# ARBITRAL AWARD

**(BAT 0303/12)**

by the

# BASKETBALL ARBITRAL TRIBUNAL (BAT)

**Mr. Klaus Reichert SC**

in the arbitration proceedings between

**Mr Damir Markota**

**- Claimant 1 -**

**XL Agency for Management & Marketing**
Cernicka 41, 10000 Zagreb, Croatia

**- Claimant 2 -**

both represented by Ms Koraljka Tomasic, attorney at law

vs.

**Union Olimpija Ljubljana BC**
Celovška cesta 25, 1000 Ljubljana, Slovenia

**- Respondent -**

represented by Ms. Martina Žaucer, attorney at law,

BASKETBALL
ARBITRAL TRIBUNAL

## 1. The Parties

### 1.1 The Claimants

1. Mr Damir Markota (hereinafter referred to as “Player”) is a professional basketball player of Croatian nationality. XL Agency for Management & Marketing is a basketball agency (hereinafter referred to as “Agent”) which represented Player in relation to his retainer by Respondent for the 2010-2011 and 2011-2012 seasons.

### 1.2 The Respondent

2. Union Olimpija Ljubljana BC (hereinafter referred to as “Respondent”) is a professional basketball club in Ljubljana, Slovenia.

## 2. The Arbitrator

3. On 24 July 2012, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert SC, 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 Background and the Dispute

4. On 30 August 2010, Player and Respondent entered into an agreement whereby the former was engaged to play basketball for the 2010-2011 season (“the First Agreement”). On 30 July 2011, Player and Respondent entered into an agreement whereby the former was engaged to play basketball for the 2011-2012 season (“the

Second Agreement").

5. The Second Agreement provided for a fee to Agent of EUR 22,000.00 net.

6. Player says (and this is admitted by Respondent) that he is owed a remaining amount of EUR 38,000.00 net arising out of the First Agreement. Player says (and this is denied by Respondent) that he is owed a remaining amount of EUR 170,000.00 net arising out of the Second Agreement. Agent says (and this is partially denied by Respondent) that EUR 22,000.00 net is owed arising out of the Second Agreement.

**3.2 The Proceedings before the BAT**

7. Player and Agent filed a Request for Arbitration dated 30 May 2012 in accordance with the BAT Rules.

8. The non-reimbursable handling fee in the amount of EUR 4,000.00 was paid on 25 June 2012.

9. On 31 July 2012, the BAT informed the Parties that Mr. Klaus Reichert SC had been appointed as the Arbitrator in this matter. Further, the BAT fixed the advance on costs to be paid by the Parties as follows:

| | |
|---|---|
| *"Claimant 1 (Mr Damir Markota)* | *EUR 3,000* |
| *Claimant 2 (XL Agency)* | *EUR 1,000* |
| *Respondent (BC Olimpija Ljubljana)* | *EUR 4,000"* |

The foregoing sums were paid as follows (all on behalf of Player and Agent): 3 August 2012, EUR 4,000.00; and 7 September 2012, EUR 4,000.00.

10. Respondent filed an Answer dated 17 August 2013. In that document, Respondent

indicated a wish to reach an amicable settlement and by Procedural Order of 12 September 2012, the Arbitrator invited comment from Player and Agent. On 17 September 2012, they stated that they saw no possibility of settlement.

11. On 26 September 2012, Player and Agent filed their Reply submissions.

12. Respondent did not avail itself of the opportunity which it was given to make a second set of submissions.

13. On 19 October 2012, Respondent was invited to submit its statement of costs by 26 October 2012 (Player and Agent had already submitted their statement of costs). Also on 19 October 2012, the Parties were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.

14. Respondent did not submit any statement of costs within the time allowed, or at all notwithstanding the opportunity granted. On 7 November 2012, Respondent was afforded an opportunity to comment on the costs of Player and Agent. Respondent filed such comments on 13 November 2012.

15. By letter dated 20 November 2012, the Arbitrator asked the following question of Player and Agent:

> *"Before rendering the Award, the Arbitrator needs additional information and therefore herewith requests **the Claimants** to reply to the following by no later than **Tuesday, 27 November 2012**: Was Claimant 1 (Mr Damir Markota) under contract with another club during the 2011-2012 season after he left the Respondent? If so, please provide a copy of the said contract. If not, please provide evidence of the steps taken in order to find a new employment."*

16. By email dated 27 November 2012, counsel for Player and Agent asked for an extension of time citing the following reasons:

> *"I was unfortunately not able to reach the Claimant Markota on time for him to provide me*

*with the aforesaid documentation, as he presently plays abroad. The Player's agent was away on a business trip, so the XL Agency was also not able to provide me with the complete documentation within the time limit."*

17. Time for a reply was extended by the Arbitrator to 4 December 2012.

18. By email dated 4 December 2012, counsel for Player and Agent asked for a further extension of time by reason of the following:

*"Mr. Markota is still not available, and I gained some documentation from the XL Agency today, and I am awaiting the other from the archives tomorrow."*

19. Time for a reply was extended by the Arbitrator to 10 December 2012.

20. By email dated 10 December 2012 ,counsel for Player and Agent asked for a further extension of time by reason of the following:

*"embarrassingly, I was still not able to gather all the documentation necessary to comply with the Procedural Order. I can confirm that the Claimant Markota was indeed under contract with another club, the BC Zagreb from Zagreb, Croatia in the season 2011/2012, after the termination of his contract with the Respondent.*

*Mr. Markota told me that his initial contract with BC Zagreb had been changed during the season.*

*Mr. Markota is not in possession of the documentation about his final agreement with BC Zagreb, as he is in Turkey at the moment, playing for BC Besiktas. The Claimant XL Agency was not a party of those agreements, and has not got the documentation about it.*

*Mr. Markota will be coming to Zagreb within 10 days for the holiday season, and will be able to give me the documentation needed from his personal files."*

21. Time for a reply was extended (stated to be final) by the Arbitrator to 21 December 2012.

22. By submission dated 21 December 2012, counsel for Player and Agent stated the following, amongst others:

(a) Player was under contract with BC Zagreb in Croatia from 3 January 2012 until

the end of the season; and

(b) The contract between Player and BC Zagreb was made on 3 January 2012.

Attached to the submission was a copy of the contract dated 3 January 2012.

23. Respondent was afforded an opportunity to comment by 11 January 2013. It did not do so.

24. By email dated 10 January 2013 the Arbitrator asked Player and Agent the following question:

> *"[…] the Arbitrator herewith requests **the Claimants** to provide by no later than **Monday, 14 January 2013** a copy of the "separate Annex" concerning the compensation arrangements and which is referred to in Article 10 of the contract between Mr Markota and the Club Zagreb (see attached)."*

25. By email dated 14 January 2013, counsel for Player and Agent stated the following:

> *"[t]he Claimants herewith inform the Honorable Arbitrator that Mr. Markota and BC Zagreb made no annex concerning the compensation arrangements, which is referred to in the Article 10 of the contract.*
>
> *The Claimants kindly ask the Honorable Arbitrator to grant them another 10 days to enable them to obtain the appropriate statements of persons who were the responsible persons of BC Zagreb while the contract was in force, and all in order to further clarify the matter."*

26. Time for a reply was extended by the Arbitrator to 28 January 2013.

27. By email dated 28 January 2013, counsel for Player and Agent stated the following:

> *"[a]lthough having tried to do so, the Claimants still have not been able to reach the responsible persons of BC Zagreb from the time of the contract of matter. The Claimant Mr. Markota would have tried to do so also in person, as well as issue an affidavit of his own, upon his arrival to Zagreb for a break. Unfortunately, he was not able to fly to Zagreb because of the exceedingly bad weather.*

> *I therefore most sincerely apologize to the Honorable Arbitrator for not having honored the granted time-limit, and kindly ask of him to grant the Claimant an extension of another 10 days in order to comply with the Procedural Order."*

28. By email dated 30 January 2013 the Arbitrator stated the following:

> *"Having considered the Claimants' request, the Arbitrator has decided to grant the extension of the time limit until **Thursday, 7 February 2013**.*
>
> *However, given the multiple time extension requests filed by the Claimants and the considerable time afforded to them to reply, the Arbitrator informs the Claimants that*
>
> *a) there will be no further time extensions; and*
>
> *b) the Arbitrator may draw adverse inference in the event that the Claimants fail to submit the information requested until **Thursday, 7 February 2013**."*

29. By submission dated 6 February 2013, Player and Agent stated, amongst others, that there was no relevant documentation; that Player never reached any agreement on compensation with BC Zagreb; that after the termination of the Second Agreement with Respondent he hastily accepted the contract with BC Zagreb to secure a possibility to play basketball "at all" and believed a fair arrangement for compensation could be reached; that BC Zagreb encountered severe financial difficulties; and that he received no compensation from BC Zagreb.

30. Respondent was afforded an opportunity to comment by no later than 25 February 2013 which was extended by the Arbitrator to 28 February 2013. Respondent did not comment within that time, or at all.

## 4. The Positions of the Parties

31. The following is an overview of the Parties' positions.

32. Player says that the full amount of the money due to him under the First Agreement has not been paid. This sum is stated to be EUR 38,000.00 net which was payable in two instalments of EUR 19,000.00 each on 15 May 2011 and 15 June 2011. It is

admitted by Respondent that these two amounts were not paid. As these sums are not in dispute, there will be no further lengthy elaboration in this Award concerning these claims.

33. The major part of Player's claim concerns his assertion that a sum of EUR 170,000.00 net remains due to him under the Second Agreement. He says that he terminated the Second Agreement in December 2011 by reason of the fact that Respondent was long behind in its payment obligations to him. He says that he gave Respondent due notice, but that this did not result in payment.

34. Respondent counters with a claim that Player and the Respondent's Manager made a verbal agreement on 5 December 2011 that Player would leave the club. The background is stated to be an increasingly fraught and difficult relationship between Player and Respondent such as unsportsmanlike behaviour, hostile language (in public and in private), missing training sessions, etc. Respondent says it was not late in its payments to Player, and also refers to the fact that invoices (namely formal demands for payment) were not received.

35. Agent says that it is owed EUR 22,000.00 net by way of agreed agency fees. The Second Agreement is explicit in this regard and a payment date of 30 November 2011 is provided for as the deadline. Respondent counters, in part, by saying that it does not admit the entirety of this sum, but rather only an unspecified proportion by reference to the duration of Player's time at the club.

36. In the Request for Arbitration, Player and Agent requested the following relief:

- EUR 208,000.00 be awarded to Player plus interest at 5% p.a. on: EUR 19,000.00 since 16 May 2011, EUR 19,000.00 since 16 June 2011; and EUR 170,000.00 since 16 December 2011. This latter figure was adjusted by Player to interest at 5% p.a. on EUR 23,000.00 from 16 October 2011,

interest at 5% p.a. on EUR 23,000.00 from 16 November 2011, and interest at 5% p.a. on EUR 124,000.00 from 17 December 2011;

- EUR 22,000.00 be awarded to Agent plus interest at 5% p.a. from 1 October 2011 (later adjusted to interest from 1 December 2011); and

- Costs, fees and expenses "to each of the Claimants one half of the amount awarded". This was broken down, later, as EUR 8,000.00 for legal representation, EUR 200.00 for administrative costs, and then the non-reimbursable handling fee and the advance on costs.

## 5. The Jurisdiction of the BAT

37. 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).

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

39. 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].

40. The jurisdiction of the BAT over the claims is stated to result from the arbitration clauses in the First and Second Agreements, the first of which reads as follows (the reference to FAT is the former name of BAT; see Articles 1 and 18 of the BAT Rules):

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

> *"Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration rules by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss act on Private International Law (PIL), irrespective of the parties domicile. The language of the arbitration shall be English. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

41. The arbitration clause in the Second Agreement 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 shall decide the dispute ex aequo et bono."*

42. The two Agreements are in written form and thus the arbitration clauses fulfil the formal requirements of Article 178(1) PILA.

43. 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 clauses under Swiss law (referred to by Article 178(2) PILA).

44. No issue of any kind has been taken by Respondent in relation to the following two points:

- the fact that the Request for Arbitration is based upon two similar, but different arbitration agreements; and

- the Agent, while not stated expressly to be a party to either Agreement, is bringing a claim for its unpaid agency fees.

45. In fact, Respondent has participated without reservation in this Arbitration.

46. For the above reasons, the Arbitrator has jurisdiction to adjudicate upon the claims.

## 6. Discussion

### 6.1 Applicable Law – ex aequo et bono

47. 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".*

48. 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."*

49. As stated above, the Agreements both clearly stipulate that the arbitrator shall decide the dispute ex aequo et bono.

50. The concept of "équité" (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage[2] (Concordat)[3], under

[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).

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]

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

52. 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*."

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

### 6.2 Findings

54. The doctrine of *pacta sunt servanda* (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the principle by which the Arbitrator will examine the positions of the Parties.

55. As already noted, Respondent admits the claim for EUR 38,000.00 based upon the First Agreement. There is nothing stated anywhere in the Respondent's Answer which could excuse non-payment of this amount, and therefore Player is entitled to the relief

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.

he seeks in this regard.

56. Turning to interest in relation to the aforementioned sum, it is well established both as a matter of justice and equity, and in BAT jurisprudence, that a party who is deprived of the benefit of monies owed to them should, in the normal course of events, be compensated by way of interest at 5% p.a.. So it will be in this case. The Arbitrator holds that Respondent must pay interest at 5% p.a. on EUR 19,000.00 since 16 May 2011, and EUR 19,000.00 since 16 June 2011. Each date is the day following the agreed-upon date for the payment of those amounts of money pursuant to the terms of the First Agreement.

57. The major part of Player's claim stems from the Second Agreement. He seeks an award in the amount of EUR 170,000.00, being the amount which he says is owed to him pursuant to that Agreement.

58. The Request for Arbitration states that for the 2011-2012 season, Respondent took the obligation to pay Player a guaranteed salary of EUR 220,000.00 net, payable in nine monthly instalments, four in the amount of EUR 25,000.00, and five in the amount of EUR 24,000.00. The instalments were stated to be due on the 15th day of each month starting in October 2011 and finishing in June 2012. The Request for Arbitration attaches a copy of the Second Agreement, but when this is examined, one sees that the second page thereof is not included by way of exhibit, but rather page three is included twice (presumably a clerical error). This is of interest to the Arbitrator as it is page two which, in fact, includes the agreed list of salary payments (the full Second Agreement was furnished by Respondent with its Answer).

59. Player says that by 29 November 2011, Respondent was late with payment of the salary due by the previous October for more than 45 days. This, he says, triggered the provision in the Second Agreement concerning failure to pay on the part of Respondent, namely:

*"If the payment is not made within forty five (45) days of the scheduled payment date, the Player shall immediately be entitled to full salary and have no further obligations to the Club."*

60. Player then says his agent sent a notice on his behalf on 5 December 2011 giving a deadline of 16 December 2011 to settle the debt, with the consequence of termination. There was no such settlement and by letter dated 21 December 2011, Player unequivocally told Respondent that he was terminating the Agreements and warning that all sums were due.

61. Whilst there appears to be some confusion as to exactly when Player says termination took place, it appears to the Arbitrator, that Player's letter of 21 December 2011 is clear. Player did not terminate prior to his letter of 21 December 2011, but as of that date, it was unquestionably clear that Player considered his contractual arrangements with Respondent to be at an end.

62. The key to this part of the Arbitration, is whether Player had good grounds to terminate by his letter dated 21 December 2011.

63. Respondent says, as already noted, that there was a mutually agreed termination between Player and Respondent's Manager on 5 December 2011. No evidence which could corroborate or substantiate such an agreement (which is stated to have been concluded orally) has been tendered by Respondent. No statement or any sort of evidence is tendered from Mr Janes Rajgelj, the name of the manager who Respondent advises concluded this oral termination agreement. The Arbitrator cannot ascertain any proof for this alleged oral termination agreement and it appears entirely at odds with the circumstances of the matter; that Player would simply walk away from a guaranteed contract for no compensation. The Arbitrator finds therefore that there was no oral termination agreement on 5 December 2011.

64. Respondent also says that Player's attitude and behaviour was unsportsmanlike, unprofessional, and that he engaged in words and deeds which were unacceptable.

Respondent supplies, as part of its proof, a statement by its President, Mr Mörderndorfer dated 15 August 2012. This is a one-page document which refers in part to alleged conduct on the part of Player from 4 December 2011 onwards. The Arbitrator finds that the statement (as regards alleged conduct prior to 4 December 2011) is so broadly-drawn and makes such non-specific allegations, that it is of no evidential value in advancing Respondent's case.

65. Respondent refers to media reports in which Player makes unflattering comments about the club. These are all from December 2011 by which stage Player was, on his case, out of pocket and due significant sums of money. It appears to the Arbitrator that the media reports (insofar as media reports are inherently reliable) simply record Player's displeasure with not having been paid. The Arbitrator, in the circumstances of this case, does not agree with Respondent that these media reports give cause for complaint leading to absolution from liability.

66. Respondent also relies on a defence that it was never late with its payments and invoices, an essential feature of how it was to pay Player, were not duly received.

67. At this stage, the Arbitrator notes that the payment structure in the Second Agreement for salaries is actually EUR 2,000.00 net per month, and not as the Request for Arbitration states (the balance of the monthly payments are dealt with below). The appointed dates for payment are the 15th day of each month from October 2011 to June 2012 inclusive. The Second Agreement also expressly says that payment confirmation of each transfer shall be handed to the Player on the day of payment set forth in this Contract. This leaves no room for doubt – the payments are to be made on the date set forth in the Second Agreement. The alleged credit term or payment period of 45 days is not present, and the Arbitrator does not accept Respondent's argument that such a provision exists. Respondent cannot convert a 45 day non-payment period provided for in the Second Agreement which allows for termination by Player into a credit term. Respondent took on the obligation to pay on appointed dates, not 45 days

later. That argument of Respondent is rejected.

68. The Arbitrator must note that the Second Agreement does not provide the salary figures that Player asserts it does. The salary agreed in the Second Agreement, is a fraction of that which Player asserts. Where, therefore, does Player get the balance of his claim?

69. Respondent has exhibited an entirely separate agreement, namely an "Image Contract" dated 30 July 2011 between Respondent, Player and a US corporation called XL Finactive LLC. Player did not exhibit this document.

70. The Image Contract provides that Respondent will pay XL Finactive LLC, "through appropriate invoices" four instalments of EUR 23,000.00 and five instalments of EUR 22,000.00 on the 15th day of each month from October 2010 to June 2011. These dates are completely inexplicable by reference to the date of the Image Contract of 30 July 2011. It is also difficult for the Arbitrator to understand the case initially being made by Player that he was owed salary payments broken down into nine monthly instalments, four in the amount of EUR 25,000.00 and five in the amount of EUR 24,000.00. Whilst one can add the monthly figure in the Second Agreement of EUR 2,000.00 to the monthly amounts in the Image Contract and arrive at the sought-for amounts, this is unsatisfactory. Quite apart from the completely inexplicable disparity in dates in the Image Contract, it is also clear that the payments provided for in the Image Contract are to be invoiced by a corporate entity in the United States, and not Player. These are rights which, at first blush, do not appear to belong to Player at all.

71. A further complication is that the Image Contract is subject to Swiss law and arbitration in Lugano, with no reference of any kind to BAT arbitration.

72. In the briefest of submission (second round) Player refers the Arbitrator to BAT jurisprudence (case BAT 0071/09) in which a similar situation was considered. A

separate contract whereby payments to a corporate entity for image rights was held to constitute salary due to a player in the wider context of the contractual arrangements.

73. The Arbitrator is prepared to accept, in the light of that jurisprudence, that the payments in the Image Contract were within the ambit of the Second Agreement and represented, in substance, salary payments properly due to Player. The Arbitrator is also prepared to accept that the dates in the Image Contract, were meant to relate to the 2011-2012 season. In addition, the Respondent did not object to the jurisdiction of BAT at any stage of these proceedings nor to the resolution of this dispute *ex aequo et bono*.

74. This conclusion comports with the justice and equity of the situation as it would be difficult to conclude that Player's sole recompense for his playing skills was EUR 2,000.00 per month. However, in bringing the claim as he has done and framing the claim as overdue salary payments, whatever advantage may have flown from the Image Contract arrangements will not, of course, inure to his benefit. He has characterised in his claim, the sums due to him as salary payments, and not as anything else.

75. Taking all of foregoing into account, and also assessing the evidence as put forward by the parties, it appears to the Arbitrator that Respondent was indeed in default of its payment obligations in October and November 2011 to Player. The Arbitrator takes note of the table set out in paragraph 9 of the second round of submissions presented by Player and Agent and the referenced documentation. Respondent had not paid in a timely fashion the first two instalments of EUR 23,000.00 (plus tax) pursuant to the Image Contract. There is no stateable excuse for this failure.

76. In such circumstances, the Arbitrator concludes that Player was justified in sending his termination letter dated 21 December 2011. The sums were then long overdue and his frustration at not being paid was entirely legitimate.

77. At that moment, on 21 December 2011, the guarantee provisions of the Second Agreement triggered a remaining liability of EUR 216,000.00 which was the amount then unpaid and yet to be paid throughout the lifetime of the Second Agreement. The fact that Respondent arranged for two payments of EUR 23,000.00 plus tax to arrive on 22 December 2011 was too late. Termination had occurred by that time and all that happened arising from these payments was that the liability was reduced to EUR 170,000.00.

78. The liability of EUR 170,000.00 of Respondent to Player as of 22 December 2011 does not translate into an entitlement of Player to that amount by way of an award. As noted already, Player was afforded numerous opportunities to state what he did afterwards and after several extensions of time it emerged that he obtained no salary of any kind for the rest of the 2011-2012 season.

79. This is not satisfactory from the Arbitrator's viewpoint. Player is an obviously talented centre, in his late 20's (his talent is confirmed by his current playing for a major Turkish club, Besiktas, that participates in Euroleague) and commanded high salaries. It is simply not sufficient for a player to spend well over half a professional season playing for the sake of playing, yet take no steps to mitigate his financial position.

80. The Arbitrator, taking into account the justice and equity of the case, and the mandate in the Second Agreement to decide *ex aequo et bono*, holds that a 50% reduction of the claim for the 2011-2012 season is appropriate. The Arbitrator also specifically notes that Player has decided to assert his claim under the auspices of the Second Agreement and therefore bring the Image Contract within its ambit (and therefore justifying the application of *ex aequo et bono* to that latter agreement). In summary, Player will be awarded a net salary amount of EUR 85,000.00 for 2011-2012.

81. Turning to interest, it appears to the Arbitrator that the failure by Player to mitigate his position in any manner whatsoever renders it just and equitable to award interest at 5%

p.a. on EUR 85,000.00 from 14 days after the date of this Award.

82. Finally, the Arbitrator turns to the claim by Agent for its fees. The Arbitrator notes that the figure of EUR 22,000.00 net is plainly set at 10% of the overall sums agreed for Player. In light of the outcome of Player's claims for the 2011-2012 season, and taking into account the justice and equity of the situation, Agent's claim is reduced to EUR 13,500.00, namely 10% of the amounts that the Player is found to be entitled to for the 2011-2012 season (220,000.00 – 85,000.00 = 135,000.00) with interest at 5% p.a. from 14 days after the date of this Award.

## 7. Costs

83. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

84. On 7 May 2013 – considering that pursuant to Article 17.2 of the BAT Rules "*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*", and that "*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time*", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 8,000.00.

85. Considering that Player and Agent prevailed, in part, in 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 a proportion of those of the Claimants.

86. The Claimants' claim for legal fees and expenses amounts to EUR 8,000.00 plus EUR 200.00 Administrative costs (not including the non-reimbursable handling fee and arbitration costs).

87. The Arbitrator assesses a figure of EUR 4,000.00 as appropriate amount of legal fees and expenses which Respondent should be liable for to Player and Agent. The reduction from EUR 8,000.00 stems in part from the relative success of Player and Agent, and also from the manner in which the case was presented. It was not acceptable that key contractual documents were absent from the Request for Arbitration and that an important point of principle (namely the reliance on BAT 0071/09) emerged in sketchy outline in the second round of submissions.

88. In addition, the Arbitrator will award a figure reflecting a proportion of the non-reimbursable handling fee, namely EUR 2,000.00, which is to be borne by Respondent.

89. Given that Player and Agent paid advances on costs of EUR 8,000.00, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

    (i) Respondent shall pay EUR 4,000.00 each to Player and Agent (EUR 8,000.00 in total), being the amount of arbitration costs advanced by them;

    (ii) Respondent shall pay EUR 3,000.00 each to Player and Agent (EUR 6,000.00 in total) representing the amount of their legal fees and expenses.

## 8. AWARD

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

1. **Union Olimpija Ljubljana BC shall pay Mr Damir Markota EUR 19,000.00 net by way of unpaid salary with interest at 5% per annum from 16 May 2011.**

2. **Union Olimpija Ljubljana BC shall pay Mr Damir Markota EUR 19,000.00 net by way of unpaid salary with interest at 5% per annum from 16 June 2011.**

3. **Union Olimpija Ljubljana BC shall pay Mr Damir Markota EUR 85,000.00 net by way of unpaid salary with interest at 5% per annum from 14 days from the date of this Award.**

4. **Union Olimpija Ljubljana BC shall pay XL Agency for Management & Marketing EUR 13,500.00 net by way of unpaid agency fees with interest at 5% per annum from 14 days from the date of this Award.**

5. **Union Olimpija Ljubljana BC shall pay Mr Damir Markota EUR 4,000.00 as reimbursement for his arbitration costs.**

6. **Union Olimpija Ljubljana BC shall pay XL Agency for Management & Marketing EUR 4,000.00 as reimbursement for its arbitration costs.**

7. **Union Olimpija Ljubljana BC shall pay Mr Damir Markota EUR 3,000.00 as reimbursement for his legal fees and expenses.**

8. **Union Olimpija Ljubljana BC shall pay XL Agency for Management & Marketing EUR 3,000.00 as reimbursement for its legal fees and expenses.**

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

Geneva, seat of the arbitration, 8 May 2013

Klaus Reichert
(Arbitrator)