ARBITRAL AWARD

(BAT 0155/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Mr. Pawel Kikowski,

- Claimant -

Represented by Mr. José Lasa Azpeitia, Laffer Abogados,
c/ Almagro 13, 2 D, 28010 Madrid, Spain

vs.

KK Union Olimpija Ljubljana,
Celovška 25, 1000 Ljubljana, Slovenia

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Pawel Kikowski (the “Player” or “Claimant”) is a professional basketball player of Polish nationality. He is represented by Mr. José Lasa Azpeitia, attorney-at-law in Madrid, Spain.

1.2 The Respondent

2. KK Union Olimpija Ljubljana (the “Club” or “Respondent”) is a professional basketball club located in Ljubljana, Slovenia. The Club is represented by its General Manager, Mr. Janez Rajgelj.

2. The Arbitrator

3. On 9 February 2011, the President of the Basketball Arbitral Tribunal (the "BAT") appointed Prof. Dr. Ulrich Haas as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the "BAT Rules"). Neither of the Parties has raised any 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 1 August 2009, the Parties signed an employment contract according to which Respondent engaged Claimant as a professional basketball player for three seasons, namely 2009/2010, 2010/2011 and 2011/2012 (the “First Player Contract”). Article 4 of the First Player Contract provided for remuneration in the amount of EUR 60,000.00 for

the 2009/2010 season, of EUR 80,000.00 for the 2010/2011 season and of EUR 100,000.00 for the 2011/2012 season. In addition, bonuses for specified achievements and a late payment penalty of EUR 25.00 per day were stipulated. The compensation and the bonuses should be net of any taxes and charges.

5. In mid-September 2009, the Parties agreed on a further employment contract for the same three seasons (the "Second Player Contract") dated 14 September 2009, which was however never signed by the Parties. Clause 2 of the Second Player Contract stated the Player's salary in the amount of EUR 28,000.00 gross for each of the three seasons. The amounts for bonuses and the late payment penalty remained the same as in the First Player Contract.

6. On 17 September 2009, Respondent and the agency Reval Sport Agency OU, located in Tallinn, Estonia, signed an agreement about the Player's image rights (the "Image Rights Agreement"). In Clause IV of the Image Rights Agreement, Reval Sport Agency OU stated that the Player had assigned his *"representation and economic rights to his promotion"* to the agency. The term of the Image Rights Agreement should start on 17 September 2009 and expire on 15 June 2010. As compensation, according to Clause 3 of the Image Rights Agreement, the Club was to pay the agency the amount of EUR 42,000.00, payable in monthly instalments.

7. The Player started training and playing, and stayed the entire 2009/2010 season with Respondent's team. Respondent made payments to Claimant at least once a month, amounting to EUR 22,689.01 in total, but stopped payments after 15 March 2010.

8. By letter to Respondent of 3 March 2010, Claimant's agent noted that Respondent had failed to pay the *"full monthly scheduled payments"* and requested immediate payment.

9. By letter to Respondent of 21 July 2010, Claimant's counsel requested the payment of EUR 37,310.99 for outstanding remuneration and set a time limit by no later than 28 July 2010.

10. On 29 July 2010, Claimant's counsel submitted a letter to the Club's General Manager, at that time Mr. Igor Dolenc, which in its relevant parts reads as follows:

> *"Dear Mr. Dolenc,*
>
> *[...]*
>
> *II. The Club up to date has not duly fulfilled his* (sic) *financial obligations towards the Player as it has failed to disburse his due remuneration for season 2009/10, amounting to an outstanding current debt of THIRTY SEVEN THOUSAND THREE HUNDRED AND TEN EUROS WITH NINETY NINE CENTS (37,310.99 €) net of taxes as salary owed for the season 2009/10 as well as the penalty fees concretely established within the Agreement.*
>
> *[...]*
>
> *V. As a result of the above and given the Club's failure to pay the Player's due remuneration within the period established to such effect in the Agreement, the relationship between the Player and the Club shall be deemed to be terminated."*

11. After the 2009/2010 season, Claimant left Respondent's team and signed a new employment contract with the Polish basketball club BC Trefl Sopot for the 2010/2011 season. This contract commenced on 1 August 2010 and provided for a salary in the total amount of PLN 210,000.00. The letter of clearance, issued by the Basketball Federation of Slovenia, is dated 19 August 2010.

12. By letter dated 9 September 2010 to the Club's Sport Director, at that time Mr. Janez Rajgelj, Claimant's counsel once again asked for the outstanding payments for the

2009/2010 season and additionally requested interest and late payment penalties. Up to the date of the award, no further payments have been made by Respondent.

13. After the 2010/2011 season, Claimant left the Polish club and to date he has not entered into an employment agreement for the upcoming 2011/2012 season.

3.2 The Proceedings before the BAT

14. On 24 January 2011, the Claimant's counsel filed a Request for Arbitration (with several exhibits) dated 6 January 2011 on behalf of Claimant and in accordance with the BAT Rules. The non-reimbursable fee of EUR 3,000 was received in the BAT bank account on 18 January 2011.

15. On 24 February 2011, the BAT informed the Parties that Prof. Dr. Ulrich Haas had been appointed as Arbitrator in this matter; invited the Respondent to file its answer in accordance with Article 11.2 of the BAT Rules by no later than 18 March 2011 (the "Answer"); and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 11 March 2011 as follows:

"Claimant (Mr. Kikowski)	*EUR 4,000*
Respondent (BC Union Olimpija)	*EUR 4,000"*

16. On 4 April 2011, the BAT Secretariat informed the Parties that the FIBA Arbitral Tribunal (FAT) had been renamed into Basketball Arbitral Tribunal (BAT) as of 1 April 2011 and that, absent any objections by the Parties on or before 11 April 2011, the new name would be applied also to the present proceedings. Neither of the Parties raised any objections within the said time limit.

17. On 19 April 2011, the BAT Secretariat confirmed receipt of Claimant's share of the Advance on Costs and informed the Parties that Respondent had failed to both pay its share, and to submit the Answer. Furthermore, the BAT Secretariat noted that, in

accordance with Article 9.3 of the BAT Rules, the arbitration would not proceed until the full amount of the Advance on Costs was received. Therefore, Claimant was invited to effect payment of Respondent's share of the Advance on Costs by no later than 2 May 2011.

18. On 13 May 2011, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs, and the Arbitrator granted final time limits for the Parties to submit further documents and information, *inter alia*, Respondent's Answer, until 20 May 2011.

19. On 20 May 2011, Respondent submitted its Answer. Claimant failed to submit the requested documents and information within the set time limit, but submitted comments by email of 24 May 2011.

20. Since the Parties did not request the BAT to hold an oral hearing, on 25 May 2011 the Arbitrator decided in accordance with Article 13.1 of the BAT Rules, to render 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 invited the Parties to submit their accounts on costs by 1 June 2011. Within the same time limit, the Arbitrator requested Claimant provide his residential address.

21. On 1 June 2011, Claimant's counsel informed the BAT Secretariat that no additional costs needed to be incorporated into the proceedings as he had already listed the Claimant's costs and fees amounting to EUR 11,500.00 in the Request for Arbitration.

22. Respondent did not submit an account of costs.

4. The Positions of the Parties

4.1 Claimant's Position

23. Claimant submits the following in substance:

- The First Player Contract is a kind of "master agreement", and the total net amount of EUR 240,000.00 for the three seasons includes the value of Claimant's image rights. Article 9 of the First Player Contract therefore grants the Club the right to take pictures of the Player and that those pictures shall belong to the Club.

- In order to save upon Slovenian taxes, the Club offered the Player the option of splitting the First Player Contract into two separate agreements, i.e. the Second Player Contract and the Image Rights Agreement. The Parties agreed that all terms and conditions of the First Player Contract would remain unchanged, especially the salaries and bonuses. In addition, the Claimant submits that he never signed the Second Player Contract, nor the Image Rights Agreement. Consequently – according to the Player – the First Player Contract was, and still is, the decisive document binding the Parties in this procedure.

- According to the Player, his view is corroborated by looking at the payments made by the Club to the Player in October and November 2010. These payments amount to a gross sum of EUR 6,265.00 for each month, which corresponds to the monthly net salary of EUR 6,000.00 agreed upon in the First Player Contract.

- As a result of Respondent's failure to pay all due amounts on time, Claimant had the right to terminate the employment relationship with Respondent while remaining entitled to the contractually agreed salaries in the amount of EUR 240,000.00. Because Claimant received EUR 22,689.01 from Respondent during the 2009/2010 season and is entitled to EUR 54,337.96 (equal to PLN 210,000.00) from his new

Polish club for the 2010/2011 season, Respondent still owes Claimant the amount of EUR 162,973.03. For the upcoming 2011/2012 season, Claimant and his agent are screening the respective market for entering into a new employment agreement. However, according to the Player, no new contract has been concluded so far.

- In addition, Claimant submits that Respondent is obliged to pay to him a bonus for participation in the Final Four tournament of the Adriatic League. Because of Respondent's failure to pay all due amounts on time, Claimant is further, entitled to late payment penalties until the date of Claimant's termination letter. Finally, the Player demands interest at a rate of 5% p.a. as from the termination of the First Player Contract.

24. In his Request for Arbitration, Claimant requests the following relief:

> *"CLAIMANT*
>
> - *Claimant seeks relief whereby FAT would rule ex aqueo* (sic) *et bono (as concretely settled between the Parties in the Agreement) as follows:*
>
> - *Respondent shall be held liable for the premature, unilateral termination of the Agreement without just cause.*
>
> - *Respondent is ordered to pay the net amount of ONE HUNDRED SIXTY TWO THOUSAND NINE HUNDRED SEVENTY THREE EUROS with THREE CENTS OF EURO (162,973.03€) as being this sum the amount settled by the parties as main remuneration for the Claimant services as a basketball player, minus the amount already paid by the Respondent and minus the amounts agreed as remuneration with his current team.*
>
> - *Respondent is ordered to pay the net amount corresponding to penalty payment of TWENTY SIX THOUSAND NINE HUNDRED SEVENTY FIVE EUROS (26,975 €).*
>
> - *Respondent is ordered to pay the pertinent bonus of FIVE THOUSAND EUROS (5,000 €).*
>
> - *Respondent is ordered to pay penalty for legal interest at five percent (5%) per annum to every aforesaid amount, in accordance to the terms and conditions expressed* ut supra*, i.e, since the termination of the contract.*

- *Respondent is ordered to pay expenses and reasonable legal fees on a net amount of EIGHT THOUSAND FIVE HUNDRED EUROS (8.500€) concretely related to the execution of the present request for arbitration and Respondent's refusal to submit the proper payment.*

Draw up of law suit. Study of the agreement with Respondent. Meeting with Player, conversation and communication with Player and German Agents. Termination letter Notice letters to Respondent	*3.500 Euros*
Draw up of Request for Arbitration	*5.000 Euros*
Total fees	*8.500 Euros*
Non reimbursable handling fee	*3.000 Euros*

- *Respondent, ADITIONALLY* (sic)*, is ordered to pay the legal costs effectively incurred to have access to FAT proceedings, i.e., the non-reimbursable handling fee of THREE THOUSAND EUROS (3,000€) and it should be considered when assessing the Claimants' legal fees and expenses.*

- *In virtue thereof Claimant requests for this amount to be considered additionally to the amount considered adequate to compensate the total legal fees and expenses generated to Claimant, amounting a total of ELEVEN THOUSAND FIVEN* (sic) *HUNDRED EUROS.*

Total legal fees and expenses	*11.500 Euros*

- *Respondent is ordered to disburse the advanced* (sic) *of costs eventually determined by FAT and yet paid by Claimant."*

4.2 Respondent's Position

25. Respondent submits the following in substance:

- The facts stated in Claimant's Request for Arbitration are not true. The Second Player Contract is the "sole valid" agreement between the Parties and provides for a

salary in the amount of EUR 28,000.00 per season only. Claimant confirms receipt of EUR 22,698.01 EUR from Respondent.

- The employment relationship between the Parties was mutually terminated at the end of the 2009/2010 season and Claimant received the letter of clearance.

26. In its Answer, Respondent requests the following relief:

"The claimant's request for relief should be denied."

5. Jurisdiction

27. Pursuant to Article 2.1 of the BAT Rules, *"[t]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland".* Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).

28. The jurisdiction of the BAT 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].

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

5.2 Formal and substantive validity of the arbitration agreement

30. Two of the three contracts in dispute contain an arbitration agreement in favour of BAT, i.e. the First Player Contract and the Second Player Contract.

31. Article 15 of the First Player Contract reads – *inter alia* – as follows:

> *"2. 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 Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS shall decide the dispute ex aequo et bono."*

32. Clause 13 of the Second Player Contract reads as follows:

> *"13. IN EVENT OF A DISPUTE*
> *This Agreement contains the entire agreement between the parties and there is no oral or written inducements, promises or agreements except as contained herein.*
> *Any disputes arising with respect to, or in connection with (sic) should be negotiated between the parties of this Agreement.*
> *If the parties do not find any settlement, this Agreement 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 Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law.*
> *The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

33. By contrast, the Image Rights Agreement contains an arbitration clause in favour of arbitration to be "held in Estonia", and provides for the jurisdiction of "The Court of Tallin". Clause 7 of the Image Rights Agreement reads as follows:

> *"7. GOVERNING LAWS*
>
> *Parties shall submit all disputes arising out of or relating to the Agreement to binding arbitration. Arbitration shall be held in accordance with the rules of Estonia law. Arbitration shall be held in the Estonia. This contract shall be interpreted and enforced in accordance with the laws of the Estonian under jurisdiction of The Court of Tallin. The accelerated procedure of Arbitration is accepted by both"*[sic]

34. However, it must be noted that the Player is not a party to the Image Rights Agreement. The only parties to said agreement are Respondent on the one hand and the agency "Reval Sport Agency OU" on the other hand. The Image Rights Agreement can, thus, not affect the parties' rights and duties in the present proceedings.

35. Both the First Player Contract and the Second Player Contract are in written form; thus, the arbitration clauses incorporated therein fulfil the formal requirements of Article 178(1) PILA.

36. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreements in the present matter under Swiss law (cf. Article 178(2) PILA). In particular, the wording *"[a]ny dispute arising from or related to the present contract"* in Article 15 of the First Player Contract clearly covers the present dispute.[2]

37. Finally, the Arbitrator notes that the jurisdiction of BAT has not been contested by either party. In view of all the above, the Arbitrator, therefore, holds that he has jurisdiction to decide the present dispute.

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[2] *See for instance* BERGER/ KELLERHALS: International and domestic Arbitration in Switzerland, Berne 2010, N 466.

6. Applicable Law

38. 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 reads as follows:

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

39. Under the heading "Applicable Law", Article 15.1 of the BAT 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."*

40. Article 15 of the First Player Contract provides in relation to the applicable law as follows:

> *"1. This Agreement shall be construed under and governed by the laws of the Federal Republic of Slovenia.*
>
> *2. […] The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

41. The reference to "ex aequo et bono" on the one hand and to "the laws of the Federal Republic of Slovenia" on the other hand is – at first sight – somewhat contradictory. The Arbitrator holds, nevertheless, that the contents of the mission conferred upon him by the Parties to the First Player Contract derive first and foremost from the part of Article 15 para. 2 which is directly addressed to him, i.e. that part of the clause according to which the Arbitrator "*shall decide the dispute ex aequo et bono*". Bearing also in mind that the Parties did not make any reference in their submissions to the law of the Federal Republic of Slovenia, the Arbitrator finds that Article 15 para. 1 does not supersede the express choice of the Parties in Article 15 para. 2 that the substance of

any dispute arising out of the First Player Contract should be decided *ex aequo et bono*.

42. To sum up, the Arbitrator holds that the Parties agreed on BAT arbitration and the respective set of rules applicable to BAT proceedings, including the concept of *ex aequo et bono* and that the authorization to decide the dispute *ex aequo et bono* prevails over the vague reference to Slovenian law[3].

43. In addition, in their arbitration agreement in Clause 7 of the Second Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono*, without reference to any other law.

44. Consequently, the Arbitrator will decide the present matter *ex aequo et bono*.

45. 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 of 1969[4] (Concordat),[5] under which Swiss courts have held that "arbitrage en équité" is fundamentally different from "arbitrage 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."*[6]

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3 *See also* FAT 0085/10, Ozbolt vs. KK Union Olimpija Ljubljana; FAT 0078/10, Dousa vs. Apollon Limassol; FAT 0063/09, Fisher & Entersport Management Inc. vs. KK Vojvodina Srbijagas; FAT 0031/09, Misanovic & Ristanovic vs. Enterprise Men's Basketball Club "Dynamo" Moscow; FAT 0030/09, Vujanic vs. Enterprise Men's Basketball Club "Dynamo" Moscow.

4 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

5 KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 187 PILA N 289.

6 JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

46. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

> *"the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand".*[7]

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

7. Findings

48. Claimant requests remuneration (7.1), late payment penalties (7.2), outstanding bonus (7.3) and interest (7.4).

7.1 Is Claimant entitled to remuneration in the amount of EUR 162,973.03?

a) Relation of First Player Contract and Second Player Contract

49. It is undisputed that the Parties agreed on the Second Player Contract but did not sign the document. However, it is disputed between the Parties whether or not the Second Player Contract substitutes the First Player Contract.

50. Respondent asserts in its Answer that the Second Player Contract should be the only document to be taken into account, since the Parties' intent was to replace the First by the Second Player Contract. However, this is hard to believe. Why should a player waive a large portion of his salary in favour of the Club, while maintaining the same set of obligations as before? This does not make any sense economically. Respondent

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7 POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

does not give any explanation as to the motives for which the Parties supposedly acted in such an unusual manner.

51. Claimant, by contrast, gives a frequently encountered explanation for the existence of the two contracts. According to Claimant, the initial contract was – formally – split into two separate agreements in order for the Club to optimize its tax obligations under domestic law. That this was done "pro forma", without any intent of changing the Player's rights and obligations under the First Player Contract, is evidenced, in particular, when comparing the monthly salary provided for in Article 3 of the First Player Contract (EUR 6,000.00 net in the 2009/2010 season) and the monthly salary stipulated in Clause 2 of the Second Player Contract (EUR 2,800.00 gross) together with the monthly payments in accordance with Clause 3 of the Image Rights Agreement (EUR 4,000.00). The latter two add up – subject to taxation – to the monthly amounts due under the First Player Contract.

52. Claimant supported his position by submitting his statements of account. They show payments by the Club in the amount of EUR 2,000.00 (i.e., the said EUR 2,800.00 minus taxes, social security deductions, etc.) and two payments of EUR 4,000.00 from "Reval Sport Agency OU", the party of the Image Rights Agreement.

53. Bearing in mind that the First Player Contract and the Second Player Contract are identical regarding the terms of the Player's employment, the bonus payments, the requirements for and the amount of late payment penalties, the Arbitrator cannot see any reason why Claimant should have voluntarily waived his right for salary payments three or four times higher than those stipulated in the Second Player Contract. To conclude, therefore, the Arbitrator finds that Respondent failed to prove its allegation according to which the Second Player Contract was agreed upon in order to substitute the First Player Contract. Hence, the First Player Contract of 1 August 2009 was not terminated or substituted by the Parties' entering into the Second Player Contract.

b) Termination of the contractual relationship between the Parties

54. In its Answer, Respondent alleges that the Parties mutually agreed to terminate their contractual relationship. Claimant, by contrast, submits that he terminated the employment contract by letter of his counsel dated 29 July 2010 due to Respondent's failure to pay on time.

55. Claimant's submission is supported by a copy of his counsel's letter dated 29 July 2010. This letter clearly shows Claimant's intention to terminate the employment relationship with Respondent. In para. V of this letter Claimant states that, as a result of Respondent's failure to honour its obligations on time, *"the relationship between the Player and the Club shall be deemed to be terminated".* In addition, para. IX contains the wording *"[t]his formal notice of termination"*.

56. Respondent, on the contrary, fails to offer any evidence for its allegation of a mutual termination. The letter of clearance issued by the Slovenian Basketball Federation is no proof of a mutual termination of the employment relationship between the Parties. It only shows that Claimant was given permission to play for another basketball club in the 2009/2010 season because he was no longer bound by contract in Slovenia. In these circumstances, the letter of clearance can be no proof or even an indication of a *mutual* termination agreement between the Parties.

57. In consideration of all the above, the Arbitrator finds that the contractual relationship between the Parties was unilaterally terminated by Claimant on 29 July 2010, and not through mutual consent.

c) Termination with just cause

58. The question to be answered next is whether or not Claimant terminated the First Player Contract with just cause on 29 July 2010. The First Player Contract provides in

Article 11 para. 3 that *"[i]n the event any scheduled payment is not made within 40 (fourty)* [sic] *days of the scheduled payment date, this Agreement shall be deemed terminated"*.

59. It is undisputed that Respondent's last payment to Claimant was effected on 15 March 2010. According to Article 4 para. 1 of the First Player Contract, Respondent was obliged to make payments on 31 March, 30 April, 31 May and 30 June 2010. As none of those payments had been made as of 29 July 2010, i.e. the date of Claimant's termination letter, Respondent was more than forty days late and Claimant, therefore, was entitled to terminate the employment relationship unilaterally.

d) Outstanding salary

60. Claimant requests EUR 162,973.03 in relation to the seasons 2009/2010, 2010/2011 and 2011/2012. To determine the amount to which Claimant is actually entitled, the Arbitrator has to differentiate between the periods before and after termination of the contract.

61. Regarding the 2009/2010 season, Claimant is entitled to the full salary agreed upon for that season. Having fulfilled his obligations arising out of the First Player Contract, Claimant can claim full remuneration. According to Article 4 para. 1 of the First Player Contract, Claimant was entitled to the amount of EUR 60.000,00 in total. Since he already received amounts totalling EUR 22,689.01 in salary payments, the outstanding amount for the 2009/2010 season owed by Respondent accounts for EUR 37,310.99.

e) Claim for damages

62. With the termination of the First Player Contract, the Club's obligations to pay remuneration in accordance with the contract ceased to exist. However, since the Club was in breach of its contractual duties and thereby provoked the contract termination, it

is liable for damages. As a general principle, the Player can claim damages in the amount of the salaries agreed upon in the contract.

63. This is also evidenced by Article 11 para. 2 of the First Player Contract, which states that in the event of default of forty days "*the payments remaining till the expiration of the full term of the Agreement [...] shall become immediately due and payable"*. However, according to the consistent jurisprudence of the BAT[8], a player is under the duty to take all reasonable steps to mitigate the damage. Therefore, any other payments a player received (or might have – acting with due care – received) during the contractual period for which compensation is sought must be deducted from the amount claimed as damages.

64. Regarding the 2010/2011 season, the total agreed-upon compensation was EUR 80,000.00 (Article 4 para. 2 of the First Player Contract). Since Claimant confirms that he has received the amount of EUR 54,337.96[9] from the Polish basketball club BC Trefl Sopot for the 2010/2011 season, this amount has to be deducted. Thus, the amount which remains owing to Claimant by Respondent for the 2010/2011 season is EUR 25,662.04.

65. Regarding the 2011/2012 season, the total compensation agreed upon was EUR 100,000.00 (Article 4 para. 3 of the First Player Contract). Claimant confirms that to date, he has not entered into a new employment contract for the upcoming season. As the duty to mitigate the damage exists also in respect of compensation for future salaries, the anticipated income must be taken into consideration. The Arbitrator is confident that, subject to unforeseeable circumstances, Claimant will be able to reach

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8 *See for instance* BAT 0129/10, Pomare vs. Gaz Metan Medias; FAT 0043/09, Gomis vs. Women's Basketball Club Fenerbahce.

9 According to Claimant's submissions, this is the "current" (from 6 January 2011, i.e. the date of the Request for Arbitration) exchange rate on the amount of PNL 210,000.00.

the salary level of the 2010/2011 season. Therefore, deciding *ex aequo et bono*, the Arbitrator finds that the amount of EUR 54,337.96 has to be deducted. Thus, the amount which is still owed to Claimant by Respondent for the 2011/2012 season is EUR 45,662.04.

66. To sum up, Claimant is entitled to remuneration and compensation for the seasons 2009/2010, 2010/2011 and 2011/2012 in the total amount of EUR 108,635.07.

7.2 Is Claimant entitled to late payment penalties in the amount of EUR 26,975.00?

67. Because of Respondent's failure to pay on time, Claimant requests late payment penalties in the total amount of EUR 26,975.00.

68. According to Article 11 para. 1 of the First Player Contract, Respondent is obliged to pay a penalty of EUR 25.00 per day of default after a payment delay of 20 days. In view of the wording in Article 11 para.1 of the First Player Contract, according to which *"[a]ny and all payments [...] shall be subject to a penalty fee"*, the Arbitrator finds that a late payment penalty can be claimed on every individual late payment and can, therefore, be applied cumulatively. In addition, the Arbitrator holds that partial payments do not relieve Respondent from its obligation for late payment penalties.

69. The BAT has consistently held that late payment penalty clauses are generally lawful but subject to review by the Arbitrator so as to ensure that they are not disproportionate when compared to the amount claimed as principal.[10] In addition, in line with prior BAT

[10] *See* BAT 0158/11, Stimac vs. KK Crvena Zvezda Beograd; FAT 0114/10, U1st Sports Overseas Ltd. & U1st Sports Atlanta LLC vs. Club Baloncesto Valladolid SAD; FAT 0109/10, Plaisted vs. Basketball Club Zadar (KK Zadar); FAT 0100/10, Taylor vs. KK Crvena Zvezda Beograd; FAT 0086/10, Queenan vs. Basketball Club Pecsi Noi Kosariabda Kft; FAT 0036/09, Tigran Petrosean & TP Sports vs. WBC "Spartak" St. Petersburg.

cases[11], the Arbitrator holds that the penalty clause in the First Player Contract is of a "dissuasive nature", i.e. to prevent late payments under the existing contract. It follows that, once the employment relationship was terminated by the Player, penalty payments ceased to accrue.

70. The penalty clause in the case at hand became applicable on the twenty-first day after any late payment became due, and ceased to accrue on 29 July 2010, i.e. the date of Claimant's termination letter. Considering the payments made by Respondent to Claimant during the 2009/2010 season, the late payment penalties to be paid by Respondent have to be calculated as follows:

PAYMENTS DUE		**PAYMENTS RECEIVED**		**PENALTIES**	
Date	**Amount (EUR)**	**Date**	**Amount (EUR)**	**Starting date**	**Days late**
30 September 2009	6,000.00	1 October 2009 14 October 2009 23 October 2009	2,275.00 3,990.00 2,173.00	21 October 2009	0
31 October 2009	6,000.00	16 November 2009 20 November 2009	4,000.00 2,207.93	21 November 2009	0
30 November 2009	6,000.00	18 December 2009	2,077.10	21 December 2009	221
31 December 2009	6,000.00	19 January 2010	2,077.10	21 January 2010	190
31 January 2010	6,000.00	19 February 2010	2,077.10	21 February 2010	159
28 February 2010	6,000.00	15 March 2010	2,077.10	21 March 2010	131

11 *See* FAT 0109/10, Plaisted vs. Basketball Club Zadar (KK Zadar) and FAT 0100/10, Taylor vs. KK Crvena Zvezda Beograd.

31 March 2010	6,000.00	-	-	21 April 2010	100
30 April 2010	6,000.00	-	-	21 May 2010	70
31 May 2010	6,000.00	-	-	21 June 2010	39
30 June 2010	6,000.00	-	-	21 July 2010	9
					-------- **919**

71. Therefore, Claimant is entitled to claim late payment penalties for 919 days with a daily rate of EUR 25.00 amounting to EUR 22,975.00 in total. The Arbitrator finds that an amount of EUR 22,975.00 is not excessive because it is not disproportionate to Respondent's basic obligation, i.e. EUR 37,310.99 for the 2009/2010 season.

72. Consequently, the Arbitrator finds that Respondent has to pay an amount of EUR 22,975.00 to Claimant in late payment penalties.

7.3 Is Claimant entitled to outstanding bonus in the amount of EUR 5,000.00?

73. Claimant also requests an amount of EUR 5,000.00 as bonus achieved in the 2009/2010 season. In that season, Respondent's team participated in the Final Four tournament of the Adriatic League, which took place in Zagreb, Croatia from 23 to 25 April 2010. According to Article 4 para. 4.1 of the First Player Contract a bonus of EUR 5,000.00 is to be paid to Claimant for *"Advancing to Adriatic League Final Four (NLB)"*. Therefore, Respondent is obliged to pay an amount of EUR 5,000.00 to Claimant.

7.4 Is Claimant entitled to interest?

74. Claimant requests interest at the rate of 5% p.a. on *"every aforesaid amount"* from the termination of the contractual relationship between the Parties. Such obligation is not provided for in the First Player Contract.

75. However, the obligation to pay interest on the amounts due is a generally accepted principle which is embodied in most legal systems. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for such an obligation.[12] The Arbitrator, deciding *ex aequo et bono*, considers an interest rate of 5% p.a. to be fair and equitable in the present case.

76. On the other hand, the right to claim interest exists only for those periods of time for which no late payment penalty accrues. As Claimant only requests interest as from the termination of the contractual relationship, there is no concurrence of default interest and late payment penalties.

77. Default interest accrues on all amounts due as from the termination of the First Player Contract on 29 July 2010, i.e. the outstanding salaries for the 2009/2010 season and the compensation for the seasons 2010/2011 and 2011/2012 in the total amount of EUR 108,635.07, the late payment penalties in the total amount of EUR 22,975.00 and the outstanding bonus for the 2009/2010 season in the amount of EUR 5,000.00.

78. Consequently, the Arbitrator decides that Respondent has to pay interest of 5% p.a. on the amount of EUR 136,610.07 since 30 July 2010.

8. Costs

79. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT 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.

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12 *See* 0092/10 FAT, Ronci, Coelho vs. WBC Mizo Pecs 2010; 0069/09 FAT, Ivezic, Draskicevic vs. Basketball Club Pecsi Noi Kosariabda Kft; 0056/09 FAT, Branzova vs. Basketball Club Nadezhda.

80. On 3 August 2011 – considering that pursuant to Article 17.2 of the BAT Rules "the BAT President shall determine the final amount of the costs of the arbitration, which shall include the administrative and other costs of BAT and the fees and costs of the BAT 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 BAT 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 BAT President determined the arbitration costs in the present matter to be EUR 7,400.00

81. Considering that Claimant prevailed on approximately 70% of his claims, that the financial situation of the Parties does not compel otherwise and that Respondent did not submit any account of its costs, the Arbitrator holds it fair that 70% of the fees and costs of this arbitration be borne by Respondent and 30% by Claimant and that Respondent be required to cover its own legal costs as well as 70% of Claimant's legal costs, the latter being reasonable in amount and not disputed by Respondent.

82. Given that Claimant paid the totality of the Advance on Costs of EUR 8,000.00, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

    (i) BAT shall reimburse EUR 600 to Claimant, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President;

    (ii) Respondent shall pay EUR 5,180 to Claimant, being 70% of the arbitration costs fixed by the BAT President.

    (iii) Furthermore, the Arbitrator considers it appropriate to take into account the non-reimbursable handling fee of EUR 3,000.00 when assessing the expenses incurred by the Claimant in connection with these proceedings. Hence, considering also that the further amount of EUR 8,500.00 for Claimant's legal

fees and expenses is reasonable, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at EUR 8,050.00.

9. AWARD

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

1. **KK Union Olimpija Ljubljana shall pay Mr. Pawel Kikowski an amount of EUR 136,610.07 plus interest of 5% p.a. since 30 July 2010.**

2. **KK Union Olimpija Ljubljana shall pay Mr. Pawel Kikowski an amount of EUR 5,180.00 as a contribution towards the arbitration costs paid by him.**

3. **KK Union Olimpija Ljubljana shall pay Mr. Pawel Kikowski an amount of EUR 8,050.00 as a contribution towards his legal fees and expenses.**

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

Geneva, seat of the arbitration, 8 August 2011

Ulrich Haas
(Arbitrator)