FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0009/08 FAT)

rendered by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Mr. Stevin Smith, c/o Interperformances, Via Degli Aceri, 14 – Gualdicciolo, 47892 Republic of San Marino
represented by Mr. John B. Kern, John B. Kern International Law LLC, 180 E. Bay Street, Ste 200, Charleston, SC 29401 USA

- Claimant -

vs.

PBC Lukoil Academic Sofia Basketball Club, Postoyanstvo Str. 67A, 1111 Sofia, Bulgaria

- Respondent -

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1. The Parties

1.1. The Claimant

1. Stevin Smith (hereinafter “Mr. Smith” or the “Claimant”) is a professional basketball player of US nationality. His agent, Dr. Luciano Capicchioni (hereinafter the “Agent”) has his main place of business in the Republic of San Marino. His representative, Mr. John B. Kern is an attorney-at-law domiciled in Charleston, South Carolina, USA.

1.2. The Respondent

2. PBC Lukoil Academic Sofia Basketball (hereinafter “PBC” or the “Respondent”) is a basketball club with its seat in Sofia, Bulgaria. PBC is a professional basketball club competing in the superior (A1) Bulgarian Basketball League. It is domiciled at Postoyanstvo Str. 67A, 1111 Sofia, Bulgaria. Respondent is not represented by counsel.

2. The Arbitrator

3. On 23 October 2008, the President of the FIBA Arbitral Tribunal (the "FAT") appointed

Prof. Ulrich Haas as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").

4. On 24 October 2008, the Arbitrator accepted his appointment and signed a declaration of acceptance and independence provided by the FAT Secretariat. None of the parties has raised objections to the appointment of the Arbitrator or to the declaration of independence issued by him.

3. Facts and Proceedings

3.1. Background Facts

5. On 9 October 2007, the Claimant and the Respondent concluded a player contract (hereinafter the "Contract") for "the 2007/2008 basketball season" in which a net salary in the amount of USD 160,000.00 was agreed for the services of the Claimant as a basketball player. The Contract reads – in relevant part – as follows:

> *"III. GUARANTEED NO-CUT CONTRACT*
>
> *This is a guaranteed no-cut contract. The Club agrees that this contract is no-cut, which means that neither the Club nor any assignee thereof, nor the League can terminate this contract should any injury or illness befall the Player or in the event the Player fails to reach an expected level of performance.*
>
> *IV. SALARY COMPENSATION*
>
> *The Club agrees to pay the Player a net salary of USD 160,000.00 (U.S. dollars onehundredsixtythousand) payable as follows:*

USD 10,000.00 (U.S.dollars tenthousand) at signature of this Contract and upon passing of physical examination.

USD 10,000.00 (U.S. dollars tenthousand)	*on October*	*30th 2007*
USD 20,000.00 (U.S. dollars twentythousand)	*on November*	*30th 2007*
USD 20,000.00 (U.S. dollars twentythousand)	*on December*	*30th 2007*
USD 20,000.00 (U.S. dollars twentythousand)	*on January*	*30th 2008*
USD 20,000.00 (U.S. dollars twentythousand)	*on February*	*28th 2008*
USD 20,000.00 (U.S. dollars twentythousand)	*on March*	*30th 2008*
USD 20,000.00 (U.S. dollars twentythousand)	*on April*	*30th 2008*
USD 20,000.00 (U.S. dollars twentythousand)	*on May*	*30th 2008*

This last payment of USD 20,000.00 (U.S. dollars twentythousand) must be paid no later than May 30th 2008. Payments which are received 5 (five) days later than the dates noted shall be subject to a penalty of USD 50 (U.S. dollars fifty) per day. In case of scheduled payments not being made by the Club within 10 (ten) days of the scheduled payment, the Player shall be entitled to all moneys 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 non performance will not be considered a breach of contract. In the event that payments are not made by Club, within 15 (fifteen) days of the scheduled payment date, player shall immediately be entitled to the full salary and 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 the 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.

V. BONUS COMPENSATION

ULEB CUP

To finish in the Top 32 positions	*USD 4,000.00 (U.S. dollars fourthousand)*
To finish in the Top 16 positions	*USD 8,000.00 (U.S. dollars eightthousand)*

To finish in the Top 8 positions	*USD 16,000.00 (U.S. dollars sixteenthousand)*
To finish in the Top 4 positions	*USD 20,000.00 (U.S. dollars twentythousand)*
To win	*USD 30,000.00 (U.S. dollars thirtythousand)*

All bonuses decided by Club and earned by other Players of Club.

All bonuses are net of Bulgarian income taxes.

All bonuses must be paid by the Club to the Player within 7 (seven) business days of their being earned.

VII. TAXATION

All the above mentioned payments regarding point IV (four) and V (five) shall be net of Bulgarian income taxes. Tax receipts of tax deposits shall be provided to the Player at the end of each fiscal year.

VIII. AMENITIES

In addition to the compensation above mentioned the Club agrees to provide the Player with the following amenities at no cost to the Player for the duration of this Contract:

a) Provide the Player with a fully furnished apartment satisfactory to the Player. Normal use of electricity, water, heat and rent to be paid by Club.

b) Two (2) round trip tickets (Economy Class) Player's residence/Bulgaria.

c) Provide the Player with an automobile satisfactory to the Player. Insurance, mechanical repairs, taxes to be paid by Club. Gasoline and oil are to be paid by the Player. Automobile must be returned by Player to Club in good condition.

d) Insurance and medical care for Player and family. If Player is injured or ill at any time during the term of this contract and unable to continue play, all moneys are still due and payable plus any medical expenses incurred because of the injury or illness.

e) Dental care for Player and family (Aesthetic dental care not included).

IX. PHYSICAL EXAMINATION

This will be a fully guaranteed contract which cannot be terminated for injury or lack of skill. Said guarantee shall be in full force and effect after the PLAYER has passed a medical examination. The CLUB has two days after the PLAYER'S arrival to give the

PLAYER said medical examination. Unless the PLAYER and his agent are notified in writing that he has failed to pass the medical examination, all guarantees will be in place two days after arrival and the contract terms will be in full force and effect. Should PLAYER be injured during a practice or game before he has completed his physical examination, this contract shall be fully guaranteed and all terms and conditions shall be in effect though he already passed his physical examination."

6. On the same day, the Respondent and the Claimant's Agent, Dr. Luciano Capicchioni acting on behalf of Executive Pro Management AG (E.P.M.), concluded an Agent Agreement (the "Agent Agreement") that reads in its relevant part as follows:

"3. The CLUB further agrees as follows:

a) That E.P.M. shall be paid a commission of USD 16,000.00 (U.S. dollars sixteenthousand) payable at receipt of invoice.

b) That E.P.M. will be paid a commission equal to ten percent (10%) of the Player's salary for each and every season that Mr. STEVIN SMITH is with the team. Said commission is payable within seven (7) days of Mr. STEVIN SMITH arriving in Bulgaria for each season.

c) That if Club doesn't fulfill the obligation indicated in paragraph "3"a) of this Agreement the Player will be free to leave the Club and the Club shall retain no rights to the player except for the obligation to pay all salary and bonuses under the terms of this Agreement (see Clause "IV" and "V" of PBC "LUKOIL ACADEMIC" SOFIA BASKETBALL CLUB/STEVIN SMITH Agreement."

7. In addition, Claimant concluded a contract with the Agent (on behalf of Interperformances Inc/International Basketball Center (IBC)) (the "Representation Agreement") that reads – in relevant part – as follows:

"5. COMPENSATION

For any contract procured, negotiated or otherwise secured for the Player by the Representative with any European basketball club, Player shall pay Representative an agent fee equal to ten percent (10%) of all sums received by the Player or his designee as the gross overall amount forming the current and deferred compensation package (including base salary, bonuses and other benefits) agreed with his signing club. Unless otherwise expressly agreed in writing by the Parties, Player shall pay in full the

Representative's fees within 15 (fifteen) days of receipt of any salary and/or bonuses due and paid to Player by his signing club. Representative shall endeavor to collect his agent's fee directly from the Player's signing club. Yet it is expressly agreed between the Parties that Player shall be liable to immediately pay to Representative any portion of the agent's fee he might prove unable to collect directly from the club. …

7. LEGAL COST and FEES

If necessary, Representative shall endeavor to help Player collect any outstanding sums owed to him by the signing club. Should nonetheless the services of a lawyer be required under the circumstances, the relevant retainer fees shall be at the Player's exclusive charge. With respect to clause 5.A above, Player shall likewise be liable to bear all legal costs and fees in connection with the collection of any of Representative's outstanding agent fees due from the signing club."

8. The Claimant arrived at the premises of the Respondent on 18 October 2007 and started playing with the Respondent's team. On 1 November 2007, he underwent a medical examination. The Respondent paid Claimant an amount of USD 10,000.00 at the time of the arrival of the Claimant in Sofia on 18 October 2007. Another installment of USD 10,000.00 was paid to the Claimant on 30 October 2007.

9. Since then, the Respondent made no further payments to the Claimant. On 7 November 2007, Mr. Sasho Vezenkov, the General Manager of the Respondent, wrote an email on behalf of the Respondent to the Agent. In the letter he advised the latter that the Respondent wished to terminate the Contract because the Claimant was not fit to play with the Respondent's team due to an injury.

10. With letter dated the same day, the Agent informed the Respondent that the Claimant did not accept the Respondent's proposal regarding the termination of the Contract. On 14 November 2007, Mr. Vezenkov issued a letter "To whom it may concern" in which he confirmed the termination of the Contract. By letter of 22 November 2007, the Agent on behalf of the Claimant restated that the Contract could not be terminated.

11. On 8 April 2008, the Agent wrote a letter to the Respondent, for the attention of Mr. Vezenkov, advising the Respondent that, as from 30 November 2007, it had failed to make payments as required under the Contract and that, therefore, the Claimant was asking for the full payment of the salary due under the Contract. Dr. Capicchioni's letter set a final time limit until 14 April 2008 to pay the outstanding amount of USD 140,000.00. In the event that the payment was not received by then, the Claimant advised that he would initiate "FIBA arbitration proceedings" against the Respondent and seek, in addition to the payment of the full salary of the 2007-2008 season, also payment of all bonuses due under the ULEB Cup provisions and full compensation for all attorney's fees.

3.2. The Proceedings before the FAT

12. The Claimant originally filed his Request for Arbitration dated 6 August 2008 jointly with another player, Mr. Nenad Djoric.

13. By Procedural Order (No 1) of 20 August 2008, the FAT Secretariat informed the Claimant and Mr. Nenad Djoric that the FAT President had decided to separate the proceedings. The President made it clear in the letter that *"the mere fact that both players are bringing an action against the same Respondent does not justify a consolidation of the two matters, in particular because the alleged claims are based on two totally separate contracts. Also, at least in theory, the proceedings could take a different course. Consequently, we must ask Claimants [in both cases] to make payment of an additional non-reimbursable handling fee of EUR 3'000.00 into the FAT account. In order to facilitate matters, the President has decided to assign the same Arbitrator to save time and costs."*

14. The non-reimbursable fee of EUR 3,000.00 was received in the FAT account on 10 October 2008.

15. By Procedural Order (No 2) dated 23 October 2008, the FAT Secretariat confirmed receipt of the Request for Arbitration on 11 August 2008 and informed the parties of the appointment of the Arbitrator. Also, the Claimant was invited to provide the FAT with a Power of Attorney confirming that Mr. Kern was entitled to act on his behalf. In the same Procedural Order, a time limit was fixed until 14 November 2008 for the Respondent to file its Answer to the Request for Arbitration. The Order also requested the parties to pay, by no later than 7 November 2008, the following amounts as an Advance on Costs:

"Claimant (Mr. Smith):	*EUR 4,000*
Respondent (PBC Lukoil):	*EUR 4,000"*

16. As by the time limit of 7 November 2008 no payment was received in the FAT account, the Arbitrator granted an additional time limit, requesting the parties to effect payment until 21 November 2008.

17. Given that the second time limit for payment of the Advance on Costs was again not met by the parties, the FAT fixed a final time limit until 12 December 2008. In his Procedural Order (No 4) dated 1 December 2008, the Arbitrator emphasized that: ***"In the event that FAT has not received any of the shares of the advance of costs by 12 December 2008, the Request of Arbitration shall be deemed withdrawn."***

18. On the last day of the final time limit, i.e. on 12 December 2008, Mr. Kern sent an email to the FAT Secretariat stating that "we are wiring the (…) funds today to the FAT".

19. Upon expiry of the time limit of 12 December 2008, neither party had paid its share of the Advance on Costs. On 23 December 2008, the Arbitrator issued an order stating: **"After several reminders, both parties failed to pay the Advance on Costs in the above matter. As announced by FAT in a final reminder dated 1 December 2008 the Request for Arbitration in this matter is herewith deemed withdrawn and the FAT proceedings will be closed forthwith, without reimbursement of any costs."** By e-mail of the same day the FAT Secretariat confirmed to Mr. Kern that *"there was no money received in the FAT account as of 22 December 2008".* In response, Mr. Kern stated that *"there was a delay with the bank handling the transfer" and that he would "deliver to (the FAT) the confirmation number for the wire".* Such evidence was never produced.

20. A payment of EUR 4,000.00 by the Claimant was received in the FAT account on 31 December 2008, showing an "order date" of 29 December 2008.

21. By Procedural Order (No 6) dated 8 January 2009 the FAT Secretariat informed the parties on behalf of the FAT President that: "Since all the deadlines set by the Tribunal were ignored by the Claimant and taking into consideration that the Tribunal explicitly advised the Claimant of the consequences thereof and that the Claimant did not present any valid justification as to why the deadlines were not met, the Tribunal sees no grounds for changing its order dated 23 December 2008 according to which the appeals are deemed withdrawn. The Claimant is free to file a new request for arbitration. The request for arbitration must be accompanied, however, by a transfer of a non reimbursable fee in the amount of EUR 3,000."

22. In response, Mr. Kern filed a "Claimant's Objection and Request for Reconsideration". On 6 February 2009, the FAT President decided on the basis of the evidence

submitted to her to reopen the present arbitration and informed the parties accordingly. It was emphasized that *"the present order is made on a very exceptional basis as it appears that Claimant's bank has contributed to the delay in the payment of the advance on costs. In particular, despite suggestions to the contrary in the Claimant's submission of 22 January 2009, it is undisputable that under the circumstances the FAT Secretary's "Withdrawal" order of 23 December 2008 was compliant with both the FAT Rules and the applicable Swiss arbitration law."*

23. In the same Procedural Order (No 7), the FAT President found that "there is no need to reconfirm the appointment of the Arbitrator, unless so requested within 5 days from receipt of the present order".

24. By the fixed time limit, neither party had filed a request to the effect that the FAT President reconfirm the appointment of the Arbitrator. In addition, on 13 February 2009 the Claimant sent a letter to FAT in which he stated that *"I would indeed agree with the (President's) suggestion"*.

25. In view of the specific circumstances of the case and in order to treat both parties fairly and equally, the Respondent was given – by Procedural Order (No 8) dated 16 February 2009 – a new and final time limit to file its Answer to the Request for Arbitration until 2 March 2009. In addition, the Respondent was once again requested to pay its share of the Advance on Costs in the amount of EUR 4,000.00 by no later than 23 February 2009.

26. With fax letter of 19 February 2009, the Respondent requested an extension of the time limit to file its Answer to the Request for Arbitration because it never received the full documentation of the present case. By Procedural Order (No 9) dated 24 February

2009, the Arbitrator – in light of the circumstances of the case and the correspondence between the parties regarding the possibility of a settlement – granted a new time limit for the Respondent to pay its share of the Advance on Costs by no later than 10 March 2009 and to submit its Answer by no later than 12 March 2009.

27. On 12 March 2009, the Respondent filed its Answer to the Request for Arbitration. With Procedural Order (No 10) of 13 March 2009, the FAT Secretariat acknowledged receipt of the Answer and of the Claimant's share of the Advance on Costs. Furthermore, the Secretariat informed the parties that the Respondent had failed to pay its share of the Advance on Costs. In accordance with Article 9.3 of the FAT Rules, the Claimant was invited to substitute for the missing payment of the Respondent until 25 March 2009.

28. With Procedural Order (No 11), dated 17 March 2009, the FAT Secretariat forwarded the Answer to the Claimant. In view of the extensive opportunities for the parties to present their case, the FAT Secretariat advised the parties on behalf of the Arbitrator that the exchange of documents was completed pursuant to article 12.1 of the FAT Rules. The same Order further indicated that once the full amount of the advance on costs had been received, the arbitration would proceed. Since none of the parties specifically asked for a hearing to be held, the Arbitrator announced that he would deliver the award on the basis of the written submissions of the parties. Finally, the parties were invited to submit a detailed account of costs by no later than 26 March 2009.

29. On 18 March 2009, the FAT Secretariat received an unsolicited submission from the Claimant's attorney, requesting it to disregard the Answer provided by the Respondent because the latter had failed to pay its share of the Advance on Costs. By e-mail of 27 March 2008, the Secretariat acknowledged receipt stating that the Arbitrator had

decided not to comment on this submission, but to raise the issue in the Award. The Claimant was invited to proceed with the payment of the outstanding share of the Advance on Costs by no later than 3 April 2009 in order for the Arbitration to proceed.

30. The Claimant paid the Respondent's share of the Advance on Costs on 3 April 2009.

31. On 20 March 2009, the Claimant submitted the following account of costs:

"1. Attorneys' Fees	*USD 15,497.38*
2. Expert Witness Fees	*USD 1,750.00*
3. Arbitration Fees	
a. Non-reimbursable fee paid by Claimant (€ 3,000.00)	*USD 4,066.68*
b. Fee paid by Claimant on 11 December 2008 (€ 4,000.00)	*USD 5,422.24*
c. Fee paid by Claimant on 9 March 2009 (€ 4,000.00)	*USD 5,422.24*
Total Cost:	*USD 32,158.54"*

32. The Respondent did not submit any account of costs.

33. By letter dated 20 May 2009, the FAT Secretariat received an unsolicited submission from the Respondent whereby the latter filed a request to ask from the Claimant "proofs for the reason for not signing a new professional contract with another club". Furthermore, the Respondent stated that it "was not aware for the necessity of presenting any other evidence to its first answer". By letter dated 22 May 2009 the Arbitrator advised the Respondent that the FAT Rules as a general rule provide for one exchange of documents only and that in view of the fact that the Arbitrator deemed

himself sufficiently informed, he had closed the exchange of documents by letter dated 17 March 2009.

4. The Parties' Submissions

4.1. The Claimant's Submission

34. The Claimant submits that the parties signed a one-year player contract for the 2007-2008 season, dated 9 October 2007 (the "Contract"), whereby the Claimant was provided with a net salary of USD 160,000.00 payable in accordance with a pre-determined payment schedule. According to the Claimant, while he performed his duties in conformity with the Contract, the Respondent breached its obligations by not paying him the salaries agreed in the Contract. The Respondent had paid Claimant an amount of USD 10,000.00 after his arrival in Sofia and an amount of USD 10,000.00 on 30 October 2007. Since then, the Claimant has not received any payments from the Respondent.

35. The Claimant arrived in Sofia on 18 October 2007, passed a medical examination and began practicing with the team in Sofia and performing in games. He played five games for the Respondent in late October and early November 2007.

36. On 7 November 2007, the Respondent tried to unilaterally terminate the Contract because of injury, which was rejected by the Claimant with a letter by his Agent of 7 November 2007.

4.2. The Claimant's Request for Relief

37. On the basis of the contentions set out above, the Claimant requests in particular that the FAT:

> *"2.2.1. […] exercise jurisdiction over the subject matter of the October 19, 2007 Contract and the parties to the Smith Contract.*
>
> *…*
>
> *2.2.4. […] find that Smith has satisfied all conditions precedent, concurrent and subsequent to the Smith Contract.*
>
> *2.2.5. […] hold Lukoil Academic liable for breach of the Smith Contract as of its written rejection of the player dated November 7, 2007, and its complete failure to thereafter perform on the Contract,*

38. and that:

> *2.2.6. [The Player] recover from Lukoil Academic for the breach of the Club to the October 19, 2007 Agent Contract which is integrated with the October 19, 2007 Player's Contract.*
>
> *2.2.7. [The FAT] award damages to the Claimant Smith to be paid by the Respondent as follows:*
>
> *a. Salary Compensation:* *USD 140,000.00*
>
> *b. Penalties on Failure to Pay Salary Compensation:* *USD 55,450.00*
>
> *c. Bonus Compensation:*
>
> *ULEB Cup:* *USD 8,000.00*
>
> *c. Tax Effects on Salary and Bonus Compensation:*
>
> *2007 Tax Effects:* *USD 2,222.22*
>
> *2008 Tax Effects:* *USD 19,900.00*

	USD 22,122.22
d. Amenities:	*USD 15,163.00*
e. Agency Fees:	*USD 16,000.00*
Grand Total (plus interest, fees, costs, etc.)	*USD 256,735.22+*

2.2.8. [The FAT award] pre-award interest on all amounts determined as due, from the date of the Breach (November 7, 2007) to the date of the Award at the pre-award interest rate of nine (9.0%) percent per annum and an award of post-award interest at twelve (12.0%) percent per annum to accrue until such time as all amounts due are paid in full. Should the arbitrator award pre-award interest as proposed, the amount of interest would total USD 17,218.84 as of May 29, 2008 (representing 272 days from the time of the "acceleration of damages" under paragraph IV of the Smith Contract) and continue run at a per diem rate of USD 63.30 from May 30, 2008 forward.

39. The Claimant further requests that:

2.2.9. […] the Secretary General of FIBA, or the Arbitrator as his delegate, maintain jurisdiction over the matter in order following entry of an award, so that the Claimant may seek further and additional enforcement over the payment of the appropriate arbitration award, including the full authority of FIBA to render monetary fines, restrictions or other sanctions in the event that the Respondent does not comply with all aspects of the anticipated FIBA Arbitration Award.

2.2.10. […] the Costs of this action and the attorneys' fees related to bringing this action be assessed against the Respondent Lukoil Academic. […]

2.2.11. [The FAT] provide the Claimant Smith with any and all other and further relief as justice may require."

4.3. The Respondent's Submission

40. The Respondent rejects the claim of the Claimant for the following reasons:

41. The Respondent claims that the Claimant has not stated the correct name of the Respondent in his Request for Arbitration. Since Article 9.1 of the FAT Rules obliges

him to do so, the claim has to be dismissed because of this procedural defect according to the Respondent. As of 2005 the proper name of the Respondent is – according to the Respondent – "Professional Basketball Club Academic".

42. Furthermore, the Respondent acknowledges that it has entered into an employment contract with the Claimant. However, according to the Respondent, pursuant to Article I of the Contract, the Claimant had to present himself in good physical condition. He had not informed the Respondent about the presence of serious health problems which prevented him from sports activities and performance of the contractual obligations. Respondent paid its obligations upon arrival of the Claimant in Sofia and did so until termination of the Contract. It has no obligation to effect any further payments to the Claimant based on the Contract because the Claimant was not in a good physical condition in order to play for the Respondent's team.

43. On 1 November 2007, the Club provided the Claimant with medical examination and the result from this examination indicates the existence of health problems. The Respondent notified the Agent of the Claimant with email of 7 November 2007 that certain health problems had been found in the course of the examination.

44. The Respondent submits that it was misled by the Claimant about his health conditions and his playing capabilities because the Claimant concealed his medical condition from the Respondent. Furthermore, the Respondent claims that the Claimant appeared in the Club's office "in a state of intoxication" which is contrary to the Rules of the Club. Since the Claimant did not fulfill his main obligations resulting from the Contract, the Respondent is not liable for any amounts, damages or interest claimed in the Request for Arbitration. The Respondent concludes that under these circumstances it was entitled to terminate the Contract.

4.4. The Respondent's Request for Relief

45. On such basis, the Respondent requests that the Arbitrator find:

"a) […] that Smith did not satisfy and did not fulfill his obligations and duties under the contract to present himself in a good condition in order to play as professional basketball player for the Club;

b) That the Club is not liable to Smith for any amounts pretended in the Request for arbitration for the reasons stated by the Club above;

c) That the claimant Smith suffered no damages and therefore the Club is not liable to pay any damages to him;

d) No interest is due by the Club, and the Club requests if the Arbitrator considers payment of any interest, the latter to be determined based on international market prices and average rates of interest.

e) That no other and further relief shall be provided to the Claimant Smith, for no justice requires so.

As general, the Club requests the Arbitrator to dismiss the arbitration cases with […] ref. No. 0009/08 and to hold liable [the Claimant] *for payment to the Club the legal and other fees made by the Club* [for this case]*."*

5. Procedural Issues

5.1. Jurisdiction

46. 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).

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

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

5.2. Arbitrability

49. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is, thus, arbitrable within the meaning of Article 177(1) PILA.[1]

5.3. Formal and substantive validity of the arbitration agreement

50. The existence of a valid arbitration agreement is to be examined separately for each subject matter in dispute in light of Article 178 PILA, which reads as follows:

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

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

particular the main contract, or to Swiss law."

5.3.1 With respect to the claims arising from the Contract

51. The Claimant requests the Arbitrator to award to him "salary compensation", "Penalties on Failure to Pay Salary Compensation", "Bonus Compensation", "Tax Effects on Salary and Bonus Compensation" and "Amenities". The jurisdiction of the FAT to decide on these requests results from Article XII of the Contract which reads as follows:

> *"Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President. The seat of the 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. To the extent legally possible under Swiss law recourses 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. The arbitrator shall decide the dispute ex aequo et bono.[...]"*

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

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

mentioned requests.[2]

5.3.2 With respect to the claim regarding the Agency Fees

54. The Claimant further requests the Arbitrator to award him USD 16,000.00 regarding "Agency Fees". This claim does not arise from the Contract since the latter does not mention "Agency Fees" to be paid to the Claimant. An obligation to pay "Agency Fees" by the Respondent is mentioned, however, in the Agent Agreement to which the Claimant is not a party. In addition, an obligation to pay Agency Fees is also contained in the Representation Agreement entered into between the Claimant and E.P.M. The Claimant submits that the Representation Agreement and the Agent Agreement are so closely connected with the Contract that the arbitration clause contained in the latter extends also to the claim for "Agency Fees". The Arbitrator has serious doubts as to this reasoning. The Representation Agreement and the Agent Agreement both incorporate arbitration clauses which are distinct from that contained in the Contract. For instance, Article 8 of the Representation Agreement provides as follows:

> *"Any disputes arising with respect to, or in connection with, this Agreement, shall be finally adjudicated according to the laws of Switzerland by one arbitrator to be appointed in accordance with the Lugano Arbitration Rules published by the Chamber of Commerce, Industry and Handicraft of the Canton Ticino, Lugano (Switzerland). The Parties hereby accept and agree to undergo the accelerated procedure. The arbitration venue is Lugano (Switzerland). The relevant award shall be final and binding for both parties which hereby definitively waive any right of appeal or recourse to any court. The prevailing party shall be entitled to recover all the relevant attorney's fees from the succumbing party."*

55. A nearly identical arbitration clause can be found in Article 3 lit. e of the Agent

[2] *See* for instance BERGER/KELLERHALS, Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, No. 466, pp. 160-161.

Agreement. Since both agreements (Representation Agreement and Agent Agreement) contain an arbitration clause providing for a seat of the arbitration other than Geneva and applicable procedural rules that are distinct from the FAT Rules there is – unlike in the case FAT 001/07 (Ostojic/Raznatovic vs. PAOK) – no room to act on the assumption of an implicit will of the parties that the arbitration clause contained in the Contract extends to the claim related to the "Agency Fees".

56. However, the jurisdiction of the FAT in the case at hand may derive not only from an arbitration clause concluded between the parties. The Arbitrator is also competent to decide the matter in dispute if the Respondent has participated in the proceedings without raising objections as to the lack of jurisdiction of FAT. This is precisely what happened in this case. The Respondent in its submissions dated 12 March 2009 (p. 16) contests the Claimant's request relating to the "Agency Fees" only on the merits ("the claim is not proven and confirmed by adequate evidence"). Hence, the Arbitrator is also competent to decide on the dispute relating to the claim for "Agency Fees".

5.4. Claimant's submissions to disregard Respondent's Answer

57. In his unsolicited submission dated 18 March 2009, the Claimant requested the Arbitrator to disregard the Answer provided by the Respondent because the latter had failed to pay its share of the Advance on Costs. Contrary to the Claimant's view, the FAT Rules do not make the admissibility of the Respondent's Answer conditional upon payment by the Respondent of its share of the Advance on Costs, nor do they provide for any other (procedural) sanction in such a case against the Respondent. Hence, there is no basis to reject the Respondent's submissions *in toto* in the present case.

5.5. Respondent's correct Name

58. The Respondent submits that the Claimant has "not stated the correct name of the Respondent" and requests the Arbitrator "not to consider further and to terminate the arbitration case with ref. no. 0009/08 FAT for the lack of exact Respondent." It is not entirely clear whether the Respondent wants the proceedings to be terminated or the claim to be dismissed because of this – alleged – mistake by the Claimant. The question may be left unanswered here, since the submission by the Respondent is without merit.

59. Article 9.1 of the FAT Rules states that a FAT arbitration shall commence on the date of receipt of a Request for Arbitration which shall contain the names, postal addresses, telephone, facsimile numbers and e-mail addresses of the Claimant and the Respondent and their respective counsel. Article 9.1 of the FAT Rules does not specify the consequences for not complying with the obligation contained therein. However, the obligation to state the exact name of the Respondent serves – in particular – the purpose of identifying the person against whom judicial relief is sought, the person that is accorded the status of a party in the proceedings and the person that is going to be bound by the award. In view of the foregoing, a Request for Arbitration is only admissible if the information provided therein is sufficiently specific to properly identify the respondent. In the case at hand the name "PBC Lukoil Academic Sofia Basketball Club" used by the Claimant is sufficiently specific to avoid any misunderstandings as to the identity of the party against whom judicial relief is sought. This is evidenced by the fact that the Respondent at no time was in doubt as to whether the Request for Arbitration was directed against it.

60. Whether or not the name used by the Claimant to identify the Respondent is the official

name under which the Respondent is registered can be left unanswered here, since the Respondent itself used and still uses this name and, therefore, is estopped from blaming the Claimant for not naming it correctly. For example, the official website of the Respondent is still "www. Lukoilacademic.net" and the Respondent is called "LUKOIL Academic" therein. The Respondent also signed the Contract in 2007 with the Claimant under the name of "**PBC LUKOIL ACADEMIC SOFIA BASKETBALL CLUB"**. In his email dated 7 November 2007, Mr. Vezenkov, the General Manager of the Respondent, repeated that **PBC "LUKOIL Academic" Sofia** signed a contract with the Claimant. The confirmation letter of 14 November 2007 was signed by Mr. Vezenov, in his capacity as General Manager of **PBC LUKOIL Academic**.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

61. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the arbitrators to decide *"en équité",* by opposition to the decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

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

62. 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."*

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

64. The concept of *équité* (or *ex aequo et* bono) used in Article 187(2) PILA originates from Article 31(3) of the *Concordat intercantonal sur l'arbitrage*[3] (Concordat),[4] under which Swiss courts have held that arbitration *en équité* is fundamentally different from arbitration *en droit* :

> *"When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[5]

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

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3 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PIL. Today, the Concordat governs exclusively domestic arbitration.

4 P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PILA.

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

circumstances of the case".[6]

66. This is confirmed by the provision in Article 15.1 of the FAT Rules *in fine* that the arbitrator applies "general considerations of justice and fairness without reference to any particular national or international law".

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

6.2. Findings

6.2.1 Was there a binding Contract?

68. It is undisputed among the parties that they have concluded a contract for the 2007/2008 basketball season on 9 October 2007. No evidence was submitted to the Arbitrator which indicates that the Contract was invalid or not intended to be binding upon the parties.

6.2.2 Did the Respondent terminate the Contract with just cause?

69. By email dated 7 November 2007, the General Manager of the Respondent stated that the latter was no longer interested in the services of the Claimant, and that it had taken the decision to terminate the Contract. The Respondent gave the following reasons for the termination of the Contract:

> *"Unfortunately, upon …* [Mr. Smith's][7] *arrival in Bulgaria it became clear that he is not*

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

[7] Added for better understanding.

> *capable to play for the team for the following reasons: after the injury he has had most of the problems have remained; upon the medical check it was found remaining water in the knee, and after the respective medical manipulations and the detailed examination the conclusion of the professionals is that he has very serious problems with the knee and therefore is impossible to play to the extent required and needed for our team."*

70. It is the Arbitrator's view that this does not constitute a valid cause for the termination of the Contract. It is within the parties' autonomy to regulate the grounds for the termination of the Contract. According to its Articles III and IX, the Contract is a "fully guaranteed" and "no-cut contract", meaning that it cannot be terminated by the Respondent for injury of the Claimant or lack of skill. Furthermore, the Contract prevents the Respondent from raising pre-existing health problems of the Claimant in order to terminate the Contract once a certain period of time has elapsed. The Contract specifically provides in Article IX:

> *" … Said guarantee shall be in full force and effect after the PLAYER has passed a medical examination. The CLUB has two days after the Player's arrival to give the PLAYER said medical examination. Unless the PLAYER and his agent are notified in writing that he has failed to pass the medical examination, all guarantees will be in place two days after arrival and the contract terms will be in force and effect. …."*

71. The purpose of this clause is to protect both parties. On the one hand, the medical examination enables the Respondent to check whether the Claimant possesses the physical abilities needed to fulfill his contractual obligations and – if this were to be answered in the negative – to terminate the Contract. On the other hand, the Respondent – in the interest of legal certainty – has to provide for the medical examination shortly after the arrival of the Player at the club. The purpose of this is that once the deadline has elapsed the Respondent is estopped from invoking pre-existing health problems of the Claimant as a justification for the termination of the Contract.

72. In the case at hand, the Claimant arrived at the premises of the Respondent on 18 October 2007. On 1 November 2007, i.e. 13 days after his arrival, the Claimant

underwent a medical examination. Only on 7 November 2007 did the Respondent notify the Agent of the Claimant in writing that the latter had failed the medical examination. It is obvious from the submissions of the parties that the medical examination did not take place within the timeframe provided for in the Contract. It does not follow from the submissions of the parties that they have modified Article IX of the Contract by mutual consent, nor that the Claimant waived his rights under said provision, nor that the delay in the examination was attributable to him. Furthermore, the Claimant never accepted the unilateral termination of the Contract by the Respondent. On the contrary, by letter dated 7 November 2007, the Agent of the Claimant expressly informed the Respondent that the Claimant would not accept the Respondent's decision to terminate the Contract. Hence, in light of the clear and unambiguous provision in Article IX of the Contract, the Respondent's termination of the Contract could not be justified with either an injury of the Claimant or with pre-existing health problems of the latter.

73. The termination of the Contract cannot be based on a breach of the Claimant's contractual duties either. Contrary to the Respondent's view the Claimant was – according to the specific circumstances of the case – not under an obligation to disclose alleged health problems. Firstly, there is no evidence that the Claimant had knowledge of any pre-existing health problems. Secondly, no duties of disclosure by the Claimant are stipulated anywhere in the Contract. Furthermore, the Contract explicitly states that the Claimant had to make himself available for medical examination by the Respondent. It was up to the Respondent to make arrangements for the medical examination of the Claimant, with a view to establishing whether the latter was physically apt to fulfill his contractual obligations. Since the Respondent was in the position to obtain the necessary information itself, in principle no duty of disclosure or information by the Claimant could arise. This is at least true for such

health problems as may be easily detected through a standard medical check-up as was the case in the case at hand.

74. In addition, the Respondent submits that the Claimant breached his contractual duties by appearing "in the office of the club … in a state of intoxication which caused certain problems to the club …". This submission is not substantiated and can, therefore, not constitute a valid cause for terminating the Contract. It is completely unclear what the Respondent means by "state of intoxication". Furthermore, the Respondent fails to substantiate the circumstances of the alleged event (date, time, etc.). Finally, the Respondent does not specify what kinds of problems were caused by the Claimant's alleged "state of intoxication". In the absence of conclusive evidence of Claimant's alleged breach of his contractual duties, there is no valid cause for the termination of the Contract by the Respondent.

75. For the above reasons, the Arbitrator finds that the Contract was terminated without just cause.

6.2.3 Consequences of terminating the Contract without just cause

76. As a general principle, a notice of termination of a labor agreement is final, binding and puts en end to the employment contract if the content of the notice is unambiguous and if it is understood by the employee as an expression of the will of the employer to terminate the employment. An employee cannot be compelled to continue to offer his services to an employer who is no longer willing to solicit these services. In cases in which the employer terminates a contract without just cause, its obligation to pay salary is replaced by an obligation to pay compensation to the employee. The Arbitrator finds that the Respondent terminated the Contract with the email dated 7 November 2007.

Thus, the Respondent was under the obligation to pay all monies due under the Contract until its termination (which the Respondent did) and to pay compensation to the Claimant as from that date. In principle, compensation is calculated on the basis of all the monies the Claimant would have received if the Contract had been fully executed by the Respondent.

6.2.4 Outstanding salaries / Compensation for future salaries

77. In light of the above, as a matter of principle, the Respondent must pay to the Claimant the salaries the Claimant would have received until the (normal) expiration of the Contract. Hence, the compensation for damages corresponds to the base salaries for the entire 2007/2008 season, as agreed upon in Article IV of the Contract, minus the two salary payments effected by the Respondent prior to the termination of the Contract (i.e. USD 160,000.00 minus USD 20,000.00). This amounts to USD 140,000.00.

78. However, in order to avoid that the Claimant ends up being in a better position as a consequence of the Respondent's breach than in the absence of such a breach, any income the Claimant earned or could have reasonably earned by providing his services elsewhere must be deducted from the Claimant's claim for damages. In previous awards, the FAT has developed a formula for mitigation of damages. In FAT Decision 0014/08 (van de Hare vs. Azovmash Mariupol Basketball Club, at 72-73) the Arbitrator stated the following:

> *"It might be argued that the present value of the future monthly salaries is less than the amount reached by simple addition of the outstanding annual salaries. However, such discounting is not necessary in the present case, since the compensation for damages is not the result of a mathematical formula but follows from an overall assessment, which also comprises the compensations which [the Claimant] actually earned or may have*

earned otherwise and which, by nature, includes a considerable margin of imprecision.

When it comes to the assessment of the compensations which [the Claimant] was able to earn or failed to earn because he was no longer bound [by the Contract] with the Respondent, the Arbitrator must primarily look at the contract which [the Claimant] signed with the next club. […]"

79. In the case at hand it has not been submitted by the parties that the Claimant entered into another contract during the ongoing 2007/2008 season. The question arises however, whether the Claimant has breached his duty to mitigate the damage by not seeking alternative opportunities of employment. In view of the MRI Diagnosis on the right knee of the Claimant provided by the Respondent, the accuracy of which there is no reason to doubt, the Arbitrator is of the view that the Claimant did not breach his duty to mitigate the damage. On the contrary, in view of the Claimant's health problem it could not be reasonably expected from him to sign a contract with another club. Therefore, the Arbitrator deems it just and equitable under the specific circumstances of the case to award the Claimant the full amount of salary compensation, i.e. USD 140,000.00.

6.2.5 Outstanding bonuses

80. The Claimant further requests the Arbitrator to award him bonus compensation in the total amount of USD 8,000.00 for the team's participation in the ULEB Cup. The Respondent contests its obligation to pay bonuses because the Claimant did not play in the relevant matches. Under Article V of the Contract, bonus payments are part of the agreed compensation scheme offered to the Claimant. According to the Contract, such payments are not contingent upon the active participation of the Claimant in the matches. In order for the Claimant to be entitled to bonuses under the Contract it suffices that the team achieved certain sporting results. Since it is uncontested that the Respondent's team finished in the top 16 positions of the ULEB Cup, the Arbitrator

finds that the Claimant is entitled to bonus compensation in the amount of USD 8,000.00.

6.2.6 Penalties for non-payment of salary

81. According to Article IV of the Contract, salary payments which are received 5 (five) days later than the pre-determined dates shall be subject to a penalty of USD 50.00 per day. The Claimant is claiming such penalty payments until 6 August 2008, in a total amount of USD 55,450.00.

82. The Claimant's calculation is erroneous. Article IV par. 2 of the Contract states that *"payments which are received five days later than the dates noted shall be subject to a penalty of USD 50.00 per day".* The Arbitrator is of the view that the late penalty payments are only owed for due payments (made with a delay of five days). Since the Arbitrator has found that compensation for salaries is due (in total) as from the termination of the Contract (i.e. 7 November 2007), late payment penalties accrue as from 12 November 2007 until 6 August 2008, i.e. the date of the Request for Arbitration. This amounts to a total of USD 13,400.00 for 268 days.

83. However, the Arbitrator finds this amount to be excessive in view of the fact that the Claimant waited nine months before filing his claim with the FAT. The Arbitrator in exercising his powers *ex aequo et bono* finds it, therefore, just and equitable to reduce the amount due for late payments by half, i.e. to USD 6,700.00.

6.2.7 Claim regarding "Tax Effects"

84. The Contract provides that all payments to the Claimant are to be made *"net of*

Bulgarian income taxes". The Claimant has submitted evidence in the form of an affidavit of the tax expert Robert Nagy. According to the calculations of Mr. Nagy, the income tax to be borne by the Respondent for all monies due to the Claimant in the year 2007 would amount to USD 2,222.22 and for the year 2008 to USD 19,900.00. Consequently, the Claimant asks for the payment of a total of USD 22,122.22 regarding "tax effects".

85. The calculations submitted by the Claimant are not conclusive. First of all, the figures used by Mr. Nagy do not correspond to the figures in the Claimant's Request for Arbitration. In addition, the Arbitrator finds it unclear from the record how the calculation of the Bulgarian income tax was effected. Mr. Nagy did not elaborate on the relevant legal provisions or the applicable tax rate. It is not comprehensible why the expert holds that tax effects on his salary amount to USD 22,122.22.

86. The Claimant is entitled in the present case to damages because of the termination of the Contract without just cause. Whether or not he has to pay taxes on the amount for compensation does not depend on Bulgarian tax law, since the Claimant is no longer a resident of Bulgaria and Bulgarian tax law only provides for the taxation of income which the employee actually received while being a resident of that country. Therefore, whether or not the Claimant may request to be awarded "tax effects" as part of the damage suffered by him depends on the law of the country where he is now personally liable for income tax. No evidence has been submitted by the Claimant in this respect. Consequently, the claim regarding "tax effects" is not substantiated and must be dismissed.

6.2.8 Claim for Amenities

87. The Claimant was only provided with the amenities listed under Article VIII of the Contract until the termination of the Contract. According to the Claimant, this resulted in damages in the amount of USD 15,163.00. The Arbitrator holds that, in principle, the loss of amenities constitutes a head of compensable damage. Furthermore, the Arbitrator holds that the amounts requested by the Claimant for the lost amenities are – in principle – just and equitable. This at least is true for the costs of the apartment, the flights and the automobile. Things are different, however, regarding the amenities in relation to insurance and medical care as well as dental care. Since it is impossible to provide the Claimant *ex post* with the respective insurances for elapsed periods of time, the Claimant may only request to liquidate the damage he actually suffered by not being insured by the Respondent. This damage may be equivalent to the costs for a replacement insurance or to medical expenses the Claimant incurred during the time in which he was not covered by an insurance. Since the Claimant has not provided any evidence in that respect, the claim is not sufficiently substantiated and must, therefore, be dismissed.

88. To sum up, the Arbitrator finds it equitable to award the Claimant damages for the loss of amenities for the time between 7 November 2007 until 30 May 2008 in the amount of:

Apartment (including utilities):	USD 6,300.00
Automobile:	USD 5,250.00
2 Flights Texas-Sofia	USD 2,583.00
	USD 14,133.00

6.2.9 Claim for Agency Fees

89. The Claimant is not entitled to recover Agency fees. The Contract does not contain any provision according to which the Claimant is entitled to claim these fees. According to the Agent Agreement the Respondent is liable to pay the Agency Fees. However, the Claimant is not a party to this contract. It does not follow from the Agent Agreement either that the Claimant is a third beneficiary to said contract. Furthermore, the Claimant did not submit that a claim for Agency Fees against the Respondent was assigned to him by E.P.M. To sum up, therefore, the Arbitrator holds that the Claimant has not substantiated on what grounds he is entitled to claim Agency Fees.

6.2.10 Summary

90. Summing up, the Arbitrator holds that the Claimant is entitled to damages as follows:

- outstanding salaries / compensation for unpaid salaries	USD 140,000.00
- outstanding bonuses	USD 8,000.00
- non-payment penalties	USD 6,700.00
- amenities	USD 14,133.00
Total	**USD 168.833.00**

7. Interest

91. The Claimant requests interest at an annual rate of 9% starting from 7 November 2007 (the date of termination of the Contract) and post-award interest at 12 % per annum to

accrue until such time as all amounts due are paid in full.

92. Payment of interest is a customary and necessary compensation for late payment and there is no reason why Claimant should not be awarded interest. However, the Arbitrator finds it unclear from the record how the interest calculation was made and why an interest rate of 9% or 12% per annum should be applicable. The Arbitrator notes that the claim for a rate of 12% is totally unsubstantiated and is unconvinced by Claimant's explanation as to why he should be entitled to a rate of 9%, which is substantially higher than that normally applied by FAT. No such rates ensue from the Contract. In the absence of any agreement by the parties to the contrary, the Arbitrator holds that, in line with the constant jurisprudence of the FAT, an interest rate of 5% p.a. is reasonable and equitable in the present case. No distinction shall be made between pre- and post-award interest rates.

93. Furthermore, the Arbitrator holds that the Claimant is only entitled to interest as of 6 August 2008, as opposed to the date of the termination of the Contract. There is no room to claim interest during a period for which late payment penalties are already awarded to the Claimant because this would constitute an inadmissible double compensation for damages due to late payment. Therefore, the Arbitrator finds that interest at a rate of 5% p.a. is due as of 6 August 2008 on the amount of USD 168.833.00.

8. Costs

94. Article 19.2 of the FAT Rules provides that the final amount of the costs of the

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

95. On 29 May 2009, 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 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 at EUR 8,000.00.

96. In the present case, the costs shall be borne by the Claimant and the Respondent in proportion to the amounts claimed and the amounts awarded. Considering the outcome of the case, the Claimant has been awarded USD 168.833.00 instead of the requested USD 256,735.22 and thus, succeeded by about 65%. Thus, the Claimant shall bear 35% of the costs of arbitration and the Respondent 65%.

97. Given that the Claimant has paid the totality of the Advance on Costs of EUR 8,000.00 as fixed by the Arbitrator and that the Advance of Costs correspond to the arbitration costs, the Arbitrator decides that the Respondent shall pay to Claimant 65% of the Advance of Costs which corresponds to EUR 5,200.00, being the share of the arbitration costs to be borne by the Respondent.

98. Furthermore, the Arbitrator considers it adequate that the Claimant is entitled to the

payment of a contribution towards his legal fees and other expenses (Article 19.3 of the FAT Rules). In the case at hand the payment by the Claimant of the non-reimbursable handling fee was not taken into account when allocating the costs of the arbitration. Therefore, the Arbitrator considers it adequate to take into account the non-reimbursable fee when assessing the expenses incurred by the Claimant in connection with these proceedings. After having reviewed and assessed the submissions by the Claimant and having regard to the outcome of the proceedings, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at USD 9,000.00.

9. AWARD

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

1. **PBC Lukol Academic Sofia Basketball Club shall pay to Stevin Smith USD 168.833.00 together with 5% interest p.a. from 6 August 2008.**

2. **PBC Lukol Academic Sofia Basketball Club shall pay to Stevin Smith EUR 5,200.00 as a reimbursement of the advance on the arbitration costs.**

3. **PBC Lukol Academic Sofia Basketball Club shall pay to Stevin Smith USD 9,000.00 as a contribution towards his legal fees and expenses.**

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

Geneva, 8 June 2009

Ulrich Haas
(Arbitrator)

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."