We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0046/09 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Mr. Tomislav Mahoric, Sujica 104, 1356 Dobrova, Slovenia

- Claimant 1 -

Mr. Bostjan Jakse, Seidlova 52, 8000 Novo Mesto, Slovenia

- Claimant 2 -

both represented by Messrs. Andreas Raffaelli and Giuseppe Cadel, attorneys at law, Gilberti Pappalettera Triscornia e Associati Studio Legale, Via Visconti di Modrone 21, 20122 Milan, Italy

vs.

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

- Respondent -

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1. The Parties

1.1. The Claimants

1. Mr. Tomislav Mahoric (“Mr. Mahoric”) and Mr. Bostjan Jakse (“Mr. Jakse”) (hereinafter collectively referred to as “Claimants) are basketball coaches, who were working for the basketball club BC Kyiv at the time the dispute arose.

1.2. The Respondent

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

2. The Arbitrator

3. On 5 May 2009, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Prof. Dr. Ulrich Haas as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules"). Neither of the parties has raised objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

4. On 12 June 2007 the Claimants and the Club entered into separate employment contracts whereby the latter engaged the Claimants as coaches for its team for the

seasons 2007-2008 and 2008-2009 (hereinafter collectively referred to as the "Contracts").

5. In their relevant parts the Contracts, which are practically identical, read as follows:

> *"1. Club agrees to engage [Tomislav Mahoric / Bostjan Jakse] as its [Head Basketball Coach / Assistant Coach and Strength and Conditioning Coach] for a two season term (2007-2008 and 2008-2009 basketball seasons) […]*
>
> *2. The Club agrees to pay the Coach for providing his services during the above term, a fully guaranteed net compensation as set out below in accordance with the following schedule:*
>
> *[…]*
>
> *2008/2009 season*
>
> *Net salary of € [320.000,00* to Mahoric / 80.000,00* to Jakse] during the term as follows […]*
>
> ** If Club attains any of the following goals during the 2007/2008 season, Coach's compensation for the 2008/2009 season shall be increased by the indicated corresponding percentage (subject to a cumulative maximum increase of 10%): […]*
>
> *Finish in 1st place in Ukrainian regular season: 2% […]*
>
> *The guaranteed net Compensation above is vested in and owing to the Coach upon the completion of the execution of this Agreement and is not contingent upon anything. The Club agrees that this Agreement is a no-cut guaranteed agreement, and that the Club shall not have the right to suspend or release the Coach in the event that the Coach's performance or the Club's performance is not satisfactory to the Club. […] Should the Club elect to replace the Coach with another Coach at any time during the term of the Agreement, the Club shall continue to pay the Coach its (sic) guaranteed net Compensation […] for the full term of this Agreement at the times and the amounts specified above. In such an event Coach shall be free to seek employment as a head coach with another club and shall be under no obligation to mitigate his damages and should he be hired as a Head Coach the Coach's compensation with the new club shall reduce Club's obligation to pay the Coach its compensation and bonuses required herein by the amount the Coach receives as its compensation for its new club."*

6. During the first season of the Contracts, the Club's team finished first in the regular season of the 2007-2008 Ukrainian Championship.

7. Some time after the end of the 2007-2008 season the Club decided to discontinue its collaboration with the Claimants and to hire a new head coach and a new assistant coach.

8. On 21 August 2008 the Claimants and the Club entered into separate settlement agreements (the "Settlement Agreements").

9. In their relevant parts the Settlement Agreements, which are almost identical, read as follows:

> *"WHEREAS Club and Coach are parties to a [Contract …] dated June,12, 2007 […]*
>
> *Club and Coach shall terminate their Contract immediately upon the signing of this [Settlement Agreement] and, in so doing, fully settle and mutually release each other from all of their remaining obligations set forth in said Contract, provided that:*
>
> 1. *Club shall pay Coach a "buy-out" in the net amount of EUR [150,000 to Mahoric / 36,800 to Jakse] by wire transfer as follows: EUR [75,000 to Mahoric / 18,400 EUR to Jakse] by September 15, 2008 and EUR [75,000 to Mahoric / 18,400 EUR to Jakse] by December 1, 2008.*
>
> 2. *Club agrees that upon the signing of this [Settlement Agreement] Coach is immediately free to coach anywhere in the world. Club shall not be entitled to any compensation in exchange from releasing Coach from this Contract […]*
>
> *If the requirements listed in paragraphs 1, 2, 3 above are not fully satisfied by Club by the respective dates specified therein, all the terms and conditions of the [Contract] shall remain in full force and effect. In addition, Club shall be solely responsible for the payment of any and all of Coach's Slovenian taxes that may be due on the amounts due to Coach listed in Paragraphs 1 and 3 above in the event Club does not pay said amounts by December 31, 2008."*

10. By facsimile dated 12 March 2009 counsel for the Claimants wrote to the Club *inter alia* the following:

> *"[…] Provided that as at the date of this letter the Club has paid only Euro 20.000,00 to Mr. Mahoric (by wire transfer on December 11, 2008) and no payment has been made by the Club to the benefit of Mr. Jakse, the Club is in breach of the provisions of both [Settlement Agreements] and, therefore, pursuant to the foregoing provisions, [the Claimants] are entitled to claim (i) the full compensation for 2008/2009 season indicated,*

respectively, in the Contracts, and (ii) the amount due by [Claimants] to the Slovenian Tax Authorities in respect of the compensation due according to the Contracts. […]

In light of the foregoing, we warn you to pay within 10 days from receipt of this letter (i) the aggregate amount of Euro 429,134.21 to Mr. Mahoric and (ii) the aggregate amount of Euro 112,165.93 to Mr. Jakse. […]

In case of default of such payments within the provided terms, we reserve the right to promote, without any prior notice, any necessary legal action."

11. The Club did not reply to the above letter nor make any further payments.

3.2. The Proceedings before the FAT

12. On 24 April 2009 the Claimants filed a Request for Arbitration in accordance with the FAT Rules, and on 28 April 2009 they duly paid the non-reimbursable fee of EUR 3,000.

13. On 10 June 2009, the FAT informed the parties that Prof. Dr. Ulrich Haas had been appointed as the Arbitrator in this matter and fixed the amount of Advance on Costs to be paid by the Parties as follows:

"Claimant 1 (Mr. Mahoric)	*EUR 3,500*
Claimant 2 (Mr. Jakse)	*EUR 1,500*
Respondent (BC Kyiv)	*EUR 5,000"*

14. Upon request of the Claimants, on 24 June 2009 the Arbitrator decided to stay the proceedings until 30 August 2009 unless the Respondent would express its disagreement by 29 June 2009. The Respondent did not object to said decision.

15. On 29 September 2009, the Claimants paid their shares of the Advance on Costs in a total amount of EUR 5,000.

16. On 30 September 2009, the FAT Secretariat informed the Claimants that they would have to substitute for the Club with respect to the Advance on Costs because the latter

had not paid its portion thereof.

17. On 6 October 2009, the Claimants made the substitute payment in an amount of EUR 5,000.

18. On 13 October 2009, the Arbitrator issued a procedural order whereby he requested the Claimants to

> *"a) to inform the FAT whether they have entered into an employment contract with a club, national federation or other legal or natural person after 21 August 2008; if yes, Claimants are requested to provide FAT with copies of such contracts.*
>
> *b) to provide FAT with further information as regards the amounts allegedly due by the Claimants to the Slovenian tax authorities.*
>
> *Upon receipt of Claimants' Reply the FAT will forward it to the Respondent. The Respondent will then have the right to file its comments to the Claimants' Reply within another week following the time limit fixed above, i.e. until* ***Tuesday, 27 October 2009****."*

19. On 20 October 2009 the Claimants submitted their reply with supporting documentation.

20. By email dated 21 October 2009 the Club replied for the first time in the present proceedings and informed the FAT of the following:

> *"[O]ur Club still is in very difficult financial situation. The team plays but it is the team of very young Ukrainian players with very low budget. We work hard during last 10 month[s] in order to provide [the] team with all necessary equipment and staff and keep the team playing while we pass this period and find proper solution. At the moment Club does not have any possibility to pay money at all, if Court oblige[s] us now to any payment this will immedeatly (sic) make BC Kyiv b[a]nkrupt and Club will just disappear from European Arena.*
>
> *That is we kindly ask you [to] delay consideration of this case at least till the end of 2009 and to be back to this question as only Club returns to his normal functioning.*
>
> *With respect,*
>
> *Vitalii Khomenko*
> *General manager*

BC KYIV"

21. On 3 November 2009, considering that neither party had solicited a hearing, the Arbitrator decided in accordance with Article 13.1 of the FAT Rules not to hold a hearing and to deliver the award on the basis of the parties' written submissions. The Arbitrator accordingly issued a Procedural Order providing that the exchange of documents was completed and inviting the Parties to submit their cost accounts.

22. On 10 November 2009, the Claimants replied to Respondent's request for a stay and submitted their costs, as follows:

> *"[T]he Claimants grant their consent to the respondent's request to stay the Proceedings until December 31, 2009; it being in any event understood that, effective from January 1, 2010 (or the date that the FAT will deem as appropriate) the Proceedings will resume from their current status. […]*
>
> | | |
> |---|---|
> | *Counsel's Fees* | *€ 2.500,00* |
> | *FAT Handling Fee* | *€ 3,000.00* |
> | *Fat Fees Due by Mr. Mahoric* | *€ 3.500,00* |
> | *Fat Fees Due by Mr. Jakse* | *€ 1.500,00* |
> | *Advance of Respondent's FAT Fees* | *€ 5,000.00* |
> | *TOTAL* | *€ 15,500.00"* |

23. The Club did not submit its account of costs.

4. The Positions of the Parties

4.1. The Claimants' Position

24. The Claimants submit the following in substance:

- The Club is in default with respect to its payment obligations under the Settlement Agreements since it only paid EUR 20,000 to Mr. Mahoric;

- The Club's default gives rise to Claimants' right to claim the full amounts due to

them under the Contracts;

- With the Settlement Agreements the Parties agreed to relieve the Club from making the payments due under clause 2 of the Contracts, upon the condition that the payments provided in the Settlement Agreements would be duly made. Since this did not happen, clause 2 of the Contracts and especially the provision governing the replacement of the Claimants by other coaches (see para. 5 above), "shall return into full force and effect";

- On all the amounts due in favour of the Claimants interest at a rate of 5% per annum shall accrue, consistent with the Swiss statutory rate or as deemed appropriate by the Arbitrator deciding *ex aequo et bono*.

25. In their Request for Arbitration dated 24 April 2009, the Claimants requested the following relief:

> *"1. to establish that the Respondent is in default with respect to its obligations deriving from both the Mahoric Settlement Agreement and the Jakse Settlement Agreement dated August 21, 2008;*
>
> *2. to establish that the foregoing default entails the automatic return into full force and effect of the provisions of both the Mahoric Employment Agreement and the Jakse Employment Agreement dated June 12, 2007;*
>
> *3. to condemn the Respondent to pay in favour of Mahoric the amount of Euro 429,134.21, plus the interests at the rate of 5% per annum, or at the different rate deemed appropriate by the Arbitrator ex aequo et bono, [EUR 306,400.00 for salaries and EUR 122,734.21 for Slovenian taxes, interests accruing from the date hereof]. Payments shall be made on the bank account […];*
>
> *4. to condemn the Respondent to pay in favour of Jakse the amount of Euro 122,165.93, plus the interests at the rate of 5% per annum, or at the different rate deemed appropriate by the Arbitrator ex aequo et bono, [EUR 81,600.00 for salaries and EUR 30,565.93 for Slovenian taxes, interests accruing from the date hereof]. Payments shall be made on the bank account […];*
>
> *5. in the event of the denial of the requests under foregoing points 2), 3) and 4), to*

condemn the Respondent to pay, also by virtue of a provisional measure pursuant to article 10 of the FAT Rules:

a. in favour of Mahoric the amount of Euro 188,609.46, plus the interests at the rate of 5% per annum, or at the different rate deemed appropriate by the Arbitrator ex aequo et bono, [EUR 130,000.00 for salaries and EUR 58,609.46 for Slovenian taxes, interests accruing from the date hereof]. Payments shall be made on the bank account no. […];

b. in favour of Jakse the amount of Euro 48,997.46, plus the interests at the rate of 5% per annum, or at the different rate deemed appropriate by the Arbitrator ex aequo et bono, [EUR 38,600.00 for salaries and EUR 12,197.46 for Slovenian taxes, interests accruing from the date hereof]. Payments shall be made on the bank account no. […];

6. to condemn the Respondent to pay all the expenses and costs, including the Counsels' fees and costs, incurred by the Claimants in connection with the proceeding."

4.2. Respondent's Position

26. Despite several invitations the Respondent did not make any submissions in reply to the Request for Arbitration, only requesting the FAT to postpone the issuance of a decision in the present matter due to the Club's financial situation.

5. Jurisdiction

27. 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).

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

5.1. Arbitrability

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

5.2. Formal and substantive validity of the arbitration agreement

30. The jurisdiction of the FAT over the dispute results from the arbitration agreement contained in clause 6 of the Settlement Agreements, 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. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sports (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law.*
>
> *The decisions (sic) of FAT and CAS shall decide the dispute ex aequo et bono."*

31. The Settlement Agreements are in written form and thus the respective arbitration agreements fulfill the formal requirements of Article 178(1) PILA.

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

32. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreements under Swiss law (referred to by Article 178(2) PILA).

33. Regarding the scope of the arbitration agreements and the question whether it encompass the Claimants' requests arising from the Contracts, the Arbitrator notes that the Contracts contain no dispute resolution clause; in addition, it is evident from the wording of the Settlement Agreements that the Parties amended the terms of the Contracts in several aspects, including the way they agreed to have their disputes resolved. Lastly, the Arbitrator notes that the Claimants base their claims on a provision of the Settlement Agreements which expressly refers to the "terms and conditions of the Contract[s]". Thus, the Arbitrator finds that clause 6 of the Settlement Agreements constitutes the legal foundation for FAT's jurisdiction on claims arising both from the Settlement Agreements and the Contracts. It bears emphasizing that no objection regarding the jurisdiction of the FAT has been raised by the Respondent in its letter dated 21 October 2009, where it tacitly acknowledged the FAT's jurisdiction to decide the matter by requesting the FAT to postpone the taking of a decision.

6. Other Procedural Issues

34. Article 14.2 of the FAT Rules, which the Parties have declared to be applicable in the Settlement Agreements, specifies that "the Arbitrator may nevertheless proceed with the arbitration and deliver an award" if "the Respondent fails to submit an Answer". The Arbitrator's authority to proceed with the arbitration in case of default of one of the

parties is in accordance with Swiss arbitration law[2] and the practice of the FAT.[3] However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

35. This requirement is met in the current case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator, in line with the relevant rules. It was also given ample opportunity to respond to the Claimants' Request for Arbitration. However, the Respondent has chosen not to respond and has only requested the FAT – at a late stage of the proceedings – to postpone the taking of a decision on the Request for Arbitration.

36. In light of these circumstances, the Arbitrator considers himself fit to proceed with the arbitration and to deliver the award.

37. Lastly, the Arbitrator notes that the Request for Arbitration contains the claims of both Mr. Mahoric and Mr. Jakse for payment of their salaries due under the Contracts.

38. Since (i) the factual circumstances of both claims and the Contracts submitted are identical but for figures, (ii) both claims are directed against the same Respondent, (iii) both Claimants are subject to an arbitration agreement providing for the jurisdiction of the FAT, and (iv) Respondent has not objected to the adjudication of both claims

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2 Decision of the Swiss Federal Tribunal dated 26 November 1980, in: Semaine Judiciaire (SJ) 1982, S. 613 et seq., p. 621; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international. Droit et pratique à la lumière de la LDIP, Bern 2006, N 483; LALIVE/POUDRET/REYMOND: Le droit de l'arbitrage interne et international en Suisse, Lausanne 1989, Art. 182 PILA N 8; RIGOZZI: L'Arbitrage international en matière de sport, Basel 2005, N 898; SCHNEIDER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 182 PILA N 87; VISCHER, in: Zurich Commentary to the PILA, 2nd ed., Zurich/Basel/Geneva 2004, Art. 182 IPRG N 29.

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

simultaneously, the Arbitrator deems it appropriate to handle both claims in one and the same arbitral proceeding.

7. Discussion

7.1. Applicable Law – *ex aequo et bono*

39. 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*" instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

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

40. 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."*

41. Clause 4 of the Settlement Agreements provides that "This agreement shall be governed by the laws of Switzerland". On the other hand, clause 6 *in fine* of the Settlement Agreements provides that "The decisions (sic) of FAT and CAS shall decide the dispute *ex aequo et bono*" (see para 30 above). The latter provision can only be understood as containing a clerical error ("decisions" instead of "arbitrator") authorizing the Arbitrator of FAT – and upon appeal the CAS – to decide any dispute *ex aequo et bono*. Thus, the parties to the Settlement Agreements chose Swiss law as the law

applicable to the said Agreements (clause 4), while the arbitration agreements specifically provide that disputes shall be decided *ex aequo et bono* (clause 6). These two provisions appear to be contradictory. Consequently, the question arises whether Swiss law or the principles of *ex aequo et bono* are applicable to the merits of the present dispute. Considering (i) that neither the Settlement Agreements nor the Request for Arbitration contain any indication that the Parties have made any specific legal considerations with respect to the application of Swiss law, (ii) the explicit reference to the FAT Rules made in the Settlement Agreements, (iii) the fact that the Claimants did not refer in their submissions to Swiss law but rather to *ex aequo et bono* (see Claimants' request for relief, para. 25 above), the Arbitrator finds that the authorization to decide the dispute *ex aequo et bono* prevails over the isolated reference to Swiss law in clause 4 of the Settlement Agreements[4]. Consequently, the Arbitrator will adjudicate the present matter *ex aequo et bono*.

42. 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[5] (Concordat)[6], 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*

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4 See also FAT decision 0063/09 dated 19 February 2010 Fisher and Entersport Management Inc. v. KK Vojvodina Srbijagas; FAT Decision 0030/09 dated 12 May 2009, Vujanic vs. Dynamo Moscow, p.11 ; FAT Decision 0031/09 dated 12 May 2009, Misanovic and Ristanovic vs. Dynamo Moscow.

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

6 P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

those rules."[7]

43. This is confirmed by Article 15.1 of the FAT Rules *in fine,* according to which the Arbitrator applies "*general considerations of justice and fairness without reference to any particular national or international law*".

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

7.2. Findings

7.2.1. Payments under the Settlement Agreements

45. The Claimants have produced the Settlement Agreements, pursuant to which they agreed to terminate their employments with the Club on the condition that the Club would effect certain payments. The Settlement Agreements bear the stamp of the Respondent, the signature of its General Manager Mr. Vitaliy Khomenko – who had also signed the Contracts on behalf of the Club – and, *inter alia*, set forth a schedule of payments. The Arbitrator finds that there are no circumstances which could cast any doubts as to the validity and enforceability of the Settlement Agreements. The Arbitrator also finds that, in the absence of any evidence to the contrary presented by the Club, the latter did not make any payments to the Claimants in accordance with the Settlement Agreements, with the exception of a deposit of EUR 20,000 in favour of Mr. Mahoric on 11 December 2008.

46. Therefore, the Club did not comply with its obligations under the Settlement

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

Agreements. The Arbitrator's conclusion rests on the record as it stands and not on the mere fact that Respondent has defaulted in these proceedings. Under these circumstances, the Arbitrator does not deem it necessary to call for further evidence.

7.2.2. Consequences of the breach of the Settlement Agreements

47. The Claimants argue that they are entitled to consider that, by virtue of the Club's failure to comply with its obligations under the Settlement Agreements, the Contracts are to "return into effect" and that thus they are entitled to their full compensation for the 2008-2009 season under the Contracts, since the Club replaced them with other coaches.

48. The Arbitrator firstly notes that the Club decided no longer to use the services of the Claimants after the end of the 2007-2008 season; no reason for such removal from their duties has been provided by either the Claimants or the Club. Further, the Arbitrator notes that in the Settlement Agreements dated 21 August 2008 the Claimants agreed to dissolve by mutual consent their Contracts with the Club *on the condition* that the latter would *timely* pay to them a contractually agreed compensation (described as "buy-out") for the early termination of the Contracts.

49. Since the conditions for termination were not met, the Arbitrator is of the opinion that the Contracts remained into force also after the signing of the Settlement Agreements. Further, considering that the Claimants' salaries were fully guaranteed under the Contracts (see para. 5 above) and thus would be payable also in case of premature and unjust termination, the Arbitrator finds that the wording of the Settlement Agreements and the parties' intention behind such wording are clear: the Claimants gave the Club the opportunity to pay on specific dates a reduced compensation, i.e. close to 50% of the Claimants' 2008-2009 salaries (EUR 150,000 for Mr. Mahoric and EUR 38,600 for Mr. Jakse), the payment of which would trigger the early termination of the Contracts. In case the Club failed to perform such payments, the Claimants would

be entitled to request payment of their salaries as stipulated in the Contracts, which in that sense would "return into effect".

50. The same conclusion is reached when applying *ex aequo et bono* principles, i.e. general considerations of justice and fairness, to the circumstances of this case: the Club removed the Claimants from its team during the term of the Contracts and is thus liable to pay compensation to them. Since the Club did not pay the compensation agreed in the Settlement Agreements, the compensation must be calculated on the basis of clause 2 of the Contracts. For the sake of clarity, the Arbitrator points out that the Parties' intention to merely regulate the amount of compensation and not to "revive" the Contracts altogether, as the Claimants suggest, is supported by the fact that the Parties did not address at any point of their Settlement Agreements whether the Claimants should eventually return to their duties and the Club should accept their services. The fact that the Claimants remained without alternative employment for the entire 2008-2009 season and complained for the delay in payments only in March 2009, i.e. a few months before the end of the 2008-2009 season, while the Club went on with hiring replacement coaches, corroborates the above interpretation.

51. Therefore, the Arbitrator finds that the Claimants are entitled to receive the full amount of their salaries corresponding to the 2008-2009 season under clause 2 of the Contracts.

52. In this respect, clause 2 of the Contracts provides in essence that:

- The Claimants' salaries should be increased by 2% as a result of the Club's finishing first in the 2007-2008 regular season of the Ukrainian championship. Thus, Mr. Mahoric's salary would amount to EUR 326,400.00 and Mr. Jakse's salary to EUR 81,600.00;

- The Club had contractually agreed to discharge the Claimants from their duty to

mitigate their damages in case the Contracts were prematurely terminated.

53. In view of the above and considering the fact that the Claimants did not work for any other basketball team during the 2008-2009 season and that the Club paid EUR 20,000.00 to Mr. Mahoric on 11 December 2008, the Arbitrator finds that the Club owes the amounts of EUR 306,400.00 (EUR 326,400.00 – EUR 20,000.00) to Mr. Mahoric and EUR 81,600.00 to Mr. Jakse.

7.2.3. Slovenian Taxes

54. Mr. Mahoric and Mr. Jakse also request that Club be ordered to pay to them the amounts of EUR 122,734.21 and EUR 30,565.93 respectively, corresponding to the taxes that the Claimants will have to pay to the Slovenian state for the compensation received from the Club. The Claimants refer to the following term of the Settlement Agreements:

> *"In addition, Club shall be solely responsible for the payment of any and all of Coach's Slovenian taxes that may be due on the amounts due to Coach listed in Paragraphs 1 and 3 above in the event Club does not pay said amounts by December 31, 2008."*

55. The Arbitrator initially notes that the above provision refers only to "*amounts … listed in Paragraphs 1 and 3 above*", i.e. to the payments expressly mentioned in paras. 1-3 of the Settlement Agreements. However, Claimants' main argument in this case is that they are entitled to their salaries as stipulated in clause 2 of the Contracts instead of paras. 1-3 of the Settlement Agreements. Clause 2 of the Contracts makes no reference to Slovenian taxes and reads *in fine*:

> *"The compensation and bonuses set forth above are net of all Ukrainian taxes including, without limitation, income tax. Club does hereby agree to pay any and all Ukrainian taxes due on the compensation and bonuses provided herein on the Coach's behalf and shall furnish the Coach with a tax certificate verifying Club's full payment of the taxes required,*

> *on a timely basis. In the event Club fails for any reason to pay all Ukrainian taxes due, Club shall pay in addition to its obligations hereunder, all penalties and interest which accrue against the Coach as a result of Club's failure to pay."*

56. The Arbitrator finds that the Claimants cannot have it both ways. As found above, the Club is indeed obliged to pay compensation as provided in clause 2 of the Contracts. Regarding taxes, the said clause expressly stipulates that all Ukrainian (not Slovenian) taxes on the Claimants' salaries must be paid by the Club. There is no mention of Slovenian taxes and the wording of the Settlement Agreements cannot be interpreted as introducing an additional – cumulative – obligation of the Club in case the amounts under the Contracts would be claimed. The Arbitrator finds that the Claimants' argument that "*BC Kiev is supposed to pay all necessary taxes in Ukraine and Slovenia. Both coaches are residents of Slovenia, so total tax amount is equal to Slovenian, because income taxes in Slovenija are higher then (sic) in Ukraine.*" contained in their submissions dated 20 October 2009, is without merit and must be rejected.

57. Therefore, the Club shall pay all Ukrainian taxes on the above-mentioned compensation and provide the Claimants with the necessary certificates.

8. Interest

58. In the Request for Arbitration, the Claimants request interests of 5% per annum on the amounts claimed, or at a different rate deemed appropriate by the Arbitrator deciding *ex aequo et bono*, starting from "the date hereof and until the full and unconditional payment" of such amounts.

59. Payment of interests is a customary and necessary compensation for late payment and there is no reason why Claimants should not be awarded interests. In line with the constant jurisprudence of the FAT, the Arbitrator holds that an interest rate at 5% p.a.

is reasonable and equitable in the present case. Besides, the Arbitrator finds that in view of the Claimants' request the date of the filing of the Request of Arbitration, i.e. 24 April 2009 is the appropriate date from which interest is to become payable.

9. Costs

60. Article 19 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings.

61. On 23 February 2010 - considering that pursuant to Article 19.2 of the FAT Rules "*the FAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of FAT and the fees and costs of the FAT President and the Arbitrator*", and that "*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the FAT President from time to time*", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised - the FAT President determined the arbitration costs in the present matter to be EUR 7,700.00.

62. Considering the Claimants prevailed in their main claim that the Club shall pay their salaries under the Contracts, it is fair that the fees and costs of the arbitration be borne by the Club and that the latter be required to cover the Claimants' legal fees and other expenses, those having been submitted being reasonable in amount.

63. Given that the Claimants paid the totality of the advance on costs of EUR 10,000.00 as well as a non-reimbursable handling fee of EUR 3,000.00, the Arbitrator decides that in

application of article 19.3 of the FAT Rules:

(i) FAT shall reimburse EUR 2,300.00 to the Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the FAT President;

(ii) The Club shall pay EUR 7,700.00 to the Claimants, being the difference between the costs advanced by them and the amount they are going to receive in reimbursement from the FAT;

Furthermore, the Arbitrator considers it appropriate to take into account the non-reimbursable fee of EUR 3,000.00 when assessing the expenses incurred by the Claimants in connection with these proceedings. Hence, and after having reviewed and assessed the submission by the Claimants, which the Arbitrator finds reasonable, he fixes the contribution towards the Claimants' expenses at EUR 5,500.00.

10. AWARD

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

1. **BC Kyiv shall pay Mr. Tomislav Mahoric an amount of EUR 306,400.00, plus interest at a rate of 5% per annum on such amount from 24 April 2009 until payment.**

2. **BC Kyiv shall pay Mr. Bostjan Jakse an amount of EUR 81,600.00, plus interest at a rate of 5% per annum on such amount from 24 April 2009 until payment.**

3. **BC Kyiv shall pay Mr. Tomislav Mahoric and Mr. Bostjan Jakse an amount of EUR 7,700.00 as reimbursement for the advance on costs paid by them to the FAT.**

4. **BC Kyiv shall pay Mr. Tomislav Mahoric and Mr. Bostjan Jakse an amount of EUR 5,500.00 as reimbursement for their legal fees and expenses.**

5. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 26 February 2010

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."