BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0298/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Ms. Iveta Salkauske,

- Claimant 1 -

Mr. Josep Martin,

- Claimant 2 -

Represented by Mr. Antonio Martin Molina,

vs.

BC Good Angels Kosice (Dannax Sport spol. s.r.o.),
Pri Jazdiarni 1, Kosice 4001, Slovakia

- Respondent -

Represented by its General Manager, Mr. Daniel Jendrichovsky
and by Ms. Andrea Janová

1. The Parties

1.1 The Claimants

1. Ms. Iveta Salkauske is a professional basketball player (hereinafter referred to as “the Player” or “Claimant 1”).

2. Mr. Josep Martin is a FIBA-certified agent (hereinafter “the Agent” or “Claimant 2”) representing the Player.

3. Claimants 1 and 2 are referred to jointly as “the Claimants”.

1.2 The Respondent

4. Basketball Club “Good Angels Kosice” (hereinafter also referred to as “the Club” or “the Respondent”) is a professional basketball club. Mr. Daniel Jendrichovsky is the General Manager of the Club.

2. The Arbitrator

5. On 16 July 2012, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). Neither of the parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

6. The Player previously played for the Club during the 2008/2009 season, a few months

after the birth of her first child, and the Club was pleased with her performance to the extent of being interested in engaging her for another season. However, the Player became pregnant again.

7. After the birth of her second child, the Player played in Spain and in Turkey for periods of time in 2010 and 2011 before her services were offered to several clubs, including the Respondent, for the 2011/2012 season.

8. This led to her engagement by the Club, and on 20 May 2011 the Claimants and the Club entered into a tripartite contract, which governed the Player's employment by the Club for the 2011/2012 season and the payment of the Agent's fees (the "Contract").

9. Regarding the lead up to the Player's arrival at the Club and the initial training, the Club submitted the following:

> *"The Club preparation for the new season 2011/2012 started in August 2011. We wanted Iveta to join us as soon as possible. Since she was finishing her studies, she informed us that she would train individually with her husband – a conditioning coach – and that she would come to the Club on 02.09.2011, in a maximally physical condition, with which we agreed in good faith. The player joined the summer training program on the agreed date, and after a couple of trainings which we did not dedicate to the condition, but to the game systems, she participated in the first matches at the domestic tournament from 08.09. to 10.09, which showed that her physical condition was poor. After our constructive criticism she promised the remedy and explained that she had had troubles with her children. Relying on previous good experience with Iveta, we agreed and understood and accepted her explanation in full. At the same time, I immediately notified her agent FRANCISCO GARCIA ALVAREZ by phone that Iveta has arrived with her family safely and she was healthy, but not physically prepared".*

10. According to clause 1 of the Contract, the Player was to arrive on 2 September 2011 and clause 6 stipulates that:

> *"It is the responsibility of the Club to give the Player a complete physical examination during the first three (3) days after the Player's arrival; if the Player competes in any practices or games without having received said physical examination, this contractual agreement will be considered guaranteed. If results of medical exam are negative the agreement will be terminated without any compensation".*

11. Clause 2 of the Contract provides that the Player undertakes, among other things, "*To train and practice appropriately to stay in the best possible physical condition, with the*

objective being to obtain the best possible performance as a basketball player".

12. It is uncontested that, in fact, the Player was not subjected to any physical examination by the Club and instead began practicing and playing games.

13. The Player alleges that she started practice on 5 September 2011, played a friendly game on 8 September (scoring 17 points) and another on 9 September (scoring 12 points), after which she began suffering from hip pain during the night. On 10, 12 and 13 September the Player practiced twice each day (as scheduled) but began suffering a lot of pain during the session of 13 September. The Player contends that from then on until the end of September she "… *alternated treatments, massages and some team practices and some personal practices with the physical trainer*".

14. On 24 September 2011, the General Manager ("GM") of the Club sent an email to the Agent and one of his partners stating the following:

> *"I want to inform you, that your player Iveta Salkauske is not prepared for the season. She came not prepared, out of shape and after one week she stop to practice cause of her _____ and ____ I am asking if I have to pay for nothing? If it will be same next week, I will cut her money".*

15. The Agent answered in substance that it was the first he had heard of this issue but would check the situation with the Player.

16. On 28 September 2011, the GM replied: "*I contacted Fran [one of the Agent's partners] immediately, he told me to write an email* …".

17. In this proceeding, the Agent's partner in question, Mr. Francisco Garcia Alvarez, certified in a written declaration that the GM had made contact (by telephone) with him about this matter for the first time on 23 September 2011 and that he had recommended that the GM write directly to the Agent.

18. Concerning the Player's physical condition during the period from 10 September 2011 onwards, the GM has submitted the following on behalf of the Club:

> *"During the next three weeks she again could not train for very subjective health reasons. Despite work of our doctor MUDr. Klima, our physiotherapist and masseurs, Iveta still complained about ___ pains or ___ pains. In this everything the most interesting was the fact she complained every time about something else and all the time about something that could not be objectively confirmed".*

19. The Club has also filed a statement by the team doctor, Dr. Miloslav Klima, who declared in this connection:

> *"The player Ms. Saulkauske came to our Club after a long period of decreased physical condition; as regards her condition, she was not prepared at the same level as our players, as well as new players at Good Angels […] After physical exercises coordinated by the coaches, after consultation with me and with the physiotherapist, the player's _____ and, as a result of ____, an _____. After appropriate handling and pill therapy, as well as physiotherapy, her state improved. Then, the player complained about pains with her ___, which _____ in this area. Under normal circumstances, these trouble did not exclude her from the training process […] Troubles with a ___ and with ____ are difficult to detect even by specialists, and pains are of a subjective nature, since everyone has a different threshold of feeling".*

20. On 28 September 2011, the GM notified the Player that he was going to suspend the payment of 50% of her monthly salary until she started training and performing in a satisfactory manner.

21. In an email of 30 September 2011, the GM stated to the Agent: "*She still not practice with a team and my doctor is trying to help her… He expect another three weeks without playing …*".

22. However, according to the Player's Schedule for the period between 28 September-22 October 2011, she was scheduled to simultaneously practice with the team during certain sessions, to undergo treatment (including receive regular injections), to do some weight lifting and to be available to play games.

23. Furthermore, the GM alleges that after he put her on notice that the payment of 50% of her monthly salary would be suspended she began training immediately and stopped complaining about the injuries. In that regard, the GM submits on behalf of the Club that: "*During the next two weeks, she went through trainings and plaid [sic] matches until 17.10.2011. At that time, she did not complain about any injury and plaid [sic] all*

the matches within Slovak ExtraLeague, as well as Euroleague".

24. The GM goes on to submit on behalf of the Club that the Player then again complained of ____ and stopped training for the following weeks until the end of October 2011.

25. On 31 October 2011, the Player began feeling ill and went to see the team doctor who prescribed her some medication and two days of rest. However, shortly thereafter she travelled with the team to its Euroleague match in Taranto.

26. In that relation, the team doctor declared in his written statement

> *"[…] I have no information about the ____; none of the players of the team had ____ or other _____. She travelled to Taranto with a slight _____; at that time, her state of health was almost stabilized. She took medicines, and such illnesses fall under the competence of the Club's physician, who holds the MUDr. degree – which means that he is a general medicine doctor; furthermore, he is also an attested surgeon, traumatologist and sports medicine doctor with 42 years' experience. […] I have no information about treatment of the _____ by Dr. Michna – a young orthopaedist – and this physician has no relationships with our Club".*

27. In connection with this controversy that had developed about the Player's physical fitness and her injuries – linked to the GM's assertions that the Player had arrived at the Club in poor physical condition and was suffering injuries as a result, as well as invoking "subjective" injuries – an email correspondence began between the GM and the Agent regarding the payment of the Player's monthly salaries and her contractual situation.

28. This email correspondence, which spans a period between the end of September and the end of November 2011, developed in several stages.

29. During a first stage, at the end of September and in October, the GM indicated that he was withholding the payment of 50% of the Player's monthly salary, which eventually led the Agent to put the Club on notice a first time on 21 October 2011 and a second time on 31 October to pay the outstanding part (EUR 3,750) of her salary contractually owed on 5 October 2011.

30. In early November 2011, the Club paid a corresponding amount of salary (EUR 3,750) but without clearly indicating whether it was to make up for the late/suspended 50% payment contractually owed on 5 October 2011, or whether it was an installment for the next month's salary owed on 5 November 2011.

31. Given the unpleasant situation and at the initiative of the GM, the parties had also begun discussing a settlement agreement which would enable the Player to be paid the contractually-stipulated salaries for the time spent with the Club, to leave the Club and seek employment elsewhere, as well as receive a lump sum in compensation for the early termination.

32. Those settlement discussions, which began in October 2011 and ended in November, essentially failed because aside from being willing to pay the outstanding salary amounts due for the period the Player had spent with the Club, the Club capped its compensation offer in an amount of EUR 10,000, whereas the Player was asking for EUR 22,500.

33. This eventually led to a breakdown of the discussions and during the same period the Agent asked (on 18 November 2011) the Club for the payment of the second installment of his fees, attaching an invoice to be paid by 25 November 2011.

34. Thus, on 21 November 2011 in the morning (at 10:08 am), the Agent put the Club on notice by email to pay all the outstanding amounts allegedly due to the Player under the Contract.

35. On the same morning, by return of email (at 10:21 am), the GM replied in substance and on behalf of the Club that if it was withholding the Player's salary, it was not because the Club had financial problems but because it deemed she was not meeting her duties as a Player and he concluded by saying "*We are ready to go to BAT with this …We have rights, not only obligations* …".

36. As a result, by letter of 22 November 2011, the Player terminated the Contract.

37. That was not the end of their disagreements since the Club deemed the termination to be invalid and, among others, sent a messenger round to the Player's home with a document indicating that she was expected to return to practice and that she would be fined if she failed to do so. According to the Player, the GM also called her in an angry manner at home and followed up with an SMS saying he would be calling the police if she or the Agent did not call him back that evening.

38. The foregoing events led the Player to immediately leave the lodging supplied by the Club and to move into a hotel while preparing for her departure from the country with her family.

39. The GM also threatened to call the police on the premise that the Player was attempting to leave with various objects belonging to the Club, allegedly called the travel agent to attempt to have the plane tickets cancelled, threatened to send a letter to all basketball clubs in Europe about the Player's alleged misconduct so as to prevent her from being engaged and refused to undertake the necessary steps to permit the delivery of her letter of clearance.

40. The Player deposited the car, returned by courier service the keys to the lodging and organized a flight to leave the country.

41. After the Player's departure, various unsuccessful attempts were made to reach a settlement and the Player lost an opportunity in February 2012 to be engaged by a French club, due to that club's failure to obtain the letter of clearance from the Club.

3.2 The Proceedings before the BAT

42. On 5 June 2012, the Claimants filed a Request for Arbitration in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 2,000.00 on 14 June 2012.

43. On 16 July 2012, the BAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

"Claimant 1 (Ms. Iveta Salkauske)	*€ 3,500*
Claimant 2 (Mr. Josep Martin)	*€ 1,000*
Respondent (BC Good Angels Kosice)	*€ 4,500"*

44. On 23 and 24 July 2012, the Claimants paid their respective shares of the advance on costs.

45. On 7 August 2012, the Respondent submitted its Answer, without paying its share of the advance on costs.

46. On 9 and 14 August 2012, the Claimants paid the Respondent's share of advance on costs in substitution for the latter.

47. On 30 August 2012, in light of the parties' initial submissions, the proceedings were suspended until 6 September 2012 in order to give the parties the opportunity to try and settle their dispute amicably.

48. On 6 September 2012, the Claimant informed the BAT that the parties had not been able to reach any settlement and the proceedings were resumed.

49. On 7 September 2012, the Claimants were invited to submit a reply to the Respondent's Answer.

50. On 14 September 2012, the Claimants submitted their reply.

51. On 17 September 2012, the Respondent was invited to submit a rejoinder.

52. On 28 September 2012, the Respondent submitted its rejoinder.

53. By procedural order of 2 October 2012, the proceedings were closed and the parties

invited to submit their statements of costs.

54. On 2 October 2012, the Claimants informed the BAT that the amounts representing their costs had already been detailed in their submissions on the merits.

55. On 12 October 2012, the Respondent submitted its statement of costs.

56. On 16 October 2012, the Claimants submitted observations on the Respondent's statement of costs.

4. The Positions of the Parties

4.1 The Claimants' Position

57. In a nutshell and in substance, the Player is submitting that although she fulfilled her contractual duties, the Club invoked false pretexts (alleged poor physical preparation and alleged simulation of injuries/sickness) to withhold paying her full salary during several months in the autumn of 2011, thereby breaching the Contract in a manner which justified its termination and gave rise to a right to compensation for all outstanding amounts due under the Contract and to damages.

58. The Player has characterized the Club's fault/breaches as including the following acts: "*Refusal to pay the full monthly salary to the player (despite several warnings)*" … "*Attempt to cancel the flight tickets (then property of the player)*" … "*Several lies about a supposed BAT request for arbitration already introduced by club*" … "*Poor and ineffective medical follow up*" … "*Refusal to deliver the Letter of Clearance after the termination*" … "*Refusal to bring the certified mail sent with the Claimants legal addresses*" … "*Aggressive and threatening management*".

59. The Player argues that she was in appropriate physical condition and that her ailments (injuries/illness) were real – as demonstrated by various medical reports dating both from her time with the Club and examinations/treatments undertaken thereafter.

60. She also argues that the manner in which the Club acted immediately after the termination caused her additional damage, including various costs and damage to her image/reputation, and that she was prevented from finding a new engagement after leaving the Club, due to it impeding the issuance of the necessary letter of clearance for her transfer, and that as a result in February 2012 she even lost the opportunity to be employed by a French club.

61. The Agent is claiming that the Club unjustly and without cause withheld paying the second instalment of the agency fees owed under the Contract, and that it thereby breached its contractual obligations, giving rise to his right to corresponding compensation.

62. In their Request for Arbitration dated 5 June 2012, the Claimants requested the following relief:

"a) Salaries owed (Claimant 1)

- *7 500 euros + 5% legal interest from November 5th 2011*
- *7 500 euros + 5% legal interests from December 5th 2011*
- *7 500 euros + 5% legal interests from January 5th 2012*
- *7 500 euros + 5% legal interests from February 5th 2012*
- *7 500 euros + 5% legal interests from March 5th 2012*
- *7 500 euros + 5% legal interests from April 5th 2012*
- *3 750 euros + 5% legal interests from May 1st 2012*
- *Arbitrator's fixed amount about 30 euros/day late*
- *Arbitrator's fixed amount about 250 euros/day not in compliance about LOC*

b) Bonuses owed (Claimant 1)

- *3 000 euros + 5% legal interests from April 29th 2012*

c) Image and psychological damages (Claimant 1)

- *Arbitrator's fixed amount*

d) Amenities owed (Claimant 1)

- *1057,33 euros (-323,51 euros if justified)*

e) Tax receipt (Claimant 1)

f) Agent fee owed (Claimant 2)

- *3 000 euros + 5% interests from November 25th 2011*

g) Handling fees

- *1 500 euros Claimant 1*
- *500 euros Claimant 2*

h) Advance BAT costs

- *Will be determined by the Arbitrator later*

i) Legal fees and expenses

- *Will be submitted by the Claimants to the Arbitrator as soon as the total fees will be final and fixed."*

4.2 Respondent's Position

63. In a nutshell and in substance, the Respondent alleges that it was counting in good faith on the Player's professionalism based on prior experience with her, that she had pre-contractually undertaken to arrive at the Club for the 2011/2012 season in optimum physical condition, that she did not live up to her promise and arrived in very poor physical condition and that the injuries that she rapidly incurred, as well as her illness were either feigned (i.e. she was not always truthful/in good faith) or caused by her poor physical condition.

64. Consequently, the Club was justified in withholding part of her monthly salaries as a form of sanction and motivation to work, and her unilateral termination of the Contract for late payment was abusive and in bad faith. In addition, the abusive termination was

orchestrated by the Agent at a time when the Club was trying to find solutions with the Player, notably by offering her fair terms for an amicable termination of the relationship and the opportunity to seek employment elsewhere.

65. Furthermore, by acting in the manner he did in defending the Player's selfish and unjustified interests, the Agent breached his duty under the Contract to act as a reasonable and constructive intermediary between the Club and the Player, thereby losing his right to remuneration.

66. Finally, given the unethical attitude and untruthfulness of the Player during the period preceding her termination of the Contract, as well as her breaches of contract, the Club was justified in not trusting the Player and in taking the measures it did at the time of her departure from the Club.

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

> *"Finally, I would like to add that it is not correct to base the whole Request on the injury which could not be proven at the relevant time. I also regret that Iveta Salkauske changed her position in such a marked way, despite the fact that our Club always endeavoured to meet her requirements. All the action of her, massively influenced by the agent Josep Martin, brings me to the conclusion that the purpose of all this show is to get a significant financial amount for the least effort. Therefore I do not agree with the claims of the Claimants to the extent stated in the Request for Arbitration and I request that these claims be reasonably considered and their amount be fairly adjusted in accordance with the ex aequo at bono principle."*

68. In its Rejoinder, the Club added:

> *"Even though the Contract was guaranteed, we took the liberty to ask the Arbitrator to carefully take into account all facts, circumstances and causes resulting in this situation. We refuse to pay the player her full contractual remuneration. We don't find it fair and correct. It is against a good sense to pay a high amount to the player and her agent, when the Club has finally more troubles than benefits from professional sport performance to which she was bound in the contract … We are aware that not everything was done by us correctly, we still insist that we were cheated and defrauded. We are willing to pay a salary for each day of her stay within our Club until the date of her escape. But as regards the commission of Mr. Josep Martin, it would be a great irony to pay anything to a person for so many problems which he caused to us".*

5. The Jurisdiction of the BAT

69. 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).

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

71. 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]

72. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under clause 14 of the Contract, which reads as follows:

> *"Any dispute between player, agent and club, 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, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

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

74. 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).

75. Moreover, the arbitration agreement expressly stipulates that it covers any disputes

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

between the Player, the Agent and the Club, meaning that all three parties to this proceeding are bound by it. In addition, neither of the parties challenged the jurisdiction of the BAT in their submissions.

76. For the above reasons, the Arbitrator has jurisdiction to adjudicate the claims submitted by the Player and the Agent against the Club.

6. Discussion

6.1 Applicable Law – ex aequo et bono

77. 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".*

78. 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."*

79. Clause 14 of the Contract provides that if and when any dispute between the parties hereto is submitted to the BAT: "*The arbitrator shall decide the dispute ex aequo et bono*".

80. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Claimants against the Club in this arbitration in front of the BAT.

81. 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]

82. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives *"a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case."*[5]

83. 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*".

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

6.2 Findings

85. The first issue to resolve in this case is whether, in the circumstances as evidenced, the Player's unilateral termination of the Contract on 22 November was justified or not.

86. In that respect, clause 3 (c) of the Contract is relevant, since it provides that the Player

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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).

3 P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

4 JdT 1981 III, p. 93 (free translation).

5 Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717. pp.625-626.

is entitled to terminate the Contract unilaterally: "*If the club is more than fiveteen [sic] (15) days late in the payment of any monthly salary payment or the agent's commission* …".

87. Furthermore, it is undisputed that the Club withheld the payment of 50% of the Player's monthly salaries due between October-November 2011 under the Contract's schedule of payments (clause 3a), i.e. that factually-speaking there was a situation of late payment.

88. More specifically:

- On 21 October 2011, the Player put the Club on notice a first time to pay the outstanding amount (EUR 3,750) of her monthly salary (EUR 7,500) contractually due on 5 October 2011, i.e. requested payment of the 50% of her October salary that had been withheld by the Club.
- On 31 October 2011, the Player put the Club on notice a second time for the same reason.
- On 3 November 2011, the Player received from the Club a payment of EUR 3,750, which in practice made up for the late payment in October.
- On 21 November 2011, the Player put the Club on notice for late payment of the outstanding payment of her monthly salary due on 5 November.
- On the same day, the GM replied in substance on behalf of the Club that it considered it had legitimately withheld part of the Player's salary and that it would go to the BAT if necessary.
- As a result, on 22 November 2011, the Player unilaterally terminated the Contract for late payment.

89. It is clear from the foregoing chronology of events that, on their face, the conditions of

clause 3 (c) of the Contract entitling the Player to unilaterally terminate it were met, since when the Player terminated the Contract on 22 November 2011, the Club was more than 15 days late in its payment of the 5 November salary instalment (EUR 7,500) and the GM had indicated in response to the Agent's notice of the previous day that it deemed the Club's non payment to be justified.

90. The intermediary conclusion is therefore that the Player's unilateral termination of the Contract on 22 November 2011 was justified.

91. However, given the Respondent's arguments and allegations in defence, the question remains whether any established facts demonstrate that materially-speaking, the termination was invalid or unjustified because the Player's behaviour had given the Club good cause to withhold 50% of her monthly salaries and/or because the Player undertook/notified the termination in a manner which was abusive.

92. Concerning the first point (the Player's behaviour), the Arbitrator finds that although the Club may have sincerely believed the Player was not meeting her duties and was perhaps even feigning certain injuries/illness or at least her degree of sufferance, there is insufficient evidence of either of those allegations. At the same time, even if the Club could in good faith assume the Player would arrive in adequate condition as a professional player, the Club negligently failed to implement a basic precautionary contractual right, i.e. the right to submit the Player to an entry medical/physical-fitness examination/test, designed to prevent the risk of engaging a player medically and/or physically unfit to play or to appropriately perform.

93. No conclusive evidence has been adduced that the Player was in poor physical condition when the Club approached her with an offer of employment in the spring of 2011, or that she promised to be in a given state of fitness upon arriving at the Club in September 2011.

94. Moreover, even assuming that the Player was unfit and/or had made a particular promise, the main way the Club could effectively protect itself from the risk of her

physical condition being insufficient to play at her level and possibly leading to an injury and/or illness, was to double-check her medical/physical condition upon arrival, by means of an in-depth medical/physical-fitness examination/test, which logically was even more important to undertake if the Club had any reason to doubt the Player's level of preparation.

95. Despite this, it is undisputed that upon the Player's arrival at the Club in the beginning of September 2011, the Club did not subject her to any form of entry medical and/or physical-fitness examination/test before she started practising and playing games with the team.

96. Beyond the logic there would have been for the Club to insist on a thorough medical/physical-fitness examination/test, it is clear from the following wording of clause 6 of the Contract - and it is also the rationale of this sort of clause - that the Club had the contractual choice of either subjecting the Player to an examination/test or shouldering the risk that the Player might not be in the desired state of medical and/or physical fitness:

> *"It is the responsibility of the Club to give the Player a complete physical examination during the first three (3) days after the Player's arrival; if the Player competes in any practices or games without having received said physical examination, this contractual agreement will be considered guaranteed. If results of medical exam are negative the agreement will be terminated without compensation".*

97. Moreover, a contractually-stipulated medical/physical-fitness examination and the quality of such examination as well as the preciseness of the declarations sought from a player in the process, also play an important role in terms of proof if a dispute subsequently arises about alleged pre-existing injuries or medical conditions. The importance of implementing an entry medical/physical-fitness examination cannot

therefore be underestimated.[6]

98. For the foregoing reasons and even if the Club forwent the examination/test because it trusted the Player, the Club acted negligently and it is now contractually estopped under the terms of clause 6 of the Contract from alleging that the Player was physically or medically unfit to practice or play in such manner that she breached her duties.

99. With regard to the occurrence of the ailments the Player complained of (back and hip pains) and of her subsequent illness (sore throat or influenza), the Club's position and contentions are somewhat ambiguous as to the question of whether it is contesting the very existence of the ailments/illness alleged by the Player and/or is arguing that they were caused by a poor level of physical preparation (and therefore she is responsible for the matter) and/or that she was exaggerating the sufferance and simply inventing excuses not to practice/play because she had family problems to deal with.

100. In any event, the Arbitrator finds that none of the Club's foregoing contentions are conclusively evidenced and that certain of its allegations are irrelevant.

101. To begin with, the Arbitrator considers that, given the terms of clause 6 of the Contract and because it is uncontested that the Club did not perform any type of entry medical/physical-fitness examination/test on the Player before she began practising and playing with the team, the Club is estopped from arguing and barred by principles of good faith from alleging that any of the Player's ailments or her illness were her responsibility because they were linked to a lack of physical preparation. Consequently, the Club was not entitled to suspend paying any part of the Player's monthly salaries in October and November 2011 on the grounds that her ailments were partially or entirely caused by a lack of physical preparation.

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6 *See* BAT (then FAT) 0066/09, Albert vs AEP Olimpias Patron, Arbitral Award dated 27 May 2010; also BAT 0107/10, Kelati, Maravilla vs Olympiacos BC, Arbitral Award dated 12 April 2011.

102. In addition, the Arbitrator finds that, notwithstanding the fact that a person's capacity to endure sufferance caused by an injury or a sickness is partly subjective, the Club has not established that the Player did not suffer from the ailments and the illness she complained of at the time (in October-November 2011) or that she was somehow pretending to be injured/ill or exaggerating the ailments in question.

103. The arbitrator appreciates that it can be difficult for the party having the burden of proof to bring such negative proof - here the Club since it is alleging, among others, as a defence that the ailments/illness being invoked by the Player were inexistent or at least were being exaggerated by her.

104. Nevertheless, with respect to the existence of the ailments, the evidence on record tends to demonstrate the contrary, i.e. that the Player did suffer in a manner which handicapped her, since even the statement of the Club's doctor, Dr. Klima, indicates that for certain complaints "*After appropriate handling and pill therapy, as well as physiotherapy, her state improved*" and for other aspects that "*Troubles with a _____ and with ____ are difficult to detect even by specialists, and pains are of a subjective nature, since everyone has a different threshold of feeling*", while at the same time the Player's training schedule indicates that she was to undergo injections on a regular basis over a period of several weeks and the GM indicated in an email to the Agent on 30 September 2011 that the team doctor had indicated the Player might be unable to play normally for another three weeks; and despite all of the foregoing there is no evidence that the Club either offered or requested the assistance of a specialist to undertake more probing tests to ascertain/verify the exact origin, nature and importance of the pains the Player was complaining of.

105. The Arbitrator finds the same applies to the illness the Player suffered from at the end of October 2011, i.e. that the existence of an ailment is established, because the team doctor himself diagnosed a _____ and prescribed some rest, the only controversy apparently being whether it was a case of _____ requiring her to rest for a longer period of time as recommended by another doctor, Dr. Michna, also consulted by the

Player.

106. Furthermore, the Arbitrator finds that there is no conclusive evidence, direct or circumstantial, tending to establish that the player was being lazy or trying to avoid practicing and playing because she had family preoccupations and problems to address. The declaration of one teammate, who may have had a form of conflict of interest, is not sufficient, in itself, to support those allegations of the Club, particularly since the other documentary evidence tends to demonstrate that the Player continued training and practising as much as possible and playing games, and that in certain cases she may even have been pressured to do so by the Club when she should in fact have been resting. The evidence is also inconclusive regarding the allegation that withholding her salary caused her to stop complaining and start participating properly for a period of time, thereby demonstrating that her medical problems were feigned.

107. For the above reasons, the Arbitrator finds that the Club has not established the existence of any valid cause for suspending the payment of part of the Player's salaries in October and November 2011.

108. Remains the question of whether the Player's unilateral termination of the Contract was invalid because it was abusive in the manner and/or context in which it was given.

109. It is true that at the time the termination was given, the parties were in a negotiation to try and reach an amicable settlement. Nevertheless, the discussions had reached a deadlock as to the amount of compensation that would be paid by the Club (the GM had made it quite clear that he was not willing to offer more than EUR 10,000 in compensation on top of the salary earned that far, while the Player was requesting EUR 22,500 to amicably settle) and it was never stated, nor did the negotiation in itself imply, that the parties' contractual rights and obligations were suspended during the discussions. Furthermore, when the Club was put on notice to pay on 21 November 2011, the GM did not ask for more time but instead replied by return of email that the Club deemed its position to be correct and would if necessary defend it in front of the

BAT. Thus, the Player and the Agent had reason to believe in good faith that the Club would never pay the amount being claimed failing a settlement agreement or an order from the BAT.

110. In light of the foregoing, the Arbitrator finds that the notice of termination and the termination itself were not unfair or abusive in their timing or content.

111. In conclusion therefore, the Arbitrator finds that the Contract was validly and fairly terminated for just cause on the basis of its clause 3 (c).

112. Furthermore, the amount of outstanding salary is established.

113. Consequently and in keeping with clause 3 (c), whereby after a justified unilateral termination by the Player "… *the Club remains obligated to pay all economic amounts stipulated in the Agreement",* the Player shall be awarded the amounts of outstanding salary contractually due, subject to any reduction that is decided due to the requirement to mitigate damages when possible.

114. Given the fact that the Player attempted to find a new employment after leaving the Club and before undergoing surgery that was scheduled for April 2012, and that she was prevented from being engaged by a French club in February 2012 due to the impossibility of obtaining a clearance letter directly from the Club and its federation when needed, the amount owed shall not be reduced to any large extent for lack of attempt to mitigate the damage. However, because there is no evidence on record that the Player attempted to obtain from FIBA a decision allowing the transfer to the French club, whereas she had already been faced with the Club's lack of cooperation and could therefore have anticipated a potential problem, or that she then made any further effort to find another club, the Arbitrator finds it fair and just in this case to reduce by one full month's salary the total amount of salary she will be awarded. Accordingly, the monthly salary contractually owed on 5 April 2012 will not be awarded.

115. Concerning the bonuses being claimed, although the conditions were fulfilled for the

members of the team to receive them, in the particular circumstances of this case it would seem unfair to grant their payment to the Player since the Contract was terminated so early in the season and those bonuses were linked to results covering the entire season (victory in the Slovak Championship and no losses in the Slovak Championship). Consequently the EUR 3,000 being claimed in that respect will not be granted.

116. The second issue to resolve is whether the Agent is entitled to claim the outstanding part of his agency fees in an amount of EUR 3,000, which under clause 9 of the Contract was owed on 15 November 2012; it being undisputed that such amount has not been paid by the Club despite the Agent having issued an invoice and requested payment by 25 November 2011.

117. In that connection, the Arbitrator finds that it is clear from the wording and rationale of the Contract that the Agent was representing only the Player and not the Club, and that accordingly he had the duty to defend primarily the Player's interests. That does not imply that he could act in a dishonest or unfair manner in his dealings with the Club, but there is no evidence on record that he did anything of the sort.

118. On the contrary, a careful chronological reading of the extensive email exchanges between the Agent and the GM, on the one hand, and the Agent and the Player, on the other hand, indicate that the Agent behaved in a reasonable manner.

119. Consequently, and because the Agent fulfilled the contractual conditions to be paid and the termination of the Contract by the Player was valid and did not affect the Agent's right to be paid (the Agent's payment not being contingent upon the continuation of the Contract), the Agent's claim for payment will be upheld.

120. As far as the other heads of damage being claimed by the Player, the Arbitrator finds that there is insufficient evidence of her image and reputation having suffered in a durable manner for any amount of compensation to be awarded in that connection (the Player did not articulate an amount for such claim), and that payment of the various

small amounts claimed and grouped under the heading "*Amenities*" (representing a total of EUR 1057.33 according to the corresponding prayer for relief) is unwarranted for various reasons.

121. In that relation, even if the GM does not appear to have acted in an entirely appropriate manner when the Player terminated the Contract, the evidence is unclear regarding what happened exactly between the date the Player unilaterally terminated the Contract (22 November 2011) and the date she left the country, i.e. the exact chronology of events and who can be deemed responsible in terms of causality for the extra expenses being claimed (2 nights in a hotel, cost of re-scheduling the departure flight, Courier service) is unclear. Similarly, it is factually unclear on what basis the Player is claiming the cost of extra medical consultations and expenses before and after the termination of the Contract, and why she is only now claiming (in this proceeding) the reimbursement of overweight baggage paid on her arrival flight.

122. As far as the contractual penalties for late payment are concerned (for which the Player is claiming "*Arbitrator's fixed amount about 30/euros/day late*") the Arbitrator finds that because it is not clear from clause 3 (c) of the Contract that they are due if the Player decides to terminate the Contract and because the Player is being awarded interest for the late payments by the Club (see below), no penalties shall be awarded.

123. Concerning the contractual penalty for late deliverance of the letter of clearance (for which the Player is claiming "*Arbitrator's fixed amount about 250 euros/day not in compliance about LOC*"), the Arbitrator finds that the evidence necessary to calculate it appropriately is lacking and therefore none shall be awarded, but nevertheless notes that the GM's threat to send a circular letter to other European basketball clubs to prevent the Player's engagement by a new club as well as the Club's dilatory manner of dealing with the letter of clearance were ethically unacceptable and a potential cause of financial damage.

124. Furthermore, given the Club's uncooperative approach after the Player's termination of

the Contract and the stipulation under clause 3 thereof, whereby "… *The Club agrees to provide the Player with a tax document upon request, which shows the amount of tax that has been paid on the Player's behalf by the Club at the end of the season*", the Player's request that the Club be ordered to issue such tax document shall be upheld.

125. Finally, the Claimants are also requesting the payment of interest on the amounts awarded.

126. Although the Contract does not expressly regulate interest for late payments, it is a generally recognized principle embodied in most legal systems, which is underpinned by motives of equity, that late payments give rise to interest – in order that the creditor be placed in the financial position she/he would have been in had payments been made on time. Consequently, and despite the Contract not specifying an interest rate, it is normal and fair that interest is due on the late payments owed to the Player and to the Agent. In this case it seems fair and reasonable to award interest at a rate of 5% per annum, in line with BAT jurisprudence.

127. It is an established principle that interest runs from the day after the date on which the principal amounts are due.

128. Consequently, it is fair that, with respect to the monthly salaries and bonuses provided under the Contract, the amounts owed to the Player will bear interest from the day after their due date stipulated in that Contract, and the amount due to the Agent from the day after the end of the time extension (25 November 2011) he gave the Club to pay his corresponding invoice.

7. Costs

129. 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.

130. On 21 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 9,000.

131. Considering the Claimants prevailed in a large part of their claims, it is fair that the fees and costs of the arbitration be borne by the Respondent and that it be required to cover its own legal fees and expenses as well as make a contribution to those of the Claimant in an amount of EUR 4,000.

132. Given that the Claimants paid advances on costs of EUR 9,000 as well as a non-reimbursable handling fee of EUR 2,000 (which will be taken into account when determining the Claimants' legal fees and expenses), while the Club failed to pay any advance on costs, the Arbitrator decides that in application of article 17.3 of the BAT Rules:

    (i) The Club shall pay EUR 9,000 to the Claimants, being the amount of the costs advanced by the Claimants;

    (ii) The Club shall pay to the Claimants EUR 6,000 (2,000 for the non-reimbursable fee + 4,000 for legal fees) representing the amount of the Club's contribution to the Claimants' legal fees and other expenses.

8. AWARD

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

1. **BC Good Angels Kosice (Dannax Sport spol. s.r.o.) shall pay Ms. Iveta Salkauske the following amounts as compensation for unpaid salaries:**

   - **EUR 7,500 plus interest at 5% p.a. from 6 November 2011 onwards;**
   - **EUR 7,500 plus interest at 5% p.a. from 6 December 2011 onwards;**
   - **EUR 7,500 plus interest at 5% p.a. from 6 January 2012 onwards;**
   - **EUR 7,500 plus interest at 5% p.a. from 6 February 2012 onwards;**
   - **EUR 7,500 plus interest at 5% p.a. from 6 March 2012 onwards;**
   - **EUR 3,750 plus interest at 5% p.a. from 1 May 2012 onwards;**

2. **BC Good Angels Kosice (Dannax Sport spol. s.r.o.) is ordered to immediately deliver to Ms. Iveta Salkauske a signed document indicating the amount of tax it paid on her behalf at the end of the 2011/2012 season.**

3. **BC Good Angels Kosice (Dannax Sport spol. s.r.o.) shall pay Mr. Josep Martin an amount of EUR 3,000 as compensation for unpaid agency fees, plus interest at 5% per annum on such amount from 26 November 2011 onwards.**

4. **BC Good Angels Kosice (Dannax Sport spol. s.r.o.) shall pay Ms. Iveta Salkauske and Mr. Josep Martin an amount of EUR 9,000 as reimbursement for their arbitration costs.**

5. **BC Good Angels Kosice (Dannax Sport spol. s.r.o.) shall pay Ms. Iveta Salkauske and Mr. Josep Martin an amount of EUR 6,000 as reimbursement for their legal fees and expenses.**

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

Geneva, seat of the arbitration, 23 November 2012.

Quentin Byrne-Sutton
(Arbitrator)