



**FIBA**

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**FIBA Arbitral Tribunal (FAT)**

## **ARBITRAL AWARD**

**(0034/09 FAT)**

by the

**FIBA ARBITRAL TRIBUNAL (FAT)**

**Mr. Ulrich Haas**

in the arbitration proceedings between

**Mr. Clay Tucker**, 160 McIntosh Place Drive, Fayetteville, GA 30214, USA

**- Claimant 1 -**

**Pro One Sports Management Inc.**, 513 Madison Street, Huntsville, AL 35801, USA

**- Claimant 2 -**

both represented by Messrs. Patrick King and Daniel Servick, 195 Deutz-Mülheimer Str.,  
51063 Cologne, Germany

vs.

**BC Kyiv**, 14 Starokyivska Street, Office 201, 03055 Kyiv, Ukraine

**- Respondent -**



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### **1. The Parties**

#### **1.1. The Claimants**

1. Mr. Clay Tucker (“the Player” or “Claimant 1”) is a professional basketball player of USA nationality. He was born on 14 June 1980.
2. Pro One Sports Management Inc. (“Claimant 2”) is a basketball players’ agency with offices in USA and Germany. It is represented by Mr. Patrick King, a FIBA-licensed agent, and Mr. Daniel Servick (“the Agents”).

#### **1.2. The Respondent**

3. BC Kyiv (“the Club” or “Respondent”) is a professional basketball club in Ukraine.

### **2. The Arbitrator**

4. On 23 March 2009, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Prof. Dr. Ulrich Haas as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules"). None 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**

5. On 6 August 2008 the Claimants and the Club entered into an employment contract whereby the latter engaged Claimant 1 to play for its team for the 2008-2009 season



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(hereinafter referred to as the "Contract"). The Contract also stipulated certain payments in favour of Claimant 2 for services rendered by the Agents to the Club.

6. In its relevant part the Contract reads as follows:

*"II. Term of the Agreement*

*This agreement shall be deemed valid on the date of signature and shall continue until May 31<sup>st</sup>, 2009 or until 5 days after the last official league game of the 2008/2009 season is played by the Club. [...]*

*III. Guaranteed No-Cut Contract*

*The present agreement is guaranteed even if the Player does not achieve an expected level of performance. In the case of sickness or injury not attributable to grievous or reckless behavior on the Player's part, the Player has the right to the entire amount of compensation stipulated in his contract. [...]*

*V. Salary Compensation*

*The Club agrees to pay the Player \$ 800,000.- net for the term covering the 2008/09 season. The Player shall receive the above mentioned salary as follows:*

<i>After passing medical -</i>	<i>\$ 150,000.- net</i>
<i>September 28<sup>th</sup>, 2008 -</i>	<i>\$ 65,000.-net</i>
<i>October 28<sup>th</sup>, 2008 -</i>	<i>\$ 65,000.-net</i>
<i>November 28<sup>th</sup>, 2008 -</i>	<i>\$ 65,000.-net</i>
<i>December 28<sup>th</sup>, 2008 -</i>	<i>\$ 65,000.-net</i>
<i>January 28<sup>th</sup>, 2009 -</i>	<i>\$ 65,000.-net</i>
<i>February 28<sup>th</sup>, 2009 -</i>	<i>\$ 65,000.-net</i>
<i>March 28<sup>th</sup>, 2009 -</i>	<i>\$ 65,000.-net</i>
<i>April 28<sup>th</sup>, 2009 -</i>	<i>\$ 65,000.-net</i>
<i>May 28<sup>th</sup>, 2009 -</i>	<i>\$ 65,000.-net</i>
<i>June 5<sup>th</sup>, 2009 -</i>	<i>\$ 65,000.-net</i>

*[...] In case of scheduled payments not being made by the Club within 45 (forty five) days of the scheduled payments, the Player shall be entitled to all monies in accordance with the Contract, but shall not have to perform in practice sessions or games until all scheduled payments have been made plus appropriate penalties and such nonperformance will not be considered a breach of contract. In the event that payments are not made by the Club, within 45 (forty five) days of the scheduled payment date, player shall immediately be entitled to the full salary and shall have no further obligations to the Club. The Club shall retain no rights to the Player except for the obligation to pay all salary and bonuses under the terms of this Contract. Upon receipt of a request from the National Federation to issue a Player's Letter of Clearance, the Club must authorize the Federation to do so unconditionally within 24 (twenty four) hours without charging a transfer fee. [...]*



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### XIV. Agent Fee

*The Club will pay a total commission fee, which will not be deducted from the player's salary of 10% of the Player's total salary.*

*The amount of \$ 80,000.- is to be made to the agent, Daniel Servick of Pro One Sports Management, as follows:*

*\$ 40,000.- not later than 15<sup>th</sup> of September 2008*

*\$ 40,000.- not later than 15<sup>th</sup> of December 2008.*

*An additional amount of \$ 20,000.- is to be paid by the club to Mr. Patrick King of Pro One Sports Management for services rendered in the negotiation of the transfer of the Player from the club Khimki Moscow Region. This amount is due not later than 15<sup>th</sup> September 2008. [...]"*

7. Since the beginning of the 2008-2009 season the Club was late in effecting payments under the Contract. This is documented in a number of emails exchanged during September and October 2008 between the Agents on the one hand and Mr. Vitaliy Khomenko (General Manager of the Club) and Ms. Elena Kushnirenko (General Secretary of the Club) on the other.
8. On 15 December 2008 the Agents sent three separate reminders to the attention of Mr. Khomenko regarding the Club's payments towards the Player (Article V of the Contract), the commission for negotiating the Player's Contract and the remuneration for the Player's release from his previous club (Article XIV of the Contract, hereinafter jointly referred to as "agent fees") respectively, stating *inter alia* the following:

*"Mr. Tucker has not received the \$65,000 salary payment due on October 28th, 2008 nor has he received the \$65,000 salary payment on November 28th, 2008. [Y]our club is now in violation of §5 of the [Contract]. [I]f proof of payment of both overdue salary payments is not received on or before December 22, 2008 we will pursue legal action via the FIBA Arbitral Tribunal [...]"*

*"[T]he first of two instalments of the agent fee was due on September 15, 2008 in the amount of \$40,000.00 USD and properly invoiced [...]. As of the writing of this letter, the fee has not been received. [I]f proof of payment is not received on or before December 22, 2008 we will pursue legal action via the FIBA Arbitral Tribunal [...]"*

*"[T]he fee [for the release of the Player] was due on September 15, 2008 in the amount of \$20,000.00 USD. [...] As of the writing of this letter, the fee has not been received. [I]f proof of payment is not received on or before December 22, 2008 we will pursue legal action via the FIBA Arbitral Tribunal [...]"*



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9. On 22 December 2008 the Agents informed the Club that

*"In [the letters of 15 December 2008] we notified your club if the payments were not made by December 22, 2008 we would take the matter to FIBA and pursue the actions with the [FAT] as agreed upon by [in the Contract]. We have not had any response from your club to resolve this matter so we are left with no choice but to regretfully move forward."*

10. On 24 December 2008 the Club replied in the following terms:

*"[...] Our main sponsor having funds in [...] Bank faced a problem [...]. That is why there was put a law (sic) in force about limitation of Bank transfers. That was the situation we did not expect at all. While we were in search of different options to make scheduled transfers it was lost some time. Now we managed to recredit (sic) the account and ready to wire October 2008 salary to Clay Tucker's account. The Bank to wire is closed for Christmas 25th and 26th of December. So money will be wired 29th of December 2008 by urgent transfer. You will receive immediately payment confirmation as soon as we get it from the Bank.*

*November salary of Clay Tucker as well as Agent's fee of Pro One Sports Management are supposed to be wired around 5th of January.*

*We really appreciate if you convince Clay to come to Kyiv on Sunday, 28th of December in order to manager (sic) for evening practice and start preparing for next games.[...]"*

11. The Club subsequently paid the Player's salary for October 2008 in the amount of USD 65,000 and the Player returned to Kiev and continued offering his services to the Club.

12. By emails of 9 and 12 January 2009 the Agents requested further information about the payment of the Player's November 2008 salary and of their agent fees.

13. On 12 January 2009 the Club informed the Agents that

*"[T]he payment to Clay for November 28th will be paid on Wednesday.*

*About payment of Agent's fee we will have more exact information tomorrow."*

14. On 13 January 2009 the Club wrote to the Agents as follows:

*"Now is the time when our Sponsor's companies and Banks that provide us with money start to work in full.*

*We have got first portion of money, so Club will wire to Clay's account 47 000 \$ tomorrow*



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*from 28th November payment.*

*Rest as well as agent's fee is supposed to be paid (sic) by the end of January.*

*We are really sorry for this delay and hope for your and Clay's understanding."*

15. Further to another email by the Agents dated 22 January 2009, the Club replied on 26 January 2009 that

*"[R]est of November salary for Clay will be sent till the end of the week.*

*Agent's fee will be wired as soon as possible as well."*

16. On 28 January 2009 the Agents wrote to the Club as follows:

*"Please be advised that BC Kyiv has breached Article V of the [Contract] for a second time, by being over 45 days late with the Player's payment. This time, the payment that was due on November 28th, 2008 was not paid in full and is currently 59 days late. Furthermore, the Agent fees that were due on September 15, 2008 and December 15, 2008 have also not been paid, not even partially. [...] We believe you and we realize that the financial crisis has created problems for everyone. [...] However, it is our duty to inform you of your Club's second breach of Article V of the [Contract].*

*If the Player's salary or the Agent fees are not paid by the end of the week, the Player reserves the right to leave the Club and play for another team [...]. We can guarantee you, that if all payments are made by the end of this week (January 31, 2009), as stated in your e-mail, that the Player will remain with your Club as long as his salary payments are made according to the [Contract] from here on out. [...]"*

17. On 11 February 2009 the Club contacted the Agents by email and stated:

*"[S]orry for delay of payments that had to [be] executed till the end of last week. Because of some delay in financing we are not ready to execute them these days, but we hope to fulfill our obligations as per contract of Clay Tucker as soon as it only possible (sic)."*

18. On 17 February 2009 the President of the Club Mr. Oleksander Volkov informed the foreign players of the Club that the latter was no longer in a position to pay their salaries at that time or any time in the near future.

19. On 18 February 2009 the Agents sent the following letter to the Club:



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*“This letter shall serve as notice that our client, Clay Tucker, has chosen to use his right to leave your club to pursue other employment opportunities as a result of your club’s having breached the [Contract]. The player’s right to take such action is stipulated in Article V of [the Contract]. We notified your club via e-mail and fax of its two separate breaches of contract on December 22, 2008 and more recently on January 28, 2009. It is also to be noted that the club informed the players on the evening of February 17, 2009 in a team meeting that their salaries could not be paid at this time or any time in the near future. The player is now no longer obligated to work for the club and will cease practicing and playing for the club. He is also free to sign with any other club in the world while still due the full remaining amount in his contract, totaling \$455,000. In addition, the \$100,000 in agent fees owed to [Claimant 2] by your club, remain due in full.*

*We have been extremely patient in trying to work with your club to resolve this situation but your non-payment to us and continued lack of payment to the Player despite repeated promises by your club to the contrary, leave our client with no other options. [...]*

*We will now hand the matter over to the FAT [...]*

20. The Club did not reply to the above letter nor make any further payments.
21. On 24 February 2009 the Player signed an employment agreement with the Spanish club Club Deportivo Baloncesto Sevilla SAD (“the Sevilla Contract”). Under the Sevilla Contract the Player would receive USD 150,000 as salary for the remaining of the 2008-2009 season and Claimant 2 an agent fee of USD 15,000.

### 3.2. The Proceedings before the FAT

22. On 16 March 2009 the Claimants filed a Request for Arbitration in accordance with the FAT Rules. The Claimants had duly paid the non-reimbursable fee of EUR 3,000 since 2 March 2009.
23. On 24 June 2009, the FAT informed the parties that Prof. Dr. Ulrich Haas had been appointed as the Arbitrator in this matter and fixed the amount of the Advance on Costs to be paid by the Parties as follows:

<i>“Claimant 1 (Mr. Tucker)</i>	<i>EUR 4,000</i>
<i>Claimant 2 (Pro One Sports Management)</i>	<i>EUR 2,000</i>



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*Respondent (BC Kyiv)*

*EUR 6,000”*

24. By letter dated 7 April 2009 the Respondent confirmed that it had received the Request for Arbitration and requested an extension of 55 days of the time-limit to file its Answer because Mr. Khomenko was “out of Ukraine these days and [the Club] is going to settle case of Clay Tucker via negotiations”.

25. On 29 April 2009 the Arbitrator informed the Parties that

*“[T]aking into consideration the circumstances of the case, and the agreement of the Claimants [the Arbitrator] herewith sets the following time limits*

*1. Both parties shall pay by no later than Friday, 15 May 2009 their share of the Advance on Costs in accordance with FAT’s letter dated 24 March 2009.*

*2. Respondent shall file its Answer and supporting documentation by no later than Friday, 15 May 2009.”*

26. On 13 May 2009 the Club sent a letter to FAT which in relevant part reads as follows:

*“Club is in difficult financial situation nowadays due to some circumstances among which is not only world financial crisis but political and economical situation in Ukraine. That problems (sic) influenced directly on the Owner of the Club that caused big arrears of wages towards Players that played for the Club during season 2008/2009 as well as towards Players performing Club (sic) now. [...]*

*It is necessary to mention that Clay Tucker was injured in October 2008 and for the whole season 2008/2009 played for the Club only: 8 games in Ukrainian League, 2 games in Ukrainian Cup, 1 game in Elimination round of EuroCup FIBA, 2 games in EuroChallenge FIBA and got from the Club \$345 000,00 that concluded 43,125% of his Contract. Starting from February, 2009 he has been playing for Spanish Club. If to talk about financial waste (sic) of the Player it may be only difference between his salary in BC kyiv and his new Club. And the amount in Statement of claim (\$445 000,00) can not be compared with that difference.*

*We would kindly ask you to delay consideration of this case till beginning of new sports season 2009/2010 and give us time to settle financial problems of the Club in order to be back to this matter once again later.”*

27. Further to Claimants’ letter dated 14 May 2009, the Arbitrator informed the Parties that



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*"The Arbitrator has noted*

- Respondent's submission that the "Club is in difficult financial situation nowadays";*
- Respondent's request to "delay consideration of this case till beginning of sports season 2009/2010 [in order to] settle financial problems";*
- Claimants' preference for the case to "rest for the time being, with the possibility to restart it later this summer" for the same reasons as above.*

*In view of the above submissions the Arbitrator has decided to stay the proceedings until 30 August 2009, unless the Respondent expresses its disagreement with this Order on or before 20 May 2009."*

28. The Respondent did not object to the above procedural order.
29. On 17 September 2009 the FAT sent a final reminder to the Parties advising them as follows:

*"In view of the fact that [...] the FAT has not received any correspondence from the parties after 30 August 2009, the Arbitrator herewith decides the following:*

- 1. The Answer shall be filed by the Respondent in accordance with Art. 11.2 of the FAT Rules by no later than Friday, 8 October 2009.*
- 2. The parties shall pay by no later than Friday, 1 October 2009 [their shares of the] advance on costs [...]"*

30. On 28 and 30 September 2009 the Claimants paid their shares of the Advance on Costs in a total amount of EUR 6,000.
31. On 16 October 2009, the FAT Secretariat informed the Claimants that they would have to substitute for the Respondent with respect to the Advance on Costs because the latter had not paid its portion thereof.
32. By email dated 21 October 2009 the Respondent informed the FAT of the following:

*"[O]ur Club still is in very difficult financial situation. The team plays but it is the team of very young Ukrainian players with very low budget. We work hard during last 10 month[s] in order to provide [the] team with all necessary equipment and staff and keep the team*



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*playing while we pass this period and find proper solution. But at the moment even our share on the Advance of Costs of 6 000 Euro is impossible to be payed (sic) by the Club.*

*That is we kindly ask you [to] delay consideration of this case at least till the end of 2009 and to be back to this question as only Club returns to his normal functioning.*

*With respect,*

*Vitalii Khomenko  
General manager  
BC KYIV"*

33. On 27 October 2009, the FAT Secretariat reminded the Claimants that they would have to substitute for the Respondent's share of the Advance on Costs by 4 November 2009. The Claimants were also requested to comment on Respondent's letter of 21 October 2009.
34. On 2 November 2009 the Claimants requested the FAT to stay the proceedings until 29 January 2010 "due to the fact that the Ukrainian presidential elections in January of 2010 will have a major impact on the financial future of the club BC Kiev and will likely determine it's (sic) fate in terms of continuing to function or declaring for bankruptcy".
35. On 4 November 2009 the Arbitrator, in view of the submissions made by the Parties, decided to stay the proceedings until 15 February 2010.
36. On 16 February 2010 the FAT Secretariat informed the Parties that the proceedings would resume and invited the Claimants to pay the Respondent's share of the Advance on Costs by no later than 3 March 2010.
37. On 3 March 2010, the Claimants made the substitute payment in an amount of EUR 6,000.
38. On 12 March 2010, 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



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accordingly issued a Procedural Order providing that the exchange of documents was completed and inviting the Parties to submit their cost accounts.

39. On 30 March 2010, the Claimants submitted their costs, as follows:

*“Our costs in conjunction with the FAT case 0034/09 are as follows:*

<i>Non-refundable FAT fee:</i>	<i>€ 3.000,-</i>
<i>Claimant’s share of Advance on Costs paid by Clay Tucker:</i>	<i>€ 4.000,-</i>
<i>Claimant’s share of Advance on Costs paid by Patrick King:</i>	<i>€ 2.000,-</i>
<i>Respondent’s share of Advance on Costs paid by Patrick King:</i>	<i>€ 6.000,-</i>
<i>Total:</i>	<i>€ 15.000,-</i>

*We kindly request that all incurred costs be included in the Arbitral Award and be reimbursed by the Respondent in full, should they be the losing party in the award. We also kindly note that we refrained from adding an interest penalty to our request for relief in an effort to show our understanding for the Respondent’s difficult financial situation last season.”*

40. The Respondent did not submit its account of costs.

## 4. The Positions of the Parties

### 4.1. The Claimants’ Position

41. The Claimants submit the following in substance:

- The Club has been in default with respect to its payment obligations towards the Player under the Contract;
- The Club’s default gave rise to the Player’s right to terminate the employment relationship and claim the full amounts due to him under the Contract;
- The Club still owes to Claimant 2 the entire agent fees as stipulated in Article XIV of the Contract.



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42. In their Request for Arbitration dated 16 March 2009, the Claimants requested the following relief:

*"Request for relief*

*As stipulated in §XI of the contract signed on August 6, 2008 between BC Kyiv, the player, Clay Tucker, and his agency Pro One Sports Management, the player and his agency have to chosen (sic) to file a Request for Arbitration with the FIBA Arbitral Tribunal in Geneva, Switzerland.*

*The Club BC Kyiv breached §V of the above mentioned contract on three separate occasions as explained in detail in the attached "statement of the facts" and supported by the attached evidence.*

*BC Kyiv still has the following contractual obligations:*

*Salary payment to the player, Mr Clay Tucker:*

<i>Dec. 28, 2008:</i>	<i>\$65,000.</i>
<i>Jan. 28, 2009:</i>	<i>\$65,000.</i>
<i>Feb. 28, 2009:</i>	<i>\$65,000.</i>
<i>Mar. 28, 2009:</i>	<i>\$65,000.</i>
<i>Apr. 28, 2009:</i>	<i>\$65,000.</i>
<i>May 28, 2009:</i>	<i>\$65,000.</i>
<i>June 5, 2009:</i>	<i>\$65,000.</i>

*Total: \$445,000. (sic)*

*Fee payments to Pro One Sports Management (Daniel Servick and Patrick King):*

*Placement commission fee totalling 10% of player's salary: \$80,000.*

*Negotiation of transfer of player from Khimki Moscow: \$20,000.*

*Total: \$100,000.*

*The player, Mr Clay Tucker, and the agency, Pro One Sports Management, request the club, BC Kyiv, fulfil said obligations.*

*This shall serve as the player and agency's official request for relief by the FIBA Arbitral Tribunal."*



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### 4.2. Respondent's Position

43. The Club did not submit a formal Answer to the Request for Arbitration. However, in its letter dated 13 May 2009 the Club mentioned that

- The Player was injured in October 2008 and participated in a relatively low number of games during the 2008-2009 season;
- The Club paid to the Player USD 335,000;
- The Player's real financial loss is not reflected in the amount claimed in this case, i.e. in the remaining salaries for the 2008-2009 season under the Contract, since the Player started playing for a Spanish club in February 2009.

44. Despite several invitations the Respondent did not make any further submissions in reply to the Request for Arbitration or file any prayer for relief; it only requested the FAT to postpone the issuance of its decision in the present matter due to the Club's financial situation.

### 5. Jurisdiction

45. 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).

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



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### 5.1. Arbitrability

47. 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<sup>1</sup>.

### 5.2. Formal and substantive validity of the arbitration agreement

48. The jurisdiction of the FAT over the dispute results from the arbitration agreement contained in Article XI of the Contract, which reads as follows:

*"XI. Arbitration*

*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), 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."*

49. The Contract 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

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



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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. The scope of the arbitration agreement covers the requests of both Claimants. The claim of Claimant 2 in relation to the payment of agent fees originates in clause XIV of the Contract. It is true that this clause is situated behind the arbitration agreement in Article XI of the Contract. However, it is clear from the wording in Article XI that the arbitration clause contained therein refers to all claims arising from the contract (“any dispute arising from or related to the present contract”) and, therefore, covers also the request by Claimant 2.
52. It bears emphasizing that no objection regarding the jurisdiction of the FAT has been raised by the Respondent in any of its letters, where it tacitly acknowledged the FAT’s jurisdiction to decide the matter by requesting the FAT to postpone the taking of a decision.

### 6. Other Procedural Issues

53. Article 14.2 of the FAT Rules, which the Parties have declared to be applicable in the arbitration agreement, specifies that “the Arbitrator may nevertheless proceed with the arbitration and deliver an award” if “the Respondent fails to submit an Answer”. The Arbitrator’s authority to proceed with the arbitration in case of default of one of the parties is in accordance with Swiss arbitration law<sup>2</sup> and the practice of the FAT.<sup>3</sup>

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<sup>2</sup> Decision of the Swiss Federal Tribunal dated 26 November 1980, in: *Semaine Judiciaire (SJ)* 1982, S. 613 et seq., p. 621; KAUFMANN-KOHLER/RIGOZZI, *Arbitrage international. Droit et pratique à la lumière de la LDIP*, 2<sup>nd</sup> ed., Bern 2010, N 483; LALIVE/POUDRET/REYMOND: *Le droit de l’arbitrage interne et international*



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However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

54. This requirement is met in the current case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator, in line with the relevant rules. It was also given ample opportunity to respond to the Claimants' Request for Arbitration. However, the Respondent has chosen not to file a full-fledged Answer and to merely request on two occasions (on 13 May 2009 and 21 October 2009, see *supra* paras. 26 and 32 respectively) that the FAT postpone the taking of a decision related to the Claimants' Request for Arbitration.
55. In light of these circumstances, the Arbitrator considers himself fit to proceed with the arbitration and to deliver the award.

## 7. Discussion

### 7.1. Applicable Law

56. 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

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en Suisse, Lausanne 1989, Art. 182 PILA N 8; RIGOZZI: L'Arbitrage international en matière de sport, Basel 2005, N 898; SCHNEIDER, in: Basel commentary to the PILA, 2<sup>nd</sup> ed., Basel 2007, Art. 182 PILA N 87; VISCHER, in: Zurich Commentary to the PILA, 2<sup>nd</sup> ed., Zurich/Basel/Geneva 2004, Art. 182 IPRG N 29.

<sup>3</sup> See *ex multis* FAT Decision 0001/07 dated 16 August 2007, Ostojic and Raznatovic vs. PAOK KAE; FAT Decision 0018/08 dated 10 February 2009, Nicevic vs. Beşiktaş; FAT Decision 0020/08 dated 19 March 2009, Dimitropoulos vs. Athlitiki Enosis Konstantinoupoleos; FAT Decision 0024/08 dated 11 May 2009, Sakellariou and Dimitropoulos vs. S.S. Felice Scandone Spa.



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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”.*

57. 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.”*

58. Article XII of the Contract entitled “Governing Law” provides that

*“This agreement shall be interpreted and enforced in accordance with the laws of Switzerland”*

59. Accordingly, the Arbitrator notes that, in this case, the Parties have agreed otherwise within the meaning of Article 15.1 of the FAT Rules.

60. Thus, the Arbitrator will adjudicate the present matter on the basis of Swiss law. The relevant provisions will be referred to and interpreted, to the extent necessary for the resolution of the dispute, when discussing the merits of this case.

61. In light of the foregoing considerations, the Arbitrator makes the findings below:

### 7.2. Findings

#### 7.2.1. Breach and Termination of the Contract

62. The Claimants have produced the Contract pursuant to which the Player was hired by



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the Club as a professional basketball player. The Contract bears the stamp of the Club and, *inter alia*, sets forth a detailed schedule of salary payments. The Claimants submit that the Player rendered his services as instructed by the Respondent.

63. The Club has not challenged the validity of the Contract and has admitted that the Player indeed participated in games for its team. The Club submits that the Player was injured in October 2008 and did not play a large number of games during the 2008-2009 season. The Arbitrator refers to Article III of the Contract entitled “Guaranteed No-Cut Contract” which makes it clear that “In the case of sickness or injury not attributable to grievous or reckless behavior on the Player’s part, the Player has the right to the entire amount of compensation stipulated in his contract” (see *supra* para. 6). No circumstances suggesting a “grievous or reckless” behaviour of the Player have been brought forward by the Club. Also, no complaint was ever raised by the Club with regard to the Player’s performance under the Contract in the frequent communications between the Club and the Agents.
64. Therefore, the Arbitrator finds that the Player was entitled to his entire salary during the period that he remained injured and could not participate in training sessions and games.
65. Further, the Arbitrator notes that the Club admittedly faced serious financial problems during the 2008-2009 season and, as is evident from the correspondence between the Agents and the Club, it was late in making almost every salary payment to the Player. In fact, the Player had more than one opportunity to terminate the Contract and seek for alternative employment but decided to exercise his right only after the third breach by the Club had taken place and after the Club’s President informed the Players that the financial situation did not allow for a timely payment of their – outstanding and forthcoming – salary payments.
66. The Arbitrator finds that the Club owed to the Player at the date of termination (18



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- USD 65,000 for the salary payment due on 28 December 2008;
- USD 65,000 for the salary payment due on 28 January 2009.

67. On the basis of the facts established above, the Arbitrator holds that the Club breached its obligations under the Contract, in particular its main obligation to pay to the Player the agreed remuneration. The condition of non-payment of a salary for more than 45 days past the scheduled payment date as stipulated in Article V of the Contract (see *supra* para. 6) has been met in this case. Consequently, also in view of Article 337 para.2 of the Swiss Code of Obligations<sup>4</sup> (hereinafter referred to as "CO") and after having sent numerous warnings to the Club, the Player had valid reasons<sup>5</sup> to exercise his right of early termination of the Contract by letter of 18 February 2009.

### 7.2.2. Consequences of the termination

68. Since the notice of termination terminates the contractual relationship only for the future, and not retroactively, the Club must make all payments which it should have

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<sup>4</sup> "A valid reason is considered to be, in particular, any circumstances under which, if existing, the terminating party can in good faith not be expected to continue the employment relationship". (English translation provided by the Swiss-American Chamber of Commerce)

<sup>5</sup> See ATF 2 February 2001, 4C.240/2000 no. 3 b aa. ATF 5 May 2003, 4C.67/2003/md no. 2; Rémy Wyler, *Droit du travail*, Berne 2002, p. 364 and Pierre Tercier, *Les contrats spéciaux*, Zurich Basel Geneva 2003, no. 3402 p. 496.



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made according to the Contract until the date of termination. As a consequence, the Club has to pay to the Player the amount of USD 130,000 for outstanding salaries.

69. The next question is whether the Club has to pay damages because it was responsible for the early termination of the Contract. The Arbitrator notes that Article V of the Contract explicitly provides that in the event of termination of the Contract by the Player because of delays in salary payments

*“...player shall immediately be entitled to the full salary and shall have no further obligations to the Club.”*

70. This contractual provision is consistent with mandatory Swiss labour law. Moreover, the Arbitrator is of the opinion that the immediate payment of all outstanding amounts under the Contract is equitable in the present case and also in compliance with a consistent line of FAT jurisprudence<sup>6</sup>.
71. With respect to Swiss law, according to Article 337b CO, if the just cause for termination lies in the conduct of one of the parties in breach of contract, then the latter must pay "full compensation" taking into account all claims arising out of the employment relationship. For calculating the compensation due Article 337c para. 2 CO applies *mutatis mutandis*. According to this, the employee's claim for compensation is to be reduced by any amounts *"which he saved as a consequence of the termination of the employment relationship and which he earned or intentionally failed to earn"*

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<sup>6</sup> See FAT decision 0014/08 dated 16 April 2009 van de Hare, Hammink, Glushkov vs Azovmash BC and FAT decision 0021/08 dated 30 April 2009 Varda, Fimic vs. Zalgiris BC.



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*through other work."*<sup>7</sup>

72. Thus, in order to avoid the Player being in a better position as a consequence of the Club's breach than without said breach, any monies which the Player earned because he provided his services elsewhere and any monies he could have reasonably earned in addition thereto must be deducted from the Player's claim for damages. This follows from Art. 337c para. 2 CO and is in line with constant FAT jurisprudence<sup>8</sup>
73. The Arbitrator notes that the Player's remaining salary under the Contract is USD 325,000 (i.e. a salary of USD 65,000 for each of the remaining five months). On the other hand, the Player's salary for the same period of time (February – June 2009) under the Sevilla Contract is USD 150,000.
74. Therefore, the Arbitrator finds that the Player is entitled to USD 175,000 (USD 325,000 – USD 150,000) as compensation for breach of contract by the Club.

### 7.2.3. Agent Fees

75. The agent fees claimed by Claimant 2 have been agreed because of its services which undisputedly led to
- the release of the Player from his previous club (remuneration in the amount of USD 20,000);

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<sup>7</sup> See CAS 2006/A/1180 Galatasaray v/ Ribéry & Olympique de Marseille.



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- the conclusion of the Contract (remuneration in the amount of USD 80,000, payable in two equal instalments on 15 September 2008 and 15 December 2008).

76. The Club failed to pay any of the instalments.

77. When looking at the Contract it is not clear – at first sight – whether the agent fees are owed to Claimant 2 or to Mr. Daniel Servick and Mr. Patrick King personally. However, since both Mr. Servick and Mr. King are representatives (CEO and President) of Pro One Sport Management (Claimant 2) it can be assumed that they acted on Claimant 2's behalf when signing and agreeing to the Contract. Therefore, in the Arbitrator's view Claimant 2 holds the claims arising from Art XIV of the Contract. Furthermore, the Arbitrator notes that the Club, in its various communications with the Claimant 2 between September 2008 and February 2009, did not raise any objections regarding (and implicitly acknowledged) its obligation to pay the above-mentioned amounts to Claimant 2. It merely asked for the postponement of the date of payment of the agent fees due to its financial problems and lack of funding from its sponsors.

78. In addition, in its submissions before the FAT the Club did not take issue with the claim for agent fees.

79. At this point the Arbitrator refers to the considerations of FAT in the matter FAT 0021/08 and specifically to para. 81:

*“The Arbitrator finds that as a principle, the agent fee is due in full because of the*

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<sup>8</sup> See FAT Decision 0024/08 dated 11 May 2009 Sakellariou, Dimitropoulos vs. Avellino BC.



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*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 [...]"*

80. The Arbitrator considers that such principles are applicable also to the matter at hand and, as mentioned above (paras. 69-70) are consistent with Swiss law.
81. Thus, the Arbitrator will take into account the agent fee that Claimant 2 agreed to receive under the Sevilla Contract (USD 15,000) when calculating the amount owed by the Club to Claimant 2.
82. Therefore, the Arbitrator finds that the Club shall pay a total amount of USD 85,000 (USD 20,000 + USD 80,000 – USD 15,000) to Claimant 2.

### **8. Costs**

83. Article 19 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
84. On 29 April 2010 - considering that pursuant to Article 19.2 of the FAT Rules "*the FAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of FAT and the fees and costs of the FAT President and the Arbitrator*", and that "*the fees of the Arbitrator shall be calculated on*



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*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 7,350.00.

85. Considering the Claimants prevailed in their main claim that the Club shall pay their salaries and agent fees under the Contract, 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 Claimants' legal fees and other expenses.
86. Given that the Claimants paid the totality of the advance on costs of EUR 12,000.00 as well as a non-reimbursable handling fee of EUR 3,000.00, the Arbitrator decides that in application of article 19.3 of the FAT Rules:
  - (i) FAT shall reimburse EUR 4,650.00 to the Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the FAT President;
  - (ii) The Club shall pay EUR 7,350.00 to the Claimants, being the difference between the costs advanced by them and the amount they are going to receive in reimbursement from the FAT.

Furthermore, the Arbitrator considers it appropriate to take into account the non-reimbursable fee of EUR 3,000.00 when assessing the expenses incurred by the Claimants in connection with these proceedings. Hence, since the Claimants were neither represented by a legal counsel in the present proceedings nor submitted any further legal expenses, the Arbitrator fixes the contribution towards the Claimants' expenses at EUR 3,000.00.



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### **9. AWARD**

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

- 1. BC Kyiv shall pay Mr. Clay Tucker an amount of USD 305,000.00 for outstanding salaries and compensation for breach of contract.**
- 2. BC Kyiv shall pay Pro One Sports Management Inc. an amount of USD 85,000.00 for agent fees.**
- 3. BC Kyiv shall pay Mr. Clay Tucker and Pro One Sports Management Inc. an amount of EUR 7,350.00 as reimbursement for the advance on costs paid by them to the FAT.**
- 4. BC Kyiv shall pay Mr. Clay Tucker and Pro One Sports Management Inc. an amount of EUR 3,000.00 as a contribution towards their legal fees and expenses.**
- 5. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 3 May 2010

Ulrich Haas  
(Arbitrator)



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### Notice about Appeals Procedure

cf. Article 17 of the FAT Rules

which reads as follows:

#### "17. Appeal

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