2009 receiving assurances regarding the payments due to the PLAYER and the REPRESENTATIVE, but with no result*”.
25. On 20 August 2009, the Claimants’ lawyer sent the Club another notice letter stating that payments contractually owed had not been made “[n]otwithstanding prior requests of payment ... “.
26. Having not received any payments from the Club further to the foregoing notice letter, the Claimants filed a Request for arbitration with the FAT.
27. During the course of the proceedings before the FAT, the Parties exchanged various submissions and filed documents (as summarized below in section 3.2 of this award) which establish that they agree on the total amount of payments received by the Player from the Club - i.e. an amount of EUR 120,800.57 (see the document entitled “*Pagamenti Effettuati a Strawberry*” filed with the Club’s submission of 12 May 2010 and Claimants’ observations thereon of 22 June 2010) - and that in May 2009 the Player received a payment of EUR 59,055.12 from Krisken.
28. However, whereas the Player deems the Club to owe him, at a minimum, the difference between the foregoing payments and the USD 500,000 of salary foreseen in the Main Agreement, the Club contends that any outstanding remuneration is owed by Krisken and not by the Club, under the License agreement to which the Club is not a party.
29. In addition, in its submissions the Club has made a counterclaim under articles 3.2 and



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3.3 of the Main Agreement, whereby it is claiming a total amount of EUR14,670.34 from the Player based on various alleged costs paid in his place for damages to the car the Club loaned to him, apartment-related charges and traffic violations.

3.2. The Proceedings before the FAT

30. On 18 November 2009, the Claimants filed a Request for Arbitration in accordance with the FAT Rules.

31. On 20 November 2009, the non-reimbursable handling fee of EUR 3,988 paid by Claimants was received by the FAT.

32. On 8 December 2009, the FAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

<i>“Claimant 1 (Mr. Strawberry)</i>	<i>€ 5,000</i>
<i>Claimant 2 (Bill A. Duffy International)</i>	<i>€ 1,000</i>
<i>Respondent (Fortitudo Pallacanestro)</i>	<i>€ 6,000”</i>

33. On 28 December 2009, the Claimants paid the advance on costs in an amount of EUR 5,988.

34. On 12 January 2010, the Club wrote to the FAT Secretariat as follows:

“We received [a] few weeks ago the request of arbitration FAT 0067 “Strawberry, Duffy International VS Fortitudo”. My administration Office didn’t respect the dead line of 29 December to pay, according to FAT rules, the amount of 6.000 euros as advance on costs. I’m asking if it is possible pay the advance on costs now and if we have any sanction for this delay”.

35. On 18 January 2010, the Club wrote a follow-up message to the FAT Secretariat as follows:



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“Due to technical problems and to some changes occurred in our management our club didn’t respect the deadlines reported in your communication FAT 0067 - “Strawberry, Duffy International vs Fortitudo”. The club, apologizing for our delay, ask to FAT the possibility to fix another deadline for paying the advance on costs and for sending our answer according FAT rules”.

36. On 28 January 2010, by procedural order, the FAT Secretariat informed the Club that the Arbitrator had decided to allow it to pay the advance on costs and to file its Answer within a new deadline of 5 February 2010. The FAT also indicated that: *“Any defence as to lack of jurisdiction of the FAT must be submitted in the Answer failing which the defence is deemed waived”* and that *“... according to Art. 14.2 of the FAT Rules the Arbitrator may proceed with the Arbitration even if the Respondent fails to submit an Answer or to submit his Answer in accordance with Art. 11.2 of the FAT Rules”*.
37. By procedural order of 11 February 2010, the FAT informed the Claimants that the Club had failed to pay its advance on costs within the new deadline and that, as a result, under Article 9.3 of the FAT Rules the Claimants were required to substitute for the Club if they wished the proceedings to continue.
38. On 24 February 2010, the Claimants made the substitute payment in an amount of EUR 5,985.
39. By procedural order of 8 March 2010, the FAT informed the Parties that the Claimants were requested by the Arbitrator to submit additional information and any related written evidence regarding certain aspects of their claim, and that the Club would be given the opportunity to comment thereon, after which the Arbitrator would decide whether or not a hearing would be held.
40. On 19 March 2010, the Claimants submitted their answers to the Arbitrator’s questions and filed related documents.
41. By procedural order of 23 March 2010, the Club was given the opportunity to provide



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observations on the Claimants' submission of 19 March.

42. On 12 April 2010, the Club submitted its observations.
43. By procedural order of 29 April 2010, given the additional documents filed by the Club with its observations of 12 April 2010, the FAT informed the Parties that the Club was requested by the Arbitrator to clarify certain points and to submit any related written evidence, and that the Claimants would be given the opportunity to comment thereon.
44. On 12 May 2010, the Club submitted its answers to the Arbitrator's questions and filed related documents.
45. By procedural order of 28 May 2010, the Club was invited to supplement in an amount of EUR 3,000 the advance on costs, given the scope of its submission of 12 May 2010; and the Claimants were provided with a deadline until 10 June 2010 to answer certain additional questions and to provide any observations on the Club's submission of 12 May 2010.
46. On 7 June 2010, the Claimants applied for an extension until 22 June 2010 to file their answers, and the next day the FAT granted such request.
47. On 8 June 2010, the Club paid the requested advance on costs of EUR 3,000.
48. On 22 June 2010, the Claimants submitted their answers.
49. On 24 June 2010, the Club was granted a deadline to submit its comments on the Claimants' answers. By procedural order of 28 June 2010, the foregoing deadline was extended until 12 July 2010.
50. On 12 July 2010, the Club submitted its comments.
51. On 14 July 2010, the proceedings were closed and the Parties were invited to submit



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their accounts of costs.

52. On 23 July 2010, the Claimants submitted their account of costs.
53. The Club did not submit its account of costs.

4. The Positions of the Parties

4.1. The Claimants' Position

54. The Claimants submit the following in substance:
 - By not paying the entire contractually-agreed salaries of the Player for the 2008-2009 season despite the Player having fulfilled all his obligations, the Club is in breach of its contractual duties.
 - Accordingly and because the Main Agreement is a fully guaranteed contract, the Club is liable for the payment of the entire outstanding salaries, which at a minimum represents the difference between the contractually-agreed amount of USD 500,000 and the total payments received from the Club and Krisken.
 - In that respect: *“In case the amount of **EURO 59’055.12 (USD 75,000.00)** received from Krisken Management is to be included, the aggregate salary compensation due would be equal to **EURO 213,845.10 (EURO 393,700.79 agreed - EURO 120,800.57 paid = EURO 272,900.22 - EURO 59,055.12)**, i.e. **USD 271,583.27** at the exchange rate of 1.27, if applicable”.*
 - Furthermore, since the amount of salary in question has been outstanding since the end of the 2008-2009 season – after the Player was permitted and contractually entitled to return home in April 2009 due to suffering an injury



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requiring surgery – the Club is obliged to pay the contractually-stipulated penalty of USD 100 per day from the 31st day after his last performance, i.e. starting on 16 May 2009.

- In addition, by not paying any part of the contractually-agreed agency fee of USD 50,000 on the stipulated date of 10 February 2009, the Club is in breach of its contractual duties towards the Agent and is obliged to pay the entire amount.
- With respect to the counterclaim, it must be rejected for lack of supporting evidence of the damages and payments alleged by the Club.

55. In their Request for Arbitration dated 18 November 2009, the Claimants request the following relief:

"In light of the foregoing, Claimants request the FIBA Arbitral Tribunal order to the Respondent Fortitudo Pallacanestro Societa' Sportiva Dilettantistica a R.L.:

(1) to pay to the PLAYER the full salary compensation due, pursuant to the Agreement dated October 28, 2008 and in accordance with any other relevant and connected documents, in the remaining and net amount of \$ 353,459 or any other sum that may be determined by the Arbitrator as fair and due under the circumstances;

(2) to pay to the PLAYER late fees of USD 100 per day starting from May 16, 2009 or from any other date that the Arbitrator may deem fair and reasonable and up to the payment date;

(3) to pay to the REPRESENTATIVE the full agency fee in the net amount of \$ 50,000 or any other sum that may be determined by the Arbitrator as fair and due under the circumstances;

(4) to pay to both Claimants all arbitration costs, fees and connected expenses."

4.2. Respondent's Position

56. The Club submits the following in substance:



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- Contrary to the Claimants' allegations, the Player did sign an image contract whereby he licensed his image rights to Krisken on 28 November 2008, i.e. to a third party and not to the Club, the latter then receiving a sublicense from Krisken.
- Furthermore, in the side letter of the same date the Player acknowledged the existence of the sublicense and acknowledged that the consideration to be paid by the Club thereunder (USD 300,000) was "*... part of the global salary compensation provided for in the agreement*".
- The Main Agreement was a mixed contract providing that part of the Player's remuneration would stem from the League Contract.
- Accordingly, the Player's compensation rights derive from several distinct contracts.
- With respect to any outstanding remuneration deriving from the License agreement, the Player cannot claim it from the Club in this arbitration because such amount is owed by a third party (Krisken) under a contract to which the Club is not a party. This is further established by the fact that the Player admits to having received a payment of EUR 59,055.12 (corresponding to an instalment of USD 75,000.00) from Krisken under the License agreement.
- The Player must make any such claim against Krisken on the basis of article 11 of the License Agreement, whereby any disputes thereunder are subject to Swiss law and to the exclusive jurisdiction of Swiss courts.
- Consequently, the FAT lacks jurisdiction to decide upon any amounts due under



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the License agreement.

- Similarly, any claim that the Club did not pay Krisken is outside the scope of jurisdiction of the FAT since the Sublicense provides that any disputes thereunder are subject to Italian law and to the exclusive jurisdiction of the Italian courts.
- In any event “... *the respondent has completely fulfilled all the contractual obligations towards Mr. Darryl Eugene Strawberry Jr. and this time nothing further is owed to the athlete*”. In that connection, the Club contends that under the League Contract the last two salaries representing a total amount of EUR 40,000 were not owed due to the fact that if a team is relegated to a lower league a player’s fixed income is automatically reduced to 80% of the contractual remuneration during the season when the relegation occurs.
- The Club is counterclaiming EUR 14,670.34 against the Player under the Main Agreement based on the cost of damages to the car (representing an amount of EUR 1,525) loaned to him, on apartment-related charges the Club had to pay in his place (representing a total of EUR 1,558.61) and on the expenses related to a large number of traffic violations committed by him for which the Club had to pay 103 fines (representing a total cost of EUR 11,586.73).

5. The jurisdiction of the FAT

57. 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). The jurisdiction of the FAT presupposes the arbitrability of the dispute and the



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existence of a valid arbitration agreement between the parties.

58. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA¹.

59. The jurisdiction of the FAT over the dispute would result from the arbitration clause in article 9.3 of the Main Agreement, which reads as follows:

“Any dispute arising or related to the present Agreement shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved definitely in accordance with the FAT Arbitration Rules. The Arbitration [sic] shall decide the dispute ex aequo et bono. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. To the extent legally possible under Swiss law, recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sports (CAS) upon appeal shall be excluded.”

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

61. With respect to substantive validity, the Arbitrator considers that there is no evidence on record that casts any doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).

62. Concerning the counterclaim made by the Club there is no doubt that its subject-matter falls within the scope of the foregoing arbitration clause since the counterclaim is grounded in articles 3.2 and 3.3 of the Main Agreement. Furthermore, the jurisdiction of the Arbitrator is uncontested in that respect. Consequently, the Arbitrator has jurisdiction over that part of the dispute. The same applies to the Agent's claim for payment of its agency fee of USD 50,000 on the basis of article 6.1.1 of the Main Agreement.

63. However, the Club is contesting the Arbitrator's jurisdiction to adjudicate the Player's

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



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claim for payment from the Club of any outstanding amounts of remuneration allegedly owed for his services as a player during the 2008-2009 Italian Championship. In essence, the Club is objecting that the Arbitrator lacks jurisdiction over the claim because any balance of remuneration is not owed under the Main Agreement but under the League Contract and/or the License agreement, which both contain a dispute-resolution clause of their own that does not refer to the FAT.

64. Therefore the issue that needs determining is whether the claim for payment made by the Player in these proceedings falls within the scope of the above-quoted FAT arbitration clause contained in the Main Agreement.
65. That is a matter of interpretation of the arbitration clause in light of the content of the Main Agreement.
66. The Arbitrator finds that for a combination of the following reasons the Player's claim as formulated does fall within the scope of the FAT arbitration clause contained in article 9.3 of the Main Agreement:
 - The Club and the Player are parties to the Main Agreement containing the FAT arbitration clause.
 - The terms of the Main Agreement include all the essential elements of agreement between the Club and the Player with respect to the latter's right to remuneration for the season 2008-2009, i.e. the total amount net of tax of the Player's salary (USD 500,000), the detail of services that the Player must render to be entitled to his full remuneration - including the timeframe and games involved (2008-2009 season) – the Player's fringe benefits, the guarantees offered to the Player and the conditions of termination of the agreement.
 - It is clear from those terms of contract that, irrespective of any modalities that would be agreed upon in other agreements and side agreements as to the mode and schedule of payments, the parties' common intent under the Main Agreement



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was that the Club itself was fully guaranteeing to the Player the payment of a total salary of USD 500,000 by the end of the season 2008-2009 at the latest.

- It follows that the broad terms of the arbitration clause in the Main Agreement stating that “*Any dispute arising or related to the present Agreement shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland ...*” necessarily encompass and were intended by the Parties to cover any disputes relating to the non payment by the end of the season 2008-2009 of any part of the Player’s total guaranteed salary of USD 500,000 stipulated in the Main Agreement.
- Payment by the Club of the balance of the total salary of USD 500,000 due to the Player under the Main Agreement is precisely what the Player is claiming in this FAT arbitration.

67. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Player’s claim.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

68. 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*” instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:



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“the parties may authorize the arbitral tribunal to decide ex aequo et bono”.

69. 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.”

70. Article 9.1 of the Main Agreement provides that it “... shall be construed, interpreted and enforced according to the laws of Italy”, i.e. the laws of the country in which the player is residing and playing. Article 9.3 on the other hand provides that “*the Arbitrat[or] shall decide the dispute ex aequo et bono*”.

71. It is therefore a matter of interpretation of the Main Agreement to determine how deciding the case *ex aequo et bono* fits with the reference to the laws of Italy.

72. The Arbitrator considers that in the present case the Parties’ common intention was to account for the mandatory rules of local labour law (in this case the laws of Italy) to regulate matters such as working hours, safety, insurances, etc. as long as they did not become contentious, but that any disputes deriving from the performance of the Parties’ obligations under the contract would be decided *ex aequo et bono* if submitted to the FAT.

73. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

74. The concept of “*équité*” (or *ex aequo et bono*) used in Article 187(2) PILA originates



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from Article 31(3) of the Concordat intercantonal sur l'arbitrage² (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

75. 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*”.
76. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2. Findings

77. It is established by the evidence on record that:
 - Under the terms of the Main Agreement the Player was guaranteed payment by the Club of a total salary of USD 500,000 net of tax by the end of the 2008-2009 season, corresponding to EUR 393,700.79 (at the exchange rate of 1.27 used by both parties when accounting for remuneration to be paid under the Main Agreement).
 - For his services rendered throughout that season, the Player only received a total remuneration equivalent to EUR 179,855.69 (EUR 120,800.57 from the Club

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 PILA.

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



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directly and EUR 59,055.12 via Krisken), leaving an unpaid balance of EUR 213,845.10 (EUR 393,700.79 minus EUR 179,855.69), corresponding to USD 272,583.27, out of the total amount guaranteed under the Main Agreement.

- Under the Main Agreement the Agent was entitled to be paid USD 50,000 net of tax by the Club by 10 February 2009 and it did not receive payment of any part of that amount.

78. Consequently, unless the existence of relevant objections linked to the terms of the Main Agreement is established and/or reasons of fairness so require, the claims for the outstanding amounts indicated above must be admitted.
79. With respect to the Agent's claim for payment of its agency fee of USD 50,000, the Club has not provided any evidence of any reason for which such amount did not become due to the Agent under the terms of article 6 of the Main Agreement.
80. Accordingly, the Arbitrator considers the Agent's claim to be contractually well grounded and finds there are no reasons of fairness not to grant it.
81. With regard to the Player's original claim (in his Request for arbitration) for the payment of a total amount of outstanding salary of USD 353,459, subsequently reduced to a claim for at least USD 272,583.27, the Club has not invoked any actions and/or breaches by the Player that would contractually justify the non-payment of that balance of the guaranteed salary of USD 500,000 for the season 2008-2009.
82. Instead, the Club is arguing in essence that the balance of the Player's salary was to be paid in part by a third party (Krisken) under the License agreement – in accordance with the schedule of payments contained therein – and is therefore not owed by the Club; and in part on the basis of the League Contract under the terms of payment contained therein, which included a reduction in salary in the event of a relegation of



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the Club to a lower league; such reduction being applicable in the present case with the consequence that no further monies are owed under the League Contract.

83. Having accepted jurisdiction for the reasons indicated above, the Arbitrator finds that from a contractual perspective the terms of the Main Agreement are sufficient to entitle the Player to claim the entire amount owed to him on the basis of that contract alone, since it unambiguously derives from its terms that the Club has the obligation to fully guarantee the Player's total salary of USD 500,000 by the end of the 2008-2009 season at the latest.
84. The provision of a payment schedule in other contracts and the fact that certain payments would be made *via* a third party do not detract from the fact that the Club's main obligation – i.e. to guarantee payment of the total amount of salary by the end of the 2008-2009 season at the latest – remains under the Main Agreement with respect to whatever sums are unpaid at the end of the stipulated season.
85. Furthermore, if the Club has no justified reasons of substance not to pay the Player – which the Arbitrator finds to be the case here, since the Club has not even alleged any breach of contract by the Player – considerations of justice and fairness prevent the Club from invoking the existence of the other contracts as a formal pretext for not paying the total remuneration it guaranteed under the Main Agreement.
86. Consequently, the Player's request for payment of USD 272,583.27 and the Agent's request for payment of USD 50,000 shall be awarded.
87. Regarding the request for payment of the USD 100 per day as a fee for late payment – which according to article 2.2 of the Main Agreement starts from the 31st day after the due date of payment – the Arbitrator finds that, in the circumstances of this case and considering that approximately one year has lapsed since the end of the 2008-2009 basketball season for which the Player was engaged, principles of justice and fairness



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warrant applying such fee for late payment for a period of one year, bearing in mind that it thus represents an amount of **USD 36,500** (365 days x USD 100).

88. With respect to the Club's counterclaim, it is relevant that according to article 3.2 of the Main Agreement "*Any uninsured liability will be the sole responsibility of the CLUB. The CLUB except for gasoline, oil change, parking and cleaning the automobile, as well as driving fines, will pay all maintenance expenses of the automobile*" and that according to article 3.3 "*The use of the telephone and the cleaning of the apartment will be at the PLAYER's expense*". Accordingly, it would not be fair or just to allow any part of the counterclaim for alleged damage to the car (which, if paid by the Club, constitutes "uninsured liability") or for expenses concerning the apartment (apart from the cleaning bill which must be footed by the Player). Therefore, that part of the counterclaim will be rejected. However, the cost of cleaning the car (EUR 25) can be recovered in accordance with what the Main Agreement provides.
89. Concerning the traffic violations and parking tickets, the Arbitrator finds that the detailed chronological list of violations with the corresponding fines can be deemed sufficient evidence of their existence in the present case and that there is no reason to consider that the Club did not pay the corresponding amounts instead of the Player. Furthermore, the disbursements made to pay the fines in a total amount of EUR 11,586.73, as well as the cost of cleaning the apartment (EUR 350) and the car (EUR 25) fall into the categories of expenses that the Player is deemed to cover under articles 3.2 and 3.3 of the Main Agreement and there are no reasons of fairness not to award the Club its request for reimbursement of those costs.
90. Consequently, the counterclaim will be admitted in the amount of **EUR 11,961.73**, covering the costs of the driving fines, of the parking tickets and of cleaning the apartment and the car.



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7. Costs

91. Article 19 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
92. On 20 August 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 to be EUR 10,900.00.
93. Considering, on the one hand, that the Claimants prevailed in a large part of their claims and given the nature of those claims, and considering, on the other hand, the small amount of the counterclaim and the absence of evidence on record that the corresponding costs were ever previously requested from the Player, it is fair that the fees and costs of the arbitration be borne by the Club and that it be required to cover its own legal fees and expenses as well as those of the Claimants, the latter being reasonable in amount.
94. Given that the Claimants paid advances on costs of EUR 11,973.00 as well as a non-reimbursable handling fee of EUR 4,000.00, while the Club paid an advance on costs of EUR 3,000.00 the Arbitrator decides that in application of article 19.3 of the FAT Rules:



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- (i) FAT shall reimburse EUR 4,073.00 to the Claimants, being the difference between the costs advanced by the Parties and the arbitration costs fixed by the FAT President;
- (ii) The Club shall pay EUR 7,900.00 to the Claimants, being the difference between the costs advanced by them and the amount they are going to receive in reimbursement from the FAT.
- (iii) The Club shall pay to the Claimants EUR 21,898.27 (17,898.27 + 4,000.00) representing the amount of their legal fees and other expenses.



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8. AWARD

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

1. Fortitudo Pallacanestro Societa' Sportiva Dilettantistica a R.L. shall pay Mr. Darryl Eugene Strawberry an amount of **USD 272,583.27**, net of taxes, as compensation for unpaid salary.
2. Fortitudo Pallacanestro Societa' Sportiva Dilettantistica a R.L. shall pay Mr. Darryl Eugene Strawberry an amount of **USD 36,500.00**, net of taxes, as compensation for late payment fees.
3. Fortitudo Pallacanestro Societa' Sportiva Dilettantistica a R.L. shall pay Bill A. Duffy International Inc an amount of **USD 50,000.00**, net of taxes, as compensation for outstanding contractual agency fees.
4. Mr. Darryl Eugene Strawberry shall pay Fortitudo Pallacanestro Societa' Sportiva Dilettantistica an amount of **EUR 11,961.73**, as compensation for its costs incurred for driving fines, parking tickets and the cleaning of the apartment and of the car.
5. Fortitudo Pallacanestro Societa' Sportiva Dilettantistica a R.L. shall pay Claimants an amount of **EUR 10,900.00** as reimbursement for the Claimants' arbitration costs.
6. Fortitudo Pallacanestro Societa' Sportiva Dilettantistica a R.L. shall pay Claimants an amount of **EUR 21,898.27** as reimbursement for the Claimants' legal fees and expenses.



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7. Any other or further requests for relief are dismissed.

Geneva, seat of the arbitration, 31 August 2010

Quentin Byrne-Sutton
(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."