BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0291/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Sharon Drucker

- Claimant 1 -

Beobasket Ltd.
Strahinjica bana 18, 11000 Belgrade, Serbia

- Claimant 2 -

both represented by Mr. Miodrag Raznatovic, attorney-at-law,

vs.

Sutor Basket Montegranaro s.r.l.
Via Martiri d'Ungheria 108, 63812 Montegranaro (FM), Italy

- Respondent -

Represented by Mr. Enrico Cassi, attorney-at-law,

1. The Parties

1.1. The Claimants

1. Mr. Sharon Drucker (hereinafter the “Coach”) is an Israeli professional basketball coach. Beobasket Ltd. (hereinafter the “Agency”) is a basketball agency located in Belgrade, Serbia. Both are represented by Mr. Miodrag Raznatovic, attorney-at-law in Belgrade, Serbia.

1.2. The Respondent

2. Sutor Basket Montegranaro s.r.l. (hereinafter the “Club”) is a professional basketball club located in Montegranaro, Italy. The Club is represented by Mr. Enrico Cassi, attorney-at-law in Ragusa, Italy.

2. The Arbitrator

3. On 6 July 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 22 April 2011, the Coach and the Club entered into an employment agreement (hereinafter the “Coaching Agreement“) for three basketball seasons, i.e. for the rest of the 2010/2011 season and for the entire 2011/2012 and 2012/2013 seasons. When

signing the contract, the Coach was represented by two agencies, i.e. the Agency (represented by the Claimants' counsel who is also a FIBA-certified agent) and "Sigma Srl" (represented by its president and FIBA-certified agent Mr. Matteo Comellini).

5. By signing the Coaching Agreement, the Club agreed to pay salaries to the Coach of EUR 7,500.00 for the remaining 2010/2011 season, EUR 160,000.00 for the 2011/2012 season and EUR 185,000.00 for the 2012/2013 season each to be paid in accordance with the payment schedule in Article 3 of the Coaching Agreement. The Club also agreed to pay certain agent fees to both the Agency and Sigma Srl. Article 8 of the Coaching Agreement stipulated that the Coach would no longer be obliged to fulfil his contractual duties and was entitled to terminate the employment under the requirements of this provision if any salary was received late.

6. On 15 November 2011, the Club sent an email in Italian to the Coach's agent Mr. Matteo Comellini of Sigma Srl, which reads in the English translation provided by the Claimants as follows:

> *"Dear Mr. Comellini,*
>
> *We are writing to you about the contract with Head Coach Sharon Drucker and we are informing you that, also following our conversation with Dr. Drucker, by the present email we are willing to sospend*(sic) *Mr. Drucker from all his duties connected to the activity of the first team.*
>
> *Best regards,*
>
> *Tiziano Basso*
> *President"*

7. Upon receipt of this message, the Coach stopped working with the team.

8. On 1 January 2012, the Coach signed an employment agreement with the basketball club Hapoel Jerusalem for the rest of the 2011/2012 season and the entire 2012/2013 season.

9. On 3 January 2012, the Claimants' counsel sent an email to the Club which reads as follows:

"Dear Sirs,

Having in mind that you remove MR Drucker from the position of the head coach, as well as that you dramatically delay with the payments towards the coach, as well as to our agency, with this letter according to the article 8 of the contract signed on the 221nd(sic) *of April 2011, I notice you that you have 5 business days to fulfil all obligations.*

Till now, my partner M. Comellini informed you many times about delay.

Till now you have supposed to pay to the coach 64.000 Euro as well as 18.500 Euro agents fee.

MR Drucker agreed with Hapoel Jerusalem, because he has not funds for living.

I suggest you as soon as possible to pay owed amount, or maybe to offer release of the settlement of the contract.

MR Comellini informed that you are unsatisfied with his agreement with Jerusalem, what's more than strange.

Regards,

Misko Raznatovic"

10. On 9 January 2012, the Club initiated a bank transfer of EUR 16,000.00 to the Coach's bank account with the payment reference "4TH SALARY'S INSTALMENT". In sum, the Club paid to the Coach a total amount of EUR 64,000.00 for the 2011/2012 season corresponding to the four monthly salary instalments of EUR 16,000.00 each for September, October, November and December 2011.

11. On 12 January 2012, the Club sent a letter titled "Notification of disciplinary blame" by registered mail and email to the Coach. The Club reminded the Coach that he was still under contract with the Club and invited him to *"clear your position or to produce your defense by written form within 5 (five) days from receipt of such communication"*. On the same date, the Club sent a further letter to both agents in response to the Claimants counsel's email of 3 January 2012 blaming the Coach for having violated his contractual duties when he signed another employment agreement with Hapoel Jerusalem.

12. By letter of 4 February 2012, the Club informed the Coach about its decision *"to enforce [...] the disciplinary sanction of termination for just cause"*.

13. On 12 March 2012, the Club sent a letter titled "disciplinary dismissal SHARON

DRUCKER" to LEGABASKET, the organizing body of the top division of Italian men's professional basketball and confirmed the termination of the employment of the Coach.

14. By letter of 4 April 2012, the accountant of Hapoel Jerusalem confirmed to the Coach that according to his employment contract, he was entitled to receive USD 60,000.00 net for the 2011/2012 season and USD 145,000.00 net for the 2012/2013 season.

15. On 10 July 2012, the Club transferred EUR 9,000.00 to the Agency's bank account with the payment reference "SALDO INVOICE 1-GN/1112 DATE 2011/NOVEMBER/10".

3.2. The Proceedings before the BAT

16. On 23 May 2012, the BAT Secretariat received a Request for Arbitration filed by Mr. Miodrag Raznatovic on behalf of the Coach and the Agency. The non-reimbursable handling fee of EUR 2,980.00 was paid in the BAT bank account on 22 May 2012.

17. By letter of 10 July 2012, the BAT Secretariat informed the Claimants as follows:

> *"Dear Mr. Raznatovic,*
>
> *The President of the BAT has carefully reviewed the Request for Arbitration received on 23 May 2012 in the matter Drucker, Beobasket vs. Sutor Basket Montegranaro s.r.l. and has decided as follows:*
>
> *1. The foregoing Request for Arbitration contains two claims made by Claimant 2 on the basis of different contracts. The facts on which these claims are based do not appear to be interlinked in any way. These claims shall therefore be disjoined. Considering the factual background of each claim as it results from a preliminary analysis of the case, the proceedings shall proceed as follows:*
>
> *(a) Drucker, Beobasket vs. Sutor Basket Montegranaro s.r.l.: Applicable non-reimbursable fee: EUR 3,000*
>
> *(b) Beobasket vs. Sutor Basket Montegranaro s.r.l. (regarding agency fee for player Sandro Nicevic): Applicable non-reimbursable fee: EUR 1,500*
>
> *2. Both cases will be assigned to the same Arbitrator for the sake of cost- and time-efficiency.*
>
> *3. This decision is without prejudice of the Arbitrator's power to order that the proceedings shall be further disjoined if the circumstances so require.*

4. Unless specified otherwise by the Claimants until Friday, 13 July 2012, the payment of EUR 2,980.00 received in the BAT bank account on 22 May 2012 will be credited against the non-reimbursable handling fee for the case Drucker, Beobasket vs. Sutor Basket Montegranaro s.r.l. In such case, a further payment of EUR 1,500.00 will be required for the initiation of the case Beobasket vs. Sutor Basket Montegranaro s.r.l."

18. The Claimants did not reply to the above letter.

19. By letter of 16 July 2012, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about 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 6 August 2012 and the Claimants were requested to provide a residential address. The BAT Secretariat also requested the Parties pay the following amounts as an Advance on Costs by no later than 27 July 2012:

"Claimant 1 (Mr. Sharon Drucker)	*EUR 3,500*
Claimant 2 (Beobasket Ltd.)	*EUR 500*
Respondent (Sutor Basket Montegranaro)	*EUR 4,000"*

20. By email of 6 August 2012, the BAT Secretariat acknowledged receipt of the Respondent's Answer to the Request for Arbitration.

21. By letter of 7 August 2012, the BAT Secretariat acknowledged receipt of payments regarding the Advance on Costs received in the BAT bank account in the amount of EUR 3,480.00 on 25 July 2012 (Coach's share) and in the amount of EUR 4,000.00 on 31 July 2012 (Club's share). The Agency was urgently requested to pay the outstanding share of the Advance on Costs by no later than 15 August 2012 and the Parties were informed that, in accordance with Article 9.3 of the BAT Arbitration Rules, the arbitration would not proceed until the full amount of the Advance on Costs was received.

22. On 14 August 2012, the BAT Secretariat acknowledged receipt of an unsolicited submission dated 10 August 2012 which was submitted by the Claimants' counsel in

response to the Respondent's Answer of which the Respondent had sent a copy directly to the Claimants.

23. By letter of 20 August 2012, the BAT Secretariat acknowledged receipt of the full Advance on Costs. The Arbitrator invited the Parties to provide the BAT with further documents and information by no later than 31 August 2012. In addition, the Arbitrator informed the Claimants that their unsolicited submission dated 10 August 2012 would not be added to the record and requested the Claimants comment on Respondent's request for relief "B)" (hereinafter the "Counterclaim") by no later than 31 August 2012.

24. By email of 28 August 2012, the Club replied to the procedural order of 20 August 2012 and submitted further documents and information. The Claimants did not reply to the procedural order of 20 August 2012.

25. By letter of 11 September 2012, the BAT Secretariat informed the Parties that the Arbitrator had decided to declare the exchange of documents complete. The Parties were therefore invited to submit a detailed account of their costs by 19 September 2012.

26. By email of 13 September 2012, the Claimants submitted an account of costs as follows:

> *"1. Payments to BAT – 6.500,00 Euro*
> *2. Attorney's fee – 4.750,00 Euro*
> *3. Translation of the agreement – EUR 450,00 Euro*
>
> *TOTAL costs: 10.700,00 Euro"*

27. On 18 September 2012, the Respondent submitted an account of costs as follows:

> *"BAT fee: € 4,000.00*
> *Legal fees and expenses vs/Sharon Drucker: € 8.000,00*
> *Legal fees and expenses vs/Beograd: € 2.500,00"*

28. By email of 20 September 2012, the Arbitrator invited the Parties to submit their comments, if any, on the other Parties' account of costs by no later 28 September

2012. By the same email, the Arbitrator requested the Claimants to reply to two further questions within the same time limit as above.

29. By email of 21 September 2012, the Claimants' counsel replied to the Arbitrator's two questions of the previous day.

30. The Parties did not submit any comments on the accounts of costs of the other parties.

31. The Parties did not request the BAT to hold a hearing. The Arbitrator therefore 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 Positions of the Parties

4.1. The Claimants' Position

32. The Claimants submit the following in substance:

- By suspending the Coach from his duties as head coach on 15 November 2011, the Club practically fired the Coach and terminated the Coaching Agreement.

- The Club had no right to suspend the Coach of his duties. Already in the Counsel's letter of 12 January 2012 to the Club the Claimants said: *"The part of the contract is money, but the part of the contract is also right to work. This is very important part, especially nowadays in countries of EU. It means, if you removed the head coach from his position, it's not enough that you pay him salary, and that he has not right to work. Not working, especially in coach's business, makes huge damage for the future contract."*

- According to the *ex aequo et bono* principle, the Coach attempted to mitigate his loss as much as possible and to find another Club. He eventually signed a new contract with Hapoel Jerusalem on 1 January 2012. Consequently, only the difference to the salary agreed in the Coaching Agreement is claimed by the

Coach. Considering the already paid amount of EUR 64,000.00 regarding the 2011/2012 season and the payments to the Coach from his new club in the amount of USD 60,000.00 net (corresponding to EUR 47,310.00)[1] for 2011/2012 and USD 145,000.00 net (corresponding to EUR 114,330.00) for 2012/2013 the Coach is entitled to EUR 48,690.00 for the 2011/2012 season and to EUR 70,670.00 for the 2012/2013 season, i.e. to EUR 119,360.00 in total.

- The Club has not yet paid the Agency's outstanding agent fee of EUR 10,666.00. This amount consists of the agent fee for the services related to the Coach in the amount of EUR 10,666.00 as agreed in Article 10.2 of the Coaching Agreement and which became due on 20 October 2011, i.e. before the Coach's suspension of 15 November 2011.

4.2. The Claimants' Request for Relief

33. In their Request for Arbitration, the Claimants request the following relief:

> *"a) To award claimant Mr. Sharon Drucker with amount of 112.360,00 Euro plus interest at the applicable Swiss statutory rate from the 22th of May 2012*
>
> *b) To award claimant BeoBasket LTD. With amount of 10.666,00 Euro plus interest at the applicable Swiss statutory rate from the 11th of November 2011*[2]
>
> *c) To award claimant with the full covered the costs of this Arbitration."*

34. Later, the Claimants corrected the claimed amount to be awarded to the Coach to EUR 119,360.00 because of a typographical error.

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1 Corresponding to the exchange rate EUR 1.00 = USD 1.2682 as stated by the Claimants in their Request for Arbitration and not objected by the Respondent.

2 The amount claimed for agent fees under the employment contract of the player Mr Nisevic (EUR 9,000) has not been taken into account for the reasons set out in para. 17 of this award.

35. The Claimants did not submit any comments or request for relief concerning the Respondent's Counterclaim.

4.3. The Respondent's Position

36. Regarding the Claimants' Request for Arbitration, the Club submits the following:

- By email of 15 November 2011, the Club "relieved" the Coach. Up to that date, the Club had paid all salary instalments. The December 2011-salary instalment of EUR 16,000.00 was paid by the Club on 9 January 2012.

- The Coach is confusing the terms "relief" and "dismissal". The term "dismissal" is limited to a suspension of the Coach's position as the head coach but it does not terminate the contractual agreement with the Club. The suspended Coach should actually remain available to the team for any reinstatement in his previous position. He would also remain entitled to receive the agreed monthly payments. It is therefore inaccurate to claim that the Coaching Agreement was "terminated" by the Club's notification of 15 November 2011.

- When the Coach started his new job as head coach with Hapoel Jerusalem, he was still contractually bound to the Club. The signing of a second contract for the remaining part of the season 2011/2012 and for the subsequent 2012/2013 season without first having "dissolved the current agreement" for the same years with the Club constituted a serious breach of the FIBA rules. Because the Club had correctly paid all due salaries, the Coach was not entitled to terminate the Coaching Agreement according to Article 8.

- Furthermore, the Coach breached Article 8 of the Coaching Agreement when he terminated the Coaching Agreement without just cause because the 30-day grace period for the payment of the December 2011-instalment had not expired when the Coach signed the new contract with Hapoel Jerusalem. In addition, the Coach did not notify the Club about his new employment.

- The Club has lawfully dismissed the Coach on disciplinary grounds by its ruling of 4 February 2012. Because the Coach has not contested the sanction of dismissal, the disciplinary action taken by the Club has therefore become final and irrevocable. The Coach is not entitled to receive the claimed amounts and in particular no payments for January and February 2012 because the Coach already worked for Hapoel Jerusalem since 1 January 2012.

- In the event the Arbitrator found that the Coach was entitled to receive any compensation, the Club submits that the Coach miscalculated the claim for the 2012/2013 season (EUR 185,000.00). Considering Article 1.2 of the Coaching Agreement, the Club had the right to terminate the Coaching Agreement at the end of the 2011/2012 season by paying EUR 15,000.00. Consequently, the Coach is entitled to EUR 15,000.00 at the maximum.

- As to the requested agent fees, the Agency is not entitled to receive the agent fee of EUR 10,666.00 agreed in Article 10.2 of the Coaching Agreement because it "contributed to the failure" of the Coaching Agreement. Alternatively, the BAT should reduce the requested amount at its discretion under the applicable law.

37. Regarding the Counterclaim, the Club submits that it was entitled to compensation because of the Coach's serious breaches of the Coaching Agreement and his disloyalty which created substantial damage to the Club's national and international image.

4.4. The Respondent's Request for Relief

38. In its Answer and Counterclaim, the Respondent requested the following relief:

> *"A) To reject all of Mr. Drucker's financial claims because they are unfounded and unjust.*
>
> *B) To recognize Sutor's right compensation for damages sustained owing to Mr. Drucker's serious contractual default, the disloyalty shown by signing behind Sutor's back and for any consequential damages relating to credibility and image in*

the national and international field. By consequently condemning Mr. Drucker to reimburse in Sutor's favour such amount as appears equitable to the BAT, or so however subordinately by fully compensating any amounts which may be still due to Mr. Drucker with the damages caused by him to Sutor.

C) Alternatively, to limit the amounts due to Mr. Drucker within the limits of the escape clause agreed to € 15,000.

D) Reject the application for the contract Nicevic Beograd Ltd (€ 9,000.00) as regularly paid[3]*;*

E) Reject the application for Beograd Ltd for the Agent fee of Drucker contract (€ 10,666) as unfounded because the Agency had contributed with the coach to the failure of the Contract, or alternatively reduce it pro bono et aequo.

F) To condemn Mr. Drucker and Beograd Ltd to all legal and arbitration expenses."

5. The Jurisdiction of the BAT

39. 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).

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

41. 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.

42. The jurisdiction of the BAT over the dispute results from the arbitration clauses contained in Article 13 of the Coaching Agreement which reads as follows:

"Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT 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. The arbitrator upon appeal (sic) shall decide the dispute ex aequo et bono."

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[3] See footnote 2.

43. The Coaching Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

44. The Arbitrator notes that the Coaching Agreement was signed by all of the Parties to these arbitration proceedings.

45. Furthermore, the Arbitrator 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 Article 13 of the Coaching Agreement covers the present dispute.

46. The Club did not object to the BAT jurisdiction.

47. For the above reasons, the Arbitrator finds that he has jurisdiction to decide the present dispute and to adjudicate all of the Parties' claims including the Counterclaim.

6. Other Procedural Issues

6.1. Counterclaim

48. The Arbitrator considers the Club's damage claim (request for relief "B") as a Counterclaim.

49. According to Article 11.2 of the BAT Rules, the Club is entitled to submit a Counterclaim together with the Answer. The Counterclaim concerns the same parties as the Claimants' claim and is subject to the same arbitration agreement. It is also closely related to the subject matter of the Claimants' claim. The Arbitrator also notes that the Respondent paid its share of the advance on costs. Further, the Claimants have not disputed the admissibility of the Counterclaim which will therefore be decided in the framework of this arbitration procedure.

6.2. Claimants' unsolicited submission and Reply

50. By letter of 20 August 2012, the Arbitrator informed the Claimants that their unsolicited submission dated 10 August 2012 would not be considered and not be added to the record. Instead, the Arbitrator invited the Claimants to comment on the Club's Counterclaim (the "Reply"). However, the Claimants decided not to submit any comments. Consequently, no Reply is on record and the Claimants' unsolicited submission of 10 August 2012 remains unconsidered.

7. Applicable Law – *ex aequo et bono*

51. 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".*

52. 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."*

53. In the arbitration agreement in Article 13 of the Coaching Agreement, 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*.

54. The concept of équité (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage of 1969[4] (Concordat),[5] under which Swiss courts have held that "arbitrage en équité" is fundamentally different from "arbitrage en droit":

> *"When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[6]

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

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

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

8. Findings

57. According to the Claimants' request for relief and their supplemental statement of 21 September 2012 regarding the amount to be awarded to the Coach, the Claimants request (a) compensation for the Coach in the amount of EUR 119,360.00 and (b) agent fees in the amount of EUR 10,666.00. The Club counterclaims for damages in an amount to be established by the BAT and to be set off against any compensation awarded to the Claimants.

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

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

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

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

8.1. Is the Club obliged to pay to the Coach the amount of EUR 119,360.00?

58. The claimed amount of EUR 119,360.00 is the difference of the alleged outstanding compensation for the Coach as agreed in the Coaching Agreement and the Coach's income from his new club Hapoel Jerusalem for the seasons 2011/2012 (EUR 48,690.00) and 2012/2013 (EUR 70,670.00).

59. For the 2011/2012 season, the Parties agreed on salaries in the total amount of EUR 160,000.00 (Article 3.A para. 2 of the Coaching Agreement). The amount of EUR 64,000.00 has already been paid by the Club. In addition, the Coach received from his new club EUR 47,310.00 for that season. The Coach therefore requests a payment of EUR 48,690.00 for the 2011/2012 season.

60. For the 2012/2013 season, the Parties agreed on salaries in the total amount of EUR 185,000.00 (Article 3.A para. 3 of the Coaching Agreement). Considering the amount of EUR 114,330.00 which has been agreed between the Coach and Hapoel Jerusalem for the 2012/2013 season, the remaining sum for that season amounts to EUR 70,670.00.

61. Undisputedly, the Club and the Coach have validly signed the Coaching Agreement for the remaining season 2010/2011 and the full seasons 2011/2012 and 2012/2013. The Coach's claim does not relate to the 2010/2011 season which is therefore not subject to this arbitration. The Parties also agree that the Coaching Agreement has been terminated. They disagree, however, on the termination date and the justification of the termination.

(a) Termination by the Club's email of 15 November 2011?

62. When the Club wrote an email on 15 November 2011 saying that it was *"willing to sospend*(sic) *Mr. Drucker from all his duties connected to the activity of the first team",* the Coach understood this as a unilateral termination of the Coaching Agreement. The Club submits on the other hand, that it had not intended to terminate the Coaching Agreement but only released the Coach from his duties related to the first team without terminating the Coaching Agreement.

63. The Arbitrator agrees with the Club: for the interpretation of the Club's email of 15 November 2011, its text is most relevant. The email speaks of a "suspension" of the Coach's obligations related to the first team ("sollevarlo dall'incarico ... dall'attività della prima squadra") but it does not refer to a termination of the Coaching Agreement. Also the circumstances as demonstrated by the submitted documents do not allow a different conclusion. In particular, there is no evidence that the Coach asked for clarification of the Club's notice to find out whether the suspension was meant to be temporary or whether the Club wanted to terminate the employment.

64. It is true that according to the Coaching Agreement, the Coach was expressly employed "as head coach of men team of the club" which was meant to be the team "competing in the First National Division of the Italian league" as set out in the same paragraph of Article 1 of the Coaching Agreement. Thus, when the Coach was suspended from his duties related to the first team, he could not be requested to coach another team of the Club or to perform other services for the Club.

65. On the other hand, the Arbitrator does not accept the Coach's submission that he had an unrestricted "right to work" as the head coach of the first team and that any suspension would qualify as a termination of the Coaching Agreement. The duty of the employer consists mainly of the obligation to pay the agreed salary and to provide the agreed additional benefits to the employee. Since the Arbitrator does not apply any national law (e.g. EU law as referred to by the Claimants) but has to decide the dispute under the law agreed by the Parties, i.e. "ex aequo et bono", the Arbitrator finds that the "right to work" is not unrestricted, and it is the right of the employer to temporarily suspend the employee from his or her duties as long as such suspension is not in bad faith and the agreed salaries are still paid.

66. The Coach does not submit that the Club acted in bad faith. The Club was therefore entitled to temporarily suspend the Coach from his obligations which does not, however, release the Club from its obligations to continuing paying the salary and providing the other contractually agreed benefits to the Coach. The Arbitrator finds

therefore that the Coaching Agreement was not terminated by the Club's email of 15 November 2011.

(b) Termination because of the Club's payment delay?

67. The Coach then submits as an alternative that the Coaching Agreement was eventually terminated because of the Club's failure to timely pay the December 2011-salary. Article 7 of the Coaching Agreement entitles the Coach to terminate the Coaching Agreement with immediate effect after the Club's contractual payments were not received by the Coach within 30 days from the due date. With respect to the December 2011-salary, this would have been on 9 January 2012. Then, the Coach must notify the Club that the Coaching Agreement would be deemed terminated if no payment was received within another 5 days.

68. Already by letter of 3 January 2012, the Coach's agent referred to Article 8 of the Coaching Agreement and requested the Club to effect compliance with contractual obligations within 5 days. Payment of the December 2011-salary was made only on 9 January 2012. The Arbitrator accepts that the Coach was not prohibited from sending his termination notice before the expiration of the 30-day time limit of Article 8 of the Coaching Agreement. However, also in that case, the termination notice could only lead to the termination of the Coaching Agreement if the due payments had not arrived at the Coach's bank account on or before 35 days upon the due date, i.e. on or before 14 January 2012. The Club paid the December 2011-salary on 9 January 2012 and the Coach does not assert that he had not received the payment before 14 January 2012. The Agent's email of 3 January 2012 may have brought the Club to pay the due December 2011-salary. However, it did not terminate the Coaching Agreement.

(c) Termination because of the Coach's agreement with Hapoel Jerusalem?

69. The Arbitrator concurs with the Coach that he was entitled to look for another occupation during his suspension. An employee dismissed without cause has an *obligation* to actively search for new employment in order to mitigate the compensation which the employer must pay to the employee because of the wrongful termination of

the employment contract. There is no such duty on a suspended employee. Rather, the suspended employee is *entitled* (but not obliged) to pursue another occupation during his suspension. But while he remains entitled to his salary, he must accept that any alternative income is deducted from the salary. On the other hand, although the Coach was entitled to look for another job, he had to remain at the employer's disposal in case the latter wished to discontinue the suspension.

70. In the present case, the Coach signed a new long-term employment contract with Hapoel Jerusalem without arranging the terms of suspension and the alternative occupation with the Club. He put himself in a position where he could not easily come back to Montegranaro if the Club discontinued the suspension and requested the Coach to resume his function. The Coach became actually party to two different employment contracts. The Arbitrator finds however, that the mere fact that the Coach signed another employment contract did not automatically terminate the Coaching Agreement with the Club. The signing of the new employment agreement must rather be understood as the Coach's declaration that he did not want to resume his functions as the Club's head coach even if the Club would have requested him to return. Insofar, the Arbitrator interprets the Coach's signing of the agreement with Hapoel Jerusalem as an offer to terminate the (suspended) Coaching Agreement. This is supported by the Claimant counsel's email of 3 January 2012, by which only salary for the past, i.e. the December 2011-salary, was requested and a mutual termination was offered ("*I suggest you as soon as possible to pay owed amount, or maybe to offer release of the settlement of the contract.*").

(d) Termination as a disciplinary sanction imposed by the Club?

71. When the Club learned of the Coach's alternative occupation with Hapoel Jerusalem, it did not call the Coach back to duty, but prompted the payment of the December 2011-salary. It was only by letter of 4 February 2012 when the Club wrote to the Coach that it sanctioned him because he signed an agreement with Hapoel Jerusalem. However, there is no evidence on record that the Club ever exercised its right to terminate the suspension and request the Coach to resume his function as head coach of the first

team. The Arbitrator therefore, does not accept the Club's contention that it was entitled to unilaterally terminate the Coaching Agreement because of the Coach's breach of contract.

(e) Mutual termination of the Coaching Agreement

72. The Club's letter of 4 February 2012 demonstrates that the Club had lost its interest in continuing co-operating with the Coach. Whether this was the case already in November 2011 when the Club suspended the Coach from his duties can remain open since there is no evidence that would support such an understanding. The evidence available rather leads the Arbitrator to understand that the Club had not yet come to a decision to dismiss the Coach back in November 2011 but that it wanted to keep its options open. This was still the case on 12 January 2012, when the Club invited the Coach to *"clear your position or to produce your defense".* However, the fact that the Coach moved to Jerusalem and did not want to come back led the Club to the conclusion that it now preferred to terminate the Coaching Agreement instead of insisting on the contractual rights and call the Coach back. The Arbitrator therefore understands the letter of 4 February 2012 as the Club's manifestation of its desire to also terminate the Coaching Agreement.

73. Taking these two manifestations together, the Arbitrator concludes *ex aequo et bono* that when the Coach signed the agreement with Hapoel Jerusalem, he implicitly offered to terminate the Coaching Agreement with the Club and maintained this offer by his counsel's email of 3 January 2012. When the Club sent the termination letter of 4 February 2012 to the Coach, it accepted the Coach's offer. As a consequence, the Coaching Agreement was terminated by mutual consent upon receipt of the Club's letter of 4 February 2012 by the Coach.

74. One might argue that the time period between the Coach's offer and the Club's acceptance to terminate the Coaching Agreement was unreasonably long. Indeed, it is generally accepted that the offeror remains bound to its offer only until such time as it should reasonably expect receipt of a reply. However, it is obvious in the present case that the Coach had no intention to terminate his new employment with Hapoel

Jerusalem and return to Montegranaro. The Arbitrator therefore concludes that he was still bound to his offer when the Club expressed its decision to also withdraw from the Coaching Agreement.

75. As a further consequence of the mutual termination of the Coaching Agreement by 4 February 2012, the Club is liable for the Coach's contractual salary until that date, from which the income earned otherwise must be deducted. While the entire salary for 2011 under the Coaching Agreement has been received by the Coach, the salary for January 2012 (EUR 18,500.00) and the salary from 1 to 4 February 2012 (EUR 2,551.70) from which the salary earned in Jerusalem (January 2012: EUR 7,885.00; February 2012: EUR 1,087.60) must be deducted. The Coach is therefore entitled to the difference of EUR 12,079.10.

8.2. Are the Claimants obliged to pay damages to the Club?

76. The Club requests damages because of grievous impairment of its national and international image and its credibility. The above finding of the Arbitrator, namely that the Coaching Agreement was terminated upon by the Coach's offer and the Club's acceptance renders the issue of a compensation for reputational damage moot. In any event, the Club has not submitted any evidence and not even substantiated its claim. The Club's claim for damages is therefore dismissed in its entirety.

8.3. Is the Club obliged to pay to the Agency the amount of EUR 10,666.00?

77. The Claimants' request for relief includes the amount of EUR 10,666.00 to be paid by the Club to the Agency for services related to the Coach (Article 10.2 of the Coaching Agreement).

78. In Article 10.1 of the Coaching Agreement, the Parties agreed on agents' fees of EUR 5,334.00 to "Sigma Srl." and EUR 10,666.00 to "BeoBasket", i.e. the Agency. These agent fees were considered as compensation for the agencies' "involvement in the conclusion of this Agreement for the season 2011/2012." Further agent fees have been

agreed for the season 2012/2013 which have however not been requested in this arbitration.

79. Undisputedly, the Agency's share of the 2011/2012 agent fees has not been paid. The Arbitrator sees no reason which would entitle the Club to withhold this payment since it has not disputed that the Agency was involved in the conclusion of the Coaching Agreement for 2011/2012. In particular, the Arbitrator does not accept the Club's allegation that the Agency lost its claim to the agent fee because it contributed to the failure of the Coaching Agreement. The Agency did nothing wrong when it reminded the Club of its payment obligations and there is no evidence demonstrating that the Agency acted against the legitimate interests of the Club. The Agency is therefore entitled to the agent fee of EUR 10,666.00.

9. Interest

80. In addition, the Claimants request interest at the applicable Swiss statutory rate on the claimed amounts of EUR 119,360.00 from 22 May 2012 and EUR 10,666.00 from 11 November 2011.

81. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest[8]. Although the Coaching 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.

82. Deciding *ex aequo et bono* and taking into consideration that the Claimants have not submitted any evidence concerning a request for interest before filing the Request for Arbitration with the BAT, the Arbitrator finds that the starting date for the calculation of

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

the default interest shall be the day when the Request of Arbitration was received by the BAT, i.e. 23 May 2012.

83. The awarded amounts to the Coach for compensation and to the Agency for agent fee based on the Coaching Agreement are still outstanding. Therefore, the Claimants are entitled to interest on these amounts from 23 May 2012 until payment.

84. 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.

85. Consequently, the Arbitrator finds that the Coach is entitled to interest of 5% p.a. on the amount of EUR 12,079.10 since 23 May 2012 and the Agency to interest of 5% p.a. on the amount of EUR 10,666.00 since 23 May 2012.

10. Costs

86. 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.

87. On 14 November 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 7,980.00.

88. Considering the outcome and the circumstances of the present case and given that the Coach paid an advance on costs of EUR 3,480.00, the Agency an advance on costs of EUR 500.00 and the Club an advance on costs of EUR 4,000.00, in application of Article 17.3 of the BAT Rules the Arbitrator decides that the fees and costs of the arbitration costs shall be borne by the Coach in the amount of EUR 3,480.00, by the Agency in the amount of EUR 500 and by the Club in the amount of EUR 4,000.00. Accordingly, the arbitration costs are entirely covered by the advances on costs already paid by the Parties.

89. Furthermore, the Arbitrator considers it adequate that each Party bears its own legal fees and other expenses (Article 17.3. of the BAT Rules).

11. AWARD

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

1. **Sutor Basket Montegranaro s.r.l. is ordered to pay to Mr. Sharon Drucker the amount of EUR 12,079.10 plus interest of 5% p.a. on this amount since 23 May 2012.**

2. **Sutor Basket Montegranaro s.r.l. is ordered to pay to Beobasket Ltd. the amount of EUR 10,666.00 plus interest of 5% p.a. on this amount since 23 May 2012.**

3. **Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 20 November 2012

Stephan Netzle
(Arbitrator)