BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0478/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Annett Rombach

in the arbitration proceedings between

Mr. Dwayne Curtis
27 Inca Cove, Jackson, TN 38305, USA

- Claimant -

vs.

CSU Asesoft Ploiesti
Mihai Bravu Str. 10, 100550 Ploiesti, Romania

- Respondent -

represented by its Executive President, Mr. Ionut Georgescu

BASKETBALL
ARBITRAL TRIBUNAL

1. The Parties

1.1 The Claimant

1. Mr. Dwayne Curtis (the “Player” or “Claimant”), is a professional basketball player from the United States of America.

1.2 The Respondent

2. CSU Asesoft Ploiesti (the “Club” or “Respondent”) is a professional basketball club located in Ploiesti, Romania.

2. The Arbitrator

3. On 19 December 2013, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Ms. Annett Rombach as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the "BAT Rules"). Neither of the Parties has raised any objections to the appointment of the Arbitrator nor to her declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. On 23 July 2008, the Parties entered into a labour contract (the “Player Contract”), pursuant to which Respondent engaged the Player as a professional basketball player.

5. With respect to the term of the Player Contract, clause II sets forth that “*this contract shall be deemed to have commenced on August 15th 2008 till July 1st 2009”*.

6. Pursuant to clause III of the Player Contract, the Player's base salary for the 2008-2009 season was agreed at USD 80,000 (net), to be paid pursuant to the following payment schedule:

"Upon passing physical	*2500 USD*
September 1	*1500 USD*
November 1	*8000 USD*
December 1	*8000 USD*
January 1	*8000 USD*
February 1	*8000 USD*
March 1	*8000 USD*
April 1	*8000 USD*
May 1	*8000 USD*
June 1	*8000 USD*
June 15th	*4000 USD"*

7. Clause III also provides a payment schedule for the 2009-10 season, for which the Player was to receive a base salary of USD 100,000 net, to be paid in nine monthly shares of USD 10,000 (payable on the 1st of each months), and two monthly shares of USD 5,000 (payable on 1 September 2009 and 15 June 2010, respectively).

8. Clause III further reads:

> *"In the event that the club does not make payments within 10 (ten) days of the scheduled payment date, the Player shall immediately be entitled to the full year salary and shall have no further obligation to the Club."*

9. Clause IV of the Player Contract provides for the following bonus compensation:

> *"Wining Romanian League 5,000 $*
> *Wining Romanian Cup 3,000 $*
> *ULEB/FIBA Bonuses: 500 USD per win*
> *Moving each round of competition 3000$*
>
> *All bonuses are payable no later than 10 days after the player earn the bonus."*

10. Clause XV of the Player Contract (titled "Buy Out Clause") allows the Player "*to transfer to any team after the first year of the contract but no later than July 15 2009 with a buy out payable to the team in the amount of 30,000 USD*."

11. The Player received the full salary amount of USD 80,000 for the 2008-2009 season and a bonus in the amount of USD 3,000. The Player did neither receive any salary payments for the 2009-2010 season, nor any further bonus payments for the 2008-2009 or 2009-2010 season.

12. On 25 April 2009, two American players of the Club were involved in an incident at a Romanian night club, following which a woman filed criminal charges at the Romanian police for [alleged crime]. The particular circumstances of the incident are disputed between the Parties. Specifically, it is in dispute whether Claimant was one of the players involved in the [alleged crime].

13. The Player continued to play for the Club until the end of the season. He left Romania for the United States after the last game of the 2008-2009 season and never returned to the Club. The particular circumstances of him not returning to Romania are disputed between the Parties. The only written evidence on record is an e-mail exchange between the Player and a representative of the Club in June and July 2009.

14. On 14 June 2009, the Player sent the following message to the Club:

> *"Hey Alexx, this is Dwayne. I was wondering when will we get the rest of the money because I want to take a little vacation trip with me and my girl and I was depending on that money to go. Can you hit me back to let me know when so that I can have an Idea if I will have it on time. Thanks"*

15. The Club, on the same day, replied "*let u know tomorrow afternoon*".

16. On 27 June 2009, the Player sent another message to the Club, stating:

> *"Hey Alexx this is DC I know you are busy and all, I was trying to see when you will send that money cause I really need it and I wanted to know If you know anything about next year yet."*

17. There is no answer to this email by the Club in the file.

18. Finally, on 27 July 2009, the Player sent the following e-mail to the Club:

> "*Hey Alexx, I talk the other guys and I am trying to figure out what is up I know you haven't told me anything. When you get a chance can you fill me in on what your plans are, and I really an in need for the bonus money.* [sic]"

19. On 24 September 2009, the Player signed with Beykoz Sports Club in Turkey (the "Beykoz Contract"). Under the Beykoz Contract the Player was to receive a total of USD 32,000.00 for the 2009-2010 season to be paid in seven monthly instalments of USD 4,000.00, plus a signing fee of USD 4,000.00.

20. With its Answer, Respondent submitted a document dated 19 March 2012, addressed by the local police department to it, which sets forth as follows (in the English translation):

> *"On 26. 04. 2009 the aggrieved party* [name] *formulated a criminal complaint against Curtis Daywne and* [name], *both American citizens, for having committed the crime of* [alleged crime] *against her in the "Ice" Club of Ploiesti City on the night of 25/26 April 2009.*
> *Further to the investigations made and to the rules of evidence brought in the case, the criminal prosecution has been initiated against the two assailants on 19. 09. 2009, at 14: 00, for having committed the crime stipulated and punished by art. 180 paragr. 2 of the Criminal Code.*
> *Please note that the file in the cause has been forwarded to the Prosecutor's office under the Ploiesti Court of Justice with a legal solution on 29. 03. 2010 […].*

3.2 The Proceedings before the BAT

21. On 26 November 2013, Claimant filed a Request for Arbitration (with several exhibits). The non-reimbursable handling fee of EUR 2,000 was received in the BAT bank account on 26 November 2013.

22. On 2 January 2014, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 24 January 2014 (the "Answer"), and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 17 January 2014 as follows:

"Claimant (Mr. Dwayne Curtis)	*EUR 4,500*
Respondent (CSU Asesoft Ploiesti)	*EUR 4,500"*

23. On 15 January 2014, Respondent submitted its Answer to the Request for Arbitration (the "Answer").

24. By letter to the Parties dated 27 January 2014, the BAT Secretariat acknowledged receipt of Claimant's share of the Advance on Costs and of Respondent's Answer. It also informed the Parties that Respondent had failed to pay the Advance on Costs as per BAT's letter dated 2 January 2014 and invited Claimant to substitute for Respondent's share.

25. By Procedural Order of 13 February 2014 ("PO 1") the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs (with Claimant having substituted for Respondent's share). The Arbitrator further noted that "*in deviation from the standard BAT arbitration clause, the Player Contract, in Clause 9, provides for Romanian law to apply to the current dispute.*" She proposed "*[f]or the sake of procedural efficiency … that the dispute be decided ex aequo et bono instead of under the laws of Romania*", and invited the Parties to comment on that proposal.

26. On 24 February 2014, Respondent sent an e-mail to BAT, stating – inter alia – "*yes, I would answer you to go for ex aequo et bono but I need to know exactly what this means…*" In the same e-mail, Respondent also submitted comments regarding the merits of Claimant's case, which the Arbitrator considered premature and beyond the scope of the PO 1, and decided not to admit to the record.

27. On 3 March 2014, Claimant, within the (extended) time limit, submitted his comments on Respondent's Answer (the "Reply"), and – following the Arbitrator's invitation in PO 1 – stated:

> *"I do agree on a* [sic] *Ex Aequo Et Bono."*

28. By Procedural Order of 12 March 2014 ("PO 2"), Respondent was invited to comment on Claimant's Reply and to state its position with respect to substantive law applicable to the dispute. In this respect, the Arbitrator issued the following instruction:

> *"Taking into account (a) the above provision* [i.e. Art. 15.1 BAT Rules]*, (b) the submissions of the parties up to date, (c) BAT's consistent practice in applying ex aequo et bono, (d) BAT's mission to "provide for a simple, quick and inexpensive means to resolve disputes", the Arbitrator informs the parties that she intends to decide the dispute ex aequo et bono, unless Respondent files its objection with reasons by no later than Friday, 28 March 2014.*

29. On 28 March 2014, Respondent submitted its comments to Claimant's Reply (the "Rejoinder"). In regards of the applicable law, Respondent stated the following:

> *"[W]e hereby confirm our approval of applicability of ex aequo et bono principels* [sic] *in the current proceedings, BAT 0478/13 – Curtis vs. CSU Asesoft Ploiesti, in order for general considerations of justice and fairness to be applied."*

30. By Procedural Order of 2 April 2014, the Arbitrator declared the exchange of documents completed and invited the Parties to submit a detailed account of their costs by no later than 9 April 2014.

31. On 3 April 2014, Claimant submitted its account on costs as follows:

> *"I Dwayne Curtis (The Claimant) paid the non-reinbursable fee of 2,000 EUROs on 26.11.2013*
> *I (The Claimant) also paid my share of advance cost of 4,500 Euros on 13.01.2014.*
> *I (The Claimant) also paid the Respondent's advance cost of 4,500 Euros on 05.02.2014*

Bringing the total contribution expenses to 11,000 Euros."

32. On 8 April 2014, Respondent submitted its account on costs as follows:

"- Legal costs: 5.000 EUR"

33. On 9 April 2014, the BAT Secretariat forwarded the cost accounts to the Parties and requested their comments on the other side's account of costs.

34. Upon Claimant's request, by Procedural Order dated 28 May 2014, Respondent was requested to submit proof for the legal costs it purports to have incurred. Respondent did not file any response to the request.

35. 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 render the award solely based on the written record before her.

4. The Positions of the Parties

36. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this award, the Arbitrator has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award or in the discussion of the claims below.

4.1 Claimant's Position and Request for Relief

37. Claimant submits the following in substance:

- The Club only paid bonuses in the amount of USD 3,000 despite the Player having earned USD 11,000 bonuses in total due to the achievement of certain sporting goals;
- The Club never contacted the Player with respect to the continuation of his employment for the 2009-2010 season;
- The Player's attempts to contact the Club with respect to the outstanding payments and his continued employment throughout the 2009-2010 season remained fruitless;
- The Player was not involved in the night club incident on 25 April 2009, and the Club knows that. The Player submits a statement from his former teammate Michael Jones, who testifies that two other American Players got involved in a fight in a local night club in Ploiesti, and that Claimant was not present there. Claimant asserts that he was not even aware that there was apparently an investigation against him before the Club submitted the police report in these proceedings.

38. Pursuant to the Request for Arbitration, Claimant submits the following request for relief:

> *"Season 2009/2010 (100,000 USD)*
> *Season 2008/2009 (8,000 USD) bonuses*
> *4 years of 5% interest (23,274.67 USD)*
> *Cost of Arbitration (2,811.60 USD)*
> *Total (134,086.27 USD)"*

4.2 Respondent's Position and Request for Relief

39. Respondent submits the following in substance:

- The Player was personally involved in the night club incident in Ploiesti, and criminal charges were brought against him for which he was summoned to appear in a Romanian court;

- After the Club had notified the Player of the need to appear before court, the Player no longer answered his phone and failed to return to Romania;
- In 2012, the Player notified the Club of his outstanding payment claims, in response to which the Club notified the Romanian basketball federation that it terminated the Player Contract as a result of Claimant's failure to show up in Romania for the 2009-10 season;
- Mr. Mike Jones is not a credible witness in support of Claimant's allegations;
- The Player Contract ended on 1 July 2009 and did not continue into the 2009-2010 season without a mutual agreement by the Parties, which was never reached.

40. Respondent does not include a formal request for relief, but makes clear that it "*did fulfill all* [its] *payment obligations towards the Claimant.*" Respondent's defending itself against Claimant's claims can only be interpreted as a request to have Claimant's claims dismissed in their entirety and its submissions on costs as a request to be reimbursed its legal fees and expenses.

5. The Jurisdiction of the BAT

41. Pursuant to Art. 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").

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

43. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Art. 177(1) PILA.

44. The jurisdiction of the BAT in this dispute follows from Clause VIII of the Player Contract, which reads as follows:

> *"Any dispute arising from or related to present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved definitely in accordance with the FAT Arbitration Rules and regulations."*

45. According to Article 1.1 of the BAT Arbitration Rules the Rules shall apply whenever the parties to a dispute have agreed in writing to submit the same to the BAT – including by reference to its former name "FIBA Arbitral Tribunal (FAT)".

46. The agreement is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA and Article 1.1 of the BAT Arbitration Rules.

47. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity of the arbitration agreement in the present matter under Swiss law (cf. Article 178(2) PILA). In particular, the wording, *"[a]ny dispute arising from or related to present contract"* in Clause VIII of the Player Contract clearly covers the present dispute. Furthermore, Respondent did not contest the jurisdiction of the BAT.

48. In view of all the above, the Arbitrator, therefore, holds that she has jurisdiction to decide the claims submitted to her in the present matter.

6. Applicable Law – *ex aequo et bono*

49. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties

may authorize the arbitrators to decide *"en équité"* instead of choosing the application of rules of law. Article 187(2) PILA reads as follows:

> *"the parties may authorize the arbitral tribunal to decide ex aequo et bono".*

50. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

> *"Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law."*

51. In Clause IX of the Player Contract, the Parties agreed that "*Romanian law will be applicable in this agreement*".

52. During these proceedings, in response to the Arbitrator's comments in PO 1 and PO 2, both Parties agreed that this dispute be decided *ex aequo et bono*. By means of their express statements in the Reply and the Rejoinder quoted above at para. 25 (Claimant) and 27 (Respondent), they opted out of Romanian law and empowered the Arbitrator to decide this dispute *ex aequo et bono.*

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

7. Findings

54. As an initial matter, the Arbitrator finds that based upon the record before her, there is no reason to doubt that the Parties entered into a valid agreement for the 2008-2009 basketball season, and that the Player is principally entitled to receive the stipulated payments agreed for that time period (including bonuses). What is, however, in dispute between the Parties is whether the Player Contract extended to the 2009-2010 season, and – if this is the case – whether the Player is entitled to salary payments for that period despite his decision not to return to the Club after the end of the 2008-2009 season.

7.1 The Player's claim for outstanding bonuses (2008-2009 season)

55. The Player purports that, in the 2008-2009 season, he earned bonuses in a total amount of USD 11,000 under clause IV of the Player Contract for winning the Romanian league championship, the Romanian cup and for winning two games in the UTEP/FIBA competition, which advanced the Club by one round.

56. The Arbitrator, having verified by means of publicly available sources that the Club indeed achieved the results mentioned by the Player, finds that the Player is entitled to receive the bonuses as per clause IV of the Player Contract (quoted above at para 9). The Club does not dispute the Player's submission that he only received USD 3,000 and in fact stated in its Answer that it had paid the Player USD 80,000 (i.e. his annual salary) "*and $ 3,000 in bonuses*". Therefore, in accordance with Claimant's request for relief, the Club is obligated to pay to Claimant another USD 8,000 in bonuses for the 2008-2009 season.

7.2 The Player's claim for outstanding salary (2009-2010 season)

57. The Player also requests salary payments in the amount of USD 100,000 for the 2009-2010 season, relying on a payment schedule included in clause 3 of the Player Contract. The Player essentially argues that, despite him not playing for the Club in 2009-2010, he is entitled to the full salary because of the Club's failure to pay him the outstanding bonuses, which triggered the acceleration of all payments in accordance with clause 3 of the Player Contract.

58. The Club denies any payment obligation for 2009-2010, arguing that

- the Player Contract automatically ended on 1 July 2009 as per clause 2 of the Player Contract;

- the Club would have terminated the Player Contract in any event had the Player come to Romania after the summer break because of the night club incident and the Player's subsequent criminal prosecution;
- the Player did not properly offer his services to the Club for the 2009-2010 season, and had no right to stay away from the team after the summer break.

59. The Arbitrator considers that each of these arguments alone, if successful, would suffice to render Claimant's salary claim meritless. She will, therefore, address each of them in turn below.

(a) Did the Player Contract end automatically on 1 July 2009?

60. Clause 2 of the Player Contract, labelled "Term of Agreement", provides that *"[t]he term of this contract shall be deemed to have commenced on August 15 till July 1st 2009"* (emphasis added). The plain wording suggests that the Parties indeed intended to limit the term of the Player's employment to the 2008-2009 season.

61. However, the literal meaning of a contractual provision can be altered by evidence demonstrating, as the Arbitrator finds, that the parties' true intent differs from the plain language reflected in a written agreement. It is a fundamental principle of contract interpretation consistent with principles of justice and equity that the real intent of the parties, if sufficiently indicated by evidence in front of a judge or arbitrator, must be given effect to the greatest extent possible, unless specific circumstances warrant adherence to the plain wording of the contract (e.g. when non-signatory third parties are affected by the contract).

62. Based on the record before her, the Arbitrator finds that the Parties, in this case, intended to enter into the Player Contract also for the 2009-2010 season, despite the contrary wording in clause II. Specifically, the Parties' respective intent is indicated by the following:

- Clause III of the Player Contract sets out a payment schedule for the Player's salary for the 2009-2010 season;
- The payable agent fees (USD 18,000 in total) determined in clause XI of the Player Contract represent 10% of the total salary for both the 2008-2009 and the 2009-2010 season. The agent fees were payable in two instalments on 20 August 2008 and 15 August 2009, which only makes sense under the assumption that the contract ran beyond the 2008-2009 season;
- Clause XV of the Player Contract contains a buy-out clause, determining that the Player "*is free to transfer to any team after the first year of the contract* [i.e. after the 2008-09 season]*… with a buy out payable to the team in the amount of 30,000 USD.*" This provision would be nonsensical if the Player Contract were to end on 1 July 2009.
- Additionally, Respondent's Answer reveals that the Club itself considered the Player Contract to extend to the 2009-10 season. Respondent purports that it waited for Claimant to return to Romania after the 2009 summer break in order to terminate his employment ("*From this moment on, Mr. Curtis didn't answer the phone to establish the terms of his return to Romania for the trial and the termination of his contract*"). The Club also expressed its surprise that the Player had obtained a letter of clearance from FIBA to join the Turkish club Beykoz for the 2009-10 season.

63. In light of these facts, the Arbitrator finds that the term of the Player Contract was agreed to encompass the 2009-2010 season. Accordingly, the Player Contract did not end automatically on 1 July 2009, and the Player was generally entitled to the salary promised under clause 3 of the Player Contract.

(b) Did any of the Parties terminate the Contract prematurely?

64. The next question the Arbitrator needs to address in determining whether the Player is entitled to any salary for the 2009-2010 season is whether any of the Parties terminated the Player Contract prematurely during or after the 2008-2009 season.

65. Respondent, in its Answer, submits that it "*intended to terminate the contract, taking into consideration point XIII – Team rules and regulations, regarding the player's behaviour outside the court* [i.e. because of the alleged night club incident]". It further states that it "*notified the Romanian Basketball Federation* [of] *the termination of the contract*." Respondent, however, did neither submit any (written) termination notice nor any other proof for terminating the Player Contract vis-à-vis the Player. Because Respondent bears the burden of proof for showing that it properly notified the Player of the termination of his employment and because Respondent did not offer any such proof during this arbitration, the Arbitrator cannot assume that Respondent indeed terminated the Player Contract. Therefore, it can be left undecided whether the night club incident, the exact details of which are vigorously disputed between the parties, constitutes a valid reason that would have entitled the Club to terminate the Player's employment for just cause.

66. Similarly, nothing in the record indicates that the Player terminated his employment after the 2008-2009 season. Although the Player decided not to return to the Club at the beginning of the 2009-2010 season due to the outstanding bonus payments, the simple act of staying away from the team does not amount to a termination notice with the effect of a cancellation rights and obligations under the agreement.[1]

[1] See also BAT 0418/13, para. 78.

67. Hence, none of the Parties terminated the Player Contract prematurely before the beginning of the 2009-2010 season.

(c) Does the Player's absence from the Club after the 2009 summer break cancel his payment claim?

68. The last question that remains to be addressed is whether Claimant lost his right to be paid his 2009-2010 salary because he did not return to the Club after the 2009 summer break and eventually signed a contract in Turkey in September 2009. Bearing in mind one of the basic principles of contract law, *pacta sunt servanda* (agreements must be kept), there is only a limited range of situations in which one contractual party does not fulfil its part of the contract, and yet the other contractual partner remains obliged to perform.

69. The Player claims two reasons for his right to stay away from the Club after the 2009-summer break:

- the Club's failure to pay certain bonuses he had earned during the 2008-2009 season; and
- the Club's failure to pay his September 2009 salary.

(i) The Cub's failure to pay bonuses for the 2008-2009 season

70. As discussed above at Section 7.1, the Club was in default with bonus payments in the amount of USD 8,000. Whether or not this default gave the Player the right to deny his services to the Club for the 2009-2010 season is primarily a question of contract interpretation.

71. The Player relies on Clause III of the Player Contract under which *"the Player shall immediately be entitled to the full year salary and shall have no further obligation to the*

club" in case *"the club does not make payments within 10 (ten) days of the scheduled payment date."* Clause III (labelled "Salary Compensation") only addresses the Player's salary claims, which means that the "*payments*" mentioned therein only refer to salaries and not to bonuses. Bonuses are dealt with in Clause IV of the Player Contract, and Clause IV does not include any payment acceleration mechanism in case of a default on bonuses. It follows (*argumentum e contrario*) that a failure to pay bonuses (in whichever amount) was not intended to trigger the Player's right to sit out of practices and games.

72. Absent any contractual right to cease performance, the question remains whether Claimant can rely on a general retention right to justify that he did neither practice nor play as of the beginning of the 2009-10-season. It is an established legal principle in many countries[2] that within the same legal relationship, the creditor of a due payment is entitled to withhold his own performance until he receives payment of the obligor's debt. Under the applicable regime of *ex aequo et bono*, which is in compliance with the main principles governing statutory retention rights in different countries, the Arbitrator finds that in order for the Player to withhold his services, the following conditions have to be fulfilled:

- The Club is in default with a payment the amount of which is not negligible or entirely insignificant;
- The Player properly exercises his retention right, i.e. makes clear towards the Club that he will not offer his services as long as the outstanding debt has not been paid.

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[2] See for Romania (*drept de retentie*): Art. 2.495 Noul Cod Civil; see also under German law, § 273 German Civil Code.

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73. As shown above at 7.1, the Club was in default with bonus payments in the amount of USD 8,000 at the time the Player decided to stay away from the team. This amount constitutes 10% of the Player's annual salary for the 2008-2009 season.

74. Whether or not this is significant enough to justify the Player's sitting out of practices and games must not be decided here, because the Player – in any event – failed to properly exercise his retention right vis-à-vis the Club.

75. Nothing on the record suggests that the Player, who bears the burden of proof for showing a proper exercise of his right to withhold services, clarified his position towards the Club at the beginning of the 2009-2010 season in a manner that allowed the Club to understand that he would not perform until payment of the outstanding bonuses relating to the previous season. Although, in his emails of 14/27 June 2009 and 27 July 2009, the Player notified the Club of the outstanding bonus payments and asked about when he could expect to receive them, this is not a sufficient notice demonstrating that the Player intended to condition his future performance on the payment of these bonuses. As a loyal party to the Player Contract, it would have been the Player's obligation to inform the Club about his motives and reasons for not returning to the team. Absent a clear notice to this extent, the Player cannot rely on a retention right to justify that his salary payment claim remained unaffected by his decision to cease performance.

(ii) The Cub's failure to pay the September 2009-salary

76. The Player also asserts that the Club's (undisputed) failure to pay him the September 2009-salary (USD 5,000) triggered the payment acceleration mechanism set forth in clause III of the Player Contract (entitling him to request salary payments for the entire 2009-10 season). The Club argues that the Player had not returned to Romania and had not participated in any practices or games after the summer break, justifying its non-payment of the September salary.

77. Under general principles of justice and fairness, Claimant may only rely on the payment acceleration addressed in clause III if he can demonstrate that he offered his services to the Club in an appropriate manner, or that he was excused to offer them in light of special circumstances. Based on the record before her, the Arbitrator finds that Claimant did not meet his respective burden of proof.

78. First, it is undisputed that the Player did not return to Romania at the end of the summer break. He was not physically present when his team resumed for the 2009-10 season, and he also does not show that he offered to come to Romania in order to join the team, either in writing or by any other means.

79. Second, in the Arbitrator's view, the Player also failed to invoke special circumstances that would have excused him from offering his services. A Player may be exempt from his duty to offer performance when his Club makes it clear that it will not accept the Player's services because it intends to move forward without him. In such a case, an offer of his services would be nothing more but a redundant formality.

80. The evidence presented by the Player in this arbitration is not sufficient to demonstrate the Club's clear and unequivocal denial of the Player's services for the 2009-10 season. The e-mail exchange between the Player and the Club in June and July 2009, which – on Claimant's own account – has been the only communication between him and Respondent at the time, does not reveal any intent by the Club to refuse the Player's services for the future. Although the Club apparently failed to reply to the Player's e-mail of 27 June 2009, in which he inquired about the Club's plans for the new season ("*I am trying to figure out what is up I know you haven't told me anything. When you get a chance, can you fill me in on what your plans are…*"), the Club's mere silence is not sufficient for the Player to decide to stay away from the team. The Player had a valid contract, and if he was in doubt about the Club's position towards him, he should have made efforts to clarify the situation. Absent any clear message from the Club that it did not plan with him any further (despite the valid contract), the Player was

required to show up at the team at the beginning of the season in order not to lose his salary claims.

81. Because the Player failed to properly offer his services to the Club after the 2009 summer break, he cannot invoke the right for payment acceleration under clause III of the Player Contract. Therefore, the Player is not entitled to any salary for the 2009-10 season.

7.3 Interest

82. The Player further requests interest on his claims in the amount of 5% p.a. for four years.

83. The Player Contract does not provide for any obligation by the Club to pay interest in case of a non-payment. However, it is a generally accepted principle embodied in most legal systems and reflected in the BAT jurisprudence[3] that default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. The Arbitrator, deciding *ex aequo et bono* and in accordance with constant BAT jurisprudence, considers the interest rate of 5% per annum – as requested by the Player – to be fair and just to avoid that the Club derives any profit from the non-fulfillment of its obligations.

84. With respect to the starting date, clause IV of the Player Contract provides that the bonuses shall be due and payable no later than 10 days after the Player earned the respective bonus. Claimant, in his Request for Arbitration, requests interest for four years i.e. from 26 November 2009 until 26 November 2013 (date of the receipt of the Request for Arbitration). On 26 November 2009 (i.e. four years before the receipt of the

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3 *See, ex multis*, BAT 0092/10;; BAT 0069/09; BAT 0056/09; BAT 0237/11.

Request for Arbitration), all bonuses relating to the 2008-09 season had become due. Despite Claimant's repeated communications to the Club, he was not paid the amount due. In view of the particular circumstances of this case, Claimant's request for four years of interest payments is, therefore, justified.

8. Summary

85. The Player is entitled to an amount of USD 8,000.00 for outstanding bonus payments (2008-2009 season), plus interest of 5% p.a. for four years in the amount of USD 1,600.00. All amounts are to be understood net of all deductions for social insurance and/or taxes.

9. 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 legal fees and expenses incurred in connection with the proceedings.

87. On 9 August 2014 – 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"; 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", and 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 9,000.00.

88. Considering the outcome and the circumstances of the present case and given that Claimant lost on a large part of his claim (i.e. the entire salary claim), the Arbitrator deems it appropriate that Claimant shall bear 80% of the arbitration costs. Therefore, considering that Claimant paid an advance on costs of EUR 9,000 (EUR 4,500.00 for each party), 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 Claimant in the amount of EUR 7,200.00 and by the Respondent in the amount of EUR 1,800.00. Hence, Respondent shall reimburse Claimant in the amount of EUR 1,800.00 for the costs advanced by the latter.

89. With respect to the Parties' legal fees and expenses (Article 17.3 of the BAT Rules), the Arbitrator decides as follows:

- Claimant is entitled to 20% of the handling fee. Accordingly, Respondent shall reimburse him in the amount of EUR 400.
- Respondent shall bear its own legal fees and expenses. Respondent, despite an invitation by the Arbitrator, failed to explain the nature and quantum of its legal costs, which it claimed despite the fact that it had not retained any outside counsel to represent it in these proceedings. Under these circumstances, despite its partial success on the merits of this case, Respondent cannot be awarded these costs (or any portion thereof).

10. AWARD

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

1. **CSU Asesoft Ploiesti is ordered to pay to Mr. Dwayne Curtis USD 8,000.00 net for unpaid bonuses and USD 1,600.00 for interest of 5% p.a. for four years.**

2. **CSU Asesoft Ploiesti is ordered to pay to Mr. Dwayne Curtis EUR 1,800.00 as a reimbursement of the arbitration costs advanced by him.**

3. **CSU Asesoft Ploiesti is ordered to pay to Mr. Dwayne Curtis EUR 400.00 as a contribution towards his legal fees and expenses.**

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

Geneva, seat of the arbitration, 13 August 2014

Annett Rombach
(Arbitrator)