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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0057/09 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Mr. Andriy Podkovyrov, Dragomanova 17/204, 02068 Kiev, Ukraine

represented by Mr. Piotr Bujnarowski, attorney at law, Kancelaria Radcy Prawnego Bujnarowski, ul. Moniuszki 31/6, 87-100 Toruń, Poland

- Claimant -

vs.

Słupskie Towarzystwo Koszykówki Sportowa Spółka Akcyjna, ul. Przemysłowa 35, 76-200, Słupsk, Poland

- Respondent -



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1. The Parties

1.1. The Claimant

1. Mr. Andriy Podkovyrov (the “Coach” or “Claimant”) is a basketball coach, who was working for the basketball club Słupskie Towarzystwo Koszykówki Sportowa Spółka Akcyjna at the time the dispute arose.

1.2. The Respondent

2. Słupskie Towarzystwo Koszykówki Sportowa Spółka Akcyjna (the “Club” or “Respondent”) is a professional basketball club in Poland.

2. The Arbitrator

3. On 24 July 2009, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Prof. Dr. Ulrich Haas as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules"). Neither of the Parties has raised 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 28 May 2008 the Parties entered into an employment contract whereby the Club engaged the Claimant as coach for its team for the season 2008-2009 (the “First Contract”).



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5. In its relevant parts the First Contract reads as follows:

“CONDITIONS

1. *CLUB hereby employs COACH as a skilled basketball Coach for a term of one (1) Basketball season (2008-2009) to commence on the date hereof and to continue through the day following the final official game in which the Club participates in the 2008-2009 season and/or the 2008-2009 Polish League play-offs, Polish Cup and any other European competition for that season, whichever date occurs later. [...]*

2. SALARY

CLUB will pay COACH according to the payment schedule listed in EXHIBIT A and B. ALL PAYMENTS WILL BE MADE IN EURO, and NET OF ALL Polish TAXES. [...]

ALL PAYMENTS SHALL NOT BE SUBJECT TO ANY FURTHER TAXES OR ANY OTHER DEDUCTIONS OR PENALTIES.

3. GUARANTEE OF SALARY

Each and everyone of the above payments shall be ABSOLUTELY GUARANTEED and non-payment of such shall constitute an immediate breach whereby CLUB SHALL BE LIABLE FOR SUCH DEBTS. COACH shall undeniably be entitled to receive the payments provided for in 2 above in case of breach, even if CLUB releases COACH, CLUB is eliminated from competition or if COACH is unable to continue to perform his duties for CLUB.

4. TAXES

During the term of this Agreement, CLUB will make any applicable payments for withholding taxes; CLUB shall be responsible for any final income tax, which may arise from the payment of salary to COACH. CLUB also agrees to provide COACH with an official tax credit certificate documenting the amounts and dates of all of the required taxes that have been paid on behalf of COACH by CLUB. [...]

9. RIGHT OF TERMINATION BY THE CLUB AND THE COACH

Coach has right to terminate the contract during the season 2008/2009 by himself. If COACH breach this contract he must pay compensation in amount 10 000 EUR. In case of 7 defeats on the way the Club can dissolve the contract without any financial consequences for the Club. [...]

12. ENTIRE AGREEMENT

This Agreement contains the entire agreement between CLUB and COACH and



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they cannot be altered or modified except by a written agreement signed by COACH and CLUB: Similarly, any and all future agreements during the term of this Agreement or thereafter between CLUB (or any person or entity affiliated with, related to, or controlled by CLUB) and COACH cannot be executed without and (sic) agreement in writing signed by COACH, CLUB and REPRESENTATIVE. Any such agreement without the approval of all three parties shall be null and void.

13. EXHIBIT A – SALARY PROVISIONS

Club agrees to pay Coach, for rendering services to Club, the amount of USD (sic), for the season 2008-2009 net of all Poland taxes which shall be paid by the Club in addition to salary.

Payments shall be in accordance with the following schedule:

Season 2008/2009, 60420 EURO

<i>June</i>	<i>1, 2008</i>	<i>6420 EURO</i>
<i>September</i>	<i>1, 2008</i>	<i>6000 EURO</i>
<i>October</i>	<i>1, 2008</i>	<i>6000 EURO</i>
<i>November</i>	<i>1, 2008</i>	<i>6000 EURO</i>
<i>December</i>	<i>1, 2008</i>	<i>6000 EURO</i>
<i>January</i>	<i>1, 2008 (sic)</i>	<i>6000 EURO</i>
<i>February</i>	<i>1, 2008 (sic)</i>	<i>6000 EURO</i>
<i>March</i>	<i>1, 2008 (sic)</i>	<i>6000 EURO</i>
<i>April</i>	<i>1, 2008 (sic)</i>	<i>6000 EURO</i>
<i>May</i>	<i>1, 2008 (sic)</i>	<i>6000 EURO</i>

6. On the same day, the Parties signed another employment contract (the “Second Contract”) which is actually identical to the First Contract except for clause 13 regarding Claimant’s remuneration. Clause 13 of the Second Contract reads as follows:

“Club agrees to pay Coach, for rendering services to Club, the amount of EURO (sic), for the season 2008-2009 net of all Poland taxes which shall be paid by the Club in addition to salary.

Payments shall be in accordance with the following schedule:

Season 2008/2009, 4500 EURO

<i>September</i>	<i>1, 2008</i>	<i>500 EURO</i>
<i>October</i>	<i>1, 2008</i>	<i>500 EURO</i>
<i>November</i>	<i>1, 2008</i>	<i>500 EURO</i>
<i>December</i>	<i>1, 2008</i>	<i>500 EURO</i>



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January	1, 2009	500 EURO
February	1, 2009	500 EURO
March	1, 2009	500 EURO
April	1, 2009	500 EURO
May	1, 2009	500 EURO

7. Also on 28 May 2008, a document entitled “Declaration” (the “Declaration”) was signed by the Claimant and the company Blue Coat Management Limited, which has its seat in Dublin, Ireland (“BCM”). According to the Declaration, the Claimant and BCM agreed that

“in accordance with the assignment signed on [they] hereby expressly and irrevocably declare that all money paid to [BCM] by [the Club] with reference to the above mentioned assignment, is the Coach sole property (excluding the commission of EUR 3,355,- EUR for the season agreed between the club and [BCM]) and is payable upon receipt to the Coach (who is responsible to fulfill all his tax obligations in his country of tax residence) on the following Bank Account [...]”

8. On 10 June 2008 the Club and BCM signed an agreement whereby the latter assigned to the first the “non-exclusive Right Of Image for Europe of [the Claimant]” in exchange for an amount of EUR 59,725.00 (the “Image Rights Contract”).
9. On 18 October 2008 the Club decided to terminate its employment relationship with the Claimant and served on him the following letter (the “Termination Letter”):

“Since the beginning of the sports season 2008/2009 Mr Andrei Podkovyrov, as coach of the team Energa Czarni Slupsk have not met the expectations of the Board of Slupskie Towarzystwo Koszykowski SSA. Numerous meetings of Mr Andrzej Twardowski, President of the Board and Mr Adam Romanski, Sports Director, with Mr Podkovyrov didn’t result in any progress in level of play of the team. According to the Board situation was aiming towards very bad sports result for the team in season 2008/2009.

Two consecutive losses of the games with very poor quality of play resulted in disappointment of fans and very vicious reaction from press, which influenced the sponsor of the club. It also resulted in drop of attendance during games. These elements are very dangerous to the financial existence of the club.

Also displeasure from the fans may have resulted in uncontrolled behaviour, which in future may transform into events, that the club couldn’t control.



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All of the above resulted in day October 13th 2008 in offering to Mr Podkovyrov the agreement to terminate the previous agreement signed on May 28th, 2008 by both parties. Mr Podkovyrov declined to sign so the only solution was to terminate the agreement from May 28th, 2008 immediately for the reasons stated above.”

10. On 23 April 2009 counsel for the Claimant wrote to the Club requesting the payment of EUR 58,345 “as a consequence of unlawful and contrary to contractual provisions renouncement of the contract”, alleging that the Club had paid to the Claimant only EUR 2,075. The Claimant had also authorized his counsel to conduct negotiations with the Club aiming to an amicable resolution of the dispute.
11. Following a communication from the Club dated 8 May 2009, on 22 May 2009 counsel for the Claimant wrote again to the Club stating that the Second Contract is “null and void, hence it does not bind the parties”. After explaining the reasons behind his position counsel to the Claimant stated:

“Please consider this statement as final. I also once more call STK SSA on behalf of my mandator (sic) to pay all receivables due in term of 7 days from receiving this letter. In other case I will fill in a petition to entertain this dispute to the FIBA Arbitration Tribunal (FAT) in Geneva.”

12. The Club did not reply to the above letter nor make any further payments.

3.2. The Proceedings before the FAT

13. On 22 July 2009 the Claimant filed a Request for Arbitration dated 14 July 2009 in accordance with the FAT Rules, and on 13 July 2009 he duly paid the non-reimbursable fee of EUR 3,000.
14. On 29 July 2009, the FAT informed the Parties that Prof. Dr. Ulrich Haas had been appointed as the Arbitrator in this matter and fixed the amount of Advance on Costs to be paid by the Parties as follows:

“Claimant (Mr. Podkovyrov)

EUR 4,000



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Respondent (Slupskie SSA) EUR 4,000"

15. On 7 August 2009, the Claimant paid his share of the Advance on Costs in an amount of EUR 4,000.
16. On 26 August 2009 the Club filed with FAT its Answer with four exhibits. The Answer lists the exhibits and provides for the following "Explanation":

"Contract dated 28.05.2008 by mutual (sic) consent STK S S.A., Andriy Podkovyrov and his agent was cancelled and Mr Andriy Podkovyrov pass on his wriht (sic) to BCM. For this was made a deal by Andriy Podkovyrov and BCM company. BCM Company declare that has a right for Andriy Podkovyrov image and there was made a contract with BCM company and STK S S.A. for using Andriy Podkovyrov image by STK S S.A.. Between Andriy Podkovyrov and STK S S.A. was signed a new contract w[h]ich we send as well."

17. The Club produced with its Answer the Second Contract, the Image Rights Contract, a brief statement by the [Player's] agent Mr. Antanas Sakavickas (the "Agent") dated 17 August 2009 ("I declare that I agree to sign by Coach Andriy Podkovyrov Image Contract") and a declaration dated 28 May 2008 signed by the Claimant and the Club which reads as follows:

"Mr Andriy Podkovyrov (Coach) and Slupskie Towarzystwo Koszykówki SSA (Club) declare, that all previous contracts signed between Coach and Club are void and null. The only valid is agreement signed on May 28th, 2008, in which the payments for the coach (&13) (sic) are 4500 euro total (four thousands five hundreds euro)."

18. On 2 September 2009, the FAT Secretariat informed the Claimant that he would have to substitute for the Club with respect to the Advance on Costs because the latter had not paid its portion thereof.
19. On 10 September 2009, the Claimant made the substitute payment in an amount of EUR 4,000.
20. On 24 September 2009, the Arbitrator issued a procedural order whereby he a) noted that, despite the choice of Polish law in the employment agreements dated 28 May 2008, none of the Parties had based its arguments on specific provisions of Polish law;



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b) requested the Parties to inform him whether they had objections to the Arbitrator deciding the matter *ex aequo et bono*; and c) invited the Respondent to submit “details of the relief sought” in accordance with Article 11.2 of the FAT Rules, and explain how the documents provided should be taken into account by the Arbitrator.

21. On 2 October 2009 the Claimant replied that his position was that the dispute should be decided according to the provisions of Polish law.
22. On the same day, the Club submitted its reply which reads as follows:

“Refer to a note from 24 September 2009 we would like to inform that after sign (sic) a image and sport contract by Mr. A.Podkovyrov we start to realizing it. For a proof we’re sendin[g] a confirmation of made payment for A.Podkovyrov.”

23. On 20 October 2009 the Arbitrator issued a procedural order whereby he requested the Parties to file with FAT English translations of a) the applicable Polish law provisions and b) relevant Polish doctrine and jurisprudence, on which the Parties based their arguments.
24. On 30 October 2009 the Claimant filed his reply along with English translations of Polish Civil Code provisions, other polish law provisions, applicable doctrine and jurisprudence. The Claimant also submitted his reply to the Club’s Answer supported by a new statement of the Agent dated “.../10/2009” and a statement by the Claimant before a notary dated 6 October 2009. The Agent’s statement reads as follows:

“I [...] declare that I have indeed signed a statement from August 17, 2009 expressing consent for [the Claimant] to conclude an image contract. However, after the authorities of the [Club] had contacted me on the matter, I was convinced that the statement concerns a new and additional contract to the prior binding agreement with [the Claimant] in which his monthly remuneration was 6.000 EUR, the only agreement I have signed and agreed on.

Moreover, I declare that I have neither signed other agreements concerning [the Claimant] nor expressed my consent to conclude such agreements except the one dated May 28, 2008 according to which [the Claimant] had a guaranteed monthly remuneration of 6,000 EUR. I had never and I would never agree to conclude by [the Claimant] an



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agreement in which his monthly remuneration from the Club would be as little as 500 EUR because that is inappropriate salary for high[...] coach skills of [the Claimant].

I also declare that the joint intention of all parties to the Agreement signed on May 28, 2008 was that [the Claimant] shall receive 6.000 EUR directly from the Club [...].”

25. On 10 November 2009 the Club submitted a letter dated 6 November 2009, which reads as follows:

“Słupskie Towarzystwo Koszykówki Sportowa S.A. in answer to a letter dated [...] 20.10.2009 inform that with Mr. Andriy Podkovyrov Słupskie Towarzystwo Koszykówki Sportowa S.A. was related only by Contract signed on 28.05.2008, in which the payments for [...] Mr. A.Podkovyrov are 4500 Euro total. Which will be executed and Mr. A.Podkovyrov will receive his salary. Except the contract mentioned (sic) above, Słupskie Towarzystwo Koszykówki Sportowa S.A. and Mr. A.Podkovyrov does not unite nothing else. In that case starting of any argument by Mr. A.Podkovyrov is made to early (sic) and any of dispute suppose to be settled by a [P]olish law.”

26. On 14 November 2009 the Club submitted another declaration from the Agent, dated 17 November 2009, which reads as follows:

“I [...] declare that I have signed agreement on 28 May 2008 between [the Claimant] and [the Club] in which his monthly remuneration was 6.000 Euro.

After negotiations between Club and [the Claimant] I agree to sign Image Contract for Coach. Later negotiations about Image Contract, terminations of Agreement on 28 May 2008, was just between Club, [the Claimant] and [BCM].”

27. On 17 November 2009 the Claimant objected to the admissibility of the Club’s letter (see *supra* para. 25) because it had been filed late.
28. On 27 November 2009 the Arbitrator issued a procedural order whereby he a) invited the Club to file its comments – especially as regards Claimant’s contention that he did not sign the 28 May 2008 declaration referring to the Second Contract – on Claimant’s submissions dated 30 October 2009, b) informed the Parties that the Club’s submissions filed on 10 November 2009 were accepted on record, in light of the circumstances of the case. The Arbitrator reached this decision taking into account *inter alia* the Club’s right to be heard and the fact that it was not represented by



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counsel in this arbitration.

29. On 7 December 2009 the Club submitted the following reply:

"[P]lease be advised that if the conclusion of the contract accompanying Image Contract, the termination of the contract is the act of the previous mandatory. At the same time note that the attached document was drafted by a party representing [the Claimant] and agent said that he was forced to sign it. [...]"

The "attached document" referred to by the Club in its reply was the Agent's declaration dated ".../10/2009" , submitted by the Claimant on 30 October 2009.

30. On 28 January 2010, considering that neither party had solicited a hearing, the Arbitrator decided in accordance with Article 13.1 of the FAT Rules not to hold a hearing and to deliver the award on the basis of the Parties' written submissions. The Arbitrator accordingly issued a Procedural Order providing that the exchange of documents was completed and inviting the Parties to submit their cost accounts.

31. On 1 February 2010, the Claimant submitted his costs, as follows:

"[...] Expenses -- 12.800,00 EUR including: 3.000,00 EUR non-reimbursable fee, 4.000,00 EUR Claimant's share on costs, 4.000,00 EUR Respondent's share on costs paid by the Claimant, 1.800,00 EUR counsel's fee, and optionally other costs of the arbitration fixed by the arbitrator.

II. Additional costs:

1. costs of documents and statement translations – 675 EUR"

32. The Club did not submit its account of costs.

4. The Positions of the Parties

4.1. The Claimant's Position

33. The Claimant submits the following in substance:



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- The only binding agreement between him and the Club is the First Contract;
- The Second Contract is null and void because a) the Agent did not sign it, contrary to clause 12 of the First Contract, b) there is no proper *causa* for the Second Contract: the Club's purpose was to minimize the tax and social security obligations arising from the First Contract, because it had undertaken to pay net amounts to the Claimant, c) the Second Contract does not mention that the First Contract was set aside, d) the Club was not entitled to terminate the First Contract and substitute it with a new contract;
- The Claimant never signed the declaration dated 28 May 2008 stating that the only valid agreement is the Second Contract. The Claimant's signature that appears on the declaration next to that of the Club's President was "presumably forged or by any other means (e.g. scanned from another document) placed on the document with neither Claimant's knowledge nor consent";
- The Claimant does not claim any amounts from the Image Rights Contract since it is subject to a different law and jurisdiction;
- The Claimant's salary due under the First Contract was "absolutely guaranteed" and the Club had the right to terminate the employment relationship only in case the team would suffer seven defeats in a row. However, on 18 October 2008 the Club was not entitled to terminate their employment relationship, since the Club's team had suffered only two defeats in a row. As a result, the Club must be held liable for the unlawful termination of the First Contract and be ordered to pay the Claimant's entire salary due under the First Contract (EUR 60,420) less the money already paid to the Claimant (EUR 2,075), i.e. a total amount of EUR 58,345.



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34. In his Request for Arbitration dated 14 July 2009, the Claimant requested the following relief which he subsequently corrected on 30 October 2009:

“ - Due salary – 58.345,00

- Interests to the day of payment in the amount of 11,5% (due interests in foreign currency according to Polish law) due since October 19, 2008 (the day after the agreement was unlawfully terminated by the Respondent) to December 14, 2008, and in the amount of 13,5% since 15 December 2008 (the day of fixing new statutory interest rate by the Council of Ministers)

optionally in the amount due since May 2, 2009 (the first day after the day of all contractual payments becoming due)”

4.2. Respondent's Position

35. The Respondent submits the following in substance:

- After signing the First Contract, the Parties signed a series of documents – also with BCM – and a Second Contract with lower salary for the Claimant, which is the only document governing the employment relationship between the Parties;
- The Agent has provided his consent to the signing of the Second Contract. His declaration produced by the Claimant was prepared by Claimant’s counsel and the Agent “said that he was forced to sign it”;
- The Claimant assigned his rights to BCM and the Club made payments to BCM. A payment order to BCM in the amount of EUR 5,500 and dated 10 September 2008 is produced by the Club. Also, a copy of the Club’s bank account shows that the amount of PLN 18,760.50 was transferred to BCM’s account on 1 October 2008;
- The Club paid to the Claimant



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- EUR 500 (PLN 1,725) on 10 September 2008 (receipt produced),
 - EUR 500 (PLN 1,725) on 6 October 2008 (receipt produced), and
 - PLN 1,967 on 19 November 2008 (wire transfer certificate produced).
36. Despite several invitations by the Arbitrator, the Club did not file a request for relief.

5. Jurisdiction

37. Pursuant to Article 2.1 of the FAT Rules, “[t]he seat of the FAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland”. Hence, this FAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).
38. The jurisdiction of the FAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

5.1. Arbitrability

39. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA¹.

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



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5.2. Formal and substantive validity of the arbitration agreement

40. The jurisdiction of the FAT over the dispute results from the arbitration agreement contained in clause 14 *in fine* of both the First and the Second Contract (the “Contracts”), which reads as follows:

“ALL DISPUTES, SHOULD THEY ARISE SHOULD BE UNDER POLISH LAW AND IN THE FIBA ARBITRAL TRIBUNAL (FAT) COURTS”

41. The Contracts are in written form and thus the respective arbitration agreements fulfill the formal requirements of Article 178(1) PILA.
42. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreements under Swiss law (referred to by Article 178(2) PILA).
43. It bears emphasizing that no objection regarding the jurisdiction of the FAT has been raised by the Respondent in its numerous submissions before FAT.

6. Discussion

6.1. Applicable Law

44. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the Arbitrators to decide “*en équité*” instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

“the parties may authorize the arbitral tribunal to decide ex aequo et bono”.



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45. Under the heading "Applicable Law", Article 15.1 of the FAT 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."

46. As mentioned above, clause 14 of the Contracts provides that "ALL DISPUTES, SHOULD THEY ARISE SHOULD BE UNDER POLISH LAW [...]". The Parties have chosen Polish law as the law applicable to their employment relationship. Further, the Arbitrator notes that the Parties also "agreed otherwise" in the sense of Article 15.1 of the FAT Rules by explicitly confirming in their submissions (see Claimant's submissions of 2 October 2009, *supra* para. 21 and Respondent's letter dated 6 November 2009, *supra* para. 25) their preference for Polish law to be applied to this particular dispute.

47. Article 16 of the PILA, the analogical application of which is deemed appropriate by the Arbitrator², reads as follows:

"1 The content of the applicable foreign law shall be determined ex officio. To that end the co-operation of the parties can be requested. In pecuniary matters, the burden of proof can be put on the parties.

2 In the event that it is impossible to determine the content of the applicable foreign law, Swiss law shall apply."

48. As mentioned above (para. 24) the Claimant replied to the Arbitrator's request for information on Polish law and provided the FAT with English translations of the relevant Polish rules, jurisprudence and doctrine. Consequently, the Arbitrator will adjudicate the present matter on the basis of Polish law. The relevant provisions will be referred to

² See also Decision of the Federal Tribunal 4P.242/2004 of 27 April 2005 at 7.3, Bull. ASA 2005, p. 719, 723-724,



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and interpreted, to the extent necessary for the resolution of the dispute, when discussing the merits of this case.

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

6.2. Findings

6.2.1. Undisputed facts

50. The Parties have focused their submissions on the issue of whether the First or the Second Contract applies to this case. The Arbitrator regrets the fact that the Respondent has failed to elaborate on its position, instead choosing to repeatedly file with FAT documents accompanied only by very brief cover notes. Nonetheless, since the Respondent, a professional basketball club, has concentrated its submissions on the issue of the discrepancy in figures between the Contracts, the Arbitrator finds that a series of important factual and legal issues have remained undisputed:

- The Club hired the Coach on 28 May 2008 and the Coach indeed rendered his services until 18 October 2008, when the Club announced to him that their employment relationship was terminated with immediate effect.
- The First Contract and the Second Contract are identical except for the Claimant's salary.
- The Club terminated the employment relationship on 18 October 2008 in violation of the terms of the Contracts. The condition of seven defeats was not met at that time and thus the Club could not make use of clause 9 of the Contracts (see *supra* para. 5). In this respect the Arbitrator notes that, although the words "on the way" do not necessarily mean "in a row" as suggested by the Claimant, there



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is no evidence on record suggesting that the Club's team had suffered seven defeats in total. The Arbitrator also notes that the Club did not make any submissions whatsoever regarding the reasons for termination, nor has it in any way denied the Claimant's contention that the termination was unlawful.

51. Therefore, the Arbitrator finds that the Club was not entitled to terminate the employment relationship "without financial consequences for the Club" (clause 9). The Arbitrator's conclusion rests on the record as it stands and not on the Club's failure to file a full-fledged Answer. Under these circumstances, the Arbitrator does not deem it necessary to call for further evidence.

6.2.2. Consequences of the unlawful termination

52. As a consequence of the Respondent's unilateral termination in breach of the Contracts, Claimant is entitled to damages. Article 471 of the Polish Civil Code reads as follows:

"The debtor shall be obliged to redress the damage resulting from the non-performance or improper performance of the obligation unless the non-performance or improper performance were due to circumstances for which the debtor is not liable".
(English translation provided by the Claimant)

53. In this respect Polish law is not different from the general principles of civil law in most jurisdictions or from the jurisprudence of FAT when deciding *ex aequo et bono*³.

³ See *ex multis* FAT decision 0014/08 dated 16 April 2009 van de Hare, Glushkov, Hammink v. Azovmash Mariupol BC, para. 68.



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54. In addition, Respondent has not denied at any stage of the proceedings its duty to compensate the Claimant by paying the remaining salaries for the 2008-2009 season, pursuant to clause 3 of the Contracts entitled “Guarantee of salary” (see *supra* para. 5). The Club’s only objection refers to the amount of compensation which, in Respondent’s opinion, should be calculated on the basis of the Second Contract rather than the First:

“[...] with Mr. Andriy Podkovyrov Słupskie Towarzystwo Koszykówki Sportowa S.A. was related only by Contract signed on 28.05.2008, in which the payments for [...] Mr. A.Podkovyrov are 4500 Euro total. Which will be executed and Mr. A.Podkovyrov will receive his salary.”
(emphasis added by the Arbitrator)

55. The Arbitrator shall now examine which of the Contracts applies to this case. More specifically, the Arbitrator shall decide whether the compensation that the Club must pay to the Coach shall be calculated on the basis of the First or the Second Contract.
56. The Parties have not disputed that, although the Contracts bear the same date, the Second Contract was signed after the First Contract on 28 May 2008. The Club argues that the Second Contract substituted the First Contract.
57. The Arbitrator notes that the Second Contract does not contain any reference to the First Contract and thus does not expressly amend it or otherwise overrule it. On the other hand, the Parties have agreed in the First Contract that

“... any and all future agreements during the term of [the First Contract] or thereafter between CLUB (or any person or entity affiliated with, related to, or controlled by CLUB) and COACH cannot be executed without an agreement in writing signed by COACH, CLUB and REPRESENTATIVE. Any such agreement without the approval of all three parties shall be null and void.” (see *supra* para. 5 – emphasis added by the Arbitrator)

58. The Arbitrator is of the opinion that, generally, it is not uncommon in the world of sports that a player or coach concluding an agreement in a foreign country incorporates in his contract a term to protect him from future amendments, drafted and signed without the participation, supervision and prior advice of his agent. In this case, the Claimant is invoking the above clause as a defence to the application of the Second Contract



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which stipulates a salary equal to approximately 1/12th of the Claimant's salary due under the First Contract.

59. In this context, the Arbitrator further notes that the Second Contract was signed only by the Club and the Claimant. Polish law allows the parties to a contract to agree on terms upon condition, i.e. that certain legal consequences will come into effect once specific conditions are met⁴. In the present matter the Arbitrator finds that, in application of clause 12 of the First Contract and absent the Agent's signature, the Second Contract did not override or substitute the First Contract, which is still in force. For the same reason the document entitled "Declaration", dated 28 May 2008 and stating that the Second Contract is the only binding agreement, even if it were to be accepted as a document truly signed by the Claimant, is also an agreement between the Parties during the term of the First Contract and without the Agent's co-signature; thus, it cannot amend the First Contract.
60. Furthermore, on the basis of the – contradictory – documents and declarations submitted to him, the Arbitrator is not convinced that the Agent provided his consent to the Second Contract at a later stage. Subsidiarily, the Arbitrator points to the fact that even if the Agent had provided his consent at a later stage, this would be irrelevant for the case at hand, since such approval cannot have retroactive effect⁵.
61. The Arbitrator therefore concludes that the First Contract was applicable when the Club terminated the employment relationship and that the compensation due to the Claimant

⁴ Article 89 of the Polish Civil Code (Section V: Condition) reads: "*Barring the exceptions specified in statutory law or resulting from the character of a given act in law, the commencement or the cessation of the effects of that act in law may be made dependent upon a future and uncertain event (condition)*".(English translation provided by the Claimant).

⁵ Article 90 of the Polish Civil Code reads: "*The fulfilment of a condition shall have no retroactive effect unless stipulated otherwise*" (English translation provided by the Claimant).



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should be calculated on the basis of the salary agreed in the First Contract, i.e. a total amount of EUR 60,420.

62. The Claimant submits that he has received only EUR 2,075 from the Club. The Club does not expressly dispute this amount but has produced three receipts for EUR 500 (PLN 1,725), EUR 500 (PLN 1,725) and PLN 1,967 (without reference to EUR) respectively. Given that the aggregate of the receipts produced by the Club appears to be slightly lower than the amount the Claimant has admittedly received, the Arbitrator will take into account the higher amount, i.e. EUR 2,075.
63. In view of the above and considering the fact that there is no evidence on file suggesting that the Claimant worked for any other basketball team during the 2008-2009 season, the Arbitrator finds that the Club owes the amount of EUR 58,345 (EUR 60,420 – EUR 2,075) to the Claimant.
64. For the sake of completeness, the Arbitrator notes that the two payments made by the Club to BCM in execution of the Image Right Contract are not relevant to the case at hand since they refer to a different legal relationship governed by a contract obviously independent from the First Contract.

7. Interest

65. In the Request for Arbitration, the Claimant requests interests of 11,5% per annum on the amount claimed for the period between 19 October and 14 December 2008 and interests of 13,5% per annum since 15 December 2008. The Claimant submits that the interest rate in Poland changed on 15 December 2008 through a decision of the Polish



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Council of Ministers⁶.

66. Payment of interests is a customary and necessary compensation for late payment and there is no reason why Claimant should not be awarded interests. The Respondent has not denied this request either.
67. The Claimant's claim for damages arose out of the unlawful termination of the First Contract by the Respondent, i.e. on 18 October 2008. As of that date the Respondent was under the obligation of payment. In view of the general provisions of Article 481 of the Polish Civil Code⁷, the Arbitrator decides that interest shall accrue from the day following the breach of the contract, i.e. from 19 October 2008.
68. The interest rate according to the uncontested submissions by the Claimant is 11,5% per annum and – due to a change in Polish legislation – 13,5% per annum as of 15 December 2008.

8. Costs

69. Article 19 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT 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.

⁶ Article 359 para.3 of the Polish Civil Code reads: "*The statutory interest rate shall be fixed by a regulation of the Council of Ministers*" (English translation provided by the Claimant).

⁷ Article 481 paras.1 and 2 of the Polish Civil Code read: "*§1. If the debtor delays in making the performance in money the creditor may demand interest for the time of the delay even if he suffered no damage whatever and if the delay was a result of circumstances for which the debtor is not liable. §2. If the rate of*



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70. On 15 March 2010 – considering that pursuant to Article 19.2 of the FAT Rules “*the FAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of FAT and the fees and costs of the FAT President and the Arbitrator*”, and that “*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the FAT President from time to time*”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the FAT President determined the arbitration costs in the present matter to be EUR 7,650.00.
71. Considering the Claimant prevailed entirely in his claim, the fees and costs of the arbitration shall be borne by the Club and the latter shall be required to cover the Claimant’s legal fees and other expenses, those having been submitted being reasonable in amount.
72. Given that the Claimant paid the totality of the advance on costs of EUR 8,000.00 as well as a non-reimbursable handling fee of EUR 3,000.00, the Arbitrator decides that in application of article 19.3 of the FAT Rules:
- (i) FAT shall reimburse EUR 350.00 to the Claimant, being the difference between the costs advanced by him and the arbitration costs fixed by the FAT President;
 - (ii) The Club shall pay EUR 7,650.00 to the Claimant, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the FAT;

Furthermore, the Arbitrator considers it appropriate to take into account the non-

the interest for the delay was not fixed in advance, the statutory interest shall be due. [...] (English translation provided by the Claimant).



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reimbursable fee of EUR 3,000.00 when assessing the expenses incurred by the Claimant in connection with these proceedings. Hence, and after having reviewed and assessed the submission by the Claimant, which the Arbitrator finds reasonable, he fixes the contribution towards the Claimant's expenses at EUR 5,475.00 (3,000 + 1,800 + 675).



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9. AWARD

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

1. Słupskie Towarzystwo Koszykówki Sportowa Spółka Akcyjna shall pay Mr. Andriy Podkovyrov an amount of EUR 58,345.00, plus interest on such amount at a rate of
 - (a) 11,5% per annum from 19 October 2008 until 14 December 2008;
 - (b) 13,5% per annum from 15 December 2008 until payment.
2. Słupskie Towarzystwo Koszykówki Sportowa Spółka Akcyjna shall pay Mr. Andriy Podkovyrov an amount of EUR 7,650.00 as reimbursement for the advance on costs paid by him to the FAT.
3. Słupskie Towarzystwo Koszykówki Sportowa Spółka Akcyjna shall pay Mr. Andriy Podkovyrov an amount of EUR 5,475.00 as reimbursement for his legal fees and expenses.
4. Any other or further requests for relief are dismissed.

Geneva, seat of the arbitration, 15 March 2010

Ulrich Haas
(Arbitrator)



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Notice about Appeals Procedure

cf. Article 17 of the FAT Rules

which reads as follows:

"17. Appeal

Awards of the FAT can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland and any such appeal must be lodged with CAS within 21 days from the communication of the award. The CAS shall decide the appeal *ex aequo et bono* and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure."