FÉDÉRATION INTERNATIONALE
DE VOLLEYBALL

The

FIVB TRIBUNAL

Mr. Alexis Schoeb, Single Judge

herewith issues the following

DECISION

on the Request for Review of CC 56/2015 filed by

Impel Volleyball S.A. ("Applicant")
represented by Mr. Piotr Kopeć and Agata Wantuch,
Kancelarie, Wantuch & Partnerzy, adwokaci radcowie prawni doradcy podatkowi
ul. Rzemieslnicza 6, 30-363 Krakow, Poland

vs.

Ms. Denise Hanke ("Respondent")
represented by her Agent, Mr. Theo Hofland,
Theo Hofland Sports Management
Het Veen 39, 7132 EK Lichtenvoorde, the Netherlands

1. The Parties

1. The Applicant is a professional volleyball club with its legal seat in Krakow, Poland.

2. The Respondent is a professional volleyball player from Germany.

2. The FIVB Tribunal Judge

3. Article 1.5 of the FIVB Tribunal Regulations ("Regulations") provides as follows:

> *"1.5 Cases before the FIVB Tribunal shall be heard by the Chairperson and two (2) other members, appointed by the Chairperson. If one or more of the members is unavailable or ineligible due to reasons of conflict (see Article 9) the Chairperson shall appoint another member. However, in the event that a case only involves parties from the same Confederation, that case shall be heard by the judge from that Confederation as a single judge unless a hearing by a three(3)-member FIVB Tribunal is requested by one of the parties. If that member has the same nationality as one of the parties, is unavailable or ineligible due to reasons of conflict (see Article 9) he/she shall be replaced by the substitute member from the same Confederation. If both the member and the substitute member from the Confederation in question have the nationality of one of the parties, the FIVB President shall appoint ad-hoc a neutral judge from the same Confederation provided that he/she possesses the qualifications set out in Article 1.3 above".*

4. Because both parties come from Europe and none of the parties requested a hearing by the full FIVB Tribunal, this Request for Review will be heard by a judge of the FIVB Tribunal from Europe, acting as a single judge.

5. On 5 March 2014, Mr. Erhard Rubert, the regular member of the FIVB Tribunal from Europe, is no longer a member of the FIVB Tribunal. The substitute member, Mr. Piotr Stolarski, was forced to resign from this case because he shares the nationality as the Applicant. Therefore, the FIVB President appointed Mr. Alexis Schoeb (hereinafter the "Judge"), attorney-at-law in Geneva, Switzerland, as the FIVB Tribunal Judge in this case. The Judge does not have the same nationality as any of the parties, and the parties did not challenge his appointment.

3. Facts and Proceedings

3.1 Background Facts

6. On 4 May 2014, the Applicant and the Respondent entered into a contract in which the Respondent agreed to play for the Applicant's team for the 2014/2015 and 2015/16 seasons in

exchange for a salary of EUR 105,000 net for the 2014/15 season and EUR 120,000 net for the 2015/16 season, amongst other benefits (hereinafter the "First Contract").

7. The First Contract contained the following relevant provisions:

> *"1) The Player is being transferred to the Club for two volleyball seasons, 2014-2015 and 2015-2016 and will play for the women team of Impel Wroclaw. The contract will start at August 1st 2014. The player will take part to all training sessions and play all matches upon the request of the Club's management.*
>
> […]
>
> *3) The player will receive a base salary for season 2014-2015 of €105.000 (one hundred and five thousand euros) and for season 2015-2016 of €120.000 (one hundred and twenty thousand euros) The Club will pay all necessary taxes in Poland and handle over to the Player a tax-payment report after every payment. All payments in sport contract will be done by Player named bank account. For all payments in imagerights contract part will be discussed the banking situation. Costs for banking will be shared by club and player in normal way of Polish banking system. The payment schedule will be discussed before May 31st 2014.*
>
> […]
>
> *10) Until 30 March 2015 the club can unilaterally terminate the contract for the season 2015/16 with no additional financial consequences, in the case situations of non further funding of sporting activities in the next season."* (sic)

8. On 1 August 2014, the Applicant and the Respondent entered into another contract, titled Sports Contract, in which the Applicant agreed to pay the player a monthly remuneration of PLN 5,000 gross in exchange for the Respondent's sporting services (hereinafter "Second Contract").

9. The Second Contract contained the following relevant provisions:

> *"Section 2*
>
> *The Parties conclude the Contract for the period from 01 August to 31 May 2015 or to the day when league matches end in the 2014/2015 season if they end later than on 31 May 2015.*
>
> […]
>
> *Section 4*
>
> *1. The Company shall undertake to pay to the Player for representing its colours the monthly remuneration of gross PLN 5 000,00 (in words: five thousand zloty only), paid out to the 15th of the month following the month to which it applies.*
>
> […]
>
> *Section 6*

[…]

2. The Company may terminate the Contract without notice before the expiry of the term if the Player behaves in a manner that breaches the rules of sports competition or is in gross negligence of the provisions herein.

3. If the Contract is terminated by the Company before the term for which it is concluded:

a. […]

b. The Player shall be obliged to pay to the Company a contractual penalty of PLN 30,000.00 (in words: thirty thousand zloty);

c. After the Contract has terminated, the Player may not represent any other club for the period specified in Section 2 herein.

Section 11

Any disputes which may arise between the Parties shall be resolved by the Arbitration Court of the Polish Volleyball Federation based in Warszawa by the rules of this Court (the arbitration agreement)." (sic)

10. On 1 November 2014, the Respondent and the Cypriot company Procuro Company Ltd. (hereinafter "IR Company") entered into another contract in which the IR Company agreed to pay the player a remuneration of EUR 97,776 in exchange for the Respondent's image rights (hereinafter "IR Contract").

11. The IR Contract contained the following relevant provisions (English translation):

"§1 SUBJECT OF THE ASSIGNMENT

1) The subject of the contract is the assignment of the image rights of the Player to PROCURO, the Assignee. The Player hereby assigns to PROCURO irrevocably and exclusively his image rights, i.e. all rights related to his appearance in the capacity of a professional Player.

2) PROCURO reserves the right to sale at the whole rights resulting from present Agreement to any third party, only on condition that the Player is previously informed and gives his approval on it in writing.

3) Should the aforementioned rights be sold, the payment obligations of PROCURO towards to the Player shall be subject to PROCURO receipt of payment from the purchasing third party. PROCURO shall make all efforts to secure the Player's interests.

[…]

§3 REMUNERATION

1. In consideration of the assignment referred to under §1 above PROCURO shall pay the Player the following remuneration: 97 776 Euro in period: 01st November 2014 to 31st day of May 2015.

[…]

§4 PAYMENT METHOD

1. The amount of remuneration mentioned in §3 shall be paid as the following:

- Euro 13 968,00 until 20th November 2014;
- Euro 13 968,00 until 5th January 2015;
- Euro 13 968,00 until 5th February 2015;
- Euro 13 968,00 until 5th March 2015;
- Euro 13 968,00 until 5th April 2015;
- Euro 13 968,00 until 5th May 2015;
- Euro 13 968,00 until 5th June 2015;"

12. On 24 November 2014, the Respondent's Agent sent the following email to Ms. Ewa Naryniecka, an employee of the Applicant:

"Hello Ewa,

Thank you for sending contracts.
On Wednesday I would like to have some questions answered:

Why is just Procuro responsible? In my opinion it is at the end the responsibility of Volleyball Club Impel Wroclaw that player get complete negotiated salary at the end of season. I made agreement with Impel Wroclaw and in my opinion it is responsibility of Impel Wroclaw that the player get her nett agreed salary. When there come any problem or change in tax system in Procuro or Cyprus I would like have written that Impel Wroclaw will clear the situation. This is the same with taxes afterwards. Now it is in hands of Procuro and that is not what I like so much...sorry.

For Denise we agreed 2 year contract, are we making for coming season new agreement with Procuro?

I know Procuro in person but...how safe is Procuro?

All payments will be done in Euros, right?

Wednesday...which time is possible for you?

Regards,
Theo" (sic)

13. In response on 25 November 2014, Ms. Naryniecka responded to the Respondent's email on behalf of the Applicant by stating the following:

"Hi Theo,

It's not like the only Procuro is responsible. There are pre-agreements signed by Impel Volleyball and the Players and according to them we are signing sport contracts and image contract – keeping with the objective of tax optimization. This the reason why we're using Procuro company. We've already done it with ……. (other players' names). *Were there any problems?*

We've always confirmed that we are committed to pay net salaries from the pre-agreement. If you need it this time, we can also sign statement that we guarantee them new amounts of money if tax system will be changed and they would have to pay extra taxes.

All payments will be done in Euros.

I'll let you know what time we can meet.

Greets,
Ewa" (sic)

14. On 1 December 2014, the Respondent received an image rights payment of EUR 13,968 under the IR Contract.

15. Later in December 2014, the Respondent and the Applicant met about the Respondent's status with the Applicant. In that meeting, the Respondent alleges that the Applicant asked to terminate the relationship with the Respondent in exchange for 40 percent of the compensation under the IR Contract, which the Respondent declined.

16. On 3 February 2015, the Respondent emailed the Applicant and informed it that the Respondent had not received her payment. In that email, the Respondent's Agent informed the Applicant that other players on the team had received their respective payments. The Respondent's Agent also confirmed that he would be in Wroclaw on 9 February 2015 to meet with the Applicant's board to discuss the Respondent's contract situation.

17. On 13 February 2015, the Respondent emailed the Applicant and stated the following:

"Hello mr Ptak, Hello mr Grabowski,

I took some time to think about the situation Denise Hanke. I discussed the legal part with my lawyer and of course the sport situation with Denise.

Denise signed in the spring of 2014 a contract with your club for 2 seasons, 2014-2015 and 2015-

2016. The contract about this is clear, only when financial situation with the main sponsor will change it can be possible to break the second season contract.

Denise started with big ambition in her new club in August 2014 and to be prepare for season in the best way for your club, she cancelled her invitation for German national team after discussion with her head coach, Giovanni Guidetti.

Denise gave all her power to your team, followed all instructions of staff and management. Till now the team has not made the best games but everybody can see the potential and the team of Impel Wroclaw can have reached high goals at the end of the season!

In our meeting last Monday, February 9th 2015 in your office you explained your opinion about Denise Hanke. I have other opinion and that is the reason that Denise want to continue as player in team Impel Wroclaw. From her side there is no reason to ask you to stop, she is very motivated to practice and start playing again when the coaching staff is asking her. She is still top motivated.

Your proposal for breaking/changing her contract is not what Denise Hanke wants. She will follow all instructions and behave like we agreed by contract.

When the financial situation is changed or will be changed for season 2015-2016, Denise Hanke is willing to discuss with you and with me the consequences for her contract during season 2015-2016.

I wish you a nice day,

Best regards,
Theo" (sic)

18. On 26 February 2015, the Respondent sent another email to the Applicant noting that the Applicant again failed to pay the Respondent.

19. On 5 March 2015, the Applicant responded to the Respondent's emails by providing a letter, the contents of which were not disclosed in the present proceedings.

20. On 30 March 2015, the Applicant sent a letter titled "Declaration on Further Cooperation" to the Respondent (hereinafter "Declaration") stating the following:

"On behalf of the Impel Volleyball S.A. with seat in Wroclaw, in spite of the sports

contract which has been concluded on 01.08.2014 and on the basis of which private sports agreement-sports contract from 04.05.2014 has been ceased, from excess of caution, we declare that we are not interested in further cooperation with you for the season 2015/2016."

21. On 14 April 2015, the Applicant sent the following email from Ms. Naryniecka to the Respondent:

"Hi,

I'd like to complete on the subject of you travel costs. You have in your pre-contracts sum of 1500 euro guaranteed. We had to find the solution how we can pay you that. The best way will be to create the separate image agreement with our second company (4 Sports) and Jacek is doing that. What you have to do to fill that agreement is taking part in Volleymania (kids) tournament in Wroclaw on Saturday (18th April).

Patryk will give you a call and all the details about it and go there with you as usually.

I hope everything is ok for you. We have to sign that agreement for the period of April 2015 so the money will be paid at the begging of May.

If you have any questions please ask me about it.

Greets,
Ewa" (sic)

22. On 20 April 2015, the Respondent received the following email from the IR Company:

"Dear Denise,

Please let me inform you that I have just received leagal document from the volleyball Club Impel Wroclaw with the termination of the image contract with my company Procuro Ltd.

The date of the document is 24 of February 2015.

In addition I would like you to inform you that we had not received any salary for Your image in 2015 year.

Please contact to the Club to explain this situation.

Best Regards,

Piotr Jóźwiak" (sic)

23. From 9 September 2014 to 12 June 2015, the Applicant paid monthly instalments of PLN 3,037.67 to the Respondent, which totalled PLN 30,376.70.

24. During the 2015/16 season, the Respondent has been playing with her hometown club, the German club SSC Schwerin, in which she has received payments for health insurance and social security. The Parties dispute whether or not she receives any compensation in addition to health insurance and social security.

3.2 The Proceedings before the FIVB Tribunal

25. On 15 October 2015, the CEV Mediation Chamber issued a decision in the present manner in accordance with Article 45.11 of the FIVB Sports Regulations (hereinafter the "Decision") ruling that the Applicant owed the Respondent the amounts of EUR 83,808 net for the 2014/15 season and EUR 120,000 net for the 2015/16 season, which the Applicant was ordered to pay by 15 November 2016. The Applicant was notified of the Decision on 16 October 2015.

26. On 30 October 2015, the Applicant filed a Request for Review of the Decision with accompanying exhibits. Among other requests, the Request for Review contained a motion to stay the Decision until the end of the present proceedings.

27. On the same day, the FIVB Tribunal acknowledged receipt of the Applicant's Request for Review and invited the Respondent to file an Answer by no later than 20 November 2015.

28. On 12 November 2015, the FIVB Tribunal called the Parties' attention to the Applicant's motion to stay the Decision, invited the Respondent to submit her comments on the motion by no later than 18 November 2015, and extended the Club's deadline to comply with the Decision to 26 November 2015.

29. On 18 November 2015, the Respondent submitted her comments on the Applicant's motion, in which, amongst other comments, she agreed to the stay of the Decision, and filed her Answer with accompanying exhibits.

30. On the same day, the FIVB Tribunal acknowledged receipt of the Respondent's comments on the Applicant's motion and her Answer. Additionally, the FIVB decided to grant the Applicant's

motion to stay the Decision and stated that the submissions would be forwarded to the FIVB Tribunal Judge to determine if a further exchange of documents was necessary.

31. On 24 November 2015, the Applicant filed a request for a further exchange of documents, in which it argued that a further exchange of documents was required because the Respondent claimed that she was playing with SSC Schwerin on a voluntary basis for the first time and might be hiding additional compensation.

32. On 1 December 2015, the Respondent filed her comments on the Applicant's request for a further exchange of documents by arguing that no new facts were stated in her Answer because she had previously disclosed this information.

33. On 7 December 2015, the FIVB Tribunal informed the Parties that the Judge had been appointed to hear this case. Additionally, the Judge issued a procedural order ("Procedural Order") in which he requested the Respondent to answer the following question:

- Has the Player signed any kind of agreement with SSC Schwerin?
  - If so, the Player is ordered to provide a copy of said signed agreement.
  - If not, the Player is ordered to provide any evidence of the steps that she took to find new, paid employment before joining SSC Schwerin, such as emails from her agent showing negotiations with other clubs, etc.

The FIVB Tribunal provided a deadline of 20 December 2015 for the Respondent to provide its Answer and noted that the Applicant subsequently would have the ability to respond to the Player's submission.

34. On 16 December 2015, the Respondent provided her response to the Procedural Order.

35. On 28 December 2015, the FIVB Tribunal acknowledged receipt of the Respondent's response to the Procedural Order and invited the Applicant to provide its comments on the Respondent's response by no later than 11 January 2016.

36. On 8 January 2016, the Applicant provided its comments on the Respondent's response to the Procedural Order.

37. On the same day, the FIVB Tribunal confirmed receipt of the Applicant's comments and stated that the proceedings were closed.

4. The Parties' Submissions

38. 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 has thoroughly considered all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference has been made to those arguments in this section.

4.1 The Applicant's Request for Review

39. In essence, the Applicant makes seven arguments against the Decision: 1) the Decision incorrectly found that the Parties were bound by the First Contract instead of the Second Contract; 2) the Decision erroneously found that the Applicant was liable for the outstanding image rights payments owed under the IR Contract even though the Applicant was not a party to the IR Contract and is a separate legal entity; 3) the Decision incorrectly determined that the Parties were bound by the First Contract for the 2015/16 season even though the Second Contract replaced the First Contract and, even if the First Contract was applicable, the Applicant sent proper notice terminating the First Contract on 30 March 2015; 4) the Decision improperly held that the Respondent was not playing for SSC Schwerin despite clear evidence otherwise; 5) the Decision violated the legal principle of *ultra petita* by awarding the Respondent the amount of EUR 120,000 despite the fact that she only requested a good faith solution for compensation between the Parties; 6) the Decision incorrectly determined that the Declaration led to a breach of the First Contract; and 7) the CEV Mediation Chamber lacked competence to decide the dispute.

40. Regarding the nature of the First Contract, the Applicant contends that the First Contract was a non-binding agreement designed to serve as a provisional contract until the Parties concluded a future contract. The First Contract never entered into force because the Respondent decided to conclude two different contracts with two distinctive legal entities. Instead, the First Contract was, in essence, a pre-contract which *"expressed the will of the Parties to strike cooperation in the future, but the details of the cooperation and final will of the Parties to be bound were supposed to be contained in the contracts concluded on the ground of the preliminary contract."* The preliminary nature of the First Contract was further revealed by the title of "Private Agreement – Sports Contract", the fact that it was only written in English rather than in two languages, and the fact that its form and content did not comport to the typical final sports services contract.

41. Additionally, the Applicant argued that the First Contract did not enter into force because the Respondent decided to conclude the Second Contract and the IR Contract, which replaced the First Contract. The Applicant stated that *"both contracts concluded by the Claimant* [Respondent before the FIVB Tribunal] *(the first with Impel Volleyball S.A. and the second with Procuro Company Ltd) together have the same subject as the Private Agreement - Sports Contract* [First Contract]*"*. The Respondent was represented by her agent who represents several volleyball players. The decision to contract with two entities was the decision of the Respondent and her agent, and the Applicant contended that it should not bear the consequences of the Respondent's decision. Moreover, the Polish Volleyball League's by-laws dictate that certain provisions are required to be contained in a playing contract. Those provisions were not included in the First Contract but were included in the Second Contract. The Applicant also noted that the Second Contract, not the First Contract, was sent to the Polish Volleyball Federation, as required, which also it claimed demonstrated that the Second Contract was legally binding. Furthermore, the Applicant also confirmed in its Declaration that the First Contract had ceased, which proved that the Parties considered that the First Contract was not binding.

42. Regarding the IR Contract, the Applicant contended that any claims under the IR Contract should be brought against the IR Company because the Applicant was not a party to that agreement. The Applicant is a separate legal entity and the Second Contract did not contain any references to the assignment of the Respondent's image rights or any references to the IR Contract, which demonstrates that these contracts are separate. The Applicant further argued that there was no basis for holding it legally liable for the obligations of the IR Company based on business links, generally applicable provisions of law, volleyball regulations, the language of the First, Second and IR Contracts, or under *ex aequo et bono* principles. The Respondent can pursue her claims against the IR Company and these rights fall outside of the scope of the FIVB and CEV Regulations. The Respondent is attempting to extort payments out of the Applicant for which the Applicant assumed no legal liability. The email correspondence between the Applicant and the Respondent's Agent demonstrate that this system agreed upon by the Parties was that the Respondent was going to pay the net salary from the Second Contract and would cover the costs of the Respondent's *"business activity"*. The Applicant claimed that it met all of its obligations to the Respondent.

43. Regarding the Respondent's contract for the 2015/16 season, the Applicant first contended that the CEV Mediation Chamber violated the legal principle of *ultra petita* by awarding EUR 120,000 despite the fact that the Respondent did not seek a specific amount in her

requests for relief before the CEV Mediation Chamber but instead stated that she wanted to discuss the situation with the Applicant in order to reach a settlement. Additionally, the Applicant claimed that it was unequivocally clear that the Respondent signed a contract with and played for SSC Schwerin based on articles and internet postings demonstrating that she appeared in matches for SSC Schwerin during the 2015/16 season. The Applicant asserted that the Respondent misled the CEV Mediation Chamber by stating that the Respondent was not playing for SSC Schwerin, and the CEV Mediation Chamber committed a number of procedural irregularities because it relied solely on the Respondent's submissions, failing to take into account the substantial evidence provided by the Applicant. Additionally, the fact that the Applicant through its Declaration, and the Respondent through her clear actions of moving back to Germany and playing for SSC Schwerin demonstrated that neither party intended to continue their relationship during the 2015/16 season. Consequently, these facts prove that the relationship was terminated by mutual agreement of the Parties. Moreover, the Applicant noted that the Respondent would have the amount of EUR 120,000 in monthly instalments if the Respondent had played for the Applicant during the 2015/16 season as opposed to one lump sum as awarded. Therefore, the Applicant would suffer great damage if the amount is awarded in one lump sum because of the strain on its budget. Furthermore, by awarding EUR 120,000 to the Respondent, the Decision would allow for unjust enrichment because the Respondent would receive a double recovery, i.e. the compensation that she would receive from the Applicant and the compensation that she would receive from SSC Schwerin. Likewise, there are no legal grounds to award any type of compensation for the 2015/16 season because the Second Contract is the binding agreement on the Parties and does not contain any provisions regarding an extension of the Contract. Thus, the Decision erred by awarding compensation to the Respondent for the 2015/16 season.

44. Regarding the Declaration, the CEV Mediation Chamber misinterpreted the content of the Declaration. Article 10 of the First Contract allowed the Applicant the ability to terminate the First Contract by 30 March 2015 with no additional consequences. The Declaration clearly exercised this right and, thus, the Respondent can have no claims for the 2015/16 season. Additionally, the Declaration also made it clear that the First Contract had ceased because the Second Contract now governed the relationship between the Parties and that the Declaration was merely sent as a precaution.

45. Regarding the lack of CEV competence, the Applicant stated its opinion that the present dispute should be heard by the Arbitration Court of the Polish Volleyball Federation based on Article 11 of the Second Contract and the by-laws of the Polish Volleyball League. Additionally,

the CEV incorrectly determined that this dispute fell under Article 45.11(c) of the FIVB Sports Regulations because this dispute is not of an international dimension. The Second Contract was signed in Poland with the subject of it being that the Respondent would provide services in Poland to a Polish club in the Polish League. Article 9 of the Second Contract also states that the Polish Civil Code and the relevant regulations of the Polish Volleyball Federation. Thus, the Applicant claimed that there was no basis to settle this dispute before the FIVB and the Arbitration Court of the Polish Volleyball Federation was competent to decide this case.

46. In addition to the motion to stay the Decision, which was granted by the FIVB Tribunal upon the agreement of the Parties (and, thus, will not be discussed in this decision), the Applicant additionally requested that the Respondent be suspended from playing for SSC Schwerin based on the fact that the Decision compelled the Applicant to pay compensation to the Respondent for the 2015/16 season and the Respondent was not playing for the Applicant.

47. The Applicant requests the following relief:

> *"In view of the above I, therefore, request for:*
>
> *1) dismissal in entirety of the claims for payment to Denise Hanke the amount of EUR 83,808 net with regard to the Player's image rights for the season 2014/2015*
>
> *2) dismissal in entirety of the claims for payment to Denise Hanke the amount of EUR 120,000 net with regard to the financial consideration for the season 2015/2016.*
>
> *3) dismissal in entirety of the claims for reimbursement to Denise Hanke the amount of EUR 400 for the handling fee,*
>
> *4) according to the point 12.1 of FIVB Tribunal Regulatinos I request for holding a hearing of the Parties (Denise Hanke and the persons authorised to represent the Respondent) by video conference for the event that 'Private Agreement – Sports Contract' from 4th May 2014 was replaced by sports contract concluded for the period from 1st August 2014 to 31st May 2015, that on 1st November 2014 the Claimant concluded contract Assignment of the Rights of the Image with company under the name Procuro Company Ltd., that for the season 2015/2016 Denise Hanke signed a contract with the German Club SSC Schwerin*
>
> *5) obligate German Volleyball Federation (address: Deutscher Volleyball-Verband e.V. Otto-Reck-Schneise 8 60528 Frankfurt a.M. Deutschland) to submit to FIVB Tribunal a contract on the basis of which Denise Hanke was formally notified to play in the league in the club SSC Schwerin in the season 2015/16, for the event that Denise Hanke signed a contract with the German club SSC Schwerin for the season 2015/2016*
>
> *6) obligate the German club SSC Schwerin (address: Geschäftsstelle SSC*

Sport-Marketing GmbH Schwerin Von-Rotow-Straße 19 19059 Schwerin, Deutschland) to submit to FIVB Tribunal a contract on the basis of which Denise Hanke plays for the club SSC Schwerin, for the event that Denise Hanke signed a contract with the German club SSC Schwerin for the season 2015/2016

7) *obligate the player Denise o submit to FIVB Tribunal all the contracts signed with club SSC Schwerin, for the event that Denise Hanke signed a contract with the German club SSC Schwerin for the season 2015/16.*

8) *order the matter to be referred to the Arbitration Court of the Polish Volleyball Federation in Warsaw for examination of the substance.*

9) *suspension of the player Denise Hanke and ruling that Denise Hanke is not entitled to play for the club SSC Schwerin until the Request for Review is ruled by FIVB Tribunal as well as summons Denise Hanke to appear in person in the club Impell Volleyball S.A. in Wroclaw.*

10) *suspend the effect of the whole decision issued by the Confédération Européenne de Volleyball on 15th October 2015 until the Request for Review is ruled by FIVB Tribunal."* (sic)

4.2 The Respondent's Answer

48. The Respondent contends that the Applicant is not complying with the fair play and "Green Way" mantras of the FIVB and CEV by failing to respect the contracts that it signs. The Applicant failed to the consistently pay the Respondent during her first season and unilaterally dismissed the Respondent before her second season with the Applicant despite a signed agreement.

49. The Parties have already discussed the contracts, correspondence, and payments thoroughly before the CEV. The Respondent had nothing new to add to this proceeding because the claim was clear and the CEV Mediation Chamber decided this case correctly. Every relevant fact and piece of evidence was submitted before the CEV Mediation Chamber, and the Respondent fully accepted the CEV's decision.

50. The CEV has already asked the Respondent if she has signed a contract with another club for the 2015/16 season. The Respondent confirmed that she did not sign any kind of agreement with SSC Schwerin. Rather, she was participating on a voluntary basis with the SSC Schwerin in order to stay in shape. The Respondent had checked with the CEV to see if it was okay for the Respondent to begin the preseason with SSC Schwerin. The Respondent was not licensed with SSC Schwerin immediately before the first match of the German Bundesliga. Once she was licensed, SSC Schwerin was obliged by German law to pay the health insurance and social security of the Respondent. The Respondent received no other compensation from SSC Schwerin other than housing, travel, and food. This information could be confirmed by SSC

Schwerin's company that contracts with volleyball players for the club.

51. In her request for relief, the Respondent requested that the FIVB Tribunal order the Applicant to follow the holdings of the Decision.

4.3 The Respondent's Response to the Procedural Order

52. The Respondent reiterated that she did not sign any kind of agreement with SSC Schwerin for the 2015/16 season. She claimed that she only signed a license with SSC Schwerin in order to register with the German Volleyball League. The attached statement provided by SSC Schwerin demonstrates how much it will pay for the Respondent's services during the 2015/16 season.

53. The Respondent contended that she was physically and emotionally drained after her experience with the Applicant because the Applicant's actions of not honouring the agreed upon terms of the contract nearly ruined her career. After this experience, she returned to her hometown and pondered her future. SSC Schwerin and the German national team helped her through this process, which is why she is playing on a voluntary basis with SSC Schwerin.

54. The Respondent stated that her Agent attempted to find her new employment but, after her experience in Poland, the Respondent did not have a lot of options and was not ready to play abroad. The Respondent was included on her Agent's website and was presented in a list in communications with teams looking for a setter.

55. After she left the Applicant, the Respondent contended that it was best for her to go back to a safe environment, i.e. her old hometown club. The Respondent started by practicing with SSC Schwerin and the German national team but could not sign a contract for the 2015/16 season because she was under the impression that the First Contract was still valid until the Decision was rendered. Thus, she started playing on a voluntary basis with the SSC Schwerin.

4.4 The Applicant's Comments on the Respondent's Response

56. The Applicant contested the Respondent's assertion that she only practices with SSC Schwerin and presented several printouts from online sources demonstrating that the Respondent was a key member of SSC Schwerin who had played an important role in several matches. This evidence contradicted the Respondent's assertion that she was unable to find a new club because she was an important member on the team that was leading the German Volleyball

League. The Applicant contended that the Respondent should have a contract comparable to other important players on SSC Schwerin.

57. In its letter to the FIVB Tribunal, SSC Schwerin claimed that it did not sign the Respondent to a contract because it had already concluded contracts with two other setters. However, the Applicant asserted that, when comparing the statistics of the Respondent to those other two players, it was clear that the Respondent was the superior player and, thus, there was no justification why those two setters had a contract with SSC Schwerin while the Respondent did not have a contract.

58. Additionally, in the Procedural Order, the FIVB Tribunal requested that the Respondent provide any evidence that the Respondent took steps to find new, paid employment. The Applicant argued that the Respondent did not take any steps to secure paid employment based on her Response to the Procedural Order. The Applicant asserted that the only evidence submitted by the Respondent was an email in Italian, which was both inadmissible due to the fact that it was not in English and does not prove that the Respondent took any steps to find paid employment. The Respondent started working with SSC Schwerin in May 2015 (even though she was receiving compensation from the Applicant at that time) and, thus, had five months to find new, paid employment.

59. Moreover, the Applicant noted that the Respondent had a good relationship with SSC Schwerin because it was her hometown club. Consequently, she did not attempt to find another club and could wait by playing as a volunteer until she received a favourable outcome in the present proceedings. Once a final decision was rendered, she could receive full remuneration from SSC Schwerin for the entire season.

60. The Applicant also noted that the Respondent joined SSC Schwerin while she was still bound by the Second Contract, which concluded on 31 May 2015. The Applicant argued that this proved that the Respondent thought that her relationship with the Applicant was only for one year and not two. Thus, the Respondent argues in bad faith that her agreement with the Applicant was for two years.

61. The Applicant contended that it should not bear the consequences of the Respondent's decision to play for EUR 1,600 per month even though she could have found a contract that would pay her much more than that because she is one of the best players on SSC Schwerin and in the league. It's clear that the Respondent's actions demonstrate that she has an

implied-in-fact contract with SSC Schwerin, even if there is not a formal written contract.

62. The Applicant also contested the rationale of the Decision because it would lead to the absurd conclusion that the Applicant would have to pay the Respondent for the services that she rendered to SSC Schwerin. The Applicant argued that it should not have to pay for a player from who it receives no benefits.

63. The Applicant re-emphasised that the First Contract was replaced by the Second Contract and the IR Contract for one season. It argued that, if the First Contract was found to be binding by the FIVB Tribunal, the First Contract was implicitly terminated by both Parties on 30 March 2015, i.e. the date of the Declaration. The Applicant made it clear that it no longer wanted the Respondent and the Respondent made it clear that she no longer wanted to play for the Applicant because she signed with SSC Schwerin. Thus, the First Contract was terminated by mutual agreement.

64. The Applicant alleged that the Respondent was trying to hide her true agreement with SSC Schwerin, which constituted a misuse of the law and rules of fair play. The Applicant contends that these actions should not be supported by the FIVB Tribunal against the Applicant, which is acting in good faith in the present proceedings.

65. Finally, the Applicant requested that the FIVB Tribunal suspend the Respondent and annul the results of SSC Schwerin if it upheld the Decision in full because said ruling would be tantamount to saying that the Respondent is a member of the Applicant for the 2015/16 season, making her ineligible to play for SSC Schwerin.

66. The Applicant reiterated its requests for relief but, in particular, highlighted the following:

> *1) 'Private Agreement – Sports Contract' did not constitute the final and binding contract but had the nature of the preliminary contract which contained the pace of negotiations that took place in May 2014 that were supposed to provide ground for final contract that would be concluded in the future.*
>
> *2) 'Private Agreement – Sports Contract' had not entered into force Denise Hanke concluded two different contracts instead of it – first with Impel Volleyball S.A. concerning sports services and the second with Procuro Company Ltd concerning rights of image, which both replaced the initial Private Agreement – Sports Contract.*
>
> *3) The sports contract concluded between Denise Hanke and Impel Volleyball was signed for the period 01.08.2014 r. – 31.05.2015, so it ended on 31.05.2015. There are na basis to claim that the Parties were*

bound by the contract of the season 2015/2016.

4) Any possible claims resulting from non-performance or improper performance of the Assignment of Rights of Image shall be targeted against Procuro Company Ltd. Because Impel Volleyball S.A. was not the party of the Assignment of the Rights of Image Contract.

5) CEV infringed the prohibition on adjudicating ultra petita (not beyond the request). It shall be noticed that Denise Hanke in the request for relief from 31st May 2015 did not request to award her with the amount of EUR 120,000 but she requested for the discussion of a second year of contract 2015/2016 and talk to find a good solution for both sides in terms of a buy out sum. Denise Hanke did not formulate the claim for payment." (sic)

5. Jurisdiction

5.1 In general

67. 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 Regulations.

68. Article 2.1 of the Regulations reads as follows:

> *"[t]he FIVB Tribunal is competent to decide financial disputes of an international dimension between clubs, players and coaches from within the world of volleyball".*

69. Article 2.2 of the Regulations stipulates that the FIVB Tribunal can only resolve disputes:

> *"2.2.1 arising between the natural and legal persons/entities mentioned in Article 2.1;*
>
> *and*
>
> *2.2.2 decided previously by the FIVB/ a Confederation or referred by the FIVB/ a Confederation to the FIVB Tribunal"*

70. Article 2.3 of the Regulations grants the Judge the power to rule on his own jurisdiction.

71. Thus, in order for the FIVB Tribunal to have jurisdiction over the dispute, the Judge shall examine whether the conditions of both Articles 2.1 and 2.2 are satisfied.

72. The present dispute involves a claim for unpaid image rights and damages by a German player against a Polish club. The Judge finds that this dispute clearly qualifies as a financial dispute of an international dimension between a player and a club in accordance with Articles 2.1 and 2.2.1. As will be explained in greater detail in Section 5.2 below, the Applicant's contention

that this is not a financial dispute of an international dimension must be dismissed.

73. Furthermore, the Request for Review at hand is made against the Decision, which was rendered by the CEV Mediation Chamber. The CEV Mediation Chamber was created to adjudicate – among others – financial disputes within the Confédération Européenne de Volleyball ("CEV"), a confederation of the FIVB. Indeed, the CEV Mediation Chamber was competent and decided the case in the first instance on the basis of Article 45.11 of the FIVB Sports Regulations following the FIVB's delegation to the CEV of the respective power to decide financial disputes among European parties. Therefore, the present Request for Review stems from a decision of a confederation, and the Judge holds that Article 2.2.2 is also satisfied.

74. Based on the above, the conditions of Articles 2.1 and 2.2 are satisfied. Therefore, the FIVB Tribunal has jurisdiction over the present Request for Review pursuant to the Regulations.

5.2 Applicant's contention regarding Jurisdiction

75. In its Request for Review, the Applicant contested the CEV's competence to hear this dispute. In particular, it highlighted two reasons for contesting the CEV's competence: 1) the dispute did not contain an international dimension and 2) this case should be referred to the Arbitration Court of the Polish Volleyball League as required by the Second Contract and the Polish Volleyball League's by-laws.

76. The FIVB Tribunal first notes that the requirement that a dispute be of an international dimension in order for the FIVB, its confederations based on a delegation of authority by the FIVB, or the FIVB Tribunal to hear a case stems from the fact that the relevant provisions come from the international federation. When a dispute is wholly within one national federation, the relevant authority designed to handle that issue is the national federation because it drafts regulations that govern the climate and regularities of volleyball family within, or unique to, its federation. However, when a dispute involves parties from separate national federations, the dispute takes on an international character, and, thus, it is no longer the national federation rules that can properly regulate the dispute but the confederation or international federation that must regulate the dispute. For example, it would be unfair to hold a Polish club to the German Volleyball Federation's national regulations. Consequently, the relevant regulations governing a dispute must come from either the CEV, if the dispute is within the confederation and authority has been delegated by the FIVB, or the FIVB itself.

77. As noted above, this dispute involves a German player and a Polish club. That is the only relevant information necessary to determine whether or not a dispute has an international dimension for purposes of the FIVB Sports Regulations and the Regulations. Thus, the Applicant's arguments regarding the place where the contract was signed, the league in which the Respondent competed or the Polish Volleyball League's by-laws are irrelevant to the determination of whether this dispute is of an international dimension. As a player from Germany, the Respondent is part of the German Volleyball Federation, and, as a club in Poland, the Applicant is a part of the Polish Volleyball Federation. Consequently, the FIVB Sports Regulations govern this dispute, and Article 45.11(c) was properly applied by the CEV. Hence, the Applicant's first argument must be dismissed.

78. Additionally, the Applicant claims that any dispute regarding the relationship between the Parties must be referred to the Arbitration Court of the Polish Volleyball League. The Applicant makes this argument based on the language of the Second Contract and the Polish Volleyball League by-laws. As already discussed, the Polish Volleyball League's by-laws are irrelevant to the present dispute.

79. Regarding the contractual language, the FIVB Tribunal first notes that the First Contract did not have a dispute resolution clause. However, the Applicant highlighted the language of Section 11 of the Second Contract, which states as follows:

> *"Any disputes which may arise between the Parties shall be resolved by the Arbitration Court of the Polish Volleyball Federation based in Warszawa by the rules of this Court (the arbitration agreement)."*

80. The Judge notes that this language clearly grants a party the option to file a claim with the Arbitration Court of the Polish Volleyball Federation.

81. However, the present dispute involves parties falling under the jurisdiction of the FIVB. As such, both parties are subject to the regulatory framework enacted and implemented by the FIVB, including the FIVB Sports Regulations and the Regulations.

82. As correctly noted in the Decision, the FIVB Sports Regulations grant the FIVB the power to delegate to a Confederation (here: to the CEV) the competence to decide the dispute in the first instance (*see* Section 4.1 of the Decision). Likewise, as stated above, the Regulations grant the FIVB Tribunal jurisdiction over a Request for Review of said Decision.

83. Thus, two potential paths are provided to resolve disputes between the Parties: 1) through the

Arbitration Court of the Polish Volleyball Federation pursuant to Section 11 of the Second Contract and 2) through the CEV Mediation Chamber and the FIVB Tribunal on second instance – and potentially before the Court of Arbitration for Sport – pursuant to the FIVB's Regulations. The Respondent, i.e. the Claimant in CC 056, had the option to choose either path and chose the latter. Therefore, the Judge holds that Applicant's contention, that the CEV does not have jurisdiction due to the language of Section 11 of the Second Contract, must also be dismissed.

6. Discussion

6.1 Applicable Law

84. Under the heading "Law Applicable to the Merits", Article 13 of the 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)."*

85. Neither of the parties has contested the applicable of *ex aequo et bono* as applicable to the present dispute nor based their arguments on any national law. Even though the Applicant mentioned that the Polish Civil Code was mentioned in the Second Contract, it does not assert that the Polish Civil Code is applicable in the present dispute nor did it make any arguments based on the Polish Civil Code. In light of the above, the Judge will decide the issues submitted to him in this proceeding *ex aequo et bono*.

86. In substance, it is generally considered that an arbitrator 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*".[1]

87. In light of the foregoing matters, the Judge makes the following findings.

6.2 Applicant's Other Procedural Requests

88. In addition to the stay of the Decision, which was granted, the Applicant made two additional procedural requests: 1) a request for a hearing and 2) to order the German Volleyball Federation, SSC Schwerin, or the Respondent to produce the contract between the

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[1] POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

Respondent and SSC Schwerin.

89. Regarding the Applicant's request for a hearing, the FIVB Tribunal notes that Article 12.1 of the Regulations allows the FIVB Tribunal to determine in its sole discretion if a hearing will be held taking into account the Parties' submissions.

90. While the FIVB Tribunal notes the Applicant's request, it decided based on the submissions before it that a hearing was not necessary to decide this dispute. In essence, the Applicant had two written submissions to fully address its arguments on the merits. The FIVB Tribunal finds that a hearing would have added unnecessary costs and burden on the Parties without having been likely to elucidate new information not provided in the written submissions. Consequently, the FIVB Tribunal holds that the written submissions are sufficient to decide this dispute.

91. Regarding the Applicant's request to order the German Volleyball Federation, SSC Schwerin, and the Respondent to produce the Respondent's contract with SSC Schwerin, the FIVB Tribunal must dismiss this request as it relates to the German Volleyball Federation and SSC Schwerin. Neither the German Volleyball Federation nor SSC Schwerin is a party to these proceedings. The FIVB Tribunal does not have subpoena powers and, thus, cannot compel these parties to produce evidence in this case. Even so, on its own accord, SSC Schwerin submitted a signed letter that the Respondent did not sign a written contract with SSC Schwerin. Regarding the Respondent, the FIVB Tribunal addressed the Applicant's request in its Procedural Order.

92. Ultimately, the Applicant's concern seems to be that a written contract exists and is being hidden by the Respondent. However, without evidence otherwise, the FIVB Tribunal cannot accept the existence of a hidden contract. That being said, the FIVB Tribunal finds that it shall adequately address the Applicant's concern in the Findings section below.

6.3 Findings

93. In essence, the FIVB Tribunal must look at five issues in this dispute: 1) the legal relationship between the First Contract and the Second Contract/IR Contract; 2) the termination of the employment relationship between the Applicant and the Respondent; 3) what, if any, damages result from said termination; 4) the allegation that the CEV Mediation Chamber violated the principle of *ultra petita*; and 5) the request for the Respondent's suspension/return to the

Applicant. The FIVB Tribunal will discuss each of these arguments in turn.

6.3.1 Legal Relationship between the First Contract and the Second Contract/IR Contract

94. The FIVB Tribunal must first examine the legal relationship between the First Contract and the Second/IR Contract. This relationship has an enormous impact on the remaining issues in this dispute. This relationship is important in determining whether one or both contracts are legally binding on the Parties.

95. The Applicant contends that the First Contract was a pre-contract that was either 1) not binding on the Parties or 2) replaced by the Second Contract. Therefore, it argues that the First Contract is not valid. The Respondent argues that the First Contract is still valid.

96. In the Decision, the CEV Mediation Chamber found that the First Contract was still binding on the Parties and that the Second Contract and the IR Contract were complementary to it. In looking at the relationship between the contracts, the CEV Mediation Chamber noted that there was no express provision in the Second Contract or the IR Contract that stated that the Parties agreed to replace the First Contract and, thus, it had to look at the manifestation of the Parties' mutual intent in order to address this issue. In reaching its conclusion that the Second Contract and the IR Contract complemented the First Contract, the CEV Mediation Chamber highlighted four important points: 1) usually parties intending to create a non-binding agreement provide language demonstrating the non-binding nature of the agreement, which said language could not be found in the First Contract; 2) 8 of the 10 provisions in the First Contract were not mentioned in the Second Contract, and it was unlikely that the Respondent abandoned a substantial amount of obligations owed by the Applicant; 3) in the Declaration, the Applicant's justification for termination appeared to invoke Article 10 of the First Contract; and 4) Article 3 of the First Contract explicitly described a system in which the Respondent's salary payments would be split based on a sport contract and an image right contract.

97. In order to have a valid contract, a contract must demonstrate a manifestation of mutual intent between the Parties. This manifestation of mutual intent is demonstrated by the Parties signing a document with the terms of the relationship. In an employment context, these terms usually include the salary and other benefits to be earned by the employee in exchange for the services provided by the employee.

98. Turning to the Applicant's contention that the First Contract was not binding on the Parties,

the FIVB Tribunal agrees with the CEV Mediation Chamber that the First Contract was a valid, binding contract. The First Contract contains basic terms describing the employment relationship between the Respondent and the Applicant, i.e. term of the agreement, salary, bonuses, and other obligations owed by the Applicant, etc. in exchange for the Respondent's playing services for the Applicant's women's team, and is signed by both Parties. The Applicant does not contest that it signed the First Contract. The FIVB Tribunal finds that the terms of the First Contract and the signatures of both Parties on the First Contract are sufficient to create a legally binding contract.

99. Given that the FIVB Tribunal finds that the First Contract is legally binding, the First Contract was valid until it is terminated or its term expires. In the present case, the Applicant first contends that it was terminated because it was replaced by the Second Contract and the IR Contract. Again, a manifestation of mutual intent must demonstrate that the Parties agreed that the First Contract was replaced by the Second Contract and the IR Contract.

100. In looking at the facts and circumstances of this case, the FIVB Tribunal finds that no manifestation of mutual intent has been demonstrated proving that the Parties agreed that the First Contract was replaced by the Second Contract and the IR Contract. On the contrary, the evidence before the FIVB Tribunal tends to show that the opposite was the case.

101. The FIVB Tribunal agrees with the CEV Mediation Chamber's analysis regarding the complementary nature of the Second Contract and the IR Contract to the First Contract. In particular, Article 3 of the First Contract does make it clear that the specifics as it relates to how the Respondent's salaries for the 2014/15 and 2015/16 seasons were to be paid would be provided in separate sporting and image rights contracts. In essence, the First Contract was a framework agreement laying out the basic terms of the agreement, the Second Contract was the sporting contract described in Article 3 of the First Contract, and the IR Contract was the image rights contract described in Article 3 of the First Contract.

102. Additionally, the FIVB Tribunal examined additional evidence in the form of the correspondence between the Parties not discussed by the CEV Mediation Chamber that further supports this conclusion. The FIVB Tribunal notes that an employee of the Applicant sent the following to the Respondent's Agent after the Respondent's Agent expressed concerns about the image rights agreement:

"It's not like the only Procuro is responsible. <u>There are pre-agreements signed by Impel Volleyball</u>

and the Players and according to them we are signing sport contracts and image contract – keeping with the objective of tax optimization. This the reason why we're using Procuro company. We've already done it with…… (names of other players)*. Were there any problems?*

We've always confirmed that we are committed to pay net salaries from the pre-agreement..." (emphasis added)

103. It's apparent from the contents of this email, which was sent on 25 November 2014, i.e. after the date that the Second Contract had been signed, that the Applicant believed that the First Contract was still valid and binding. The only time that the Applicant contends that the First Contract was no longer valid in its communications with the Respondent is in the Declaration, which as the CEV Mediation Chamber correctly pointed out appears to invoke Article 10 of the First Contract (!) to terminate the relationship between the Parties. However, even after the Declaration, the Applicant's communications demonstrate that it believed that the First Contract was still valid. In an email sent on 14 April 2015, i.e. 15 days after the Declaration, an employee of the Applicant sent the following email to the Respondent:

"Hi,

I'd like to complete on the subject of you travel costs. You have in your pre-contracts sum of 1500 euro guaranteed. We had to find the solution how we can pay you that. The best way will be to create the separate image agreement with our second company (4 Sports) and Jacek is doing that. What you have to do to fill that agreement is taking part in Volleymania (kids) tournament in Wroclaw on Saturday (18th April)." (emphasis added)

104. If the Applicant truly believed as it asserted in its Request for Review and the Declaration that the Second Contract replaced the First Contract, then it would not have an obligation to pay travel costs as found in Article 5 of the First Contract. Based on the correspondence between the Parties, it appears clear that the Applicant, in fact, believed that the First Contract was still valid and binding on the Parties. Thus, the FIVB Tribunal holds that the First Contract was still legally binding on the Parties and that the Second Contract and IR Contract were the agreements referenced in Article 3 of the First Contract.

105. Given this determination, the FIVB Tribunal must look at the ramifications of its finding on the image rights payments owed under the IR Contract. Specifically, does the FIVB Tribunal's determination that the First Contract was still valid affect the Applicant's liability as it relates to the image rights payments found in the IR Contract?

106. The Applicant argues that it cannot be held for the image rights payments found in the IR Contract because it is not a party to the IR Contract between the Respondent and the IR Company. The Respondent contends that it can be held liable for the image rights payments because these payments are a part of the total remuneration provided in the First Contract.

107. It is uncontested that the Applicant is not a party to the IR Contract. Consequently, the only way that the Applicant can be held liable for the image rights payments found in the IR Contract is if there is some other contractual basis for liability, i.e. the obligation to make these payments is found in some other provision of a contract that the Applicant is a party to. The Decision found that said contractual basis stemmed from Article 3 of the First Contract.

108. As stated, Article 3 of the First Contract states that the Respondent would be entitled to a base salary of EUR 105,000 for the 2014/15 season and EUR 120,000 for the 2015/16 season. Article 3 of the First Contract further provides that the payments would be split into sport contract payments and image rights contract payments.

109. In Section 4.3 para. l) of the Decision, the CEV Mediation Chamber properly described a common practice in the sports industry in which salaries owed to a player are split into salary and image rights payments for tax purposes. In this system, salary payments are paid directly to the player while the image rights payments, which are usually a bigger portion of the total compensation, are paid by a club to the player through a third party company. In essence, the payment is filtered through a tax shelter to create optimal tax benefits for the Parties.

110. Looking at the evidence before it, the FIVB Tribunal first looks at the compensation in the Second Contract and the IR Contract to see if it reflects the EUR 105,000 net total remuneration found in Article 3 of the First Contract. The Second Contract provides that the Player would be paid PLN 50,000 gross. Based on the Applicant's payments, it appears to total PLN 30,376.70 net. Taking into account the publically available exchange rate at the time that the Second Contract was concluded (1 EUR = 4.185 PLN), i.e. 1 August 2014, the total amount of salaries provided under the Second Contract was approximately EUR 7,258 when added to the total image rights payments of EUR 97,776 under the IR Contract, , which appear to have been agreed to be net of taxes based on the single instalment paid to the Respondent under the IR Contract (*see above* para. 14), results in a total compensation of EUR 105,034. While it does not correspond exactly to the figure found in the First Contract, the FIVB Tribunal notes that there is a very small difference between the two figures which can be potentially explained by the exchange rate found by the FIVB Tribunal.

111. More importantly, the correspondence between the Parties and between the Respondent and the IR Company demonstrate that the Parties were clearly using the sports industry practice described above. As stated in the email provided in para. 102 above, an employee clearly states that the use of the IR Company was designed for *"tax optimization"*. Moreover, in an email from the IR Company to the Respondent, the IR Company states the following:

> *"Dear Denise,*
>
> *Please let me inform you that I have just received leagal document from the volleyball Club Impel Wroclaw with the termination of the image contract with my company Procuro Ltd.*
>
> *The date of the document is 24 of February 2015.*
>
> *In addition I would like you to inform you that we had not received any salary for Your image in 2015 year.*
>
> *Please contact to the Club to explain this situation."* (emphasis added)

112. Thus, the above email demonstrates that the Applicant also had a contract with the IR Company regarding the Respondent in which the Applicant would make payments to the IR Company for the Respondent's image, which would then be paid to the Applicant. This system seems to also be reflected in §1, para. 3 of the IR Contract in which the IR Company states that its obligation to pay the Respondent is *"subject to PROCURO receipt of payment from the purchasing third party"*. Based on the above emails, the FIVB Tribunal finds that the Applicant is said purchasing third party.

113. Given the above evidence, the FIVB Tribunal finds that the Applicant can be held liable for the image rights payments under Article 3 of the First Contract. The FIVB Tribunal is convinced that the arrangement described in Article 3 of the First Contract was put into practice through the Second Contract, the IR Contract, and the Applicant's agreement with the Respondent.

6.3.2 The termination of the employment relationship between the Parties

114. Given the above finding that the First Contract was valid, the FIVB Tribunal must look at how the First Contract ended given that it had a term for both the 2014/15 season and the 2015/16 season.

115. It is uncontested that the Respondent performed for the Applicant for the 2014/15 season and received all of her sporting salaries owed. However, the Applicant contends that the First Contract was properly terminated before the 2015/16 season either through Article 10 of the First Contract or mutual agreement. The FIVB Tribunal will deal with each argument in turn.

116. The Decision found that the Applicant had not properly terminated the First Contract. It noted that a contract could only be terminated by mutual agreement or for just cause, i.e. a serious breach of legal or contractual duties or the repeated violation of those obligations. It then found that the Applicant failed to properly terminate the First Contract based on Article 10 of the First Contract because Article 10 limited termination to *"non further funding of sporting activities in the next season"* and the Applicant did not provide any evidence demonstrating that this condition had been satisfied.

117. The First Contract contains a termination provision in Article 10. Article 10 of the First Contract provides the following:

> *"10) Until 30 March 2015 the club can unilaterally terminate the contract for the season 2015/16 with no additional financial consequences, in the case situations of non further funding of sporting activities in the next season."*

118. Based on this provision, the Applicant was entitled to unilaterally terminate the First Contract for the 2015/16 season with no additional financial consequences only if it did not have funding for 2015/16 season as properly determined by the CEV Mediation Chamber. The Applicant has not provided any additional evidence demonstrating that this condition was satisfied. Consequently, the FIVB Tribunal upholds the CEV Mediation Chamber's decision on this issue and finds that the Applicant failed to terminate the First Contract in accordance with Article 10.

119. Turning to the Applicant's argument that the First Contract was terminated by mutual agreement of the Parties, the FIVB Tribunal first notes that there is no agreement in writing affirming the Parties' mutual agreement to terminate the First Contract before the 2015/16 season. The only written evidence of termination of the First Contract is the Declaration in which the Applicant, in essence, expressed its decision to unilateral terminate the employment relationship with the Respondent before the 2015/16 season. There is nothing on record demonstrating that the Respondent agreed to this in writing.

120. Rather, the Applicant argues that the Respondent's actions demonstrate that she agreed to

the termination of the First Contract because she began practicing with SSC Schwerin in May 2015. The FIVB Tribunal finds that the Respondent's actions cannot be adjudged to demonstrate her agreement to the termination. The Applicant sent the Declaration on 30 March 2015. In essence, this Declaration improperly stated that the Applicant wished to exercise its unilateral right to terminate the First Contract. The Respondent could not have been expected to stay with the Applicant after this letter because the Applicant's intentions were clearly expressed in the Declaration. The Declaration effectively ended the employment relationship between the Applicant and Respondent. Thus, regardless if the Applicant was still paying the Respondent after the Declaration, anything that the Respondent did after the Declaration cannot demonstrate her mutual accent to the termination of the First Contract. Consequently, the FIVB Tribunal finds that the Parties did not agree to a mutual termination of the First Contract. Thus, the FIVB Tribunal finds that the Applicant terminated the First Contract without just cause through its Declaration.

6.3.3 Damages for the Applicant's improper termination

121. Given its determination that the Applicant did not terminate the First Contract for just cause, the FIVB Tribunal must now determine the amount of damages owed to the Respondent due to the Applicant's improper termination.

122. When calculating damages, generally accepted principles of contract law dictate that the aggrieved party must be made whole, i.e. that he or she receives what he/she would have received had the contract been fully honoured.

123. In the present dispute, the Respondent is seeking EUR 83,808 in image rights payments owed for the 2014/15 season and EUR 120,000 for the 2015/16 season. The Decision awarded these amounts to the Respondent. The Applicant argues that the Decision erred in awarding those amounts.

124. Looking first at the 2014/15 season, the following facts are uncontested. The Respondent was paid all of the amounts due under the Second Contract and received one instalment under the IR Contract. The Respondent performed her obligations under the First Contract until she received the Declaration.

125. The image rights payments owed before the date of the Declaration had already been earned by the Respondent through the performance of her obligations up to the date of the

Declaration. Consequently, the FIVB Tribunal finds that those amounts were already owed by the Applicant and must be paid. Regarding the image rights payments owed after the Declaration, the Respondent would have been entitled to those image rights payments had the First Contract been fully honoured because the total remuneration found in the First Contract was reflected in the Second Contract and the IR Contract. Therefore, based on the above generally accepted principles of contract law, the Respondent is also entitled to the image rights payments owed under the IR Contract after the Declaration as well. Given the above FIVB Tribunal's determinations that the salary provided in the First Contract was split into the Second Contract and IR Contract and that the Applicant can be held liable for the image rights payments under the IR Contract, the FIVB Tribunal finds that the Respondent is entitled to EUR 83,808 for the 2014/15 season. The details of the calculation are as follows:

	EUR 97,776	(amounts due according to Image Rights Contract)
	EUR 7,258	(amounts due according to Second Contract)
	EUR 105,034	
-	EUR 13,968	(amounts received from Image Rights Contract)
-	EUR 7,258	(amounts received from Second Contract)
	EUR 83,808	

126. Turning to the 2015/16 season, the FIVB Tribunal first notes that the First Contract provided that the Respondent would receive total remuneration of EUR 120,000 for that season. The Decision awarded this amount to the Respondent because it found inadequate evidence that the Respondent was playing for SSC Schwerin. The Applicant contested this specific award because 1) the Respondent signed a contract with SSC Schwerin for the 2015/16 season and, thus, would receive a double recovery and 2) the CEV Mediation Chamber violated the legal principle of *ultra petita* because it awarded more than the Respondent requested. The FIVB Tribunal will address the Respondent's contract with SSC Schwerin in this section and shall address the Applicant's *ultra petita* in the following section.

127. Under generally principles of contract law, a player has a duty to mitigate damages, i.e. a player has to be active in trying to find a new job after a contract is terminated. She should not merely sit idly by and wait to collect money for a club that she is not performing for. Thus, any amounts received by a player from another club after termination must be deducted from the amount requested from the breaching party. The duty to mitigate is also subject to the circumstances of the situation as well. For instance, a player cannot be expected to find another job if the player was terminated too late into the season.

128. In the present case, the Respondent was terminated well before the start of the 2015/16 season. After the Declaration, the Respondent returned to her hometown and began practicing for her hometown club, where she decided to play on a voluntary basis. The Respondent claims that she decided to do this because she was incredibly affected by her time with the Applicant. While it appears that her name may have been offered to clubs as part of a group list, there are no other indications that she attempted to find paid employment. It is unequivocally clear that the Respondent is not only playing for SSC Schwerin, but she is playing sufficiently well to start for the club. The Respondent stated that she is currently playing for SSC Schwerin on a voluntary basis and only receives small payments to cover her living expenses, food, health insurance, and social security. According to SSC Schwerin's letter to the FIVB Tribunal, the Respondent received a total remuneration of EUR 10,552.38 for her performances since November 2015.

129. The circumstances of this case are the type of circumstances that the duty to mitigate damages is designed to prevent. Whether intentional or not, the fact of the matter is that the Respondent is seeking to perform for another club while, in essence, getting fully paid by the Applicant. The amount of EUR 10,552.38 clearly does not reflect the Respondent's full value given that she is a starter on SSC Schwerin and a German national team player. Under *ex aequo et bono* principles, the FIVB Tribunal finds that an award of the full amount or even a reduction based purely on the remuneration that she will allegedly receive from SSC Schwerin would violate principles of justice and fairness. The FIVB Tribunal finds that the CEV Mediation Chamber did not fully consider the duty of mitigation in issuing its award of EUR 120,000 for the 2015/16 season. The Decision should have determined an amount *ex aequo et bono* that would have demonstrated that the Respondent had duty to mitigate to her damages.

130. Given that the Respondent is a starter and national team player, that she had the entire offseason to find paid employment, and the fact that she decided to play on a voluntary basis even though she was clearly a sufficiently talented player to warrant a substantial compensation package from a club, the FIVB Tribunal decides *ex aequo et bono* to reduce the amount of compensation that the Respondent should receive from the Applicant by the EUR 20,152.38 amount that she will have received from SSC Schwerin until the end of 2015/16 season and an additional EUR 40,000. Thus, the FIVB Tribunal awards the amount of EUR 59,847.62 to the Respondent for the 2015/16 season.

6.3.4 The Applicant's argument on *ultra petita*

131. Additionally, the Applicant alleges that the CEV Mediation Chamber infringed the principle of *ultra petita*. This argument stems from the Respondent's request for relief in her Complaint, which states the following:

> *"Discussion of second year of contract 2015-2016, Impel Wroclaw wrote that they are not interested to have Denise Hanke in the team for season 2015-2016. When this is the case, we can discuss a buy out sum for the agreed salary as written in contract signed May 4th 2014 (base salary €120.000). When Impel Wroclaw has different financial position as expected, we are willing to talk about and find a good solution for both sides."*

132. The principle of *ultra petita* is a general principle of law that states that a claimant cannot be awarded an amount higher than requested in an arbitration proceeding. The rationale behind this principle is that a deciding body should be limited to what the parties have requested in the proceedings.

133. The FIVB Tribunal finds that the Applicant's argument must be dismissed. While it is true that Respondent's request for relief in her Complaint could be interpreted as an act to reach an amicable settlement with the Applicant, this request was not reiterated in her second submission before the CEV Mediation Chamber, where she requested that Applicant "*respect all points agreed in Private agreement signed May 4th 2014*". Likewise, in her Answer to the Request for Review, Respondent expressly requested that the Decision be upheld also as regards the payment of EUR 120,000 for the 2015/16 season. Thus, the Applicant's argument regarding the legal principle of *ultra petita* must be dismissed.

6.3.5 Request for the Player's suspension and return

134. Finally, the Applicant requests that the FIVB Tribunal suspends the Player and orders her return to the Applicant if it awards salaries for the 2015/16 season.

135. These requests must also be dismissed. The Applicant's request fails to properly understand the legal characterisation of the award for the 2015/16 season in making its request. The relationship between the Applicant and the Respondent was terminated through the Declaration on 30 March 2015. This termination cannot be undone. However, because this termination was improper, the Respondent was entitled to damages under the First Contract, including damages for the 2015/16 season. Therefore, the CEV Mediation Chamber, in the Decision, and the FIVB Tribunal, in this decision, are not awarding salaries but are awarding damages based on the Applicant's improper termination. Additionally, a decision-making body

cannot legally order an employee to work for a certain employer against an employee's will due to basic personal liberty rights recognised by most legal systems. Consequently, the FIVB Tribunal cannot order the Respondent to return to the Applicant.

136. Regarding the Applicant's request to suspend the Respondent, the FIVB Tribunal has found that the Applicant, not the Respondent, improperly terminated the First Contract. Consequently, the breach of contract was determined to be the fault of the Applicant. Even so, the FIVB Tribunal does not have a regulatory basis for suspending a German national player from a German competition. Article 45.11.3 of the FIVB Sports Regulations only allows the FIVB to suspend a player from international competitions if a player fails to comply with a decision of the FIVB/Confederation, the FIVB Tribunal or the Court of Arbitration for Sport. The German competition is not international competition and there is no decision against the Respondent that she has failed to comply with.

6.4 Costs

137. In its Decision, the CEV Mediation Chamber ordered the Applicant to pay the full amount of costs of EUR 400 for the proceedings before the CEV. Given that the Applicant partially succeeded in its appeal before the FIVB Tribunal by reducing the amount owed by approximately 25 percent, the FIVB Tribunal orders that the Applicant is entitled to a similar reduction of the costs for the proceedings before the CEV. Thus, the Applicant shall pay the amount of EUR 300 to the Respondent for the proceedings before the CEV.

138. Regarding the handling fee for the proceedings before the FIVB Tribunal, the Applicant did not request any kind of reimbursement of the CHF 1,000. Consequently, no reimbursement shall be ordered.

DECISION

139. For the reasons set forth above, the Judge decides as follows:

1. The Request for Review filed by Impel Volleyball S.A. is partially accepted.

2. The decision rendered by the CEV Mediation Chamber dated 15 October 2015 is modified as follows:

- **Impel Volleyball S.A. Wroclaw shall pay to Ms Denise HANKE the amount of**

EUR 83,808 net with regard to the Player's image rights for the 2014/15 season.

- **Impel Volleyball S.A. Wroclaw shall pay to Ms Denise HANKE the amount of EUR 59,847.62 net as financial damages for the 2015/16 season.**

- **Impel Volleyball S.A. Wroclaw shall reimburse to Ms Denise HANKE the amount of EUR 300 for the handling fee.**

- **Impel Volleyball S.A. shall comply with this decision by no later than 12 May 2016.**

- **As of 13 May 2016, the CEV may not approve transfers of players from CEV National Federations to Impel Volleyball S.A. Wroclaw unless adequate proof of full compliance with the present decision has been previously provided to the CEV. Additional sanctions may be imposed at a later stage by the CEV.**

3. Each party shall bear its own costs for the proceedings before the FIVB Tribunal.

4. Any other requests for relief are dismissed.

Lausanne, seat of the arbitration, 12 April 2016.

Alexis Schoeb

Single Judge