BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0502/14)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Mr. Marko Banic

- Claimant -

represented by Mr. José Lasa Azpeitia and Ms. Patricia Fraile,
attorneys at law, Calle Serrano 33, 2° planta, 28001 Madrid, Spain

vs.

Unics Kazan Basketball Club
M. Jalil Str. 7, 420111 Kazan, Russia

- Respondent -

represented by Mr. Dimitri Lavrov, attorney at law,
6 Place des Eaux-Vives, 1207 Geneva, Switzerland

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1. The Parties

1.1 The Claimant

1. Mr. Marko Banic (hereinafter the “Player” or “Claimant”) is a professional basketball player of Croatian nationality.

1.2 The Respondent

2. Unics Kazan Basketball Club (hereinafter the “Club” or “Respondent”) is a professional basketball club located in Kazan, Russia.

2. The Arbitrator

3. By letter of 10 April 2014, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), Prof. Richard H. McLaren, appointed Prof. Ulrich Haas as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the (then) applicable 2012 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

4. On 30 March 2012, the Player played for his former club “Bilbao Basket S.A.D.” in a Euroleague match. One day later, on 1 April 2012, the Player felt pain in his [Player’s body part]. After MRI examination on 2 April 2012, a “[Player’s medical diagnosis]” was diagnosed. The Player was treated with several therapies without clinical attention and returned to the team practises on 12 April 2012. On 15 April 2012, the Player made his

comeback in official matches and played for the team until the end of the 2011/2012 season, i.e. end of May 2012.

5. On 27 June 2012, the Player and the Club entered into an employment agreement according to which the Player was engaged as a professional basketball player for three basketball seasons, namely 2012/2013, 2013/2014 and 2014/2015 (hereinafter the "Employment Contract"). Article 3 of the Employment Contract provides a salary for the Player in the amount of EUR 850,000.00 for the 2012/2013 season, EUR 900,000.00 for the 2013/2014 season and further EUR 900,000.00 for the 2014/2015 season.

6. In August 2012, the Player passed the Club's initial medical examination and started training with the Club's team. During practice in the 2012/2013 pre-season, the Player felt pain in his [Player's injury] and was diagnosed with "[Player's medical diagnosis]".

7. On 12 September 2012, the Parties agreed to an amendment of the Employment Contract because of the Player's "*temporarily inability […] to fulfil his duties and obligations with full force*" (hereinafter the "First Amendment"). The First Amendment reads – inter alia – as follows:

> *"This agreement is made between … UNICS … and Marko Banic … . According the agreement made on 27th June 2012 …*
>
> *1. the Player shall undertake to provide the Club with his sports activity, the Player informs the club about his* [Player's medical condition].
>
> *2. Due to chronic illness pursuant the Article 1 of the present agreement the Club does not fulfil its financial obligations for the consequences of the previous injury that become apparent during the term of the contract including for the period of the Player disablement.*

3. Disablement is have to be considered as temporarily inability of the Player to fulfil his duties and obligations with full force according to the agreement dated on June 27, 2012 …

4. Basketball Club … bears the responsibility to pay all payment to the Player for the period from August, 1st until September 20th as if the Player fulfilled his obligations fully.

5. Starting from September 20th in case If due to repeated aggravation of that chronic illness the Player is not able to participate in games and/or practices with full force during the periods of longer than 2 weeks, the Club shall have the right not to pay these periods … ." (sic)

8. On 20 September 2012, the Player underwent MRI examination of his [Player's body part] at "Bars Med" in Kazan, Russia. Until November 2012, he practiced with the Club's team and was simultaneously treated by the Club's medical staff. In November 2012 the Parties agreed on a rehabilitation program for the Player which took place from 29 November to 12 December 2012 at "Eden Reha" in Donaustauf, Germany. At the end of the rehabilitation program a document titled "Review Clinical Results" was issued by Eden Reha on 13 December 2012.

9. After the end of the rehabilitation program, the Player returned to practice with the Club's team. He was no longer treated by the Club's medical staff. However, on 24 January 2013, the Player underwent a further MRI examination of his [Player's body part] at "Bars Med" in Kazan, Russia.

10. In February 2013, the Parties entered into a loan agreement with the Russian club Krasniye Krylia. According to this amendment of the Employment Contract (hereinafter the "Second Amendment") the salary payments to the Player would be shared by the Club and Krasniye Krylia. However, the Second Amendment was not executed because according to a letter dated 18 February 2013 from Krasniye Krylia to the Club, the Player failed to pass the medical examination.

11. In March 2013, the Parties exchanged drafts for another amendment to the Employment Contract. On 29 March 2013, the Player underwent a further MRI examination of his [Player's body part] at "Bars Med" in Kazan, Russia.

12. On 1 April 2013, the Parties agreed to a third amendment of the Employment Contract (hereinafter the "Third Amendment") which reads in its clause 2 as follows:

> *"2. The Parties have agreed for the Player to be released from his obligations until the end of the season 2012/2013 and BC UNICS would be released as well of its obligations for the season 2012/2013 except what has already been fulfilled by BC UNICS for the moment of signing the very Amendment Agreement.*
>
> *The target is to let the Player come back home and get back to Kazan in the best shape at the beginning of the next season."*

13. On 20 August 2013, the Player arrived in Kazan for the 2013/2014 season. On 21 August 2013, the Player and all other players of the Club underwent a medical examination including MRI examination at "Klinika LMS" in Kazan. On 23 August 2013, a so called "Medical Commission" constituted of six persons found with regard to the Player as follows:

> *"The available pathology does not allow load of professional basketball player."*

14. By letter of 23 August 2013, the Club wrote to the Player and his agent, inter alia, as follows:

> *"According to the medical exam which took place from August 21 till august*[sic] *23, 2013 r.*[sic] *and specialists conclusions we inform you of necessity of further medical examination."*

15. On 25 or 26 August 2013, the Player underwent a physical test to which the Club's coaching team attended. As a result of this test a document was drawn up dated 26 August 2013, which bears the heading "MEMORANDUM" and is signed by five coaches of the Club and the Club's medical doctor. The MEMORANDUM states that the Player "*didn't reach the standard in any of the seven suggested check tests*" and

that, therefore, the six signatories "*believe that he is not able to play at the level of the United League of VTB and Euroclub*". (sic)

16. By letter of 26 August 2013 (hereinafter the "Termination Letter"), the Club informed the Player that taking into account the "BC UNICS reports" the Employment Contract "*is considered terminated, the Parties carry no obligations under this Contract*". On the same day, the Player's counsel replied by email and objected to the termination of the Employment Contract.

17. On 30 August 2013, the Player signed a new employment contract with the Spanish club Baloncesto Estudiantes for two basketball seasons, namely 2013/2014 and 2014/2015 (hereinafter the "Estudiantes Contract"). Clause 2 of the Estudiantes Contract provides for salary in the amount of EUR 160,000.00 for the 2013/2014 season and EUR 200,000.00 for the 2014/2015 season.

18. From 10 to 12 September 2013, the Player underwent three medical tests: 1) medical test including MRI examination at the clinic "Sv. Katarina" in Zagreb, Croatia on 10 September 2013; 2) medical test at "Sporthopaedicum" in Straubing, Germany on 11 September 2013; 3) medical test including x-ray and MRI examination at "Zentrum für Orthopädie & Sportmedizin" in Munich, Germany on 12 September 2013.

19. From 17 to 19 September 2013, the Spanish club Baloncesto Estudiantes executed a medical examination of the Player which the latter passed.

20. By letter of 28 October 2013 and email of 4 November 2013, the Player's counsel referred to the Club's Termination Letter and requested "total reimbursement" of the amounts agreed under the Employment Contract. However, he invited the Club to find an amicable settlement before seeking legal action. By letter of 15 November 2013, the Club insisted that the Parties did not carry any obligation under the Employment Contract after its termination.

21. The Player played the entire 2013/2014 season for the Spanish club Baloncesto Estudiantes.

22. On 22 September 2014, the Player signed a new employment contract with the German club ALBA Berlin for the 2014/2015 season (hereinafter the "ALBA Contract") and took residence in Berlin, Germany. Clause 5 of the ALBA Contract provides for salary in the gross amount of EUR 154,000.00. On 24 September 2014, the Player passed a medical test executed by the medical staff of ALBA Berlin.

23. The present dispute concerns the consequences of the termination of the Employment Contract, in particular, compensation for the salary agreed for the 2013/2014 season and the 2014/2015 season and payment of further amounts due to tax reasons.

2.2 The Proceedings before the BAT

24. On 8 January 2014, the BAT received the Claimant´s Request for Arbitration dated 15 November 2013. The non-reimbursable handling fee of EUR 7,000.00 was received in the BAT bank account on 24 December 2013.

25. By letter of 16 April 2014, following several emails between the BAT Secretariat and the Claimant regarding the filing of the exhibits to the Request for Arbitration, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for Respondent to file its answer in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 7 May 2014. The BAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs by no later than 30 April 2014:

"Claimant (Mr Marko Banic)	*EUR 9,000*
Respondent (Unics Kazan)	*EUR 9,000"*

26. By letter of 23 April 2014, Respondent's General Director requested an extension of the time limit for the Answer. Claimant did not agree. By email of 30 April 2014, the BAT Secretariat informed the Parties about the Arbitrator's decision, to grant an extension to file the Answer by no later than 16 May 2014.

27. By email of 8 May 2014, Respondent's newly appointed counsel requested a further extension of the time limit for the Answer. Claimant did not agree. On 9 May 2014, the BAT Secretariat informed the Parties about the Arbitrator's decision, to grant a final extension to file the Answer by no later than 23 May 2014. By emails of 26 and 30 May 2014, the BAT Secretariat acknowledged receipt of Respondent's Answer and exhibits submitted on 23 May 2014.

28. By email of 26 June 2014, the BAT Secretariat requested Claimant to clarify some issues regarding exhibits to his Request for Arbitration. Such clarification was provided on 30 June 2014.

29. By letter of 8 July 2014, the BAT Secretariat confirmed receipt of the full Advance on Costs in the total amount of EUR 17,985.00 and informed the Parties about the Arbitrator's decision to reject Respondent's procedural request for the appointment of an "independent medical expert". Instead, the Arbitrator invited Respondent to submit by no later than 22 July 2014 an expert opinion based on the medical documents on file and to submit further information/documents of the medical and/or physical examinations executed by the Respondent. In addition, the Arbitrator requested Claimant to provide further information on specific issues within the same time limit.

30. On 22 July 2014, Claimant provided the additional information as requested. On the same date, Respondent requested the BAT to extend the time limit for its submission until 29 August 2014. Claimant did not agree. By email of 23 July 2014, the BAT Secretariat informed the Parties about the Arbitrator's decision, to grant an extension to

Respondent until 31 July 2014. By email of 31 July 2014, Respondent submitted a "Medical Expert Report" of Dr. Laurent Koglin (hereinafter the "Koglin Report").

31. By letter of 14 August 2014, the Arbitrator invited Claimant to comment on Respondent's submission of 31 July 2014 and Respondent to comment on Claimant's submission of 22 July 2014. The Arbitrator in particular drew the Parties' attention to the issue of "tax effects".

32. By email of 27 August 2014, Claimant requested an extension of the time limit for his submission until 2 September 2014. By email of 28 August 2014, the BAT Secretariat informed the Parties of the Arbitrator's decision to grant an extension and that the new time limit for both Parties to submit their comments was fixed to 2 September 2014. By emails of 3 September 2014, the BAT Secretariat acknowledged receipt of the submissions of both Parties.

33. By letter of 19 September 2014, the BAT Secretariat informed the Parties about the Arbitrator's decision to declare the exchange of documents complete. The Parties were therefore invited to submit a detailed account of their costs by 26 September 2014.

34. By email of 26 September 2014, the BAT Secretariat acknowledged receipt of the Parties' accounts of costs and invited the Parties to submit their comments, if any, on the opposite party's account of costs by no later than 2 October 2014. No comments were received by the BAT.

35. By email of 3 October 2014, Respondent informed the BAT that Claimant had signed a new contract for the 2014-2015 season with the German club "ALBA Berlin" and that such fact would affect Claimant's claims. By unsolicited email of 6 October 2014, Claimant replied to Respondent's submissions and announced to present further documents.

36. By email of 7 October 2014, the Arbitrator requested Claimant to provide specific information and documents, inter alia Claimants' new employment contract with ALBA Berlin, and invited him to comment on Respondent's email of 3 October 2014. The time limit set was 15 October 2014. Claimant filed his submissions on that date.

37. By email of 16 October 2014, the Arbitrator invited Respondent to comment on Claimant's submission by 24 October 2014. Respondent submitted comments by email of 24 October 2014.

38. By email of 27 October 2014, Claimant requested the opportunity to present a new tax assessment should it be deemed necessary by the Arbitrator in order to assess the actual damage caused to Claimant.

39. By email of 29 October 2014, the Arbitrator invited Claimant to provide additional submissions regarding his claim for "tax effects" by 5 November 2014. Upon request by Claimant, the Arbitrator decided to grant an extension and invited Claimant to file his submissions by 17 November 2014.

40. By email of 17 November 2014, the BAT Secretariat acknowledged receipt of Claimant's submission and invited Respondent to comment on it by 25 November 2014. Furthermore, the Parties were invited to produce an amended account of costs by the same time limit, in case they had any additional legal costs since submission of their accounts of costs.

41. By email of 25 November 2014, Respondent submitted its comments and contested Claimant's submissions regarding tax issues. On the same day, Claimant submitted his revised legal costs by email. Respondent did not submit any amendments regarding its costs. By email of 26 November 2014, the BAT Secretariat invited Respondent to submit its comments, if any, on the Claimant's amended account of costs by 2 December 2014. Respondent did not submit any comments.

42. The Parties did not request the BAT to hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the BAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions available.

4. The Positions of the Parties

43. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Arbitrator, however, has carefully considered all the submissions made by the Parties, even if there is no specific reference to those submissions in the following summary.

4.1 Claimant's Position

44. Claimant submits the following in substance:

- The Club's termination of the Employment Contract is unjustified. The Player successfully passed the initial medical examination in August 2012 and was fit to play and compete at the beginning of the 2013/2014 season. The latter is confirmed not only by several medical tests made between 10 and 19 September 2013, but also by the Player's participation in competitions with Baloncesto Estudiantes in the 2013/2014 season and with ALBA Berlin in the 2014/2015 season. Furthermore, the Player's good health conditions are also evidenced by the medical reports issued in the context of the Club's health examination dated 21 August 2013.

- The Player never concealed any injuries suffered before contracting with the Club. After becoming injured, he showed his good faith by refraining from requesting the agreed salary for the main part of the 2012/2013 season.

- The physical test performed on 26 August 2013 cannot be taken into account because it was performed outside the time frame agreed upon by the Parties (see Article 4 of the Employment Contract). The Employment Contract provides that such

tests be performed within 5 days of arrival at the Club. Furthermore, the Player submits that the physical test was rather unusual. Finally, the test was not conducted for objective and comprehensible medical reasons, but instead was *"a dull masquerade configured by Respondent aiming to elude the economic legal consequences of an unfair termination"*.

- That the test results were a prefabricated scenario is further evidenced by the fact that when the Player returned to the Club at the beginning of the 2013/2014 season, the Club had already signed the maximum number of foreign players and, thus, had replaced the Player. This is just a further indication that the Club was "*seeking for any pretext to get rid of*" the Player.

- The Koglin Report presents a conclusion based on partial, biased and incomplete analyses of the medical evidences provided by the Player. Consequently, the Koglin Report should not be taken into consideration by the Arbitrator.

- The Club terminated the Employment Contract only at the end of August 2013. Therefore the Player had to seek for a new club very late in the 2013/2014 pre-season and this fact limited the Player's options for negotiations with other clubs.

- The salary agreed under the Employment Contract was net of taxes. As the Player was a resident in Spain from summer 2013 to late September 2014 and is now residing in Germany, he is subject to Spanish tax imposition if the BAT award is delivered to the Parties in 2014 and subject to German tax imposition if the BAT award is issued in 2015. In case the BAT award is issued in 2014, Claimant would be submitted to Spanish tax law and, thus, the tax burden would amount to EUR 1,529,072.16. If, on the contrary, the BAT award is handed down in 2015, the tax due under German law amounts to EUR 1,286,690.66. Russian tax law is not applicable in this case, as the Player is residing in Germany.

- As a consequence of the unfair termination, the Club is obliged to compensate any damage incurred by the Player. This damage amounts first and foremost to the difference between the salary for both the 2013/2014 and the 2014/2015 season agreed upon under the Employment Agreement and the Player's salary under the Estudiantes Contract. According to the Player the employment contract with ALBA Berlin for the 2014/2015 season is of no avail, since the salaries due under this contract are inferior to the salaries due under the Estudiantes Contract. Furthermore, the Player requests to be compensated for his medical expenses. In addition, the Player requests the above amounts as net amounts. Thus, the Player requests to be compensated for any tax impositions under the applicable laws. Finally, the Player requests to be paid interests on the above amounts.

4.2 Claimant's Request for Relief

45. In his Request for Arbitration, Claimant requests the following reliefs:

> *"**CLAIMANT***
>
> - *Claimant seeks relief whereby BAT would rule ex aequo et bono (as concretely settled between the Parties in the Agreement) as follows:*
>
> - *Respondent shall be held liable for the premature, unilateral termination of the Agreement without just cause.*
>
> - *Respondent is ordered to pay the **NET** amount of **ONE MILLION FOUR HUNDRED FORTY THOUSAND EURO (€1,440,000)** as being this sum the amount settled by the parties as main remuneration for the Claimant services as a basketball player for season 2013/2014 and 2014 and season 2015, minus the amount already paid by the Club BALONCESTO ESTUDIANTES S.A.D for the agreed seasons 2013/14 and 2014/15.*
>
> - *Respondent is ordered to pay an additional amount of **ONE MILLION FIVE HUNDRED TWENTY NINE THOUSAND AND SEVENTY TWO EURO with SIXTEEN CENTS OF EURO (€1,529,072.16)** as being this the sum that Claimant shall have to bear as tax imposition for receiving the salaries owed in Spain and not in Russia. This damage is clearly created by Respondent's unfair termination.*
>
> - *Respondent is ordered to pay an additional net amount **ONE THOUSAND TWO HUNDRED SIXTY EIGHT EUROS AND SIX***

CENTS OF EURO (€1,268.06) *as damages in the cost of the medical exams generated to prove the actual fitness of the Player.*

- *Respondent is ordered to pay penalty for legal interest at five percent (5%) per annum, in accordance to the terms and conditions expressed ut supra."*

46. In his subsequent submissions, Claimant requests to uphold the reliefs above. In addition, in his submission received by the BAT on 2 September 2014, Claimant requests to dismiss the Koglin Report. Finally, in his submission dated 14 November 2014, Claimant amended his statements regarding the tax imposition in case the BAT Award is issued in 2015. Accordingly, the Player requests to be compensated in the amount of EUR 1,286,690.66 in that respect.

4.3 Respondent's Position

47. Respondent submits the following in substance:

- The Player concealed severe health problems in order to contract with the Respondent. Therefore, the Club had the right to immediately terminate the Employment Contract according to its Article 3.1.

- The Player's strong pain syndrome right after the first training session in the 2012/2013 season and the MRI findings of September 2012 are indications that the [Player's injury] originated from a time well before the signing of the Employment Contract. This is confirmed by the Koglin Report which concludes that the Player could at least not have been unaware of the existence of a "[Player's injury]" in his [Player's body part] in April 2012.

- The Player failed to pass the medical examination at the beginning of the 2013/2014 season. The tests performed in August 2013 showed that the Player was not in top physical condition because of his chronic health problems.

- The regulations for the Russian Championship 2013/2014 do not provide for a maximum number of foreign players. Thus, the Player could have been registered in the Club's team without any restrictions under the condition that he was fit to play.

- The tax calculations submitted by the Player are not conclusive and his damage claim concerning "tax effects" is not substantiated. The Player's change of residence to Germany annihilated his "tax gross-up" damage claim which shall be dismissed. In addition, the Player's damage claim is irrelevant because his main claim lacks any factual and legal grounds.

4.4 Respondent's Request for Relief

48. In its Answer, Respondent requests the following reliefs:

> *"Respondent therefore requests an award from the Basketball Arbitral Tribunal:*
>
> *(1) A medical expert in the person of Dr. Sayegh Souheil, Sport Medicine, Av, J.-D. Maillard 3, Hôpital de la Tour shall be appointed in order to establish whether Claimant's medical condition is pre-existent and, in such case, determine whether Claimant could have been unaware of the existence of a health problem by the date of execution of the contract of 27 June 2012.*
>
> *(2) Claimant's request for relief shall be dismissed as inadmissible for lack of standing or, in the alternative, as unfounded.*
>
> *(3) Any other or further-reaching Claimant's requests for relief shall be dismissed.*
>
> - *Claimant shall be ordered to cover the whole of the costs of arbitration, as well as Respondent's legal costs and expenses."*

49. In its subsequent submissions, Respondent requests to uphold the reliefs above and states that Claimant shall not be entitled to any compensation.

5. The Jurisdiction of the BAT

50. 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 (hereinafter "PILA").

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

52. 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.

53. The jurisdiction of the BAT with respect to the present dispute results from the arbitration clause in Article 8.1 of the Employment Contract, which reads as follows:

> *"8.1 Any disputes arising under this Contract shall be settled in amicable way. In case of failing to achieve the consent, the dispute will be solved in accordance with the Rules of FIBA Arbitral (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 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. BAT decision will be final*
> *The arbitrator shall decide the dispute ex aequo et bono." (sic)*

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

55. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording "*[a]ny disputes arising under this Contract*" in Article 8.1 of the Employment Contract covers the present dispute. The Parties failed to amicably settle their dispute according to the correspondence of Claimant's counsel to Respondent of 28 October and 4 November 2013 and Respondent's response by letter of 15 November 2013.

56. Respondent did not object to the jurisdiction of the BAT.

57. For the above reasons, the Arbitrator finds that he has jurisdiction to decide the present dispute and to adjudicate the Claimant's claims.

6. Other procedural issues

6.1 Respondent's request for appointment of an "independent medical expert"

58. With respect to its request to appoint Dr. Sayegh Souheil as an "independent medical expert" (no. 1 of Respondent's requests for relief), Respondent submits in its Answer as follows:

> *"63. For the avoidance of doubt and in order to establish once and for all Claimant's pre-existing medical condition, it is necessary to appoint an independent medical expert. The expert will have to establish, on the basis of a full medical file to be produced by Claimant, whether the chronic disease suffered by Claimant appeared on or before the conclusion of the contract dated 27 June 2012 and, in such case, assess the significance of the pain suffered by Claimant in order to determine whether Claimant could not be aware of the existence of a health problem on or before the signing of the said contract."*

59. By letter of 8 July 2014, the BAT Secretariat informed the Parties about the Arbitrator's decision to reject Respondent's procedural request for appointment of Dr. Sayegh. Given the numerous exhibits to the Parties' submissions with regard to the medical conditions and examinations of Claimant prior, during and after the 2012/2013 season, in accordance with Article 12.2 of the BAT Rules the Arbitrator decided not to appoint any medical expert but to invite Respondent to submit an expert opinion of an expert of its choice based on the medical documents on file and to submit further information/documents of the medical and/or physical examinations executed by Respondent.

6.2 Claimant's request to dismiss the Koglin Report

60. In his submission received by the BAT on 2 September 2014, Claimant requests to dismiss the Koglin Report because "*the medical report is a partial and biased attempt to support Respondent's stand rather objectively examining a medical situation under medical standards*".

61. As explained in section 6.1 above, given the numerous exhibits with regard to the medical conditions and examinations of Claimant prior, during and after the 2012/2013 season, in accordance with Article 12.2 of the BAT Rules the Arbitrator decided to invite Respondent to submit an expert opinion of an expert of its choice based on the medical documents on file. The Koglin Report follows those procedural provisions and will not be dismissed for formal reasons.

62. The content of the Koglin Report will be considered by the Arbitrator as evidence submitted by a party rather than an expert opinion of an independent expert appointed by the Arbitrator.

6.3 Claimant's (alternative) requests for further submissions regarding taxes

63. In the Request for Arbitration (para CDLIV on page 45) and the submission dated 22 July 2014 (para XXVII on page 17), Claimant requests that "*should the Arbitrator eventually grant a different reward that the one required as principal by means of this document he shall be allowed to present the pertinent taxation to these effects corresponding to such eventual number*". Furthermore, by email of 27 October 2014, Claimant requested the opportunity to present a new tax assessment should it be deemed necessary by the Arbitrator in order to assess the actual damage caused to Claimant.

64. Taking into consideration all circumstances, in particular the fact that Claimant signed the ALBA Contract in September 2014 and moved from Spain to Germany during the arbitration proceedings, the Arbitrator decided to invite Claimant to file additional submissions in order to evaluate Claimant's claims, in particular his damage claim regarding "tax effects". To that effect, the Arbitrator ordered that Claimant's additional submissions should consider Claimant's new domicile in Germany and contain information of any double taxation treaty applicable in the present case. Moreover, the Arbitrator provided Respondent the chance to comment on Claimant's additional submissions.

6.4 Respondent's request for certified translation of Claimant's exhibits

65. In its submission dated 2 September 2014, Respondent requested Claimant to submit a certified translation of "Exhibit B" to Claimant's submission dated 22 July 2014.

66. In accordance with Article 4.2 of the BAT Rules and in light of BAT's purpose to provide for a simple, quick and inexpensive mechanism of dispute resolution, the Arbitrator decided not to order an English translation. Claimant's "Exhibit B" was submitted as *"Documentation evidencing Mr. Jose Cobelo's position as Sports director at Basket Bilbao SAD at the time and thereafter"*. The Arbitrator finds that the documents submitted state Mr. Cobelo to be the "director deportivo" of Basket Bilbao SAD and that this Spanish expression can easily be understood as "Sports Director". In addition, the Club has not contested the Player's submissions that Mr. Cobelo holds the position of Sports Director of Basket Bilbao SAD but rather requested only the translation of Claimant's "Exhibit B".

7. Applicable Law – *ex aequo et bono*

67. 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".*

68. 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."*

69. The concept of équité (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage of 1969[1] (Concordat),[2] under which Swiss courts have held that "arbitrage en équité" is fundamentally different from "arbitrage en droit":

> *"When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[3]

70. 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"*.

71. In Article 8.1 of the Employment Contract, the Parties have explicitly decided and empowered the Arbitrator to decide the dispute *ex aequo et bono* without reference to

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1 This Swiss statute governed international and domestic arbitration prior to the enactment of the PILA (governing international arbitration) and the Swiss Code of Civil Procedure (governing domestic arbitration).

2 KARRER, in: Basel Commentary to the PILA, 2nd ed., Basel 2007, Article 187 PILA N 289.

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

any other law. Consequently, the Arbitrator will decide the present matter *ex aequo et bono*.

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

8. Findings

73. The Player requests compensation (see para 8.1 below) and reimbursement of medical expenses (see para 8.2 below) with interest on both amounts (see para 8.3 below). In addition, the Player requests compensations related to "tax effects" (see para 8.4 below).

8.1 Compensation (EUR 1,440,000)

74. The Player requests compensation for salary agreed under the Employment Contract for the 2013/2014 season (EUR 900,000) and the 2014/2015 season (EUR 900,000), however, reduced by the salary agreed under the Estudiantes Contract for the same time periods (EUR 360,000 in total). The Club contests the Player's claim for payment of EUR 1,440,000 because it was entitled to terminate the Employment Contract by notice of 26 August 2013 and does, therefore, not carry any further obligations towards the Player.

75. According to Clause 3.1 of the Employment Contract, the Player was entitled to salary for the 2012/2013 season in the amount of EUR 850,000, for the 2013/2014 season of EUR 900,000 and for the 2014/2015 season of further EUR 900,000. The Parties are not in dispute in relation to any payments for the 2012/2013 season because of the Third Amendment dated 1 April 2013. The latter provides that the Player and the Club are released from their obligations until the end of the 2012/2013 season.

76. With regard to payments for the 2013/2014 and 2014/2015 seasons, the Arbitrator has to decide whether the Club's unilateral termination of 26 August 2013 was valid (see para 8.1.1 below) and, in case this is answered in the negative, what the consequences of an unjustified termination would be (see para 8.1.2 below).

8.1.1 Validity of the Club's unilateral termination

77. The Club submits that its unilateral termination of 26 August 2013 was justified by the Club's right to immediately terminate the Employment Contract according to its Clause 3.1 which states in its last section as follows:

> *"- The Club has the right to immediately terminate this Contract in the following cases:*
>
> *- The Player suffers from the consequences of previous injuries or illnesses which had previously been received before the present Contract had been signed.*
>
> *- The Player suffers from injuries or diseases which are a direct result of his careless behaviour off the court, impeding the Player to regularly perform his duties;*
>
> *- The Player breaches Internal disciplinary Regulations of the Club, the disciplinary rules of FIBA and/or Russian Basketball Federation.*
>
> *- drug, doping and/or alcohol application,*
>
> *- felony."*

78. The Arbitrator finds that only the first alternative of Clause 3.1 of the Employment Contract has to be analysed in detail in the present case. Thus, the Club would have been entitled to terminate the Employment Contract if the Player suffered from the consequences of previous injuries or illnesses received before the Employment Contract had been signed.

8.1.1.1 Player's (pre-existing) [Player's body part] injury

79. The Player acknowledges to have suffered a "[Player's medical condition]" in his [Player's body part] in spring 2012 while playing for the Spanish club Bilbao Basket

S.A.D. This type of injury (commonly referred to as "[common name for Player's injury]") is encountered quite frequently among (professional) basketball players (and volleyball players). The Player submits that he returned to team practice and matches after a two-week break. The Player did not solicit clinical attention / surgery and – after the break – was able to play and practice with Bilbao Basket S.A.D. until the end of the 2011/2012 season. In the First Amendment of the Employment Contract dated 12 September 2012, the Player acknowledges to have a "*chronic illness*", which is described as "[Player's medical condition]". This "*chronic illness*" – according to the First Amendment – renders it impossible for the Player "*to fulfil his duties and obligations with full force*". However, the First Amendment is silent on the issue when the Player incurred the "*chronic illness*" (after or before entering into the Employment Contract of 27 June 2012).

80. The BAT already dealt with the issue of pre-existing injuries in several cases[4]. According to that jurisprudence, the question who has to bear the consequences of an injury is a question of risk allocation. The Parties signed the Employment Contract as a guaranteed contract (Clause 3.1: "*The Club agrees that this Agreement is a no-cut guaranteed agreement. – In case that Player gets injury during practising or games while carrying his obligations under this contract and that will bring him to being unable to perform in some or all rest games of the team, Club agrees to pay all salary as if Player would participate in all games.*") which assumes the Club to take the risk of any injury.

81. However, risk allocation presupposes an informed decision by the Club when it accepts the Player, in other words a "guaranteed contract does not protect cheating"[5]. In this context, clubs are responsible to take reasonable measures to reduce the risk of

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4 For instance, BAT cases 0014/08, 0162/11, 0190/11, 0213/11 and 0318/12.

5 BAT 154/11, para. 77.

undetected pre-existing injuries, e.g. by high standard medical examination consistent with best practice in the basketball industry[6] and by research of publicly available sources on the player's health condition[7]. In the present case, the Club has not submitted evidence in regard to any specific questions asked to the Player. However, Clause 1.4 of the Employment Contract provided the following obligation for the Player:

> *"1.4 By signing this Contract the Player is obliged to declare about current or previous injury or illness which might reduce his capability to perform at his best possible level. The club does not fulfil its obligations (including financial one) for the consequences of the previous injuries or illnesses, that become apparent during the term of this contract including for the period of the player's disablement."*

82. The Player's obligation under the Employment Contract to reveal – *sua sponte* – any significant and serious injury (Article 1.4. of the Employment Contract: "*which might reduce his capability to perform at his best possible level*") is in line with BAT jurisprudence.[8] According thereto an injury is "significant and serious" within the above meaning if the Club would not have executed the contract had it known of the injury.

83. According to general standards and in line with BAT jurisprudence, the burden of proof for any fact lies with the party which derives its arguments from it. In the present case the Club submits that it rightfully terminated the Employment Contract. Consequently, the Club has to prove that the Player's [Player's body part] problems already pre-existed when the Employment Contract was entered into, that the injury was likely to affect the Player's basketball performance during the term of the Employment Contract and that the Player knew of such significant and serious injury.

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6 See BAT cases 0213/11, 0263/12 and 0318/12.

7 See BAT cases 0190/11 and 0213/11.

8 See, inter alia, BAT cases 0014/08, 0039/09, 0066/09, 0162/11 and 0213/11.

84. In support of its position the Club has submitted the Koglin Report. In this report Dr. Laurent Koglin addressed the question whether the Player's "*medical condition was pre-existent to the signature of the contract of 27 June 2012*" and whether the Player "*could have been unaware of the existence of a health problem by the date of execution of the contract of 27 June 2012*". The Arbitrator notes, in particular, the following sections and findings of the Koglin Report:

- When analysing the medical evidence submitted to him, Dr. Koglin, inter alia, refers to the MRI examination at "Bars Med" in Kazan on 20 September 2012 (not 2 September 2012 as erroneously understood by Dr. Koglin due to a typo in the English translation of the Club's exhibit no. 2). Regarding the diagnosis "*no bone traumatic changes*", Dr. Koglin finds in para 18 of the Koglin Report that "[t]*his is a sign that Mr. Banic had no severe acute injury during the preceding few weeks*".

- In para 62 of the Koglin Report, Dr. Koglin finds that the Player's various medical conditions analysed in the MRI of 20 September 2012 (again not 2 September 2012) "*on the balance of probability,* [were] *already present since a significant period of time*". Based on this finding, Dr. Koglin concludes in para 63 of the Koglin Report that the Player's "*medical conditions* [were] *pre-existing*".

- In addition, in para 64 et seq. of the Koglin Report, Dr. Koglin concludes as follows:

> *"64. In my opinion, Mr. Banic could have been unaware of the existence of the following health problems which were diagnosed by the several medical examinations:*
>
> - [General description of Player's medical condition] *frequently occur in sports-active people without any history of injury/trauma or symptoms attributable to the degeneration. Moreover, many patients present* [Player's medical condition] *with or without associated pain or discomfort. Therefore, Mr. Banic could in my opinion have been unaware of the existence of his degenerative injury.*
> - [Condition that occurs in adolescents around the same area as the Player's medical condition] *usually resolve when the patient is fully grown. However, its long term sequel may be a* [Description of degeneration that can occur with Player's medical condition]*. Such condition can occur without feeling any pain or restraint.*

- [Player's medical condition] *can be asymptomatic or symptomatic.*

65. *A professional basketball player which is suffering from the above injuries, if asymptomatic, can be in condition to play at his best level. The findings of the medical examinations conducted after the execution of his contract* in se *do not allow concluding that Mr. Banic was aware of his condition.*

66. *[…]*

67. *This leads me to conclude that Mr. Banic could at least not have been unaware of the existence of a* [Player's medical condition] *in April."*

85. Taking into consideration Dr. Koglin's conclusions above as well as the other submissions by the Parties, the Arbitrator finds that the Club failed to prove that the Player was aware of a relevant medical condition with regard to his [Player's body part] on the date when the Employment Contract was executed. As a result, the Arbitrator finds that Player did not conceal any severe [Player's injury] when signing the Employment Contract and/or during the Club's medical examination which he passed without any reservations by the Club. The "[Player's medical condition]" diagnosed on 2 April 2012 did not hinder the Player to participate in games and practices. This is evidenced by the fact that he continued playing for his former Spanish club from 12 April 2012 until end of May 2012, i.e. the end of the 2011/2012 season. Furthermore, the Player was and still is able to perform in matches and practices in top level clubs, namely the Spanish club Baloncesto Estudiantes in the 2013/2014 season and the German club ALBA Berlin in the 2014/2015. In addition, Dr. Koglin only explained the probability of the existence of medical conditions ("*on the balance of probability"*) but concluded that the Player could have been unaware of any [Player's body part] problems ("*In my opinion, Mr. Banic could have been unaware of the existence of the following health problems which were diagnosed by the several medical examinations:").* He also concluded that a professional basketball player who is suffering from those injuries, if asymptomatic, "*can be in condition to play at his best level*".

86. Furthermore, for the sake of completeness the Arbitrator holds that even if the injury should have pre-existed and the Player were aware of it, the Club would be precluded

from terminating the Employment Contract. The Club – once the problems with the [Player's body part] became apparent – did not terminate the Employment Contract. Instead, the Club entered into various Amendments of the Employment Contract and, thereby, expressed its wish to retain the Player. It would constitute a behaviour *venire contra factum proprium* if the Club despite of these additional agreements would be allowed to terminate the Employment Contract after knowing of the Player's injury for about eleven months.

87. To summarise, the Club failed to prove that the Player concealed a significant medical condition and therefore the Arbitrator finds that the Club had no right to terminate the Employment Contract according to Article 3.1 thereof.

8.1.1.2 Player's (failed) medical examination at the beginning of the 2013/2014 season

88. In addition, the Club submits that its unilateral termination was also justified because the Player failed to pass the medical examination at the beginning of the 2013/2014 season.

89. The Employment Contract provides for medical exams, in particular, in its Article 4 (titled "Medical examination"). Article 4.1 provides for an "initial medical exam" administered and fully completed within five days upon the Player's arrival in Russia. Article 4.2 stipulates the Club's right to arrange "annual medical examination" as well as the Player's duty to take part in such examinations and to follow any medical advice received. It is undisputed between the Parties that the Player passed the "initial" medical exam executed in August 2012. However, the Club argues that the Player failed the "annual" medical exam performed between 21 and 26 August 2013. The Player on the contrary submits that the medical tests were not performed within the prescribed time frame of five days and that the evaluation parameters of the physical tests did not comply with the standard tests.

90. In order to support its arguments, the Club filed the Koglin Report. The Arbitrator notes, in particular, the following sections and findings of the Koglin Report:

- "*3.1.6. Exhibit Nr. 8: Mr. Banic's outpatient medical record at Kazan Klinika, 21 August 2013. Examination done by Dr. Fidanaiya Yakonpova.*

  39. Dr Yakonpova's report shows that Mr. Banic is in good global health and had no previous injury. It is important to note that for this medical check there was no [test of body part where Player's injury occurred]."

- "*3.1.7. UNICS's Exhibit Nr. 9: Findings by a commission(sic) on the medical examination of Mr. Banic, 23 August 2013*

  […] 43. ***Recurrent*** **[Player's injury]:** *This means that the* [Player's body part] *is often swollen because of a* [Player's injury]. *Most of the time, the cause is a* [Player's injury]. *It's a sign that the* [Player's body part] *is suffering.*

  44. ***Protrusion of*** **[Additional medical condition]:** *This indicates that the* [additional medical condition] *are suffering. These findings are very common with symptomatic and asymptomatic basketball players."*

- "*3.1.8. Exhibit Nr. 10 : Medical performance test of Mr. Banic, 25 August 2013*

  45. Mr. Banic underwent 7 standard basketball tests. The tests measure the endurance, the speed, the resistance and the jumping of the player. Mr. Banic scored for all the tests slightly under the performance standard."

- "*3.1.9. Exhibit Nr. 10: Memorandum and video from the medical and technical staff of the UNICS, 26 August 2013*

  46. The video shows that Mr. Banic did the 7 standard basketball tests. During the different tests, I didn't observe signs of a [Player's injury]. *Mr. Banic*['s movements did not show signs of injury]. *He looked rapidly tired in the Jumping test and was slow in the endurance test. This observation could be related to a lack of fitness, because he couldn't train well during the former season (2012/2013) because of his* [Player's injury]."

91. From the Koglin Report, the Arbitrator understands that the Player was in "*good global health"* scoring all basketball standard tests "*slightly under the performance standard*" and that no "[Player's injury]*"* could be analysed while any existing [Player's body part] problems were "*very common with symptomatic and asymptomatic basketball players".* In addition, the Player suffered some tiredness and slowness being the result of the Player's absence from regular practise due to his limited training in the 2012/2013 season.

92. The question to be addressed here is what legal consequences follow from these Player's conditions and, more concretely, whether they justify a unilateral termination of the Employment Contract by the Club.

93. According to BAT jurisprudence, parties are free to agree on standards or terms for medical examination being deemed passed or failed; in the absence of any express agreement, a club must prove "objective and comprehensible" reasons for the failure on the basis of which a reasonable person would find that a player failed the medical examination; also the club must immediately communicate detailed reasons and explanations for failed examination to give the player fair opportunity to discuss and contest the result.[9] In addition, parties are free to agree on legal consequences of failed examination, e.g. stipulating that failure will render the contract null and void or merely granting the club a termination right.

94. Neither the Employment Contract nor any of its Amendments contain any standards or terms when a medical examination is being deemed to be passed or failed. Even in the Third Amendment of 1 April 2013, the Parties only agreed on the contractual "target". The latter consisted in letting "*the Player come back home and get back to Kazan in the best shape at the beginning of the next season*". However, the Amendment does not provide any standards or terms how to determine whether the Player fulfils this target.

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[9] See, in particular, BAT cases 0107/10 and 0346/12 with further references.

Moreover, the reasons provided by the Club to the Player for his (alleged) failure of the health / physical test were very general. In the reports of 23 and 26 August 2013 concerning the different tests during the "annual" examination, a so called "Medical Commission" constituted of six persons (five coaches and the Club's medical doctor) communicated that the "*available pathology does not allow load of professional basketball player*" and that the Player "*didn't reach the standard in any of the seven suggested check tests*". Therefore, the "Medical Commission" concluded: we "*believe that he is not able to play at the level of the United League of VTB and Euroclub*". However, the Club did not provide further details which the Player could discuss and contest. Even in the Termination Letter of 26 August 2013, the Club remained very general by stating, inter alia, as follows:

> *"According to the results of a final medical examination we advise you that the player Marko Banic did not pass physical examination (negative medical examination).*
>
> *We consider that diseases which were revealed during the profound medical examination do not allow Marko Banic to fulfil his professional duties with the full load.*
>
> *Taking into account all stated above BC UNICS reports that in connection with the negative passing of medical examination, the contract dated June, 27, 2012r, made between the player Marko Banic and the Club, is considered terminated, the Parties carry no obligation under this contract."*

95. The above statements have to be interpreted and weighted in light of the findings of the Koglin Report, which was submitted by the Club. According thereto the Player was in "*good global health"* without a "[Player's injury]*".* Furthermore, the report stated that the Player scored all physical tests only "*slightly under the performance standard*". It follows from the Koglin Report and the various medical reports submitted by the Parties, that – apparently – the Player did not encounter any problems with respect to the medical part of the annual examination (including MRI examination at the "Klinika LMS" in Kazan on 21 August 2013). Instead, the problems – if any – related rather to the additional physical tests that the Player had to undergo on 26 August 2013.

96. Moreover, the results of several further medical examinations executed by different persons from 10 to 19 September 2012 (medical test including MRI examination at the clinic "Sv. Katarina" in Zagreb, Croatia on 10 September 2013; medical test at "Sporthopaedicum" in Straubing, Germany on 11 September 2013; medical test including x-ray and MRI examination at "Zentrum für Orthopädie & Sportmedizin" in Munich, Germany on 12 September 2013; medical examination by the Spanish club Baloncesto Estudiantes from 17 to 19 September 2013) all provided that the Player was, in principle, fit to play basketball at a professional level.

97. Thus, the Arbitrator finds that the Club failed to prove "objective and comprehensible" reasons for the Player to have failed the annual examination. The Arbitrator is not persuaded that a reasonable person would find that the Player failed the medical examination.

98. In addition, legal consequences with respect to the Employment Contract for failing the medical exam are expressly provided only with respect of the "initial" exam. According thereto in case the Player fails the medical examination the Employment Contract "*is considered invalid*" (last sentence of Article 4.1 of the Employment Contract). Article 4.2 does not contain any similar provision in case the Player fails the "annual" exam. Even Article 1.5 of the Employment Contract – which grants the Parties the right to cease their obligations in case of, inter alia, "*unsuccessful passing of medical examination*" – does not provide any specific termination right. Apart from that, taking into consideration the second sentence of Article 4.1 ("*Unless the PLAYER and his agent are notified in writing form that he has failed to pass the initial medical examination, all guarantees will be in place and the contract terms will be in full force and effect*."), the Club's right to cease its obligations according to Article 1.5 of the Employment Contract only makes sense with regard to the "initial" exam. Thus, the Arbitrator finds that the Parties expressly agreed on legal consequences only for failure of the "initial" exam and that passing the "annual" exams is no condition precedent for the Employment Contract to be in force for the respective subsequent season. The Arbitrator also holds that the Player's conditions at the beginning of the 2013/2014 season cannot be

considered significant and serious breaches of contract which would justify a unilateral termination without any express provision agreed by the Parties.

8.1.1.3 Conclusion

99. To conclude, the Arbitrator finds that the Club was not entitled to terminate the Employment Contract. Its unilateral termination of 26 August 2013 is, thus, unjustified.

8.1.2 Calculation of the Player's compensation

100. The Player claims the total amount of EUR 1,440,000 net as compensation for the 2013/2014 and 2014/2015 seasons.

101. According to Article 3.1 of the Employment Contract, the salary agreed by the Player and the Club was EUR 900,000 for the 2013/2014 season and further EUR 900,000 for the 2014/2015 season; these amounts should be "*paid as net payments after all taxes*".

102. In line with constant BAT jurisprudence[10], in any event the total net amount of EUR 360,000 agreed under the Estudiantes Contract (EUR 160,000 for the 2013/2014 season and EUR 200,000 for the 2014/2015 season) has to be deducted from the remuneration under the Employment Contract. The Player's transfer to ALBA Berlin does not affect the calculation of compensation because the salary agreed under the ALBA Contract is less than the one agreed under the Estudiantes Contract. The Player submits that his decision to sign a new contract with less salary was for personal reasons and should not reduce the amounts to be deducted. Consequently, the Player is entitled at maximum to the net amount of EUR 1,440,000.00 (EUR 1,800,000.00 minus EUR 360,000.00) as actually claimed.

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[10] See, *ex multis*, the following BAT awards: 0038/09 and 0441/13.

103. However, the Arbitrator finds that a further deduction has to be made because of the Player's duty to mitigate the damage. The Player signed his new contract with the Spanish club Baloncesto Estudiantes only four days after the Termination Letter of 26 August 2013. It is noteworthy that the salary agreed under the Estudiantes Contract was much less than under the Employment Contract (EUR 360,000 instead of EUR 1,800,000.00 for both, the 2013/2014 and the 2014/2015 season). The Player submits that the Club's termination was late in the 2013/2014 pre-season which limited his options for negotiations with other clubs.

104. The Player's duty to mitigate provides at least for the attempt to mitigate the damage. Four days seem very short to get into negotiations with different clubs and to find the best offer. This is even true when considering that the Player was under some time pressure because the season had already started. The Player did not provide information about his negotiations with other clubs and/or his efforts to conclude a new contract providing a salary higher than the one under the Estudiantes Contract. Furthermore, the Player could have tried to improve his financial situation for the season 2014/2015 (instead of entering into a contract with inferior financial conditions). When assessing the Player's obligation to mitigate the damage the Arbitrator takes also into account the findings of the Koglin Report. The latter shows that the Player was in "*good global health",* however, that his physical conditions were "*slightly under the performance standard*". The Arbitrator finds that these personal conditions of the Player must be taken into account when assessing the Player's possibilities in obtaining a new contract.

105. Furthermore, in the context of the Player's duty to mitigate the damage the Arbitrator takes also in consideration, inter alia, the submissions regarding the Player's salary under contracts with his former Spanish clubs Bilbao Basket S.A.D. and Baloncesto Estudiantes as well as the Second Amendment of February 2013 by which the Club and the Russian club "Krasniye Krylia" agreed to share the Player's salary payments. According to the latter contract "Krasniye Krylia" agreed to pay EUR 30,000 per month

for the Player's services. The Arbitrator finds that this amount of remuneration is, in principle, the benchmark for the Player when negotiating for a new contract in the spring of 2013. Starting from this benchmark and taking into account the time constraints when negotiating the new contract as well as the Player's state of fitness the Arbitrator finds – deciding *ex aequo et bono* – that the Player's claim for compensation must be further reduced by EUR 340,000.00.

106. Consequently, the Player is entitled to compensation in the amount of EUR 1,100,000.00 net. The Employment Contract does not provide for accelerated payments of all amounts due in case of breach of contract by the Respondent. However, the Arbitrator deems that this is not necessary. The Employment Contract was terminated through a breach of contract by Respondent. Thus, the original claim of the Player for monthly remuneration turned into a claim for damages which becomes due on the date the Employment Contract was (unlawfully) terminated (26 August 2013). However, in order to avoid over-compensation, the Arbitrator must discount the amount of EUR 1,100,000.00 in order to take into account that under the Employment Contract some of the payments were due a long time after 26 August 2013. Deciding *ex aequo* et bono, the Arbitrator, thus, deems appropriate to adjust the claim for damages by deducting a further amount of EUR 44,000. Thus, the claim for damages due on 26 August 2013 amounts to EUR 1,056,000.

8.2 Medical expenses (EUR 1,268.06)

107. The Player requests reimbursement of EUR 1,268.06 regarding medical expenses invoiced prior to and after the termination of the Employment Contract. In this context, the Player refers to Exhibit 46 to the Request for Arbitration which contains five invoices of "Radiologie München", a clinic for radiology in Munich, Germany.

108. The five invoices total EUR 5,286.91 and none of them states an amount of EUR 1,268.06. Furthermore, the five invoices of "Radiologie München" dated 23 April,

6 June, 15 July and 12 September 2013 do not correspond to the Player's rehabilitation program at "Eden Reha" in Donaustauf, Germany at the end of 2012 or his medical tests in September 2013 at the clinic "Sv. Katarina" in Zagreb, Croatia, at "Sporthopaedicum" in Straubing, Germany and at "Zentrum für Orthopädie & Sportmedizin" in Munich, Germany.

109. Therefore, the Arbitrator is not able to determine how the Player arrived at the amount claimed and whether he is entitled to any reimbursement. The Arbitrator finds that the claim for reimbursement of medical expenses is unsubstantiated and rejects the Player's request for payment of EUR 1,268.06.

8.3 Interest

110. The Player requests "*legal interest at five percent (5%) per annum*" on "*the payment owed to the Claimant from the due date of payment*".

111. The Employment Contract does not provide for any interest payments. However, it is a generally accepted principle embodied in most legal systems and reflected in the BAT jurisprudence[11] that default interest can be awarded even if the underlying agreement does not explicitly provide for a respective obligation.

112. In line with constant BAT jurisprudence, the Arbitrator deems an interest rate of 5% p.a. appropriate and proper to prevent the Club from deriving any profit out of the non-fulfillment of its obligations.

113. When determining the commencement date, the Arbitrator, deciding *ex aequo et bono* and taking into consideration the circumstances of the case, finds it fair and reasonable

[11] See, *ex multis*, the following BAT awards: 0056/09, 0069/09, 0092/10 and 0237/11.

to award default interest from the day the Claimant requested "total reimbursement" for the unjustified termination of the Employment Contract, i.e. from 28 October 2013. Consequently, default interest shall start to run from the day following the issuance of the Claimant's letter, i.e. from 29 October 2013.

114. For the reasons above, the Arbitrator finds that the Player is entitled to interest in the rate of 5% p.a. on his compensation of EUR 1,056,000 from 29 October 2013.

8.4 Damage regarding "tax effects"

115. The Player requests payment of an additional amount which he shall have to bear as tax imposition regarding the compensation awarded in the present arbitration.

116. In order to support his claim, the Player submitted reports of tax experts concerning Russian, Spanish and German tax law, namely two reports of Mr. Rodrigo Martin Garcia of 26 December 2013 and 17 July 2014 and a report of the law firm "Lexton" of 13 November 2014 (hereinafter the "Lexton Report"). According to these reports as well as the Claimant's further submissions, the Player (on the basis of a claim for EUR 1,400,000 net) is subject to Spanish tax imposition with tax burden of EUR 1,529,072.16 if the BAT award is delivered to the Parties in 2014 and subject to German tax imposition with tax burden of EUR 1,286,690.66 if the BAT award is delivered to the Parties in 2015. The Club objects that the Player's change of residence to Germany annihilated his "tax gross-up" damage claim and that the tax calculations submitted are not conclusive.

117. The Arbitrator agrees with the findings of the Lexton Report that the Player is subject to unlimited taxation in Germany regarding his worldwide income (paragraph IV. of the Lexton Report). The present award is issued and communicated to the Parties in the year 2015 and, therefore, the Player is deemed to be a German resident under both

German tax law and the double taxation treaty between Germany and the Russian Federation.

118. The Lexton Report further states that the compensation awarded to the Player is taxable income in accordance with the German Income Tax Act (Einkommensteuergesetz ["EStG"]) and that "[a]*ccording to § 11 Sec. 1 EStG such compensation will be taxed in the fiscal year, when it has been paid and received (Zuflussprinzip)*". In this context, paragraph IV. 1.2.2 of the Lexton Report reads as follows:

> *"considering this, it is not questionable that the compensation claimed by the Claimant is taxable under German law in the fiscal year when payment has been executed and received by the Claimant."*

119. It is true that the Player's duty to pay German income tax on the compensation awarded in this BAT award will become due at the end of the fiscal year (provided that payment is effectuated in 2015). Even though the Player at present is not obliged to pay taxes on the amount in question and, thus, has not incurred an actual damage yet, the arbitrator finds it just and equitable that the Player is already entitled at present to request reimbursement of this prospective damage. The Arbitrator comes to this conclusion by taking into account that the purpose of the damage claim is to put the Player in the exact financial position as he would have been in case his contractual partner would have duly fulfilled its obligations. Furthermore, the Arbitrator finds that it would be unacceptable if the victim of the breach of contract would have to advance the amounts due under German tax law (which are an integral part of the damage incurred) in order to be entitled to reimbursement. No harm is done to the Respondent if the Player is entitled to reimbursement of the tax effects at this early stage.

120. It may be true that because of a change of factual or legal circumstances the tax amount to be paid at the end of the year may differ from the amount calculated in this award, since the present calculation of the Player's tax imposition under German law is based on certain assumptions (present tax rates and several other parameters which

may change over time such as e.g. joint assessment of Player and his wife; church tax; further income derived by the Player; child-related deductions). However, the Respondent is not barred from raising any of these factual changes that impact the tax imposition under German law in the enforcement stage, provided that the factual change occurred after the issuance of this award.

121. The present calculation is based on the following assumptions, i.e. that Claimant and his wife are assessed jointly for tax purposes in 2015, that no income is derived by the Claimant's wife in 2015, that no church tax is applicable in 2015, that the Claimant is entitled to child-related deductions for two kids and that Claimant in 2015 does not derive any other income except the income derived from ALBA Berlin (EUR 132,000.00 gross until the expiry of the contract at the end of the 2014/2015 season). Based on these assumptions in order to receive the amount of EUR 1,056,000.00 net the Player would have to be paid EUR 1,940,000.00 gross. Thus, the Arbitrator awards the Player an amount of EUR 884,000.00 to compensate the tax effects.

8.5 Summary

122. The Player is entitled to compensation in the net amount of EUR 1,056,000.00 plus interest of 5% p.a. from 29 October 2013 as well as EUR 884,000.00 to compensate German tax imposition. All other or further-reaching prayers for relief are dismissed.

9. Costs

10. 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.

11. On April 23 2015 – 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 17,985.00.

12. Considering the outcome and the circumstances of the present case, in application of Article 17.3 of the BAT Rules, the Arbitrator finds it fair that Claimant shall bear 1/4 of the costs of this arbitration and the Respondent 3/4 of the arbitration costs. Thus, Claimant bears EUR 4,496.25 and Respondent EUR 13,488.75 of the arbitration costs. Considering that Claimant paid EUR 8,975 as advance on costs, the Respondent must reimburse to Claimant an amount of EUR 4,478.75.

13. Furthermore, the Arbitrator takes note of the accounts of costs submitted by the Parties. Claimant submitted documentation for legal fees in the total amount of EUR 39,830.00 plus the non-reimbursable handling fee of EUR 7,000.00. Respondent submitted an account of costs stating legal fees in the total amount of EUR 34,430.00.

14. When assessing the reasonable legal fees and expenses incurred by the Parties in connection with these proceedings (Article 17.3 of the BAT Rules), the Arbitrator takes into consideration that the maximum contribution to a parties' reasonable legal fees and other expenses (including the non-reimbursable handling fee) is EUR 40,000.00 according to Article 17.4 of the BAT Rules. With the outcome and the circumstances of the present case in mind, the Arbitrator considers it adequate, that Claimant is entitled to a contribution towards his legal fees and expenses in the amount of EUR 29,000.00 while Respondent has to bear its own legal costs and expenses.

10. AWARD

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

1. **Unics Kazan Basketball Club is ordered to pay to Mr. Marko Banic the amount of EUR 1,056,000.00 plus interest of 5% p.a. on that amount since 29 October 2013.**
2. **Furthermore, Unics Kazan Basketball Club is ordered to pay to Mr. Marko Banic the amount of EUR 884,000.00 to compensate the effects of German tax imposition.**
3. **The costs of this arbitration shall be borne in the amount of EUR 4,496.25 by Mr. Marko Banic and in the amount of EUR 13,488.75 by Unics Kazan Basketball Club. Accordingly, Kazan Basketball Club is ordered to reimburse Mr. Marko Banic the amount of EUR 4,478.75.**
4. **Unics Kazan Basketball Club is ordered to pay to Mr. Marko Banic the amount of EUR 29,000.00 as a contribution towards his legal fees and expenses. Unics Kazan Basketball Club shall bear its own legal costs.**
5. **Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 30 April 2015

Ulrich Haas
(Arbitrator)