FIBA

We Are Basketball

**FIBA Arbitral Tribunal (FAT)**

# ARBITRAL AWARD

**(0012/08 FAT)**

rendered on 6 February 2009 by the

# FIBA ARBITRAL TRIBUNAL (FAT)

**Mr. Ulrich Haas**

in the arbitration proceedings between

Mr. **Catalin Burlacu**, Str. Tabacului n. 1C, BL.255, ET.1 AP.5 - IASI, Romania
represented by Mr. Marco Damiani, Via degli Scogli 16/1, 34170 Gorizia, Italy

**- Claimant -**

vs.

**Società Sportiva Felice Scandone Spa.**, Piazza della Libertà 39/A, Avellino, Italy
represented by Mr. Walter Mauriello, Attorney at Law, Iannaccone 5, Avellino, Italy

**- Respondent -**

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## 1. The Parties

### 1.1. The Claimant

Mr Catalin Burlacu (hereinafter “Mr. Burlacu” or the “Claimant”) is a professional basketball player of Romanian nationality. He was born on 3 July 1977.

### 1.2. The Respondent

Società Sportiva Felice Scandone Spa (hereinafter "Avellino Basketball Club" or the "Respondent") is an Italian professional basketball club with its seat in Avellino, Italy. The Respoindent is competing in the “serie A” basketball league.

## 2. The Arbitrator

On 7 October 2008, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Prof. Ulrich Haas as arbitrator (hereinafter referred to as the “Arbitrator”) pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules"). In a letter dated 10 October 2008, the Arbitrator accepted his appointment and signed a declaration of acceptance and independence provided by the FAT Secretary.

None of the parties has raised objections to the appointment of the Arbitrator or to the declaration of independence rendered by him.

## 3. Facts and Proceedings

### 3.1. Background Facts

The Claimant played for the Respondent in the 2007/2008 season. The Claimant has produced a copy of an employment contract (hereinafter referred to as "the Contract") for "the 2007/2008 basketball season" dated 16 July 2007. The Contract bears the signature of the Respondent's "president", Mr. Vincenzo Ercolino.

In its relevant part, the Contract reads as follows:

> *"Agreement*
>
> *This agreement made on the 16th day of July 2007, by and between SS Felice Scandone Spa […] participating the next season 2007/2008 in the Italian Legal championship, and hereby represented by the legal representative Mr Vincenzo Ercolino (President), ereinafter referred to as 'the club'*
>
> *And*
>
> *Catalin Burlacu, a professional basketball player […] represented in the negotations by Court-Side agency.*
>
> *[…]*
>
> *Arbitration*
>
> *Any dispute arising out of, or in connection with, this 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 arbitrator shall decide the dispute ex aequo et bono. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS) in 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 Sport (CAS) upon appeal shall be excluded.*
>
> *Witnesseth*

*In consideration of the mutual promises hereinafter contained, the parties hereto promise and agree as follows:*

*1 – The club hereby employs the player as a skilled basketball player for the 2007/2008 season.*

*[…]*

*3 – The club agrees to pay the player for rendering services described herein the following net payments for the total amount of 150.000 Euros (one hundred and fifty thousand Euros) at these dates:*

| | |
|---|---|
| *September 15th* | *15.000 Euros* |
| *October 15th* | *15.000* |
| *November 15th* | *15.000* |
| *December 15th* | *15.000* |
| *January 15th 2008* | *15.000* |
| *February 15th* | *15.000* |
| *March 15th* | *15.000* |
| *April 15th* | *15.000* |
| *May 15th* | *15.000* |
| *June 15th* | *15.000* |

| | |
|---|---|
| *Bonuses (are cumulative)* | |
| *a) Playoffs* | *10.000 Euros* |
| *b) Each round passed* | *5.000* |
| *c) Winning the championship* | *20.000* |
| *d) reaching the Italian Cup Final Eight* | *7.000* |
| *e) Each round passed in the It.Cup Final Eight* | *3.500* |
| *f) Winning the Italian Cup* | *10.000* |

*a) All payments (salaries and bonuses) are net amounts and have been paid on the 15th day of the each month in Euros. […]*

*b) A delay in payment of more than 15 days will be regarded as a breach of the contract by the club. In this case the player is entitled to immediately go on strike and to refuse rendering his services to the club. If after 15 additional days the club still has not fulfilled all its financial commitments towards the player, the player will be free to leave, while the club has to pay all salaries mentioned above, and issue a letter of clearance.*

*c) In order to get the bonus, the player's name has to be on the official game sheet. The (net amount) bonuses are paid on top of the following month's salary. […]*

*5 – This is a fully guaranteed contract after the player has successfully passed the medical test upon arrival. If this contract is terminated for any reason (including injuries) after that date, all payments must be made for the whole season.*

*[…]*
*14 – The employment shall end after the last playoff game in 2008.*

*15 – This contract contains the entire agreement between the parties and no other agreement, oral or otherwise, regarding the subject matter of this contract shall be deemed to exist or bind any of the parties hereto.*

*16 – This contract will be executed under the official rules of the law in Italy. Disputes shall be presented to the competent jurisdiction of the city of Trieste.*
*[…]"*

On 11 August 2008, the Claimant wrote an email to the Respondent to the attention of Mr. Luigi Ercolino, the Respondent's "Amministratore Delegato". In the email the Claimant advises the Respondent that the latter owes him salaries and bonuses under the Contract in the amount of "EUR 84,000". The email also refers to numerous previous attempts by the Claimant and his representative to recover the monies and to several promises made by the Respondent to pay the amount. Finally, the email sets a final deadline to pay the outstanding amount of EUR 84,000 by 15th September 2008, failing which the Claimant would initiate "FIBA arbitration proceedings" against the Respondent.

### 3.2. The Proceedings before the FAT

The Claimant filed a Request for Arbitration dated 17 September 2008.

The non-reimbursable fee of EUR 3,000.00 was credited to the FAT account on 25 September 2008.

By letter dated 29 September 2008 the Claimant was advised to complete his Request for arbitration by specifying his request for relief.

By letter dated 15 October 2008, the Claimant specified his request for relief and indicated that he claimed EUR 84,360 plus interests at a montly rate of 1% from the due date and the reimbursement of his legal costs. By letter dated 21 October 2008, the Arbitrator fixed a time-limit to the Respondent for filing its Answer to the Request for Arbitration by 11 November 2008. The letter also advised the Respondent of the consequences in the event that it did not file an Answer or if it filed an incomplete Answer. Furthermore the parties were requested to pay each an advance on costs in accordance with Art. 9.3 of the FAT Rules in the amount of EUR 4,000.00.

On 20 October 2008 the Respondent submitted a letter signed by Mr. Walter Mauriello to the Arbitrator, which reads – in relevant part – as follows:

> "*The society Felice Scandone s.p.a […] represented by the lawyer Muriello Walter with address in Avellino […] just he obtains to the acts of the Studio, what follows he pressed and illustrates,*
>
> *PREMISES IN FACT*
>
> - *That society Scandone do not fully recognize the subscription of the document that at Mr Burlaco demands with request 0f 16th July 2007.*
> - *That all payments due to the basketball player Burlacu has been respected as stated by the contract;*
> - *That it is not immaginable to use a document in which the signature is not recognized;*
> - *That every other legal consideration is postponed during the discussion of the arbitration;*
> - *Everything above stated with safety of all right of impugnation is postponed during the discussion of the arbitration;*
>
> *WE ASK FOR THE RESPECT OF THE LEGISLATION IN FORCE*
>
> *[…]"*

By letter dated 30 October 2008, the Arbitrator informed the Respondent that it was not allowed to reserve any legal considerations for a later stage of the proceedings, but that it had to submit a written Answer containing all the elements mentioned in Art. 11.2 of the FAT Arbitration Rules. Said letter reads - *inter alia* -:

> *"[…] please be advised that […] the time limit for the Respondent's Answer is therewith extended: you are required to submit on or before 14 November 2008 (17:00 CET) a complete Answer to the request of arbitration containing all the elements listed in Art. 11.2 of the FAT Arbitration Rules. Since it follows from your letter that you contest the signature on the contract submitted by the Claimant you are requested to provide the FAT with a copy of the contract which was executed between the Claimant and the Respondent*.
>
> *[…]*
>
> *after the expiry of the aforementioned deadline no further submission will be taken into account unless the Arbitrator – in his sole discretion – orders otherwise (Art. 12.1 of the FAT Arbitration Rules)*
>
> *[…]*
>
> *if you fail to submit your Answer in accordance with Art. 12.1 of the FAT Arbitration Rules or if you fail to submit the Answer within the aforementioned deadline the Arbitrator may nevertheless proceed with the arbitration and deliver an award (Art. 14.2 of the FAT Arbitration Rules)*".

In the same letter, the Arbitrator informed the Respondent, that an oral hearing would take place only under the conditions set out in Art. 13 of the FAT Arbitration Rules.

By letter dated 11 November 2008, the Respondent submitted its Answer. No document was attached to the Answer.

By email dated 19 November 2008, the Claimant commented on the Answer submitted by the Respondent. The Arbitrator invited the Respondent to submit its comments on Claimant's submission of 19 November 2009 on or before 27 November 2008. No

comments were received from the Respondent.

By letter dated 1 December 2008, the Arbitrator informed the parties that the Respondent had failed to pay its share of the advance on costs and advised the Claimant of the possibility of substituting for the Respondent's share of the advance on costs under Art. 9.3 of the FAT Arbitration Rules.

By letter dated 12 December 2008 the Arbitrator confirmed to the parties that the Claimant had paid the Respondent's share of the advance on costs. Furthermore, the parties were requested to submit to the Arbitrator a detailed account of their costs in connection with these proceedings by 22 December 2008.

By email dated 19 December 2008 the Claimant submitted the following account:

| | |
|---|---|
| *"Non reimbursable fee* | *EUR 3,000.00* |
| *Advance on costs (Claimant's share)* | *EUR 4,000.00* |
| *Advance on costs (in lieu of Respondent)* | *EUR 4,000.00* |
| *TOTAL COSTS:* | *EUR 11,000.00"* |

The Respondent did not submit any account within the set time-limit.

By letter dated 7 January 2009 the Arbitrator sought a final clarification from the Claimant as to the exact amount requested by him in respect to the outstanding monthly salaries. The Claimant followed the directions of the Arbitrator with email dated 14 January 2009 and specified that he asked for EUR 52,360.00 as stated in his letters dated 29 September 2008 and 15 October 2008. The Respondent was given the opportunity to comment on this clarification made by the Claimant but did not make use of it.

Since none of the parties have filed an express application for a hearing within the set time limit, the Arbitrator decided - in accordance with Art. 13.1 of the FAT Rules – not to hold such a hearing. In particular the Arbitrator holds that the last sentence of the Respondent's letter of 11 November 2008 cannot be understood as a tacit application to this effect. Said sentence reads, "*Thinking superfluous every other appraisal ulterior legal intensification to the audience are reserved arbitrate"*. The Arbitrator does not understand the meaning of this sentence. Keeping in mind that the Respondent is represented by legal counsel, that he was advised by the Arbitrator that the language of the proceeding is English and that a hearing would only be held in case of an express application in accordance with Art. 13.1 of the FAT Rules, it cannot be inferred from said sentence that the Respondent wished that a hearing to take place. Even if - contrary to the opinion held here - it is possible to infer a request for an oral hearing from the sentence quoted above, the application would be irrelevant in the present case because an oral hearing would, in this case, only have the purpose of introducing new facts and new legal considerations into the proceedings in favour of the Respondent. However, the Arbitrator expressly advised the Respondent in his letter of 30 October that it had to submit all facts and all of its legal arguments supporting its application in its Answer and that any supplementation to its Answer at a later point in time was not permitted.

## 4. The Positions of the Parties

### 4.1. The Claimant’s Position

The Claimant submits that he entered into a vaild working contract with the Respondent for the 2007/2008 season.

Furthermore, the Claimant submits that while he performed his duties in conformity with the contract, the Respondent breached its obligations by not paying the full amounts agreed upon.

In addition, the Claimant requests the payment of the outstanding bonuses that are due according to the Contract for specific sporting achievements. In support of his claim the Claimant has submitted all boxscores ot the official game sheets of the "serie A", including the "regular season", the "playoffs" and the "Italian Cup".

The Claimant further submits that he has reminded the Respondent several times of the oustanding amounts and that he always received assurances that the monies would be paid to him shortly. However, since he had still not received the sums following the expiry of the contractual term, he set the Respondent a final deadline by email of 11 August 2008 and after it had expired with no result he commenced the arbitration proceedings against the Respondent.

On the basis of the contentions set out above, the Claimant requests the Arbitrator to condemn the Respondent to pay:

> *"a. From the contract of the 2007-2008 season:*
> *EUR 52.360 in Monthly salaries*
> *EUR 10.000 Bonus for winning the Italian Cup*
> *EUR 7.000 Bonus for reaching the final of the Italian cup*
> *EUR 10.000 Bonus for reaching the Italian Play Offs*
> *EUR 5.000 Bonus for winning the first round of the Italian Play Offs*
> *EUR 84.360 in total*
>
> *b. A monthly interest of 1 % starting since I did not receive the amounts from the contract until the present day."*
>
> *c. All the legal costs involved with the FAT to enforce my contract"*

### 4.2. The Respondent's Position

In its Answer dated 11 November 2008, the Respondent *"contests totally the request carried out from his former player"*. It appears that the Respondent is probably of the opinion that no valid contract came about between the Claimant and the Respondent on 16 July 2007. The reasons are difficult to understand and should therefore be cited *in extenso*:

> *"In particular it goes found as the subscription of the contract has not been executed from the general executive manager, only consignee of the company, and therefore the obligatory agreement has not been realized. Applaying in the present case the Italian right, that it exactly previews the necessary affixing of the company of the single general executive manager on behalf of the society, not there is doubt like the contract activated for the impelementation is null. According to the Italian jurisprudence in hypothesis of conclusion of a contract by means of subscription from the legal representative 'temporary' of a limited liability company, without that it turns out indicated 'in express terms' the same Society like contracting part I, is possible to think subsisting the spending one of the representatives powers in case such sense it places the univocal behaviour and concluding of the underwriter […] Moreover the production in judgment of the contract from the successor of the contractor who does not have it not healthy undersigned the invalidity of the contract. The invalildity of the title, obligatory it for the deficiency of noticeable subsription and therefore of the office, without necessity of specific exception, whereby the vailidity of the contract constitutes a condition of the action, that is when of they are in dispte only the application or the execution. In such case it is therefore obligation of the judge to find the eventual invalidity, as an impedimental to the acceptation of the question, without that it comes thus violating the pronciple of the correspondence between demanded and the pronounced one being to us this disownment a reversal of the burden of proof will have to be taken place being held in such case, the same player to demonstrate that company has been carried out from the President of the Scandone. Thinking superfluous every appraisal ulterior legal intensification to the audience are reserved arbitrate. […]*".

## 5. Jurisdiction

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, the present FAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).

The Respondent did not explicitly challenge the Arbitrator's jurisdiction. Hence the Arbitrator asserts jurisdiction over the present dispute (Art. 186(2) PILA).

For the sake of completeness, and given the lack of clarity of Respondent's submission in this respect, the Arbitrator will nevertheless examine the validity and the scope of the arbitration agreement contained in the Contract.

### 5.1. Arbitration Agreement

#### 5.1.1 The conclusion of the arbitration agreement

In the present case one could question whether a valid arbitration agreement came about between the parties. As far as the substantive preconditions are concerned, they are governed by Art. 178(2) PILA. The provision reads:

> *"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."*

The Respondent does not dispute that, under the heading "Arbitration", the Contract stipulates that "any dispute arising out of, or in connection with this Agreement shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva".

For the sake of completeness, the Arbitrator wishes to point out that he did not overlook the Respondent's argument that it is not bound by the Contract on the ground that Mr. Vincenzo Ercolino, the person who signed the contract, was allegedly not an authorized representative. Even if this argument were to be interpreted as an implicit jurisdictional challenge, it would fail for the reasons set out below, in the discussion of the merits of the case.

### 5.1.2 Requirements as to form

In the present case, the requirements as to form stipulated in Art. 178(1) PILA are also met. Said Article reads:

> *"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.*

The requirements as to form stipulated in Art. 178(1) PILA are met if, inter alia, the arbitration agreement has been concluded in writing. That is so in the present case, as "writing" for this purpose does not require the written document containing the arbitration agreement to be signed by the parties (see Kaufmann-Kohler/Rigozzi, Arbitrage International, 2006, marg. no. 214 *et seq.*). Instead, the provision only requires that the arbitration agreement must be in a form allowing proof by means of a text (Berger/Kellerhals, Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz, 2006, marg. no. 396). This is also the case if the mutual declarations are recorded on a sheet, which does not bear the

signature of both parties.

In the present case, the arbitration agreement is contained in a written contract and is thus valid under Art. 178(1) PILA, irrespective of any concern regarding the signatures.

### 5.1.3 Exclusion of state jurisdiction

It is characteristic for an arbitration clause that the parties wish to exclude recourse to the state courts. Whether this is so in the present case is questionable. Doubts arise from the fact that, although on the one hand the Contract contains an arbitration clause in favour of FAT, on the other hand - at the end of the Contract - it contains an agreement on jurisdiction in favour of the "competent jurisdiction of the city of Trieste". The relationship between the two clauses is not very clear. It does not emerge from the Contract that the arbitration and jurisdiction clauses are supposed to apply side by side as a choice. It also does not emerge from the Contract that the jurisdiction clause is supposed to apply only subsidiarily, i.e. only in the event that the arbitration clause is void. The substantive contradiction is ultimately probably a mistake on the part of the parties, which may be due to the fact that an "old contract" was used as a template for the present Contract.

As regards the question of how the two conflicting provisions are to be interpreted in relation to one another, one can also consider the conduct of the parties after the Contract was concluded to the extent that this provides an insight into the parties' intention at the time when they concluded the Contract. In their submissions to the Arbitrator neither party has invoked the jurisdiction clause contained in the Contract. From this, the Arbitrator concludes that at the time

when the Contract was concluded the parties' intention was to provide for FAT arbitration.

### 5.2. Arbitrability

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

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]

## 6. Merits of the Claim: Discussion

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

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",* in derogation from the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

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

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

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."*

In the present case the parties have not agreed otherwise. Consequently, the Arbitrator shall adjudicate the claims *ex aequo et bono*.

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]

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

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2 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PIL. 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).

circumstances of the case".[5]

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".

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

## 6.2. Findings

### 6.2.1 Contract Conclusion

It is not disputed between the parties that the Claimant offered his sporting services to the Respondent during the 2007/2008 season on the basis of a contract concluded between the parties. Thus, for example, the Respondent's letter of 20 October 2008 states, "*that all payments due to the basketball player Burlacu has been respected as stated by the contract".* The Respondent thereby obviously acknowledges that the parties had a contractual relationship for the 2007/2008 season.

However, it appears to be disputed between the parties whether the contract between the parties is the Contract produced by the Claimant. As regards this, the Respondent submits in its letter of 20 October 2008 that the Contract is not valid because *"the signature in the document is not recognized".* On the other

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

hand, in its letter of 11 November 2008 the Respondent states that the Contract is not binding because it was not signed by the Respondent's "General Executive Manager". The Respondent's submissions in this regard are not very clear and are contradictory.

Inasmuch as Respondent's position can be understood to imply that the signature on the Contract is not that of a legal representative of the Respondent, it cannot be followed. Indeed, the Arbitrator requested the Respondent to produce the "correct" version of the contract, which the Respondent failed to do.

Insofar as the Respondent's position can be understood to assume that the signature of the "President", Mr. Vincenzo Ercolino, does not bind the Respondent because he lacks the authority to represent the company, this cannot be agreed with either. In substance, it is Respondent's submission in this respect that only the "General Executive Manager" and not the "President" can validly represent the Respondent in relation to third parties. According to the Respondent, the Contract is thus "null" as it was signed by Mr. Vincenzo Ercolino and not by the club's "General Executive Manager".

The Respondent is an Italian public limited company (s.p.a.). Said companies are - in principle - represented by the *"amministratori".* If there is more than one *"amministratore"* they are also called a *"consiglio di amministrazione".* Unless otherwise provided, the latter elects a chairman who is called the *"presidente"* (Art. 2380bis Codice Civile). In the present case it was the "president" of the s.p.a., Mr. Vincenzo Ercolino who signed the Contract dated 16 July 2007 in the Respondent's name. From the position held by Mr. Vincenzo Ercolino within the Respondent's organisation a strong presumption follows that he was authorized to represent the Respondent. But even if Mr. Vincenzo Ercolino acted as "falsus

procurator" the Arbitrator is convinced that the Contract is binding on the Respondent. From the fact that the Claimant played for the Respondent and that the Respondent paid parts of the Claimant's salaries it follows that the Respondent at least tacitly approved and ratified the Contract concluded by the president Mr. Vincenzo Ercolino on behalf of the Respondent. Thus, there is in any event a valid and binding declaration of intent by the Respondent. The fact that the player accepted the Contract is demonstrated by the fact that he filed the copy signed by the Respondent and that he undeniably played for the Respondent during the 2007/2008 season and also received a salary from the latter.

### 6.2.2 Outstanding salaries

In the present case the Claimant has met his burden of presenting his case to the court. It follows from the Contract that the Respondent is – in principle – obliged to pay a total of EUR 150,000.00 to the Claimant. To this extent the Claimant has therefore – in principle – also made sufficiently substantiated submissions about the outstanding monthly salaries in the amount of EUR 52,360.

Although in its submissions the Respondent has claimed that, "*all payments due to the basketball player Burlacu has been respected"* the Respondent did not put forward any proof of this. However, it is the debtor who has the burden of proving that an obligation has been extinguished due to alleged performance. Since there is a lack of substantiated submissions in this regard by the Respondent the consequence thereof is that – in the absence of any indications to the contrary – the Claimant's claim must be allowed to this extent. According to the wording of the Contract the sums owed as "salary" are "net amounts" with the consequence that no deductions are to be made therefrom either for tax reasons or for social

security reasons.

### 6.2.3 Outstanding bonuses

As regards the outstanding bonuses, the Contract provides the following:

*"In order to get the bonus, the player's name has to be on the official game sheet."*

In the present case the Claimant has submitted sufficient proof of the sporting targets achieved by the Respondent's team in the 2007/2008 season. In addition, the Claimant has provided the boxscores of the official games sheets of the "serie A" which show whether or not the Claimant was fielded by the Respondent for the respective games. In summary therefore, the Claimant's request as to the payment of bonuses is substantiated. Since the Respondent did not dispute these facts and since – to the Arbitrator's knowledge – there are no circumstances to cast doubt on the submissions by the Claimant, the request referring to the outstanding bonuses in the amount of EUR 32,000.00 must be admitted.

### 6.2.4 Interest rate

Finally, the Claimant is claiming interest at a rate of 1% per month starting from the moment in which he "*did not receive the amounts from the contract until the present day*". This request is - in principle - not specific enough because the Claimant has not submitted for which periods the Respondent withheld specific payments from him. In the absence of substantiated submissions the Claimant cannot therefore request interest with effect from the due date.

Furthermore, the Claimant's request contradicts his previous conduct. In his letter to the Respondent of 11 August 2008 he did not demand the payment of any interest. It therefore appears fair and equitable to the Arbitrator to allow the Claimant interest only with effect from the filing of his complete Request for arbitration, i.e. from 15 October 2008.

With respect to the interest rate, the Claimant is proceeding on a 1 % per month basis, which amounts to a rate of 12 % per annum. No such rate ensues from the Contract. Hence, in the absence of any specific submissions in that respect, the Arbitrator finds such a rate to be unreasonably high.

In view of the consistent case law of the FAT, the Arbitrator does however consider an interest rate of 5 % p.a. to be fair and equitable in the present case.

## 7. Costs

Article 19.2 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and may either be included in the award or communicated to the parties separately. Furthermore, Article 19.3 of the FAT Rules provides that the award shall grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings.

On 2 February 2009, the FAT President has rendered the following decision on costs:

> *Considering that pursuant to Article 19.2(1) of the FAT Rules "the FAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of FAT and the fees and costs of the FAT President and the Arbitrator".*

*Considering that Article 19.2(2) of the FAT Rules adds that 'the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the FAT President from time to time'.*

*Considering all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and of the procedural questions raised, the President of the FAT determines the arbitration costs as follows:*

| | |
|---|---|
| • *Arbitrator's fees (18 hours at an hourly rate of EUR 300)* | *EUR 5,400.00* |
| • *Arbitrator's costs* | ----- |
| • *Administrative and other costs of FAT* | ----- |
| • *Fees of the President of the FAT* | *EUR 1,700.00* |
| • *Costs of the President of the FAT* | ----- |
| ***TOTAL*** | ***EUR 7,100.00*** |

In the present case, the Arbitrator decides that the costs shall be borne by the Respondent alone. This also reflects the outcome of the proceedings.

Moreover, the Arbitrator wishes to note that given the above allocation there is no need to take into account the handling fee when allocating the costs of the arbitration to the parties as provided for by Article 19.1(2) of the FAT Rules.

Given that the Claimant paid the entirety of the advance on the arbitration costs in the amount of EUR 8,000, the Arbitrator rules that:

(i) the FAT shall reimburse to the Claimant the difference between the advance on costs paid by the Claimant and the effective costs of the arbitration proceedings, i.e. EUR 900.00 and

(ii) the Respondent shall pay the Claimant the difference between the costs advanced by the Claimant and the amount which will be reimbursed to him by the FAT, i.e. EUR 7,100.00.

Finally, the Arbitrator has to decide whether or not the Claimant is entitled to a contribution toward his reasonable legal fees and expenses (Article 19.3 of the FAT Rules). In his request for arbitration, the Claimant requested the reimbursement of “[a]ll the legal costs involved with the FAT to enforce my contract”. When asked to provide an account, the Claimant only indicated the advances of costs and the EUR 3,000.00 non-reimbursable handling fee. After having carefully reviewed and assessed all the circumstances fo the case, including the fact that the Claimant's payment of the non-reimbursable handling fee was not taken into account when allocating the costs of the arbitration, the Arbitrator considers it fair and reasonable to fix the contribution towards the Claimant in the amount of EUR 3,000.00.

## 8. AWARD

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

1. **The Arbitrator assumes jurisdiction over Mr. Catalin Burlacu's claims.**

2. **Società Sportiva Felice Scandone Spa shall pay Mr. Catalin Burlacu EUR 84,360.00.**

3. **Società Sportiva Felice Scandone Spa shall pay Mr. Catalin Burlacu interest in the amount of 5% p.a. as of 15 October 2008 on the amount of EUR 84,360.00.**

4. **The costs of the present arbitration proceedings shall be borne by Società Sportiva Felice Scandone Spa. Società Sportiva Felice Scandone Spa shall pay EUR 7,100.00 to Mr. Catalin Burlacu as reimbursement of the advance on arbitration costs.**

5. **Società Sportiva Felice Scandone Spa shall pay Mr. Catalin Burlacu EUR 3,000.00 as a contribution towards his legal fees and other expenses.**

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

Geneva, place of the arbitration 6 February 2009

Ulrich Haas

(Arbitrator)

**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."