

**ARBITRAL AWARD**

**(BAT 0244/12)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Stephan Netzle**

in the arbitration proceedings between

**Mr. Julius Hodge,**  
2309 Mayo Forest Lane, Morrisville, NC 27560, USA

**- Claimant -**

Represented by Ms. Cheryce M. Cryer, Esq., Crown Jewel Sports Management,  
6709 La Tijera Blvd #165, Los Angeles, CA 90045, USA

vs.

**Petrochimi Bandar Imam Harbour Basketball Club,**  
Mahshar, Iran

**- Respondent -**

Represented by Mr. Alipour Gholamreza, attorney-at-law,  
Apt 12, No. 4 Jahan Ara Street, Tehran 1436735795, Iran

## **1. The Parties**

### **1.1. The Claimant**

1. Mr. Julius Hodge (hereinafter the "Player") is a professional basketball player of US nationality and was born on 18 November 1983. He is represented by Ms. Cheryce M. Cryer, CEO of Crown Jewel Sports Management which is located in Los Angeles, USA.

### **1.2. The Respondent**

2. Petrochimi Bandar Imam Harbour Basketball Club (hereinafter the "Club") is a professional basketball club located in Mahshar, Iran. The Club is represented by Mr. Alipour Gholamreza, attorney-at-law in Tehran, Iran.

## **2. The Arbitrator**

3. On 14 February 2012, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), Prof. Richard H. McLaren, appointed Dr. Stephan Netzle as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). None 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 20 January 2011, the Player and the Club entered into an employment agreement for the rest of the 2010-2011 basketball season (hereinafter the "Player Contract"), i.e. from 20 January to 5 May 2011 or the day of the last match. According to Clause 2 of the Player Contract, the Parties agreed on a "net, fully guaranteed salary" for the

Player of USD 140,000.00 to be paid in three instalments of USD 40,000.00 each on 1 February, 1 March and 1 April 2011, and one final instalment of USD 20,000.00 on 1 May 2011. According to Clause 8 of the Player Contract, the Club reserved the right to terminate the Player Contract at any time upon payment of a termination fee of USD 20,000.00 to the Player.

5. On or about 18 February 2011, the Club offered the Player USD 20,000.00 in cash. The Player refused but asked the Club to transfer this amount to his Australian bank account.
6. On or about 21 February 2011, the Club handed over a check in the amount of USD 20,000.00 to the Player. The Player submits that he tried to cash the check with a bank in Mahram, Iran, but failed to do so because the check was not covered and then returned the check to the Club.
7. On 24 February 2011, the Club paid USD 18,947.50 into the Player's Australian bank account.
8. On 25 February 2011, a meeting between the Player and two Club officials (the Club's President and team manager Mr. Gholamabbas Safarnejadi and the Club's assistant coach Mr. Ali Arezoomandi) took place. At this meeting, the Player was allegedly offered a cash amount of USD 20,000.00 as submitted by the Club (or a reduced amount of USD 13,000.00 as submitted by the Player) and was additionally requested to sign a paper confirming the payment of USD 40,000.00 as the first salary instalment under the Player Contract. Whether the Player accepted the cash amount and/or signed the paper is under dispute.
9. On 28 February 2011, the Club sent an email to the Player and his then agent, Mr. Ivan Asanin, which reads as follows:



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"Dears,

at this date 28.02.2011,

we basketball club Petrochimi Imam Harbour, located in Mahshahr in Iran would like to officially let you know that we are terminating our cooperation with basketball player Julius Hodge.

The reason for our decision it that we are looking for different tip(sic) of the player.

So we are using article 8. from the contract (agreement) that were signed by all sides (club,player and agent) that say's(sic) that "The Club can terminate this contract (agreement) at any time and in that case will pay 20 000 USD as a released fee. Also in this money is not included the money that player has earned and didn't get it."

As the player has already received full amount of his salary scheduled by the contract (agreement) signed by all sides, we feel obligated to pay only 20 000 USD to the player more as a released fee.

best regards,basketball club Petrochimi Imam Harbour."

10. On 3 March 2011, the Player and the Club signed a termination agreement drafted by Mr. Asanin (hereinafter the "Termination Agreement"). The Parties agreed on the following:

**"TERMINATION AGREEMENT**

**THIS AGREEMENT** is made in IRAN, on the March 3, 2011

**BETWEEN:**

3.1.1. Basketball club Petrochimi Imam Hrabour(sic) (hereinafter the "Club"), entity domiciled in the town of Mahshahr, Iran represented by its President Mr. Jaber Ghate.

3.1.2. Mr. **Julius Hodge (November 18-th 1983)**, basketball Player (hereinafter "the Player"), of United States nationality, born on the 18th of November 1983, represented by **011 Sports- Ivan Asanin with the with the(sic) FIBA license number 2008020413**

**PREAMBLE:**

1. Whereas both parties, reciprocally recognize to each other the necessary legal capacity to oblige themselves and to contract, in their respective status, freely and spontaneously,

2. Whereas both parties, recognize:

a) That the Club and the Player had an original agreement in place, dated 20.01.2011 based on which the Player was entitled to the amount of **140.000 USD**, for the period up to 5-th.05.2011

b) That the club decides to terminate the mention agreement, by using article 8. from that agreement dated 28.02.2011 by which club can terminate the contract with playing to the



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player **20 000 USD** as a released fee. In that money is not included money that player has earned and didn't get it.

c) That both parties wish to enter into a new agreement under the following terms and covenants:

**IT IS HEREBY AGREED** as follows:

*Contractual Terms and Covenants*

*Article 1*

*1.1 The club to release immediately the player free and clear to play in any country of his choosing. The player's license will not be held for any reason and the player is free of any further commitments with the Club. The club is obligated to send the letter of clearance immediately.*

*1.2 Both Parties agree and recognize the Club's liability to pay to the Player **20.000 USD** (released fee), and club agrees that this amount of the money will be paid to the player before March 31-st 2011.*

*Article 2. Breach and remedies:*

*In the event that the Club fails to make any scheduled payment to the Player on the date mentioned under this agreement, with a grace period of maximum seven (7) days then the Club shall be in breach of the contract AND Club agrees additionally to pay the Player the amount of the Player's entire salary, bonuses for the 2010/2011 season as stipulated in the original agreement (contract). Also Club agrees to reimburse player for all expenses, including all attorney fees, resulting from such non-payment."*

11. The Player did not receive the payment due under the Termination Agreement by 31 March 2011 or within the "grace period of maximum seven (7) days". Still, by letter of 4 April 2011, the Club informed the Iranian Basketball Federation that the Player "had settled his accounts" with the Club and was permitted to enter into contracts with any other club.
12. On 27 April 2011, Mr. Aleksandar Bojic, a professional basketball player of Serbian nationality signed a confirmation having received USD 3,000.00 as "part of last payment (...) of Julius Hodge".
13. On 5 May 2011, the Player received an amount of USD 16,970.00 which was transferred by the Club to the Player's Australian bank account.
14. From June 2011 on, the Player played for the team of Jiangsu in the NBL Chinese Summer League.

### 3.2. The Proceedings before the BAT

15. On 2 January 2012, the BAT Secretariat received a Request for Arbitration dated 30 December 2011 and filed by Ms. Cheryce M. Cryer on behalf of the Player. The non-reimbursable handling fee of EUR 2,001.32 arrived at the BAT bank account on 29 December 2011.
16. By letters of 15 February and 8 March 2012, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties of the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Club to file its answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 29 March 2012. The BAT Secretariat also requested the Parties pay the following amount as an Advance on Costs by no later than 19 March 2012:
- |   |                   |
|---|-------------------|
| <i>"Claimant (Mr. Julius Hodge)</i>                   | <i>EUR 3,500</i>  |
| <i>Respondent (Petrochimi Bandar Imam Harbour BC)</i> | <i>EUR 3,500"</i> |
17. By letter dated 18 March 2012, received by the BAT Secretariat only on 26 March 2012, the Club confirmed receipt of the forwarded Request for Arbitration and the payment of its share of the Advance on Costs, and requested an extension of the time limit to file the Answer.
18. On 27 March 2012, the BAT Secretariat informed the Parties that the Arbitrator had decided to grant the Club an extended time limit to file the Answer until 10 April 2012.
19. By email of 5 April 2012, the Club's counsel requested a further 10-day extension to file the Answer. By email of the same date, the BAT Secretariat requested a Power of Attorney from the Club which was submitted on 8 April 2012.

20. On 10 April 2012, the BAT Secretariat informed the Parties that the Arbitrator had granted a final extension of the time limit to file the Answer by no later than 20 April 2012.
21. On 20 April 2012, the Club submitted its Answer. Corresponding exhibits were submitted on 23 April 2012.
22. By letter of 27 April 2012, the BAT Secretariat forwarded the Answer to the Player and acknowledged receipt of the Parties' shares of the Advance of Costs received in the BAT bank account on 28 February 2012 in the amount of EUR 3,475.00 (Claimant's share) and on 20 March 2012 in the amount of EUR 3,457.30 (Respondent's share). In the same letter, the Arbitrator requested further information and documents from both Parties to be submitted by no later than 7 May 2012 and invited the Player to comment on the Club's Answer within the same time limit.
23. On 8 May 2012, the BAT Secretariat confirmed receipt of the Player's comments which included several procedural requests (see para. 43 et seq. below) and of the information and documents which had been requested from both Parties. In addition, the Club was invited to comment on the Player's submissions, in particular on his procedural requests, by no later than 18 May 2012.
24. On 17 May 2012, the Club's counsel asked for an extension of seven days to file its comments and to provide the bank statements requested by the Player.
25. On 18 May 2012, the BAT Secretariat informed the Parties that the time limit to reply to the Procedural Order of 8 May 2012 had been prolonged until 25 May 2012.
26. On 25 May 2012, the Club submitted its comments and further exhibits.

27. By letter of 14 June 2012, the Arbitrator declared the exchange of documents complete and invited the Parties to submit a detailed account of their costs by no later than 25 June 2012.
28. By email of 22 June 2012, the Player's counsel submitted a "Bill for Arbitration Services" which contained a list of her services rendered in 2012 amounting to a "Total Amount Due" of USD 4,112.50.
29. By email of 25 June 2012, the Club's counsel submitted three invoices for legal services in the amounts of EUR 4,000.00 (dated 30 March 2012), EUR 13,400.00 (dated 30 April 2012) and EUR 5,200.00 (dated 30 May 2012).
30. On 26 June 2012, the BAT Secretariat acknowledged receipt of the accounts of costs submitted by the Parties. Both Parties were invited to submit their comments, if any, on the opposing party's account of costs by no later than 2 July 2012. No such comments were filed by either of the Parties.

#### **4. The Positions of the Parties**

##### **4.1. The Claimant's Position**

31. The Player submits the following in substance:
  - By failing to pay the Player as stipulated in the Player Contract and the Termination Agreement, the Club was in breach of both agreements:
    - o When the Player refused to receive the amount of USD 20,000.00 in cash on 18 February 2012, the Club was more than 15 days late with the payment of USD 40,000.00 due on 1 February 2011. Consequently, the Player was entitled to be "released immediately and Club (...) be obligated to pay his remaining salary for the duration of the agreement".

- The termination fee of USD 20,000.00 was not paid before 31 March 2011 as agreed by the parties in the Termination Agreement. Due to this failure, the Player is entitled to receive the remaining sum of the full salary agreed in the Player Contract.
  
- The check of USD 20,000.00 provided to the Player on 21 February 2011 could not be cashed because of insufficient funds in the Club's bank account. That is why the Player returned the check to the Club. The Club then urged the Player to accept the reduced amount of USD 13,000.00. Otherwise drugs would be deposited in his hotel room and the police would be called. This can be confirmed by the Player's former teammate, Mr. Benny Koochoie.
  
- Even if the Club had difficulties to transfer the money to the Player's Australian bank account because of international restrictions against Iran, which is disputed by the Player, the Club failed to notify the Player of such delays. In addition, any payments to third persons, in particular to the Player's former agent Mr. Asanin and/or the Serbian player Mr. Aleksandar Bojic, are irrelevant and do not constitute payment of the respective amounts to the Player.

#### **4.2. The Claimant's Request for Relief**

32. In his Request for Arbitration, the Player requests the following relief:

*"Claimant(s) request(s):*

- *Salaries owed in the amount of USD\$104,082.50, plus interest.*
- *Costs of the arbitration*
- *Legal Fees and expenses in the amount of USD\$3937.50"*

#### **4.3. The Respondent's Position**

33. The Club submits the following in substance:

- Since his arrival, the Player was not motivated to play and practise. The Club officials repeatedly complained about his unprofessional attitude. Because the Player did not change his behaviour, the Club decided to terminate the Player Contract. Before that termination, the Club had paid the Player the amount of USD 40,000.00 for the period 20 January to 28 February 2011 which is confirmed by the receipt signed by the Player.
- When the Termination Agreement was signed, Iran was subject to international restrictions on money transfers. Therefore, the Club offered to pay the Player the termination fee of USD 20,000.00 in cash, but the Player refused the offered cash. The Club eventually managed to transfer USD 17,000.00 to the Player's Australian bank account in May 2011. The difficulties to transfer the money can be proven by Mr. Abdolreza Sahranavard, manager of Sahranavard Exchange Bureau. The remaining sum of USD 3,000.00 was forwarded to the Player via Mr. Aleksander Bojic and Mr. Asanin.
- The Player was never threatened by Club officials. The respective allegations of the Player are not true. Mr. Koochoei only confirmed the Player's statement made to him after an alleged meeting with Club officials but was never present at the meeting claimed by the Player.

#### **4.4. The Respondent's Request for Relief**

34. In its Answer, the Club requested the following relief:

*"The Respondent, respectfully request(sic) that the Basketball Arbitral Tribunal grant the following relief:*

*1- Dismiss the Request for Arbitration by claimant*

*2- Order that claimant shall bear all the costs of this arbitration.*

*3- Order that the claimant shall pay compensation towards the legal fees and other expenses incurred by the claimant in connection with these proceedings."*

## 5. 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.
37. 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.
38. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Clause 10 of the Player Contract, which reads as follows:

*“10. 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 Parties’ domicile.*

*The language of the arbitration shall be English.*

*The arbitrator shall decide the dispute “ex aequo et bono”.*

39. In accordance with Article 1.1 of the BAT Rules, these rules “*shall apply whenever the parties to a dispute have agreed in writing to submit the same to the BAT – including by reference to its former name “FIBA Arbitral Tribunal (FAT)”* (emphasis in the original). Article 18.2 of the BAT Rules says: “*Any reference to BAT’s former name “FIBA Arbitral Tribunal (FAT)” shall be understood as referring to the BAT.*” The Parties’ reference to the “FIBA Arbitral Tribunal (FAT)” in Clause 4 of the Player Contract as well as the Addendum is therefore understood as a reference to the BAT.

40. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA. The Arbitrator also considers that there is no other indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” in Clause 10 of the Player Contract covers the present dispute.
41. The Club did not object to the BAT jurisdiction but rather agreed to it in para. 26 of the Answer where it stated: “*It follows that the BAT has jurisdiction to rule upon this matter.*”
42. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Player’s claims.

## **6. Other Procedural Issues**

43. In his submission of 7 May 2012, the Player made four procedural requests as follows:

*“Conclusion:*

- *The claimant respectfully requests that the Club provide evidence of relevant financial, trade and/or monetary transfer restrictions imposed against Iran by Australia at the time of the Player’s contract (approximately January 2011-May 2011).*
- *The claimant requests that the Club please provide an official bank statement of the Club from the time period in question, so as to review the verity of payments made to the Player, and review the financial health of the Club at the time of the transaction (approximately January 2011-June 2011).*
- *The claimant requests that the respondent, please provide a copy of the US\$20,000 check that was provided to Mr. Julius Hodge, on approximately February 21, 2011.*
- *The claimant respectfully requests that the tribunal remove exhibits 8, 12 and 13 from the respondent’s exhibit list.”*

44. In response to the Player's requests, the Club provided a leaflet from an English law firm and an excerpt from an unidentified website both informing about financial restrictions against Iran imposed by the Australian Government, and a bank statement of the "Bank \_\_\_\_\_" regarding the Club's bank account no. \_\_\_\_\_ for the period 20 February to 19 March 2011. The Club did not submit the requested copy of the USD 20,000.00 check that was provided to the Player. It also objected to the request to remove exhibits 8, 12 and 13 from the file.

**6.1. Player's first request: money transfer restrictions**

45. It is common knowledge that certain OECD-countries imposed economic restrictions on the State of Iran which also included restrictions on the transfer of money. The Arbitrator finds that the documents provided by the Club may indeed confirm that such transfer restrictions applied also to the transfer of money to the Player's Australian bank account. Although the submitted documents do not explicitly refer to the specific date when the Club attempted to transfer money to the Player's account, there is no evidence that these restrictions no longer applied in the beginning of 2011. However, the Arbitrator finds that the money transfer restrictions did not materially affect the outcome of this case (see para. 70 et seq. below).

**6.2. Player's second request: bank statements confirming the Club's payments to the Player**

46. The Club has submitted a bank statement which is of little evidentiary value: it does not indicate to whom the transfers were made and which exchange rate was applied. It also seems to be incomplete since it covers only a period from 16 March 2011 to 19 March 2011 although the title says that the bank statement is „from 20/2/2011 to 19/03/2011“ (emphasis added by the Arbitrator). However, the Arbitrator finds that further bank statements would not materially affect the outcome of this case (see para. 55 et seq. below).

**6.3. Player's third request: copy of the check of USD 20,000.00 given to the Player**

47. The Arbitrator rejects the Player's production request with respect to a copy of the Club's check because the generally accepted requirements for production of documents in arbitral proceedings are not met. The Player does not explain the purpose of his request and the relevance of the requested copy for his case and why this should prove his allegation that the check could not be cashed. In addition, the Player has not demonstrated the reason why he assumes that the check is in possession, custody or control of the Club.

**6.4. Player's fourth request: exclusion of certain exhibits from the file**

48. The Arbitrator rejects the Player's request to exclude certain exhibits from the file. As long as documentary evidence is submitted in accordance with the BAT Rules or the specific orders of the Arbitrator, it is basically admissible and will be taken into consideration. However, whether or not these documents are able to prove or disprove the Parties' submissions on the merits is a matter that falls within the Arbitrator's assessment of the evidence.

**7. Applicable Law – *ex aequo et bono***

49. 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".*

50. 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.”*

51. In the arbitration agreement in Clause 10 of the 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. Consequently, the Arbitrator will decide the issues submitted to him *ex aequo et bono*.
52. 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<sup>1</sup> (Concordat),<sup>2</sup> 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.”<sup>3</sup>*

53. 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.”<sup>4</sup>*

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

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<sup>1</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>2</sup> KARRER, in: Basel commentary to the PILA, 2<sup>nd</sup> ed., Basel 2007, Art. 187 PILA N 289.

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

<sup>4</sup> POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

## **8. Findings**

55. The Player requests the amount of USD 104,082.50 as the remaining sum of his entire salary agreed in the Player Contract and interest on this amount. The claimed amount of USD 104,082.50 results from the contractual salary of USD 140,000.00 from which the Club's two payments to the Player of USD 18,947.50 (received on 18 February 2011) and USD 16,970.00 (received on 5 May 2011) have been deducted.

### **8.1. The relevant circumstances**

56. The Arbitrator bases his conclusions on the following set of facts which he determined by a mere balance of probability based on the rather scarce evidence at hand.

57. The first instalment of the Player's salary became due on 1 February 2011. Undisputedly, the Player was offered a partial cash payment of USD 20,000.00 on 18 February 2011. The Player refused acceptance but asked the Club to transfer this amount to his Australian bank account where, on 24 February 2011, an amount of USD 18,947.50 arrived.

58. On 21 February 2011, a second payment of USD 20,000.00 on account of the first salary instalment was made by check. The handover of the check has been confirmed by both Parties. The Arbitrator rejects the Player's allegation that the check was not cashed but returned to the Club because of lack of contrary evidence.

59. The Player has signed the (undated) receipt of USD 40,000.00 attached as Exhibit 10 to the Club's Answer. The Parties do not elaborate on the date and circumstances of this receipt. The receipt has been written under the letterhead of "Bandar Imam Petrochemical Co. Ltd." and reads as follows:

*"I confirm that, I Received my Second part of my first payment That is 20,000 US \$.  
Totally I Received 40,000 US \$ That is my first payment.*

*(sig.) Julius Hodge*

60. The receipt bears also some stamps and another signature, which have not been identified. The authenticity of the Player's signature has not been disputed. Actually, the Player does not comment on that receipt at all.
61. The wording of the signed receipt and the dates of the previous payments support the Arbitrator's conclusion that the Player confirmed having received the first instalment of his salary sometime between 24 February 2011 (i.e. the date of receipt of the payment transferred to the Player's bank account) and 28 February 2011 (i.e. the date of the Club's termination letter).
62. The signed receipt confirms payments in the amount of USD 40,000.00 whereas there is evidence only that the Player received USD 38,947.50. Whether the Player accepted a smaller amount because the difference of USD 1,052.50 was due to banking fees or exchange rate differences or whether the difference was paid by other means must remain open. The Arbitrator holds the Player accountable that he confirmed with his signature having received USD 40,000.00 from the Club corresponding to the first instalment of his salary. On the other hand, the Arbitrator does not follow the Club's version that the Player confirmed receipt of USD 40,000.00 and that the amount of USD 18,947.50 was paid separately and in addition to the received USD 40,000.00.
63. In the Request for Arbitration, the Player refers to two offers which the Club had made to him around 25 February 2011. The first offer was a payment of USD 13,000.00 as a settlement of all due payments. The Player refused to accept this offer despite the Club's alleged menace to place drugs in his room and call the police if he would not accept. Thereafter, the Club offered cash of USD 20,000.00 but requested the Player to sign a receipt of USD 40,000.00 confirming the receipt of all due salary amounts and the release fee of USD 20,000.00. The Player submits that he refused this offer as well. The Arbitrator finds that these offers are not relevant for the outcome of this arbitration. They have both been refused by the Player and are not taken into account in the

Arbitrator's conclusions. The Arbitrator relies only on the receipt which was signed by the Player and which confirms that he received the first instalment of his salary (see para. 59 above).

64. On 28 February 2011, the Club issued a letter announcing its intention to unilaterally terminate the Player Contract against payment of USD 20,000.00. However, no such release fee was paid on this date. It was only on 3 March 2011 when the Parties eventually agreed on the termination by an agreement in which the modalities of the termination of the Player Contract were determined, i.e. the Termination Agreement.

## **8.2. The Termination of the Player Contract**

65. It may be that the Club was late with the payment of the first instalment of the Player's salary and that the Player was entitled to terminate the Player Contract based on Clause 7 of the Player Contract. However, there is no evidence on record that the Player actually exercised his termination right.
66. Further, it was the Club that expressed in a letter dated 28 February 2011 that it intended to terminate the Player Contract. Neither party submits that this letter actually terminated the Player Contract. It was the Termination Agreement of 3 March 2011 by which the Parties eventually agreed to terminate the Player's employment according to the terms set out therein.
67. The Arbitrator therefore finds that the Player Contract was terminated upon signature of the Termination Agreement, i.e. on 3 March 2011. The payment of the release fee was a subsequent obligation of the Club and not a condition precedent of the termination becoming effective.

### 8.3. The Club's late and incomplete payment of the release fee

68. The Termination Agreement obligated the Club to pay a release fee of USD 20,000.00 before 31 March 2011. Undisputedly, the release fee was not paid on that date or within the following 7 days "grace period" as determined by Article 2 of the Termination Agreement. A payment of USD 16,970.00 arrived only on 5 May 2011. The Club submitted that it had also paid USD 3,000.00 in cash to Mr. Aleksander Bojic, consisting of *"Ivan Asanin's agent fee and part of last payment (3,000) of Julius Hodge (also agent's fee for this player)."* It seems that Mr. Bojic did not forward the USD 3,000.00 to the Player.
69. The Club failed twofold to comply with its payment obligation under the Termination Agreement: (1) the payment arrived approximately one month late; and (2) the release fee was not paid in full.
70. With regard to the delay, the Club submitted that the delay of payment of almost a month had been due to the money transfer restrictions. The Arbitrator does not accept this excuse: the two prior bank transfers to the Player show that the Club was indeed able to transfer money to the Player's Australian bank account within a few days and the Club did not demonstrate any efforts that it initiated the payment before 31 March 2011.
71. With regard to the incomplete payment, it is the Club's burden to prove that the USD 3,000.00 paid to Mr. Bojic, who was not a legal representative of the Player, was forwarded to the Player. The Club did not provide any evidence that this amount actually arrived at its destination. In addition, the receipt of Mr. Bojic shows that also the USD 3,000.00 were paid only on 27 April 2011 (and not before the agreed due date).

72. The Arbitrator therefore finds that the Club was in breach of the Termination Agreement.

#### **8.4. The Club's obligation to pay the full agreed salary**

73. According to Article 2 of the Termination Agreement, if the Club fails to timely pay the agreed release fee, it is obliged to pay the *“entire salary, bonuses for the 2010/2011 season as stipulated in the original agreement (contract)”*. No bonuses have been claimed. Hence, the Club is obliged to pay to the Player the agreed salary minus the payments already made to date.

74. Clause 2 of the Player Contract stipulates a total salary for the Player of USD 140,000.00. The Arbitrator has already found that the Player received his first salary instalment of USD 40,000.00 and USD 16,970.00 as a release fee which was however paid late and incomplete. Still, the sum of USD 56,970.00 must be deducted from the otherwise due salary of USD 140,000.00 which results in an amount of USD 83,030.00.

75. According to consistent BAT jurisprudence, when calculating the compensation due because of the early termination of the employment, the salary which a player earned during the remaining term of the terminated contract must be taken into consideration. Likewise, the obligation to mitigate damage requires that a player whose contract was early terminated must take serious efforts to find a new employment.

76. The Player was contracted by other clubs for the next season but not for the remaining term of the terminated Player Contract. The Arbitrator therefore accepts that the Player did not obtain any financial compensation from other sources until the scheduled end of the Player Contract. However, the Player failed to demonstrate any efforts to find a new team after the termination of his engagement with the Club on 3 March 2011, despite an explicit request of the Arbitrator in the procedural order of 27 April 2012. Although it may be difficult to find an engagement as a professional player at this late stage of the

season, it is definitely not impossible, especially by accepting a lower salary. The Arbitrator therefore finds *ex aequo et bono* that the Player must accept a further reduction of his compensation by an amount equal to one third of the amount which he would have earned with the Club in April and May 2011 (i.e. USD 60,000.00) which amounts to USD 20,000.00.

77. From the full salary of USD 140,000.00, the payments made to the Player in the amount of USD 56,970.00 as well as an amount of USD 20,000.00 attributable to the Player's hypothetical income must be deducted, resulting in a total amount payable by the Club to the Player of USD 63,030.00.

## 9. Interest

78. In addition, the Player requests interest on the amount of USD 104,082.50 without indicating any specific interest rate or any commencement date.
79. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest<sup>5</sup>. Although the Player Agreement does not provide for the payment of default interest, this is a generally accepted principle which is embodied in most legal systems. However, it is also generally accepted that the obligee has to expressly request payment of interest from the obligor.
80. The Arbitrator, deciding *ex aequo et bono* and taking into consideration that the Player has not claimed interest before filing the Request for Arbitration with the BAT, finds that

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<sup>5</sup> See, *ex multis*, the following BAT awards: 0092/10, *Ronci, Coelho vs. WBC Mizo Pecs 2010*; 0069/09, *Ivezic, Draskicevic vs. Basketball Club Pecs Noi Kosariabda Kft*; 0056/09, *Branzova vs. Basketball Club Nadezhda*

the starting date for the calculation of the default interest shall be the day when the Request of Arbitration was received by the BAT, i.e. 2 January 2012.

81. Regarding the interest rate, the Arbitrator, still deciding *ex aequo et bono* and in line with BAT jurisprudence, considers interest in the rate of 5% p.a. to be fair and equitable in the present case without reference to any national law.
82. Since the Player is only entitled to an amount of USD 63,030.00, interest can only be considered for this amount. Consequently, the Arbitrator finds that the Player is entitled to interest of 5% p.a. on the amount of USD 63,030.00 from 2 January 2012.

## **10. Costs**

83. 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 reasonable legal fees and expenses incurred in connection with the proceedings.
84. On 28 August 2012 - 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 6,932.30.

85. Considering the requests for relief, the outcome and the circumstances of the present case, the Arbitrator finds it fair that 2/3 of the fees and costs of the arbitration shall be borne by the Club, i.e. EUR 4,621.55.
86. Given that the Player paid advance on costs of EUR 3,475.00 and the Club paid advance on costs of EUR 3,457.30, in application of Article 17.3 of the BAT Rules the Arbitrator decides that the Club must reimburse EUR 1,165.25 to the Player, i.e. the difference between the advance on costs paid by the Club and the share of the arbitration costs that the Club must actually bear.
87. Furthermore, the Arbitrator considers it adequate that the parties are entitled to the payment of a contribution towards their legal fees and other expenses (Article 17.3. of the BAT Rules). The Arbitrator deems it appropriate to take into account a total amount of EUR 5,167.95 including the non-reimbursable handling fee of EUR 2,001.32 paid by the Player and further legal costs of USD 4,112.50 (corresponding to EUR 3,166.63<sup>6</sup>) when assessing the expenses incurred by the Player. On the other hand, the Arbitrator finds the Club's invoice for legal fees of EUR 22,650.00 regarding services of 54.5 hours rather excessive taking the circumstances and the complexity of the case into account. The Arbitrator finds it appropriate to consider only 23.5 hours as served by the Claimant's counsel at the Club's counsel's hourly rate of EUR 400.00 and therefore to fix the compensation for the Club's legal fees on EUR 9,400.00.
88. Considering his holding that the Club is required to cover 2/3 of the Player's legal fees and other expenses (i.e. EUR 3,445.30) while the Player is required to cover 1/3 of the Club's legal fees and other expenses (i.e. EUR 3,133.33), the Arbitrator fixes the contribution to be paid by the Club to the Player at EUR 311.97.

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<sup>6</sup> Exchange rate of 2 January 2012, when the Claimant's Request for Arbitration was received by the BAT: USD 1,00 = EUR 0.77.

## **11. AWARD**

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

- 1. Petrochimi Bandar Imam Harbour Basketball Club is ordered to pay to Mr. Julius Hodge the amount of USD 63,030.00 net plus interest of 5% p.a. on this amount since 2 January 2012.**
- 2. Petrochimi Bandar Imam Harbour Basketball Club is ordered to pay to Mr. Julius Hodge the amount of EUR 1,165.25 as a reimbursement of his advance on arbitration costs.**
- 3. Petrochimi Bandar Imam Harbour Basketball Club is ordered to pay to Mr. Julius Hodge the amount of EUR 311.97 as a contribution towards his legal fees and expenses.**
- 4. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 29 August 2012

Stephan Netzle  
(Arbitrator)