BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 1455/19)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Brianna Quinn

in the arbitration proceedings between

Mr. Michael Humphrey

- First Claimant -

Mr. Eric Fleisher

- Second Claimant -

both represented by Mr. Juan de Dios Crespo Pérez and
Mr. Alessandro Mosca, attorneys at law

vs.

Grono Sportowa Spolka Akcyjna

- Respondent -

represented by Mr. Kosma Zatorski, General Manager

1. The Parties

1.1 The First Claimant

1. Mr. Michael Humphrey (“the First Claimant” or “the Player”) is an American professional basketball player, who was under contract with the basketball club Grono Sportowa Spolka Akcyjna in the 2018-19 and 2019-20 basketball seasons.

1.2 The Second Claimant

Mr. Eric Fleisher (“the Second Claimant” or “the Agent”) is a basketball agent with FIBA License number 2010022679, who represented the Player in relation to the abovementioned contract with Grono Sportowa Spolka Akcyjna.

1.3 The Respondent

2. Grono Sportowa Spolka Akcyjna (“the Club”) is a basketball club competing in the Polish professional basketball league.

2. The Arbitrator

3. On 29 November 2019, Prof. Dr. Ulrich Haas, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Ms. Brianna Quinn as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force as at 1 January 2017 (hereinafter the "BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of impartiality and independence.

3. Facts and Proceedings

4. The relevant facts and allegations presented in the Parties' written submissions and evidence are summarised below. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows.

5. Although the Arbitrator has considered all the facts, allegations and evidence submitted by the Parties in the present proceedings, she refers in this Award only to those necessary to explain its reasoning.

3.1 Summary of the Dispute

3.1.1 The Agreement

6. On 27 February 2019, the Claimants entered into an agreement with the Club whereby the First Claimant was engaged as a basketball player for: (i) the remainder of the 2018-19 basketball season; and (ii) the entire 2019-20 basketball season (hereinafter the "Agreement").

7. Article 3 of the Agreement governed the "Term and Validity" and, relevantly to this arbitration, provided that the Club could terminate the Agreement after the conclusion of the 2018-19 basketball season by: (i) serving a written notice to the Agent's email on or before 30 June 2019; and (ii) paying a "buyout amount" of USD 10,000.00.

8. As far as the remuneration owed to the First Claimant was concerned, Article 4 of the Agreement provided as follows:

> "*The Club shall pay towards the Player a total salary of 36 000,00 USD (thirty six thousand dollars) Net for the 2018-19 basketball season under the conditions set out below:* […]
>
> *Provided that the Agreement is still in force during the 2019-20 basketball season, the Club shall pay towards the Player a total salary of 140 000,00 USD (one hundred forty thousand dollars) Net for the 2019-20 basketball season under the conditions set out below* […]."

9. The "conditions" referred to in Article 4 were, in summary, that the Player was to receive:

   (i) USD 700.00 per month under an Employment or Job Order Contract (hereinafter referred to as "Salary Instalment(s)") during both seasons; and

   (ii) USD 8,300.00 (for the 2018-19 season) and USD 13,300.00 (for the 2019-20 season) per month paid to the Player's Image Company (plus 6% tax towards the Image Company) (hereinafter referred to as "Image Rights Instalment(s)").

10. Article 11 of the Agreement, entitled "Liability. Late payments." read in its relevant part as follows:

> "*1. In case any and all payments described in Article 4 are made later than 14 (fourteen) days after the scheduled payment dates noted, the interests will be imposed at the rate 10% per annum. In the event that, despite filing a written payment demand to the Club by the Player or his Agent, any of the scheduled payments are not made by Club within 30 (thirty) days of the scheduled payment dates, Player shall not be required to perform in any practice sessions, games, or any Club activity whatsoever, until all scheduled payments and appropriate interest penalties have been paid.*
>
> *2. In addition, in case of any scheduled payment is not being made to the Player by the Club within thirty (30) days of the scheduled payment date, Player will have the right to initiate resolution of this Agreement by serving a written notice to Club. In case of the scheduled payment is not being made within the next seven (7) days after such a written notice is received by Club, Player will have right to terminate this Agreement and to be paid by Club his full salary for the season-in-progress by acceleration and shall have no further obligations to the Club. Upon presentation of Player's notice, Club agrees here-in to grant to Player his release and make him an unrestricted free-agent worldwide. All legal fees and BAT fees payable by Player and/or Agent in the enforcement of this Agreement and collection of monies due Player and/or Agent shall be payable by Club. Club agrees that there shall be no off-set or mitigation of Player's salary and/or bonuses or Agent's fee in the event Club shall breach this Agreement.*"

11. Finally, Article 16 governed the relevant payments to the Second Claimant as follows:

> "*1. The Club agrees to pay the agency fee to the Agents in the total amount of 3 600,00 USD (three thousand six hundred dollars) for the 2018-19 basketball season.* […]
>
> *2. If the agreement is in full force for the 2019-20 basketball season, the Club agrees to pay a full amount of 14 000,00 USD (fourteen thousand dollars) for the 2019-20 season to the Agents* […].

> *4. In case of any and all payments described in Article 16, paragraph 1 are made later than 14 (fourteen) days after the scheduled payment dates noted, the interests will be imposed at the rate 10% per annum.* […]"

3.1.2 Outstanding payments and termination

12. It is undisputed that the Player performed his duties under the Agreement throughout the 2018-19 season and that the Club paid only (and late) the first of the Image Rights Instalments for that season. It is further undisputed that the Club did not pay: (i) any further Image Rights Instalments; (ii) any of the Salary Instalments; or (iii) the Agent Fee, that were due in the 2018-19 season.

13. On 9 May 2019, the Agent sent a "Written Notice of [sic] in Advance of Termination" which stated as follows:

> "*According to Article 11.2 of the February 17, 2019 Agreement* […] *this letter shall provide written notice of Michael Humphrey's right to terminate his agreement with your club in the event he doesn't receive his past due salary and image payments indicated below within 7 days of this notice*".

14. This letter referred specifically to the Salary Instalment due on 15 April 2019 and the Image Rights Instalment due on 31 March 2019.

15. On 16 May 2019, the Club paid the first Image Rights Instalment.

16. On 29 June 2019, the Club wrote to the Player noting that *"*[o]*n June 30, 2019, we must decide on* [the Player's] *contract*". The Club stated that it would like to "*keep*" the Player, but on "*new financial conditions*", specifically, a reduced salary of USD 100,000.00 for the 2019-20 season. The Club further suggested a "*payment schedule for the 2018-19 season*" and requested confirmation that the above payment terms were acceptable.

17. On the same day, the Agent responded as follows:

> "[…] [the Player's Agreement] *shall remain in full force and effect and that your settlement proposal dated June 29, 2019 is* ***not accepted****. Therefore, in the event that you elect to*

> *terminate* [the Agreement] *pursuant to paragraph 4* […] *you are required to provide written notice to me no later than tomorrow and to transfer a buyout amount of $10,000* […] *within 3 days of your written notice. As you are well aware, these buyout amounts are in addition to the past due salary payments currently owed to* [the Player] *covering the 2018-2019 season. Below please find the bank account information of Michael Humphrey* […]
>
> *In addition, payment of my agent fees* […] *were due on April 15, 2019 in the amount of $3,600* […]. *To date, they remain unpaid by your club and must be paid in full at this time.* […]"

18. The Respondent has filed in this arbitration an "Amendment" (dated 30 June 2019) to the Player's Agreement, according to which the Player's salary would be reduced to USD 110,000.00 for the 2019-20 season and the amounts outstanding for the 2018-19 season would be paid in instalments. As far as the "Amendment" is concerned: (i) the precise facts surrounding such document (and in particular from which party it originated) are disputed; however (ii) it is undisputed that this document was never signed.

19. Following these exchanges of correspondence: (i) the Club did not make any further payments to the Player for the 2018-19 season; (ii) the Club did not send any formal notice that it intended to terminate the Agreement nor did it pay the "buyout" amount in accordance with Article 3.4 of the Agreement; and (iii) the Player did not send any further formal requests for payment of the relevant outstanding Salary and Image Rights Instalments.

20. On 30 July 2019, the Agent sent an email to the Club concerning the Agent Fee as follows:

> "*We have made numerous written and verbal demands for payment of our agent fees for* [the Player]. *Nonetheless, they remain unpaid at this time. Therefore, please be advised that this is a FINAL DEMAND for payment of our fees* […]."

21. On 1 August 2019, the Player sent a termination letter to the Club as follows:

> "*This letter is written confirmation of my termination of our Agreement dated February 27, 2019 pursuant to Articles 11 and 13 of said Agreement. On May 9, 2019 my agent sent you written notice of my right to terminate our agreement in the event I didn't receive my past due salary and image payment within 7 days of the notice. Not only did I not receive these payments in full but I also have never received my June 2019 and July 2019 League*

payments and April, May and June 2019 Image payments.

*Accordingly, pursuant to Article 11.2 '**Upon presentation of Player's notice Club agrees to here-in grant to Player his release and make him an unrestricted free-agent worldwide. All legal fees and BAT fees payable by Player and/or Agent shall be payable by Club. Club agrees there shall be no off-set or mitigation of Player's salary and/or bonuses or Agent's fee in the event Club shall breach this Agreement.'*** "

22. On 3 August 2019, the Player entered into an agreement with the basketball club Slask Wroclaw for the 2019-20 season. According to this agreement, the Player was to receive a total salary of USD 80,000.00 net for the season, and the Agent was to receive a USD 8,000.00 fee.

23. On 8 August 2019, the Club responded to the Player's termination letter as follows:

> "[…] *we kindly inform you that, in accordance with the provisions of the* [Agreement, the Player's contract is] *still valid.*
>
> *We are surprised by the official information that the* [Player has] *concluded contracts in other clubs. We kindly ask you to explain why* [the Player has] *signed new contracts during the term of the* [Agreement]*.*
>
> *We hereby declare that we are willing to talk about the termination of the contracts and repayment of all amounts due to the Agent and the Players.*"

24. On 14 August 2019, the Agent responded to the Club's letter suggesting, with reference to his letter of 9 May 2019, that the Agreement had been "legally terminated". The Agent further stated that it was only after the termination letter of 1 August 2019 was sent that the Player "[went] *ahead and legally sign*[ed]" with another club.

25. On 25 October 2019, the Club wrote to the Agent as follows:

> "*After a careful review of your proposal I'd like you* [sic] *to update you on the current situation and inform that the Club will receive the bigger money in a litter more than 8-10 weeks from now* […].
>
> *Based on the current recovery plan implemented by the Club we would definitely like to close this matter avoiding the BAT.* […]
>
> *Being 100% straight with you, we will not be able to match your suggested dates. Thankfully, though, both guys have their new jobs and they get their money from the current season. So, after a clear look into our financial situation, we will be able to resolve all three*

cases within the following dates: […]"

26. Relevantly to these proceedings, the Club proposed to pay:

    (i) to the Agent: USD 7,200.00 for the 2018-19 season and two instalments of USD 14,000.00 each for the 2019-20 season (such amounts apparently relating to both the Player and another player);

    (ii) to the Player: a total of USD 97,800.00 in instalments by June 2020.

27. It is undisputed that this settlement offer was not accepted by the Claimants.

28. On 12 March 2020, due to the decision of the management of the Polish basketball league to suspend the Polish competition (as a result of the coronavirus pandemic), the Player and his new club Slask Wroclaw agreed to an amendment of his contract according to which the club released the Player from his contractual obligations and "*declare*[d] *the payment of all liabilities due to the Player and Agents resulting from the signed contract and arising up to 15 March 2020*".

3.2 The Proceedings before the BAT

29. On 18 November 2019, the Claimants filed a Request for Arbitration in accordance with the BAT Rules and paid the non-reimbursable handling fee in the amount of EUR 2,990.00.

30. On 29 November 2019, the BAT informed the Parties that Ms. Brianna Quinn had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

"*Claimant 1 (Mr. Michael Humphrey)*	*€ 4,505.00*
Claimant 2 (Mr. Eric Fleisher)	*€ 1,005.00*
Respondent (Grono Sportowa Spolka Akcyjna)	*€5,500.00*"

31. On 16 and 18 October 2019, following an extension of the time limit granted by the Arbitrator, the Claimants paid their respective shares of the advance on costs (save for an amount of EUR 15.00 for the First Claimant and EUR 5.00 for the Second Claimant which remained outstanding at the date of this Award).

32. On 23 December 2019, the BAT informed the Parties that the Respondent had failed to pay its share of the advance on costs and invited the Claimants to substitute for the Respondent's share by 10 January 2020. In the same letter, the Respondent was granted a final opportunity to file an Answer by no later than 7 January 2020.

33. On 7 January 2020, the Respondent filed its Answer, including a request for disclosure of any agreements entered into by the Player with a new club for the 2019-20 season.

34. On 10 January 2020, the Claimants paid the Respondent's share of the advance on costs (however, due to a clerical mistake the payment was not ultimately received until 31 January 2020).

35. On 17 March 2020, the Arbitrator issued a Procedural Order inviting the Claimants to file a Reply to the Respondent's Answer, as well as information on – and documents supporting – whether the First Claimant had ultimately been contracted to another basketball club in the 2019-2020 season.

36. On 31 March 2020, the Claimants filed their Reply to the Respondent's Answer.

37. On 5 May 2020, the Arbitrator issued a Procedural Order inviting the Respondent to file a Rejoinder to the Claimants' Reply.

38. On 12 May 2020, the Claimants filed an executed copy of an exhibit (namely, the amendment to the agreement with the First Claimant's new club Slask Wroclaw) that had been filed with the Reply of 31 March 2020.

39. On 19 May 2020, the Respondent filed its Rejoinder to the Claimants' Reply.

40. On 23 June 2020, considering that neither party had requested a hearing, the Arbitrator decided in accordance with Article 13 of the BAT Rules not to hold a hearing and to render the award on the basis of the Parties' written submissions. The Parties were therefore notified that the exchange of submissions was completed in accordance with Article 12.1 of the BAT Rules. The Parties were further invited to set out how much of the applicable maximum contribution to costs should be awarded to them and why, and to include a detailed account of their costs, including any supporting documentation in relation thereto.

41. On 30 June 2020, the Claimants filed their costs submission. The Respondent did not submit an account of costs.

4. The Positions of the Parties

42. The following section of the Award does not contain an exhaustive list of the Parties' contentions, its aim being to summarise the Parties' main arguments.

43. In considering and deciding upon the Parties' claims, the Arbitrator has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award or in the findings below.

4.1 The First Claimant's Position: Principal Amounts

44. The First Claimant submits the following, in substance, as far as the principal amounts claimed in this arbitration are concerned:

4.1.1 Outstanding payments in the 2018-19 season

45. The First Claimant submits that he fulfilled his duties and honoured his contractual obligations during the 2018-19 season and that, despite this, the Club failed to pay: (i) the Salary Instalments due on 15 April, 15 May, 15 June and 15 July 2019 (a total amount of USD 2,800.00 net); and (ii) the Image Rights Instalments due on 31 March, 30 April, 31 May and 30 June 2019 (a total amount of USD 26,394.00 – which includes the 6% fee payable to the Image Rights Company). As far as the Salary Instalments are concerned, the First Claimant suggests these "shall be considered NET, meaning that the Club shall bear and pay all taxes (including social security duties)".

46. As part of the total amount of his principal claims, and on the basis of Article 11.1 of the Agreement, the First Claimant has factored in penalty interest at a rate of 10%, from 15 days after each scheduled payment was due until the date of termination of the Agreement (i.e. 1 August 2019). The First Claimant calculates the total amount of such interest to be USD 378.72.

47. Relying on the principle of *pacta sunt servanda,* the First Claimant therefore seeks payment in the amount of USD 29,572.72 (USD 2,800 being payable as a net amount) in relation to the 2018-19 season.

4.1.2 Termination of the Agreement

48. The First Claimant submits that he validly terminated the Agreement on 1 August 2019, in accordance with Article 11 of same, by: (i) sending the Club notice on 9 May 2019 of the (at that time) outstanding Salary and Image Rights Instalments (the latter of which was subsequently paid but the former not); (ii) granting the Club 7 days' notice to make the relevant payments; and (iii) ultimately waiting 84 days before finally terminating the Agreement.

49. The First Claimant further suggests that, despite being able to terminate the Agreement at his "earliest convenience (i.e. on 17 May 2019)" he duly concluded the 2018-19 sporting season and was willing to honour the Agreement by continuing to play for the Club in the 2019-20 season. However, considering that one month after the start of the 2019-20 season the Club had still not paid 3 out of 4 Image Rights Payments, all of the Salary Payments, and the Agent's Fee from the 2018-19 season, the First Claimant had no choice but to terminate the Agreement and find a new club to continue his professional career.

50. Finally, the First Claimant submits that: (i) he again "requested" the payment of the outstanding amounts on 29 June 2019 (i.e. when he reminded the Club of the outstanding amounts together with his rejection of the Club's new contract proposal); and (ii) the Club did not finally abide by the "payment schedule" it had proposed (together with its suggested amendments to the Agreement) on 29 June 2019.

51. On that basis, the First Claimant submits that the termination of the Agreement was made for just cause and in accordance with the relevant contractual provisions.

4.1.3 Compensation for the 2019-20 season and mitigation

52. Insofar as the 2019-20 season is concerned, the First Claimant relies on the express terms of Articles 3.4, 4 and 11.2 of the Agreement to seek: (i) acceleration of all future payments until the end of the Agreement (i.e. all salary instalments due for the 2019-20 season); and (ii) a finding that such amounts should not be subject to any mitigation or offset.

53. Specifically, the First Claimant argues that because the Respondent failed to terminate (and buy out) the Agreement by 30 June 2019 in accordance with its Article 3.4, the Agreement entered into force also for the 2019-20 season (which, according to the First

Claimant, commenced on 1 July 2019).

54. On that basis, the First Claimant suggests that the Agreement was "still in force during the 2019-20 basketball season", i.e. as required by Article 4 of the Agreement in order to receive payment of the relevant Salary and Image Rights Instalments for that season.

55. As a result, and in view of his subsequent and justified termination of the Agreement, the First Claimant:

    (i) submits that Article 11.2 of the Agreement applied such that he had the "*right to terminate* [the] *Agreement and to be paid by Club his full salary for the season-in-progress by acceleration*";

    (ii) submits the season in progress was the 2019-20 season; and, therefore

    (iii) claims the amount of USD 147,980.00 (comprised of USD 7,000.00 net in Salary Payments and USD 133,000.00 + 6% in Image Rights Payments).

56. Additionally, with reference to Article 11 of the Agreement, as well as BAT 0421/13, the First Claimant suggests that no deduction shall be made from the above amounts and that he did not have to comply with the duty to mitigate his damages.

4.2 The First Claimant's request for tax certificates

57. Insofar as the amounts claimed by the First Claimant are salary payments (i.e. USD 2,800.00 for the 2018-19 season and USD 7,000.00 for the 2019-20 season) and are expressed in the Agreement as "net" amounts, the First Claimant suggests that this means that "the Club shall bear and pay all taxes (including social security details)".

58. The First Claimant therefore submits that the Respondent shall provide the relevant tax certificates in order to allow the Player to receive a net benefit as per the terms of the

Agreement.

4.3 The Second Claimant's Position: Principal Amounts

4.3.1 Outstanding payments in the 2018-19 season

59. As far as the 2018-19 season is concerned, the Second Claimant relies on Article 16 of the Agreement to claim the Agent Fee in the amount of USD 3,600.00, which was expressly provided for by the Agreement and – undisputedly – not paid by the Respondent.

60. As part of the total amount of this claim, and on the basis of Article 16.4 of the Agreement, the Second Claimant has factored in penalty interest at a rate of 10%, from 15 days after the scheduled payment was due until the date of termination of the Agreement (i.e. 1 August 2019). The Second Claimant calculates the total amount of such interest to be USD 91.73.

61. Relying on the principle of *pacta sunt servanda,* the Second Claimant therefore seeks payment in the amount of USD 3,691.73 in relation to the 2018-19 season.

4.3.2 Termination, compensation for the 2019-20 season and mitigation

62. As far as the 2019-20 season is concerned, the Second Claimant relies on Article 16.2 of the Agreement to suggest that he was entitled to payment of the amount of USD 14,000.00.

63. More specifically, the Second Claimant submits that: (i) Article 16.2 of the Agreement provided for such payment so long as the Agreement "[was] *in full force for the 2019-20*

basketball season"; (ii) the Agreement entered into force for such season because the Club did not exercise its right to terminate the Agreement after the 2018-19 season; and (iii) the Agent was financially prejudiced by the termination of the Agreement due to the Club's non-payment of this amount.

64. In terms of the quantum of compensation sought, the Second Claimant submits that this should put him in the same situation he would have enjoyed had the Agreement remained in force in the 2019-20 season. Moreover, the Second Claimant submits – as with the First Claimant – that pursuant to Article 11 of the Agreement and BAT 0421/13, no deduction shall be made from this amount and he did not have to comply with the duty to mitigate his damages.

4.4 The Claimants' respective requests for interest

65. Finally, both Claimants submit that, in accordance with well-established BAT jurisprudence, they are entitled to interest at a rate of 5% per annum on the amounts sought in this arbitration.

66. The Claimants request such interest from 1 August 2019, suggesting that (in view of the penalty interest already factored into their principal claims for the 2018-19 season and in accordance with BAT jurisprudence – for example BAT 0404/13) they are not entitled to double recovery and therefore interest should accrue only from the date of termination of the Agreement.

67. The Claimants request, for both seasons, interest on the principal amount of the debt due without penalty interest applied (i.e. with respect to the 2018-19 season the amount of USD 29,194.00 for the First Claimant and USD 3,600.00 for the Second Claimant).

4.5 The additional arguments put forward in the Claimants' Reply

68. In addition to the above, the Claimants submitted the following in the course of their Reply to the Respondent's Answer: (i) the Club's involvement in other BAT proceedings demonstrates that it systematically fails to comply with its financial obligations; (ii) the Club concealed its – ongoing – financial difficulties from the Claimants and, in any event, such financial difficulties cannot excuse the Club's non-performance of its obligations; (iii) the Club's behaviour (in particular breaching the Agreement and then insisting it was still valid) must be taken into account – together with the highly specific contractual arrangements – such that no mitigation of the amounts sought in this arbitration should be ordered; (iv) the Club agreed to a "financial guarantee" in favour of the Claimants if it failed to fulfil its financial obligations; (v) there are no mitigating circumstances which would warrant a reduction in the compensation payable to the Claimants (to the contrary there are aggravating circumstances in terms of the Club's behaviour); (vi) the fact that the Player's new contract was mutually terminated, as well as the fact that the Respondent won the Polish league in 2019-20 (which would have entitled the Player to a USD 10,000.00 bonus), should be taken into account in determining the appropriate compensation payable; and (vii) in the event the Arbitrator deems it appropriate to reduce the amount of compensation requested by the Claimants, this shall not be lower than the debts allegedly acknowledged by the Respondent in its correspondence of 15 October 2019.

4.6 The Claimants' Requests for Relief

69. In their Request for Arbitration dated 18 November 2019, the Claimants requested the following relief:

> *"The Claimants request that the BAT issues a decision as follows:*
>
> ***a.*** *To accept this claim;*
>
> ***b.*** *That the Arbitrator decides as follows:*
>
> *i.* *Grono Sportowa Spolka Akcyjna is ordered to pay Mr. Michael Humphrey* ***USD 29,572.72*** *as compensation for 2018-2019 unpaid salary, image payments and relevant penalty, together with interest of 5% p.a. since 1 August 2019 on the amount of USD 29,194.00 until its effective and entire payment;*
>
> *ii.* *Grono Sportowa Spolka Akcyjna is ordered to pay Mr. Michael Humphrey* ***USD 147,980.00*** *as compensation for unpaid 2019-2020 salary and image payments by acceleration, together with interest of 5% p.a. since 1 August 2019 until its effective and entire payment;*
>
> *iii.* *Grono Sportowa Spolka Akcyjna is ordered to provide Mr. Michael Humphrey with the* ***tax certificates*** *related to the salary of the 2018-2019 (being USD 2,800) and 2019-2020 sporting seasons (being USD 7,000).*
>
> *iv.* *Grono Sportowa Spolka Akcyjna is ordered to pay Mr. Eric Fleisher* ***USD 3,691.73*** *as compensation for 2018-2019 unpaid fees and relevant penalty, together with interest of 5% p.a. since 1 August 2019 on the amount of USD 3,600.00 until its effective and entire payment;*
>
> *v.* *Grono Sportowa Spolka Akcyjna is ordered to pay Mr. Eric Fleisher* ***USD 14,000.00*** *as compensation related to the 2019-2020 Agent's fee, together with interest of 5% p.a. since 1 August 2019 until its effective and entire payment;*
>
> ***c.*** *Further to article 17.3 of the BAT Arbitration Rules that the Respondent bear the entirety of the costs of this arbitration;*
>
> ***d.*** *Further to article 17.4 of the BAT Arbitration Rules that the Respondent pays the legal fees of the Claimant with respect to this procedure in the amount of EUR 10,000.00;"*

70. The Claimants repeated these same prayers for relief in their Reply of 31 March 2020.

4.7 The Respondent's Position

4.7.1 Outstanding payments in the 2018-19 season

71. As far as the First Claimant is concerned, the Respondent expressly acknowledges its obligation to pay the amount of USD 29,572.72 for the 2018-19 season.

72. As far as the Second Claimant is concerned, the Respondent expressly confirmed in its Answer its obligation to pay the amount of USD 3,600.00 as an overdue agent's fee for the 2018-19 season. The Respondent did not, however, address the amount of USD 91.73 in penalty interest incorporated into the principal amounts sought by the Second Claimant.

4.7.2 Termination of the Agreement

73. The Respondent does not object to the validity of the termination of the Agreement in and of itself, but rather focuses on whether the Claimants have any right to compensation for the 2019-20 season.

4.7.3 Compensation for the 2019-20 season

74. As far as the 2019-20 season is concerned, the Respondent submits that the Claimants' request for compensation is legally unfounded.

75. Specifically, the Respondent first argues that the fact that the Parties signed a fixed term agreement does not automatically mean that there was a "guaranteed contract" in effect.

76. The Respondent then submits that the term "season-in-progress" in the Agreement

should be defined by reference to a "practical understanding". According to the Respondent such practice is that the basketball season – irrespective of formal definitions – starts when players arrive at the club to start training and preparing for the new season. Considering that the First Claimant provided no services to the Club in the 2019-20 season, and in fact started that season for another club, it should be concluded that at the time of the termination of the Agreement the 2019-20 season had not yet begun. On that basis, the Respondent suggests that the conditions specified in the Agreement (according to which the First Claimant is entitled to acceleration of his salary payments) are not met, and the First Claimant is not entitled to any compensation in relation to the 2019-20 season.

77. The Respondent further suggests that, from an *ex aequo et bono* perspective, it cannot be considered "fair and just" for the First Claimant to receive compensation for the 2019-20 season considering that he was playing in another club and provided no services (nor image rights) to the Respondent. The Respondent argues in this respect that the Claimants have not precisely indicated the subject matter for their claims, i.e. whether the amounts requested should be considered as remuneration for services, a contractual penalty or compensation for damages.

78. Developing on this last argument, the Respondent first submits that the claim cannot be considered remuneration for services, as no such services were provided.

79. Accordingly, the Respondent submits that the claim could be considered as a contractual penalty, in which case the Arbitrator can and should reduce it on the grounds that it is excessive. The Respondent requests the Arbitrator to take into account in this respect: (i) the nature and duration of the Agreement as well as the Player's new contract; (ii) the fact that the amounts claimed are significantly higher than the main claim for the 2018-19 season; (iii) the degree of fault and of the contractual violation; (iv) the economic situation of the Respondent; (v) the lack of additional damage suffered by the Claimant; and (vi) the lack of reciprocity if the penalty would be awarded in the full agreed amount.

80. Additionally, the Respondent submits that, if not considered a contractual penalty, the claim could be considered as a claim for compensation for damages – in which case, and considering the Player was employed by another Club in the 2019-20 season, the Claimants have not proven any damage.

81. In both its Answer and its Rejoinder, the Respondent relied on the particular facts of the case to justify its position, in particular that: (i) on 29 June 2019 the Parties had discussed a possible amendment of the Agreement for the following season; (ii) the First Claimant could have terminated earlier but instead negotiated contracts with other clubs despite the existence of the Agreement; and (iii) the Player joined a new club only days after termination and received a Letter of Clearance to do so.

82. Generally, the Respondent: (i) protested the Claimant's suggestion that it did not respect its contractual arrangements (noting that it had never been sanctioned by FIBA for failure to respect a BAT award); and (ii) confirmed that it did not contest the Claimants' request for payments for the 2018-19 season and had referred to its financial difficulties solely to explain why these had not been paid on time.

83. As far as the quantum of any possible compensation is concerned, and following receipt of the relevant agreements with the Player's new club, the Respondent submitted that any award in relation to the 2018-19 season must be limited to the difference between the salary agreed with the Player's new club and what he would have received with the Respondent. In addition, the Respondent argued that the early termination of that new contract could not be taken into account as it was not related to any action of the Respondent.

4.7.4 Tax certificates and interest

84. The Respondent did not address the First Claimant's submissions with respect to the

"net" nature of the salary instalments or his entitlement to tax certificates.

85. As far as interest is concerned, the Respondent did not address the Claimants' position in substance, however included a request in its prayers for relief that the Arbitrator dismiss the part of the Claimants' claim which relates to the payment of the interest.

4.8 The Respondent's Requests for Relief

86. In its Answer dated 7 January 2020, the Respondent requested the following relief:

> "*Taking into account all arguments pointed out above the Respondent hereby request the Arbitrator:*
>
> - *To dismiss this part of the claim which relates to the payment of 147,980.00 USD to the Player*
> - *To dismiss this part of the claim which relates to the payment of the interest*
> - *To dismiss this part of the claim which relates to the payment of 14,000.00 USD for the agents fee for the season 2019/2020*
> - *To decide that each party covers its own legal costs*".

87. In its Rejoinder of 20 May 2020, the Respondent requested the following:

> "*In view of the above-mentioned arguments, the Respondent reiterates its request to dismiss the claim in that part which concerns the payment of compensation for unreceived salary for the 2019/2020 season. Simultaneously, considering that the uncontested amounts represent a small part of the total amount of the claim, the Respondent reiterates its request that each of the parties should bear the costs of the BAT proceedings, which it has borne itself.*"

5. The Jurisdiction of the BAT

88. Pursuant to Article 2.1 of the BAT Rules, "[t]*he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland*". Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law

("PILA").

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

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

91. The jurisdiction of the BAT in the present case results from the arbitration clause contained under Article 15 of the Agreement, which reads as follows:

> *"Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved, in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono".*

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

93. With respect to substantive validity, there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).

94. Moreover, the Club actively participated in the arbitration and did not challenge the jurisdiction of BAT.

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

95. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimants' claims.

6. Applicable Law

96. 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 authorise the Arbitrator 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".*

97. Under the heading "Law Applicable to the Merits", 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".*

98. The Agreement expressly provides that the Arbitrator shall decide the dispute *ex aequo et bono*.

99. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to her in this proceeding.

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

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[2] That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

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

Swiss courts have held that arbitration "en équité" is fundamentally different from arbitration "en droit":

> *"When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules".*[4]

101. 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".

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

7. Findings

103. It is undisputed in the present arbitration that the Respondent owes certain amounts to the Claimants in relation to the 2018-19 basketball season. What is in dispute is whether the Claimants are properly entitled to accelerate and claim the entirety of the amounts provided for under the Agreement in relation to the 2019-20 season.

104. The Arbitrator addresses each of these issues below, as well as the First Claimant's requests for tax certificates and the Claimants' respective requests for interest.

7.1 The First Claimant: outstanding payments in the 2018-19 season

105. As noted, the First Claimant has requested payment in the amount of USD 29,572.72 for unpaid Salary and Image Rights Instalments in the 2018-19 season. Such amount includes the principal amounts due under the Agreement, as well as both: (i) pre-

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

termination penalty interest at a rate of 10%; and (ii) an amount of 6% tax payable to the Player's Image Rights Company.

106. As also noted, it is undisputed by the Respondent that the First Claimant is entitled to this payment in the amount of USD 29,572.72.

107. As far as the Salary Instalments are concerned (i.e. the amount of USD 2,800), the First Claimant argues that these should be considered as "net" amounts as per the terms of the Agreement. Considering that the Agreement expressly refers to the salary payments being net amounts, and that the Respondent has not disputed this, the Arbitrator accepts that the Salary Instalments of USD 2,800 shall be considered net.

108. Moreover, the Arbitrator notes that Article 4 of the Agreement expressly states that the Club was "not responsible for payment of any taxes of the Player's image rights salary nor bonuses towards the tax authorities respective to the Player's place of residence and/or center of his main life interests". As with the arbitrator in BAT 1457/19, the Arbitrator interprets this clause to mean that: (i) the term "net" in Article 4 indicates that the Salary Instalments were due to the First Claimant "net of all Polish taxes"; and (ii) the Image Rights Instalments were payable as gross amounts.

109. The Arbitrator therefore finds that the Club owes the First Claimant an amount of USD 29,194,00 in unpaid Salary and Image Rights Instalments for the 2018-19 season, (USD 2,800.00 net and USD 26,394.00 gross), as well as USD 378.72 in pre-termination penalty interest.

7.2 The Second Claimant: outstanding payments in the 2018-19 season

110. It is undisputed in this arbitration that the Respondent owes the Second Claimant the amount of USD 3,600.00 in relation to an unpaid Agent's Fee for the 2018-19 season.

111. With that said, the Respondent did not expressly accept its obligation to pay the corresponding pre-termination penalty interest claimed by the Second Claimant (in the amount of USD 91.73), nor did it specifically address this claim in its submissions.

112. Consistent with the Respondent's approach to the First Claimant's claim, and consistent with the express terms of Article 16.4 of the Agreement, the Arbitrator considers that the Second Respondent is entitled to the amount of pre-termination penalty interest claimed.

113. The Arbitrator therefore finds that the Club owes the Second Claimant an amount of USD 3,600.00 in unpaid Agent Fees for the 2018-19 season, as well as USD 91.73 in pre-termination penalty interest.

7.3 The First Claimant: request for compensation for the 2019-20 season

114. As far as the First Claimant's request for compensation for the 2019-20 season is concerned, the validity of the First Claimant's termination of the Agreement is not in dispute in the present arbitration.

115. Rather, the two key issues in dispute are: (i) whether the Player is entitled to acceleration of all Salary and Image Rights Instalments for the 2019-20 season; and (ii) if so, whether such amounts should be reduced, or not.

7.3.1 Acceleration of Salary and Image Rights Payments

116. The Arbitrator agrees with the First Claimant that the strict operation of Articles 3.4, 4 and 11.2 of the Agreement is such that: (i) if the Club does not inform the Player of its intention to terminate the Agreement after the 2018-19 season, and pay the relevant buyout amount, the Agreement remains in force for the 2019-20 season (Article 3.4); (ii) this results in an obligation for the Club to pay the amount of USD 140,000.00 in Salary

and Image Rights Instalments (plus 6% tax towards the Image Company) for the 2019-20 season (Article 4); and (iii) if the Player then validly terminates the Agreement on the basis of non-payment, he is entitled to "his full salary for the season-in-progress by acceleration and shall have no further obligations to the Club" (Article 11.2).

117. On its part, the Respondent argues: (i) that "season-in-progress" should be interpreted according to a common practice; (ii) that in reality the 2019-20 season had not begun when the First Claimant terminated the Agreement; and (iii) that the First Claimant cannot therefore be entitled to compensation for services not rendered.

118. The Arbitrator is not convinced by this position. Rather, the Arbitrator agrees with the Claimants that due to the Club's failure to meet the conditions of Article 3.4 of the Agreement by the express deadline, the Agreement entered into force also for the 2019-20 season. Indeed, the purpose of such "early termination" clauses are to allow the Parties to bring an end to their agreement in sufficient time to, respectively, replace the player or find a new team for the coming season. Accepting the Respondent's "practical" construction of this term would defeat that purpose.

119. The Arbitrator further accepts that, in accordance with the express terms of the Agreement and considering that the Player undisputedly complied with the requirements for termination set out in the Agreement, he was indeed entitled to terminate the relationship with the Club on 1 August 2019. It follows that – in principle and on the basis of the specific contractual terms – the First Claimant is entitled to the acceleration of the Salary and Image Rights Instalments for the 2019-20 season.

7.3.2 Quantum of compensation for the 2019-20 season

120. Where this case becomes rather less straightforward is in the First Claimants' insistence – despite the existence of a new contract for the 2019-20 season – on Article 11.2 of the

Agreement, insofar as it provides that in case of breach by the Club (and justified termination for non-payment) "*there shall be no off-set or mitigation of the Player's salary and/or bonuses or Agent's fee*".

121. The Club, on the other hand, suggests that this position is legally unfounded, arguing, in summary, that: (i) the Player did not provide any services, thus cannot be compensated for services rendered in the 2019-20 season; (ii) awarding the entire amount of the claim would amount to an excessive contractual penalty and would not be "just and fair"; and (iii) if the player's claim is to be considered compensation for damages, there are in fact no damages.

122. The Arbitrator considers that situations like this do not fit neatly into any of the categories suggested by the Respondent. Moreover, in deciding on this element of the First Claimant's claim, the Arbitrator has consulted prior BAT decisions discussing contractual provisions in basketball agreements that expressly derogated from the well-established BAT jurisprudence concerning mitigation of damages.[5]

123. In this respect, the Arbitrator has come across three main categories of decisions:

    i. Decisions in which the relevant claimant spontaneously accepted to mitigate his or her damages, or offset additional amounts earned, despite having – based on the wording of the contract – no obligation to do so;[6]

    ii. A decision in which the relevant arbitrator held that such clauses are valid if sufficiently specific and clear, namely the decision which is relied on by the Claimants

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5 Specifically, that "*according to generally accepted principles of the law of damages and also of labor law, any amounts which the Coach earned or could have earned by exercising reasonable care during the remaining term of the Coach Contract must be deducted*" (BAT 0785/15 at para. 99).

6 By way of example see BAT 0160/11 at para. 55; BAT 0435/13 at para. 40; and BAT 0615/14 at para. 65).

in these proceedings (BAT 0421/13) in which it was held as follows:

> *"The issue as to Player's claims for 2013-2014 and 2014-2015, would, in the normal course of claims under professional basketball contracts which contain a BAT clause, be subject to well-established principles of mitigation. However, the Agreement has a particular feature which takes this case out of the usual position. As already noted, clause 10, in part, states the following: "[…] PLAYER is under no obligation to mitigate his damages and CLUB shall receive no offset".*
>
> *The Parties have expressly and unambiguously lifted the burden from Player requiring him to mitigate his damages in case of termination. Further, Respondent is expressly prohibited from receiving an offset.*
>
> *In light of these highly specific contractual arrangements, it appears to the Arbitrator that the Parties clearly intended that the guaranteed sums payable under the Agreement were protected from any reduction or mitigation. This cannot take Respondent by surprise; it chose to agree these highly specific terms with Player. Respondent argues unjust enrichment in its Answer, however that position is irreconcilable with the precise contractual arrangements to which it agreed. […] There is an express prohibition in the Agreement on any offset accruing to Respondent, and this unquestionably circumscribes, and emasculates the scope for reduction of these claims".*[7]

iii. Cases in which the relevant arbitrator held that while the unambiguous wording of a contract should, in principle, be respected, the application of clauses derogating from a duty to mitigate must be evaluated in light of all the circumstances of the particular case, including for example:

- in BAT 0535/14 the relevant Arbitrator noted that: (i) in many legal systems and to different degrees, a contractual clause may be deemed invalid or its consequences tempered by the courts in certain circumstances; (ii) the interpretation of a contract requires consideration of all the circumstances to determine the true intention of the parties; and (iii) an *ex aequo et bono* assessment may result in the conclusion that the application of a – clear – contractual term may nevertheless be deemed "intrinsically unfair and

[7] See BAT 0421/13 at para. 65-68.

unjust".[8]

- in BAT 0634/14 the relevant Arbitrator noted that the concept of *ex aequo et bono* does not entitle an arbitrator to simply rewrite the parties' agreement – the arbitrator must be guided by the parties' consensus as reflected in the relevant contract (which, of course, is subject to interpretation). Only where "*the wording is unclear or if a literal interpretation leads to a manifestly unfair and unjust result under the specific circumstances*"[9] is an arbitrator entitled under the concept of *ex aequo et bono* to deviate from the wording of the contract. The Arbitrator further noted that even where the clause in question is clear and its application not manifestly unfair, it may nevertheless conflict with another principle consistently applied by BAT – namely the obligation and power of the Arbitrator to review excessive contractual penalties. The Arbitrator in that case ultimately "*balanc*[ed] *the principles of pacta sunt servanda and the requirements of a contractual penalty by analogy (in particular the requirement of specificity and proportionality)*", to find that the Player's new income should be deducted from his claim.[10]

- in BAT 1457/19 (a case which is similar to and somewhat related to the present case, but must be distinguished on factual grounds), the relevant Arbitrator discussed the above cases and ultimately concluded that "[t]*aking all the principles articulated above into consideration, the Arbitrator finds that the Parties' exclusion of the First Claimant's duty to mitigate his losses can be reviewed in light of all the circumstances in order to prevent a manifestly*

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8 BAT 0535/14 at paras. 47-56. Cf BAT 0615/14 at para. 65, where the arbitrator upheld the relevant clause in circumstances where (*inter alia*): (i) the Club did not challenge the validity of the clause or object to its application; (ii) the player spontaneously accepted to offset amounts earned under his new contract; (iii) the Club's termination of the contract was "radical and unfair".

9 With reference to CAS 2014/A/3524, para. 66.

10 BAT 0634/14 at paras 67-76.

unfair and unjust result".

124. Whilst the above cases diverge to a certain extent, the Arbitrator considers that this jurisprudence reinforces the notion that in an *ex aequo et bono* assessment, it is "*necessary to consider each case according to its own circumstances, so that different approaches* […] *may be necessary in different cases*".[11] Moreover, the Arbitrator agrees with the general assertion (as in BAT 0421/13) that clear and unambiguous contractual provisions should not be easily dismissed or departed from, however also agrees that from an *ex aequo et bono* perspective the specific circumstances of the case must be taken into consideration, and the consequences of the strict application of clauses such as that in Article 11.2 of the Agreement may be subject to a review – and a reduction – depending on the particular facts of the case.

125. In conducting her *ex aequo et bono* assessment of the case at hand, and bearing in mind the above legal context and principles, the Arbitrator agrees with the Respondent that it would be excessive in the particular circumstances of this case for the First Claimant to receive the entire amount of USD 147,980.00 for Salary and Image Rights Instalments in relation to the 2019-20 season.

126. As a threshold matter, the Arbitrator accepts that the First Claimant was entitled to, and did, terminate the Agreement principally on the basis of non-payment and that the Club's behaviour is a relevant factor in these proceedings.

127. However, as transpires from the above factual background, the First Claimant did not terminate the Agreement when he was first entitled to (i.e. 7 days after the warning in question) or even during or at the end of the 2018-19 season, but rather very shortly after

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11 See FAT 0128/10 at para. 63.

the commencement of the 2019-20 season.

128. Moreover, and while the First Claimant indeed warned the Respondent of his right to terminate in May 2019, he did not make clear to the Respondent – at least in writing, and in particular during their discussions at the end of the 2018-19 season – that he effectively intended to exercise such right if the Respondent failed to pay the relevant outstanding amounts at the latest at the beginning of the 2019-20 season.

129. Further, and whilst the Arbitrator does not agree with the Respondent's interpretation of "season-in-progress" (as set out above), it is nevertheless worth noting that the season had not yet begun in earnest when the First Claimant terminated the Agreement.

130. Finally, the Arbitrator cannot simply ignore the reality that, whilst the Respondent initially and briefly objected to the termination of the Agreement, the First Claimant received his Letter of Clearance apparently without any issues and managed to procure a relatively lucrative contract with another team – an agreement which was signed mere days after the termination of the Agreement. This is indeed a key factual distinction from the similar proceedings in BAT 1457/19 where the Arbitrator noted as part of her assessment that: "the Respondent conducted itself unfairly towards the First Claimant. It failed to pay any part of the remuneration promised to him for a significant period. It then proceeded to negotiate the terms of the First Claimant's extension at the end of the season without demonstrating any intention to comply with the terms already agreed. Having failed in its attempt to secure the First Claimant's services for the next season, it then opposed his letter of clearance contrary to the Agreement and thereby jeopardised the First Claimant's chances of securing alternative employment. The First Claimant was then forced to retain counsel and incur costs just to perform the replacement contract he had

signed".[12]

131. In view of all of the above, the Arbitrator considers that the specific facts of this case require the Arbitrator to review – and revise – the consequences of the strict application of this clause to the case at hand.

132. In doing so, the Arbitrator considers *ex aequo et bono* that to award the entire amount of USD 147,980.00 claimed by the First Claimant would be both excessive and unjust in the overall circumstances of the case, and that the claim for Salary and Image Rights Payments should be reduced by approximately 40% to a flat amount of USD 90,000.00. The Arbitrator notes that this amount is slightly higher than both: (i) the difference between the salary agreed with the Respondent and the Player's new club (noting also the likelihood that the Player would have similarly accepted a reduction to his salary had he still been playing with the Club when the coronavirus pandemic hit); and (ii) what (the Arbitrator understands to be) the amount that the Respondent offered, in October 2019, to pay the First Claimant for the 2019-20 season.

133. Additionally, and for the sake of clarity, the Arbitrator notes that for the purposes of this breakdown (and the Player's request for a tax certificate), USD 4,200.00 of this amount shall be considered as Salary Instalments – i.e. 60% of the Player's Salary Instalments for the 2019-29 season. In line with the reasoning in paragraph 108 above, such amounts shall be payable net of all Polish taxes, with the remaining USD 85,800 payable as a gross amount.

134. On the basis of all of the above and deciding on an *ex aequo et bono* basis, the Arbitrator therefore finds that the Respondent owes the First Claimant the amount of USD 90,000.00 as compensation for the 2019-20 season, USD 4,200.00 of which is to be

[12] BAT 1457/19 at para. 135.

considered as a net amount and the remaining USD 85,800.00 as a gross amount.

7.4 The First Claimant: request for tax certificates

135. Having decided partially in favour of the First Claimant on the principal claims, the Arbitrator must address the First Claimant's request for a tax certificate for those portions of the compensation awarded that relate to Salary Instalments.

136. In this respect and as noted above, the Agreement expressly provides for "net" payments insofar as the Salary Instalments are concerned (and the Arbitrator interprets this to mean "net of all Polish taxes"). Moreover, the Respondent does not dispute the First Claimant's entitlement to net amounts nor to the tax certificates requested.

137. Therefore, the Arbitrator finds that the Respondent is required to provide the First Claimant with the requested tax certificates.

138. In terms of the relevant amounts, and considering the findings immediately above, the Arbitrator notes that the tax certificates shall be provided in relation to: (i) the Salary Instalments in the amount of USD 2,800.00 for the 2018-19 season; and (ii) the Salary Instalments in the amount of USD 4,200.00 for the 2019-20 season.

7.5 The Second Claimant: request for compensation in relation to the 2019-20 season

139. The Arbitrator notes that, insofar as the Second Claimant is concerned, the Respondent has not addressed his claim for compensation in the 2019-20 season in any meaningful way, simply requesting the Arbitrator to dismiss the part of the Second Claimant's request for compensation which relates to that season.

140. As far as this claim is concerned, the Arbitrator first notes that there is no equivalent

"acceleration" of the Agent Fee due to the Second Claimant (i.e. as there is for the First Claimant under Article 11.2 of the Agreement) in the event of justified termination of the Agreement.

141. Having said that, the Arbitrator agrees that in case of justified termination of the Agreement the Second Claimant is, in principle, entitled to compensation which would place him in the same situation he would have enjoyed had the Agreement remained in force in the 2019-20 season. Moreover, the Arbitrator notes that the Second Claimant is also referred to in that part of Article 11 of the Agreement which states that there is no duty to mitigate his damages.

142. In line with the Arbitrator's findings in relation to the First Claimant, and for the same reasons, the Arbitrator considers *ex aequo et bono* that to award the entire amount of USD 14,000.00 claimed by the Second Claimant would be excessive and unjust in the circumstances of the case. The Arbitrator therefore finds that the claim should be reduced by 40% to a flat amount of USD 8,400.00 (which is slightly higher than the difference between the Agent Fee with the Respondent and the Player's new club). For the sake of clarity, the Arbitrator notes that she has taken into consideration that the Respondent appears – from its letter of October 2019 – to have agreed to pay the entirety of the Agent's Fee for the 2019-20 season in the context of settlement proceedings. However, it is uncontested that such settlement was rejected by the Claimants, leading to additional and significant costs in the present proceedings, and it is unclear from the amendment to the agreement with the Player's new club whether the Agent fee was similarly reduced in the context of the coronavirus pandemic.

143. Accordingly, considering all of the above and deciding on an *ex aequo et bono* basis, the Arbitrator therefore finds that the Respondent owes the Second Claimant the amount of USD 8,400.00 as compensation for the 2019-20 season.

7.6 Interest on the amounts awarded to the Claimants

144. As a final matter, the Claimants have each requested interest at a rate of 5% per annum on the amounts awarded to them from the date of 1 August 2019 (i.e. the date of termination of the Agreement) until effective and final payment.

145. The Arbitrator notes, as a first remark, that the Claimants' approach to this request is transparent, fair, and in line with constant BAT jurisprudence. Indeed, the Claimants have spontaneously accepted that: (i) this interest should not apply at the same time as the pre-termination penalty interest sought (and awarded) on the 2018-19 amounts; (ii) the rate of 5% per annum be applied in accordance with consistent BAT jurisprudence; and (iii) the interest apply on the principal amounts due (i.e. without the inclusion of the pre-termination penalty interest).

146. To the contrary, the Respondent has simply requested – without developing its position in any meaningful way – that the Claimants' request for interest should be dismissed.

147. The Arbitrator considers that payment of interest is a customary and necessary compensation for late payment and there is no reason why it should not be awarded in this case. Moreover, the Arbitrator considers that a rate of 5% per annum, applicable from the day following termination of the Agreement, is in accordance with well-established BAT jurisprudence and an *ex aequo et bono* assessment.

148. Thus, the Arbitrator awards interest from the date of 2 August 2019 until payment, at a rate of 5% per annum, on the following amounts:

    i. For the First Claimant, the amount of: (i) USD 29,194.00; and (ii) USD 90,000.00.

    ii. For the Second Claimant, the amount of: (i) USD 3,600.00; and (ii) USD 8,400.00.

8. Costs

149. Articles 17.2 and 17.3 of the BAT Rules provide that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

150. On 13 October 2020 – considering that pursuant to Article 17.2 of the BAT Rules "the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator", and that "the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 11,000.00.

151. Article 17.3 of the BAT Rules further provides that:

> *"When deciding on the arbitration costs and on the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties".*

152. In these proceedings, both the Claimants and the Respondent submit that some or all of the costs of the proceedings should be borne by the opposing party.

153. The Claimants submit that, in accordance with Article 11.2 of the Agreement[13] and

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[13] Which, for reminder, states that "[a]*ll legal fees and BAT fees payable by Player and/or Agent in the enforcement of this Agreement and collection monies due Player and/or Agent shall be payable by Club*".

irrespective of the outcome of the proceeding, the Respondent shall bear the entirety of the costs of the arbitration.

154. On its part, the Respondent submits that considering: (i) its position on the 2019-20 compensation; (ii) that it did not contest the 2018-19 claims; and (iii) that such uncontested amounts represent a small part of the total claim, the Parties should bear the arbitration costs in equal amounts.

155. Considering the content of Article 11.2 of the Agreement, the fact that the present proceedings were in essence caused by the Respondent's failure to respect its financial obligations, as well as the fact that the Claimants prevailed entirely with their claims for the 2018-19 season, as well as – in principle and with a 40% reduction to quantum – their claims for the 2019-20 season, the Arbitrator considers it fair and equitable that the Respondent bears the entirety of the costs of the arbitration.

156. As far as costs and legal fees are concerned, the Claimants also request payment of the following:

    i. The non-reimbursable handling fee in the amount of EUR 3,000.00; and

    ii. Legal fees in the amount of EUR 15,000.00 (the Claimants have filed a corresponding invoice for three 10 hour periods of work for each of the Claimants' lawyers).

157. Once again, the Claimants rely on Article 11.2 of the Agreement to submit that the Respondent shall bear the entirety of the legal costs incurred by the Claimants.

158. The Arbitrator notes that as far as legal costs are concerned, and with particular respect to such clauses, it has been the prevailing approach in BAT arbitration that the costs requested must nevertheless be reasonable. The Arbitrator considers in this respect that

the overall fee claimed by the Claimants is not demonstrably unreasonable considering the number, length and complexity of the submissions filed. The Arbitrator therefore finds the Respondent liable to pay the Claimants EUR 15,000.00 in legal fees and EUR 3,000.00 in respect of the non-reimbursable handling fee.

9. AWARD

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

1. **Grono Sportowa Spolka Akcyjna shall pay Mr. Michael Humphrey USD 2,800.00 net of all Polish taxes in unpaid salaries for the 2018-2019 season.**

2. **Grono Sportowa Spolka Akcyjna shall pay Mr. Michael Humphrey USD 26,394.00 gross in unpaid image rights payments for the 2018-2019 season.**

3. **Grono Sportowa Spolka Ackyjna shall pay Mr. Michael Humphrey USD 378.72 in pre-termination penalty interest accruing until 1 August 2019 for sums owed in respect of the 2018-2019 season.**

4. **Grono Sportowa Spolka Akcyjna shall pay Mr. Michael Humphrey interest at a rate of 5% *per annum* on the amount of USD 29,194.00 from 2 August 2019 until the date of full payment.**

5. **Grono Sportowa Spolka Akcyjna shall pay Mr. Michael Humphrey USD 4,200.00 net of all Polish taxes in unpaid salaries for the 2019-2020 season by acceleration, plus interest at a rate of 5% *per annum* from 2 August 2019 until the date of full payment.**

6. **Grono Sportowa Spolka Akcyjna shall pay Mr. Michael Humphrey USD 85,800.00 gross in image rights for the 2019-2020 season by acceleration, plus interest at a rate of 5% *per annum* from 2 August 2019 until the date of full payment.**

7. **Grono Sportowa Spolka Akcyjna shall provide Mr. Michael Humphrey with tax certificates in respect of the salary payments of USD 2,800.00 for the 2018-2019 season and USD 4,200.00 for the 2019-2020 season.**

8. **Grono Sportowa Spolka Akcyjna shall pay Mr. Eric Fleisher USD 3,691.73 in unpaid agency fees and pre-termination interest for the 2018-2019 season, plus interest at a rate of 5% *per annum* on the amount of USD 3,600.00 from**

2 August 2019 until the date of full payment.

9. **Grono Sportowa Spolka Akcyjna shall pay Mr. Eric Fleisher USD 8,400.00 as compensation for unpaid agent fees in the 2019-2020 season, plus interest at a rate of 5% *per annum* from 2 August 2019 until the date of full payment.**

10. **Grono Sportowa Spolka Akcyjna shall pay Mr. Michael Humphrey and Mr. Eric Fleisher jointly EUR 11,000.00 as reimbursement for their arbitration costs.**

11. **Grono Sportowa Spolka Akcyjna shall pay Mr. Michael Humphrey and Mr. Eric Fleisher jointly EUR 18,000.00 as a contribution to their legal fees and expenses.**

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

Geneva, seat of the arbitration, 16 November 2020.

Brianna Quinn
(Arbitrator)