The

FIVB TRIBUNAL

herewith issues the following

DECISION

2019-03

on the Request for Review of CC209/2018 filed by

Chemik Police S.A. ("Claimant")
represented by Mr. Tomasz Dauerman, attorney at law

vs.

Mr. Yuri Marichev ("Respondent")
represented by Mr. Sergiu-Valentin Gherdan, attorney at law

1. The Parties

1. The Claimant is a professional volleyball club with its legal seat in Police, Poland (hereinafter the "**Claimant**" or "**Club**").

2. The Respondent is a professional volleyball coach from Russia (hereinafter the "**Respondent**" or "**Coach**").

2. The FIVB Tribunal (FIVB Tribunal Judge)

3. Article 19.1.5 of the FIVB Sports Regulations[1] provides as follows:

> *"Cases before the FIVB Tribunal shall be heard by the Chairperson, provided that the amount in dispute does not exceed CHF 200'000 (two hundred thousand Swiss Francs). All other cases shall be heard by the Chairperson and two (2) other members of the FIVB Tribunal, appointed by the Chairperson.* […]*"*

4. Because the amount in dispute in the present case does not exceed CHF 200,000.00, this Request for Review will be heard by the Chairperson as a single judge. Dr. Karsten Hofmann from Germany is the current Chairperson of the FIVB Tribunal and, thus, was appointed as the single judge in the present case (hereinafter the "**FIVB Tribunal Judge**").

3. Facts and Proceedings

3.1 Background Facts

5. On 19 January 2016, the Coach and the Club signed an agreement (hereinafter the "**Contract**") under which the Coach agreed to coach the Club's team for the 2016-2017 and 2017-2018 seasons. In return, the Club agreed to pay the Coach – among other financial benefits – a total compensation of EUR 15,000.00 net monthly. The term of the Contract ran from 1 June 2016 to 30 June 2018.

[1] The versions of the FIVB Sports Regulations in force as of 1 June 2018, 22 January 2020 and 13 November 2020 are identical with regard to the provisions relevant for the case at stake, i.e. "Section III – Financial Disputes" (Articles 18 – 21).

6. On 26 August 2016, the parties mutually terminated the Contract (hereinafter the "**Termination Agreement**") and agreed to a compensation for the Coach. Pursuant to § 2 (1) of the Termination Agreement, the Club agreed to pay the Coach the amount of USD 50,000.00 gross and PLN 45,000.00 gross both to be paid by 14 September 2016.

7. On 12 September 2016, the Club paid the Coach the amount of PLN 29,539.55. An additional amount of USD 32,766.72 was paid to the Coach on 14 September 2016.

8. According to the Club's submission, on 17 October 2016, it paid to the competent state authorities in Poland the public-law debt in relation to the gross amounts agreed under the Termination Agreement.

9. On 9 April and 27 May 2019, the Coach filed a Complaint for Financial Dispute before the CEV, in which he alleged that he did not receive the full amount of the compensation agreed under the Termination Agreement, and paid the requested handling fee of EUR 400.00 to the CEV.

10. The proceedings before the CEV continued with submissions of the parties and the CEV issued its decision in the case "CC209/2018[2]" on 27 November 2019 (hereinafter the "**CEV Decision**"). The CEV found that the Club had to pay the Coach the amount of EUR 19,271.54 net as compensation with default interest of 5 percent per annum from 14 September 2016 as well as the amount of EUR 400.00 as reimbursement of the CEV handling fee.

3.2 The Proceedings before the FIVB Tribunal

11. On 11 December 2019, the Club filed its Request for Review (dated "11 December 2016" [sic]) concerning the CEV Decision including a request to suspend the effect of the CEV Decision until a final decision of the FIVB Tribunal.

12. By email dated 23 December 2019, the Club filed further submissions asking for a stay of execution of the CEV Decision. Such submissions were sent by email and directly copied to the

[2] Case number as named on the cover page of the CEV Decision. However, the year "2018" seems to be a typo because the first instance proceedings before the CEV started in 2019 and both parties have referred to case number "CC209/2019" during the proceedings.

Coach. On the same day, by email, the Coach filed comments on the Club´s submissions and stated his *"position of opposition to this suspension requested by the Respondent Club as well*".

13. On 7 January 2020, the FIVB Tribunal Secretariat acknowledged receipt of the Club's Request for Review as well as of the relevant applicable handling fee paid by the Club and received by the FIVB on 10 December 2019. The FIVB Tribunal Secretariat also noted that the Coach's email dated 23 December 2019 would be considered as his objection to the Club's request for a stay of the CEV Decision. Furthermore, the FIVB Tribunal invited the Coach to submit a valid Power of Attorney by no later than 14 January 2020. Additionally, the FIVB Tribunal invited the Club to file English translations of Exhibits 15, 16 and 17 of the Request for Review by no later than 10 January 2020.

14. By email dated 13 January 2020, the FIVB Tribunal Secretariat acknowledged receipt of the Power of Attorney requested from the Coach (filed on 7 January 2020) and of the English translations provided by the Club (included in the emails submitted on 9 and 10 January 2020). In accordance with Article 20.5 of the FIVB Sports Regulations, the FIVB Tribunal Secretariat invited the Coach to file an Answer on the Request for Review by no later than 3 February 2020.

15. By email dated 16 January 2020, the FIVB Tribunal Secretariat informed the parties about the decision of the FIVB Tribunal Judge on the Club´s request for a stay, namely to request the FIVB and/or CEV to stay the effect of the CEV Decision until the date of a decision on the merits by the FIVB Tribunal.

16. By email dated 4 February 2020, the FIVB Tribunal Secretariat acknowledged receipt of the Coach's Answer on 3 February 2020.

17. By email dated 3 March 2020, the FIVB Tribunal received an unsolicited email of the Coach's counsel requesting the opportunity to submit the Coach´s account of costs. The FIVB Tribunal Secretariat confirmed receipt of the Coach's request by email dated 26 March 2020 and forwarded it to the FIVB Tribunal Judge for his review and further instructions regarding the next steps.

18. By email dated 8 December 2020, the FIVB Tribunal invited the parties to submit any final comments they may have concerning the present case and to submit a detailed account of costs

in accordance with Article 20.7.1 of the FIVB Sports Regulations by no later than 22 December 2020. The FIVB Tribunal Secretariat noted that the parties' submissions should be limited to the information requested and that any additional information submitted would not be taken on file.

19. By email dated 18 December 2020, the FIVB Tribunal received the Club's final submissions including its account of costs.

20. By email dated 22 December 2020, the FIVB Tribunal received the Coach´s final submissions including his account of costs.

21. On 4 January 2021, the FIVB Tribunal Secretariat acknowledged receipt of the parties' submissions and stated that the FIVB Tribunal Judge would issue a decision or further instructions in due course.

4. The Parties' Submissions

22. The following section provides a brief summary of the parties' submissions and does not purport to include every contention put forth by the parties. However, the FIVB Tribunal Judge has thoroughly considered all the evidence and arguments submitted by the parties and taken on file, even if no specific or detailed reference has been made to those arguments in this section.

4.1 The Claimant's Position and Request for Relief

23. The Coach was subject to social security obligations in Poland. On 12 July 2016, the Club registered the Coach together with three other persons for social insurance by using the "ZUS P ZUA" form (Club´s exhibits no 4 and 5). The Club then received the "*Mailing and email receipt confirmation*" document, which clearly indicated the date of sending the form, i.e. 12 July 2016, and the status as being processed.

24. Since the Termination Agreement resulted from the Contract, the gross amounts listed in the Termination Agreement constitute remuneration subject to public-law liabilities. As a result, the Club was obliged to pay income tax and social security contributions, including health insurance contributions, for the Coach to the competent state authorities in Poland. Those payments to

the competent state authorities were made as part of the Club´s social security contributions for all of its employees and as part of the advance payment on income tax on behalf of all of its employees who were foreign persons under Polish law (including the Coach).

25. On 14 October 2016, the Club's declaration of social security contributions that the Club had to pay in October 2016 for all its employees that received remuneration in September 2016 was completed (form "ZUS P DRA" with filing date 14 October 2016). In relation to the Coach, the total contributions to be paid were stated in the form "ZUS P RCA" (filing date 14 October 2016). Also on 14 October 2016, the Club received the "*Mailing and email receipt confirmation*" document and the "*List of accounting documents transmitted*", which included the previous mentioned forms, stating that the forms had been processed by the Social Insurance Institution (ZUS). Furthermore, the Club was obliged under Polish law to pay an advance on income tax on behalf of all its employees who were foreign persons, such as the Coach. The form "*Monthly flat rate income tax – supplementary report to annual PIT-8AR tax return*" shows that the advance on income tax to be paid by the Club amounted to PLN 71,684.00.

26. On 17 October 2016, any amounts due for social contributions and income tax were paid to the bank accounts of the relevant state authorities, as shown in the document "*Bank statement No. 619*". To provide further evidence that all charges were paid in due time to the competent authorities, the Social Insurance Institution (ZUS) issued the "*Certificate of no arrears in payment of contributions*" (dated 28 November 2019) and the Head of the First Revenue (Tax) Office in Szczecin, Poland, issued the "*Certificate testifying to the lack of tax payment arrears or stating the arrears amount*" (dated 10 December 2019).

27. Since the Club has proven the fulfilment of its public-law obligations, the burden of proof in respect of the Club's failure to fulfil its obligation now lies with the Coach. The CEV's argument, i.e. that the Club did not provide sufficient evidence for the public-law liabilities having been paid to the competent state authorities, is not justified because at least now the Club is able to submit respective evidence. The fact of having a business relationship with an accounting company cannot be the only reason to exclude the probative value of a company's declaration and statements. In addition, given the content of the Termination Agreement, in which the amounts were clearly defined as gross, the forms submitted, the nature of the services provided by the Coach and the experience of life, the amount awarded to the Coach by way of the CEV Decision was in fact a public-law debt.

28. Finally, the Club requested in its Request for Review – and did not amend its request for relief in the meantime – the following:

> *"In view of the above the Club kindly requests for:*
>
> *1) Annulment of the CEV decision dated 27th November 2019 in so far as it orders the Club to pay to the Coach the sum of EUR 19,271.54 together with 5% default interest calculated from 14 September 2016 and in so far as it orders the Club to pay to the Coach the sum of EUR 400 as reimbursement for the costs incurred in connection with the payment of the handling fee. Furthermore, the Club requests that the Coach's claim be dismissed;*
>
> *2) Order the Respondent to reimburse the Claimant for the costs of the proceedings, including the costs of legal representation on the basis of the VAT invoice submitted to this letter (attachment no 15), the confirmation of payment (attachment no 16) and the average Swiss franc exchange rate on the day of payment (attachment no 17), as well as the costs incurred in connection with the payment of the handling fee."*

4.2 The Respondent's Position and Request for Relief

29. The Club has produced new evidence in its Request for Review, which should be found inadmissible. The documents were available at the Club's disposal at the time of the proceedings before the CEV but had not been submitted by the Club. Its duty of due diligence would have required the Club to provide all relevant documents stating its defense at such earlier point. The concept of equity embraces the inadmissibility of producing such "new" evidence only in review/appeal proceedings while it has been available during the first instance proceedings. The FIVB Tribunal has to verify the interpretation of facts and findings in a review/appeal procedure based on given facts and law by an inferior court/arbitration body. If the FIVB Tribunal accepted such "new" evidence, this purpose of an appeal procedure would be "*thwarted*".

30. According to the principle of *actori incumbit probatio* (any facts, that the Coach is unpaid, represent negative facts for him), the burden of proof regarding the payment of all the amounts agreed under the Termination Agreement to the Coach lies with the Club. Therefore, it is the Club's obligation to prove such aspects in accordance with the general standard of evidence "beyond a reasonable doubt", in a clear and convincing manner. The fact that the Club paid a

certain amount as taxes for all employees, is no direct evidence for the Club having paid its public-law debt related to amounts agreed under the Termination Agreement.

31. Furthermore, the Club has never been liable to pay such taxes on behalf of the Coach. The amount to be paid under the Termination Agreement represents a compensation for terminating the original Contract and thus does not have the legal value of a "salary", for which the alleged taxes would have had to be paid. Moreover, the compensation had been paid at a moment in which the Coach no longer was a temporary resident in Poland. Therefore, the compensation was free of applicable tax in Poland. Rather, it was the Coach's own responsibility to declare and properly tax such income in accordance with domestic fiscal law.

32. Finally, the Coach concluded in his submission dated 22 December 2020 – and similarly in his Answer dated 3 February 2020 – as follows:

> *"1.* […] *Therefore, we kindly request to strike out from the case file and disconsider any evidence piece consisting of any whatsoever new documents produced by the Appellant that (1) were not submitted before the CEV Arbitral Tribunal and (2) had been attached, omisso medio, to the Request of Review by such party.* […]
> *8. Therefore, in the light of these aspects, nothing from the Appellant´s appeal should represent grounds to alter the CEV arbitral award issued, which we duly request to be held and the club´s appeal to be duly rejected.*
> *9.* […] *Thus YURI MARICHEV duly request that the Club of KLUB PILKI SIATKOWEJ "CHEMIK POLICE" SPOLKA AKYJNA to be obliged to pay towards him an amount of 3.000 EUR, representing legal fees costs (attorneys fees)."*

5. Jurisdiction

33. The FIVB Tribunal must first examine whether it has jurisdiction to hear the present dispute. In order to do so, it must first look at the relevant provisions of the FIVB Sports Regulations.

34. Article 19.2.1 of the FIVB Sports Regulations reads as follows:

> *"The FIVB Tribunal is competent to decide financial disputes of an international dimension between clubs, players, FIVB-licensed agents and coaches from within the world of volleyball. The FIVB Tribunal´s jurisdiction extends also to financial disputes of an international dimension between a coach and a National Federation."*

35. Article 19.2.2 of the FIVB Sports Regulations stipulates that the FIVB Tribunal can only resolve disputes:

> *"19.2.2.1 arising between the natural and legal persons/entities mentioned in Article 19.2.1; and*
>
> *19.2.2.2 decided previously by the FIVB / a Confederation or referred by the FIVB/a Confederation to the FIVB Tribunal"*

36. Article 19.2.3 of the FIVB Sports Regulations grants the FIVB Tribunal the power to rule on its own jurisdiction.

37. Thus, in order for the FIVB Tribunal to have jurisdiction over the dispute, the FIVB Tribunal Judge shall examine whether the conditions of both Articles 19.2.1 and 19.2.2 of the FIVB Sports Regulations are satisfied.

38. The present dispute involves a claim initially submitted by a coach from Russia against a club from Poland concerning compensation agreed under a termination agreement. The FIVB Tribunal Judge finds that this dispute clearly qualifies as a financial dispute of an international dimension between a coach and a club in accordance with Articles 19.2.1 and 19.2.2.1 of the FIVB Sports Regulations.

39. Furthermore, the Request for Review at hand is made against the CEV Decision, which was rendered by the CEV Legal Chamber. Therefore, the present Request for Review stems from a decision of a Confederation and the FIVB Tribunal Judge holds that Article 19.2.2.2 of the FIVB Sports Regulations is also satisfied.

40. Based on the above, the conditions of Articles 19.2.1 and 19.2.2 of the FIVB Sports Regulations are satisfied.

41. Additionally, the Club's Request for Review was filed on 11 December 2019 concerning the CEV Decision of 27 November 2019, i.e. within the 14-day period described in Article 18.2 of the FIVB Sports Regulations.

42. Therefore, the FIVB Tribunal has jurisdiction over the present Request for Review pursuant to the FIVB Sports Regulations.

6. Procedural Issues

6.1 The Claimant´s request for a stay of execution

43. In its Request for Review and in its further submissions dated 23 December 2019, the Club requested to suspend the effect of the CEV Decision while under review/appeal. On 16 January 2020, the FIVB Tribunal Judge found to request the FIVB and/or CEV to stay the effect of the CEV Decision until the date of a decision on the merits by the FIVB Tribunal, in particular, for the following reasons:

a) The FIVB Tribunal Judge had taken note of exceptional circumstances in the present case: According to section 4.2 of the CEV Decision, both, the Agreement of 19 January 2016 and the Termination Agreement of 26 August 2016, stipulated "gross" payments to be made by the Club to the Coach and it was undisputed between the parties that the Club had duly made (net) payments in the amounts of USD 32,766.72 and PLN 29,539.55 to the Coach. According to the information available to the FIVB Tribunal Judge, – without any prejudice for the FIVB Tribunal's decision on the merits – it was not excluded but quite possible that the Club had actually made further payments related to the Coach to competent state authorities in Poland (difference between "net" and "gross" amounts). Therefore, the FIVB Tribunal Judge found that a stay of the effect of the CEV Decision avoided any (possible) double payments and/or related (unjustified) sanctions under Chapter 9 of the FIVB Sports Regulations and provided the chance for a detailed finding on the issues under dispute in the present proceedings.

b) The FIVB Judge further found that a stay of the effect of the CEV Decision did not cause irreparable harm to the Coach: The payments in dispute relate to agreements signed by the parties in 2016 and being claimed before the CEV by the Coach only in 2019. Furthermore, according to publicly available information, the Coach had been under contract with other clubs in the meantime and earned his livings.

6.2 Admissibility of (new) documents submitted by the Claimant

48. In his submissions, the Coach requested that any new evidence provided only before the FIVB Tribunal should be held inadmissible. He argued that the new documents produced by the Club only for the proceedings before the FIVB Tribunal were "*available at its* [the Club's] *disposal at the date of the proceedings before the CEV Tribunal*" but were not submitted. The Coach went on by saying "*considering that the FIVB Tribunal verifies the interpretation of facts and the findings en droit by the first instance […]* [and] *having the concept of equity at their base*", new evidence, which had been available during the first instance proceedings, should not be admissible in appeal proceedings. Thus, if the FIVB tribunal accepted such evidence, the purpose of an appeal procedure, being the interpretation given to facts and law by an inferior court or arbitration body, would have been "*thwarted*".

49. The FIVB Tribunal Judge notes that Article 20.10.1 of the FIVB Sports Regulations gives the FIVB Tribunal "*full power to review the facts and the law of the dispute*". However, the FIVB Tribunal Judge does not note any provision according to which evidence filed only in the proceedings before the FIVB Tribunal but not in the first instance has to be found inadmissible. To the contrary, according to Article 20.7.1 of the FIVB Sports Regulations, the FIVB Tribunal is specifically authorized to "*order the production of (additional) evidence* […]*, or give directions for the further proceedings*" and "*shall determine in its sole discretion the procedure before it, taking into account the principles of equal treatment of the parties and their right to be heard*" according to Article 20.1.2. of the FIVB Sports Regulations.

50. The FIVB Tribunal Judge agrees that the appeal/review proceedings before the FIVB Tribunal should not be automatically open for any kind of new evidence without any closer connection to the first instance proceedings. Therefore, the admissibility of new evidence should be decided under the circumstances of each specific case. This is also in line with the rules of the Court of Arbitration for Sport (CAS), which is the appellate body for any decisions rendered by the FIVB Tribunal (Article 20.12 of the FIVB Sports Regulations). Article R57 of the CAS Code provides that the CAS Panel has full power to review the facts and the law – like the FIVB Tribunal – but additionally states that the CAS Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision had been rendered. Therefore, the CAS approach is a general right to file new evidence in appeal proceedings but gives the CAS Panel the competence to exclude

evidence if deemed reasonable under the circumstances. This approach should be the guidance for the FIVB Tribunal in respective situations.

51. Based on the provisions and principles mentioned above, the FIVB Tribunal Judge finds all parties´ submissions filed in the present proceedings admissible, including any evidence submitted by the Club only before the FIVB Tribunal but not in the first instance with the CEV. Consequently, all parties´ submissions including exhibits have been taken on file.

52. That being said, the FIVB Tribunal Judge would like to emphasize that several of the documents and information filed by the Club had already been submitted in the first instance with the CEV. This can also be read from the CEV Decision, where section 4.3 lit h) and lit i) mentions some of the documents submitted again by the Club in the present proceedings (e.g. forms "ZUS RCA" and "IFT – 1R"). The documents submitted by the Club for the first time are, however, closely related to the arguments already discussed and documents already filed in the first instance. Thus, the Club has not submitted new arguments but rather completed its list of exhibits to support its arguments already on file in the first instance. The documents produced by the Club only before the FIVB Tribunal are exactly those documents mentioned in section 4.3 lit k) of the CEV Decision as further evidence supporting its already filed arguments. In addition, at least the documents "*Certificate of no arrears in payment of contributions*" (dated 28 November 2019) and "*Certificate testifying to the lack of tax payment arrears or stating the arrears amount*" (dated 10 December 2019) were issued only after the CEV Decision and therefore not available in the first hearing proceedings before the CEV.

53. Furthermore, the Coach was provided with his full right to be heard and the respective opportunity to file any statements deemed necessary. Thus, the parties have been treated equally and all procedural rights fully granted.

54. Finally, it seems evident for the FIVB Tribunal Judge to now render a decision that is as correct as possible with regard to the merits of the case and therefore to take into consideration as much convincing evidence as possible instead of ignoring it just for procedural reasons. This holds true even more so when deciding *ex aequo et bono* instead of ruling according to general and abstract legal rules. The decision of the FIVB Tribunal can only be just and fair if it is based on all relevant documents and facts. When a party brings evidence forward only in the second instance, whereas it would have been able to do so already in the first instance, this does not

justify *per se* the decision of the FIVB Tribunal to be based on incomplete facts. The disadvantages arising out of a delay as to filing of evidence and caused by the Club will rather be considered in the context of costs of the present proceedings.

7. Discussion

7.1 Applicable Law

44. Under the heading "Law Applicable to the Merits", Article 20.9 of the FIVB Sports Regulations reads as follows:

> *"Unless otherwise agreed by the parties, the Tribunal shall apply general considerations of justice and fairness without reference to any particular national or international law (ex aequo et bono)."*

45. Both parties made some references to domestic laws. The Club referred to Polish law when arguing on fulfilling its public-law debts but did not contest the applicability of *ex aequo et bono* to the present dispute. The Coach referred to general principles of domestic law when arguing that no tax obligations in Poland existed but also explicitly noted that the FIVB Tribunal should issue its decision *ex aequo et bono*.

46. Thus, the FIVB Tribunal Judge has not been provided with an agreement of the parties to apply an alternative law as *ex aequo et bono*. Because Article 20.9 of the FIVB Sports Regulations requires such an agreement in order to not apply *ex aequo et bono* ("*Unless otherwise agreed by the parties* […]"), absent such agreement, the FIVB Tribunal Judge will decide the issues submitted in this proceeding *ex aequo et bono*.

47. In substance, it is generally considered that an arbitrator/judge deciding *ex aequo et bono* receives "*a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case*" (POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626).

48. In light of the foregoing matters, the FIVB Tribunal Judge decides as follows:

7.2 Findings

49. In essence, the Club requests the FIVB Tribunal to annul the CEV Decision and to find that it does not owe any amount to the Coach, while the Coach requests the FIVB Tribunal to fully uphold the CEV Decision.

50. The FIVB Tribunal Judge has reviewed the CEV Decision, considered the parties' submissions as well as the evidence before him and makes the following findings:

7.2.1 The Club's obligation to pay further amounts to the Coach under the Termination Agreement

51. It is undisputed between the Parties, that § 2 (1) of the Termination Agreement stipulated the Club´s obligation to pay the Coach the amount of USD 50,000.00 gross and PLN 45,000.00 gross, both by 14 September 2016. It is also undisputed between the Parties, that the Club paid the Coach the amounts of USD 32,766.72 and PLN 29,539.55 by 14 September 2016. Furthermore, it is undisputed that the Club did not pay the remaining amounts of USD 17,233.28 and PLN 15,460.45 directly to the Coach. The reasons for these non-payments are, however, under dispute between the parties and the core issue in the present case.

52. The Club justified the reduced payment to the Coach in September 2016 by its duty to deduct amounts it was obliged to pay to the competent state authorities in Poland concerning tax, health insurance and social security duties resulting from the fact that the Coach was an employee of the Club. The Coach argues that the Club has not fulfilled its burden of proof of paying all the amounts agreed under the Termination Agreement "*beyond a reasonable doubt, in a clear and convincing manner*" and the Club had never been liable to pay such taxes on behalf of the Coach.

53. As to the standard of proof in the present proceedings: The standard of "*beyond a reasonable doubt"* is the one for criminal cases in various jurisdictions but not the general standard of proof that is applicable as claimed by the Coach. While one can discuss its application in sport disciplinary cases, it is not evident, why it should be the standard of proof applied by the FIVB Tribunal in financial disputes. For such financial disputes at first instance, Article 18.1 lit e. of the FIVB Sports Regulations stipulates that the "*decision will be taken on a balance of probabilities*". While the standard of proof to be applied by the FIVB Tribunal in appeal/review proceedings is

not explicitly stipulated in the FIVB Sports Regulations, the FIVB Tribunal Judge finds that it should be the same as in the first instance of the financial dispute, i.e. "*by a balance of probabilities*". However, even if one agreed on a higher standard of proof in the present case, e.g. "comfortable satisfaction", the FIVB Tribunal Judge is ready to make its decision in the present case by applying such a higher standard.

54. Whether the letter from the Club´s auditor is insufficient proof – as held by the CEV in the first instance arguing a close business relationship between the accounting company and the Club – does not need to be decided by the FIVB Tribunal Judge. Given all the further evidence provided by the parties in the present proceedings, the FIVB Tribunal Judge is actually comfortably satisfied that the Club was entitled to reduce the (gross) amounts agreed under the Termination Agreement as done when the payments to the Coach on 12 and 14 September 2016 were made because it made respective payments concerning tax, health insurance and social security obligations to the competent state authorities in Poland.

55. The Coach is correct in stating that the burden of proof for such respective payments to the state authorities in Poland lies with the Club. However, the Club has fulfilled its burden of proof not only in light of general payments related to all of its employees concerning the month "September 2016" but also in light of specific payments related to the Coach for the amounts agreed under the Termination Agreement.

56. The Club has provided sufficient evidence for registering the Coach to the social security contribution system in Poland by using the "ZUS P ZUA" form on 12 July 2016. There is a specific form naming only the Coach for "application for insurance" (see Club´s exhibits 4) and a further document naming the Coach and three other persons including corresponding document numbers, which sufficiently proves the date of application for insurance (see Club´s exhibits 5).

57. The Club has provided a detailed payroll related to the Coach, which states a remuneration of PLN 236,925.00 for August 2016 to be paid in September 2016 and lists respective social security contributions and tax advance amounts (see Club´s exhibits 6). The Coach did not submit any comments on that payroll document and therefore did not object to its correctness. Its correctness is also supported arguing as follows: Taking into account the amounts agreed under the Termination Agreement on 26 August 2016 to be paid by 14 September 2016, i.e. USD 50,000.00 gross and PLN 45,000.00 gross, the sum of these amounts corresponds to the total

remuneration amount stated on the payroll (USD 50,000.00 equals to approximately PLN 190,000.00; thus a total amount of approximately PLN 235,000.00). The information on the relevant dates (remuneration for period 1 to 31 August 2016 to be paid in September 2016) corresponds additionally. Moreover, the detailed payroll states different amounts like PLN 47,385.00 for advance tax payment, PLN 20,068.10 for health insurance contribution and PLN 13,946.16 as the Coach's part of the social security contribution (the Club´s part is stated as an additional amount of PLN 28,025.28), amounting to PLN 89,356.44 in total. It can be assumed sufficiently that the total amount stated on the payroll actually equals to the amount of EUR 19,271.54 awarded in the CEV Decision as the Coach´s initial claim before the CEV (PLN 89,356.44 equals to EUR 19,828.33 according to www.xe.com at present). Thus, the FIVB Tribunal Judge is sufficiently satisfied that the detailed payroll relates to the gross amounts agreed under the Termination Agreement.

58. Furthermore, the Club has sufficiently proven that it did in fact pay this total amount to the competent authorities in Poland. The Club submitted a bank statement dated 17 October 2016 (see Club´s exhibit 11) which shows the Club´s payments for health insurance (PLN 45,837.95), labour fund and guaranteed employee benefits fund (PLN 13,130.49) and social insurance contributions (PLN 93,394.91) as well as "monthly flat rate income tax" (PLN 71,684.00) to the respective state authorities. The fact that the Club only proves payment for its employees altogether does not create doubts on the payments made concerning the Coach. It is standard practice for an employer that payments to state authorities for tax, health insurance and social security obligations are made collectively for all employees together and not separately for every single employee. Moreover, the Club has provided the social security contribution form "ZUS P RCA", which is a personalized report naming the Coach and listing details of his contributions (see Club´s exhibit 8). It also provided a document "*Mailing and email receipt confirmation*", which names the Coach and confirms the electronic submission of the "ZUS DRA" und "ZUS RCA" forms (see Club´s exhibit 9).

59. The FIVB Tribunal Judge understands the Coach´s desire to be aware of the concrete amounts of income tax paid by the Club to the state authorities in Poland in relation to his remuneration earned in Poland. This is an important aspect for a possible double taxation issue concerning the Coach´s home country. However, it would be for the Coach to ask the Club for any respective tax certificates given that the compensation agreed under the Termination Agreement was explicitly stated as "gross". The Coach did not request for tax certificates in his first instance

claim with the CEV and, as far as the FIVB Tribunal Judge is aware, did not ask for it beyond the legal proceedings. Given the content of the CEV Decision and the first instance proceedings, i.e. silence on the issue of tax certificates, any certificates confirming concrete amounts paid for income tax are no issue for the present proceedings before the FIVB Tribunal.

60. Taking into account all the above, the FIVB Tribunal Judge is comfortably satisfied that the Club paid the amounts listed on the detailed payroll amounting to PLN 89,356.44 (equal to the amount of EUR 19,271.54 initially claimed by the Coach before the CEV and awarded in the CEV Decision) to the competent authorities in Poland as part of its collective payments for tax, health insurance and social security obligations. This finding is also supported by the "*Certificate of no arrears in payment of contributions*" (dated 28 November 2019) and the "*Certificate testifying to the lack of tax payment arrears or stating the arrears amount*" (dated 10 December 2019) provided by the Club in the present proceedings. Those documents show that the Club complied with all its tax, health insurance and social security obligations under Polish law, including the above-mentioned obligations concerning the month "September 2016" and, therefore, concerning the Termination Agreement and respective payments related to the Coach.

61. The FIVB Tribunal Judge does not agree with the Coach's submission that compensation paid because of the termination of an employment contract would not qualify legally as "salary". First, the FIVB Tribunal Judge notes that several decision-making bodies in the sports law sector did consider such compensation – agreed in a termination agreement for the purpose of terminating an employment contract and mutually settling its provisions related to salary – to have the same tax effects as the initially agreed salary. This is based on the legal argument that such compensation represents the substitute payment for the originally owed remuneration and, thus, must follow the same fiscal, health insurance and social security payment rules. This principle is also reflected in the CEV Decision. Secondly, the Coach has failed to prove that this well-established principle shall not apply in the present case. His general reference to Polish websites is not sufficient for discharging his burden of proof in this case.

62. In this context, the FIVB Tribunal Judge wonders why the parties should have explicitly agreed "gross" amounts (USD 50,000.00 and PLN 45,000.00) in the Termination Agreement if those amounts were not to be handled as amounts subject to Polish social security and income tax provisions. Exactly this § 2 (1) of the Termination Agreement, where the amounts to be paid by the Club are listed as gross, clearly shows that the Club was entitled to reduce the compensation

owed to the Coach by the amount the Club was obliged to pay as part of tax, health insurance and social security obligations to the competent authorities. Thus, the Club was not obliged to pay these amounts on top of the compensation owed under the Termination Agreement.

63. Accordingly, the Club has proven in the present proceedings that it was in fact entitled to deduct the amounts not paid to the Coach (EUR 19,271.54) but rather obliged to pay such sum to the competent state authorities in Poland as part of its tax, health insurance and social security obligations. The Club has also sufficiently proven the actual payment of these amounts to the competent authorities.

64. Consequently, the FIVB Tribunal Judge finds – contrary to the CEV Decision but based on additional evidence – that the Club fulfilled its burden of proof and therefore complied with its obligation arising out of the Termination Agreement, resulting in the fact that the Club does not have to pay any outstanding amount to the Coach. The CEV Decision needs to be amended accordingly.

7.2.2 Interest on outstanding compensation

65. The Coach initially claimed interest at a rate of 5 percent per annum on different amounts and the CEV Decision awarded "*default interest in amount of 5% per annum from 14.09.2016"* on the amount of EUR 19,271.54 net.

66. Due to the fact that the Coach is actually not entitled to any further amount under the Termination Agreement but the Club has already paid the amount requested by the Coach directly to the state authorities in Poland in October 2016, the Coach is not entitled to any interest.

7.2.3 Summary

67. The evidence newly submitted by the Club during the appeal/review proceedings is admissible.

68. The Club fulfilled its burden of proof of payment of the remaining amount of USD 17,233.28 and PLN 15,460.45 (totalling EUR 19,271.54 as calculated in the CEV Decision) to the competent state authorities in Poland.

69. The Club is not obliged to make further payments to the Coach under the Termination Agreement. The Club is also not obliged to pay any interest to the Coach.

70. Consequently, the Request for Review is fully upheld and the CEV Decision to be amended accordingly.

7.3 Costs

71. In the CEV Decision, the Club was ordered to reimburse to the Coach the first instance handling fee, namely EUR 400.00 paid by the Coach to the CEV. Given that the FIVB Tribunal Judge has contrarily to the CEV Decision ruled that the Coach is not entitled to any further payment under the Termination Agreement, the Coach´s first instance claim was not justified and should have been dismissed in full. Consequently, the costs of the first instance proceedings shall be borne by the Coach and the Club does not need to reimburse the amount of EUR 400.00 to the Coach. As the CEV Decision does not contain any decision on legal fees, no amendments are necessary on this issue.

72. Article 20.11.2 of the FIVB Sports Regulations allows the prevailing party to be granted a contribution towards legal fees and expenses (including the applicable handling fee). However, legal fees must be reasonable. When determining the contribution, the FIVB Tribunal Judge must consider the outcome of the proceedings as well as the conduct and financial resources of the parties.

73. In the present proceedings before the FIVB Tribunal, the Club paid a handling fee of CHF 1,500.00, requested payment of a total amount of PLN 6,150.00 as legal fees for the proceedings before the FIVB Tribunal and submitted respective evidence (invoice, payment confirmation). The Coach, in his last submission, requested payment of EUR 3,000.00 "*representing legal fees costs (attorney fees)*" and provided a corresponding invoice addressed to the Coach.

74. Although the Club's Request for Review is fully upheld, the different judgement of the FIVB Tribunal Judge is very largely based on the completed evidence submitted by the Club in the appeal/review proceedings. Most of that evidence had been available at the Club´s disposition already during the first instance proceedings or, at least, would most probably had been possible to obtain by the Club at that time. Thus, the Request for Review and the proceedings before the

FIVB Tribunal are caused by the Club and would not have been necessary in case of submitting the full evidence available to the Club already in the first instance. Therefore, the FIVB Tribunal Judge holds that the Club must bear the costs relating to the present proceedings before the FIVB Tribunal including a contribution to the Coach´s reasonable legal fees and expenses.

75. Consequently, the FIVB Tribunal Judge finds according to Article 20.11.2 of the FIVB Sports Regulations that

a) the Club must bear the handling fee paid by it to the FIVB in the amount of CHF 1,500.00;

b) the Club shall bear its own legal fees and expenses related to the present proceedings before the FIVB Tribunal; and

c) the Club shall pay to the Coach the amount of EUR 1,500.00 as a contribution to his reasonable legal fees and expenses related to the present proceedings before the FIVB Tribunal.

DECISION

For the reasons set forth above, the FIVB Tribunal Judge decides as follows:

1. **The Request for Review filed by Chemik Police S.A. is upheld.**

2. **The decision "CC209/2018" rendered by the CEV on 27 November 2019 is annulled and amended as follows:**

   a. **Mr. Yuri Marichev´s complaint filed on 9 April and 27 May 2019 with the CEV is dismissed. He is not entitled to further payments from Chemik Police S.A. under the Termination Agreement dated 26 August 2016.**

   b. **Mr. Yuri Marichev shall bear the costs of the first instance proceedings before the CEV, i.e. the handling fee of EUR 400.00 already paid by Mr. Yuri Marichev to the CEV.**

   c. **Mr. Yuri Marichev and Chemik Police S.A. shall both bear their own legal fees and costs incurred in connection with the first instance proceedings before the CEV.**

3. **Chemik Police S.A. shall bear the costs of the present proceedings before the FIVB Tribunal, i.e. the handling fee of CHF 1,500.00 already paid by Chemik Police S.A. to the FIVB.**

4. **Chemik Police S.A. shall pay to Mr. Yuri Marichev the amount of EUR 1,500.00 as a contribution towards his reasonable legal fees and costs incurred in connection with the present proceedings before the FIVB Tribunal. In addition, Chemik Police S.A. shall bear its own legal fees and costs incurred in connection with the present proceedings before the FIVB Tribunal.**

5. **Any other requests for relief are dismissed.**

Lausanne, seat of the proceedings, 31 August 2021

Dr. Karsten Hofmann

FIVB Tribunal Chairperson

NOTICE OF APPEALS

An appeal may be filed against this decision exclusively before the Court of Arbitration for Sport (CAS), in accordance with

a) Article 20.12 of the FIVB Tribunal Regulations which provides as follows:

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

b) The CAS Code of Sport-related Arbitration, which is available under www.tas-cas.org.

The address and contact details of the CAS are the following:

Court of Arbitration for Sport
Avenue de Beaumont 2
1012 Lausanne, Switzerland
Tel: +41 21 613 50 00
Fax: +41 21 613 50 01
email: info@tas-cas.org

In the event of an appeal, this decision shall remain in effect while under appeal unless the CAS orders otherwise.