Arbitration CAS 2009/A/1854 Viesoji Istaiga Kauno "Zalgirio" Remejas v. Ratko Varda & Obrad Fimic, award of 30 November 2009

Panel: Mr John Faylor (USA), President; Mr François Carrard (Switzerland); Mr András Gurovits (Switzerland)

Basketball
Breach of contract
Calculation of damages ex aequo et bono
Authority of a CAS Panel to award interests even if no specific request was raised before the first instance tribunal
Nature of a players' agent's fee claim against the football club

1. **The measure of damages to the party who was entitled to terminate the contract, taking into consideration fundamental legal principles common to many jurisdictions, is based on the notion of making the injured party "whole". Stated differently, the injured party has to be restored to the same economic situation in which he would have found himself if the events causing the damages had not occurred. At the same time, however, it is a fundamental principle of law that the injured party is obligated to mitigate the damages incurred by crediting the value of any advantage resulting from the contract breach to the amount of the damages demanded.**

2. **CAS panels have authority to award interests on the amounts due, even if no specific request for interest was raised before the first instance tribunal. Pursuant to art. R57 of the CAS Code, the panel has full power to review the facts and the law, and may issue a new decision which replaces the decision challenged. The rate of interest earned on money claims should correspond to the one claimed, where this is inferior to the current statutory rate of interest earned on money claims pending before Swiss courts.**

3. **By its nature, a players' agent's fee claim against the club is not a claim for damages, but rather a claim for collection of an open account. The player's agent's obligation is discharged upon "brokering" the player to the club for a season, when the player passes his medical examination and the agent's invoice is issued to the club.**

Viesoji Istaiga Kauno "Zalgirio" Remegas (the Appellant) is a professional basketball club based in Kaunas, Lithuania. It is a member of the Lithuanian Basketball Federation, which, in turn, is a member of the International Basketball Federation (FIBA) and plays domestically in the Lithuanian Basketball League (*Lietuvos Krepsinio Lyga*) and the Baltic Basketball League. It was the winner of the Lithuanian Championship in the years 2005, 2007 and 2008 and winner of the Baltic Basketball League Championship in 2006 and 2007.

The 1st Respondent, Mr Ratko Varda, is a Serbian national born in 1979. He has played professional basketball in Serbia in the 1996-97 through 2000-01 seasons. He was signed as a free agent by the Detroit Pistons in July 2001 and was traded to the Washington Wizards in September 2002. Since then, he has played professional basketball in Kiev, Ukraine and in Serbia.

The 2nd Respondent, Mr Obrad Fimic, a Polish national, is a FIBA licensed agent who has represented a number of Russian, Serbian and Croatian professional basketball players. Mr. Fimic represented Mr Varda in the negotiation and conclusion of his player's contract with the Appellant.
On or about 19 August 2008, the Appellant and the 1st Respondent entered into a two year contract for the 2008/09 and 2009/10 basketball seasons (the "Contract") which commenced on 27 August 2008. The Contract covered all games of the Lithuanian Basketball League, the ULEB Euroleague Competition and the Baltic League Competition. The Contract also regulated the agent's fee to be paid the 2nd Respondent.

The relevant provisions of the Contract are the following:

> *"Article 1: Employment – Duration*
>
> *[…]*
>
> *The club undertakes to employ the player for the season 2008-09 and 2009-10. The contract shall begin on August 20, 2008 and will end after the last official game of the club for the season 2009-10 (no later than 1st June). The Player has to arrive between the 20th of August and 27th of August, 2008. […]*
>
> *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 EUR 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 player's 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 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".

It is undisputed between the parties that the 1st Respondent arrived in Lithuania on 2 September 2008, whereupon he successfully passed the prescribed medical examination.

On 15 October 2008, the 1st Respondent received a payment of EUR 45,000. This was undisputedly the first and last payment which the 1st Respondent received from the Appellant.

On 3 November 2008, the 2nd Respondent acting on behalf of the 1st Respondent issued an e-mail to the President of the Appellant, Mr. Paulius Motiejunas, which announced the following:

"Dear Paul,

I would like to inform you that due to financial problems of B.C. Zalgiris and the breach of Article 3 of the contract with my client, and your player Ratko Varda, he is no longer obligated to participate in practices or games. […]

Player will 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.

Thank you for your understanding and hoping that you will solve this unpleasant situation soon".

By letter dated 14 November 2008, the 1st Respondent terminated the Contract on the grounds that the Appellant had breached the financial terms of the Contract. The letter stated:

> *"Mr. Ratko Varda was supposed to get paid every 15th day of each month, unfortunately since August Vsl Kauno Zalgirio REMEJAS has provided him with only one salary of 45.000 (forty five thousand) EURO.*
>
> *[…]*
>
> *It has been past 30 (thirty) days, from now on Mr. Ratko Varda according the agreement Article 3A is free to leave the team and sign agreement with any other team worldwide".*

On 25 January 2009, the 1st Respondent, after having issued the Appellant notice of "Termination of the Contract" by letter of his agent dated 14 November 2008, signed a player's contract for the remainder of the current season 2008/09 with the basketball club, BC Khimki Moscow Region. The latter is a member of the Russian Basketball Federation.

The 1st Respondent's new player's contract commenced on the date of signature. BC Khimki agreed to pay the 1st Respondent "the net amount of 200,000 (two hundred thousand) USD" for the duration of the season.

The FIBA Arbitral Tribunal (FAT) decided the dispute by a sole arbitrator, Mr. Stephan Netzle. Applying the principle *ex aequo et bono,* the sole arbitrator ruled that

> *"On 15 October 2008, [the Appellant] effectuated its first (and only) payment [to the 1st Respondent] in the amount of EUR 45,000. 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".*

The sole arbitrator further held that the Appellant was not entitled to withhold payments on the grounds of default or non-performance of the 1st Respondent.

After excluding the possibility that the Respondents may have acted in bad faith, the sole arbitrator concluded that

> *"… after an additional 15 days of delay, i.e. on 14 November 2008, Claimant 1* [read: 1st Respondent] *was free to leave and the Respondent* [read: Appellant] *had to pay all salaries (for the whole season) and issue a letter of clearance".*

In consequence of the established breach of contract, the sole arbitrator held that the Respondents were entitled to damages. The measure of the damages is *"the sum which would restore the injured party into the economic position that he or she expected from performance of the contract".* The injured party is, however, obliged to mitigate damages and any advantages received as a result of the breach (e.g. salaries otherwise received) must be taken into account.

On the basis of the above, the sole arbitrator granted the 1st Respondent in the FAT Award of 30 April 2009 the sum of EUR 254,374.50.

This amount represented the balance of the contractually-agreed salary of EUR 450,000 for the 2008/09 season after subtraction of the amount of EUR 45,000 which was paid to the 1st Respondent on 15 October 2008 and minus USD 200,000, the latter amount representing the total salary compensation due under the BC Khimki contract. In converting the USD 200,000 amount into EUR, the sole arbitrator applied the rate of exchange quoted on 7 April 2009 and arrived at a Euro amount of EUR 150,625.50.

The sole arbitrator awarded the 2nd Respondent the amount of EUR 29,937.50 as his agent's fee. Citing the principle of *ex aequo et bono*, the arbitrator held that, because the 1st Respondent left the club before the end of the contractual term and concluded a new agreement with BC Khimki, the agent's fee of USD 20,000 earned from the Russian club must be credited to the amount otherwise due from the Appellant.

The Appellant filed its Statement of Appeal on 25 May 2009. It was followed by its Appeal Brief on 05 June 2009.

In essence, Appellant requests the CAS to annul the decision of the FAT, and

> *"… to refer the case back to the previous instance (the FAT);*
>
> *or, if the CAS deems it appropriate, to replace the Decision of the FAT and issue a new decision, which:*
>
> *(i) confirms that FAT failed to adequately apply the law and assess facts of the case not taking into account the breaches by the Respondents;*
>
> *(ii) specifies the level of compensation for which the First and Second Respondents should be liable to the Appellant for unjust termination of [the] contract;*
>
> *(iii) order that the Respondents pay the amount so assessed; and*
>
> *(iv) orders the Respondents to pay costs before the FAT and CAS in an amount to be assessed by the CAS".*

The 1st and 2nd Respondents filed their Answer to the Appellants Appeal Brief on 26 June 2009.

The Respondents request from CAS the following relief:

> *"[to] uphold the Award given by the FAT;*
>
> *or, if the Court deems it appropriate, [to] replace the Decision and [to] issue a new decision:*
>
> *(i) ordering the Appellant to pay to the First Respondent EUR 405,000.00 plus an interest of 4% on monthly basis as from 15th of October 2008,*
>
> *(ii) ordering the Appellant to pay to the Second Respondent EUR 45,000.00 plus an interest of 4% on monthly basis as from 2nd of September 2008,*
>
> *(iii) ordering the Appellant to pay to the Respondents EUR 13,000.00 as a full reimbursement of costs of [the] proceedings before FAT.*
>
> *[to] order the Appellant to cover all the costs of this Appeal Procedure".*

In addition to the above, the Respondents, without further explanation or evidence, request that CAS award them

> *"… additional financial compensation to [the] First and Second Respondent considering all moral, physical stress that [the] First and Second Respondents had. Also that under consideration [of the] facts that … market value [of the 1st Respondent] will not be 450,000 EURO following 2009-2010 season due to this year. We request that First Respondent receives additional compensation of two salaries in total of 90,000 EURO from 2009-2010 season, and Second Respondent additional 45,000EURO for second season 2009-2010".*

LAW

CAS Jurisdiction

1. The jurisdiction of the CAS to act as an appeal body is based on art. R47 of the Code of Sports-related Arbitration in the version in force as of January 2004 (the "CAS Code") which provides that:

   "A party may appeal from the decision of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body".

2. Article 17 of the FAT Rules bearing the title "Appeal" reads as follows:

   "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".

3. Article 10 ("Disputes") of the Contract also confirms that *"Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland".*

4. In accordance with the above, the jurisdiction of the CAS has been explicitly recognized by the parties in the Order of Procedure which they respectively signed, the Appellant on 21 September 2009, the 1st Respondent on 16 September 2009 and the 2nd Respondent on 7 September 2009.

5. The CAS therefore has jurisdiction to decide this dispute.

Applicable Law

6. Art. R58 of the CAS Code deals with the issue of the "Law Applicable" in appeal proceedings before the CAS as follows:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. …".

7. The provisions of Article 17 of the FAT Rules, which are quoted above, have been accepted by the Appellant by virtue of its membership in FIBA. Pursuant to Article 17, this CAS Panel is charged by the explicit wording of the provision to decide the appeal *ex aequo et bono* and in accordance with the CAS Code, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure.

8. Notwithstanding the clear language of Article 17 of the FAT Rules, the parties have expressly accepted the application of the principle *ex aequo et bono* in Pt. 7 of the Order of Procedure.

9. Article 10 ("Disputes") of the Contract does not contradict or otherwise derogate application of this principle. Article 10 indirectly refers to application of Article 17 of the FAT Rules in the following:

"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".

10. Moveover, the Panel has not overlooked that Article 10 ("Disputes") of the Contract mandates that "the arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PILA) *"However, the Panel finds no provision of Chapter 12 PILA which conflicts with the application of the principle ex aequo et bono".*

11. To the contrary, Article 187 (1) PILA of Swiss law provides that an arbitral tribunal chosen by the parties must decide the dispute according to the rules of law chosen by the parties. That choice has already been made by the parties in their acceptance of Article 17 of the FAT Rules and in Pt. 7 of the Order of Procedure.

12. This conclusion is also confirmed by the provisions of Article 187 (2) PILA which expressly provide that *"the parties may authorize the arbitral tribunal to decide ex aequo et bono"*. Such an authorization has taken place in FIBA's adoption of Article 17 of the FAT Rules and in the Appellant's recognition of the FAT Rules.

13. The Panel therefore rejects the argument raised by the Appellant that the decision to apply the principle *ex aequo et bono* in the proceedings before the FAT was made "without the Appellant's consent" and that the FAT should have applied Lithuanian law.

14. The Panel will therefore decide this dispute on the principle *ex aequo et bono* pursuant to Article 17 of the FAT Rules.

Admissibility of the Submissions and Procedure

15. Based on the uncontested statement of the parties, the decision of the FAT dated 30 April 2008 was notified to the parties on 5 May 2009.

16. Likewise uncontested by the Respondents is the date of submission of the Appellant's Statement of Appeal on 25 May 2008. The Statement was therefore received by the CAS within the 21 day deadline set out in Article 17 of the FAT Rules.

17. The Appeal Brief was submitted by the Appellant on 5 June 2008, i.e., within the 10 day deadline prescribed in art. R51 of the CAS Code. Both the Statement of Appeal and the Appeal brief are therefore admissible.

18. The Respondents' joint Answer to the Appeal Brief was submitted on 26 June 2009, i.e., within the 20 day deadline prescribed in art. R55 of the CAS Code.

19. In light of the Respondents modified requests for relief in their joint Answer Brief, the Panel granted the Appellant by letter dated 18 August 2009 a ten day period within which to submit a supplemental brief to address specifically the issues of "additional financial compensation", the alleged loss of "market value" and Respondent's request for interest.

20. Claiming that the Appellant did not receive the CAS letter of 18 August 2009, the Respondent requested by letter dated 7 September 2009 an additional 10 day period to submit a supplemental brief. The Respondents objected to the requested extension.

21. By letter dated 9 September 2009, the CAS Panel granted an extension of 5 days from the date of receipt of the letter for the submission of the supplemental brief from the Appellant. The Appellant filed its supplemental brief on 14 September within the 5 day deadline.

22. In its letter of 18 August 2009, the parties were informed by CAS that following receipt of the Appellant's supplemental brief, it considered that it was sufficiently informed regarding the subject matter of this dispute in order to render a decision (pursuant to Article R57 of the CAS Code) without an oral hearing.

23. In their acceptance of the Order of Procedure, the parties have confirmed their agreement that the Panel may decide this matter based on the parties' written submissions. In accordance therewith, the Panel has decided to render this final decision without the holding of a hearing.

The Merits of the Appeal

A. Appellant's breach of the Contract; non-payment of amounts due to the Respondents

24. The Panel has established on the basis of the undisputed facts of this case that the Appellant made its first and only payment of EUR 45,000 to the 1st Respondent on 15 October 2008. The payment due to the 1st Respondent upon successful completion of his medical examination in September was denied.

25. The 2nd Respondent did not receive any payment of the EUR 45,000 due to him as agent's fee for the 2008/09 season pursuant to Article 11 of the Contract.

26. The Appellant would have the Panel believe that the 1st salary payment of EUR 45,000 was withheld on the grounds of the 1st Respondent's alleged late arrival in Lithuania on 2 September 2008 and other alleged breaches of the Contract which followed.

27. The Panel views the monthly payment schedule contained in Article 3 A of the Contract as constituting a set of fixed payment dates, the passing of which without payment and absent any grounds justifying non-payment automatically places the Appellant in default. The consequence of such default and the remedies agreed between the parties are set out in the last sub-paragraph of Article 3 A:

"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 service 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".

28. The Panel reads the language of Article 3 A a) (set out at Pt 2.2 above) as requiring that the medical exam take place within 7 days after the 1st Respondent's arrival at the club and not as requiring payment within 7 days after successful completion of the examination.

29. As a consequence, and barring any grounds to withhold payment, the Appellant placed itself in default by refusing to pay the 1st salary amount following the 1st Respondent's successful medical examination. An additional demand of payment from the Respondents was not required.

30. The consequences of this default are clearly set out in the above-quoted provision of Article 3 A and leave no room for interpretation: After the lapse of 15 days from the agreed (fixed) date of payment, the 1st Respondent, acting "under his own wish" (meaning at the 1st Respondent's own discretion), was no longer obligated to participate in practices or games. Upon expiration of "15 additional days", the 1st Respondent was entitled to cancel the Contract ("free to leave") with the Appellant being obligated to pay him "all salaries" for the whole season and to issue a "letter of clearance" for the current season.

31. Based upon the above, and not knowing the exact date of his successfully passing his medical examination, but assuming (in the absence of contrary pleadings of the parties) that the medical examination took place by no later than 9 September (within 7 days following his arrival on 2

September), the Panel concludes that the 1st Respondent was entitled to refuse participation in both practice and in games already in late September.

32. The "additional 15 day period" therefore commenced to run immediately upon expiration of the first 15 day period and had already expired by the end of October. The timely payment of the monthly salary due on 15 October 2008 did not have the effect of curing the Appellant's default with the 1st payment.

33. The Panel does not share the interpretation of the Appellant that the "additional 15 day period" began to run upon receipt of the 2nd Respondent's letter of 3 November 2008. In that letter, the 2nd Respondent announced that the 1st Respondent, acting "under his own wish", was no longer obligated to participate in practices or games.

34. Upon receipt of this letter, the Appellant was placed on notice that the Respondents considered the Appellant to be in default with its payment obligations and would avail themselves of their contractual remedies as set out in Article 3 A (last sub-paragraph) quoted above in Pt 27.

35. As reflected in the letter of 3 November 2008, upon the Appellant's failure to make payment of the initial amount due the Respondents (*"it has been past 30 (thirty) days …"*), the 2nd Respondent, acting as agent for the 1st Respondent, was entitled to issue the "Termination of the Contract" by letter of 14 November 2008.

B. Was the Appellant justified to refuse the first payment of EUR 45,000 on the grounds that the 1st Respondent had not performed or otherwise himself breached the Contract?

36. The Respondents may be barred from raising their claims on the grounds that they themselves were guilty of malfeasance in the performance of their Contract duties. Such a breach would provide the Appellant a right to withhold payment until the breach was remedied or to credit such payment to any damages caused by the Respondents' breach.

a) The 1st Respondent's late arrival at the club:

37. Although the Panel notes that Article 1 of the Contract uses the term *"... has to arrive between the 20th of August and 27th August, 2008"*, it does not share the view of the Appellant that the parties agreed that arrival within this time frame was *"of the essence"*.

38. The term "of essence" in describing the nature of the 1st Respondent's arrival obligation is first used in the Appellant's Appeal Brief to CAS. The Panel finds no mention of this term in the Contract itself, and if the "(100%) GUARANTEE" provided in Article 1 (last paragraph) of the Contract is to be understood as an implied guarantee of the 1st Respondent's timely arrival, it is noteworthy that no clearer and louder protest of the guarantee violation was raised in the days following 2 September 2008.

39. In this regard, the Panel is missing any hint or representation of an express oral or written notice given by the Appellant that the 1st Respondent's late arrival constituted a grievous violation of a contract obligation justifying non-payment of the first amount of EUR 45,000 in compensation of the damages claimed. If the Appellant considered the 1st Respondent to be in default and if a valuable sponsorship was lost, why did it not expressly protest this malfeasance immediately to the Respondents? There is no representation in the submissions of the Appellant that such a protest or notice took place.

40. The Respondents' defence against the charge of "late arrival" cites specifically the Appellant's lack of protest or warning. This, in turn, was specifically referred to in the FAT decision. The Respondents state in their Answer Brief that there were *"no issues mentioned by [the] team's management"* regarding the fact of the 1st Respondents late arrival or the alleged losses suffered by the Appellant as a result thereof".

41. In the same manner, the Panel notes that the Appellant has not specifically rebutted or otherwise explained in its Appeal Brief the statement of the 1st Respondent in the FAT proceeding that the Appellant purchased his air ticket for the flight to Lithuania on 2 September 2008.

42. Even if the 1st Respondent's late arrival can be deemed, retroactively, to constitute a breach of the Contract by the 1st Respondent, the fact that the Appellant failed to protest the contract violation to the Respondents in a timely manner, to inform them that damages had been incurred and to ground the withholding of the first payment by reference to this contract violation, – especially after receipt of the 2nd Respondent's letters of 03 November and 14 November 2008 –, places the credibility of the Appellant's pleadings regarding the consequences of the 1st Respondent's late arrival in severe doubt.

(b) Faking an injury and 1st Respondent's Refusal to Play in the Euroleague Game in Poland on 5 November 2008:

43. The Panel finds no evidence that the 1st Respondent faked an injury on 16 October 2008. To the contrary, the Appellant's own witness, the physiotherapist, Mr Robertas Narkas, confirms in his written statement of 04 June 2009 that *"Mr Ratko Varda received an injury during the Appellant's game in Riga"* on 16 October 2008. He continues:

"He was taken to the local hospital for medical inspection. After the inspection, the Player was suggested to rest his shoulder and to put an immobilization on it. … In Kaunas, the player went through a more thorough medical inspection. In result, the player was recommended to rest for 10 days. He, however, refused to do so and decided to play and practice".

44. With regard to the injury which he allegedly sustained during the game against Panathinaikos Athens on 22nd October 2008, Mr Narkas confirms that *"the player got hit on the arm and did not play anymore at the game".* He further states that he could not observe movement of the arm which would indicate an injury (*"His moves did not show any serious pain"*). Not even Mr. Narkas claims,

however, that he medically examined the 1st Respondent. Observing the position of the 1st Respondent on the flight from Athens does not qualify as a medical examination.

45. Hence, the issue is one of severity of the injury allegedly sustained and whether the 1st Respondent's refusal to play in the Euroleague game in Poland on 5 November 2008 was justified and, if not justified, whether a contract violation took place.

46. Although the severity of the 1st Respondent's injuries on 16 and 22 October 2008 may leave the question in doubt whether he could have played in the Euroleague game on 5 November 2008, the Panel is of the opinion that the 1st Respondent's refusal to play cannot be deemed to be a breach of his contractual duties

47. By his letter of 3 November 2008, the 2nd Respondent, acting on behalf of the 1st Respondent, cited the "financial problems" of the club and quoted Article 3 A of the Contract. In so doing, the Respondents placed the Appellant on notice that they deemed the Appellant to be in breach. The consequences are clearly stated:

"Player will 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".

48. Moreover, in its written submissions to the CAS, the Appellant does not contest the finding of the FAT sole arbitrator that the club raised no protest when the 1st Respondent refused to play in the Euroleague game on 5 November 2008. The FAT sole arbitrator pointed out clearly in his decision:

"He [the 1st Respondent] was recommended to practice on his own, but again no warning or the like was issued by the Respondent [read: Appellant]".

49. The Appellant's undisputed failure to protest the 1st Respondent's refusal to play in the game on 5 November indicates to the Panel that the Appellant either excused the 1st Respondent from having to play due to his injury or the Appellant understood only too well that the 1st Respondent was exercising his contractual right (*"under his own wish"*) to refuse to play as announced in his agent's letter of 3 November 2008. The Panel tends to believe the latter.

50. After all of the above, the Panel finds no grounds upon which the 1st Respondent can be held to have failed to perform or to violate the Contract by refusing to play on 5 November 2008.

(c) Refusal to Appear for the Medical Examination on 8 November 2008

51. It remains uncontested that the 1st Respondent notified the Appellant on 8 November 2008, the date on which an examination of his arm injury had been scheduled, that he was recovered and did not need any medical examination. Moreover, it is undisputed that the 1st Respondent played in the games on 9, 11 and 15 November 2008.

52. The Panel holds that the 1st Respondent's decision to forego the medical examination does not constitute a contract breach for the reasons set out at Pt. 9.2.11 above. The Appellant was

placed on notice by the 2nd Respondent's letter of 3 November 2008 that the *"Player will practice or play under his own wish"* and would return to *"regular team schedule"* at such time as the Appellant paid its outstanding debt.

53. At this point in time, the 1st Respondent had not yet exercised his termination right. His first and primary motive was to place pressure on his employer (the Appellant) to pay the still outstanding salary due him from September. There can be no question, however, that he deemed the Appellant to be in breach of the Contract.

54. Moreover, the Panel is unable to find that the 1st Respondent's capricious behaviour – playing in this game, but not in another, participating in this practice session, but not in another – constituted a violation of good faith between contracting parties. The Appellant was in breach and the 1st Respondent announced in his agent's letter of 3 November 2008 how he would conduct himself.

55. Lastly, the Appellant never protested the 1st Respondent's playing in the games on 9, 11 and 15 November 2008. If the Appellant considered the 1st Respondent to be in breach of the Contract on 8 November by having refused to submit to medical examination, it would have been only consequential to prohibit the 1st Respondent from playing in these games in order to prevent possible further injury to him and to avoid potential liability of the club. The Panathinaikos Athens game less than two weeks before was still fresh in the Appellant's memory. Indeed, the argument can be made that the Appellant breached its "good faith" duty to safeguard the health and safety of the athlete and to avoid potential liability of the club by allowing the 1st Respondent to play on these dates.

56. Conclusion. On the basis of the above, the Panel concludes that the Appellant's non-payment of the first salary amount of EUR 45,000 following the 1st Respondent's successful medical examination in September constituted a breach of the Contract which permitted the 1st Respondent to exercise the rights set out in Article 3 A of the Contract. The Appellant's claims that the 1st Respondent further breached his duties by *"faking an injury"*, refusing to play in the Euroleague Game on 5 November and by not appearing for the medical examination on 8 November 2008 are without merit.

C. Consequence of Appellant's Breach; Payment of Damages

(a) The Calculation of the 1st Respondent's Damages

57. As a consequence of the Appellant's breach in refusing to pay the 1st Respondent his initial salary amount of EUR 45,000, the 1st Respondent was entitled to terminate the Contract by letter of his agent on 14 November 2008 and to demand damages.

58. The measure of damages to which the 1st Respondent is entitled, taking into consideration fundamental legal principles common to many jurisdictions, is based on the notion of making the injured party "whole". Stated differently, and reflecting the concept applied by the sole

arbitrator of the FAT, the 1st Respondent was to be restored to the same economic situation in which he would have found himself if the events causing the damages had not occurred.

59. At the same time, however, it is a fundamental principle of law that the injured party is obligated to mitigate the damages incurred by crediting the value of any advantage resulting from the contract breach to the amount of the damages demanded.

60. Having said the above, the Contract provides several guidelines for calculating the amount of damages. Firstly, the Contract makes clear in Article 1 (last paragraph) that the obligations of the parties *"are fully (100%) GUARANTEED by both parties for the entire contract period"*. This would indicate that, in the event of a contract breach resulting in damages to either of the parties, the injured party would be entitled to demand the entire benefit of the Contract, meaning, in the case of the 1st Respondent, the total of all salaries due him for both playing seasons, i.e., EUR 900,000.

61. However, Article 3 A (last paragraph) limits the recovery in the event of termination prior to the agreed expiration date of the Contract to the total of the salaries due in the current playing season. This provision states that

"… the club has to pay all salaries mentioned above (for the whole season) and issue a letter of clearance".

62. The Panel interprets the term "for the whole season" to mean the current basketball season in which the termination occurs, i.e., the 2008/09 playing season. Moreover, the Panel reads the term "all salaries" to exclude any possible boni, prize monies, or other forms of variable remuneration. In keeping with this limiting language, the 1st Respondent has restricted his request for relief both before the FAT and before the CAS to the salary amounts due in the 2008/09 playing season. These total EUR 450,000.

63. Accordingly, the Panel rejects the Appellant's argument that application of Article 3 A (last paragraph) would result in *"a disproportionate repartition of the rights of [the] parties to the contract to the strong detriment of the Appellant"*. The measure of damages is defined in Article 1 (*"This contract is fully (100%) GUARANTEED")* and Article 3 A (last paragraph) *("… all salaries mentioned above (for the whole season)"*).

64. To be deducted from the total salaries due to the 1st Respondent in the amount of EUR 450,000 is the one and only payment made to him by the Appellant on 15 October 2009 in the amount of EUR 45,000. Although the 1st Respondent excluded the deduction of this payment in his request for relief before the FAT, he has now included it in his request on appeal before CAS.

65. Upon termination, the 1st Respondent sought an alternative playing opportunity to compensate for his lost income. This search was rewarded when the 1st Respondent entered into a player's contract with the Moscow club BC Khimki on 25 January 2009 which provided him a total salary for the remaining 2008/09 season of USD 200,000.

66. The Panel confirms that the BC Khimki contract closely tracks the provisions of the Contract and, with the exception of its one year term and amount of remuneration, is a comparable, if not equivalent agreement.

67. In quantifying the advantages which derived from the BC Khimki contract, the Panel confirms the conclusion of the sole arbitrator that the entire amount of the remuneration agreed (USD 200,000) in the BC Khimki contract must be deducted from the 1st Respondent's requested damages.

68. Although the 1st Respondent claims in his Answer Brief to have received only USD 90,711 from the total USD 200,000 guaranteed to him by BC Khimki for the season which ended in May 2009, he has not requested the Panel to increase his damages by the amount of the shortfall, although the amount of the shortfall must have been known to him when he filed the Answer. The last instalment of his total remuneration was due on 20 May 2009. To the contrary, the 1st Respondent states in the Answer Brief that his *"actual earnings […] cannot be a subject matter of this case"*.

69. The Appellant does not address this issue in its Appeal Brief, but requests only that the Respondents be ordered *"to present certificates of relevant national authorities (tax and/or social security) proving the First Respondent's earnings from Khimki basketball club"*.

70. In light of the 1st Respondents failure to claim and prove the amount of any shortfall from his BC Khimki salaries, the Panel confirms the grounds given by the sole arbitrator in Pt. 77 of the FAT Award: both the Contract with the Appellant and the contract with BC Khimki were *"fully (100%) GUARANTEED"*. Therefore, the whole net salary of USD 200,000 must be taken into account when calculating the compensation.

71. In conclusion, the Panel confirms the sole arbitrator's finding in this regard and holds that the damages due to the 1st Respondent are the amount of EUR 254,374.50 (= EUR 450,000 less EUR 45,000 less EUR 150,625.50). The Panel recognizes the application of the exchange rate quoted on 7 April 2009 and notes that neither of the parties have objected to application of this conversion rate.

(b) The 1st Respondent's amended Request for Relief before the CAS

72. In his request for relief before the FAT, the 1st Respondent did not request the payment of interest. This was duly noted in the decision of the sole arbitrator.

73. In the Respondents' Answer Brief, the Respondents now request interest on the respective amounts due at the rate of 4% commencing as of the due date of the payments which Respondents' place at 15 October 2008, respectively 2 September 2008. The Respondents provide no explanation of how they have chosen the rate of 4%.

74. The Panel has authority to award the 1st Respondent interest on the amount due to him, even if no specific request for interest was raised before the FAT. Pursuant to art. R57 of the CAS Code, *"the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"*.

75. Because the request for interest was apparently overlooked in the initial proceedings before the FAT, interest payments should commence not retroactively to 15 October 2008, as requested by the 1st Respondent, but rather to the filing date of the Respondents' Answer Brief on 26 June 2009. Although the current statutory rate of interest earned on money claims pending before Swiss courts of law is 5%, the Panel awards interest at the rate 4% as claimed by the Respondents.

76. The Panel rejects the 1st Respondent's claim for *"additional financial compensation"* for the *"moral, physical stress"* which they allege to have experienced as a result of the untimely termination. The Respondents' claims for immaterial damages are unsubstantiated and not supported by any evidence.

77. The same applies to the 1st Respondent's additional claim for compensation of lost "market value". If the 1st Respondent is unable to demand salary compensation from other clubs in the amount of EUR 450,000 in the upcoming 2010/11 season, he has neither shown, much less proven, that the amount and the grounds for the loss of value lie in the early termination of the Contract and not in the general economic crisis prevailing in the world. These claims are quantified at EUR 90,000 for the 1st Respondent (two months' salaries) and EUR 45,000 for the 2nd Respondent. The Panel rejects these claims.

(c) Damages owed to the 2nd Respondent

78. Although the 2nd Respondent was not a party either to the Contract with the Appellant or to the player's contract with BC Khimik, he assumed the position of a 3rd party beneficiary. As such, the terms and conditions of fee payments owed to him are subject to the specific provisions of Article 11 (Agents Fee) of the Contract and to any other general provisions applicable to both of the Respondents in the Contract.

79. The sole arbitrator awarded the 2nd Respondent the amount of EUR 29,937.50 for the 2008/09 season which represents the difference between the agreed fee of EUR 45,000 after deduction of EUR 15,062.50 (=USD 20,000 at the exchange rate quoted on 7 April 2009). The amount of USD 20,000 is the agent's fee earned by the 2nd Respondent under the player's contract with BC Khimki.

80. The Panel does not share the view of the sole arbitrator that the USD 20,000 fee earned at BC Khimki must be deducted from the fee earned under the player's Contract with the Appellant for the 2008/09 season.

81. By its nature, the 2nd Respondent's fee claim against the Appellant for 2008/09 is not a claim for damages, but rather a claim for collection of an open account. Upon "brokering" the 1st Respondent to the Appellant for the 2008/09 season, the agent's obligation to perform was discharged when the player passed his medical examination and the agent's invoice was issued to the Appellant.

82. The 2nd Respondent's request for relief, namely the payment of his entire fee for the 2008/09 season, is, therefore, in the view of the Panel, to be granted in the full amount of EUR 45,000.

83. Damages claimed by the 2nd Respondent in the form of *"additional financial compensation"* for *"moral, physical stress"* are denied for the reasons set forth in para. 76 above.

The Court of Arbitration for Sport rules:

1. The Appeal of Viesoji Istaiga Kauno "Zalgirio" Remejas against the decision of the FIBA Arbitral Tribunal (FAT) of 30 April 2009 is dismissed.

2. The counterclaims filed by Ratko Varda and Obrad Fimic are partially upheld.

3. The Panel confirms the decision of FAT that Viesoji Istaiga Kauno "Zalgirio" Remejas shall pay Ratko Varda EUR 254,374.50 in damages for breach of contract. In addition, Viesoji Istaiga Kauno "Zalgirio" Remejas is ordered to pay Ratko Varda four percent (4%) interest on the damages amount of EUR 254,374.50 commencing as of 26 June 2009.

4. The Panel amends the decision of FAT with regard to the agent fee awarded to Obrad Fimic and orders Viesoji Istaiga Kauno "Zalgirio" Remejas to pay Obrad Fimic EUR 45,000, in addition to four percent (4%) interest commencing as of 26 June 2009.

5. The Panel confirms the decision of FAT that Viesoji Istaiga Kauno "Zalgirio" Remejas shall pay Ratko Varda and Obrad Fimic EUR 4,560 as a reimbursement towards the costs of the FAT proceedings.

6. (…).

7. (…).

8. All further claims of the parties are denied.