

ARBITRAL AWARD

(BAT 1482/20)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Clifford J. Hendel

in the arbitration proceedings between

Mr. Greg Surmacz

- Claimant -

represented by Mr. Hubert Radke, attorney at law,
Wojska Polskiego 31 87-800 Wloclawek, Poland

vs.

BM Slam Stal S.A.

u. Kusocinskiego1 63-400 Ostrow Wielkopolski, Poland

- Respondent -

represented by Mr. Bartosz Karasinski, President and CEO

1. The Parties

1.1 The Claimant

1. Mr. Greg Surmacz (hereinafter also referred to as “the Player”) is a Polish/Canadian professional basketball player.

1.2 The Respondent

2. BM Slam Stal S.A. (hereinafter also referred to as “the Club”, and together with the Claimant, “the Parties”) is a professional basketball club competing in the Polish professional basketball league, Polska Liga Koszykowi S.A.

2. The Arbitrator

3. On 17 January 2020, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Clifford J. Hendel as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. 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, he refers in this Award only to those necessary to explain its reasoning.

3.1.1 The Agreement

6. On 29 July 2019, the Player and the Club entered into an agreement, executed in the English and Polish languages, whereby the latter engaged the Player for the season 2019-2020 (the “Agreement”).

7. According to Article 1 of the Agreement:

“Objective of the Agreement: - *The Club hereby engages the Player as a professional basketball player and undertakes to pay him for the services provided. The Player undertakes to perform as a professional basketball player, as set forth in this Agreement.”*

8. Article 3 of the Agreement provides:

“Term and Validity of the Agreement:

1 The Club engages the services of the Player as a professional basketball player for the 2019-2020 season. This Agreement shall come into force on the day of signing and shall remain valid till the last day of the term of this Agreement, unless terminated prior to the term as set forth therein. The Player shall provide services for the Club till 3 (three) days after the last official game of the Club. The Player shall be entitled to leave the Club immediately 3 (three) days after the expiration of the Agreement.

2 The Club will administer any necessary medical/physical exams within first three days of Player’s arrival. If exam is not completed within said three (3) days of Player’s arrival, it is understood that Club declines right to complete such exam and all aspects of the contract are in force. Otherwise the contract becomes valid after passing by the Player medical and physical exams.”

9. With regard to the Player’s salary, Number 2 of the Recitals of the Agreement reads:

“The Club shall pay the Player a fully guaranteed salary of 170,000 PLN (hundred and seventy thousand polish zloty) net for the 2019/2020 season. Salary shall be paid in monthly installments to the Player.”

10. Further, Article 4 of the Agreement provides:

“Remuneration

Season 2019/2020

1 In connection with Player’s services for the Club, the Club agrees to pay to the Player’s Image Company specified by Agent the following amounts for image rights of the Player: 170,000,00 PLN (hundred seventy thousand polish zloty) plus 6% tax, paid after settling invoices, as follows:

<i>PLN 17’000</i>	<i>On October 30th 2019</i>
<i>PLN 17’000</i>	<i>On November 30th 2019</i>
<i>PLN 17’000</i>	<i>On December 30th 2019</i>
<i>PLN 17’000</i>	<i>On January 30th 2020</i>
<i>PLN 17’000</i>	<i>On February 28th 2020</i>
<i>PLN 17’000</i>	<i>On March 30th 2020</i>
<i>PLN 17’000</i>	<i>On April 30th 2020</i>
<i>PLN 17’000</i>	<i>On May 30th 2020</i>
<i>PLN 17’000</i>	<i>On June 30th 2020</i>
<i>PLN 17’000</i>	<i>On July 30th 2020</i>

[...]

3 The remuneration and bonuses described herein shall be net.

[...]

5 In case of an injury incurred by the Player and coming from executing this Agreement which will make the Player unable to execute this agreement for longer than 14 days, the Club will keep paying his salary decreased according to the percentage below, related to monthly installments in proportion to the period of being unable to perform the Agreement:

- In the first month Player will receive 100% of the contractual remuneration*
- In the second month Player will receive 75% of the contractual remuneration*

- *In the third month Player will receive 50% of the contractual remuneration.*

11. Article 5 of the Agreement reads as follows:

“Rights and Obligations of the Player:

1 By signing the within Agreement, the Player agrees to observe and comply with all requirements of the Club regarding conduct of the basketball team and its players. In this regard the Player will, upon presentation by the Club in writing, review specific Club rules. Within one day of such presentation by the Club, the Player will review a copy of such rules and will commit to it in writing [...]

2 The Player shall:

- a) Report at the time and place fixed by the Club in good physical condition;*
- b) Keep himself in good physical condition throughout the season;*
- c) Comply with reasonable advices of the Club’s doctor;*
- d) Give his best services, as well as his loyalty to the Club;*
- e) Be neatly and fully dressed in public and shall always conduct himself on and off the court according to the highest standards of honesty, morality, fair play and sportsmanship;*
- f) During official events, when it is expressly required so by the Club, to wear only official gear of the Club provided by the Club;*
- g) Not intentionally do anything which is detrimental to the best interests of the Club.*

3 Prohibition of alcohol abuse and prohibition of illegal substances. Infringement of this rule will be penalized a termination of the contract [sic] on Player’s fault.”

12. Article 7 of the Agreement provides:

“Medical Issues.

1 During the period of this Agreement, the Club shall cover all medical expenses for cure and treatment of injuries incurred by the Player and occurring during his stay in Poland – standard healthcare, hospitalization...

2 The Player agrees to give the Club’s coach, trainer or physician, immediate notice of any injury suffered by him, including the time, place, cause and nature of such injury. Should

the Player suffer an injury, he shall submit himself to a medical examination and treatment administered by a physician designated by the Club. Such examination when made at the request of the Club shall be at its expense, unless made necessary by some act or conduct of the Player contrary to the terms thereof.”

13. Article 13 of the Agreement provides:

“Ending of the Agreement.

1 This Agreement shall be deemed ended upon expiration of its term or termination.

2 This Agreement can be terminated prior to its term by the mutual consent of the parties, or unilaterally by any of the parties in cases stipulated in this Agreement. Unilateral termination of the Agreement shall become effective immediately after the written or email notice of such termination was delivered to the other party, provided that the premises of the agreement’s termination will not be removed during that period.”

3.1.2 Factual background of the dispute

14. On 12 August 2019, some two weeks after the signature of the Agreement, the Club administered medical and physical exams to the Player as provided in Article 3.2 thereof, including a urine test that revealed the presence of marijuana in the Claimant’s sample.¹ In a meeting with the Club’s President and Head Coach on 13 August 2019, the Player acknowledged that he had consumed marijuana for recreational purposes several times during his stay in Canada in the second half of July where, he claimed, the use of marijuana is fully legal for both recreational and medical purposes.²
15. On 14 August 2019, the Club sent a letter to the Player and his agent issuing an official warning, expressing their “*extreme... surprise... and outrage [...]*”, characterizing the Player’s conduct as “*unprofessional and unacceptable*” and creating “*a situation that can*

¹ See Exhibit 2 attached to the Request for Arbitration (“RfA”).

² RfA, Section 1.2.

have huge consequences for both the player and the... club".³ The Club informed Claimant that a second test would be carried out on 26 August 2019 and that "after obtaining their results" the Club would "decide what further steps to take in relation to the situation, in accordance with the contract signed by the player in 2019/2020 and the club's internal regulations".⁴ The Player continued providing his services to the Club without interruption after this date.

16. The result of the second urine test was negative for marijuana.⁵ The Player continued providing his services to the Club without interruption after this date.
17. On 29 September 2019, the Player suffered an injury in the course of an official match. On 1 October 2019, the Player visited the doctor designated by the Club who diagnosed a _____ ("_____").⁶
18. On 4 October 2019, the Club sent a letter to the Claimant and his agent informing that he was "*released until further notice from participating in any team training*".⁷
19. On 14 October 2019, the Club sent a further letter to the Player, his agent and his lawyer unilaterally terminating the Agreement on the grounds of Claimant's breach of the prohibition to use illegal substances (the "Termination Letter"):⁸

"Please be advised that, acting on behalf of Club BM SLAM STAL S.A. we terminate with immediate effect through the fault of Grzegorz Surmacz, the Contract concluded between

³ See Exhibit 3 attached to the RfA.

⁴ *Ibid.*

⁵ See Exhibit 4 attached to the RfA.

⁶ See Exhibit 5 attached to the RfA.

⁷ See Exhibit 6 attached to the RfA.

⁸ See Exhibit 7 attached to the RfA.

the parties on 29th July 2019.

At the same time, we point out that in a letter of 14th August, the Club announced that the Player Grzegorz Surmacz on 12th August 2019 underwent comprehensive tests that showed the presence of a prohibited substance – marijuana in the Player’s body. On 26th August 2019, the Club conducted another examinations [sic]. In the said letter it was also stated that after obtaining the results of the re-examination, the Club Board will decide on possible further steps towards the Player in accordance with the parties’ Contract and the Club’s internal Regulations.

Considering the above, the Club’s management decided that the behaviour of Player Grzegorz Surmacz was completely unacceptable and unprofessional...

The player has violated the following in his conduct: point 5.1 of the Contract obliging the Player to comply with all Club requirements regarding the players’ behaviour; point 5.2 of the Contract indicating the obligations regarding the Player’s behaviour and conduct; point 5.3 of the Contract prohibiting the consumption of prohibited substances.

Thus, pursuant to point 5.3 of the Contract in connection with point 13.2 of the Contract, the Club terminated the Contract immediately due to the fault of the Player.”

20. On 14 October 2019, together with the Termination Letter, the Club sent a second letter to the Claimant, his agent, and his lawyer by means of which the Club requested the Player to make the payment of a PLN 34,000 penalty *“pursuant to the Regulations for the Provision of Services by Players of the basketball section representing the BM SLAM SATL A.A. (Club)”*:⁹

“The basis for the imposition of this penalty is the Player’s violation of the obligation to prohibit the consumption of prohibited substances [sic]. The conducted tests of the Player showed the presence of a prohibited substance – marijuana in the Player’s body.”

21. On 30 October 2019, the Player underwent _____.¹⁰ The cost of the surgery -

⁹ See Exhibit 13 attached to the RfA.

¹⁰ See Exhibits 8 and 9 attached to the RfA.

performed by the same doctor designated by the Club- was paid by Claimant.¹¹

22. On 18 November 2019, the Claimant, through counsel, addressed a letter to the Club in response to the Termination Letter, challenging as groundless and unjustified the Club's termination, requesting the reimbursement of his medical expenses, challenging the penalty of two months of salary imposed by the Club in the Termination Letter, and seeking damages for terminating the Agreement without just cause.¹²
23. The Parties entered into conversations; however, no settlement was reached. On 9 December 2019, the Club sent a letter to the Player confirming the terms of the Termination Letter.¹³
24. On 24 February 2020, the Claimant signed a new contract with basketball club Starogardzki Klub Sportowy Spółka Akcyjna for the remainder of the 2019-20 season (with the possibility of a second season if the club avoids relegation). Claimant's salary under the new contract for the remainder of the 2019-20 season is PLN 4,000 net.¹⁴

3.2 The Proceedings before the BAT

25. On 7 January 2020, the Claimant filed a Request for Arbitration, accompanied by voluminous exhibits, in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 1,500 on 8 January 2020.
26. On 20 January 2020, the BAT informed the parties that Mr. Clifford J. Hendel had been

¹¹ See Exhibit 12 attached to the RfA.

¹² See Exhibit 14 attached to the RfA.

¹³ See Exhibit 15 attached to the RfA.

¹⁴ See Exhibit 17 attached to Claimant's submission of 28 February 2020.

appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

<i>“Claimant (Mr. Greg Surmacz)</i>	<i>EUR 3,000.00</i>
<i>Respondent (BM Slam Stal S.A.)</i>	<i>EUR 3,000.00”</i>

27. On 24 January 2020, the Claimant paid his part of the foregoing advance on costs.
28. On 10 February 2020, the Respondent submitted its Answer to the Request for Arbitration.
29. On 13 February 2020, the BAT informed the Parties that the Respondent had failed to pay its share of the advance on costs and invited the Claimant to substitute for the Respondent’s share by 24 February 2020.
30. On 19 February 2020, the Claimant paid Respondent’s share of the advance on costs.
31. On 28 February 2020, the Claimant submitted a request for the modification of the request for relief in his claim on the grounds that the Player had, a few days prior, signed a contract with a new team for the remainder of the 2019-20 season and had thus mitigated his damage.
32. On 6 March 2020, the parties were invited to set out (by no later than 16 March 2020) how much of the applicable maximum contribution to costs should be awarded to them and why. The parties were also invited to include a detailed account of their costs, including any supporting documentation in relation thereto. Finally, the parties were also notified that the exchange of submissions was closed in accordance with Article 12.1 of the BAT Rules.
33. The Claimant filed his costs submission on 14 March 2020. The Respondent did not submit an account of costs, although it did object to the “success fee” portion of

Claimant's cost submission.

34. On 19 March 2020, the Respondent requested the Arbitrator to re-open the proceedings and to grant the Respondent an additional 7-day term to present the Club's position regarding the new legal situation resulting from the declaration of the state of emergency in Poland and the closure of the Polish League season, asserting that "[t]he request must be considered as justified as the claim in this case regards to the period in which the competition will not be continued". The Arbitrator invited the Parties to discuss this matter and to present a joint request by 24 March 2020.
35. On 23 March 2020, Claimant's counsel advised that the Parties had communicated during the course of the day without reaching agreement, Claimant's position being that "a mere reference in generic terms to the [state of emergency in Poland and the ending of the basketball season caused by the Covid-19 outbreak]... cannot be considered as [...] sufficient to re-open the arbitral proceedings". On the same day, the Arbitrator decided to re-open the case and invited Respondent to present its position on the issues it raised by 30 March 2020. Respondent submitted its position on the same day (23 March).
36. On 29 March 2020, the Claimant submitted his position on the issues raised by the Respondent.
37. On 31 March 2020, the BAT invited the Parties to submit an updated account of costs by 7 April 2020.
38. On 7 April 2020, Respondent submitted its comments to Claimant account of costs, requesting that the "success fee" portion of Claimant's requested legal costs be excluded as not within the contemplation of the BAT Rules.
39. On 8 April 2020, the BAT informed that none of the Parties submitted any updated

account of costs and that the proceedings were definitively closed.

40. While the amount in dispute in this proceeding falls below the threshold of EUR 50,000 established in Article 16.2 of the BAT Rules for the issuance of an award with reasons, the BAT President has determined, pursuant to the discretion afforded to him by Article 16.3 (b) of the Rules, that certain of the issues that the case raises and the interest of the basketball community on having a sufficient body of publicly-available awards with reasons merit a reasoned award.

4. The Positions of the Parties

41. This section of the Award does not contain an exhaustive list of the Parties' contentions, its aim being to summarise the Parties' main arguments. In considering and deciding upon the Parties' claims, the Arbitrator has accounted for and carefully considered all 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 Claimant's Position

42. The Claimant submits the following in substance:
43. Claimant contends that Respondent unilaterally terminated the Agreement by letter of 14 October 2019 without just cause. Claimant argues that after the result of the first urine test on 12 August 2019 "*Respondent had a full right to declare that the Claimant failed the medical/physical exams and as a consequence declare that the Player's Contract is null and void. However, the Respondent did not make the use of its contractual right and*

the Claimant started to provide the services under the Player's Contract".¹⁵

44. Claimant argues that Respondent subjected its decision as to the potential contractual consequences to the result of the second urine test taken on 26 August 2019. The result of such test was negative, and the Club decided not to raise any objection as to the validity of the Agreement or to impose any other legal consequences to Player under the Agreement.¹⁶
45. Claimant contends accordingly that by its conduct in the period prior and after the second urine test "*the Club renounced the right to unilaterally terminate the Player's Contract and/or take any other legal actions under the Player's Contract due to said cause*". Consequently, Player performed his services under the Agreement between 12 August 2019 and 4 October 2019.¹⁷
46. In Claimant's view, the fact that it was only after the Player suffered the _____ injury that the Club raised the issue of the result of the first urine test demonstrates that the marijuana issue was used "*only as an excuse*", conveniently permitting the termination of the Agreement on the grounds that the now-injured Player had breached his obligations under the Agreement (prohibition of the use of illegal substances).¹⁸
47. In his Request for Arbitration (filed 7 January 2020), the Claimant requested the following relief:

" Claimant(s) request(s):

*2.1. The damages in the amount of **PLN 157.250,00 net** (one hundred fifty seven thousand*

¹⁵ RfA, p. 5.

¹⁶ RfA, p. 3.

¹⁷ RfA, p. 4.

¹⁸ *Ibid.*

*two hundred and fifty Polish zlotys net 00/100) for the premature termination of the Player's Contract without just cause along with the interests at the rate 5% per annum in the amount of **PLN 1.809,36** (one thousand eight hundred and nine Polish zlotys 36/100) since October 14th, 2019 till January 6th, 2020 and **PLN 21,54** per day (twenty one Polish zlotys 54/100) since January 7th, 2020 till the actual payment date;*

*2.2. The damages in the amount **PLN 5.350,13** (five thousand three hundred fifty Polish zlotys 13/100) related to the costs of the knee injury treatment that were born by the Claimant;*

2.3. Reimbursement of the Costs of Arbitration, including the non-reimbursable handling fee and advance on costs;

*2.4. Reimbursement of the legal fees and expenses in the amount of **EUR 5.000,00** (five thousand Euros) of the attorney representation costs;*

*2.5. Reimbursement of the legal costs related to the translation of documents in the amount of **PLN 1.564,50** (one thousand five hundred sixty four Polish zlotys 50/100) (Exhibit 16).*

*Total amount in dispute: **PLN 164.409,49 (approx. EUR 38.235)** (excluding legal/arbitral costs and interests after filling the Request for Arbitration)."*

48. On 28 February 2020, in light of the contract signed in mitigation as set out above, Claimant updated the first limb of his request as follows:

*"Claimant... requests the Arbitrator to award the damages in the amount of **PLN 153.250,00 net** (one hundred fifty three thousand two hundred and fifty Polish zlotys net 00/100) for the premature termination of the Player's Contract without just cause, along with the interests at the rate 5% per annum in the amount of **PLN 1.763,42** (one thousand seven hundred and sixty three Polish zlotys 42/100) since October 14th, 2019 till January 6th, 2020 and **PLN 20,99 per day** (twenty zlotys 99/100) since January 7th, 2020 till the actual payment date. All the remaining requests for relief remain unchanged. The total amount in dispute (excluding legal/arbitral costs and interest after filling the Request for Arbitration) is currently: **PLN 160.363,55 (approx. EUR 36.950).**"*

4.2 Respondent's Position

49. The Respondent submits the following in substance:

50. The Club has never questioned the validity of the Agreement. This is confirmed by the

fact that the Club issued the Termination Letter on 14 October 2019.¹⁹

51. The Club argues that it terminated the Agreement as per its Article 5.3 that gives the Club the right to unilateral termination if the Player infringes the prohibition of using illegal substances. The Club contends that such right “*is not time-barred*” or “*limited in any way*” under the Agreement.²⁰
52. Finally, the Club argues that in the hypothetical event that “*the Player is entitled to receive any compensation it must be pointed out that, according to the agreement, in case of an injury, the full monthly remuneration is only due for the first month after the injury occurs. For the following months the remuneration will be significantly reduced, up to 70% in the following month and up to 50% in the next months*”.²¹
53. In its Answer dated 10 February 2020, the Respondent requested the following relief:
- "The Respondent requests*
- A dismissal of the claim entirely and a conclusion that the club had the right to terminate this contract through a fault of the Player, and*
 - Requests a ruling that each of the parties shall bear their own costs of the BAT proceedings"*
54. As set out above (paragraph 34), Respondent requested the Arbitrator to re-open the proceedings and to allow the Club to present its position regarding the new legal situation resulting from the declaration of the state of emergency in Poland and the closure of the Polish League season due to the Covid-19 pandemic.

¹⁹ Answer, para 5.

²⁰ Answer, para 16.

²¹ Answer, para 21.

55. In its submission of 23 March 2020, Respondent states that as a consequence of the measures taken by the Polish authorities and the Polish League the Club was forced to cease its normal activity “*for an indefinite period of time*” and to terminate “*all contracts... with immediate effect*”.
56. The Club invoked the principles of *force majeure*, *rebus sic stantibus* and impossibility of performance of the obligation for both parties and requested the Arbitrator “*to re-examine the scope of the claim of this case and to ignore in this examination in total the period after 17th of March 2020*” (the day the state of emergency was declared in Poland).

4.3 Claimant’s comments on Respondent’s submission of 23 March 2020

57. Claimant points out that the Respondent ultimately “*seeks the reduction of the Claimant’s damages claims*” thereby acknowledging that “*the Claimant’s claims are justified as to the merits*”.²²
58. Claimant contends that Respondent “*fails to specify*” how the situation referred in its submission of 23 March 2020 (declaration of the state of emergency in Poland and closure of the basketball season due to the pandemic) “*affects Respondent’s obligation to repair the damages caused by the unilateral termination of the parties’ agreement without just cause*”.²³
59. With regard to the *force majeure* invoked by Respondent, Claimant argues that the Club needs to “*prove that the non-performance is due to the occurrence of an event or an impediment that is beyond its control and that it could not reasonably be expected to*

²² Claimant’s submission of 29 March 2020, para 1.

²³ *Ibid*, para 2.

have taken into account when it assumed the relevant obligation".²⁴

60. Claimant contends that Respondent has failed to established a causal link between the pandemic and the impossibility of performance of its financial obligation towards the Player: "*the Respondent only assumed that the existence of the pandemic situation per se creates the general reason to cease the fulfilment of its financial obligations*".²⁵ However, "*a mere difficulty to perform the obligation, is not enough to invoke the force majeure concept*".²⁶
61. Claimant further argues that the principles of *rebus sic stantibus* and impossibility of performance "*can be invoked only in relation to existing contractual relationships. In the present case, however, the Respondent unilaterally terminated the Player's Contract with the Claimant on 14 October 2019*".²⁷

5. The jurisdiction of the BAT

62. 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).
63. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

²⁴ *Ibid*, para 3.

²⁵ *Ibid*, para 4.

²⁶ *Ibid*, para 5.

²⁷ *Ibid*, para 7.

64. The dispute is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA²⁸.

65. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under paragraph one of article 15 of the Agreement, which reads as follows:

“1 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 in English. The arbitrator shall decide the dispute ex aequo et bono.

2 Any dispute arising from or related to the present contract shall be submitted to the Sports Arbitral Tribunal of Polish Basketball Association and shall be resolved in accordance with the Arbitration Rules by a single arbitrator appointed by the Tribunal President. The seat of the arbitration shall be Warsaw. The language of the arbitration shall be Polish or English in respect to the arbitrator’s decision. The arbitrator shall decide the dispute ex aequo et bono.

3 The right to choose the entity competent to recognize the dispute, i.e. the arbitral tribunal referred to in paragraph 1 or paragraph 2 or the court of law of the Republic of Poland, shall be entitled to the party seeking to satisfy its claims”

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

67. 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 agreement under Swiss law (referred to by Article 178(2) PILA).

68. While, alternatively to BAT arbitration, the arbitration clause in Article 15.2 provides for arbitration before the Sports Arbitral Tribunal of the Polish Basketball Association, Article

²⁸ Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

15.3 gives “*the party seeking to satisfy its claims*” the right to choose between the two arbitral tribunals and proceedings. Claimant made use of his right under Article 15.3 by bringing his claim to the BAT. Furthermore, the Respondent participated in the proceedings but did not raise any objection to BAT’s jurisdiction.

69. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimant’s claim.

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

70. 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”.

71. Under the heading “Applicable Law”, Article 15 of the BAT Rules reads as follows:

“15.1 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.

15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead.”

72. Article 15.1 of the Agreement expressly provides that the Arbitrator shall decide the

dispute *ex aequo et bono*.

73. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.
74. 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’arbitrage²⁹ (Concordat)³⁰, under which Swiss courts have held that arbitration “*en équité*” is fundamentally different from arbitration “*en droit*”:

“When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.”³¹

75. 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”.
76. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2 Findings

77. It is undisputed between the Parties that the amounts claimed have not been paid to the Player by the Club.
78. The Club unilaterally terminated the Agreement under Article 5.3, alleging that it had just

²⁹ 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).

³⁰ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

³¹ JdT 1981 III, p. 93 (free translation).

cause to do so and accordingly that the Club is not obliged to pay any remuneration, expenses, or damages to the Player.

6.2.1 Unpaid salaries

79. As set out above (Section 4.1), the Claimant contends that Respondent's unilateral termination of the Agreement by letter of 14 October 2019 was without just cause.
80. It is Claimant's position that after the result of the first urine test on 12 August 2019, the Club had the right to declare that the Agreement was null and void. Instead, Respondent decided to administer a second urine test to the Player on 26 August 2019 and expressly stated that its decision as to the potential contractual consequences would be subject to the result of such second test.
81. The result of the second test was negative for the presence of illegal substances. Consequently, the Club did not impose any legal consequence to the Player under the Agreement. Instead, the Player continued providing his services to the Club, without interruption.
82. In Claimant's view, it was only after the Player suffered the ____ injury, in early October, that the Club raised the issue of the result of the first urine test and terminated the Agreement on the grounds that Player had breached his obligations (prohibition of the use of illegal substances).
83. Respondent, for its part, contends that it exercised its right to terminate the agreement under Article 5.3 on the grounds that the Player had breached the prohibition of the use of illegal substances. The Club argues that its right to unilaterally terminate the

Agreement for cause “*is not time-barred*” or “*limited in any way*” under the Agreement,³² and that any delay in deciding and communicating the termination was attributable to travel commitments of the Club’s senior management.³³

84. The Arbitrator agrees that the Club’s right to terminate the contract on Player’s fault as per Article 5.3 of the Agreement is not subject to any particular time limit. However, the urine test that had a positive result on the presence of an illegal substance was administered by the Club in the context of the medical examinations provided in Article 3.2 of the Agreement, as a pre-condition to the validity of the Agreement (“*..the contract becomes valid after passing by the Player medical and physical exams*”).
85. After the first test the Club issued a warning to the Player and decided to administer a second test on 26 August 2019, the result of which would determine “*what further steps to take in relation to the situation, in accordance with the contract... and the club’s internal regulations*”.³⁴
86. The result of the second test was negative for the presence of illegal substances.³⁵ Consequently, Respondent did not take any further decision and the Player continued providing his services to the Club until he suffered the knee injury on 29 September 2019.³⁶
87. The Club may well have concluded that, after the result of the first test, the condition under Article 3.2 of the Agreement was not met and, thus, the Agreement had not

³² Answer, para 16.

³³ See Exhibit 15 attached to the RfA.

³⁴ See Exhibit 3 attached to the RfA.

³⁵ See Exhibit 4 attached to the RfA.

³⁶ See Exhibit 5 attached to the RfA.

become valid and effective. Instead, the Club decided to administer a second test to the Player and (apparently) was satisfied with its result, so the Agreement was validly performed for several weeks.

88. The Arbitrator considers that the result of the first test, administered in the context of Article 3.2 of the Agreement, cannot constitute the basis for the unilateral termination of the Agreement under Article 5.3, where (i) the Club had expressly conditioned the fate of the Agreement on the results of a second test that proved negative and (ii) the Player had performed his services to the Club under the Agreement for the period between 12 August and 4 October 2019 without, so far as the record reflects, any reservation of rights of the Club or other indication that would have given the player reasonable grounds to doubt whether the Agreement had entered into full force and effect.
89. Therefore, the Arbitrator concludes that the unilateral termination of the Agreement by the Club was effected without just cause and, consequently, that the Club owes to Player his outstanding salaries for the remainder of the 2019-2020 season in the amount of PLN 153,250.00 net.
90. The calculation of said amount reflects the criteria set forth in Article 4.5 of the Agreement for the reduction of Player's salary in the case of an injury (reduction of 25% of the salary for the second month and 50% reduction for the third and following months). Claimant was absent from regular basketball activities for a period of approximately three months.³⁷
91. Claimant has duly satisfied his duty to mitigate damages by entering into a new contract with basketball club Starogardzki Klub Sportowy Spółka Akcyjna for the remainder of the

³⁷ See Exhibit 9 attached to the RfA.

2019-20 season.³⁸

92. The previous conclusions are not affected by the Club's submission of 23 March 2020. As seen above (Section 4.2), Respondent requested the Arbitrator to re-open the proceedings and to allow the Club to present its position regarding the new legal situation resulting from the declaration of the state of emergency in Poland and the closure of the Polish League season due to the Covid-19 pandemic.
93. Respondent submitted that as a consequence of the measures taken by the Polish authorities and the Polish League the Club was forced to cease its normal activity "*for an indefinite period of time*" and to terminate "*all contracts... with immediate effect*". The Club invoked the principles of *force majeure*, *rebus sic stantibus* and impossibility of performance of the obligation for both parties. Respondent requested the Arbitrator "*to re-examine the scope of the claim of this case and to ignore in this examination in total the period after 17th of March 2020*" (the day the state of emergency was declared). Therefore, the Club claims that the calculation of damages needs to consider the new situation resulting from the pandemic.
94. As Claimant rightly pointed out in his submission of 29 March 2020, the principles of *rebus sic stantibus* and impossibility of performance for both parties are not applicable to the present case. Such principles operate in relation to existing contractual relationships. In this case, Respondent unilaterally terminated the Agreement on 14 October 2019.
95. Consequently, only the *force majeure* concept would be potentially applicable. However, for this concept to operate the Respondent needs to establish, *inter alia*, a causal link between the extraordinary, unavoidable, and unforeseeable events and the impossibility

³⁸ See Exhibit 17 attached to Claimant's submission of 28 February 2020.

of performance of the obligation. Respondent has not satisfied such requirement. In Claimant's words, "*the Respondent fails to specify what consequences of the pandemic make it impossible to fulfil the financial obligation towards the Claimant*". Indeed, Respondent has not provided any argument or evidence whatever in this regard.

96. The Club unlawfully terminated the Agreement by letter of 14 October 2019. Such unlawful termination was not in any way related to the Covid-19 pandemic. An argument of elemental fairness supports that a party that breached its contract should not benefit from an extraordinary and unforeseeable situation that happened only after the breach. The calculation of the damages to which Claimant is entitled – the so-called "but-for" scenario – must be effected at the time that the contract was executed or, perhaps, the time of the breach, but without regard to the actual course of future developments, especially future developments (like the pandemic and its consequences) which were not within the reasonable contemplation or expectations of the parties at the relevant time. Indemnity for breach is designed to preserve and give effect to the parties' reasonable expectations (sometimes referred to as the "positive interest"), not to permit one party to take advantage of new, unrelated, unforeseen and unforeseeable events to the detriment of the other. Permitting this would have the undesirable, indeed perverse, effect of encouraging the breaching party to postpone the settling of its debt in the hopes that future developments could be used to reduce or delay further the satisfaction of the debt. This cannot be countenanced.
97. The foregoing findings are fully in line with the principles set in the "COVID-19 Guidelines Issued on 20 April 2020 by the BAT President, Vice-President and Arbitrators" (the "BAT Covid-19 Guidelines"). In particular, point 11 of the BAT Covid-19 Guidelines provides:

"When calculating damages for any unlawful termination not related to the COVID-19 crisis, the arbitrators will, in principle, not take into account the hypothetical impact that the COVID-19 crisis would potentially have had on the contract had it run its normal course. In particular, in case of any unlawful termination by a club that is unrelated to the COVID-19 crisis, the Guidelines on reductions of players' and coaches' salaries shall, in principle, not apply to the calculation of damages or outstanding remunerations under the

contract. The onus of proof that the Guidelines exceptionally apply for reasons of equity shall be on the respective club. Elements that may be taken into account in this context are, in particular, the nature, the motive and the gravity of the contractual breach committed, the vicinity of the breach to the Lockdown Period and the behavior of the parties subsequent to the breach. In case there are reasons to deviate from the above principle, i.e. non-application of the Guidelines, preference should be given to deferring the maturity of some of the claims to the beginning of the 2020/21 season... (emphasis supplied)

98. The Club has neither satisfied, nor come close to satisfying, its “onus of proof” to establish that the principles of the BAT Covid-19 Guidelines on the reduction of players’ salaries should, exceptionally, apply to the present case despite the general indication as to their non-applicability. As noted, the Club has on the contrary made no effort to so establish. Instead, it merely asserts in an entirely conclusory fashion that *“it is obvious that the new situation has to be taken into account.....when calculating the amount of compensation [owed to the Player]”*.
99. The Club’s breach occurred months before the pandemic and its consequences hit. The pandemic and its consequences did not cause or contribute to the breach, nor is it alleged to have caused or contributed to the breach. The Club has not satisfied any amount of the Player’s agreed salary for the 2019-20 season. For all of these reasons, the Arbitrator finds no reason – in law, equity or otherwise -- to deviate from the orientation included in point 11 of the BAT Covid-19 Guidelines set out above.
100. For the reasons above, the Club shall pay the Player’s outstanding salaries for the remaining 2019-2020 season in the amount of PLN 153,250.00 net.

6.2.2 Medical expenses

101. The Claimant further requests the reimbursement of the expenses incurred in the

medical treatment for his _____ injury, in the amount of PLN 5,350.13.³⁹

102. Article 7 of the Agreement provides that “*the Club shall cover all medical expenses for cure and treatment of injuries incurred by the Player and occurring during his stay in Poland*”. The Player, for his part, shall give immediate notice to the Club and “*submit himself to a medical examination and treatment administered by a physician designated by the Club*”.

103. All the conditions in Article 7 are met:

- The Player suffered an injury during an official match of the Polish league.
- The Player visited the doctor designated by the Club.⁴⁰
- Player underwent treatment and surgery with the same doctor, even after the termination of the Agreement by the Club.⁴¹

104. Therefore, under Article 7 the Club shall be responsible for the medical expenses borne by the Player. Claimant shall be awarded PLN 5,350.13 as a reimbursement of such medical costs.

6.2.3 Interest

105. As a final matter, the Claimant has requested interest on the amount of PLN 157,250 (outstanding salaries) at the applicable Swiss statutory rate (i.e. 5%), starting from 14 October 2019 (the day of the unilateral termination of the Agreement) until complete payment.

³⁹ See Exhibit 12 attached to the RfA.

⁴⁰ See Exhibit 5 attached to the RfA.

⁴¹ See Exhibit 8 attached to the RfA.

106. The Respondent has not specifically disputed the Claimant's request for interest.

107. The Agreement does not provide for interest. However, in accordance with consistent BAT jurisprudence, and deciding *ex aequo et bono*, the Arbitrator considers it fair and reasonable to award interest at the rate of 5% per annum on the amount of PLN 157,250 starting from 14 October 2019, until complete payment.

7. Costs

108. In respect of determining the arbitration costs, Article 17.2 of the BAT Rules provides as follows:

“At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4). [...]”

109. On 11 May 2020, the BAT President determined the arbitration costs in the present matter to be EUR 8,900.00.

110. Moreover, in accordance with Article 18.2 of the BAT Rules, a contribution has been determined to be paid from the BAT Fund towards the arbitration costs in this case. As per the Information Notice accompanying the 2019 edition of the BAT Rules, this amount is EUR 3,000.

111. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 of the BAT Rules provides as follows:

“The award shall determine which party shall bear the arbitration costs and in which proportion. [...] When deciding on the arbitration costs [...], 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.”

112. Considering that the Player was the prevailing party in this arbitration, it is consistent with the provisions of the BAT Rules that costs of the arbitration be borne by Club alone. Given that the Player paid the entire Advance on Costs in the amount of EUR 6,000.00 (of which EUR 100 will be reimbursed to the Claimant by the BAT), Club shall reimburse EUR 5,900.00 to the Player.

113. In relation to the Parties' legal fees and expenses, Article 17.3 of the BAT Rules provides that

“as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding [...] on the amount of any contribution to 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.”

114. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses.

115. The Claimant claim legal fees in the amount of EUR 5,000.00 plus expenses of documents translation fees totalling PLN 1,564.50. He also claims for the expense of the non-reimbursable handling fee.

116. Claimant's legal fees include two different concepts:

- attorney representation costs in pre-arbitration proceedings in the amount of EUR 1,000.
- a success fee for services provided in the arbitration proceedings, in the amount of EUR 4,000.

117. The first part of Claimant's legal fees was not incurred, strictly speaking, in connection with the BAT proceedings (Art. 17. 3 of the BAT Rules), but rather in connection with pre-arbitration services. The Arbitrator notes that a line of BAT jurisprudence tends to

preclude the recovery of legal costs involving pre-arbitration services, but also notes that the chronological or substantive distinction between “pre” and “not pre” arbitration services may not be readily drawn in practice. Moreover, a rigid application of this distinction could simply lead to denying recovery of costs in cases in which their nature is described in detail in the cost submission, and granting their recovery in cases in which the description provided is more generic in nature; this is clearly sub-optimal and can be inequitable. Finally, Respondent did not object to the award of this portion of the costs claimed (although it did object to the “success fee” portion). Since the Arbitrator finds the overall amount of the costs claimed by Claimant to be reasonable, he considers it fair and equitable in the circumstances to award the EUR 1,000 claimed for actual costs of representation albeit described as being provided in the “pre-arbitral” phase of the proceedings.

118. Regarding the second part of Claimant’s legal fees submitted, the Arbitrator finds that in the context of an international arbitration, a success fee may in principle be recoverable if and to the extent that it is reasonable. In this case, the success fee is not considered excessive, taking into account the circumstances of the case, including the relative complexity of the factual situation underlying the RfA, and the fact that the proceedings re-opened for a second round of submissions on new factual and legal issues.
119. The Arbitrator accordingly considers it fair and reasonable to award the amount of EUR 5,000 in legal fees, plus PLN 1,564.50 in expenses, as well as the payment of the NRHF in the amount of EUR 1,500.
120. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:
 - (i) The BAT shall reimburse EUR 100 to the Claimant, being the difference between the costs advanced by the Parties and the arbitration costs fixed by the BAT President;



BASKETBALL
ARBITRAL TRIBUNAL

- (ii) The Club shall pay EUR 5,900 to the Claimant, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT;
- (iii) The Club shall pay to the Claimant EUR 6,500.00 (1,500.00 for the non-reimbursable fee plus 5,000.00 for legal fees), and PLN 1,564.50, representing the amount of his legal fees and other expenses.

8. AWARD

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

- 1. BM Slam Stal S.A. shall pay Mr. Greg Surmacz PLN 153,250, net of taxes, as compensation for unpaid salary payments, plus interest at 5% per annum on such amount, from 14 October 2019 until complete payment.**
- 2. BM Slam Stal S.A. shall pay Mr. Greg Surmacz PLN 5,350.13, as compensation for non-reimbursed medical expenses.**
- 3. BM Slam Stal S.A. shall pay Mr. Greg Surmacz an amount of EUR 5,900 as reimbursement for his arbitration costs.**
- 4. BM Slam Stal S.A. shall pay Mr. Greg Surmacz an amount of EUR 6,500, and PLN 1,564.50, as reimbursement for his legal fees and expenses.**
- 5. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 14 May 2020

Clifford J. Hendel
(Arbitrator)