BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0253/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Raj Parker

in the arbitration proceedings between

Interperformances, Inc.,
Via degli Aceri 14, 47892 Gualdicciolo, Republic of San Marino

represented by Mr. John B. Kern,
JBK International Consulting LLC, Via degli Aceri 14,
47892 Gualdicciolo, Republic of San Marino

- Claimant -

vs.

Mr. Predrag Samardziski,

represented by Mr. Miodrag Raznatovic,
Strahinjića Bana 18, Belgrade Serbia

- Respondent -

1. The Parties

1.1 The Claimant

1. Interperformances, Inc. (hereinafter the “Claimant”), is a basketball agency with offices in Chicago, Illinois, and Gualdicciolo in the Republic of San Marino.

1.2 The Respondent

2. Mr. Predrag Samardziski (hereinafter the “Respondent”), is a professional basketball player from the Former Yugoslav Republic of Macedonia, who began the 2010-2011 basketball season playing for Olin Genclik Kulubu (which changed its name to Olin Edirne during that season) (hereinafter “Olin”).

2. The Arbitrator

3. On 21 February 2012, the President of the Basketball Arbitral Tribunal (the "BAT") Prof. Richard H. McLaren appointed Mr. Raj Parker as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Arbitration Rules of the BAT (hereinafter the "BAT Rules"). Neither of the parties has raised any objections to the appointment of the Arbitrator nor to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. On 10 March 2009, the Claimant and the Respondent entered into a "player representation agreement" under which the Claimant was to act as the Respondent's agent (the "Representation Agreement").

5. Clause 3 (*TERM AND RENEWALS*) of the Representation Agreement provides that:

> *"This Agreement shall begin on the date hereof and will lapse one year thereafter or when the engagement contract negotiated by Representative on a basketball club on the Player's behalf expires, whichever period is longer. This agreement shall thereafter be deemed automatically renewed for subsequent periods of one year each unless written notice is given by either Party to the other with an advance notice of no less than 15 (fifteen) and no more than 30 (thirty) days prior to the natural expiry date of the Agreement ("the Window Period"). Such non-renewal communication will have to be sent only via registered post service with return receipt to be addressed exclusively to the domicile respectively elected by the Parties under clause 6 herebelow. Failure by either Party to fully and timely comply with the above requirements will result in the non-renewal notice not being valid and enforceable against the other Party except for what stipulated under clause 4 below."*

6. Clause 4 (*IMPROPER NON-RENEWAL NOTICE PENALTY*) of the Representation Agreement provides that:

> *"Should Player [i.e. the Respondent] in any manner notify Representative [i.e. the Claimant] outside the Window Period that he does not intend to renew this Agreement upon its expiry, then Representative will be entitled to immediately collect from Player a penalty fee equal to the commission earned for the last engagement contract negotiated by Representative on Player's behalf."*

7. Clause 5 (*EXCLUSIVITY CLAUSE*) of the Representation Agreement provides that:

> *"Player expressly acknowledges and accepts that pending this Agreement, the Representative shall be the sole and only person and/or entity entitled to act in the name of and on behalf of the Player in connection with the provision of any of the representation services listed under paragraph 1 above. Should nevertheless Player,*

> *directly or though the services of any other person/entity other than the Representative, enter into or even simply negotiate any engagement deal with any basketball club pending this agreement, then Representative shall be entitled to claim his commission fee from the Player over any such deal as though it had been actually brokered by the Representative himself. Such fee will fall due and immediately payable upon simple written request by the Representative to the Player."*

8. At the time of signing the Representation Agreement, the Respondent was contracted to play for FMP Zeleznic (Belgrade). The Claimant did not negotiate a playing contract for the Respondent until August 2010, when it negotiated the Respondent's playing contract with Olin (signed 17 August 2010). Accordingly, the Claimant did not negotiate a contract for the Respondent before the first anniversary of the signing of the Representation Agreement.

9. On 6 April 2011, the Claimant received a letter from the Respondent, marked for the attention of Dr. Luciano Capicchioni, which stated:

> *"It is with sincere regret, that I must inform you that I have decided to end our business relationship. I no longer wish to retain you as my agent. At this time, upon expiration of our agreement signed on the 10th of March 2009, I feel it is my best interest to go in a different direction.*
>
> *I want to be clear that I have the utmost respect for you – however at this time I think it s in my best interest to hire someone else as my agent. I appreciate all the hard work, you have put in on my behalf.*
>
> *I hope we continue to have friendly relationship."*

10. By a letter dated 19 April 2011, which appears to have been sent to the Respondent by email on 21 April 2011, the Claimant informed the Respondent that his purported notice of termination was not accepted. Specifically, Claimant said:

> *"Please be advised that your attempt at termination is contrary to the legal requirements in your contract with Interperformances dated March 10th 2009.*
>
> *Your letter has been referred to our legal staff for a more comprehensive response in which your responsibilities and our course of action will be further explained."*

11. On 15 May 2011, the Respondent entered into a contract with BC Lietuvos Rytas, a

basketball club domiciled in Vilnius, Lithuania (hereinafter "Rytas").

3.2 The Proceedings before the BAT

12. On 23 January 2012, the Claimant filed a Request for Arbitration in accordance with the BAT Rules and paid the non-reimbursable handling fee of EUR 2,000.00.

13. On 22 February 2012, the BAT informed the parties that the Arbitrator had been appointed and fixed the advance on costs to be paid by the parties as follows:

"Claimant	*€ 5,000.00*
Respondent	*€ 5,000.00"*

14. On 12 March 2012, the Respondent (through his representative) submitted his Answer to the Request for Arbitration. The Answer is dated "2012-03-13", but this must have been a typographical error, as the Answer was received by the BAT Secretariat on 12 March and not on 13 March.

15. On 16 March 2012 the Arbitrator issued a Procedural Order setting a time limit for the Claimant to pay the Respondent's share of the Advance on Costs in accordance with Article 9.3 of the BAT Rules by 27 March 2012.

16. The Claimant did not pay the Respondent's share of the Advance on Costs by 27 March 2012. On 28 March 2012, the Arbitrator issued a further Procedural Order, fixing a new deadline of 9 April 2012 for the Claimant to pay the Respondent's share of the Advance on Costs.

17. The Respondent's share of the Advance on Costs was not paid by 9 April and on 12 April, the Arbitrator issued a further Procedural Order fixing a final deadline of 23 April 2012 for payment of the Respondent's share. The Respondent's share of the Advance

on Costs was then paid by the Claimant on 12 April 2012.

18. On 26 April 2012, the Arbitrator issued a Procedural Order requiring the Claimant to provide, by 7 May 2012, submissions as to the "Window Period" under the Representation Agreement and as to the possibility of the Respondent knowing the dates of the Window Period or sending a valid non-renewal communication under the terms of the Representation Agreement.

19. On 7 May 2012, the Claimant responded to the Procedural Order of 26 April 2012.

20. On 8 June 2012, the Arbitrator issued a further Procedural Order, requiring the Claimant and the Respondent to provide, by 20 June 2012, submissions as to the necessity or otherwise of an oral hearing, an alleged meeting between the Respondent and the Respondent's representative in these proceedings in Turkey in February 2011, and the Claimant's assertion that the Turkish league had made clear that all players were bound to their clubs until the last game of the Turkish play-offs.

21. On 19 June 2012, by an email sent to the BAT Secretariat, the Respondent's representative requested an additional 10 days in which to respond to the 8 June Procedural Order. On 20 June 2012, the BAT Secretariat communicated the Arbitrator's response, which was to grant both parties an extension until 22 June 2012.

22. There followed a number of emails between the Respondent's representative in which the Respondent's representative maintained that the Respondent could not reply to the 8 June Procedural Order by 22 June 2012.

23. After close of business on 22 June 2012, the BAT Secretariat on behalf of the Arbitrator issued a Procedural Order in the following terms:

> "*With reference to the extension granted on 20 June 2012 for the reply to the Procedural Order dated 8 June 2012, the Arbitrator would like to inform the Parties of the following:*

> *1. Respondent has requested an extension to the deadline for his submissions until next Friday (see attached);*
>
> *2. BAT has no confirmation that the above-mentioned Procedural Order has been received by the Claimant, and no submissions have been filed by Claimant until this moment;*
>
> *3. the Arbitrator does wish to consider the Parties' further submissions before rendering any Award; and*
>
> *4. the Arbitrator therefore orders that both Parties provide their response by no later than **Friday, 29 June 2012**."*

24. The Claimant's representative replied promptly, saying:

> "*On behalf of the Claimant, I acknowledge receipt of the previous order extending the parties' submission deadline to today's date and further acknowledge that the Tribunal will accept these submissions through Friday, June 29, 2012.*"

25. The Respondent, through his representative, provided a substantive response to the 8 June Procedural Order on 26 June 2012. The Claimant provided its response on 5 July 2012, without prior warning of or an explanation for its lateness.

26. On 20 July 2012, the Arbitrator issued a further Procedural Order, requiring the Claimant to explain the basis of its assertions as to the likely value of the Respondent's new contract with Rytas, and requiring the Respondent to provide a copy of that contract (in each case the response to be provided by 1 August 2012). The Claimant provided its response on 31 July 2012. The Respondent did not comply with the requirement that he provide a copy of his contract with Rytas.

27. Having considered the parties' responses to the Procedural Order of 8 June 2012 and in accordance with Article 13 of the BAT Rules, the Arbitrator decided that an oral hearing would not be necessary because he had sufficient information with which to determine the case and, in the interests of saving the parties unnecessary expense, there should be no oral hearing. This decision was communicated to the parties in the Procedural Order of 20 July 2012.

28. On 7 August 2012, the Arbitrator informed the parties that the exchange of documents was complete and requested detailed accounts of the parties' costs until 15 August 2012.

29. On 8 August 2012 the Respondent's representative contacted the BAT Secretariat to state that the Respondent would not request any costs.

30. On 25 August 2012, The Claimant's representative submitted the Claimant's account of costs and a letter requesting the Arbitrator's assistance in obtaining a copy of the Respondent's contract with Rytas. In light of this request, on 5 September 2012, the Arbitrator issued a further Procedural Order, which included the following:

> "*The Arbitrator notes that he did not receive a response from the Respondent to the Procedural Order made on 20 July 2012. In light of that, and in light of the Claimant's request in the attached correspondence, the Arbitrator has made a provisional decision to write to BC Lietuvos Rytas requesting that that club provide the Arbitrator with a copy of its contract with the Respondent. The Arbitrator intends to make that request of BC Lietuvos Rytas unless the Respondent provides, by no later than Thursday, 13 September 2012:*
>
> - *a copy of his contract with BC Lietuvos Rytas; or*
> - *evidence, satisfactory to the Arbitrator in his absolute discretion, of the value of the Respondent's contract with BC Lietuvos Rytas; or*
> - *an explanation, satisfactory to the Arbitrator, for the Respondent's failure to submit a copy of the contract or the evidence referred to above.*
>
> *If the Respondent does not provide a copy of the contract or the evidence requested, then the tribunal may draw appropriate inferences about the contract's value from the fact that the Respondent has not responded to the Claimant's estimate of the contract's value.*"

31. The Respondent's representative provided a copy of the Respondent's contract with Rytas on 6 September 2012.

4. The Parties' Submissions

4.1 The Claimant's Position

32. The Claimant's position is essentially that:

- If the Respondent wished the Representation Agreement not to renew after the 2010/2011 season, then he was required to give notice in accordance with the agreement's terms. Specifically, he was required to give that notice during the Window Period, i.e. between 8 February and 23 February 2011 (inclusive).

- The Respondent did not give notice during the Window Period. Accordingly, the Respondent is required to make the penalty payment provided for under clause 4 of the Representation Agreement.

- Moreover, because the Respondent did not give notice of non-renewal in accordance with the terms of the Representation Agreement, the agreement renewed automatically on 10 March 2011 and was in force in April/May 2011 when the Respondent (and perhaps his new representative on his behalf) negotiated a new contract with Rytas. Accordingly, the Claimant is entitled to claim his commission fee from the Respondent in relation to the contract with Rytas as though the Respondent had brokered it.

33. In the Request for Arbitration, the Claimant requested the following relief:

> "*1. That the BAT exercise jurisdiction over the claim and the parties;*
>
> *2. That the FIBA President appoint a qualified arbitrator to resolve this matter among the parties in accordance with the BAT Rules;*
>
> *3. That […] the arbitrator hold a hearing in Geneva or elsewhere […] to allow the*

arbitrator to ascertain the parties' rights and responsibilities upon the presentation of the pleadings, witnesses and expert witnesses, as applicable;

4. *That the arbitrator […] collect from [Rytas] and/or Raznatovic, a true copy of the current contract signed by the Player with the Lithuanian club on or about May 29, 2011;*

5. *That the Claimant be awarded:*

   a. *Compensatory damages equal to ten (10%) percent of the value of the contract signed by Samardziski with [Rytas], said to have been executed on or about May 29, 2011, for at least the current (2011-12) basketball season and for so many years as the Player remains as a player, believed to be a minimum of two seasons, with [Rytas]. These damages are believed to be a minimum of EUR25,000.00 for each season of the contract, and not more than a combined total of EUR75,000.00.*

   b. *Contract penalties equal to ten (10%) percent of the last contract negotiated by the Claimant for the Respondent, i.e. 10% of US $210,000.00 or $21,000.00.*

   c. *A contribution toward the Claimant's attorneys' fees and costs of this action as is customary in BAT proceedings, which are to be determined by the Arbitrator and the President of FIBA, respectively.*

   d. *Interest at the rate of 5% per annum effective May 29, 2011 as to the compensatory damages determined by the arbitrator. (Claimant does not claim damages on the amount of the contract penalties.)*

   e. *Such other and further relief as is just in equitable.*"

4.2 The Respondent's Position

34. The Respondent's position is essentially that:

- The Respondent could not be certain when the Window Period was because its dates were determined by reference to the end of his contract with Olin. It was not possible to know the date of the end of his contract with Olin because that contract expired on the last day of Olin's season. Depending on whether Olin reached the playoff stage of the Turkish league and, if Olin did reach the playoff stage, how well it did in that stage, Olin's season could have ended on a variety of different days. The Respondent would not know which day it was to be 15 to

30 days in advance.

- In light of that fact, the Respondent deliberately and conscientiously provided notice of non-renewal in advance of the dates that might have been the Window Period dated by reference to the dates that Olin's season might have ended.

- In view of the complexity of clause 3 of the Representation Agreement, the impossibility of complying with it in the Respondent's position, and the good faith shown by the Respondent in ensuring that he gave notice of his intention not to renew the Representation Agreement well in advance of its expiry, it would not be fair to award the Claimant the contractual penalty under clause 4 or damages under clause 5. Accordingly, in exercising the ex aequo et bono jurisdiction of the BAT, the Arbitrator should decline to award either the damages or the contractual penalty.

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[1].

38. The jurisdiction of the BAT over the dispute results from the arbitration agreement contained in clause 8 (*GOVERNING LAW*) of the Representation Agreement, which reads as follows:

> "*In case of disputes on the present Agreement the parties will take all measures to resolve them by negotiations. If the dispute between the parties is not resolved by way of negotiations then it should be resolved in accordance with the FIBA Arbitral Tribunal (FAT) as follows:*
>
> *Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile.*
>
> *The language of the arbitration shall be English. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for 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. In the event that a party to a FAT Arbitration fails to honour a final award (the "first party") of FAT or of the Court of Arbitration for Sport upon appeal against a FAT award, the party seeking enforcement of such award (the "second party") shall have the right to request that FIBA sanctions the first party. The following sanctions can be imposed by FIBA:*
>
> *a) a monetary fine of up to €100.000,00.00 (Euro onehundredthousand/00); this fine can be applied more than once; and or,*
> *b) withdrawal of FIBA licence if the first party is a player's agent;*
> *c) a ban on international transfers if the first party is a player/coach;*
> *d) a ban on registration of new players if the second party is a Club.*"

39. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In addition, the Respondent did not object to the jurisdiction of BAT.

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

40. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimant's claim.

6. Discussion

6.1 Applicable Law – ex aequo et bono

41. 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".*

42. Under the heading "Law Applicable to the Merits", 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."*

43. As stated above at paragraph 38, the Parties have expressly elected that the Arbitrator shall determine the dispute ex aequo et bono.

44. Consequently, the Arbitrator shall decide ex aequo et bono the issues submitted to him in this proceeding.

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[2] (Concordat)[3], 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."*[4]

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

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

6.2 Findings

48. The key question to be determined in these proceedings is whether or not the Respondent, by his communication received on 6 April 2011, gave valid notice of termination for the purposes of the Representation Agreement. If he did not give valid notice for those purposes, then the Representation Agreement would still have been binding upon him when he negotiated his new contract with Rytas and, in negotiating a new contract, he would have breached the exclusivity provisions of the Representation Agreement.

49. Clause 3 (*TERM AND RENEWALS*) of the Representation Agreement is far from being a model of clarity. However, the Arbitrator finds it to have the effects set out below.

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[2] 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).

- The Representation Agreement renews itself each year automatically unless it is terminated (or rather, in the language of the agreement, "not renewed") in accordance with its provisions as to termination.

- The provisions as to non-renewal require that notice of non-renewal be given within a specified "Window Period", which is 15 days long and begins (each year) 30 days before the Representation Agreement is due to renew automatically.

- The date upon which the Representation Agreement will renew automatically (and, therefore, the date of the start of the Window Period) depends upon whether the Claimant has negotiated a playing contract for the Respondent during the first year of the term of the Representation Agreement. If the Claimant has not negotiated a playing contract for the Respondent during that year, then the Representation Agreement will automatically renew on the first anniversary of its signing, and on the same date in each subsequent year. If the Claimant has negotiated a playing contract for the Respondent during that first year, then the Representation Agreement will automatically either renew on the date that that playing contract expires, or on the first anniversary of the signing of the Representation Agreement, whichever is later.

- Communication of non-renewal must be made by registered post sent to the contact details stipulated for that purpose in the Representation Agreement.

- If either party fails to communicate non-renewal in accordance with the terms of the Representation Agreement then that non-renewal notice is not effective although, according to the terms of the contract, it still gives rise to an obligation

[3] P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.
[4] JdT 1981 III, p. 93 (free translation).

that the Respondent (if it is he who is in default) make a penalty payment.

50. The Arbitrator believes that this interpretation is consistent with the interpretation submitted by the Respondent in its response to the Procedural Order of 26 April 2012.

51. The Respondent has argued that it was impossible for him to know when the Window Period began and ended (and, therefore, that it was impossible for him to be certain of complying with the Representation Agreement's termination provisions).

52. The Arbitrator finds that, on the particular facts of this case, the Respondent's submission in this regard is not correct. The Claimant did not negotiate a playing contract for the Respondent during the first year that the Representation Agreement was in effect, and therefore the Representation Agreement renewed automatically on the first anniversary of its signing, being 10 March 2011, and would have renewed automatically on the same date each year thereafter.

53. Accordingly, it was possible to determine the dates of the Window Period. The Window Period was from 30 days before 10 March until 15 days before 10 March each year, i.e. it was from 8 February until 23 February in 2011 and would fall between the same dates in every year which is not a leap year.

54. As stated above, clause 3 of the Representation Agreement is not perfectly clear. The Arbitrator therefore accepts that the Respondent may not have known when the Window Period fell, and that the Respondent may accordingly have attempted to "over-comply", i.e. to give more notice than was required on the basis that that must be preferable to less notice. In the circumstances, and from a practical perspective, the Arbitrator accepts that this would have been a commercially reasonable thing to do. Nevertheless, it does not alter the fact that the Respondent did not provide notice of non-renewal within the contractually required time but rather after it had expired. The Arbitrator therefore finds that the Respondent's communication on 6 April 2011 was not

an effective communication of non-renewal for the purposes of clause 3 of the Representation Agreement.

55. The Claimant made clear in its letter of 19 April 2011 that it did not accept the Respondent's notice of non-renewal. Therefore, the Claimant did not waive the requirements of clause 3 of the Representation Agreement.

56. It follows that the Representation Agreement was binding upon the Respondent when he, or his new representative, negotiated a new contract with Rytas. Accordingly, in negotiating a new contract with Rytas in April/May 2011, the Respondent acted in breach of his obligations under clause 5 of the Representation Agreement.

57. In those circumstances, the Respondent is liable for breach of contract and, subject to what is said at paragraphs 60 and 61 below about quantum of damages, must pay the Claimant damages in accordance with clause 5 of the Representation Agreement.

58. There is also the matter of the penalty payments provided for under clause 4 of the Representation Agreement. Under that provision, if the Respondent notifies the Claimant outside of the Window Period, "in any manner", that he does not intend to renew the Representation Agreement, the Claimant is entitled immediately to be paid a "penalty fee" by the Respondent, which fee will be equivalent to the commission earned by the Claimant for the last playing contract negotiated by the Claimant for the Respondent. As stated above, the Respondent did give notice outside of the Window Period.

59. The Claimant stated in the Request for Arbitration that the commission earned by the Claimant on the last contract negotiated for the Respondent by the Claimant was USD 21,000.00. The Respondent has not disputed this. Accordingly, the Arbitrator finds that the Respondent must pay the Claimant USD 21,000.00 pursuant to clause 4 of the Representation Agreement. The Claimant has not sought interest on that amount and

none is awarded.

60. The Arbitrator has considered whether in all the circumstances it is appropriate to award damages under clause 5 of the Representation Agreement as well as awarding the penalty payment referred to above. In doing so, the Arbitrator has made particular reference to:

- the terms of the non-renewal provisions in the Representation Agreement, which are not easy to follow and which seem to be unnecessarily complicated;
- the Respondent's conduct in providing notice to the Claimant and the Respondent's submissions as to the reasons for doing so in the manner that he did; and
- the damages described in clause 5 of the Representation Agreement.

61. The Arbitrator has concluded that it would be unfair, in light of the matters referred to at paragraph 60 above, to require the Respondent to pay the damages provided for under clause 5 without taking into account the Respondent's right to a penalty payment under clause 4. Accordingly, in reaching his decision ex aequo et bono, the Arbitrator finds that the amount to be paid to the Claimant for breach of clause 5 should be modified as follows.

- The amount of EUR 37,500.00, which would have been due on 1 September 2012, must be paid in full.
- The amount of EUR 30,000.00, which would have been due on 1 September 2011, will be reduced by the value of the Claimant's rights under clause 4 (being USD 21,000.00).

62. The Arbitrator finds that the appropriate date at which to calculate the value in EUR of the USD 21,000.00 owed under clause 4 is 15 May 2011, i.e. the date of the Respondent's breach of contract under clause 5. That is because 15 May 2011 was the date on which the Respondent, by his own actions, committed a breach of duty which (because his new contract is denominated in EUR) results in a liability denominated in EUR.

63. The currency conversion rate for EUR to USD on 15 May 2011 was approximately 0.70932 to 1.[5] On this basis, USD 21,000.00 was worth EUR 14,895.72 on 15 May 2011, and therefore EUR 14,895.72 is the amount which must be deducted from the EUR 30,000.00 which would have been due on 1 September 2011.

6.3 Interest

64. The Claimant has claimed interest at a rate of 5% per annum on the "*compensatory damages determined by the arbitrator*", but not on the "*contract penalties*". The Arbitrator finds that payment of interest is a customary and necessary compensation for late payment and there is no reason why the Claimant should not be awarded interest in relation to the amounts awarded. The Arbitrator finds that a 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 outstanding payments on which payment of interest is appropriate.

65. Accordingly, in respect of the damages for breach of clause 5, the Arbitrator finds that the Respondent must pay the Claimant:

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[5] Source: www.xe.com.

- EUR 37,500.00 plus interest at a rate of 5% per annum from 1 September 2012 until the date that payment is made; and

- EUR 15,104.28 plus interest at a rate of 5% per annum from 1 September 2011 until the date that payment is made.

7. Costs

66. 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.

67. On 9 January 2013 - 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 10,000.00.

68. The Arbitrator notes that the Claimant was successful in establishing its claim. The Arbitrator also notes that the Respondent did not pay its share of the Advance on Costs. The Arbitrator considers it appropriate to take into account the non-reimbursable fee when assessing the legal 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:

- The Respondent shall pay to the Claimant EUR 10,000.00, being the amount of the costs advanced by the Claimant.

- The Respondent shall pay to the Claimant the amount of EUR 8,000.00 as a contribution towards its legal fees and expenses.

8. AWARD

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

1. **Mr Predrag Samardziski shall pay Interperformances, Inc. USD 21,000.00 in respect of his liability under clause 4 of the Representation Agreement.**

2. **Mr Predrag Samardziski shall pay Interperformances, Inc., in respect of his breach of clause 5 of the Representation Agreement:**

   a. **EUR 15,104.28 plus interest at a rate of 5% per annum from 1 September 2011 until the date that payment is made; and**

   b. **EUR 37,500.00 plus interest at a rate of 5% per annum from 1 September 2012 until the date that payment is made.**

3. **Mr Predrag Samardziski shall pay Interperformances, Inc., EUR 10,000.00 as reimbursement for Interperformances, Inc.'s arbitration costs.**

4. **Mr Predrag Samardziski shall pay Interperformances, Inc., EUR 8,000.00 as reimbursement for Interperformances, Inc.'s legal fees and expenses.**

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

Geneva, seat of the arbitration, 22 January 2013.

Raj Parker
(Arbitrator)