FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0054/09 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Marc Salyers, 2234 Middleground Drive, Owensboro, KY 42301, USA
represented by Mr. Sebastien Ledure, FIVE Legal, Avenue Louise 475/18, 1050 Brussels, Belgium

- Claimant -

vs.

Azovmash Mariupol Basketball Club, Mashinostroiteley Square 1, 87535 Mariupol, Ukraine

- Respondent -

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1. The Parties

1.1. The Claimant

1. Mr. Marc Salyers ("the Player") is a professional basketball player, who was playing for the basketball club Azovmash Mariupol at the time the dispute arose.

1.2. The Respondent

2. Azovmash Mariupol ("the Club") is a professional basketball club in Ukraine.

2. The Arbitrator

3. On 14 July 2009, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules"). Neither of the parties has raised objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

4. The Player and the Club entered into an agreement on 1 July 2008 whereby the latter engaged the Player for the seasons 2008-2009 and 2009-2010 (the "Agreement").

5. Article 1.7 of the Agreement provides that:

> "*The Club and the Player have the right to terminate the present contract, only for the season 2009-2010, after the end of the season 2008-2009 …*"

6. Article 3 provides a monthly schedule of payment for the agreed salaries for the two seasons, and in that connection article 3.3 stipulates the following:

> *"The Contract is also subject to the Player not materially breaching this Agreement. The Club agrees that this Agreement is fully guaranteed agreement. In this regard, even if Player is removed or released from the Club without justification, or if this Agreement is terminated or suspended by Club due to Player's lack of or failure to exhibit sufficient skill, Player's death, illness, injury or other mental or physical disability incurred on the court (during any practice or game) except due to Player's breach of this Agreement, Club shall nevertheless be required to pay to Player, on the dates set forth above, the full amounts set forth above.*
>
> *If Club is late by more than 10 days on making payment in full then there will be a late fee of 500 USD net per day. If Payment is still not made and Club is 15 days late then player will refrain from all team functions including practices and games with no penalty to the player. If for some reason club is late in paying by more than 21 days or club has not performed any non-economical obligation for 21 days or more, then Player may terminate this Contract and shall be deemed a free agent and receive his basketball license immediately from the club to play anywhere else in the world while Club is still responsible to pay player the entire agreement in full within 30 days of players departure. Player shall be under no obligation to mitigate his damages should he seek employment with another basketball club following termination. In such case, Club agrees to provide Player with his Letter of Clearance to play basketball anywhere in the world Player chooses"*

7. In 2008, the Club began experiencing some financial difficulties with the consequence for the Player that his monthly salaries started being paid late.

8. Regarding the financial situation of the Club in general, the following was reported on 3 December 2008 on the online newspaper Kyiv Weekly:

> *"Ukrainian champion Azovmash Mariupol is also facing serious problems. Due to reduced production at the Azovmash plant, the city's basketball team is experiencing financial difficulties […]"*

9. According to the Player, his October 2008 salary was paid 17 days late, his November salary 28 days late and his December salary 30 days late.

10. As of the late payment in November 2008, the Player reacted by requesting his agent to intervene, and on 20 November his agent addressed a letter by fax with the following

content to the Club:

> *"As of today, November 20, 2008, your club is yet to pay my client, MARC SALYERS, his November salary, $88,000, which is now overdue 19 days. I would like to remind you of the following, according to Paragraph (3) of your contract with Mr. Salyers:*
>
> *1. Your club is subject to a daily penalty of $500, which, as of today totals $9,500.*
>
> *2. As of the 16th of this month, Mr. Salyers has no longer been obligated to participate in any of your club's games or practices.*
>
> *3. As of this Saturday, November 22, 2008, Mr. Salyers shall have the right to terminate the contract altogether AND be entitled to his entire salary, as specified in the contract.*
>
> *As a gesture of good will, and based on your club's promise to pay the November salary by this upcoming Monday, November 24, 2008, Mr. Salyers has not yet ceased participation in club activities. However, unless he receives a definite proof of payment, in the form of an authentic bank wire receipt, that his salary has been paid by this Monday, Mr. Salyers will immediately exercise all his rights, as specified in his contract with your club, including taking his case to FAT.*
>
> *Therefore, I urge you to pay Mr. Salyers as soon as possible. Thank you."*

11. On 22 November 2008, the agent sent a second notice by email stating that:

> *"As of Sunday, November 23, 2008, Marc Salyers, in accordance with his contract with your club BT Azovmash Mariupol, will cease participation in all practices and games until his November salary, $88,000, and all penalties, totaling $11,000 as of today, have been paid to him".*

12. According to the Club, the above notices came a few days before it was scheduled to participate in a Eurocup game against Kalise G.C. on 25 November 2008.

13. As a result, during a practice session on 24 November a representative of the Club gave the Player a copy of a SWIFT transfer message confirming that the Club had effected payment of half of the salary for the month of November 2008, i.e. an amount of US$ 44,000.

14. This prompted the Player's agent to address on 24 November another fax letter to the Club, this time putting the Club on notice to pay the outstanding part of the November

salary, as follows:

> *"My client, MARC SALYERS, has informed me that your club only paid him $44,000 today, instead of his full November salary, $88,000, which is now overdue 23 days. Your club is also subject to a daily penalty of $500, which, as of today, totals $11,500*
>
> *Therefore, and in accordance with Paragraph (3) of your agreement with him, Mr. Salyers has asked me to notify you that unless he receives ALL overdue payments immediately, he will terminate the current agreement between BT Azovmash Mariupol and himself.*
>
> *In such case, Mr. Salyers will be entitled to his entire salary, as specified in the agreement + all penalties. Mr. Salyers is ready to immediately exercise all his rights, as specified in his agreement with your club, including taking his case to FAT.*
>
> *I therefore urge you to make the promised payment as soon as possible."*

15. According to the Player's bank statements, the first half of his November 2008 salary, i.e. an amount of US$ 44,000, was credited to his account on 26 November and the second half on 28 November.

16. The Player nonetheless took part in the Eurocup game on the 25th of November.

17. Delays occurred again when time came round for payment of the next month's salary in December 2008.

18. According to the Agreement, the salary was due on 1 December 2008.

19. The parties were still involved in an exchange of correspondence about the salary payment being outstanding when, on Friday 26 December 2008, a representative of the Club sent an email message to the Player as follows:

> *"Merry Christmas to you and your family!*
>
> *We want you to come back. We paid the money and if you don't see it on your account, you will see it on Monday for sure. Our transaction was done on 23 December, and I hope today we will have the bank receipts.*
>
> *As for tickets, President promised to reimburse the money together with the January payment. Could you arrange it by yourself?".*

20. The same day, the Player's agent replied by email on behalf of the Player with a copy

to the latter:

> *"1. If the payment was made, there must be a bank wire receipt which u could fax/mail me.*
>
> *2. Regarding the ticket, it is specifically the obligation of the club to purchase it for Marc."*

21. Later that day, the representative of the Club answered as follows:

> *"Dear Guy and Marc,*
>
> *Here is the wire receipt. I hope now it is fine to come."*

22. The wire receipt in question was a copy of the instructions given to the Club's bank to transfer an amount of US$ 88,000 to the Player's account, such instructions recording the transfer date and value date as being 26 December 2008.

23. According to further wiring information on file and the Player's bank statements, the foregoing order was actually executed by the Club's bank and the payment arrived on the Player's account on 30 December 2008 (US time zone).

24. Meanwhile, on 30 December 2008 at 12:41 AM (US local time), i.e. at 00:41 US time on the 24 hour clock, the Player's agent sent the following email message to the Club with a copy to the Player, whereby the agent terminated the Agreement on behalf of the Player:

> *"Dear Sir,*
>
> *As of today, and despite your repeated promises, your club is yet to pay my client, MARC SALYERS, his December salary, US$ 88, 000, which is now overdue 28 days. Therefore, according to Paragraph (3) of your agreement with Mr. Salyers,*
>
> *1. Your club is subject to a daily penalty of $500 which, as of today, totals $14,000, for December.*
>
> *2. You are now in breach of Mr. Salyers' contract and subject to legal action.*
>
> *3. MR. SALYERS HAS DECIDED TO EXERCISE HIS RIGHT AND TERMINATE THE*

AGREEMENT BETWEEN HIMSELF AND YOUR CLUB. YOU ARE HEREBY NOTIFIED OF THE TERMINATION OF THE AGREEMENT.

4. You now owe Mr. Salyers his ENTIRE remaining net, base salary, plus all penalties, for late payments in November and December.

5. You are also obligated to provide Mr. Salyers with an immediate release/Letter of Clearance.

6. Mr. Salyers will retain an attorney as soon as possible and commence legal action against your club".

25. Very soon thereafter settlement discussions began regarding the payment by the Club of the six outstanding monthly salaries (January-June 2009) for the 2008-2009 season.

26. On 3 January 2009, the Club sent the following email message to the Player's agent with a copy to the Player:

"Dear Guy,

We are very sorry for the delay to start negotiations about settlement of Marc's contract. We are sure that all clubs in Europe have problems with payments and many of them delay salaries of the players. In such financial situation in the world it can happen. We are sorry that we were not able to save Marc in our team.

Nevertheless, we kindly ask you for understanding of financial situation and would like to offer December salary plus one monthly salary as settlement of contract termination. Moreover, it will hard for us to pay full amount at once, so we kindly ask to accept installments payment: 3 equal installments of the total amount paid within 5 days after signing settlement agreement, on 1st of February and on 1st March.

We hope you will not address FIBA court because we are ready to find peaceful way of settlement".

27. Subsequently, in an email dated 22 January 2008, the Club indicated as follows that it needed more time to make any payments beyond the equivalent of one month of salary:

"Dear Guy,

The letter of clearance is a matter of Federations. There will be no delays from our side.

As for the money, I told you that this is not so simple to take it from the pocket and give to Marc. We still can offer Marc one salary as a compensation, but you and him will insist on more than one. We understand that, and try to find the way where to take this money."

28. However, the Club made no further payments to the Player.

29. Finally, the Player having been unable to advance toward what he considered a satisfactory settlement, his lawyer sent an ultimate reminder to the Club on 21 April 2009 for payment of the total amount of six salaries he was claiming (US$ 440,000) and stated the Player would be seeking relief, including payment of late penalties and expenses, with the FAT.

30. It is uncontested that the Player was not employed by any other basketball club during the period from January-June 2009 for which he is claiming the outstanding salaries from the Club.

3.2. The Proceedings before the FAT

31. On 22 June 2009, the Player filed a Request for Arbitration dated 25 May 2009 in accordance with the FAT Rules, and on 6 July 2009 he duly paid the non-reimbursable fee of EUR 3,980.

32. On 14 July 2009, the FAT informed the parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the amount of Advance on Costs to be paid by the Parties as follows:

"Mr. Salyers (Claimant) EUR 5,000
BC Azovmash (Respondent) EUR 5,000"

33. On 5 August 2009, the Player paid his advance on costs in a total amount of EUR 4,990.

34. On 19 August 2009, the Club submitted its Answer.

35. On 24 August 2009, the FAT Secretariat informed the Player that he would have to substitute for the Club with respect to the Advance on Costs because the latter had not paid its portion thereof.

36. On 28 August 2009, the Player made the substitute payment in an amount of EUR 5,000.

37. On 9 October 2009, the Player submitted a Reply to the Club's Answer.

38. On 23 October 2009, the Club submitted a Rejoinder (entitled "Second Answer").

39. On 28 October 2009, considering that neither party had solicited 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 parties' written submissions. The Arbitrator accordingly issued a Procedural Order providing that the exchange of documents was completed and inviting the Parties to submit their cost accounts.

40. On 6 November 2009, the Player submitted his costs.

41. The Club did not submit its account of costs.

4. The Positions of the Parties

4.1. The Claimant's Position

42. The Player submits the following in substance:

- When paying the salaries late from October-December 2008, the Club was in breach of its contractual duties.

- As a result of the Club's late payment in December 2008 and its corresponding

breach of contract, he was entitled under the terms of the Agreement (article 3) to terminate it and receive payment within 30 days of the entire amount due to him under the Agreement, which represents the sum of the six monthly outstanding salaries for the 2008-2009 season.

- Since to date the foregoing payment has not been made by the Club he is entitled to claim it.

- Furthermore, on the basis of article 104.2 of the Swiss code of obligations, he is entitled to receive interest on all late payments, in an amount corresponding to the daily penalty rate of US$ 500 provided in the Agreement.

- Accordingly, he is entitled to receive as late interest (i) an amount corresponding to the aggregate value of the daily penalties of US$ 500 for the total number of days of delay in payment of his October, November and December salaries, and (ii) an amount corresponding to the daily penalty of US$ 500 from the date on which he should have received payment of a sum corresponding to the six outstanding salaries (i.e. from 30 days beyond the date of termination of the Agreement) until full and final payment of such amount.

- In addition, given the signs of financial difficulty of the Club and to protect himself against the risks of its insolvency, he is entitled to an award which is immediately enforceable and which orders the Club not to take any measures to transfer its assets or liquidate its activities.

43. In his Request for Arbitration dated 25 May 2009, the Player requests the following relief:

> "*1. To award Claimant, MARC SALYERS, with a net amount of four hundred*

and forty thousand U.S. Dollars (440.000 $) as compensation for breach of contract by Respondent, to be raised with late interests at the contract rate of 500 US $ per day, starting from January 29th 2009 until the date of complete payment by Respondent;

2. *To award Claimant, MARC SALYERS, with a net amount of twenty-two thousand (sic) U.S. Dollars (22.500 $) as contract penalties on the late payments of his October, November and December 2008 salaries, amounting respectively to 3.500 $, 9.000 $ and 10.000 $;*

3. *To declare the award to be rendered enforceable by provision nonetheless any possible appeal and without any possibility of stay of execution;*

4. *To prevent Respondent from any sale, merger, transfer of rights and/or assets, liquidation or cease of activities whatsoever regarding its team "BC AZOVMASH MARIUPOL", without having priory honored its payment obligations under the award to be rendered.*

5. *To award Claimant with the full reimbursement by Respondent of the costs of this Arbitration procedure, including legal expenses, counsel fees and arbitrators fees.*"

4.2. Respondent's Position

44. The Club submits the following in substance:

- In principle under the terms of the Agreement, the Player would have been entitled to terminate the Agreement when he did in December 2008 due to the delay in payment of his December salary.

- However, due to the Player's attitude and the statements made on his behalf by his agent during the parties' discussions between 20-25 November relating to the delayed payment of his November salary, the Player created the expectation and the practice subsequently relied on by the Club that the Player would not terminate his contact, provided he received proof from the Club that it had given

instructions to the bank for payment of such amount on a given date.

- More specifically, the contractual condition for the Club to meet its payment duty and thus prevent the Player from exercising his remedy was deemed fulfilled from the date instructions were given by the Club to its bank rather than by receipt of the payment by the Player.

- Furthermore, given the fact that the payments had to be made internationally to the Player's bank account in the US, he must reasonably have expected some delay between the date of the Club's bank instructions and the receipt of the corresponding funds on his account, i.e. he could not expect the payment to occur instantaneously.

- Consequently, and because during the discussions between the parties relating to the delay in payment of the Player's December salary, the Club gave the Player's agent proof of the instructions to its bank for the transfer of funds corresponding to the Player's December salary, the Club was entitled to believe he would not terminate the Agreement and he was in good faith barred from doing so.

- In addition, the chronology of events relating to the payment of the Player's December salary demonstrated by the documents on record establishes that his agent rushed to terminate the Agreement, although the Club had received no indication that the Player deemed the prior evidence of the Club's instructions to the bank to be insufficient. In effect, the notice of termination was given on the same day the funds and full payment arrived in the Player's bank account.

- For the above reasons, the termination of the Agreement was unjustified and the

Player is not entitled to claim payment of any outstanding salaries or penalties relating to the period posterior to the termination.

- Furthermore, the Agreement does not foresee any penalty for late payments after the date of termination of the Agreement, the Player has failed to request interest as such in his Prayers for relief and in any event article 104 of the Swiss code of obligations does not regulate contractual penalties and cannot be interpreted as allowing interest for late payments at such a high rate as would result from characterizing the contractually-stipulated daily penalty of US$ 500 as interest.

- Accordingly, the Player's request for the payment of contractual penalties and/or of an equivalent amount as late interest must be rejected.

- The Player's request for measures tending to secure the payment of any amounts awarded to him must be rejected because by nature they fall outside the ambit of the provisional measures envisaged under article 10 of the FAT Arbitration Rules.

45. In its Answer of 19 August 2009, the Respondent requests the following relief:

> *"37. Respondent requests the Arbitral Tribunal to hold that the Agreement was unlawfully terminated by [Claimant] on 30 December 2008.*
>
> *38. Respondent requests the Arbitral Tribunal to hold that Respondent is not liable to pay Claimant any remaining salaries which Claimant was entitled to receive under the Agreement after 30 December 2008.*
>
> *39. In the alternative, Respondent requests the Arbitral Tribunal to hold that no late payment penalties after the termination of the Agreement should be awarded to Claimant.*
>
> *40. In the alternative, Respondent requests the Arbitral Tribunal to adjust the late payment penalties as being excessive by transforming them to the*

default interest of 5% p.a.

41. Respondent requests the Arbitral Tribunal to hold that Claimant shall bear all costs of the present arbitration.

42. Respondent requests the Arbitral Tribunal to order Claimant to pay to Respondent its reasonable legal fees in connection with the present arbitration."

5. The jurisdiction of the FAT

46. 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 existence of a valid arbitration agreement between the parties.

47. Subject to the comments below (*see* paras. 51-53) relating to the Player's prayers for relief n° 3 and 4, 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) PILA[1].

48. The jurisdiction of the FAT over the dispute results from the arbitration clause in article 6.2 of the Agreement, which reads as follows:

> *"Any disputes 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 by a single arbitrator appointed by the FAT President.*
>
> *The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile.*
>
> *The seat of the arbitration shall be Geneva, Switzerland.*

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

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. 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.

The arbitrator and CAS shall decide the dispute ex aequo et bono."

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

50. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).

51. However, there is a question regarding the scope of the arbitration clause and the arbitrability of certain issues, i.e. whether the Player's two following prayers for relief fall within the scope of the clause and are entirely arbitrable:

"3. To declare the award to be rendered enforceable by provision nonetheless any possible appeal and without any possibility of stay of execution;

4. To prevent Respondent from any sale, merger, transfer of rights and/or assets, liquidation or cease of activities whatsoever regarding its team "BC AZOVMASH MARIUPOL", without having priory honored its payment obligations under the award to be rendered."

52. With respect to Prayer n° 3, aside from the fact that the enforceability of an award is partly a question of mandatory procedural law which is not arbitrable, the request for an order to declare this award immediately enforceable is beyond the powers conferred on the FAT by the arbitration clause since the clause itself provides for a possible appeal to the Court of Arbitration for Sport. Consequently, the FAT lacks jurisdiction to adjudicate the Player's Prayer n° 3.

53. Concerning the Player's Prayer n°4, in addition to the fact that the conditions under which assets may be liquidated and activities wound up are partly a question of mandatory bankruptcy law which is not arbitrable, the request for the FAT to pronounce

itself upon the sale and/or transfer of rights and/or assets by the Club and/or upon a merger and/or a cessation of activity goes beyond the scope of the arbitration clause. The Agreement is a type of employment contract, not a commercial contract including provisions that regulate how the Club must operate its business or the conditions under which it may transfer or merge its activities. Consequently, and despite it being very broad, the wording of the arbitration clause stating that "[a]*ny disputes arising or related to the present Agreement*" cannot be deemed to encompass issues such as the Club's right to merge and/or to wind up activities, in particular as the latter may directly or indirectly involve third parties, which are not bound by the arbitration agreement.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

54. 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:

> *"the parties may authorize the arbitral tribunal to decide ex aequo et bono".*

55. 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."*

56. Article 6.2 of the Agreement provides that the arbitrator shall decide the dispute "*ex*

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

57. 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]

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 considerations, the Arbitrator makes the findings below:

6.2. Findings

60. One of the Club's arguments in contending that the Player's termination of the Agreement in December 2008 was unjustified is that during the discussions surrounding the late payment of his November 2008 salary the Player created a practice or at least a form of expectation for the Club which it was entitled to rely on when handling the payment of his December salary.

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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).

61. The Arbitrator finds that both the content of the Agreement and general considerations of fairness prevent the Club from invoking that the Player had created a practice or an expectation in November that precluded him from terminating the Agreement upon its terms in December.

62. Article 3.3 of the Agreement encompasses a clear mechanism to protect the Player against the risk of the Club paying salaries late or defaulting. It defines three successive steps that the Player may take, at specified intervals, to safeguard his rights. After 10 days of delay in payment, the Player may claim a daily penalty of US$ 500, beyond 15 days the Player may cease playing (thereby putting additional pressure on the Club) and, finally, upon more than 21 days of delay, the Player may terminate the contract without further notice and claim all amounts due for the 2008-2009 season as well as request a letter of clearance to be issued immediately.

63. To be effective, the mechanism provided in article 3.3 of the Agreement needs to remain applicable from month to month; and obviously the need for protection is enhanced if delays in payment repeat themselves from one month to another and if there are any signs that the Club might be experiencing financial difficulties.

64. Thus, it would be contrary to the purpose of article 3.3 of the Agreement and unfair to consider that by being indulgent with the Club in November 2008 the Player had implicitly renounced the right to strictly invoke in subsequent months the mechanism provided in article 3.3 if the Club continued to be late in its payments. On the contrary, given the fact that December was the third month in a row during which his salary payment was delayed and there was discussion in the media about alleged financial difficulties of the Club, the Player had reason to be more weary and less indulgent in December than he had been one month earlier, and the Club must in good faith have expected the Player to be stricter in enforcing his rights under the terms of the Agreement.

65. For the above reasons, the Arbitrator finds that the Club cannot invoke reliance on the Player's behaviour in November 2008 to contend that his termination of the Agreement in December on the basis of the contractual terms of article 3.3 was unjustified.

66. As a second motive for deeming the termination of the Agreement by the Player in December 2008 to be unjustified the Club invokes the sequence of events surrounding the late salary payment that month.

67. In particular, the Club contends that it was led to believe by the absence of a negative reaction of the Player's agent to the evidence provided by the Club that it had given banking instructions to pay the salary on 26 December, that the Player was accepting the delayed payment; and that in addition, in a gesture of bad faith, the Player's agent rushed to terminate the Agreement on 30 December, the day on which the money arrived on the Player's bank account.

68. In that respect, the evidence on record tends to demonstrate that the information provided by the Club to the Player's agent probably led him and the Player to consider that the payment must arrive on the latter's account by Monday, 29 December at the latest and that it is at the end of that day – or more specifically in the early hours of 30 December – that the Agreement was terminated in the absence of any notice of credit.

69. This is ascertained by a closer look at the exchange of email messages between the parties.

70. In the morning of Friday, 26 December (9:11 am Ukrainian time), the Club declared: "*We paid the money and if you don't see it on your account,* ***you will see it on Monday for sure****. Our transaction was done on* ***23 December*** *…*" (emphasis added).

71. Later that day (at 7:34 pm Ukrainian time), upon the agent's request, the Club sent another email including a wiring receipt indicating that instructions had been given for a

transfer of funds, with **26 December** being the transfer and value date.

72. In this arbitration, the Club filed another banking notice indicating that the transfer in question was effectuated by a Luxembourg bank to a New York bank on Tuesday, 30 December at 16:52 pm, which means it was probably credited to the Player's account sometime **in the morning of Tuesday, 30 December,** US local time (it being confirmed also by the Player's bank statements that 30 December was the credit date).

73. The email message whereby the agent terminated the Agreement on behalf of the Player was sent in the early hours of Tuesday, 30 December, i.e. at 12:41 am US local time (i.e. at 00:41 on the 24 hour clock).

74. Thus, it is plausible and probable that the notice of termination was drafted at the end of the day on Monday, 29 December, US local time – in the absence of any amount having yet been credited to the Player's account as promised by the Club when stating "*you will see it by Monday for sure*" – and was sent just after midnight, i.e. in the first hour of Tuesday, 30 December.

75. Given the foregoing chronology of events and the history of late payments by the Club, the Arbitrator finds that the Player cannot be deemed to have acted in bad faith by apparently deciding that the end of the day on Monday, 29 December was the final limit beyond which he would consider the payment was either too late or had in fact not been confirmed or had been retracted by the Club. In that relation it must also be borne in mind that the scenario was now quite different from what it had been in November.

76. The Player was back home (on Christmas holiday), therefore less inclined to make concessions, the Club had surprisingly asked the Player to advance the money for his return ticket to Ukraine despite the delayed salary payment (in its first email of 26 December the Club wrote "*We want you to come back*" but also added: "*As for tickets, President promised to reimburse the money together with the January payment. Could*

you arrange it yourself?") and the Player would legitimately have been more exasperated with the situation and more doubtful about the Club being able to turn things around financially.

77. Furthermore, the Club must have known that it needed to take precautions to ensure timeliness in payment for an international bank transfer, and the onus was on the Club to ensure that the payment was credited within the promised time limit of Monday, 29 December.

78. It is also noteworthy that the correspondence exchanged between the parties after the notice of termination and before the Request for Arbitration, i.e. between January and April 2009, indicates that the Club never initially invoked unjustified termination but instead admitted its financial difficulties and adopted a conciliatory tone in an attempt to obtain a settlement including the possibility of paying by instalments.

79. Consequently, the Arbitrator finds that in the circumstances it was not unfair for the Player to terminate the Agreement on 30 December 2008 as he was entitled to do under the terms of article 3.3, and that the termination must be deemed valid with the result that he is entitled to claim payment of the principal amount of US$ 440,000, representing all the salaries which remained outstanding for the 2008-2009 season.

80. On the other hand, neither principles of fairness nor article 3.3 of the Agreement allow the Player to apply the daily penalty of US$ 500 to the late payment of the principal amount of 440,000 which became due 30 days after the termination of the Agreement.

81. It is clear from the wording and rationale of article 3.3 that the Player's right to invoke the penalty in question was to serve as a means to pressure the Club into paying each successive monthly salary in a timely fashion – a measure which after a second deadline had lapsed could be combined with the Player's refusal to play – whereas the right to terminate the Agreement represented a different and new step that the Player

could take if he considered the sanctions were not functioning and he preferred to put an end to the relationship. In other words, article 3.3 provides the Player with a choice between maintaining the contract and continuing to claim penalties and/or continuing to refuse playing, or considering those measures ineffective and terminating the Agreement in order to obtain the entitlement to claim all the salary payments provided for the 2008-2009 season; but it does not allow the Player to cumulate the benefits by terminating the agreement and nevertheless claiming a penalty for the late payment of the salaries having become due.

82. Neither can the daily penalty of US$ 500 be characterized and invoked as a contractually-agreed rate of interest for late payments. There is no rate of interest stipulated in the Agreement for late payments and the penalty stipulated under article 3.3 cannot serve that purpose by default, not only because it is of a different nature but also because it would be unduly high as an interest rate[5], which serves the primary purpose of compensating a party for the loss of income on unpaid monies that cannot be placed.

83. The Arbitrator also finds that in the circumstances of this case it would be unfair if the Player were entitled to invoke payment of the US$ 500 daily penalties on the delayed payment of the October, November and December 2008 salaries since the Player did not insist on them at the time of the facts.

84. Indeed, there is no evidence on record that the Player insisted on his right to be paid the penalties since his bank statements for October and November 2008 do not indicate any payment of penalties together with the monthly salaries finally received, and, despite him not having been paid the penalties, it would appear that neither in

[5] *See* also FAT Decision 0036/09 (TP Sports vs. WBC Spartak St. Petersburg), para. 55.

October, nor in November or in December 2008 did he actually stop playing for the Club as he would have been entitled to do under the terms of the Agreement.

85. Consequently and because the Player is being fully compensated for all the salaries corresponding to the 2008-2009 season, the Arbitrator considers it would not be fair to retroactively apply any daily penalty for the late payment of the salaries relating to October, November and December 2008.

86. That said and although the Agreement does not regulate interest for late payments, it is a generally recognized principle embodied in most legal systems, which is underpinned by motives of equity, that late payments give rise to interest – in order that the creditor be placed in the financial position she/he would have been in had payments been made on time. Consequently and despite the Agreement not specifying an interest rate, it is normal and fair that interest is due on the late payments. Since the Player has referred to article 104 of the Swiss code of obligations and that provision of law sets the statutory interest rate at 5% per annum, which in this case seems fair and reasonable, interest will be awarded at that rate.

87. It is an established principle that interest runs from the day after the date on which the principal amounts are due. As stipulated in article 3.3 of the Agreement, the principal amount of US$ 440,000 representing the salaries outstanding on the date of termination (30 December 2008) became due 30 days after the date of termination, i.e. on 29 January 2009. Therefore, in the present case, interest shall run from 30 January 2009.

7. Costs

88. 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 legal fees and expenses incurred in connection with the proceedings.

89. On 13 December 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 to be EUR 8,300.00.

90. Considering the Player prevailed in his main claim that the Agreement was validly terminated by him with the consequence that all unpaid salaries for the 2008-2009 season became due, it is fair that the fees and costs of the arbitration be borne by the Club and that the latter be required to cover the Player's legal fees and other expenses, those having been submitted being reasonable in amount.

91. Given that the Player paid the totality of the advance on costs of EUR 9,990.00 [cf. paras 33 and 36] as well as a non-reimbursable handling fee of EUR 3,980.00, the Arbitrator decides that in application of article 19.3 of the FAT Rules:

    (i) FAT shall reimburse EUR 1,690.00 to the Player, being the difference between the costs advanced by him and the arbitration costs fixed by the FAT President;

    (ii) The Club shall pay EUR 8,300.00 to the Player, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the FAT;

(iii) The Club shall pay to the Player EUR 10,750 representing the amount of his legal fees and other expenses.

8. AWARD

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

1. The Arbitrator lacks jurisdiction to adjudicate Mr. Marc Salyers' prayers for relief n°3 and 4 contained in his Request for Arbitration dated 25 May 2009.

2. Azovmash Mariupol Basketball Club shall pay Mr. Marc Salyers an amount of US$ 440,000.00 as compensation for the salaries still owed to him under their Agreement of 1 July 2008, plus interest at 5% per annum on such amount from 30 January 2009 onwards.

3. Azovmash Mariupol Basketball Club shall pay Mr. Marc Salyers an amount of EUR 8,300.00 as reimbursement for the advance on costs paid by him to the FAT.

4. Azovmash Mariupol Basketball Club shall pay Mr. Marc Salyers an amount of EUR 10,750.00 as reimbursement for his legal fees and expenses.

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

Geneva, seat of the arbitration, 15 December 2009

Quentin Byrne-Sutton

(Arbitrator)

FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

Notice about Appeals Procedure

cf. Article 17 of the FAT Rules

which reads as follows:

"**17. Appeal**

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