BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0184/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Raj Parker

in the arbitration proceedings between

Mr. Miro Bilan
c/o BDA Sports, 507 N. Gertruda Ave, Redondo Beach, CA 90277, USA

- Claimant -

vs.

Kosarkaski Klub Zadar
Obala Kralha Tomislava 1, 23000 Zadar, Croatia

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Miro Bilan (hereinafter the "Claimant") is a professional basketball player.

2. In these proceedings, the Claimant is represented by Mr. Billy J. Kuenzinger of BDA Sports, 700 Ygnacio Valey Rd Suite 330, Walnut Creek, CA 94598, USA.

1.2 The Respondent

3. Kosarkaski Klub Zadar (hereinafter the "Respondent") is a Croatian basketball club.

2. The Arbitrator

4. On 28 June 2011, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Raj Parker as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules").

5. Neither of the Parties has raised objections to the appointment of the Arbitrator or to the declaration of independence issued by him.

3. Facts and Proceedings

3.1 Background Facts

6. On 4 January 2010, the Claimant and the Respondent entered into a contract of employment (hereinafter the “Contract”). The Contract contains, among others, the following provisions:

"***ARTICLE 5***

5.1. For the playing season 2009/2010 the Club is obliged to pay to the Player the amount of 178.350,00 Kunas (one hundred seventy-eight thousand three hundred and fifty Kunas), that represents the gross amount of the player's earnings, not including VAT, with the payment schedule as follows:

- Payment is made in five equal monthly installments, each of 35,670.00 Kunas, paid by the Club according to the issued invoice, plus the corresponding VAT of 23%, and all payments are due at every twentieth of the month, commencing on January 20, 2010 and terminating on May 20, 2010.

5.2. For the playing season 2010/2011 the Club is obliged to pay to the Player the amount of 579,637.00 Kunas (five hundred seventy-nine thousand six hundred and thirty-seven Kunas), that represents the gross amount of the player's earnings not including VAT, with the payment schedule as follows:

- Payment is made in ten equal monthly installments, each of 57,963.80 Kunas, paid by the Club according to the issued invoice, plus the corresponding VAT of 23%, and all payments are due at every twentieth of the month, commencing on August 20, 2010 and terminating on May 20,2011.

5.3. For the playing season 2011/2012 the Club is obliged to pay to the Player the amount of 713,400.00 Kunas (seven hundred thirteen thousand four hundred Kunas), that represents the gross amount of the player's earnings not including VAT, with the payment schedule as follows:

- Payment is made in ten equal monthly installments, each of 71,340.00 Kunas, paid by the Club according to the issued invoice, plus the corresponding VAT of 23%, and all payments are due at every twentieth of the month, commencing on August 20, 2011 and terminating on May 20,2012.

5.4. For the playing season 2012/2013 the Club is obliged to pay to the Player the amount of 1.070,100.00 Kunas (one million seventy thousand and hundred Kunas), that represents the gross amount of the player's earnings not including VAT, with the payment schedule as follows:

- Payment is made in ten equal monthly installments, each of 107,010.00 Kunas, paid by the Club according to the issued invoice, plus the corresponding VAT of 23%, and all payments are due at every twentieth of the month, commencing on August 20, 2012 and terminating on May 20, 2013.

5.5. The Player has the right to unilaterally terminate this Agreement after the playing season 2011/12, with the obligation to pay compensation in an amount of 200,000.00 (two hundred thousand) EUR, whereby the CBF is the authorized body to issue the letter of clearance for the Player or register the Player for another club in

Croatia, with the proof on paid compensation as a proof [sic], and without the consent of the Club.

ARTICLE 6

6.1. The Club and the Player stipulate the fulfillment of the obligation of the Club under Articles 5 and 8 of this Agreement to be the essential provision of this Agreement, if the said obligation fails to be fulfilled, they mutually stipulate the appearance of legal consequences pursuant to the [sic] paragraphs 2 and 3 of this Article.

6.2. In case of a 30-day-delay of payment of the monetary obligations by the Club under the Article 5 of this Agreement, the Player has the right to stop fulfilling his contractual obligations his due claims have been settled in full.

6.3. The contractual mutually stipulate the right of the Player to terminate this Agreement to the detriment of the Club, in case when the Club is 50 days late with the fulfillment of obligations under Article 5 of this Agreement. In this case the Player has the right to sign for any other club in the country or abroad in the status of a free player. The Club agrees to pay penalties of 20 Kunas per each day [sic] of delay after 50 days of delay, until all of the scheduled payments are settled.

6.4. The Club also undertakes an obligation to pay for the Player's food (lunch and dinner) in the restaurant for the duration of this Agreement.

ARTICLE 7

The Player is required to enter in the Register of Professional Athletes within the Ministry of Sports for the purpose of performing the independent sporting activities.

[…]

ARTICLE 9

This Agreement is concluded as a guaranteed agreement between the Club and the Player, regardless of the result of the Club and Player's contribution, or the inability to play due to the injury of [sic] illness of the Player incurred in connection with the fulfillment of the Player's sports and other obligations under this Agreement.

The Club waives the right to have set-off (replacement) claims from the Player under this Agreement against any claims of the Club towards the Player, including penalties imposed by the Club by-laws, which claim would exceed 5 % of the agreed amounts from the Article 5 under this Agreement for each competitive season.

[…]

ARTICLE 13

The parties agree that the provisions of this Agreement may be changed only

in writing, with the obligation to make an annex to this Agreement, and therefore no oral agreement, contrary to the contents of this Agreement is binding upon the parties."

7. In the course of the 2009-2010 and 2010-2011 seasons, the Respondent did not make certain salary payments on the dates on which they were due under the Contract. On 11 April 2011, the Claimant purported to terminate the Contract by letter (hereinafter the "Termination Letter") on the grounds that the Respondent had breached the Contract by failing to make payments due under it.

3.2 The Proceedings before the BAT

8. On 4 May 2011, the Claimant filed a Request for Arbitration in accordance with the BAT Rules. The BAT received the non-reimbursable handling fee of EUR 3,983.00 from the Claimant on 11 May 2011.

9. By letter dated 28 June 2011, the BAT Secretariat fixed a time limit until 20 July 2011 for the Respondent to file the Answer to the Request for Arbitration.

10. By the same letter of 28 June 2011, and with a time limit for payment of 13 July 2011, the following amounts were fixed as the Advance on Costs:

"*Claimant (Mr. Miro Bilan)*	*EUR 5,000*
Respondent (KK Zadar)	*EUR 5,000"*

11. The Claimant paid his share of the Advance on Costs on 13 July 2011. The Respondent failed to pay its share of the Advance on Costs. The Claimant subsequently paid the Respondent's share of the Advance on Costs (in accordance with Article 9.3 of the BAT Rules) on 5 August 2011.

12. On 15 July 2011, the Respondent filed its Answer to the Request for Arbitration. The

Respondent filed two additional submissions with the BAT on 31 August 2011 and 1 September 2011. The submission of 1 September 2011 provided the Arbitrator with a copy of a decision of 1 September 2011 (hereinafter the "CBF Decision") of the Croatian Basketball Federation (hereinafter the "CBF"). In light of the circumstances of the case, the Arbitrator decided that the Respondent's additional submissions were admissible, despite being filed after the time limit for the Answer.

13. On 12 September 2011, the Arbitrator issued a Procedural Order to both Parties (hereinafter the "First Procedural Order"). On the same day, the Respondent contacted the BAT Secretariat to inform the Arbitrator that the Respondent had made a payment to the Claimant of HRK 522,035.86 on 9 September 2011.

14. The Arbitrator therefore issued a second Procedural Order on 14 September 2011 which instructed the Parties not to respond to the First Procedural Order and requested confirmation from the Claimant that he wanted to continue the arbitration. On 19 September 2011, the Claimant responded that he would continue the BAT proceedings as he wished to claim further outstanding salary payments from the Respondent.

15. The Arbitrator issued a third Procedural Order to both Parties on 22 September 2011 (hereinafter the "Third Procedural Order"). On 27 September 2011, the Claimant submitted his reply to the Procedural Order which attached a translation of a CBF Appeal Decision of 19 September 2011 (hereinafter the "CBF Appeal Decision"). The Respondent submitted his reply, together with a counterclaim (hereinafter the "Counterclaim"), on 3 October 2011.

16. The Arbitrator issued a fourth Procedural Order to both Parties on 12 October 2011 (hereinafter the "Fourth Procedural Order"), which requested further information from the Parties. The Fourth Procedural Order also informed the Respondent that, in accordance with Article 9.3 of the BAT Rules, the Arbitrator would not consider the counterclaim unless the Respondent paid its share of the Advance on Costs by 20

October 2011. The Respondent paid its share of the Advance on Costs on 14 October 2011.

17. The Claimant submitted his reply to the Fourth Procedural Order on 28 October 2011. The Respondent submitted his reply to the Fourth Procedural Order on 31 October 2011.

18. On 16 November 2011, the Arbitrator issued a fifth Procedural Order to provide the Claimant with an opportunity to respond to the Counterclaim. The Claimant submitted his reply on 22 November 2011.

19. By Procedural Order dated 28 November 2011, the Arbitrator declared the exchange of documents complete, and requested that the Parties submit detailed accounts of their costs by 5 December 2011.

20. On 29 November 2011, the Respondent submitted the following account of costs:

"Legal fees

Response to the claim	*1,066.60 EUR*
Respondent's letter from September the 1st	*1,066.60 EUR*
Respondent's letter from September 9th	*1,066.60 EUR*
Respondent's counterclaim	*2,000.00 EUR*
Total	*5,199.80 EUR*
VAT	*1,195.90 EUR*
Total Fees	*6,395.70 EUR."*

21. On 2 December 2011, the Claimant submitted the following account of costs:

"Payments to FIBA BAT- Miro Bilan

Date	*FIBA receipts*	*Amount sent*	*Description*
May 11 2011	*€ 3,983.00*	*€ 3,983.00*	*Non reimbursable handling fee*
July 13 2011	*€ 4,983.00*	*€ 5,000.00*	*Advance on cost-claimant*
August 5 2011	*€ 4,983.00*	*€ 5,000.00*	*Advance on cost-respondent*
Total paid to FIBA	€ 13,949.00	€ 13,983.00."	

22. By email dated 5 December 2011, the BAT Secretariat invited the Parties to submit any comments on the other Party's account of costs by no later than 9 December 2011. By email dated 6 December 2011, the Claimant submitted an objection to the Respondent's account of costs, on the basis that the costs were not reasonable and that they did not set out a sufficient description of how the costs had been incurred.

23. Since neither of the Parties filed an application for a hearing, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the award on the basis of the written submissions of the Parties.

4. The Parties' Submissions

4.1 The Claimant's Request for Arbitration

24. The Claimant submits that the Respondent failed to make scheduled salary payments for the 2009-2010 and 2010-2011 seasons as required under Article 5 of the Contract. The Claimant claims that the Respondent's failure to pay was in breach of the Contract.

25. The Claimant submits that, on account of the Respondent's breach of contract, he validly, and with just cause, terminated the Contract in writing on 11 April 2011 (having orally informed the Respondent of his decision to do so on 8 April 2011).

26. The Claimant submitted that he was entitled to receive HRK 520,987.00 by way of unpaid salary and due under the Contract for the 2010-2011 season.

27. The Claimant submits that, pursuant to Article 9, the Contract is a guaranteed agreement. The Claimant therefore submits that he is entitled to receive HRK 713,400.00 and HRK 1,070,010.00 by way of salary due under the Contract for the 2011-2012 and 2012-2013 seasons.

28. The Claimant's request for relief states:

> *"Player Salary, overdue/late fee payments:*
>
> | | |
> |---|---|
> | *2,500.00 HRK* | *Late Fee* |
> | *520,987 HRK* | *Late Payments* |
> | *1,783,500 HRK* | *Remaining Players Salary* |
> | ***2,306,987 HRK*** | ***Total****"* |

4.2 The Claimant's response to the Second Procedural Order

29. In his reply to the Second Procedural Order, the Claimant confirmed that he received payment of HRK 522,035.00 from the Respondent on 9 September 2011.

30. The Claimant submitted that he would like to continue the BAT proceedings, because the payment of HRK 552,035.00 does not provide compensation for the salary due under the Contract for the 2011-2012 or 2012-2013 seasons.

31. The Claimant accordingly reduced his request for relief by HRK 522,035.00. The Claimant's revised request for relief therefore comprised HRK 1,783,500.00 for remaining salary payments and HRK 1451.14 for the late payment fee.

4.3 The Respondent's submissions

32. The Respondent submits that the Claimant attempted to unilaterally terminate the Contract on 8 April 2011 without just cause. The Respondent submits that the Termination Letter is invalid and that Claimant is still a member of the Respondent until the end of the 2012-13 season. The Respondent submits that it did not, at any time, act in breach of contract.

33. The Respondent submits that the Claimant agreed to delay receipt of the salary payments due under the Contract until 1 June 2011. The Respondent claims that the Claimant agreed to continue to fulfil his contractual obligations and not to terminate the Contract during this period.

34. The Respondent submits that, by letter dated 10 January 2011, it proposed a settlement agreement in a letter (hereinafter the "Settlement Proposal") to the Claimant's agent, Mr. Robert Jablan (hereinafter the "Agent"). The proposal stated:

> *"Dear Sir,*
>
> *We are grateful for your patience and understanding until the present day.*
>
> *Aware of the general situation in the Club and beyond, we ask you to agree to prolongation of the date of the fulfilment of our financial obligations to you and to the players until 31st May 2011.*
>
> *In case we should fail to honour in full our obligations deriving from the signed contracts at the due date, we promise to issue a debenture bond with maturity date on 30th June 2011. At the same time we ask you, until that date, not to initiate any procedures resulting in the breach of the contracts with the players you represent and who play in our Club.*
>
> *Thanking you once again*
>
> *[…]"*

35. The Respondent submits that the Agent, an employee of XL Basketball Agency (hereinafter the "Agency") had full authority, as the Claimant's representative, to make

decisions on behalf of the Claimant.

36. The Respondent submits that the Agent, by letter dated 19 January 2011 (hereinafter the "Settlement Acceptance", and together with Settlement Proposal, hereinafter the "Settlement Agreement"), agreed on behalf of the Claimant to the terms of a settlement. The Settlement Acceptance states:

> *"Dear Sir,*
>
> *I have carefully considered your proposition. In view of the financial situation and other conditions of your Club, and bearing in mind the overall situation of the basketball sport in Croatia and beyond, I find your proposition fair and acceptable.*
>
> *As a result of accepting your proposition dated 10th January 2011, I hereby take the obligation not to undertake any measures in the sense of the absence of players from training or games, nor shall I initiate any other procedures leading to the termination of the contract nor arrange any debt collection of the amounts due in any other manner.*
>
> *Sincerely*
>
> *[…]"*

37. The Respondent submits that the Settlement Agreement was mutually agreed between the Agent and the Claimant. The Respondent submits that the CBF Appeal Decision of 19 September 2011 supports this claim.

38. The Respondent has provided an email from the Agent, dated 24 October 2011, in which the Agent states that, on receiving the Settlement Proposal, he immediately contacted the Claimant and agreed together with the Claimant, to accept the Respondent's proposal.

39. The Respondent submits that on 8 April 2011, it imposed a disciplinary penalty on the Claimant (hereinafter the "Disciplinary Penalty") which banned the Claimant from transferring to another club until the end of the 2012-2013 season.

40. The Respondent submits that it was justified in imposing the Disciplinary Penalty on the Claimant given the Claimant missed training without prior notice and intended to transfer to another club. The Respondent claims that the Claimant's actions were in breach of the Respondent's "Code of Sportsmanlike Conduct and Disciplinary Responsibility of the Players of the Basketball Club Zadar" (here after the "Disciplinary Code"). The Respondent states that the Claimant was provided a copy of the Disciplinary Code shortly after signing the Contract on 4 January 2010.

41. The Respondent submits that at the time the Claimant issued the Termination Letter, the Claimant was not registered as a professional athlete in accordance with the (Croatian) *Law of Sport.* The Respondent claims that the Claimant did not register himself as a professional athlete until a few weeks prior to 9 September 2011. The Respondent submits that it was only legally able to pay the Claimant once he became registered.

42. The Respondent submits that, pursuant to Article 5 of the Contract, the Claimant is required to issue an invoice to the Respondent for each monthly salary payment. The Respondent claims that, because it did not receive an invoice for the 2010-2011 season from the Claimant until 6 September 2011, it was not obliged to make payment until this date. Article 5 provides:

> *"Payment is made in ten equal monthly instalments, […], according to the issued invoice."*

43. The Respondent submits that, given the Claimant was not properly registered and no invoice had been issued, 9 September 2011 was the earliest date the Respondent was legally able to make the payment of HRK 522,035.00 to the Claimant.

44. The Respondent's reply to the Third Procedural Order contains the Counterclaim against the Claimant. The Respondent submits that the Claimant, in unilaterally terminating the Contract, is liable to pay EUR 200,000.00 to the Respondent pursuant

to Article 5 of the Contract:

> *"5.5 The Player has the right to terminate this Agreement unilaterally after playing the season 2011/12 with the obligation to pay compensation in an amount of 200,000.00 (two hundred thousand) EUR…"*

4.4 The Claimant's response to the Third Procedural Order

45. The Claimant submits that he did not instruct the Agent to accept the Settlement Agreement on his behalf. The Claimant submits that he was not informed of the Agreement Letter signed by the Agent until after he had left the Respondent club. The Claimant submits that the Agent did not have authority to conclude the Settlement Agreement on his behalf.

46. The Claimant states that he terminated his representation with the Agency by letter dated 14 March 2011.

47. The Claimant submits that he has never been provided with a copy of the Respondent's Disciplinary Code.

48. The Claimant submits that the CBF Appeal Decision of 19 September 2011 (overturning the earlier CBF Decision) supports his submission that he was entitled to terminate the Contract and transfer as a free agent to another club.

49. The Claimant submits that, whilst he received all salary payments owed for the 2009-2010 season, he has only received HRK 556,737.00 for the 2010-2011 season. The Claimant submits that the shortfall of HRK 23,000.00 from the HRK 579,637.00 provided for by Article 5.2 of the Contract is explained by reference to an outstanding VAT payment. The Claimant states in his response to the Third Procedural Order:

> *"The reason why the amounts of money I received and the one [the Respondent]*

submitted do not match is because [the Respondent] submitted that they paid the amount of HRK 23,000, which is actually VAT for the first year of the contract. They never paid the mentioned amount."

4.5 The Claimant's response to the Fourth Procedural Order

50. In the Fourth Procedural Order, the Arbitrator requested that the Claimant clarify his submission in relation to HRK 23,000.00 allegedly owed in relation to an outstanding VAT payment. The Claimant's response to this question states:

> *"…As can be seen [from the Claimant's Tax Acknowledgment], it is also clear that my tax return for the mentioned year has a status of unsolved. This is because the VAT amount of HRK 23,000.00, which the Respondent's accounting office state through the Tax Payment Confirmation as paid, has actually never been paid. As a result, I can be ordered to pay it myself."*

51. The Claimant further submits that VAT has not been paid by the Respondent on the salary payments for the 2009-2010 and 2010-2011 seasons and that if the Respondent does not make the VAT payments, the Claimant could be required to do so.

52. The Claimant submitted in his response to the Fourth Procedural Order that, having reviewed his bank statements, HRK 1,311.88 is still owed to the Claimant by way of unpaid salary for the 2010-2011 season.

53. The Claimant submits that he registered with the Register of Professional Athletes at the Ministry of Sports in December 2010.

54. The Claimant submits that he is not required to issues invoices to receive his monthly salary payments. The Claimant submits that the Respondent had previously made salary payments during the 2009-2010 season without receiving any such invoices. The Claimant confirms that, as requested by the CBF, he issued an invoice to the Respondent for HRK 522,035.86 on 6 September 2011.

55. The Claimant submits that, pursuant to Article 6 of the Contract, the Respondent owes the Claimant the following late payment fees:

Outstanding Debt	Late Payment Fee
2009-2010 salary payments	13,780.00 HRK
2010-2011 salary payments	33,220.00 HRK
Outstanding balance 2010-2011	2,260.00 HRK
2011-2012 salary	2,020.00 HRK
Total Late Fees	51,280.00 HRK

56. Therefore, the Claimant's request for relief (as amended by his responses to the procedural orders) ultimately comprises:

i) VAT owed on the salary payments relating to the 2009-2010 season of 23,000.00 HRK.

ii) Outstanding salary payments relating to the 2010-2011 season of 1,311.88 HRK.

iii) Outstanding salary payments relating to the 2011-2012 and 2012-2013 seasons of 1,783,500.00 HRK.

iv) Late payment fees of 51,280.00 HRK.

5. Jurisdiction

57. Pursuant to Article 2.1 of the BAT Rules, "*[t]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland*". Hence, this BAT

arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).

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

5.1 Arbitrability

59. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.[1]

5.2 Formal and substantive validity of the arbitration agreements

60. The existence of a valid arbitration agreement is to be examined in light of Article 178 PILA, which reads as follows:

> *"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.*
>
> *2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law."*

61. Article 15 of the Contract stipulates:

> ***"ARTICLE 15***
>
> *The contractual parties stipulate that any disputes in connection with money claims arising from or related to the present Agreement will be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland, and they also agree that the FAT Arbitration Rules of FIBA will be applied to these disputes, which means that these disputes will be resolved pursuant to these Rules by a single arbitrator appointed by the FIBA FAT President.*

---

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

The seat of arbitration will be in Geneva, Switzerland.

The arbitration will be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' citizenship, domicile or seat.

The arbitration language shall be in English.

Against the decision of FIBA FAT the appeal can be filed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland.

The parties expressly waive the right to dispute the decisions of FIBA FAT and the decision of the Court of Arbitration for Sport in the second instance before the Swiss Federal Tribunal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal will decide about the dispute pursuant to the justice rules (ex aequo et bono)."

62. The Arbitrator notes that the FIBA Arbitral Tribunal was renamed the Basketball Arbitral Tribunal on 1 April 2011 (see also article 18.2 of the BAT Rules).

63. The Contract is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA.

64. With respect to substantive validity, the Arbitrator considers that there are no indications which could cast doubt on the validity of the arbitration agreements under Swiss law (cf. Article 178(2) PILA). In addition, the Parties did not challenge the jurisdiction of BAT in their submissions.

5.3 The Croatian Basketball Federation Proceedings

65. The Arbitrator notes that the Parties were involved in a related dispute in August 2011, which was heard by the CBF. The CBF Commissioner handed down a decision on 1 September 2011 which was subsequently overruled by the CBF Arbitration Committee on 19 September 2011.

66. The Arbitrator notes that the question for the CBF to decide was whether the Claimant

was entitled to claim the status of a 'free agent' for the 2011-2012 season because the Contract had been successfully terminated. The CBF Arbitration Committee ruled that the Contract had been validly terminated, but also found that the Respondent had accepted the Settlement Agreement. The CBF Arbitration Committee found that the Respondent did not have to pay the Claimant for future salary due under the Contract for the 2011-2012 and 2012-2013 seasons.

67. The Arbitrator notes that the dispute before the BAT includes additional, different issues (for example, whether allegedly unpaid VAT is now due and payable) to the dispute before the CBF and that different evidence has been presented to the BAT than was presented to the CBF. Therefore the Arbitrator considers that the principle of *res judicata* does not apply to the present proceedings. The Arbitrator notes that neither Party has objected to the BAT's jurisdiction or argued that the BAT should not determine the present dispute on the grounds of *res judicata.*

68. In light of the above, the Arbitrator finds that the BAT is able to determine the present dispute.

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

69. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the Parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the Parties may authorize the arbitrators to decide *"en équité",* as opposed to a decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

"the parties may authorize the arbitral tribunal to decide ex aequo et bono".

70. As set out in paragraph 61 above, the Contract stipulates that any disputes arising out of the Contract shall be resolved by the BAT "in accordance with the FAT Arbitration Rules". Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

> *"Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law."*

71. Article 15 of the Contract stipulates that "The arbitrator and CAS upon appeal will decide about the dispute pursuant to the justice rules (ex aequo et bono)." Consequently, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.

72. The concept of *équité* (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the *Concordat intercantonal sur l'arbitrage*[2] (Concordat),[3] under which Swiss courts have held that arbitration *en équité* is fundamentally different from arbitration *en droit* :

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

73. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives "a mandate to give a decision based exclusively on equity, without regard to

---

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

3 P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PILA.

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

legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case."[5]

74. This is confirmed by Article 15.1 of the BAT Rules *in fine* according to which the arbitrator applies "general considerations of justice and fairness without reference to any particular national or international law."

75. In light of the foregoing matters, the Arbitrator makes the following findings:

6.2 Findings

6.2.1 Termination of the Contract

76. It is not in dispute that the Respondent failed to make payments pursuant to the Contract for the 2009-2010 and the 2010-2011 seasons. The Arbitrator finds that, *prima facie*, this is a fundamental breach of Article 5 of the Contract. Whether or not this breach entitled the Claimant to terminate the Contract in the manner in which it purported to depends on whether the Settlement Agreement is valid and effective.

77. If the Settlement Agreement is valid and effective, then the termination of the Contract will not be valid because the Settlement Agreement provides that the Claimant shall not terminate the Contract.

78. If the Settlement Agreement is not valid and effective, then the termination of the Contract will be valid because the Respondent will have breached its obligations by, *inter alia*, not paying the Claimant any of his salary for the 2010-2011 season until 9 September 2011.

---

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

79. The Arbitrator finds that the Settlement Agreement dated 10 January 2011 does not constitute a valid agreement between the Parties for the reasons set out below. Consequently, the Arbitrator finds that the Contract was validly terminated with just cause by the Claimant on 11 April 2011.

6.2.2 The Settlement Agreement

80. The Respondent submits that the Settlement Agreement, accepted by the Agent on the Claimant's behalf, created a binding agreement between the Parties that set aside the Claimant's right of termination pursuant to Article 6 of the Contract. The Claimant submits that he had no knowledge of the Agreement Letter dated 19 January 2011, and that the Agent did not have authority to accept the Settlement Agreement on his behalf.

81. The Respondent is seeking to rely on the Settlement Agreement. Consequently, the Arbitrator finds that the burden of proof rests with the Respondent to prove that the Settlement Agreement is a valid and enforceable agreement, and that it was accepted by the Claimant.[6] The Arbitrator finds that the Respondent has provided no evidence to prove that: the Claimant was made aware of the Settlement Agreement, the Claimant accepted the Settlement Agreement and the Agent was authorised to sign the Acceptance Letter on behalf of the Claimant.

82. The Arbitrator notes that the Agent is not a signatory to the Contract and so is not a party to the Contract. The Arbitrator considers that, in circumstances where the Agent is not a party to the Contract, but attempts to enter into an agreement with the Respondent that purports to set aside the contractual rights of the Claimant (who is a party to the Contract), the Respondent should confirm such an agreement directly with

---

[6] See also BAT 0134/10, Homan v/ Maroussi BC, paras. 61-62.

the Claimant. The Arbitrator finds that the Respondent made no such attempt to contact the Claimant in this case.

83. Further, the Arbitrator considers that any agreement amending the terms of the Contract, should be signed by the Respondent and the Claimant. However, the Settlement Agreement was not signed by the Claimant.

6.2.3 The Claimant's player registration and invoices to the Respondent

84. The Respondent submits that the Claimant was not registered as a professional athlete in accordance with the (Croatian) *Law of Sport* at the time the Termination Letter was issued. The Respondent submits that it was not required to make salary payments as a result of this. The Claimant submits that it registered with the Ministry of Sport in December 2010.

85. The Arbitrator finds that the Claimant did not register with the Ministry of Sport until 8 March 2011; however, this does not justify the Respondent's actions in withholding salary payments from the Claimant due under the Contract for two reasons. Firstly, it appears from the evidence presented to the Arbitrator that the Respondent withheld payment of the Claimant's salary on the grounds that the Respondent was in poor economic health. For example the Settlement Agreement, which the Respondent relies on, refers to the "financial situation and other conditions" of the Respondent as a reason for the Respondent's failure to make payments. If the reason for withholding payments provided to the Claimant at the time was the financial condition of the Respondent, it is inequitable for the Respondent to later claim that the reason was that the Claimant had not registered with the Ministry of Sport. If the Claimant had been told at the time that the reason payments were being withheld was because he was not registered, it is very likely that he would have registered.

86. Secondly, the Arbitrator notes that the Respondent had paid the Claimant throughout

the 2009-2010 season irrespective of his registration status.

87. The Respondent submits the Claimant failed to issue the Respondent with the required invoices to process the salary payments. The Arbitrator notes again that this reason does not appear to have been given to the Claimant at the time when the Respondent was due (but failed) to make the payments under the Contract. In any event, the Arbitrator does not consider that any failure by the Claimant to produce an invoice is sufficient justification for the Respondent to have withheld an entire season's worth of salary payments.

88. The Arbitrator therefore rejects the Respondent's assertion that it was justified in withholding the salary payments.

6.2.4 The Claimant's salary for the 2009-2010 and 2010-2011 seasons

89. The Arbitrator finds that, in light of the payment made to the Claimant on 9 September 2011, the Claimant's salary for the 2009-2010 and 2010-2011 seasons has been paid in full.

90. The Arbitrator finds that Claimant's claim for an outstanding balance of HRK 1,311.88, set out in his reply to the Fourth Procedural Order, fails, because the Parties have provided bank statements which show that the Claimant's salary for the 2009-2010 and 2010-2011 seasons has been paid in full.

6.2.5 The Claimant's salary for the 2011-2012 and 2012-2013 seasons

91. Article 9 of the Contract provides that the Contract is "a guaranteed agreement." As such, and on account of the Respondent's breach of contract, the Arbitrator finds that the Respondent is liable to pay the Claimant HRK 713,400.00 in unpaid salary for the 2011-2012 season and HRK 1,070,100.00 in unpaid salary for the 2012-2013 season

(as set out in article 5 of the contract).

6.2.6 The Claimant's duty to mitigate his loss

92. The Arbitrator finds that the Claimant has a duty to mitigate his loss in this case. The Claimant, submitted in his response to the Third Procedural Order that he was currently training with Croatian Basketball Club KK Cedevita. The Claimant stated that KK Cedevita wanted a resolution to the present BAT proceedings before agreeing to the terms of a contract with the Claimant. The Claimant submitted that he was therefore unable to provide the BAT with details of a new contract with KK Cedevita.

93. However, the Arbitrator notes from publically available sources,[7] that the Claimant is, as of the date of this award, playing for KK Cedevita, as the starting center.

94. The Arbitrator considers, *ex aequo et bono*, that it is appropriate to reduce the award of the 2011-2012 and 2012-2013 salary payments to reflect the fact that the Claimant has a new contract. The Arbitrator is unaware of the terms of the Claimant's new contract and will therefore deduct an amount from the award in relation the 2011-2012 and 2012-2013 salary payments which reflects the following factors:

i) KK Cedevita is a leading Croatian basketball club that is comparable in stature to the Respondent and which is likely to offer comparable contract terms to the Respondent.

ii) the Claimant suffered inconvenience and expense caused by having to negotiate a new contract.

---

[7] See for example the official website of KK Cedevita (http://www.kkcedevita.hr/index.php?stranica=pregled-igraca&id=00023) and the Claimant's profile available with the Adriatic Basketball Association (http://www.adriaticbasket.info/w2/player.php?id=1138).

iii) the new contract was negotiated after the start of the 2011-2012 season, and so at a time when contract terms are usually not as favourable as in the off-season.

iv) there was a period at the start of the season before the new contract was agreed in which the Claimant would not have been paid at all.

vi) the Claimant appears to have been playing regularly for KK Cedevita and is likely to be able to negotiate a contract with similar terms for the 2012-2013 season.

95. The Arbitrator accordingly deducts 40% from the award of salary payments due for the 2011-2012 season and 60% from the award of salary payments due for the 2012-2013 season.

96. The total amount payable to the Claimant in relation to salary payments for the 2011-2012 and 2012-2013 seasons due under the Contract is therefore HRK 927,420.00.

6.2.7 VAT Payments

97. The Claimant submitted, in his response to the Third Procedural Order that he is owed HRK 23,000.00 by way of VAT, which the Respondent has not paid on the 2009-2010 salary.

98. The basis of this claim was unclear from the Claimant's initial submissions and so in the Fourth Procedural Order the Arbitrator requested that the Claimant clarify his submissions in relation to VAT.

99. The Claimant failed to provide adequate clarification of the basis of his claim, stating:

> *"…As can be seen [from the Claimant's Tax Acknowledgment], it is also clear that my tax return for the mentioned year has a status of unsolved. This is because the VAT amount of HRK 23,000.00, which the Respondent's accounting office state through the Tax Payment Confirmation as paid, has actually never been paid. As a result, I can be ordered to pay it myself."*

100. The Claimant has not explained how it calculates the sum of HRK 23,000.00. The Arbitrator notes that, VAT at a rate 23% (which is the amount provided for in the Contract) on the 2009-2010 salary is HRK 41,020.50, not HRK 23,000.00, as submitted by the Claimant.

101. Furthermore the Claimant has failed to show that the Respondent did not pay this amount or any other sums relating to VAT. Consequently, the Arbitrator finds that the sum of HRK 23,000.00 in relation to VAT is not payable by the Respondent to the Claimant. The Arbitrator finds that the Claimant has not proven that any other sums are due in relation to VAT, however the payments that the Respondent is required to make to the Claimant under this award are to be made net of VAT. This is because such amounts are payable pursuant to the Contract, which stipulates that such amounts are to be paid net of VAT.

6.2.8 Late Payment Fees

102. The Claimant submits, in his reply to the Fourth Procedural Order, that he is entitled to receive a number of late payment fees in accordance with Article 6 of the Contract.

103. The Arbitrator considers that penalty payment clauses in contracts of employment should only be upheld in certain circumstances. The Arbitrator refers to BAT (then FAT) decision 0039/09 (Petrosean v WBC "SPARTAK" St. Petersburg), in which the Arbitrator (Mr. Stephan Netzle) set out various considerations to be taken into account when determining the appropriate amount for a contractual penalty. Those considerations include:

i) A contractual penalty in the form of a flat fee may be problematic and may call for adjustment depending on the circumstances.

ii) The contractual penalty should be capped. Only under exceptional circumstances should a penalty exceed the compensation whose payment is secured by the contractual payment.

iii) A contractual penalty shall constitute a credible deterrent against deliberate withholding of payments.

iv) The Arbitrator should also take the behaviour of the parties into account: the duty to mitigate one's own damage requires that contractual penalties should be reduced if the creditor deliberately delays the enforcement proceedings.[8]

104. Applying the above the principles and deciding *ex aequo et bono*, the Arbitrator finds that the Claimant is entitled to receive the late payment fees that it has claimed pursuant to Article 6 of the Contract for payments received for the 2009-2010 and 2010-2011 seasons. That is to say, 13,780.00 HRK in relation to the 2009-2010 season salary payments and 33,220.00 HRK in relation to the 2010-2011 salary payments. The Arbitrator makes this finding on the basis that a penalty payment of HRK 20.00 per day is provided for in the Contract and it is not disproportionate on salary payments of HRK 35,670.00 per month (for the 2009-2010 season) and HRK 57,963.80 per month (for the 2010-2011 season).

105. The Arbitrator finds that the Claimant is not entitled to late payment fees on the outstanding balance of HRK 1,311.88 from the 2010-2011 season, because the Claimant is not owed that sum by the Respondent (as explained at paragraph 90

[8] See BAT (then FAT) decision 0008/08 (Djoric vs. PBC Lukoil Academic Sofia Basketball Club).

above).

106. The Arbitrator finds, *ex aequo et bono*, that the Claimant is not entitled to late payment fees in relation to the payments due under the Contract for the 2011-2012 season because the Contract was validly terminated prior to the start of the 2011-2012 season, and the Respondent is already receiving both payment under his new contract for that season and a sum awarded under this award as compensation for the early termination of the Contract (as explained at paragraphs 91 to 96 above).

6.2.9 The Counterclaim

107. The Respondent claims EUR 200,000.00 in damages from the Claimant pursuant to Article 5.5 of the Contract. Article 5.5 provides as follows:

> *"5.5. The Player has the right to unilaterally terminate this Agreement after the playing season 2011/12, with the obligation to pay compensation in an amount of 200,000.00 (two hundred thousand) EUR, whereby the CBF is the authorized body to issue the letter of clearance for the Player or register the Player for another club in Croatia, with the proof on paid compensation as a proof [sic], and without the consent of the Club."*

108. The Arbitrator finds that the Counterclaim fails because Article 5.5 deals with the situation where the Claimant terminates the Contract simply to play for another club and not (as is the present case) where the Claimant terminates the Contract because the Respondent has breached the Contract. Furthermore, Article 5.5 only applies where the Claimant unilaterally terminates the Contract after the 2011-2012 season, whereas the Claimant terminated the Contract before the 2011-2012 season began.

7. Costs

109. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the award or communicated to the Parties separately. Furthermore, Article 17.3 of the BAT

Rules provides that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

110. On 7 February 2012, considering that, pursuant to Article 17.2 of the BAT Rules, "the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator", and that "the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised, the BAT President determined the arbitration costs in the present matter at EUR 9,971.00.

111. The Arbitrator notes that the Claimant was successful in establishing his claim in relation to unpaid salary amounts for the 2011-2012 and 2012-2013 seasons, but unsuccessful in establishing his claim in relation to unpaid VAT. The Arbitrator notes that the Respondent was unsuccessful in establishing its Counterclaim.

112. The Arbitrator notes that the Respondent did not initially pay its share of the Advance on Costs. The Arbitrator considers it appropriate to take into account the non-reimbursable fee when assessing the legal expenses incurred by the Claimant in connection with these proceedings. Thus, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

i) The Respondent shall pay to the Claimant EUR 4,983.00 being the amount of the costs advanced by the Claimant.

ii) The Respondent shall pay to the Claimant the amount of EUR 3,983.00 as a contribution towards his legal expenses.

8. AWARD

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

1. **Kosarkaski Klub Zadar is ordered to pay to Mr. Milo Bilan HRK 927,420.00 as compensation for the unpaid salary for the 2011-2012 and 2012-2013 seasons.**

2. **Kosarkaski Klub Zadar is ordered to pay to Mr. Milo Bilan HRK 13,780.00 in late payment fees due on the salary payments of the 2009-2010 season.**

3. **Kosarkaski Klub Zadar is ordered to pay to Mr. Milo Bilan HRK 33,220.00 in late payment fees due on the salary payments of the 2010-2011 season.**

4 **Kosarkaski Klub Zadar is ordered to pay to Mr. Milo Bilan 4,983.00 as reimbursement of the advance on BAT costs.**

5. **Kosarkaski Klub Zadar is ordered to pay to Mr. Milo Bilan EUR 3,983.00 as reimbursement of his legal expenses.**

6. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 13 February 2012

Raj Parker
(Arbitrator)