

**ARBITRAL AWARD**

**(BAT 0172/11)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Raj Parker**

in the arbitration proceedings

**Mr. Daniel Jusup**

**Nebojsa Ivic**

Victor Braeckmanlaan 141, 9040 Gent, Belgium

vs.

**Kosarkaskog Kluba "Zadar"**

Obala Kralja Tomislava 1, Zadar, Croatia

**- Claimant 1 -**

**- Claimant 2 -**

**- Respondent -**

## **1. The Parties**

### **1.1 The Claimants**

1. Mr. Daniel Jusup (hereinafter "Claimant 1") is a professional basketball coach.
2. Mr. Nebojsa Ivic (hereinafter "Claimant 2") is a FIBA-certified basketball agent.
3. In these proceedings, Claimant 1 and Claimant 2 (together "the Claimants") are represented by Ms. Ann Vandecandelaere of Victor Braeckmanlaan 141, 9040 Gent, Belgium.

### **1.2 The Respondent**

4. Kosarkaskog Kluba "Zadar" (hereinafter the "Respondent") is a Croatian basketball club. It is represented in these proceedings by Mr. Rikardo Perković, attorney at law, of Perković & Perković law firm, Elizabete Kotromanić 11/II, 23000 Zadar, Croatia.

## **2. The Arbitrator**

5. On 11 April 2011, the President of the Basketball Arbitral Tribunal (the "BAT") appointed Raj Parker as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules").

6. 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

##### 3.1.1 Claimant 1

7. On 21 January 2010, Claimant 1 and the Respondent entered into a contract of employment (hereinafter "Contract 1"). Contract 1 contains, among others, the following provisions:

**"Article 1. Employment - duration"**

*The Club, KK Zadar, competing in the first national division of the Croatian basketball championship, undertakes to employ the Coach as a professional basketball Coach for the remainder of the 2009-2010 season as well as for the 2010-2011.*

*The present contract has come into effect on January 21<sup>st</sup> 2010 and ends by right on July 1<sup>st</sup> 2011.*

*The Club's management decides on the exact dates at which the season starts and ends. The Coach is allowed to take his annual vacation within the period lying between the end of the previous season and the beginning of the next season. In any case, the Coach will have to schedule his vacation in accordance with the Club's pre- and post-season obligations.*

*The Club guarantees to the Coach, for the duration of this contract, all payments as mentioned in Article 3A, the contract being fully (100%) guaranteed for skill, injury and illness.*



# BASKETBALL ARBITRAL TRIBUNAL

*In the case that the club or the coach should break the present arrangement prior to the date of the 1<sup>st</sup> July 2011, the party that is responsible for the breach of the contract has to pay the other party an amount of 50.000 euro. This amount of 50.000 euro will be due immediately. If the payment is done later than seven days after the breach of the contract an additional interest of 10% will be due (on a yearly base).*

*However, the Club is allowed to end the present contract unilaterally, without payment of any further indemnity, for any of the following reasons: severe offences against Croatian penal laws, illegal substance abuse including drugs, positive doping control.*

[...]

### **Article 3. Obligations of the Club**

The Club agrees:

A. To pay the Coach the following net monthly salary as follows:

*For the first season*

<i>February 1, 2010</i>	:	<i>5.000 €</i>
<i>March 1, 2010</i>	:	<i>5.000 €</i>
<i>April 1, 2010</i>	:	<i>5.000 €</i>
<i>May 1, 2010</i>	:	<i>5.000 €</i>
<i>June 1, 2010</i>	:	<i>5.000 €</i>
<i>July 1, 2010</i>	:	<i>5.000 €</i>
<i>August 1, 2010</i>	:	<i>5.000 €</i>

*For the second season*

<i>September 1, 2010</i>	:	<i>7.000 €</i>
<i>October 1, 2010</i>	:	<i>7.000 €</i>
<i>November 1, 2010</i>	:	<i>7.000 €</i>
<i>December 1, 2010</i>	:	<i>7.000 €</i>
<i>January 1, 2011</i>	:	<i>7.000 €</i>
<i>February 1, 2011</i>	:	<i>7.000 €</i>
<i>March 1, 2011</i>	:	<i>7.000 €</i>
<i>April 1, 2011</i>	:	<i>7.000 €</i>
<i>May 1, 2011</i>	:	<i>7.000 €</i>
<i>June 1, 2011</i>	:	<i>7.000 €</i>

B. To pay the Coach the following net bonuses:

- qualification for final Croatian League:	5.000 €
- winning the Championship of Croatian League:	15.000 €
- winning the Croatian Cup:	5.000 €
- qualification in the final four NLB League:	10.000 €
- winning the title in NLB League:	20.000 €

*All mentioned bonuses are net."*

8. Claimant 1 left the service of the Respondent club prior to the end of the 2010-2011

season.

### **3.1.2 Claimant 2**

9. On 21 January 2010, Claimant 2 and the Respondent entered into an agent's fee agreement (hereinafter "Contract 2"). Contract 2 contains, among others, the following provisions:

*"3. In consequence the Club agrees to pay the Agent an amount of thousand [sic] seven hundred fifty Euro (1750 €) for the first season and three thousand five hundred Euro (3500€) for the second season.*

*This total amount of 5250 euro is to be considered as a commission for rendered services in the mediation of the labour contract between the Club and the Coach. This commission includes the Agent's remuneration on ALL payments (salary, bonuses of any kind, advantages...) the Coach shall perceive in application of the abovementioned labour contract.*

*The payments will be effectuated as follows:*

- 1750 € net, on February 1<sup>st</sup> 2010
- 3.500 €, net on September 1<sup>st</sup> 2010

*These amounts can be claimed as soon as the Agent has established the required bills and sent them to the Club.*

*If the Coach unilaterally ends the aforementioned labour contract with the Club after the first season, the present mediation will end automatically and no further fees will be due by the Club to the Agent."*

10. No monies have been paid pursuant to Contract 2.

### **3.2 The Proceedings before the BAT**

11. On 2 March 2011, the Claimants filed a Request for Arbitration in accordance with the BAT Rules. The BAT received the non-reimbursable handling fee of EUR 3,000.00

from the Claimants on 3 March 2011.

12. By letter dated 12 April 2011, the BAT Secretariat fixed a time limit until 3 May 2011 for the Respondent to file the Answer to the Request for Arbitration. By the same letter, the BAT Secretariat informed the Parties that the FIBA Arbitral Tribunal (FAT) had been renamed to Basketball Arbitral Tribunal (BAT) and that, unless one of the Parties opposed by 18 April 2011, the new name would be applied to the present proceedings. None of the Parties raised any objections within the said time limit.
13. By the same letter of 12 April 2011, and with a time limit for payment until 26 April 2011, the following amounts were fixed as the Advance on Costs:

<i>"Claimant 1 (Mr. Dan[ie]l Jusup)</i>	<i>EUR 3,500</i>
<i>Claimant 2 (Mr. Nebosja Ivic)</i>	<i>EUR 1,000</i>
<i>Respondent (Kosarkaskog Kluba "Zadar")</i>	<i>EUR 4,500"</i>
14. Claimant 1 paid his share of the Advance on Costs on 26 April 2011. Claimant 2 paid his share of the Advance on Costs on 28 April 2011.
15. On 3 May 2011, the Respondent filed its Answer to the Request for Arbitration together with a counterclaim (hereinafter the "Counterclaim").
16. By Procedural Order dated 5 May 2011, the BAT Secretariat informed the Parties that the Claimants had paid their share of the share of the Advance on Costs, but that the Respondent had not paid its share. Furthermore, if the Respondent had not paid its share of the Advance on Costs by 13 May 2011, the Counterclaim would be deemed withdrawn.
17. The Respondent paid its share of the Advance on Costs on 10 May 2011.

18. By Procedural Order dated 16 May 2011 (hereinafter the “Second Procedural Order”), the BAT Secretariat informed the Parties that all Parties had paid their respective shares of the Advance on Costs. The Arbitrator also requested more information from the Claimants and the Respondent by no later than 25 May 2011. On 23 May 2011 the Claimants responded to the Second Procedural Order. By emails sent on 24 May 2011 and 25 May 2011, the Respondent responded to the Second Procedural Order.
19. By Procedural Order dated 31 May 2011 (hereinafter the “Third Procedural Order”), the Arbitrator invited the Claimants to respond to the Counterclaim by no later than 8 June 2011. The Arbitrator also requested further information from the Claimants and the Respondent by no later than 8 June 2011. On 1 June 2011, the Respondent responded to the Third Procedural Order. On 6 June 2011, the Claimants responded to the Third Procedural Order.
20. By Procedural Order dated 15 June 2011, the Arbitrator declared the exchange of documents complete, and requested that the Parties submit detailed accounts of their costs by 21 June 2011.
21. On 20 June 2011, the Claimants submitted the following account for costs:

***“For Mr. Jusup v Zadar***

*3000 euro paid to FIBA as non reimbursable handling fee in accordance with art. 17.1 of FAT rules*

*3500 euro paid to FIBA as advance on costs (art. 9.3 of the BAT rules)*

*3500 euro costs for legal representation.*

***For Mr. Ivic v Zadar***

*1000 euro paid to Fiba as an advance on cost (art. 9.3 of the BAT rules)*

*2000 euro costs for legal representation.”*

22. On 21 June 2011, the Respondent submitted the following account for costs:

*“Full covering of costs of this arbitration inclusive the fee of the legal representation is*

**7.500,00 euro:**

*– advance on costs (answer and the counterclaim) payed by the Respondent in amount of 4.500,00,*

*– fee of the legal representation in amount of 3.000,00 euro,”*

23. By email dated 29 June 2011, the BAT Secretariat invited the Parties to submit any comments on the other Party’s account of costs by no later than 4 July 2011. None of the Parties submitted any such comments.

24. Since none of the Parties filed an application for a hearing, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the award on the basis of the written submissions of the Parties.

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

### **4.1 The Claimants' Submissions**

25. Claimant 1 submits that the Respondent unilaterally terminated Contract 1 without just cause in a meeting held on 11 January 2011. Claimant 1 claims that three different sums due under Contract 1 are outstanding and now payable. The three sums are as follows:

(i) Salary and bonuses for the 2009-2010 season

In the Request for Arbitration, Claimant 1 submitted that the Respondent failed to pay him EUR 10,681.15 in salary and bonuses for the 2009-2010 season. In his response to the Second Procedural Order, Claimant 1 stated that the Respondent had made additional payments to him since he had submitted the Request for Arbitration. In his response to the Third Procedural Order, Claimant 1 submitted that the amount that the Respondent now owed in relation to the 2009-2010 season was EUR 10,000.00.

(ii) Salary for the 2010-2011 season

Claimant 1 submits that he is entitled to EUR 70,000.00 in unpaid salary for the 2010-2011 season.

(iii) Contractual damages

Claimant 1 submits that he is entitled to EUR 50,000.00 pursuant to article 1 of Contract 1, because the Respondent breached the terms of Contract 1. Article 1 provides that if either party breaches Contract 1 before 1 July 2011, that party must pay the other party EUR 50,000.00.

26. In his response to the Third Procedural Order, Claimant 1 submitted that if the Arbitrator did not accept that Claimant 1 was entitled to both EUR 70,000.00 in unpaid salary for the 2010-2011 season and EUR 50,000.00 in contractual damages, then Claimant 1 should be entitled to EUR 42,000.00 in unpaid salary for the 2010-2011 season and EUR 50,000.00 in contractual damages. Claimant 1 explained that this was because EUR 42,000.00 was the amount of unpaid salary due when the Respondent breached Contract 1, thereby triggering article 1 of Contract 1 which provides that a EUR 50,000.00 is payable by a party who breaches Contract 1.
27. Claimant 2 submits that the Respondent failed to make payments to him in accordance

with Contract 2 in the amount of EUR 1,750.00 for the 2009-2010 season and EUR 3,500.00 for the 2010-2011 season.

28. The Claimants' request for relief states:

*"Concerning claimant 1 Daniel Jusup*

*A ) to award claimant with the amount of 130.681.15 euro plus interest at the applicable Swiss statutory rate starting from the 28<sup>th</sup> February 2011.*

*B ) to award the claimant the interest of 10% on the 50.000 euro fine in which is due in case of the breach of the contract starting from the 11<sup>th</sup> January 2011.*

*C ) to award the claimant with the full covering of the costs of this arbitration, inclusive the fee of his legal representative.*

*Concerning claimant 2 Nebojsa Ivic*

*A ) to award claimant2 with the amount of 5250 euro plus interest at the applicable Swiss statutory rate starting from the 28<sup>th</sup> February 2011.*

*C ) to award the claimant with the full covering of the costs of this arbitration, inclusive the fee of his legal representative."*

#### **4.2 The Respondent's Submissions**

29. The Respondent submits that it has paid EUR 29,667.00 to Claimant 1 to date and, therefore, that it has a liability of EUR 5,333.00 to Claimant 1 for the 2009-2010 season. The Respondent does not dispute that it has not made any payments to Claimant 1 in relation to the 2010-2011 season.

30. However, the Respondent submits that Claimant 1 should only be entitled to either the outstanding salary for the 2010-2011 season or the contractual damages of EUR 50,000.00, and not both. In its Answer, the Respondent states that "[i]n accordance with the intention of the parties, the amount of 50,000,00 euro should represent

*Claimants financial insurance after the breach and before contracting a new engagement”.*

31. The Respondent counterclaims for EUR 124,132.00 in damages from Claimant 1 for the cost of terminating the contracts of three players: Ricardo Greer; Jurica; and Hrvoje Perinčić. The Respondent claims that Claimant 1 was careless in selecting these players to join the Respondent club.
32. The Respondent did not respond to Claimant 2’s claim in its Answer. In the Second Procedural Order, the Arbitrator requested the Respondent to make any submissions that it had in relation to Claimant 2’s claim. The Respondent did not make any such submissions.

#### **4.3 The Claimants’ response to the Counterclaim**

33. The Claimants deny that the Respondent is entitled to EUR 124,132.00 in damages from Claimant 1. The Claimants submit that Claimant 1 cannot be held liable for the performances of players.
34. The Claimants state in their response to the Second Procedural Order that *“in the club KK Zadar, it is so that the coach has an advisory role concerning the players with whom the club signs a contract or who to fire and under which conditions. The coach advises the general manager and the final decision is taken by the general management. Since the coach only gives advise, [sic] he can never be held responsible for the performance of the players. [...] [A] coach can never be held liable for the performances of players.”*

## **5. Jurisdiction and other Procedural Issues**

### **5.1 The Jurisdiction of the BAT**

35. 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).

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

#### **5.1.1 Arbitrability**

37. 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.<sup>1</sup>

#### **5.1.2 Formal and substantive validity of the arbitration agreements**

38. The existence of a valid arbitration agreement is to be examined 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.*

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

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 particular the main contract, or to Swiss law."

39. Article 4 of Contract 1 stipulates:

**Article 4. Applicable law and disputes**

*The present contract is ruled by Croatian laws.*

*All disputes arising out of the interpretation or execution of the present contract will be resolved by amicable settlement between parties, if needed, assisted by their respective counsels. Upon failure to reach a settlement the dispute will be brought before the FAT, according to the clause here below*

**Standard Arbitration Clause**

*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 in English.*

*Awards of the FAT can be appealed to the Court of Arbitration for Sports (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."*

40. Clause 4 of Contract 2 stipulates:

*4. Croatian laws are applicable on the present agreement between the Club and the Agent. Possible disputes resulting will be brought before the FAT according the following clause*

**Standard Arbitration Clause**

*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 in English.*

*Awards of the FAT can be appealed to the Court of Arbitration for Sports (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.”*

41. Both Contract 1 and Contract 2 are in written form and thus the arbitration agreements fulfil the formal requirements of Article 178(1) PILA.
42. With respect to substantive validity, the Arbitrator considers that there are no indications which could cast doubt on the validity of the arbitration agreements under Swiss law (cf. Article 178(2) PILA).
43. In addition, the parties did not challenge the jurisdiction of BAT in their submissions.
44. In light of the above, the Arbitrator finds that the BAT has jurisdiction to hear this dispute.

## 6. Discussion

### 6.1 Applicable Law – *ex aequo et bono*

45. 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 authorise the arbitrators to decide “*en équité*”, as opposed to a 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 authorise the arbitral tribunal to decide ex aequo et bono”.*

46. Article 4 of Contract 1 states that “*the present contract is ruled by Croatian laws*”. However, article 4 goes on to state that “[u]pon failure to reach a settlement the dispute will be brought before the FAT, according to the clause here below” and that the “*arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono*”. The Arbitrator considers that the common intention of the Parties when agreeing this article was to ensure that Croatian law applied to govern Contract 1 if matters were not contentious. However, as is made clear by article 4, any disputes arising out of Contract 1 shall be determined *ex aequo et bono* (as expressly stated in article 4), and not in accordance with Croatian law.

47. Clause 4 of Contract 2 states that: “*Croatian laws are applicable on the present agreement between the Club and the Agent. Possible disputes resulting will be brought before the FAT according the following clause...The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.*” The Arbitrator finds that the effect of these provisions is again that any disputes arising out of Contract 2 shall be determined *ex*

*aequo et bono* (as expressly stated in article 4), and not in accordance with Croatian law. The Arbitrator notes that none of the Parties referred to Croatian law in their submissions.

48. Article 15.1 of the BAT Rules provides that:

*“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”*

49. In light of the above provisions, the Arbitrator finds that the present case shall be decided *ex aequo et bono*.

50. 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*<sup>2</sup> (Concordat),<sup>3</sup> 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.”<sup>4</sup>*

51. 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 circumstances of the case”.<sup>5</sup>

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<sup>2</sup> 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).

<sup>3</sup> P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PILA.

<sup>4</sup> JdT 1981 III, p. 93 (free translation).

<sup>5</sup> POUURET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

52. In light of the foregoing matters, the Arbitrator makes the following findings:

## **6.2 Findings**

### **6.2.1 Termination of Contract 1**

53. The Claimants submit that the Respondent unilaterally terminated Contract 1 without just cause at a meeting between Claimant 1 and the Respondent held on 11 January 2011. The Claimants further submit that this termination breached the terms of Contract 1.

54. The Respondent has not disputed that it breached Contract 1 or that it terminated the Contract 1 without just cause. Indeed, the Respondent admits liability for either the full salary due for the 2010-2011 season or for contractual damages pursuant to article 1 of Contract 1 (which are payable in the event of a breach of contract). The Arbitrator therefore finds that the Respondent unilaterally terminated Contract 1 without just cause on 11 January 2011.

### **6.2.2 Claimant 1's salary and bonuses for the 2009-2010 season**

55. Contract 1 provides that the Respondent will pay Claimant 1 EUR 35,000.00 in salary payments in total for the 2009-2010 season. Article 3 B of Contract 1 provides that the Respondent will pay Claimant 1 a bonus of EUR 5,000.00 if the Respondent's team achieves "*qualification for the final Croatian League*". During the 2009-2010 season, the

Respondent's team qualified for the final of the Croatian League.<sup>6</sup> Accordingly, the Arbitrator finds that Claimant 1 is entitled to a bonus payment of EUR 5,000.00. The total amount payable by the Respondent to Claimant 1 for the 2009-2010 season is therefore EUR 40,000.00.

56. The Respondent submits that it has paid Claimant 1 a total amount of EUR 29,667.00. The Respondent submits that it owes Claimant 1 EUR 5,333.00 for the 2009-2010 season. The Claimant claims that it has only received EUR 30,000.00 for the 2009-2010 season. As stated above, the total amount payable for the 2009-2010 season is EUR 40,000.00. In light of the submissions made by the Parties, the Arbitrator finds that the Respondent shall pay Claimant 1 EUR 10,000.00 in unpaid salary and bonuses for the 2009-2010 season.

### **6.2.3 Claimant 1's salary for the 2010-2011 season**

57. The Parties agree that the Respondent has made no payments to Claimant 1 in respect of the 2010-2011 season. The Parties also agree that the total salary for the 2010-2011 season is, pursuant to Contract 1, EUR 70,000.00.
58. Claimant 1 submits that he is entitled to the EUR 70,000.00 in unpaid salary, as well as a further EUR 50,000.00 because the Respondent breached article 1 of Contract 1. Article 1 provides that if either party breaches Contract 1 before 1 July 2011, that party must pay the other party EUR 50,000.00.
59. The Respondent submits that the intention of the Parties when entering into Contract 1 was that the above-mentioned provision in article 1 was intended to act as a "*financial insurance*" for the period from the date of Contract 1's termination to the date on which

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<sup>6</sup> This is public information and as at the date of this Award can be verified at: <http://www.eurobasket.com>

Claimant 1 found new employment. The Respondent claims that as such, Claimant 1 is only entitled to the EUR 70,000.00 in unpaid salary or the EUR 50,000.00 in contractual damages, and not both sums.

60. The Arbitrator's findings are as follows. In addition to the above-mentioned provision, Article 1 of the Contract provides that the Respondent guarantees all payments due to Claimant 1 under the Contract. Accordingly (and in light of the fact that the Respondent unilaterally terminated Contract 1 without just cause), Claimant 1 is entitled to the EUR 70,000.00 in unpaid salary. However, this is subject to Claimant 1's duty to mitigate the loss he has suffered on the termination of Contract 1, by finding a new contract of employment.
61. In the Second Procedural Order, the Arbitrator asked Claimant 1 whether or not he had obtained new employment since leaving the Respondent club and, if he had not, what steps had he taken to obtain new employment. Claimant 1 responded that he had not been able to find new employment. Claimant 1 stated that he did, however, search for new employment and provided evidence to the Arbitrator of his attempts to find new employment.<sup>7</sup> The Arbitrator notes that it is likely to be difficult for a basketball coach to find a new job in the middle of a season. In light of the submissions and evidence presented by Claimant 1, the Arbitrator finds that Claimant 1 sufficiently fulfilled his duty to mitigate the loss he suffered on the termination of Contract 1. Accordingly, the Arbitrator finds that the Respondent shall pay Claimant 1 EUR 70,000.00 in unpaid salary for the 2010-2011 season.
62. The Arbitrator turns now to the contractual damages. The Arbitrator notes that the Respondent did breach Contract 1 before 1 July 2011 and so, on the face of article 1, EUR 50,000.00 is payable by the Respondent to the Claimant. However, the Arbitrator

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<sup>7</sup> For example, Claimant 1 submitted a copy of an emailing dated 1 April 2011, which shows that enquiries for a coaching role were made with Basketball Club Khimki.

considers it likely (as the Respondent argues) that article 1 was not intended to apply to the present situation where Claimant 1 will receive all outstanding amounts payable under Contract 1 in any event. Moreover, the Arbitrator considers that penalty payment clauses in contracts of employment should not be upheld in certain circumstances. The Arbitrator refers to BAT (then FAT) decision 0039/09 (Petrosean v WBC “SPARTAK” St. Petersburg), in which the Arbitrator (Mr. Stephan Netzle) set out various considerations to be taken into account when determining the appropriate amount for a contractual penalty. Those considerations include:

- (i) A contractual penalty in the form of a flat fee may be problematic and may call for adjustment depending on the circumstances.
- (ii) Only in exceptional circumstances should a penalty exceed the compensation whose payment is secured by the contractual payment.
- (iii) A contractual penalty shall constitute a credible deterrent against deliberate withholding of payments.

63. In determining the level of contractual penalty appropriate in the present case, the Arbitrator has considered: (i) the fact that Claimant 1 is being awarded his full salary for the 2010-2011 season, despite only working for the Respondent for part of that season; and (ii) the fact that a penalty payment of EUR 50,000.00 is very large when compared with Claimant 1's salary for the 2009-2010 and 2010-2011 seasons. In light of these factors, and of the list of considerations set out in BAT decision 0039/09, the Arbitrator decides that the Respondent shall pay the Claimant the sum of EUR 5,000.00 for breaching Contract 1.

#### **6.2.4 The Agent's fees**

64. Article 3 of Contract 2 provides that the Respondent will pay to Claimant 2 agent fees of

EUR 1,750.00 for the 2009-2010 season on 1 February 2010, and EUR 3,500.00 for the 2010-2011 season on 1 September 2010.

65. Claimant 2 submits that he has not received either of the agent's fee payments. The Respondent has not made any submissions in relation to Claimant 2's claim, despite being specifically requested to by the Arbitrator in the Second Procedural Order.
66. The Arbitrator notes that both of the agent's fee payments fell due before the Respondent terminated Contract 1. The Arbitrator also notes that Claimant 1 provided services to the Respondent club during both seasons. In light of this, and of the Parties' submissions, the Arbitrator finds that the Respondent shall pay a total of EUR 5,250.00 to Claimant 2 in respect of unpaid agent's fees.

#### **6.2.5 The Counterclaim**

67. The Respondent claims EUR 124,132.00 in damages from Claimant 1 for the cost of terminating the contracts of three players. The Respondent claims that Claimant 1 was careless in selecting those players to join the Respondent club. The Respondent has submitted copies of agreements which prematurely terminate the contracts of the three players.
68. The Claimants submit that Claimant 1 cannot be held liable for the performances of players.
69. In the Third Procedural Order, the Arbitrator asked the Respondent if it considered that there was any legal obligation on Claimant 1 to select players that would perform well, and to provide details of any such obligation. The Respondent submitted that there was such a legal obligation on Claimant 1 because Claimant 1 is "*a professional coach with the appropriate level of education in that profession, with many years of experience as the basketball coach in and outside of Croatia.*"

70. The Arbitrator has seen no evidence disputing that the Respondent terminated three players' contracts prematurely and at a cost to the Respondent. However, the Arbitrator has seen no evidence either that Claimant 1 was to blame for this, or that Claimant 1 has a binding legal obligation to the Respondent (in either written or oral form) to ensure the quality of individual players' performance. There is no provision in Contract 1 which makes Claimant 1 liable in the event that the Respondent is forced, or chooses, to terminate the contracts of players prematurely. Accordingly, the Arbitrator finds that the Respondent's counterclaim fails.

#### **6.2.6 Interest**

71. The Claimants claim interest on the unpaid salary and bonus amounts, as well as the agent's fees, from 28 February 2011 at the Swiss statutory rate. Payment of interest is a customary and necessary compensation for late payment and there is no reason why the Claimants should not be awarded interest. The Arbitrator considers that the Swiss statutory rate of 5% per annum is a reasonable rate of interest. Furthermore, it is in line with the BAT jurisprudence and should be applied to the outstanding payments.

72. The Arbitrator considers that, in accordance with the payment schedule contained in Contract 1 (as set out at paragraph 7 above), the unpaid salary and bonus amounts and the agent's fees were due and payable by the date from which the Claimants claim interest (28 February 2011). Therefore the interest on these sums shall be calculated from 28 February 2011.

73. Claimant 1 also claims interest at a rate of 10% on the contractual damages payable under article 1 of Contract 1. As explained in paragraph 62 above, the contractual damages awarded by the Arbitrator are a form of penalty payment. The Arbitrator has already reduced the amount of contractual damages payable to an appropriate sum, in accordance with the principles and circumstances set out in paragraphs 62 and 63

above. In light of those principles and circumstances, the Arbitrator considers that the sum of EUR 5,000.00 is sufficient as contractual damages and that It would not be appropriate to increase this figure by adding interest to it. Therefore the Arbitrator finds that no interest is payable in respect of the contractual damages.

## **7. Costs**

74. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the award or communicated to the Parties separately. Furthermore, Article 17.3 of the BAT 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.
75. On 23 September 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 at EUR 8,450.00.
76. The Arbitrator notes that the Claimants were successful in establishing their claim in relation to unpaid salary and bonus amounts and in relation to the agent’s fees. The Arbitrator notes that the Claimants were successful in part in establishing their claim in relation to the contractual damages. The Arbitrator notes that the Claimants were

successful in defending the Counterclaim. The Arbitrator notes that all Parties paid their own share of the Advance on Costs. The Arbitrator considers it appropriate to take into account the non-reimbursable fee when assessing the expenses incurred by the Claimants in connection with these proceedings. Thus, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

- BAT shall reimburse EUR 275 to the Claimants, being the difference between the costs advanced by the Parties and the arbitration costs fixed by the BAT President.
- The Respondent shall pay to the Claimants EUR 4,225.00, being the difference between the costs advanced by the Claimants and the amount that the Claimants are going to receive in reimbursement from the BAT.
- The Respondent shall pay to the Claimants the amount of EUR 7,000.00 as a contribution towards their legal fees and expenses.

## **8. AWARD**

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

- 1. Kosarkaskog Kluba “Zadar” is ordered to pay to Mr. Daniel Jusup EUR 10,000.00 as compensation for unpaid salary and bonuses for the 2009-2010 season, together with interest at 5% per annum, payable from 28 February 2011.**
- 2. Kosarkaskog Kluba “Zadar” is ordered to pay to Mr. Daniel Jusup EUR 70,000.00 as compensation for unpaid salary for the 2010-2011 season, together with interest at 5% per annum, payable from 28 February 2011.**
- 3. Kosarkaskog Kluba “Zadar” is ordered to pay to Mr. Daniel Jusup EUR 5,000.00 by way of contractual damages.**
- 4. Kosarkaskog Kluba “Zadar” is ordered to pay to Mr. Nebojsa Ivic EUR 5,250.00 as compensation for unpaid agent’s fees for the 2009-2010 and 2010-2011 seasons, together with interest at 5% per annum, payable from 28 February 2011.**
- 5. Kosarkaskog Kluba “Zadar” is ordered to pay to Mr. Daniel Jusup and Mr. Nebojsa Ivic EUR 4,225.00 as a reimbursement of the advance of BAT costs.**
- 6. Kosarkaskog Kluba “Zadar” is ordered to pay to Mr. Daniel Jusup and Mr. Nebojsa Ivic EUR 7,000.00 as a contribution towards their legal expenses.**
- 7. Any other or further requests for relief are dismissed.**



**BASKETBALL**  
ARBITRAL TRIBUNAL

Geneva, seat of the arbitration, 6 October 2011

Raj Parker  
(Arbitrator)