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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0021/08 FAT)

rendered on 30 April 2009 by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Ratko Varda, S. Glavasa 5, 11000 Belgrade, Serbia,

- Claimant 1-

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

- Claimant 2-

or jointly referred to as "the Claimants"

vs.

Vsl Kauno "ZALGIRIO" REMEJAS , Naglio ST. 4A, LT-52367 Kaunas, Lithuania

- Respondent -

Av. Louis Casaï 53
P.O. Box 110
1216 Cointrin / Geneva
Switzerland

Tel: (+41-22) 545 0000
Fax: (+41-22) 545 0099
info@fiba.com
www.fiba.com

1. The Parties

1.1. The Claimants

1. Ratko Varda (hereinafter "the Player" or the "Claimant 1") is a professional basketball player of Serbian nationality.

2. Obrad Fimic (hereinafter "the Agent" or the "Claimant 2") is a FIBA-licensed agent and the Player's representative. He is domiciled at Zlota 11/2 street, 00-019 Warsaw, Poland.

1.2. The Respondent

3. Vsl Kauno "ZALGIRIO" REMEJAS (hereinafter "the Club" or the "Respondent") is a basketball club from Kaunas, Lithuania. It is domiciled at Naglio ST. 4A, 52367 Kaunas. The Respondent is not represented by counsel.

2. The Arbitrator

4. On 15 December 2008, the President of the FIBA Arbitral Tribunal (FAT) appointed Dr. Stephan Netzle as Arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the

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

3. Facts and Proceedings

3.1. Background Facts

5. On 19 August 2008, the parties signed a two-year player contract for the seasons 2008-2009 and 2009-2010 (the "Contract") whereby Claimant 1 was granted a net salary of EUR 900,000.00 for two seasons and Claimant 2 was entitled to receive an agent fee of EUR 45,000.00 per season. The Contract reads – inter alia – as follows:

> *"Article 1 Employment – Duration*
>
> *[…]*
>
> *This contract will be fully (100%) GUARANTEED by both parties for the entire contract period.*
>
> *[…]*
>
> *Article 3: Obligations of the Club*
>
> *The Club agrees:*
>
> *A. To pay the Player the net amount of Euro **900,000.-** (nine hundred thousand) Euro for the duration of this contract according to the following payment schedule:*
>
> *2008/2009 Season*
>
> *a) after the player successfully passes medical exam organized after his arrival at the club within 7 working days, the club will pay to the player amount of **€ 45,000.- (forty five thousand) Euro***

*b)15th of October 2008 amount of **€ 45,000.- (forty five thousand) Euro***

*c) 15th of November 2008 amount of **€ 45,000.- (forty five thousand) Euro***

*d) 15th of December 2008 amount of **€ 45,000.- (forty five thousand) Euro***

*e) 15th of January 2009 amount of **€ 45,000.- (forty five thousand) Euro***

*f) 15th of February 2009 amount of **€ 45,000.- (forty five thousand) Euro***

*g) 15th of March 2009 amount of **€ 45,000.- (forty five thousand) Euro***

*h) 15th of April 2009 amount of **€ 45,000.- (forty five thousand) Euro***

*i) 15th of May 2009 amount of **€ 45,000.- (forty five thousand) Euro***

*j) 30th of May 2009 amount of **€ 45,000.- (forty five thousand) Euro***

[…]

All amounts are NET and Guaranteed.

[…]

If the club is late with any payment for more than 15 (fifteen) days, the player is entitled to immediately go on strike and refuse to render 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 (for the whole season) and issue a letter of clearance.

[…]

Article 5: Injury and Medical Health Insurance

In case of an injury in the course of the season necessitating the replacement of the player, this one will receive his remuneration until the end of each particular season/contract period, in its totality.

[…]

Article 8: Medical check

The club has to organize medical check for the player and to cover the costs of medical check, in the following day after the players arrival in Lithuania.

> *[…]*
>
> *Article 11: Agents Fee*
>
> *The Club is obliged to pay an agent's fee to the player's agent Mr. Obrad Fimic in the total amount of* ***€ 45,000.-(forty five thousand) Euro*** *at the time of signing contract, after the player passes successfully medical exam and upon proper billing on for the 2008-2009 season and an amount of* ***€ 45,000.- (forty five thousand) Euro*** *after the player successfully passes the medical examination for 2009-2010 season."*

6. Claimant 1 arrived at the Club on 2 September 2008 and started playing with the team after having successfully passed a medical examination. On 15 October 2008, Claimant 1 received a first payment in the amount of EUR 45,000.00. The Claimants did not receive any further payments.

7. On 3 November 2008, Claimant 2 wrote an e-mail to the Respondent for the attention of its President, Mr. Paulius Motiejunas, announcing "*that due to the financial problems of B.C. Zalgiris (sic!) and the breach of Article 3 of the Contract*", Claimant 1 was no longer obliged to participate in practices and games and that he "*would practice or play games under his own wish*. *As soon as your Club pay all his debts towards Ratko Varda, he will be back on regular team schedule.* (sic)"

8. By letter dated 14 November 2008, the Claimants terminated the Contract due to financial breach of the agreement.

3.2. The Proceedings before the FAT

9. On 23 November 2008, the FAT received the Claimant's Request for Arbitration dated 21 November 2008 in accordance with the FAT Rules. The non-reimbursable fee of EUR 3,000.00 was received in the FAT account on 28 November 2008.

10. On 15 December 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.

11. By Procedural Order (No 1) dated 15 December 2008, the FAT Secretariat confirmed receipt of the Request for Arbitration and informed the parties of the appointment of the Arbitrator and of the details of the procedure. In the same order, a time limit was fixed for Respondent to file the Answer to the Request for Arbitration on or before 5 January 2009. The letter also requested the parties to pay by no later than 29 December 2008 the following amounts as an Advance on Costs:

"Claimant 1 (Mr. Varda):	*EUR 2,500*
Claimant 2 (Mr. Fimic):	*EUR 2,500*
Respondent (Zalgirio Remejas):	*EUR 5,000"*

12. On 5 January 2009, Respondent's Answer (the "First Answer") dated 31 December 2008 was received by the FAT Secretariat.

13. By letter of 8 January 2009, the FAT Secretariat informed the parties that the Respondent had failed to pay its share of the Advance on Costs. In accordance with Article 9.3 of the FAT Rules, the Claimants were invited to substitute for the missing payment of the Respondent. A time limit was set until 21 January 2009. The Claimants paid the Respondent's share of Advance on Costs on 14 January 2009.

14. By letter dated 20 January 2009, the FAT Secretariat informed the parties that the

entire Advance on Costs had been received by the FAT. At the same time, Claimants were given the opportunity to file a response to the Respondent's Answer on or before 30 January 2009 (the "Response"). They were invited to respond in particular to the following submissions of the Respondent:

- Mr. Varda faked an injury;
- Mr. Varda refused to participate in the Euroleague Game of 5 November 2008 in Poland;
- Mr. Varda refused to appear before the Medical expert commission on 8 November 2008.

15. By the same letter, the Respondent was requested to file an answer to Claimants' Response on or before 6 February 2009 (the "Second Answer").

16. On 28 January 2009, the Claimants filed their Response to the Respondent's Answer by e-mail.

17. By e-mail of 29 January 2009, the FAT Secretariat acknowledged receipt of the Claimants' Response and reminded the Respondent that it was now entitled to file the Second Answer.

18. By e-mail dated 6 February 2009, the Respondent submitted its Second Answer dated 4 February 2009, in which it indicated, *inter alia* that Claimant 1 had joined another club (BC Khimki).

19. On 23 February 2009, the Arbitrator issued Procedural Order No. 3 and requested the Claimants to respond to Respondent's submission that Claimant 1 had joined BC Khimki (the "Second Response") and asked them to submit the new contract between Claimant 1 and BC Khimki.

20. By e-mail dated 25 February 2009, Claimant 2 asked for an extension of the Claimants' time limit set in the Procedural Order No. 3. By letter of 26 February 2009, the Arbitrator granted an extension until 4 March 2009 and indicated that the Respondent's time limit to reply was extended until 11 March 2009.

21. By letter dated 4 March 2009, the FAT acknowledged receipt of the Claimant's Second Response and informed the parties that the Claimants' request to treat the attached information as confidential was noted. Again, the Respondent was given the opportunity to comment on this contract which he did by replying to the Claimant's Second Response (the "Third Answer") dated 9 March 2009.

22. By letter of 23 March 2009, the FAT Secretariat confirmed receipt of the Respondent's Third Answer. On behalf of the Arbitrator, it informed the Parties that the exchange of documents was now complete and invited the parties to submit a detailed account of their costs by no later than 30 March 2009. The parties did not request the FAT to hold a hearing.

23. On 24 March 2009 the FAT Secretariat received an unsolicited submission from Claimant 2. By e-mail of the same day, the FAT acknowledged receipt, but stated that *"the Arbitrator has already closed the period of submissions and, in accordance with Article 12.1 of the FAT Arbitration Rules, the unsolicited submission is <u>not</u> taken into account."*

24. On 25 March 2009, the Claimants submitted the following Account on costs:

> *"1) Non-reimbursable handling fee - 3000 Euro*
>
> *2) Advance on Costs for Claimant (Mr. Ratko Varda and Mr. Obrad Fimic) - 5000 Euro*
>
> *3) Advance on Costs for Respondent (BC Zalgiris Kaunas, Lithuania) - 5000 Euro*
>
> *4) Legal Costs for Attorney - 8000 Euro"*

25. By e-mail of 26 March 2009, the Respondent stated that:

> *"Following Procedural Order No. 3 issued by the Arbitrator on March 23rd, 2009, Respondent VSl Kauno "Zalgirio" Remejas declares it's litigation costs – Attorney fee 17'800 Lithuanian Litas, which equals to 5155 Euros (five thousand one hundred fifty five euro) and asks this sum to be awarded from the Claimants."*

4. The Positions of the Parties

4.1. The Position of Claimants

26. The Claimants submit that while Claimant 1 performed his duties in conformity with the Contract, the Respondent breached its obligations by not paying the salaries agreed in the Contract. By 15 October 2008, Respondent had paid to Claimant 1 only an amount of EUR 45,000 instead of EUR 90,000 (i.e. initial fee of EUR 45,000 payable within 7 days upon the player's arrival, and the first monthly salary of EUR 45,000 due on 15 October 2008). Therefore, Claimant 1 was entitled to go on strike and to refuse to render his services to the Respondent. However, after he recovered from a shoulder in-

jury, he still participated voluntarily in the games of 9, 12 and 15 November 2008. Furthermore, Claimant 1 attended every medical examination arranged by the Respondent.

27. Since 15 October 2008, the Claimants have not received any payments from the Respondent.

28. Claimant 1 requests the payment of the salaries for the 2008-2009 season in the total amount of EUR 450,000.00, and Claimant 2 requests payment of the agent's fee of EUR 45,000.00.

4.2. The Claimants' Request for Relief

29. The Request for Arbitration contains the following joint Request for Relief:

> *"Professi[o]nal basketball player Mr. Varda Ratko and his representative, Fiba licensed agent Mr. Obrad Fimic claim the right on the whole amount of Salaries of 450.000 (four hundred fifty thousand) Euro and Agents Fee on 45.000 (fourty five thousand) Euro guaranteed to us by this Contract in Articles 3 A. and 11 for season 2008-09, because of Contract termination caused by not fulfilling financial commitments by the basketball Club Vsl Kauno Zalgirio Vermejas towards player – Mr. Varda Ratko and players agent- Mr. Fimic. Also Club has to issue a Letter of Clearance on demand. The Club as Respondent should cover all expenses taken by our side in this Arbitration."*

4.3. The Respondent's Position

30. The Respondent rejects the Claimants' claim for the following reasons:

31. It is true that the Claimants signed a contract with the Respondent according to which

the Respondent employed Claimant 1 and had to compensate him for his services. However, Claimant 1 breached his contractual duties by late arrival, by faking an injury and by refusing to participate in the Euroleague Game of 5 November 2008 in Poland and to appear before the medical expert commission on 8 November 2008. Claimant 1 continued to play with the team on games on 9, 11 and 15 November 2008 although he was allegedly injured. On 19 November 2008, Claimant 1 left Lithuania and did not render any further services to Respondent since then.

32. The Respondent submits that since Claimant 1 breached the Contract, the Respondent had a right to suspend the payments. The Respondent never refused to pay the Claimants for the services actually rendered. The Claimants are not entitled to any damages since only the non-breaching party is entitled to sue for damages for breach of contract. The Respondent recognizes Claimant 1's right to salaries for the time period during which Claimant 1 actually performed his services. Accordingly, Claimant 2 would have a right to an agent's fee corresponding to 10% of the player's salary. A Letter of Clearance had already been issued.

33. Since the Claimant had already signed a new contract with BC Khimki the respective salary must be taken into account, since he would be unjustly enriched by receiving *"double salary for 2008/2009 basketball season from two clubs"*. Therefore, Claimants' request for relief must be reduced at least by USD 200'000 for Claimant 1 and by USD 20'000 for Claimant 2.

5. Procedural Issues

5.1. Jurisdiction of FAT

34. Pursuant to Article 2.1 of the FAT Rules, "[t]he seat of the FAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland". Hence, this FAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).

35. The Respondent did not challenge the Arbitrator's jurisdiction. Hence the Arbitrator asserts jurisdiction over the present dispute (Art. 186 (2) PILA). For the sake of completeness, the Arbitrator will nevertheless examine the validity of the arbitration agreement contained in the Contract.

36. The jurisdiction of the FAT over the dispute between Claimants and the Respondent results from Article 10 ("Disputes") of the Contract which reads as follows:

> ***"****Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Tribunal Rules by a single arbitrator appointed by the FAT President.*
>
> *The seat of arbitration shall be Geneva, Switzerland.*
>
> *The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile.*
>
> *The language of the arbitration shall be English. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law.*
>
> *Any dispute arising from or related to the present contract that does not apply for submission and/or resolution to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland or to the*

> *Court of Arbitration for Sport (CAS) Lausanne, Switzerland, shall be subject to the Labour Court of Lithuania."*

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

38. 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]

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

> *"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.*
>
> *2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law."*

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

41. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt as to the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording "any dispute arising from or related to the present contract" clearly encompasses the present dispute.

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

42. The Arbitrator finds that the reference in the arbitration clause to the "Labour Court of Lithuania" must be understood as a default forum selection clause for disputes which are not arbitrable. Since (i) the present dispute has been found arbitrable, (ii) no objection against the jurisdiction of FAT has been raised and (iii) the Respondent actively participated in the arbitral proceedings, the reference to state jurisdiction does not affect the holding that the FAT is competent to adjudicate the present matter.

5.2. Joint Claims

43. In the case under consideration, the Claimants have submitted one complaint consisting of two separate claims: Claimant 1 seeks payment in the amount of EUR 450,000.00 on the basis of Article 3 of the Contract, and Claimant 2 requests payment of EUR 45,000.00 on the basis of Article 11 of the Contract. As there is an intrinsic connection between the two matters in dispute, both being based on the Contract and the same set of facts, and since both Claimants are bound by the same arbitration agreement, the Arbitrator will join the claims and adjudicate them in one single award.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

44. 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", by opposition to the decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

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

45. 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."*

46. In their agreement to arbitrate, the parties have explicitly directed and empowered the Arbitrator to decide the dispute *ex aequo et bono*. Consequently, the Arbitrator will adjudicate the present matter *ex aequo et bono*.

47. 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* :

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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.

> *"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]

48. In substance, it is generally considered that the Arbitrator deciding *ex aequo et bono* receives "a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case".[5]

49. 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".

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

6.2. Findings

6.2.1 Claimants' right to terminate the Contract

51. On 19 August 2008, the Parties signed a Contract for the 2008/2009 season and the 2009/2010 season. Claimant 1 arrived on 2 September 2008 at the club and passed the medical examination arranged by the Respondent, as provided in Article 8 of the Contract. According to Article 3 of the Contract, the Respondent was then obliged to pay Claimant 1, within 7 days, an amount of EUR 45,000.00.

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

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

52. On 15 October 2008, the Respondent effectuated its first (and only) payment in the amount of EUR 45,000.00. According to the payment schedule in Article 3 of the Contract the second salary payment of EUR 45,000.00 was already due on that date. No further payments have been made since then.

53. By letter of 3 November 2008, Claimant 2 reminded the Respondent that according to Article 3 of the Contract, Claimant 1 was no longer obliged *"to participate in the practices and games."* On 14 November 2008, Claimant 2 terminated the Contract because of Respondent's non-compliance with its financial obligations and announced that Claimant 1 would be free to leave and sign an agreement with any other team.

54. The relevant paragraph of Article 3 (page 3, second para.) reads as follows:

> *"If the club is late with any payment for more than 15 (fifteen) days, the player is entitled to immediately go on strike and refuse to render 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 (for the whole season) and issue a letter of clearance."*

55. The Respondent submits that Claimant 1 may not exercise the rights under this provision since he was himself in default. It is indeed a generally accepted principle of contract law that a party must have complied with its own contractual obligations before it may request performance from his opponent (defense of non-performance).

56. Article 1 (2) of the Contract seems to restrict the circumstances in which the Club may refuse or reduce the payments to the Player to a very few:

> *"This contract will be fully (100%) GUARANTEED by both parties for the entire contract period. Exceptions are: violence against Club's management, coach(es) and/or team."*

57. It would however lead to very odd and unfair results if this clause would be understood

as it would restrict the right of the Respondent to refuse or retain payment to cases of violence. This provision must rather be read as a clause which limits the circumstances under which the Respondent is entitled to early termination of the Contract. It should, however, not restrict the Respondent's right to retain or refuse payments if the Player does not comply with his own contractual obligations.

58. Thus, if the Respondent was entitled to withhold payment of salaries because of breach of contract by Claimant 1, the latter may not exercise the rights quoted in para. 54 above.

6.2.2 Was Respondent entitled to stop payments?

59. According to the Respondent, Claimant 1 breached the contract (i) by late arrival to Lithuania, then by (ii) faking an injury and by refusing to participate in the Euroleague Game of 5 November 2008 in Poland and finally (iii) by not appearing before the Medical expert commission on 8 November 2008.

(i) Late Arrival

60. The fact that Claimant 1 arrived later in Lithuania than agreed in the Contract, was obviously accepted by the Respondent as it bought him the flight ticket Belgrade-Vienna-Vilnius on 2 September 2008 and cannot retrospectively serve as a ground to assert a breach of contract by the Claimants.

(ii) Faking an injury and refusal to attend the Poland game of 5 November 2008

61. The Respondent submits that, as indicated by the club's doctor Mr Robertas Narkus, the shoulder injury which Claimant 1 suffered during the Euroleague Game of 22 Octo-

ber 2008 against Panathinaikos was faked Thus, according to the Respondent, Claimant 1 acted in bad faith when he refused to join the team on 5 November 2008 for a Euroleague game against Assecco Sopot in Poland. He also refused to practice on his own when he was advised by the Respondent's coach to do so.

62. Claimant 1 submits that he was indeed injured and sought treatment at home in Belgrade, which was however refused by the Respondent. He was treated in Kaunas instead.

63. Claimant 1 also submits that he wanted to travel to Poland but was advised not to do so by his manager. The Respondent rebuts that it was not up to the Claimant 2, who was not present at the time, to decide upon such sporting issues.

64. The Arbitrator relies on the testimony of the Respondent's team doctor since there is no evidence to the contrary: Mr Narkus confirms the injury which the Player already suffered during the game against Riga on 16 October 2008. It seems that the injury was not so severe as to prevent Claimant 1 from continuing to play. The Player got another hit on his arm during the Panathinaikos game of 22 October 2008. Claimant 1 then announced that he would now rest and recover and not play before a thorough medical examination which was fixed on 8 November 2008. However, the team doctor concluded from the behavior of the player following the second hit that his injury was at least *"not so serious and he was faking the pain."*

65. While it is common ground that Claimant 1 must have suffered an injury, the parties disagree about its severity. When Claimant 1, apparently upon advice of Claimant 2, concluded that he was not ready to play the game in Poland, no protest was raised by the Respondent. He was recommended to practice on his own. But again, no warning

or the like was issued by the Respondent.

(iii) Refusal to attend the medical inspection of 8 November 2008

66. The Respondent also considers that the Claimant's first refusal to attend the medical examination which was fixed on 8 November 2008 constitutes a breach of contract. The Contract provides that the Claimant 1 must pass a medical examination as a condition precedent for the Contract coming into effect. It is undisputed that Claimant 1 passed that entry examination. Further examinations may well be arranged by the Club to make sure that the Player is fit to play. This was obviously also the purpose of the medical examination arranged on 8 November 2008, namely to check whether the Player was fit to play again in the upcoming games. However, when the Player stated on the same day that he felt ready to play, the Club accepted the Player's statement and did not raise any objection but selected him for the team which played the next three games.

67. The Arbitrator concludes (i) that there was in fact an injury, (ii) that although it is questionable how severe this injury was the treating doctors recommended the Player to rest, (iii) that Claimant 1 actually followed the advice and (iv) that the Respondent did not raise any argument relating to the first Claimant's behavior until 31 December 2008 (when the Respondent submitted its Answer to the Request for Arbitration). Even if the injury was not so severe to prevent the Claimant 1 from attending the game of 5 November 2008, the Respondent did not raise a protest but readily accepted him back in the team for the games of 9, 11 and 15 November 2008. The Arbitrator does therefore not accept the Respondent's defense of non-performance.

6.2.3 Termination of the Contract

68. According to Article 3 of the Contract, when the Respondent stopped the salary payments, Claimant 1 was entitled to go "on strike" and refuse to render his services to the Respondent after 15 days of delay, i.e. on 30 October 2008.

69. The Claimants consider that Claimant 1 had no obligation to participate in the Euro-league Game of 5 November 2008 or to appear before the Medical Commission on 8 November 2008. Furthermore, with e-mail of 3 November 2008 Claimant 2 had warned the Respondent that Claimant 1 would *"practice and play under his own wish"* unless he was not paid the outstanding amount.

70. The Arbitrator finds the Claimants' interpretation of Article 3 unconvincing. First of all, Claimant 1 is inconsistent when he declares to be on strike but takes the liberty to decide, day by day, whether or not he likes to play or to exercise. Moreover, Claimants' termination of the Contract on 14 November 2009 and Claimant 1's playing for the Respondent on the following day are difficult to square with the principle of good faith. On the other hand, the Respondent was aware of the Claimants' intention to terminate the Contract, it did not protest and after all, it did not rectify the situation by paying the outstanding salary.

71. As agreed in the Contract, after an additional 15 days of delay, i.e. on 14 November 2008, Claimant 1 was free to leave and the Respondent had to pay all salaries (for the whole season) and issue a letter of clearance. Therefore, when the Respondent had not fulfilled its financial commitments to the Claimants on 14 November 2008, the Claimants were entitled to terminate the Contract. As a consequence, Claimant 1 was no longer obliged to offer his services to the Respondent but was free to look for an-

other job.

6.2.4 Consequences of the breach of the Contract

72. As a consequence of the Respondent's non-payment of the agreed salaries in breach of Article 3 of the Contract, Claimants are entitled to damages. As a matter of principle and in the absence of any provision about damages, the Arbitrator shall award the sum which would restore the injured party into the economic position that he or she expected from performance of the contract. On the other hand, the injured party is obliged to mitigate the damage. In addition, any advantages which the injured party may have gained as a consequence of the breach (e.g. salaries otherwise earned) must be taken into account when calculating the compensation.[6]

73. According to Article 3 of the Contract, Claimant 1 was entitled to salaries of EUR 900,000.00 (EUR 450,000.00 for the 2008/2009 season and EUR 450,000.00 for the 2009/2010 season). On top, the payment of certain bonuses depending on the success of the team was promised. However, Claimant 1 is not requesting a compensation for the 2009/2010 season or the loss of bonuses.

74. According to Article 3 of the Contract, the salaries for the 2008/2009 season became due for payment on a monthly basis, irrespectively of the actual playing time of Claimant 1. The fact that during the 2008/2009 season, Claimant 1 may have been unable to play because of injury did not entitle the Respondent to suspend or reduce payment of the salary, as explicitly agreed in Article 1 and 5 of the Contract.

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[6] See FAT decision 0014/08 (van de Hare, Glushkov, Hammink vs. Azovmash Mariupol BC).

75. Except for one salary payment effectuated on 15 October 2008, the Respondent did not execute any payments for the 2008/2009 season. Thus, the unpaid salaries for the entire 2008/09 season must be considered as a loss suffered by Claimant 1 which resulted from the breach of the Contract by the Respondent. Hence, the basis for compensation corresponds to the salary for the whole season 2008/2009 as agreed in Article 3 of the Contract (i.e. EUR 450,000.00), which became due after 30 days of payment delay by the Respondent.

76. It might be argued that the present value of the future monthly salaries is less than the amount reached by simple addition of the unpaid salary for the 2008/2009 season. However, such discounting is not necessary since the compensation for damages is not the result of a mathematical formula but follows from an overall assessment, which also comprises the compensation which the Claimant 1 actually earned or may have earned otherwise and which, by nature, includes a considerable margin of imprecision.

77. When it comes to the assessment of the compensation which Claimant 1 was able to earn or failed to earn because he was no longer bound by the Contract with the Respondent, the Arbitrator must look at the contract which Claimant 1 signed with the new club, i.e. BC Khimki. This contract started on 25 January 2009 and will end after the last official game of the club for the 2008/2009 season and provides for a player's salary in the net amount of USD 200'000 for the duration of the Contract. Article 1(2) of the contract with BC Khimki provides that the contract is fully guaranteed by both parties for the entire contract period. Therefore, the whole net salary of USD 200'000 must be taken into account when calculating the compensation. Just as the Claimants rely on the fully guaranteed Contract with the Respondent, they also have to accept for the purpose of the present proceedings that the almost identical new contract with BC Khimki is fully guaranteed.

78. The Arbitrator therefore holds that the compensation owed by the Respondent for the 2008/2009 season shall be the salary agreed with the Respondent for the 2008/2009 season (EUR 450,000.00) minus the salary payment effectuated on 15 October 2008 (EUR 45,000) minus the salary agreed with BC Khimki for the whole duration of this contract (EUR 150,625.50 i.e. USD 200'000; exchange rate as of 7 April 2009), that is EUR 254,374.50.

6.2.5 The agent fee claimed by Claimant 2

79. The agent fee claimed by Claimant 2 has been agreed because of his services which undisputedly led to the contracting with Claimant 1. The agent fee consists of EUR 45,000 for the 2008-2009 season.

80. According to Article 11 of the Contract, the Respondent is obliged to pay an agent fee to Claimant 2 in the amount of EUR 45,000 at the time of signing the contract, after the player successfully passes medical exam and upon proper billing on for the 2008-2009 season.

81. The Arbitrator finds that as a principle, the agent fee is due in full because of the services already provided in the past. That service consisted of the placement of a player who would be ready to play under the terms provided by the Contract. However, deciding *ex aequo et bono*, the Arbitrator finds that, because the player left the club before the end of the contractual term and concluded a new fully guaranteed contract with another club (BC Khimki), the Respondent is entitled to reduce the compensation accordingly. The whole amount of the agent fee of USD 20'000 as agreed in the new contract with BC Khimki has to be taken into account because of the above-mentioned reasons. Therefore, the Respondent is obliged to pay Claimant 2 a compensation of

EUR 29,937.50 (EUR 45,000.00 minus EUR 15,062.50 (USD 20'000; exchange rate of 7 April 2009)), i.e. the agent fee agreed with the Respondent for the 2008/2009 season minus the whole agent fee agreed with BC Khimki.

7. Costs

82. 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 reasonable legal fees and expenses incurred in connection with the proceedings.

83. On 29 April 2009, the President of the FAT 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 (19 hours at an hourly rate of EUR 300)*	*EUR 5,700.00*
• *Arbitrator's costs*	*EUR 100.00*
• *Administrative and other costs of FAT*	----------
• *Fees of the President of the FAT*	*EUR 1,800.00*
TOTAL	***EUR** 7,600.00"*

84. In the present case, the costs shall be borne by the Claimants and the Respondent in proportion of the amounts claimed and the amounts awarded. Considering the outcome of the case, the Claimants have been awarded EUR 284,312.00 instead of the claimed amount of EUR 495,000.00, and thus, succeeded by approximately 60%. Thus, the Arbitrator finds the Claimants shall bear 40% of the costs of arbitration and the Respondent 60%.

85. Considering the circumstances and the outcome of the case, the Arbitrator finds that both parties shall bear their own legal costs.

86. Given that the Claimants paid the totality of the advance of the arbitration costs of EUR 10,000.00 fixed by the Arbitrator, the Arbitrator decides that:

(i) the FAT shall reimburse EUR 2,400.00 to the Claimants;

(ii) the Respondent shall pay to the Claimants EUR 4,560.00 being the difference between the costs advanced by the Claimants and the amount which is going to be reimbursed to them by the FAT.

8. Interest

87. Since the Claimants did not request the awarded amounts to bear interest, the Arbitrator does not award any interest.

9. AWARD

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

1. **Vsl Kauno "Zalgirio" REMEJAS shall pay to Ratko Varda EUR 254,374.50 as a compensation for breach of contract.**

2. **Vsl Kauno "Zalgirio" REMEJAS shall pay to Obrad Fimic EUR 29,937.50 as agent fee.**

3. **Vsl Kauno "Zalgirio" REMEJAS shall pay to Ratko Varda and Obrad Fimic EUR 4,560.00 as a reimbursement of the advance on the arbitration costs.**

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

Geneva, 30 April 2009

Stephan Netzle

(Arbitrator)

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."