

ARBITRAL AWARD

(BAT 0230/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Elias Zouros,

- Claimant -

Represented by Mr. Pantelis Dedes, Dedes-Makroglou and Associates,
Xanthou str. 2, 10673 Athens, Greece

vs.

BC Zalgiris Kaunas,
K. Donelaicio Street 60, 44248 Kaunas, Lithuania

- Respondent -

Represented by Mr. Jonas Stadalninkas, Director

1. The Parties

1.1 The Claimant

1. Mr. Elias Zouros (hereinafter the "Coach") is a professional basketball coach of Greek nationality. He is represented by Mr. Pantelis Dedes, attorney-at-law in Athens, Greece.

1.2 The Respondent

2. BC Zalgiris Kaunas (hereinafter the "Club") is a professional basketball club located in Kaunas, Lithuania. The Club is represented by its director, Mr. Jonas Stadalninkas.

2. The Arbitrator

3. On 29 December 2011, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), Prof. Richard H. McLaren, appointed Dr. Stephan Netzle as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. By agreement of 13 January 2011, the Coach was employed by the Club for the last five months of the 2010-2011 basketball season.
5. On 10 June 2011, the Coach and the Club entered into a new employment agreement (hereinafter the "Coaching Agreement") for one basketball season starting on 10 June

2011 until the Club's last official game of the 2011-2012 Lithuanian basketball season. The Coaching Agreement was identified in Clause 1 as a "NON CUT, guaranteed one season contract" by which the Parties agreed on a net salary for the Coach of EUR 300,000.00 net. The amount was to be paid in ten instalments according to the payment schedule set out in Clause 3 of the Coaching Agreement. It is undisputed that the Coach received only one payment from the Club, namely an amount of EUR 33,000.00 in October 2011.

6. In summer 2011, the Coach was also coaching the Greek national team. That is why Clause 1 of the Coaching Agreement stipulated that the Coach would join the Club's team five days after the Greek national team's last game at the European Basketball Championships 2011 in Lithuania which took place on 17 September 2011. After the European Basketball Championships, the Coach stayed in Lithuania and took up his employment with the Club and coached the Club's team from 29 September until 17 October 2011.
7. On 19 October 2011, then Club's Director Mr. Paulius Motiejunas, informed the Coach that the Club had decided to prematurely terminate the Coaching Agreement. He presented a document with the following content:

"To:
Mr. Ilias Zouros
Head Coach of BC Zalgiris

NOTICE
/Regarding termination of the contract/
Kaunas, 19th October 2011

*In accordance to Clause 7 (Premature Termination by Club) of the Contract made on 10th day of June 2011, please be informed that **Vsi KAUNO "ZALGIRO" REMEJAS** (hereinafter called the Club) uses the right to terminate the Contract by this written notice. The Contract shall be deemed terminated from 19th October, 2011. Please note that You, as the Coach shall not be required to fulfil any obligations under the Contract. Furthermore, it is absolutely understood that You as the Coach shall have no rights to communicate with any of the players or personnel of BC Zalgiris as well as not to participate in any training session of the team. All the issues regarding compensation will be solved in the way of negotiations.*

I would like to thank you for the work you have carried out for Zalgiris basketball team and wish you well in your future career.

Sincerely,

Vsl Kauno "Zalgirio" remejas

Director

Paulius Motiejunas"

8. There is no indication that the Coach continued working for the Club after 19 October 2011.
9. In February 2012, the Coach entered into a new employment agreement with the Turkish club Anadolu Efes Spor Kulübü covering the period from 28 February 2012 to 30 June 2012. This agreement stipulates a total salary of EUR 120,000.00 net.

3.2 The Proceedings before the BAT

10. By email of 9 November 2011, the BAT Secretariat received the Coach's Request for Arbitration dated 7 November 2011 indicating that the exhibits would be sent separately by courier.
11. On 10 November 2011, the FIBA headquarters in Geneva, Switzerland received the signed copy of the Request for Arbitration and the corresponding exhibits. The non-reimbursable handling fee of EUR 4,000.00 was received in the BAT bank account on 11 November 2011. The BAT Secretariat received the exhibits on 15 December 2011.
12. By letter of 10 January 2012, the BAT Secretariat confirmed receipt of the Request for Arbitration and the exhibits, and informed the Parties of the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Club to file its answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 31 January 2012. The BAT Secretariat also requested the Parties pay the following amount as an Advance on Costs by no later than 24 January 2012:

“Claimant (Mr. Elias Zouros) EUR 5,000
Respondent (BC Zalgiris Kaunas) EUR 5,000”

13. By letter of 27 January 2012, the Club requested a 30-day extension because a) one of its main witnesses had not been available due to a business trip, b) the Club was seeking for a legal counsel in Switzerland, and c) the Parties were negotiating a settlement. By email of 27 January 2012, the BAT Secretariat invited the Coach to comment on the Club’s request by no later than 30 January 2012.
14. On 30 January 2012, the Coach’s counsel denied any negotiations between the Parties. He concluded: *“Consequently we think that no extension is needed at the present.”* By email of the same date, the Club informed the BAT Secretariat that negotiations were indeed conducted by telephone and forwarded a list of recent phone calls.
15. On 31 January 2012, the BAT Secretariat confirmed receipt of the Parties’ submissions and informed the Parties that the Arbitrator had decided to partially grant Club’s request on an exceptional basis and to extend the time limit by no later than 8 February 2012, in order to give the Club the opportunity to talk to its former director Mr. Motiejunas. In addition, the BAT Secretariat advised that both Parties had failed to pay their share of the Advance on Costs and noted that in accordance with Article 9.3 of the BAT Rules, the arbitration would not proceed until the full amount of the Advance on Costs had been received. The Parties were requested to effect payment of their share of the Advance on Costs in the amount of EUR 5,000.00 respectively by no later than 10 February 2012.
16. On 8 February 2012, the Club submitted its Answer and corresponding exhibits. In its Answer, the Club requested a hearing by video conference.

17. On 10 February 2012, the BAT Secretariat confirmed receipt of the Club's Answer and of the Coach's share of the Advance on Costs received in the BAT bank account on 9 February 2012. In addition, the BAT Secretariat informed the Parties that the Club had failed to pay its share of the Advance on Costs and once again noted that in accordance with Article 9.3 of the BAT Rules, the arbitration would not proceed until the full amount of the Advance on Costs had been received. The Coach was therefore requested to effect payment of the remaining share of the Advance on Costs in the amount of EUR 5,000.00 by no later than 23 February 2012.
18. On 5 March 2012, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs. In the same letter, the Arbitrator replied to the request in the Club's Answer and informed the Parties that according to Article 13.3 of the BAT Rules, he would conduct a hearing by video conference on the condition that a payment of an additional Advance on Costs in the amount of EUR 5,000.00, be paid by the Club alone, and by no later than 15 March 2012. The BAT Secretariat further advised that failing such payment, the Club's request would be deemed withdrawn. In addition, the Arbitrator requested that the Coach provide further documents and information, *inter alia*, regarding any new employment, by no later than 15 March 2012.
19. By letter of 21 March 2012, the BAT Secretariat acknowledged receipt of the Coach's submissions as requested by the Arbitrator, and noted that the Club had failed to pay the additional Advance on Costs. Consequently, the Club's request for a hearing by video conference was deemed withdrawn. The BAT Secretariat informed the Parties of the Arbitrator's decision to conduct a second round of written submissions instead of holding a hearing. Accordingly the Coach was invited to reply to the Club's Answer by no later than 2 April 2012.
20. On 29 March 2012, the Coach submitted his reply which was then forwarded by the BAT Secretariat to the Club, with the opportunity to comment on Coach's reply by no later than 16 April 2012.

21. By letter of 11 April 2011, the Club asked for a 10-day extension to file its comments, i.e. until 26 April 2012, because it had not yet received a letter which it had requested from the Greek Basketball Federation.
22. On 13 April 2012, the BAT Secretariat informed the Parties that the Arbitrator had rejected the Club's request for an extension of time and that the time limit to file any comments on the Coach's reply would remain 16 April 2012. The Club was granted the opportunity to forward the letter from the Greek Basketball Federation by no later than 26 April 2012. To date, no such letter was received by the BAT Secretariat.
23. By letter of 3 May 2012, the Arbitrator declared the exchange of documents complete and invited the Parties to submit a detailed account of their costs by no later than 14 May 2012.
24. By letter of 10 May 2012, the Coach's counsel submitted an Account of Costs as follows:

<i>"A) Claimant's Expenses for BAT</i>	
<i>Non reimbursable advance on costs</i>	4,000
<i>Advance on costs – Claimant's share</i>	5,000
<i>Advance on costs –Respondent's share</i>	5,000
<i>Total</i>	14,000 €
 <i>B) Legal fees and expenses of the Claimant</i>	
<i>Study of case</i>	2,000
<i>Request of arbitration</i>	3,500
<i>Remarks on the petition for extension</i>	500
<i>Remarks on tel .conférence</i>	500
<i>Remarks on Respondent's Answer</i>	500
 <i>Translations, long distance calls, e-mails, photocopies etc</i>	 250
<i>Account of costs</i>	500
<i>Total</i>	7,750 €"

25. On 14 May 2012, the Club submitted an Account of Costs as follows:

Legal Counsel	Date	Costs
<i>BMA Brunoni Mottis & Associati Studio Legale SA</i>	<i>13 February 2012</i>	<i>2'000.00 CHF</i>

Enclosures:

- (1) Pro Forma Invoice;*
- (2) Invoice No. 20084.*

26. On 15 May 2012, the BAT Secretariat acknowledged receipt of the accounts of costs submitted by the Parties. Both Parties were invited to submit their comments, if any, on the opposing party's account of costs by no later than 21 May 2012. No such comments were filed by either of the Parties.

4. The Positions of the Parties

4.1 The Claimant's Position

27. The Coach submits the following in substance:

- The Club prematurely terminated the Coaching Agreement and failed to prove the alleged reasons such as "lack of proper supervision of the assistant coach and non-proper training of the Club's team"; "demotivation of players"; and "failure to obey the directions of the Club's management". Therefore, the Club terminated the Coaching Agreement without just cause.
- In particular, the Club's Sports Director, Mr Vitoldas Masalskis, had no authority to instruct the Coach (at least not on technical matters), and Mr. Masalskis' witness statement presented in this arbitration is "inaccurate and untrue". Furthermore, the Club failed to state any detailed facts how and when the Coach refused to obey the instructions of the Club's management and/or how and when the Coach demotivated any players of the Club's team.

- During the Coach's employment with the Club (13 January to 19 November 2011), the Club's team was very successful and won the Lithuanian Championship, the Lithuanian Cup and the Baltic Cup.
- The Coach received only one of the agreed ten instalments of his salary, namely, EUR 33,000.00 and the amount of EUR 267,000.00 remained unpaid. According to the Coaching Agreement, all payments will be net. Therefore, the Club still owes the Coach the amount of EUR 267,000.00 net, plus interest according to Swiss Law since 20 October 2011.

4.2 The Claimant's Request for Relief

28. In his Request for Arbitration, the Coach requests the following relief:

"4.1 Hold that the Respondent owes to the Coach the total amount of two hundred sixty seven thousand (267,000) Euros net plus interest.

4.2 Hold that the costs of the present arbitration be borne by the Respondent alone.

4.3 Order the Respondent to reimburse the Claimant the arbitration fee as well as his legal fees and other expenses, to be ascertained."

4.3 The Respondent's Position

29. The Club submits the following in substance:

- In its Answer, the Club states that the Coach failed to file his claim within the time limit set by Lithuanian law. Although the Parties agreed the dispute being decided *ex aequo et bono* (Clause 9 of the Coaching Agreement), the imperative norms of domestic law should be respected taking into account the principles of private international law. The relevant law is the law of Lithuania. Thus, the Coaching Agreement is governed by the Lithuanian Code of Employment which states in its Article 6 para 3 that *"the imperative*

employment legal norms of the Republic of Lithuania shall be applied despite of the Parties' choice of a foreign law"(sic). In addition, Article 297 para 1 of the Lithuanian Code of Employment provides for a one month time limit for filing any claim related to employment law disputes ("*... he shall have the right to go to law within one month from the date of receipt of the respective direction (document)*."(sic)). The Coach received the termination notice on 19 October 2011, therefore the time limit expired on 19 November 2011. Because the BAT Secretariat's letter of 10 January 2012 indicates that the Request for Arbitration was received on 15 December 2011, the Request for Arbitration must be dismissed because the Coach missed the legal time limits.

- The Club submits that it had legitimate reasons for its early termination of the Coaching Agreement according to Clause 7 of the Coaching Agreement. The Coach had not properly supervised the assistant coach and the training of the Club's team, he had demotivated the players and he had not complied with the directions of the Club's management.

- Although the Parties agreed in Clause 1 of the Coaching Agreement that the Coach had to join the Club's team only five days after the last game of the Greek national team at the European Basketball Championships 2011, nothing in the Coaching Agreement can be interpreted as a release of the Coach's responsibility to be in charge of the Club's team and to ensure its proper management throughout the entire season. It was the Parties' understanding that the assistant coach, Mr Elias Kantzouris, who was employed by contract dated 1 July 2011, would be in charge of the Club's team under the supervision of the Coach during the latter's absence. However, the assistant coach arrived in Kaunas only on 15 August 2011 and was unable to ensure adequate coaching. Thus, the training sessions of the Club's team lacked proper supervision and the Coach did not change that situation. The result was a critical decrease of the team's performance.

Choosing a proper assistant coach and controlling his work was part of the Coach's duties. In addition, the Club was "induced" by the Coach to hire Mr. Kantzouris as an assistant coach and such conduct has to be considered as "gross unethical business conducts within the wording of Clause 7 Point (6)" of the Coaching Agreement.

- The Coach's style to work with the Club's team demotivated the players. The Club's Sports Director received numerous complaints from players regarding the Coach's "failure or unwillingness to adapt to the personal qualities". In addition, the Coach did not comply with the Club's policy "to give enough attention to young players" as he was told by his supervisors. For instance, the Coach "eliminated" the young Lithuanian player Mr. Adas Juskevicius from the team. According to Clause 7 Point 8 of the Coaching Agreement, the above facts justified a premature termination.
- The atmosphere within the Club's team was "spoiled" by the Coach's failure to cooperate with the Club's Sports Director. Although the Coach was obliged to follow the Sports Director's directions he systematically disobeyed his instructions. According to Clause 7 Point 10 of the Coaching Agreement, the above facts constituted a breach of the Coach's duties stipulated in Clause 2 of the Coaching Agreement and justified a premature termination, too.
- In case the Arbitrator held that the Club's termination was without just cause, the amount for compensation as requested by the Coach would be too high for the following reasons: (1) at the time of the Club's Answer, the Coach could not have earned the requested amount of EUR 267,000.00, but rather only five instalments of EUR 33,000.00 each which amount to EUR 165,000.00; (2) the amount of EUR 33,000.00 which was already paid to the Coach has to be deducted and therefore the Coach can only claim EUR 132,000.00; (3) the Coach's conduct and fault must be considered when determining the amount

of compensation because the Coach's behaviour "increasingly burdened" the Parties' relationship, and gave the Club no alternative but to terminate the Coaching Agreement; (4) to the Club's knowledge, after the termination of the Coaching Agreement, the Coach received remuneration from the Greek Basketball Federation which must be deducted, as well as any further remunerations received from any third party.

- The Coach failed to provide the BAT with any evidence of the steps taken in order to secure new employment by 29 February 2012. The reason for this failure could be that the Coach was under contract with the Greek Basketball Federation and responsible for the Greek national team.

4.4 The Respondent's Request for Relief

30. In its Answer, the Club requested the following relief:

"6.1 In the light of the arguments made in this Answer, the Respondent respectfully requests that the Claimant's claim be dismissed.

6.2 Should the Arbitrator hold that the termination of the Agreement was without the just cause (although it is not the case), the Respondent respectfully submits that the amount of compensation be reduced for the reasons set forth under section 5.3 of this Answer."

5. The Jurisdiction of the BAT

31. 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).

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

33. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.

34. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Clause 9 of the Coaching Agreement, which read as follows:

“Governing Law. Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by chapter 12 of the Swiss Act on Private International Law, irrespective of Parties’ domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono”.

35. The Coaching Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA. The Arbitrator also considers that there is no other indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” in Clause 9 of the Coaching Agreement covers the present dispute.

36. The Club has not objected to the BAT jurisdiction but rather agreed to it by submitting in para 2.1 of the Answer as follows: *“The Respondent does not dispute the jurisdiction of BAT in respect of the present matter.”*

37. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Coach’s claims.

6. Other Procedural Issues

6.1 Admissibility of the Claimant’s Request for Arbitration

38. The Club submits that the Coach failed to file his claim within the one-month time limit provided by Lithuanian employment law. The Club argues that, although the Parties

agreed that the dispute should be decided *ex aequo et bono* (Clause 9 of the Coaching Agreement), the imperative norms of domestic law must be respected, taking into account the principles of private international law. In particular, the Club refers to Article 6 para 3 of the Lithuanian Code of Employment (*“the imperative employment legal norms of the Republic of Lithuania shall be applied despite of the Parties’ choice of a foreign law”*) and Article 297 para 1 of the Lithuanian Code of Employment. The latter article provides for a one-month time limit for filing any claim related to employment law disputes (*“... he shall have the right to go to law within one month from the date of receipt of the respective direction (document).”*).

39. The Club bases its argument on the BAT Secretariat’s letter of 10 January 2012, which states that the Request for Arbitration was received by the BAT Secretariat on 15 December 2011. The Club submits that Coach received the termination notice on 19 October 2011 and therefore the time limit expired on 19 November 2011. The Coach has therefore not respected the time limit according to Lithuanian law.
40. The Request for Arbitration was filed as follows: By email of 9 November 2011, the BAT Secretariat received a Request for Arbitration without exhibits dated 7 November 2011. The Coach’s counsel also informed the BAT Secretariat that the exhibits would be sent separately by courier. Only one day later, on 10 November 2011, the FIBA headquarters in Geneva, Switzerland received the signed copy of the Request for Arbitration and the corresponding exhibits sent by courier which is confirmed by the shipping documents and FIBA’s documentation. The BAT Secretariat received the exhibits only on 15 December 2011 which is the reason why it mentioned that date in its letter of 10 January 2012.
41. According to Article 6.1 of the BAT Rules, *“Requests for Arbitration shall be filed by e-mail to the BAT Secretariat (see www.fiba.com) or with Fédération Internationale de Basketball, 51-53, Avenue Louis Casai, 1216 Cointrin/Geneva, Switzerland, Telephone: +41 (22) 545 0000, Telefax: +41 (22) 545 0099”*. Following this rule,

anyone who wants to initiate a BAT arbitration can file the Request for Arbitration either with the BAT Secretariat or with the FIBA headquarters in Geneva, Switzerland. Consequently, the Coach's Request for Arbitration was validly filed on 10 November 2012 when FIBA received the signed copy of the Request for Arbitration together with exhibits.

42. Since the Coach's Request for Arbitration was correctly filed within one month after the termination notice of 19 October 2011, the Request for Arbitration is admissible. Consequently, the Arbitrator is not required to decide whether the rules of Lithuanian law referred to by the Club were violated.

6.2 Claimants' Request for Relief

43. The Arbitrator notes that the Claimant has requested to "4.1 *Hold* that the Respondent owes to the Coach the total amount of" EUR 267,000.00 and to "4.2 *Hold* that the costs of the present arbitration be borne by the Respondent alone" whereas he also requested to "4.3 *Order* the Respondent to reimburse the Claimant the arbitration fee as well as his legal fees and other expenses, to be ascertained" (italic characters added). Requests 4.1 and 4.2 might be understood as requests for declaratory judgments and not as requests for specific performance.
44. The written submissions of the Claimants do not contain any indication that the Claimants sought declaratory relief. In particular, the Claimants do not explain why they chose a different wording for requests 4.1 and 4.2 compared to 4.3. The reasons of Appellants' submissions are clearly aimed at the payment of the due amounts by Respondent and not at the declaration that these sums are due. Also the Respondent does not address this point.
45. The Arbitrator finds therefore that it was the Claimants' intention to obtain a directly enforceable judgment and that the ambiguous wording of requests 4.1 and 4.2 as

provided by a lawyer who is not a native English speaker does not lead to a different interpretation.

7. Applicable Law – *ex aequo et bono*

46. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the Parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the Parties may authorize the Arbitrators to decide “*en équité*” instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

“the Parties may authorize the arbitral tribunal to decide ex aequo et bono”.

47. 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.”

48. In the arbitration agreement in Clause 9 of the Coaching Agreement, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. However, in its Answer the Club refers to Article 6 para 3 and Article 297 para 1 of the Lithuanian Code of Employment and argues that, although the Parties agreed on deciding the dispute *ex aequo et bono*, the imperative norms of domestic law should be regarded in deciding the case, taking into account the principles of private international law.
49. The Arbitrator finds that the Club’s reference to the Lithuanian Code of Employment was made only in connection with the one-month time limit for filing a claim related to employment law disputes, and that the Parties agreed – without any reference to any other law – that all other issues should be decided *ex aequo et bono*. Consequently, the Arbitrator will decide the issues submitted to him *ex aequo et bono*.

50. 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 of 1969¹ (Concordat),² under which Swiss courts have held that “arbitrage en *équité*” is fundamentally different from “arbitrage 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.”³

51. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

“the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand.”⁴

52. In light of the foregoing considerations, the Arbitrator makes the findings below:

8. Findings

53. The Coach requests: (a) outstanding salary in the amount of EUR 33,000.00; (b) compensation equal to the total amount of the salary instalments until the end of the Coaching Agreement (EUR 234,000.00); and (c) interest according to Swiss law on the aforementioned amounts as of 20 October 2011.

¹ 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).

² KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 187 PILA N 289.

³ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

⁴ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

8.1 Is the Coach entitled to outstanding salary in the amount of EUR 33,000.00?

54. The Coach claims the amount of EUR 33,000.00 as the outstanding salary instalment which became due on 15 October 2011.

55. According to the Coaching Agreement, the Coach was entitled to salaries for the season 2011-2012 in the total amount of EUR 300,000.00. Such sum had to be paid according to the payment schedule in Clause 3.A (1) a) of the Coaching Agreement which reads as follows:

“a) 10 (ten) monthly payments beginning 1st of October 2011 and ending on 15th June 2012 as follows:

*33 000 (thirty three thousand) Euros on 1st October 2011,
33 000 (thirty three thousand) Euros on 15th October 2011,
33 000 (thirty three thousand) Euros on 15th November 2011,
33 000 (thirty three thousand) Euros on 15th December 2011,
33 000 (thirty three thousand) Euros on 15th January 2012,
33 000 (thirty three thousand) Euros on 15th February 2012,
33 000 (thirty three thousand) Euros on 15th March 2012,
33 000 (thirty three thousand) Euros on 15th April 2012,
18 000 (eighteen thousand) Euros on 15th May 2012,
18 000 (eighteen thousand) Euros on 15th June 2012”*

56. It is undisputed that

- the Coach joined the Club's team after the last game of the Greek national team at the European Basketball Championships 2011 which took place on 17 September 2011. In particular, he coached the Club's team at games during the period of 29 September to 17 October 2011;
- the Club paid the Coach only one salary instalment in the amount of EUR 33,000.00; and
- the Club terminated the Coaching Agreement with immediate effect on 19 October 2011.

57. On the termination date, the first instalment of the Coach's salary in the amount of EUR 33,000.00 was already paid, and a second instalment of the same amount was due but not yet paid. The Club does not expressly justify the non-payment of the second instalment but complains more generally about the Coach's failure to properly instruct the assistant coach and to supervise the training of the Club's team. The Club submits that although the Coach was allowed to arrive late, he was still responsible for the preparation of the team by a capable substitute from day one of his engagement. However, the assistant coach was unable to fill in for the Coach, and the team was practically left without attendance.
58. The Arbitrator finds that there is no sufficient evidence for the Club's complaint. According to the Coaching Agreement, the Coach was indeed entitled to arrive only after his assignment with the Greek national team. It is also undisputed that the team was prepared by the assistant coach. In view of the evidence provided by the Club, it is however impossible for the Arbitrator to assess the assistant coach's work and to determine whether he was poorly instructed by the Coach. Even if the Club's allegation was correct, it would have been the Club's obligation to mitigate the damage and to take appropriate steps to improve the preparation of the team. However, there is no evidence on record which would demonstrate that the Club contacted the Coach and reminded him of his responsibility in the preparatory phase of the upcoming season.
59. The Arbitrator therefore finds that the Coach did not violate its contracted duties and that he is entitled to the full salary due on or before the termination date which means that the Club must pay also the second instalment in the amount of EUR 33,000.00.
- 8.2 Is the Coach entitled to compensation equal to the total amount of the salary instalments until the end of the Coaching Agreement (EUR 234,000.00)?**
60. Additionally, the Coach claims compensation equal to the total amount of the salary instalments due after the Club's termination of 19 October 2012 until the end of the

term of the Coaching Agreement. Although the Coach states in para. 3.2 of his Request for Arbitration the remaining amount as “(7 x 33,000 Euros = 231,000)” the Arbitrator understands this as a typo because the amount requested in the Request for Relief is EUR 267,000.00. Considering the already discussed amount of EUR 33,000.00 due on 15 October 2011 (see paras. 57 - 59), the remaining amount accounts to EUR 234,000.00 instead of the mentioned EUR 231,000.00. It is clear from the Coach’s overall argumentation that the Coach claims compensation equal to the total amount of the salary instalments due after the Club’s termination of 19 October 2012 until the end of the Coaching Agreement, i.e. EUR 234,000.00.

61. The Club denies the Coach’s claim for additional compensation because the early termination of the Coaching Agreement was justified which means that from the termination date, the Coach was no longer entitled to any compensation (Article 7.C of the Coaching Agreement). The Club advances the following reasons for the early termination: (a) lack of proper supervision of the assistant coach and inadequate training of the Club’s team, (b) de-motivation of players and (c) failure to obey the directions of the Club’s management.
62. Article 7 of the Coaching Agreement lists 10 reasons which allow the Club to terminate the agreement at any time without further obligation to the Coach. The Club submits that the specific grounds for the dismissal of the Coach meet the reasons number 6 (“*the Head Coach engages in gross unethical business conduct*”), 8 (“*the Head Coach for any reason directly or indirectly entice or solicit any of the player away from the Club and/or make any actions or attempt or influence in order to entice or solicit any of the player away from the Club*”) and 10 (“*the Head Coach performs breach of any obligation, indicated in Clause 2 of this Agreement*”).
63. While the Arbitrator finds it difficult to consider the Club’s complaints under reasons number 6 and 8, he is prepared to review all of them as alleged violations of reason number 10 (breach of the obligations listed in Clause 2 of the Coaching Agreement)

since it was indeed the Coach's responsibility to coach the team (either personally or with the help of assistants), to encourage the players and to follow the instructions of the Club's management. On the other hand, Article 1 of the Coaching Agreement explicitly states that this agreement was *"fully guaranteed and cannot be terminated due to Head Coach's skill (or lack thereof), injury, illness"*.

64. The Club bears the burden of proof that the Coach violated his contractual duties and that its dissatisfaction was not caused by the insufficient performance of the team or the "lack of skills" of the Coach.
65. The Club submits two witness statements of its sports director Vitoldas Masalskis and its former director Paulius Motiejunas. Both refer to the preparatory phase when the Coach was still with the Greek National Team and the Club's team was coached by the assistant coach. However, they are not unanimous about the arrival date of the assistant coach and what exactly was wrong with the assistant coach's work. Whether or not the assistant coach was skilled enough cannot be an issue either since "lack of skills" was explicitly excluded as a termination reason in the Coaching Agreement, which must also apply to the choice of his assistant. As already stated above, it would also have been the Club's obligation to step in and take action when it became aware of an insufficient preparation, instead of remaining passive.
66. The witnesses further testify that the Coach did not "handle the team in an adequate manner". In particular, the Coach failed to take the personal qualities of the players into consideration. One witness blames the Coach for having dismissed a promising young player. That same witness then goes on to criticise the team tactics chosen by the Coach. The other witness states that the Coach did not comply with the Club's management directions "after a series of lost games".
67. The Arbitrator regrets that the witness statements are not supported by any further evidence, such as written complaints or warnings. The Club should have specified what

exactly it understood as the Coach's inadequate handling of the team and which particular orders of the management he had disregarded. The Club has definitely not met its obligation to substantiate the grounds which would have justified the early termination of the Coaching Agreement.

68. But even if the Club's statements were accurate, the Arbitrator finds that they only confirm that the Coach, the team and the Club did not suit each other, although this comes as a surprise since the Club knew the Coach since January 2011 when it contracted him for the first time. Neither the alleged misconduct, nor lack of success constitute a breach in the sense of Clause 8 of the Coaching Agreement. Thus such assertions, even if true do not justify an early termination of the Coach's employment. The Arbitrator therefore finds that the Club was not entitled to unilaterally terminate the Coaching Agreement on 19 October 2011. Accordingly the Coach is entitled to all remaining instalments of the agreed salary until the agreed term.

8.3 Quantum of the compensation

69. The salary of the Coach for the remaining duration of the Coaching Agreement amounts to EUR 234,000.00. The Club finds that if the early termination of the Coaching Agreement would be considered unjustified, the compensation should be reduced because of several reasons:
- (a) The compensation must cover only five installments due until the "present time";
 - (b) The already paid first installment must be deducted;
 - (c) When calculating the compensation, the fault of the Coach which led the Club to terminate the employment must be taken into consideration, even if the Coach's behavior did not meet the threshold which would allow the Club to unilaterally terminate the Coaching Agreement;

(d) The compensation which the Coach obtains from the Greek Basketball Federation must be deducted.

70. The Arbitrator finds that the above reasons do not require a reduction of the claimed compensation. As to (a): according to Clause 7.C of the Coaching Agreement, the compensation corresponds to the salary for the entire remaining term of the employment and not only until the opening of a legal proceeding. As to (b): the claimed amount of EUR 234,000.00 does already take the first paid instalment into account. As to (c): the Arbitrator accepts that in principle, the Coach's fault which contributed to worsening of the relationship with the Club and led to the termination of the employment might be taken into consideration when calculating the compensation. However, also when it comes to the calculation of the compensation, the Club must prove the fault of the Coach. As already stated above (para. 67), the allegations of the Club have not been substantiated and proven to the necessary standard and may neither justify the early termination of the employment nor lead to a reduction of the compensation. As to (d): the fact that the Coach was also the coach of the Greek national team was known and accepted at the time when the Coaching Agreement was signed. The Club has not proven that the Coach actually received any compensation from the Greek Basketball Federation. Even if he did, the Coaching Agreement does not contain any reservation regarding the compensation the Coach would obtain from the Greek Basketball Federation. Therefore, any compensation paid by the Greek Basketball Federation does not have to be deducted neither from the salary under the Coaching Agreement or from the corresponding compensation due by the Club because of the unjust termination of the Coaching Agreement.

71. However, the compensation shall not lead to an unjust enrichment and any further earnings that the Coach obtained during the remaining term of the Coaching Agreement and which were not taken into calculation when the contractual salary was determined, must be considered. Thus, the Coach's earnings from the basketball club

Anadolu Efes in the amount of EUR 120,000.00 must be deducted from the otherwise due compensation of EUR 234,000.00, which leads to a remainder of EUR 114,000.00.

8.4 Is the Coach entitled to interest on the compensation?

72. Finally, the Coach requests interest on the amount of EUR 267,000.00 “[a]s will be determined by the Arbitrator and according to Swiss Law” from 20 October 2011. As set out above, the relevant sum consists of the remaining instalment for October 2011 of EUR 33,000.00 and the compensation due because of the premature termination of the Coaching Agreement of EUR 114,000.00 and totals to EUR 147,000.00.
73. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest⁵. Although the Coaching Agreement does not provide for the payment of default interest, this is a generally accepted principle which is embodied in most legal systems.
74. Regarding the interest rate, the Coach refers to Swiss Law as national law which contradicts the Parties’ agreement in the arbitration clause that the Arbitrator should decide the dispute *ex aequo et bono*. Still and in line with BAT jurisprudence the Arbitrator considers interest in the rate of 5% p.a. to be fair and equitable in the present case without reference to any national law.
75. Regarding the commencement date, the Coach requests interest on the entire amount since 20 October 2011. The Coaching Agreement was terminated by the Club on 19 October 2011 without just cause and following Clause 7.C, first sentence of the Coaching Agreement the Club’s liability of such termination shall be “*all remaining installments(sic) until the end of the agreement term*”. The Arbitrator interprets this in

⁵ See, *ex multis*, the following BAT awards: 0092/10, *Ronci, Coelho vs. WBC Mizo Pecs 2010*; 0069/09, *Ivezic, Draskicevic vs. Basketball Club Pecs Noi Kosariabda Kft*; 0056/09, *Branzova vs. Basketball Club Nadezhda*

the way that all remaining salary instalments until the end of the Coaching Agreement's term became due on the day of receipt of the termination note, i.e. on 19 October 2011. Therefore, the commencement date for the interest is 20 October 2011 as requested by the Coach.

76. Thus, the Coach is entitled to interest in the rate of 5% p.a. on the amount of EUR 144,000.00 from 20 October 2011.

9. Costs

77. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
78. On 5 July 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 to be EUR 10,000.00.
79. Considering the requests for relief, the outcome and the circumstances of the present case, the Arbitrator finds it fair that 60% of the fees and costs of the arbitration shall be borne by the Club and 40% by the Coach.

80. Given that the Coach paid the total advance on costs of EUR 10,000.00, in application of Article 17.3 of the BAT Rules the Arbitrator decides that the Club shall pay to the Coach 60% of said amount, i.e. EUR 6,000.00
81. Furthermore, the Arbitrator considers it adequate that the Coach is entitled to the payment of a contribution towards his legal fees and other expenses (Article 17.3. of the BAT Rules). The Arbitrator deems it appropriate to take into account the non-reimbursable handling fee of EUR 4,000.00 totally paid by the Coach and further legal costs of EUR 7,750.00 when assessing the expenses incurred by the Coach and legal costs of EUR 2,000.00 when assessing the expenses incurred by the Club in connection with these proceedings. Considering his holding that the Club is required to cover 60% of the Coach's legal fees and other expenses (i.e. EUR 7,050.00) while the Coach is required to cover 40% of the Club's legal fees and other expenses (i.e. 800.00), the Arbitrator fixes the contribution to be paid by the Club to the Coach at EUR 6,250.00.

10. AWARD

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

- 1. BC Zalgiris Kaunas is ordered to pay to Mr. Elias Zouros the amount of EUR 144,000.00 net plus interest of 5% p.a. on this amount since 20 October 2011.**
- 2. BC Zalgiris Kaunas is ordered to pay to Mr. Elias Zouros the amount of EUR 6,000.00 as a reimbursement of his advance on arbitration costs.**
- 3. BC Zalgiris Kaunas is ordered to pay to Mr. Elias Zouros the amount of EUR 6,250.00 as a contribution towards his legal fees and expenses.**
- 4. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 9 July 2012

Stephan Netzle
(Arbitrator)