The

FIVB TRIBUNAL

hereby issues the following

DECISION

2022-04

on the Request for Review of [case number][1] filed by

[The Club] ("Claimant")

represented by [the Club's Chairman of the Board], [the Chairman's place of residence]

v.

[The Player] ("Respondent")

represented by [FIVB licensed agent], [the Agent's place of residence]

[1] In the interest of the protection of privacy, this is a redacted version of the decision. Any redactions are marked with [brackets].

1. The Parties

1. [The Club] is a [the Club's country] professional volleyball club ("**Claimant**" or "**Club**").

2. [The Player] is a [the Player's country] professional volleyball player ("**Respondent**" or "**Player**").

2. The FIVB Tribunal (FIVB Tribunal Judge)

3. Article 19.1.5 of the FIVB Sports Regulations dated 23 June 2023 – identical the former versions dated 3 November 2020 and 21 March 2022 – ("**FIVB Sports Regulations**") 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).* […]*"*

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. Background Facts

5. On [date], the Parties entered into an employment agreement titled "CONTRACT ON PROVISIONS OF SPORTS AND ADVERTISING SERVICES" for the [year/year] and [year/year] seasons ("**Contract**").[2] The remuneration to be paid by the Club to the Player was stipulated in § 7 sec. 1 + 2 of the Contract.

6. According to § 9 sec. 6 of the Contract, in the event of a termination by the Club for specific reasons mentioned in § 9 sec. 5 of the Contract, the Club "*may impose a penalty on the Player in amount of up to 20% of the value of the contract for the season, in which there was a gross breach of the Contract*". According to § 9 sec. 5 lit. c) of the Contract gross breach of the contractual provisions of the Contract should be: "*unexcused Player´s absence by the Coach at one game or three training sessions*".

[2] Exhibit to the Club's RfR dated [date].

7. In the [year/year] season, the Player played regularly for the Club´s team. For the [year/year] season, the Club hired a new head coach. At some point thereafter, the Player was told by the Club that he would not play regularly and that he was free to look for another club if he were willing to leave. Thus, the Player looked for a new club and started negotiations with [the negotiating club's country] club [Club's name, hereafter "the Second Club"] in the middle of [date] lasting [date].

8. By invoice dated [date], the Player asked the Club to pay him EUR 23,174.84 (including VAT) for his [date] remuneration instalment agreed under § 7 sec. 2 of the Contract.[3]

9. At least at the beginning of [date], the Player asked the Club for release from the Contract and the Parties started discussions for a mutual termination agreement. Later, those discussions were joined by the [Second Club].

10. On [date], the Player was justifiably absent from the Club´s training but prepared for a trip to [the Second Club's country] for further negotiation discussions with the [Second Club].

11. From [date] to [date], the Club released the Player to attend the Club´s training. The Player actually did not attend the Club´s training.

12. By invoice dated [date], the Player asked the Club to pay him EUR 12,300.00 (including VAT) for "*Bonus for the sport goas* [sic] *in season [year/year]*".[4]

13. On [date], the Club extended the Player´s "*release from the obligations to provide sports services until January [date]*" and informed the Player as following: "*If, at this time, we do not achieve a mutually satisfactory agreement on the possibility of terminating the contract, you will return to perform sporting duties as our player*." The Player actually did not attend the Club´s training.

14. On [date], the FIVB Legal Affairs Manager informed the Player and the Club that, after assessment of the case by the FIVB Legal and Transfer Department, the FIVB had signed the release of the International Transfer Certificate (ITC) of the Player on behalf of the Club.

[3] Part of the case file in [case number] as provided to the FIVB Tribunal Judge on [date].
[4] Part of the case file in [case number] as provided to the FIVB Tribunal Judge on [date].

15. On [date], the Player signed a new employment contract with [the Second Club].

16. On [date] and [date], the Player did not attend the Club´s training. On [date], the Club sent a letter to the Player terminating the Contract based on its § 9 sec. 5 lit. c) for the absence in three training sessions on [date] and [date].[5]

17. By invoice dated [date], the Player asked the Club to pay him EUR 23,174.84 (including VAT) for his January [month] remuneration instalment agreed under § 7 sec. 2 of the Contract. Later, the Player reduced this invoice by EUR 1,065.88, thus, remaining EUR 22,108.96 to be paid by the Club to the Player.[6]

18. By letter dated [date], the Club informed the Player about its decision to charge the Player "*a contractual penalty in the amount of 45,220.00 euro which is 20% of the contract value in the amount 226,100.00 euro net for the season of [year/year]*" to be paid to the Club by [date].[7]

19. By letter dated [date], the Club informed the Player about "*an offset of mutual claims* […] *for the amount of: EUR 45 283 80 (in words: forty-five thousand two hundred and eighty-three EUR 80/100 cent)*".[8]

20. On [date], the Player filed a complaint against the Club with the FIVB and paid the applicable handling fee of CHF 500.00 on [date]. The Player requested, in particular, "*unpaid (gross) salaries*" in the amount of EUR 190,568.36. The Club requested to dismiss the complaint. The Parties exchanged several submissions until the end of [date].

21. On [date], the FIVB issued a decision in the case [case number] ("Decision") ruling, *inter alia*, that the Club should pay the amounts of EUR 38,873.92 for outstanding salaries, EUR 513.36 for partial reimbursement of the Player's legal fees (i.e., in total EUR 39,387.28) as well as CHF 100.00 for partial reimbursement of the handling fee to the Player. Moreover, the Club´s argument for invoking a contractual penalty in the amount of EUR 45,220.00 to be set off against any outstanding salaries was dismissed.

[5] Exhibit to the Club's RfR dated [date].
[6] Part of the case file in [case number] as provided to the FIVB Tribunal Judge on [date].
[7] Exhibit to the Club's RfR dated [date].
[8] Exhibit to the Club's RfR dated [date].

4. The Proceedings before the FIVB Tribunal

22. On [date], the Club filed a Request for Review of the Decision before the FIVB Tribunal ("RfR"). The RfR contained the procedural request for a "*suspension of the enforceability*" of the Decision "*pending retrial in this regard*".

23. On [date], the FIVB Tribunal Secretariat acknowledged receipt of the RfR and of CHF 2,000.00 in handling fee. It invited the Player to provide his position on the Club´s request for a stay of the enforcement of the Decision by [date] as well as to file an Answer on the RfR by [date].

24. On [date], the FIVB Tribunal Secretariat noted that the Player had failed to submit his position on the Club´s request for a stay of the Decision and was provided a final opportunity to do so by [date]. However, the Player failed to provide any submissions, i.e. comments on the Club´s request for a stay and/or an Answer.

25. On [date], the FIVB Tribunal Secretariat informed the Parties about the FIVB Tribunal Judge´s decision to reject the Club´s request for a stay of the Decision because it had failed to demonstrate exceptional circumstances for a stay and that the respective three criteria test ("irreparable harm", "likelihood of success on the merits" and whether the interests of one party outweigh those of the other party) was fulfilled. Moreover, the FIVB Tribunal Secretariat noted that the Club had not yet paid the entire handling fee in accordance with Article 20.11.1 of the FIVB Sports Regulations, which is CHF 3.000,00 for an amount in dispute exceeding CHF 100,001.00 (in accordance with Swiss procedural rules, the FIVB Tribunal determines the amount in dispute based on the prayers for relief before the first instance body regardless of the amount awarded by the first instance). Consequently, the Club was kindly invited to pay the outstanding handling fee of CHF 1,000.00 by [date] and was informed that in case of non-payment the FIVB Tribunal would deem the RfR withdrawn.

26. On [date], the FIVB Tribunal Secretariat acknowledged receipt of the outstanding handling fee of CHF 1,000.00 paid by the Club and received by the FIVB on [date] (a respective double-payment was reimbursed by the FIVB to the Club). In addition, the FIVB Tribunal Secretariat informed the Parties that the FIVB Tribunal Judge had reviewed all the submissions and no further exchange of submissions was necessary. The Parties were requested to provide a detailed account of their respective costs as well as supporting documentation by [date].

27. As both Parties had failed to submit any statement of costs, they were provided with a final opportunity to do so by [date]. On [date], the Club made its submission on costs, which was acknowledged by the FIVB Tribunal Secretariat and forwarded to the Player on [date].

28. By email dated [date], the Player´s FIVB licensed agent confirmed to be "*authorized to take care of the case*" (including a reference to a power of attorney dated [date] submitted in the first instance). He apologized for his late submission due to being informed by the Player only the same day about the correspondence of the FIVB Tribunal dated [date] and stated, *inter alia*, as following: "*Anyway, no harm done, as I have been working for free*."

29. On [date], the FIVB Tribunal Judge requested the FIVB to provide its case file in [case number]. The FIVB provided the case file to the FIVB Tribunal Judge on the same date.

30. Also on [date], the FIVB Tribunal Secretariat acknowledged receipt of the Player's agent´s email dated [date] and made reference to its communication of [date] informing that the exchange of submissions was closed.

5. The Parties' Submissions

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

5.1. The Club's Request for Relief and Position

32. In its RfR, the Club submitted the following request for relief: [9]

> *"1.the amendment of the FIVB decision of [date]. [[case number]] by waiving the obligation to pay by [the Club] (the Club's country] for [the Player] ([the Player's country]) amounts of EUR 39,387.28 and CHF 100,*
>
> *2. suspension of the enforceability of the above-mentioned decisions regarding the obligation to pay by [the Club] ([the Club's country]) to [the Player] ([the Player's country]) amounts of EUR 39,387.28 and CHF 100 pending retrial in this regard*."

[9] Page 1 of Club's RfR dated [date].

33. In support of its request for relief, the Club argued as follows:

- The Club largely agrees with the FIVB´s first instance analysis of the factual and legal evidence in the case. However, "*the Club does not share the FIVB position regarding the failure to settle the Club´s settlement with the Player, the contractual penalty imposed by the Club on the Player in the amount of EUR 45,220 (20% of the contract value for the season in which the gross violation of the Contract took place) in accordance with § 9 sec. 6*" of the Contract.

- According to § 9 sec. 5 lit. (c) of the Contract, in case of absence of a player during three training sessions, the Club may impose a contractual penalty. In the present case, this is not to be considered as an additional penalty because the Club´s termination of [date] was no "penalty". The circumstances in [date], in particular the Player´s request for release of the ITC ([date]), the respective decision of the FIVB Legal and Transfer Department ([date]), and the Player´s signing of a new contract with the [Second Club] ([date]), clearly indicate that the Club´s termination was no penalty for the Player.

- The Player´s attitude (i.e. missing the opportunity of a consensus with the Club for incomprehensible reasons) "*could not be accepted and had to be met with a decisive reaction of the Club*", namely imposing a contractual penalty. The circumstances of the case, including the Player´s behaviour, justified the need to apply a penalty of 20% of the contract value. If the amount of the contractual penalty was deemed excessive, "*as a precautionary measure*" the Club indicates that the penalty should not be fully cancelled but just the amount amended.

- The (legitimate) penalty was offset against the Player´s remuneration for [date] and [date]. Thus, the payment obligation imposed by the Decision (EUR 39,387.28 and CHF 100.00) "*is unfounded and the decision in this regard should be changed by waiving this obligation for the Club*".

- As to the request for a stay of the Decision: the Player has financial obligations in [the Club's country] and "*the Club, in accordance with the seizure of claims in the enforcement proceedings against the Player, will not be able to pay any amount directly to*" the Player.

5.2. The Player's Request for Relief and Position

34. The Player did not file a formal request for relief but his only submission was the belated one by his agent dated [date] regarding costs.

6. Jurisdiction

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

36. 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."*

37. 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"*

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

39. The FIVB Tribunal Judge finds that the present dispute is a financial dispute of an international dimension under Articles 19.2.1 and 19.2.2.1 of the FIVB Sports Regulations because it involves a claim between a [the Club's country] club and a [the Player's country] player concerning the entitlement for payment of a contractual penalty. The dispute also complies with Article 19.2.2.2 of the FIVB Sports Regulations because it was decided previously by the FIVB.

40. The FIVB Tribunal's jurisdiction is also undisputed by the Parties. Therefore, the FIVB Tribunal has jurisdiction over the present dispute under the FIVB Sports Regulations.

7. Admissibility

41. Article 18.2 of the FIVB Sports Regulations reads as follows:

> *"Within fourteen (14) days from notification of the decision under Article 18.1 above, any affected party may request that the case be reviewed by the FIVB Tribunal."*

42. The Decision is dated [date]. The Club submitted its RfR on [date], i.e. within the fourteen-day deadline. Thus, the RfR is admissible.

8. Procedural Issues

43. The Parties did not request a hearing to be held. In accordance with Article 20.8.1 of the FIVB Sports Regulations, the FIVB Tribunal Judge has decided not to hold a hearing but to decide based on the written submissions.

44. The exchange of submissions was closed by letter of the FIVB Tribunal Secretariat dated [date] and the Parties were asked to submit their accounts of costs by [date]. Thus, the email dated [date] from the Player´s FIVB licensed agent was belated. However, as his email did not contain any submissions on the merits and as he did not ask for any reimbursement of costs ("*Anyway, no harm done, as I have been working for free*."), no formal rejection of his email dated [date] is necessary.

45. According to Article 20.10.2 of the FIVB Sports Regulations, "*if the Respondent fails to submit an Answer* […], *the Tribunal may nevertheless proceed with the case and deliver a decision*". Therefore, the FIVB Tribunal Judge is still empowered to deliver a decision although the Respondent failed to submit an Answer.

46. In its RfR, the Club requested "*suspension of the enforceability of the* [Decision] *regarding the obligation to pay by* [the Club] *to* [the Player] *amounts of EUR 39,387.28 and CHF 100 pending retrial in this regard*". Even though the Player failed to submit any comments on this request for a stay, the FIVB Tribunal Judge had to determine the prerequisites for ordering to stay the execution of the Decision. As explained in the email dated [date] from the FIVB Tribunal Secretariat, the Club´s request did neither contain sufficient evidence for exceptional circumstances nor that the respective three criteria test ("irreparable harm", "likelihood of success on the merits" and whether the interests of one party outweigh those of the other party)

was fulfilled. The burden of proof for the three criteria to be fulfilled lies on the party which files the request to stay, i.e. the Club. While the RfR contained submissions on the merits of the dispute, it did not address the two further criteria, in particular Club´s "irreparable harm". Consequently, in the present case, the Club´s request for a stay of the Decision had to be rejected.

9. Applicable law

47. 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)."*

48. Pursuant to its § 14 sec. 1, the Contract shall be governed "*in accordance with laws of [the Club's country]*".

49. In the Decision, the FIVB found that that *ex aequo et bono* was to be applied to the dispute, considering that none of the Parties contested the applicability of *ex aequo et bono* to the dispute nor explicitly based their arguments on [the Club's country] law, and that the application of *ex aequo et bono* was set as a default rule under Article 18.1 lit. e of the FIVB Sports Regulations and was thus to be considered as a *lex specialis* in the absence of any specific reference to a financial dispute brought before the FIVB under § 14 of the Contract.

50. Such finding remained undisputed by the Parties.

51. The FIVB Tribunal Judge concurs with the FIVB's finding and will therefore decide the present dispute *ex aequo et bono* within the meaning of Article 20.9 of the FIVB Sports Regulations (i.e. applying general considerations of justice and fairness without reference to any particular national or international law).

10. Findings

52. The Club stated in its RfR as following: "*The Club largely agrees with the FIVB´s analysis of the factual and legal evidence in the case. However, the Club does not share the FIVB position regarding the failure to settle the Club´s settlement with the Player, the contractual penalty imposed by the Club on the Player in the amount of EUR 45,220 (20% of the contract value for the*

season in which the gross violation of the Contract took place) in accordance with § 9 sec. 6 of the [Contract]."[10]

53. In this context, the Decision reads as following: "*Furthermore, the FIVB finds that the Club shall not be entitled to invoke the contractual penalty in the amount of EUR 45,220 (20% of the value of the contract for the season, in which there was a gross breach of the contract) in accordance with section 9 para. 6 of the Contract.* […] *In light of the aforesaid and taking into account the unclear situation with regard to the Player´s transfer to [the Second Club], the FIVB finds ex aequo et bono that the Club shall not be entitled to offset the contractual penalty*."[11]

54. Therefore, the only question to be decided on the merits in the present review case is whether the Club was entitled to offset the amount of EUR 45,220.00 resulting from a contractual penalty imposed by the Club against the Player after termination of the Contract.

(i) Arguments in the Decision

55. In the Decision, the Club´s claim to offset the amount of EUR 45,220.00 was rejected for the following reasons:

56. The FIVB noted that in most jurisdictions, contractual penalties are subject to judicial review and can be adjusted if they are excessive; whether a contractual penalty is excessive is usually left to the discretion of the judge and depends on the individual circumstances.[12] The FIVB Tribunal Judge agrees to this finding because it is in line with the jurisprudence of the FIVB Tribunal: the validity of contractual clauses establishing in advance a compensation in case of breach of contract have to be examined in particular from the perspective of the principle of proportionality (see for instance FIVB Tribunal RfR 2018-06, para. 129; FIVB Tribunal RfR 2019-02, para. 56; FIVB Tribunal RfR 2022-03, para. 100 with reference to CAS jurisprudence). Thus, contractual penalties are subject to judicial review, in particular, under *ex aequo et bono*.

57. In the Decision, the FIVB determined a contractual penalty in the amount of 20% of the Player´s salary for the [year/year] season "*completely disproportionate*" under the circumstances of the

[10] Page 3 of the Club's RfR dated [date].
[11] Pages 14 + 15 of the Decision dated [date].
[12] Page 14 of the Decision dated [date].

case.[13] The FIVB found that the Player´s absence in three training sessions (i.e. on [date] and [date]) "*was not severe enough to warrant this high contractual penalty*" because the Player´s behaviour (missing three training sessions) did not adversely affect the Club´s volleyball activities: he was not part of the Club´s starting six throughout the [year/year] season (i.e. for several months) and three missed trainings could not have significant impact on the Player´s level of performance. The FIVB Tribunal Judge fully agrees and additionally notices that the Club had released the Player from the training sessions for the period of [date] to [date] (about two weeks instead of two days) which for certain had a far more significant impact on the Player´s level of performance, not to mention the Club´s basic decision to have the Player not regularly play in any matches.

58. Finally, the FIVB held in the Decision that the Club had already been released from its obligation to pay the Player´s remuneration as of [date] (thus, including [date] and [date]) and named this a "*further ´sanction´ of the Player for not providing his services to the Club*." In the RfR, the Club argues that there was no further or double sanction because the Club´s termination of the Contract was no sanction. The FIVB Tribunal Judge understands that the wording "further ´sanction´ of the Player" in the Decision is more a colloquial expression rather than a legal term. In any case, the fact that the Club was released from any payment of remuneration for [date] and [date] (and also for the days prior as of [date]) by the FIVB´s finding in the Decision, can be used as a financial argument when making an assessment whether a contractual penalty imposed on the Player by the Club is excessive or not under *ex aequo et bono*.

(ii) Further arguments

59. The FIVB Tribunal Judge notices the following further issues when making his own assessment in the present review proceedings, whether the amount of EUR 45,220.00 is excessive as a contractual penalty imposed by the Club on the Player and whether the Club should be permitted to offset such amount against the Player´s outstanding remuneration:

60. The Club´s penalty is based on § 9 sec. 6 of the Contract which reads in full as follows: "*In the event of termination of the Contract by the Club for specific reasons indicated in paragraph 5 letters a), b), c), d), h) or j) above, the Club may impose a penalty on the Player in amount of up to*

[13] Page 14 of the Decision dated [date].

20% of the value of the contract for the season, in which there was a gross breach of the Contract. Payment of the contractual penalty by the Player, referred to above, should be paid within two months from the date of termination of the Contract." According to § 9 sec. 5 lit. c of the Contract, the Club "*may impose a penalty on the Player in amount of up to 20% of the value of the contract for the season, in which there was a gross breach of the Contract*". The reference to § 9 sec. 5 lit. c of the Contract means: "*5. Gross breach of the contractual provisions of the Contract shall be:* […] *c) unexcused Player´s absence by the Coach at one game or three training sessions,"*

61. According to the wording of this contractual provision, the Player´s absence at three training sessions without the Coach´s excuse is a "gross breach" in the meaning of § 9 sec. 6 of the Contract. Taking into consideration all circumstances of the present case, one can wonder whether the Player´s absence from training sessions on [date] and [date] actually was "unexcused": not only the Club´s (head) coach but all relevant Club officials, including the Club´s President, were very well aware that the Player wanted to leave the Club and was no longer part of the Club´s team. This is evidenced by the fact that it was the Club´s decision to release the Player from training sessions in the period of [date] to [date]. On the other hand, the last paragraph of the Club´s letter dated [date] is very clear: "*In view of the above, keeping in mind the actions taken by your managers in terms of termination of the contract, and keeping with the need to maintain a good sports atmosphere in the team, we decided to extend your release from the obligations to provide sports services until [date]. <u>If, at this time</u>, we do not achieve a mutually satisfactory agreement on the possibility of terminating the contract, <u>you will return to perform sporting duties as our player</u>*." (emphases added) Therefore, the FIVB Tribunal Judge accepts that the Club was entitled to terminate the Contract on [date] according to § 9 sec. 3 of the Contract as argued by the Club and found in the Decision.

62. Regardless, the Club´s right for termination according to § 9 sec. 3 of the Contract does not automatically mean that the Club is entitled to impose a contractual penalty of exactly 20% of the Player´s remuneration for the full [year/year] season under § 9 sec. 6 of the Contract. There is one detail in the wording of this provision which seems very relevant when assessing disproportionality, namely "*in the amount of <u>up to</u> 20%*" (emphasis added). Thus, a penalty amounting to exactly 20% of the full season remuneration is the maximum the Club can impose. In this context, the further reasons for a potential imposition of a contractual penalty (§ 9 sec. 5 lit. a, b, d, h and j of the Contract) become relevant. Those reasons are: breach of the obligation

to refrain from competitive activities referred to under a non-competitive clause (lit. a), breach of the obligation of confidentiality referred to under a confidentiality clause (lit. b), the concealment of injuries and illnesses by the Player, in particular, about which the Player knew at the time of conclusion of the Contract (lit. d), resignation from the Player´s lifetime practising professional sport (lit. h) or breach of at least one of the provisions of unacceptable behaviour according to § 4 sec. 1 and 2 of the Contract (lit. j). Taking into consideration how severe those issues are and comparing it with the Player being absent from three trainings on two days ([date] and [date]), the FIVB Tribunal Judge finds that the Player´s absence was only of low significance. Thus, imposing the maximum (20% of a full season remuneration) as the amount for a penalty under the circumstances in the present case is excessive in any way.

(iii) Conclusion

63. Assessing all facts of the present case, the FIVB Tribunal Judge has noticed that the penalty was not imposed on the day of the termination ([date]) but only one month later by letter dated [date], when the Player had already submitted invoices for his remuneration for [date] and [date]. Moreover, the Club´s statement regarding the offset was communicated to the Player only by letter dated [date]. Thus, the imposition of the penalty seems to be more in connection with the Player´s claims for remuneration (although having left the Club and signed with another club in [the Second Club's country]) rather than with the Player´s absence from training on two days in [date] (while he was released from training sessions the two weeks prior and not regularly playing for the Club´s team for months). This impression is supported by the Club´s statement in its RfR as following: "*These circumstances* [Player signing with new club on [date], ITC decision of FIVB on [date] as requested by the Player on [date] *clearly indicate that the Club´s termination of the contract was not a penalty for him, because it was only for incomprehensible reason to the Club that the Player missed the opportunity of the consensus with the Club. <u>That kind of an attitude of the Player could not be accepted and had to be met with a decisive reaction of the Club, which imposed a contractual penalty on the Player pursuant to §9 sec. 6 of the Contract</u> and thus it is the only penalty, and not an additional penalty, that was imposed on the Player*." (emphasis added) Imposing the maximum penalty of 20% is actually a decisive reaction but excessive.

64. Moreover, the FIVB Tribunal Judge agrees with the first instance finding in the Decision that the Club shall not be entitled to offset any (proportional) penalty amount under *ex aequo et bono.*

When taking into consideration all the arguments made by the FIVB in the Decision and the additional arguments set in the present decision of the FIVB Tribunal, any penalty amount is found excessive under *ex aequo et bono*. The Player was absent for three training sessions on two consecutive days ([date] and [date]) while the entire Club was aware of the reasons for the Player´s absence, i.e. signing with another club in [the Second Club's country] ten days prior ([date]) and having received the respective release of the ITC by the FIVB ([date]). In addition, when imposing the penalty ([date]), the Contract had been terminated by the Club for already one month ([date]) and the Player had already signed with a new club in [the Second Club's country] ([date]) of which the Club was fully aware.

65. The FIVB Tribunal Judge finds that the Club is not entitled to offset a contractual penalty based on § 9 sec. 6 of the Contract. Therefore, the first instance finding in the Decision that the Player is entitled to receive payment of EUR 38,873.92 in "outstanding salaries" is upheld. The same applies for the first instance finding in the Decision that the Player is entitled to receive a partial reimbursement of legal fees (EUR 513.36) and handling fee (CHF 100.00) because the findings in the present proceedings before the FIVB Tribunal do not put forth any reasons to amend the first instance decision on costs.

66. In total, the FIVB Tribunal Judge agrees with the first instance finding in the Decision that the Player is entitled to the amount of EUR 39,387.28 and CHF 100.00 from the Club. Consequently, the Club´s RfR is fully dismissed.

11. Costs

67. The Club paid the handling fee of this proceeding (CHF 3,000.00) and quantified its legal expenses by submission on [date] at CHF 100.00 (first instance handling fee) and [the Club's country's currency] 1,725.00 (translation costs) in addition to the present handling. The Player did not request any reimbursement of legal expenses.

68. Article 20.11.2 of the FIVB Sports Regulations allows the prevailing party to be granted a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings before the FIVB Tribunal (including the applicable handling fee). When deciding on this contribution, the FIVB Tribunal Judge shall consider the outcome of the proceedings, as well as the conduct and financial resources of the parties.

69. The first instance handling fee (CHF 100.00) is not part of any reasonable legal fees and expenses incurred in connection with the review proceedings before the FIVB Tribunal. Thus, no contribution can be granted under Article 20.11.2 of the FIVB Sports Regulations. Moreover, the Player´s entitlement for such an amount has already been discussed in para. 65 above.

70. Considering that the Club's request for relief is fully dismissed and that the Player has not requested any reimbursement of legal expenses, all parties shall bear their own legal fees and expenses including the handling fee.

DECISION

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

1. The Request for Review filed by [the Club] is dismissed.

2. The decision rendered by the FIVB dated [date] ([case number]) is upheld.

3. All parties shall bear their own legal fees and expenses (including the handling fee).

4. Any other requests for relief are dismissed.

[Date of the decision]

Lausanne (Switzerland), seat of the proceedings

Dr. Karsten Hofmann

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 Sports Regulations:

> *"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 Bergières 10
1004 Lausanne, Switzerland
Tel: +41 21 613 50 00
Fax: +41 21 613 50 01
Email: info@tas-cas.org