



The

## **FIVB TRIBUNAL**

herewith issues the following

### **DECISION**

on the Request for Review of CF 26/2015 filed by

**Fakel Novy Urengoy (“Applicant”)**

represented by Mr. Nikolay V. Kapranov,  
Director, Fakel Novy Urengoy

Nadymkaya Str., 7b, Novy Urengoy, Yamal-Nenets Autonomous Area, Russia 629300

vs.

**Mr. Mauricio Borges (“Respondent”)**

represented by his Agent, Mr. Georges Matijasevic,  
LZ Sport Pro

148 rue Castagnary 75015 Paris, France

## **1. The Parties**

1. The Applicant is a professional volleyball club with its legal seat in Novy Urengoy, Russia.
2. The Respondent is a professional volleyball player from Brazil.

## **2. The FIVB Tribunal Panel**

3. Article 1.5 of the FIVB Tribunal Regulations (“Regulations”) provides as follows:

*“1.5 Cases before the FIVB Tribunal shall be heard by the Chairperson and two (2) other members, appointed by the Chairperson. If one or more of the members is unavailable or ineligible due to reasons of conflict (see Article 9) the Chairperson shall appoint another member. However, in the event that a case only involves parties from the same Confederation, that case shall be heard by the judge from that Confederation as a single judge unless a hearing by a three (3)-member FIVB Tribunal is requested by one of the parties. If that member has the same nationality as one of the parties, is unavailable or ineligible due to reasons of conflict (see Article 9) he/she shall be replaced by the substitute member from the same Confederation. If both the member and the substitute member from the Confederation in question have the nationality of one of the parties, the FIVB President shall appoint ad-hoc a neutral judge from the same Confederation provided that he/she possesses the qualifications set out in Article 1.3 above”.*

4. Because the parties come from different confederations, this Request for Review will be heard by a Panel appointed by the Chairman. Because the Chairman of the FIVB Tribunal was no longer sitting on the FIVB Tribunal when this case was initiated, the Vice Chairman of the FIVB Tribunal, Mr. Liu Chi from China, is acting Chairman (hereinafter “Chairman”) on the present case.
5. On 11 November 2015, the Chairman appointed Mr. Piotr Stolarski from Poland and Lic. Carlos J. Beltran from Puerto Rico as members of the FIVB Tribunal Panel (hereinafter the “Panel”) for the present case.

## **3. Facts and Proceedings**

### **3.1 Background Facts**

6. On 21 March 2014, the Applicant and the Respondent entered into a contract in which the Respondent agreed to play for the Applicant’s team for the 2014/2015 season in exchange for a salary of EUR 360,000 net, amongst other benefits (hereinafter the “Contract”).

7. The Contract contained the following relevant provisions:

*“1. This contract starts from SEPTEMBER 1<sup>st</sup>, 2014 and ends on MAY 15, 2015, or at the date of the last match of the last game that the club is participating in for the season 2014-2015. The player is free to leave 1 week after the end of the last official game of the season (regular season or playoffs). This contract will be extended for the 2015-2016 season automatically under the same conditions, unless the team or the player cancels the 2<sup>nd</sup> year of contract by sending an official notification to the other party before April 1, 2015. Any party (player or club) are free to cancel the 2<sup>nd</sup> year of contract before April 1, 2015 and this will be done without penalties and without liabilities towards the other party.*

*2. Both parties agreed upon the following: The total value of this contract is EURO 360,000 (three hundred and sixty thousand euros) to be paid directly to the player as PLAYERS SALARY. It is understood that agency fees and federation fee will be agreed upon in a later agreement*

*3. The first party will pay the second party the amount of 360,000 EUR in the following way:*

- **40 000 EURO at the contract signature** (when player arrives in the club and passes the medical examination).
- **320 000 EURO in 8 equal rates of 40 000 EUR each**
  - October 15: 40 000 EUR
  - November 15: 40 000 EUR
  - December 15: 40 000 EUR
  - January 15: 40 000 EUR
  - February 15: 40 000 EUR
  - March 15: 40 000 EUR
  - April 15: 40 000 EUR
  - May 15: 40 000 EUR

*All taxes on the salary payments (local, federal and revenue taxes) are to be covered by the club.*

[...]” (sic)

8. There are no provisions in the Contract discussing termination.

9. On 6 September 2014, the Applicant allegedly sent the following letter, which the Respondent claims that he never received:

“

**Dear Sirs!**

*Due to urgent information received today about a sudden sharp decrease in funding*

*from the sponsors of the Club we have to offer you to change the terms of the contract with Mr. Mauricio Borges, born on February 4<sup>th</sup>, 1989.*

*The new proposed contract amount may not exceed Euro 50 000 per year.*

*We appreciate the merits of the sportsman and want very much that he plays for us, but are sorry to announce that there is no other way out of this situation today for the Club.*

*Please let us know as soon as possible about your decision.” (sic)*

10. On 12 September 2014, the Club sent the following letter to the Brazilian Volleyball Federation (Confederação Brasileira de Voleibol – “CBV”):

*“FIVB determined that the volleyball club “Fakel” (Novy Urengoy) is to make compensation to the club Woori Card Volley Ball, according to the decision CF 16/2014.*

*Due to a difficult financial situation we will be able to pay the debt earlier than 1st February 2015.*

*Due to the non-performance of this decision, FIVB and CEV have forbidden to issue new ITC until 1st October and suspended those which had been issued earlier.*

*In view of this situation we consider it necessary to inform you that “Fakel can’t afford to have the player Mauricio Borges and we are ready to pay 40 000 € (what makes a monthly salary) as a compensation for the early termination of the contract.”*

11. On 15 September 2014, the Player became aware of the Club’s letter to CBV.
12. On 5 November 2014, the Player signed a contract with the Brazilian club, Sesi, in which the Player offered his playing services and image rights in exchange for a compensation totaling, according to the Agent, approximately EUR 80,000.

### **3.2 The Proceedings before the FIVB Tribunal**

13. On 30 June 2015, the FIVB issued a decision in the present manner in accordance with Article 45.11 of the FIVB Sports Regulations (hereinafter the “Decision”) ruling that the Applicant owed the Respondent the amounts of EUR 240,000 net and CHF 500, which the Applicant was ordered to pay by 30 July 2015. The Applicant was notified of the Decision on 1 July 2015.
14. On 13 July 2015, the Applicant filed a letter to the FIVB stating, amongst other things, its intention to appeal the Decision and requesting the FIVB’s bank account information so that it could pay the required handling fee.

15. On 30 July 2015, the FIVB Tribunal acknowledged receipt of the Applicant's letter and requested that the Applicant file a complete Request for Review and pay the handling fee by no later than 10 August 2015. In that letter, the FIVB Tribunal provided the Applicant with the relevant bank account information so that it could pay the handling fee.
16. On 10 August 2015, the Applicant filed its complete Request for Review and also paid the handling fee.
17. On 20 August 2015, the FIVB Tribunal acknowledged receipt of the Request for Review and invited the Respondent to submit his Answer by no later than 4 September 2015.
18. On 24 August 2015, the Applicant made an additional unsolicited submission with accompanying documentation.
19. On 3 September 2015, the Respondent submitted his Answer with accompanying documentation.
20. On 17 September 2015, the FIVB Tribunal acknowledged receipt of the Respondent's Answer as well as the additional submission made by the Applicant. The FIVB Tribunal invited the Player to submit his Answer on the Applicant's additional submission by no later than 30 September 2015.
21. On 25 September 2015, the Applicant submitted another unsolicited submission with accompanying documentation.
22. On 30 September 2015, the Respondent submitted its Answer to the Applicant's unsolicited submissions dated 3 September 2015 and 25 September 2015 respectively.
23. On 1 October 2015, the FIVB Tribunal acknowledged receipt of the Respondent's submission dated 30 September 2015 and stated that no additional submissions would be admitted unless otherwise prompted by the FIVB Tribunal.

#### **4. The Parties' Submissions**

24. The following section provides a brief summary of the Parties' submissions and does not purport to include every contention put forth by the Parties. However, the Panel has thoroughly considered all of the evidence and arguments submitted by the Parties, even if no

specific or detailed reference has been made to those arguments in this section.

#### **4.1 The Applicant's Request for Review**

25. In essence, the Applicant contended that the Contract was voided because the Player did not undergo a medical examination in Russia. In particular, the term of the Contract started on 1 September 2014 and ended on 15 May 2015 or the day of the Club's last match during the 2014/15 season. Additionally, the language of the Contract regarding the first salary instalment was subject to the Respondent passing a medical examination.
26. Under the principle of *pacta sunt servanda*, which the FIVB adheres to and the Applicant supports, the Applicant's obligations to pay salary were conditioned upon the Respondent passing a medical examination. It is a common practice in sports in general, and volleyball in particular, that a player has to pass a medical examination before the Contract becomes valid. The Decision failed to discuss this issue and, therefore, had to be overturned.
27. The Applicant requests the following relief:

*"Based on the aforesaid, being guided by the principles of justice and fairness established by the article 45.11.1.d) of the FIVB's Sporting Code, Arbitration rules of the FIVB of 2014*

*I ask:*

- *to cancel the FIVB's decision CF 26/2014 Mauricio Borges (BRA) v Fakel Novy Urengoy (RUS) of 30 June 2015*
- *to take a new decision to deny Mauricio Borges a payment of 240 000 Euro net 500 Swiss francs from Volleyball club Fakel Novy Urengoy (RUS).*
- *to withdraw the ban on any international transfers of the players of the Volleyball club Fakel, Novy Urengoy." (sic)*

#### **4.2 The Respondent's Answer**

28. The Respondent first noted that the Decision required that the Applicant file a Request for Review within 14 days from notification, i.e. 14 July 2015. However, the date of the Applicant's Request for Review was received on 10 August 2015. Thus, the Respondent contended that the Request for Review was inadmissible because it was filed too late.
29. On the merits, the Respondent noted that the Applicant stated in its letter on 12 September 2015 that it could not honour the Contract "for financial reasons". Thus, the express reason for

terminating the Contract was the Club's inability to honour the Contract because of its financial issues. The Applicant has never said anything about a medical examination and the Applicant did not send a ticket to the Respondent so that he could appear in Russia for a medical examination.

30. The Applicant failed to mention that it had agreed with the Respondent that he would join the team after the conclusion of the 2014 World Championships, which ended on 21 September 2014. The Respondent was awaiting instructions from the Applicant about the date that it wanted the Respondent to arrive in Russia. Additionally, the termination of the Contract occurred through the Applicant's letter on 12 September 2014, i.e. before the Player could come to Russia to take the medical examination and begin to perform for the Applicant. The FIVB Regulations clearly provide a right for a player to be with his national team before and during the World Championships, which was held during the national team period. In conclusion, the Respondent stated that he fully respected the Contract and was willing to take a medical examination after his team was eliminated from the World Championships; however, the Applicant prevented him from doing so by terminating the Contract before the end of the World Championships.
31. In his request for relief, the Respondent requested that the FIVB Tribunal uphold the Decision and additionally award EUR 3,000 to cover additional lawyer costs.

#### **4.3 The Applicant's First Unsolicited Submission**

32. The Applicant provided additional evidence in its first unsolicited submission. The enclosed a letter from the Transport police department of the Russian Ministry of Internal Affairs, which confirmed that the Respondent never arrived in Russia.

#### **4.4 The Applicant's Second Unsolicited Submission**

33. The Applicant reiterated that the Respondent had to undergo a medical examination before the Contract could be finalised because this was an essential term of the Contract. However, the Respondent did not begin to provide his services at the beginning of the term of the Contract, and, thus, the Contract was voided.
34. The FIVB Tribunal should dismiss the Respondent's references to the letter sent by the Applicant on 12 September 2015 because it is not relevant due to the fact that the Contract

was already void. Any changes to the Contract had to be sent in writing before the date that the Contract was voided in order to have any effect. In the present case, the letters sent by the Applicant were after the date that the Contract was voided. The letters should be considered as new terms under standard business practices that are not related to the terms of the Contract. Additionally, the letter dated 6 September 2014 is questionable evidence of an offer because the letter did not contain a recipient.

#### **4.5 The Respondent's Comments on the Applicant's Unsolicited Submissions**

35. The Applicant first confirmed that the report from the Russian Ministry of Internal Affairs is correct because the Respondent never entered Russia due to the Applicant's letter, which told him not to come. The Respondent would have gladly come to Russia and play for the Applicant at the contractually agreed upon salary, which is extremely high for a volleyball player. However, the Respondent instead received the Applicant's letter and was devastated to receive this letter at a time when the transfer market for volleyball was basically completed.
36. Regarding the Applicant's second unsolicited submission, the Respondent stated that this was the first time that he had seen the Applicant's letter dated 6 September 2015. The Respondent noted that the letter was not sent to the attention of anyone, and, thus, the Respondent could not determine who it was sent to. The Respondent claimed that he never received this letter and that the Applicant should have submitted it in its previous communications to the FIVB and the FIVB Tribunal. Thus, he claimed that the letter should not be taken into account by the FIVB Tribunal in the present case.

### **5. Jurisdiction**

#### **5.1 In general**

37. The FIVB Tribunal must first examine whether it has jurisdiction to hear the present dispute. In order to do so, it must first look at the relevant provisions of the Regulations.
38. Article 2.1 of the Regulations reads as follows:

*"[t]he FIVB Tribunal is competent to decide financial disputes of an international dimension between clubs, players and coaches from within the world of volleyball".*

39. Article 2.2 of the Regulations stipulates that the FIVB Tribunal can only resolve disputes:

*“2.2.1 arising between the natural and legal persons/entities mentioned in Article 2.1;*

*and*

*2.2.2 decided previously by the FIVB/ a Confederation or referred by the FIVB/ a Confederation to the FIVB Tribunal”*

40. Article 2.3 of the Regulations grants the FIVB Tribunal the power to rule on its own jurisdiction.
41. Thus, in order for the FIVB Tribunal to have jurisdiction over the dispute, the Panel shall examine whether the conditions of both Articles 2.1 and 2.2 are satisfied.
42. The present dispute involves a claim for damages by a Brazilian player against a Russian club. The Player finds that this dispute clearly qualifies as a financial dispute of an international dimension between a player and a club in accordance with Articles 2.1 and 2.2.1.
43. Furthermore, the Request for Review at hand is made against the Decision, which was rendered by the FIVB. Indeed, the FIVB was competent and decided the case in the first instance on the basis of Article 45.11 of the FIVB Sports Regulations. Therefore, the present Request for Review stems from a decision of the FIVB, and the Panel holds that Article 2.2.2 is also satisfied.
44. Based on the above, the conditions of Articles 2.1 and 2.2 are satisfied. Additionally, neither party contested the FIVB Tribunal’s jurisdiction to hear this case. Therefore, the FIVB Tribunal has jurisdiction over the present Request for Review pursuant to the Regulations.

## **6. Discussion**

### **6.1 Applicable Law**

45. Under the heading “Law Applicable to the Merits”, Article 13 of the Regulations reads as follows:

*“Unless otherwise agreed by the parties, the Tribunal shall apply general considerations of justice and fairness without reference to any particular national or international law (ex aequo et bono).”*

46. Neither of the parties has contested the applicability of *ex aequo et bono* to the present dispute nor based their arguments on any national law. Even though the Applicant mentioned that the Polish Civil Code was mentioned in the Second Contract, it does not assert that the Polish Civil Code is applicable in the present dispute nor did it make any arguments based on

the Polish Civil Code. In light of the above, the Panel will decide the issues submitted to it in this proceeding *ex aequo et bono*.

47. In substance, it is generally considered that an 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”.<sup>1</sup>
48. In light of the foregoing matters, the Panel makes the following findings.

## **6.2 Admissibility of the Applicant’s complaint**

49. The Respondent contests the admissibility of the Applicant’s complaint. In particular, the Respondent notes that the Decision provided the Applicant with a 14 day deadline to file its Request for Relief before the FIVB Tribunal. Based on the FIVB Tribunal’s email acknowledging receipt of the Applicant’s Request for Review, the Respondent argues that the Applicant did not file his Request for Relief within said time limit.
50. Article 45.11.2(a) of the FIVB Sports Regulations states the following regarding the time limit to file a Request for Review before the FIVB Tribunal:

*“Within fourteen (14) days from notification of the decision under Article 45.11.1 above, any affected party may request that the case be reviewed by the FIVB Tribunal.”*

51. Based on the above provision, the Panel finds that the Applicant had to file its Request for Review within fourteen days of notification of the Decision. The Decision was notified on 1 July 2015. Consequently, the Applicant had until 15 July 2015 to file its Request for Review.
52. After reviewing the facts, the Panel finds that Applicant successfully filed its Request for Review within the time limit through its letter on 13 July 2015. The letter provided sufficient notice of its intent to request a review the decision. In this way, the letter can be likened to a Statement of Appeal. Generally, Statement of Appeals provide general notice of an appeal and then a subsequent submission provides a more detailed response. Similarly, the Panel holds that the Applicant’s initial letter provided general notice of its request for review, and the subsequent completed Request for Review was the more detailed response. Consequently, the

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<sup>1</sup> POUURET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

Panel finds that the Applicant's appeal was admissible because it was timely filed.

### **6.3 Findings**

53. In essence, the Applicant contests the Decision based on one issue: whether the contract was voided because the Respondent failed to appear for a medical examination. Thus, the Applicant essentially argues that the medical examination was a condition precedent to the Contract going into effect. The Panel will turn to the facts and legal considerations necessary to answer this question. For the reasons stated below, the Panel unanimously agrees to uphold the Decision rendered by the FIVB.
54. When examining the issue of whether conducting a medical examination is a condition precedent, the Panel must first note that the effects of voiding a contract are extreme, i.e. neither party has to perform its obligations under the contract. Given this extreme result, the Panel must approach this issue with caution. In particular, it finds that a party seeking to void a contract must have used its best efforts to maintain the contractual relationship by following all of the necessary steps.
55. Regarding medical examinations, the club is typically the party responsible for setting up the medical examination due to the fact that it is either the club's in-house or outside doctor performing the examination. It must provide notice of the time and date of the medical examination to the player so that the player has been informed. Usually, the medical examination is scheduled shortly after the player's arrival in which the medical examination is conducted so as to allow the player to begin training if he passes the examination or the club to find a replacement if he does not.
56. The Panel finds that the Applicant has failed to provide any evidence that it made any attempt to set up a medical examination. The Applicant has provided no documentation that it scheduled a medical examination. Additionally, despite sending at least one and possibly two letters to the Respondent, there was no discussion in these letters about the medical examination. It never requested that the Respondent report to Russia, much less appear for medical examination.
57. The reason why this evidence does not exist is twofold. First, the Panel finds that the Applicant was clearly aware that the Respondent was playing for the Brazilian national team at the 2014 World Championships until the tournament concluded. Thus, the Parties had a clear

understanding that the Respondent was not going to report to Russia before that date. The Applicant points to the start date of the term of the Contract as evidence that the Applicant was supposed to report to Russia on 1 September 2014. However, the Applicant ignores the fact that this date falls within the National Team period as found in Article 45.5.1 of the FIVB Sports Regulations. Thus, even if the Applicant had demanded that the Respondent report to Russia on 1 September 2014, which it did not, the Applicant would have been obliged under the FIVB Sports Regulations to release the Respondent for the 2014 World Championships. Thus, the earliest possible report date for the Respondent (and, thus, the earliest date that the Respondent could have been subject to a medical examination) was 22 September 2014, i.e. the day after Brazil lost the finals of the 2014 World Championships. Second, the Panel holds that the Applicant had already terminated the Contract in its letter dated 12 September 2014. The FIVB Tribunal notes that the letter dated 12 September 2015 was sent to the CBV, not the Respondent. However, as was reasonably expected for such correspondence, this letter was subsequently forwarded to the Respondent, who accepted the termination. Also, there is no indication in the file that the Applicant ever requested that the Respondent report to the Applicant's premises or notified him of the date and place of a medical examination. The Applicant quite obviously considered the contract terminated based on the letter dated 12 September 2014. The letter unequivocally stated that the Applicant was unable to honour the Contract due to its financial problems. Therefore, the Panel agrees that the Contract was terminated by the Applicant through this letter, and, thus, this termination must be attributed to the Applicant as found by the FIVB in the Decision.

58. Before turning to the issue of damages, the FIVB Tribunal would like to note that the Applicant's argument that the use of a medical examination as a condition precedent is a standard practice in the sports industry is not completely accurate. While FIVB does not have a similar regulation, the Panel notes that FIFA has a regulation that expressly prevents a medical examination from being a condition precedent to performance under a contract. Thus, the practice is not as universally accepted within the sports industry as the Applicant claims.
59. Turning to the issue of damages, the Panel first notes that the Contract does not contain a provision regarding termination, much less a provision that provides for specific damages if a party fails to terminate the Contract with just cause. Additionally, the Panel notes that the Applicant did not contest the specific amount of damages awarded other than its argument that the Contract was voided, which was dealt with above. Consequently, unless the Panel finds *de novo* that the FIVB erred in its calculation of damages, then the amount of damages must be upheld.

60. Based on a review of the facts and circumstances, the Panel holds that the calculation of damages awarded by the FIVB in the Decision is upheld. The rationale for calculating damages is firmly in line with the generally accepted legal principle of the duty of mitigation. The FIVB reviewed the subsequent contract obtained by the Respondent and took into account that amount when calculating its damages. Neither party contested the amount of the deduction based on the subsequent contract. Thus, the FIVB Tribunal holds that this amount will be considered as part of the deduction.
61. Additionally, the FIVB reduced the Respondent's damages by an additional EUR 40,000 to account for the Respondent's failure to fully discharge his duty to mitigate damages. In making this determination, the FIVB noted that the Contract was terminated just before the beginning of the 2014/15 season. It assessed that this meant that most of the clubs that the Respondent could have signed with, had already filled their respective rosters. Additionally, it noted that the Respondent was a member of one of the best national teams in the world and, therefore, had a high market value.
62. The Panel notes that the FIVB Tribunal accurately described the duty to mitigate damages, which is a commonly accepted principle of contract law. A party cannot sit idly by and wait to collect damages after an unjust termination but must actively seek alternative earnings. Additionally, the circumstances of the situation must be taken into account when determining if the party properly mitigated its damages.
63. Taking into account the circumstances of this case, the Panel is of the unanimous opinion that the reduction provided in the Decision is warranted under the circumstances. In particular, the Panel notes that the Player was aware of the Club's termination just before the start of the season. Additionally, the Player is of a very high skill level which is reflected by the fact that he plays with the Brazilian national team and the high salary provided in the Contract. Moreover, the Club did not claim that the reduction was not low enough but rather argued that the contract was void based on the Player's failure to report to the Club. Consequently, based on the above, the Panel finds that the Decision is upheld in full.

#### **6.4 Costs**

64. In its Decision, the FIVB ordered the Applicant to pay the full amount of costs of CHF 500 for the proceedings before the FIVB. Given that the Decision was upheld in full on the merits and the Applicant's Request for Review failed, the FIVB Tribunal orders that the Respondent is

entitled to the CHF 500 awarded in the Decision.

65. Regarding the handling fee for the proceedings before the FIVB Tribunal, the Applicant did not succeed on its Request for Review. Consequently, no reimbursement shall be ordered.
66. Regarding the Respondent's request for legal fees in the present proceedings, the Panel notes that Article 15.2 of the FIVB Tribunal Regulations allows for the Panel to award a contribution towards reasonable legal fees and expenses in connection with a proceeding before it. When determining the contribution, the Panel must take into account the outcome of the proceedings as well as the conduct and financial resources of the Parties.
67. In its Answer, the Respondent requests EUR 3,000 in fees for "*additional lawyer costs*". The Panel notes that the Respondent was represented by his Agent in the present proceedings, not by outside counsel. The Respondent has not submitted any invoices demonstrating any services provided by outside counsel. Consequently, based on the record before it, the Panel cannot award attorney's fees because it has no record of an attorney representing the Respondent before it.

## DECISION

68. For the reasons set forth above, the Panel decides as follows:
  1. **The Request for Review filed by Fasel Novy Urengoy is dismissed in its entirety.**
  2. **The decision rendered by the FIVB on 30 June 2015 is upheld in full.**
  3. **Each party shall bear its own costs for the proceedings before the FIVB Tribunal.**
  4. **Any other requests for relief are dismissed.**

Lausanne, seat of the arbitration, 30 May 2016.

Liu Chi

Acting Chairman of the FIVB Tribunal

Piotr Stolarski  
CEV Substitute Member

Lic. Carlos J. Beltran  
NORCECA Member