

ARBITRAL AWARD

(BAT 0326/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Mindaugas Lukauskis

- Claimant 1 -

XL Basketball Agency (Mr. Niksa Tarle)

Ozujska 7, 10000 Zagreb, Croatia

- Claimant 2 -

Side by Side (Mr. Stefano Meller)

Via Lazzaro Papi 18, 20135 Milan, Italy

- Claimant 3 -

all represented by Dr. Spelca Meznar, Ceferin Law Firm,
Taborska 13, 1290 Grosuplje, Slovenia

vs.

Basket Barcellona S.r.l.

Via Roma 220, 98051 Barcellona Pozzi di Gotto, Italy

- Respondent -

represented by Mr. Florenzo Storelli, Studio Legale Storelli,
Viale Cadorna 50, 55100 Lucca, Italy

1. The Parties

1.1. The Claimants

1. Mr. Mindaugas Lukauskis (hereinafter the “Player”) is a professional basketball player of Lithuanian nationality. The Player is represented by Dr. Spelca Meznar, attorney-at-law in Grosuplje, Slovenia.
2. XL Basketball Agency (hereinafter the “XLB Agency”) is a professional basketball agency located in Zagreb, Croatia. Mr. Niksa Tarle is a FIBA-licensed agent working with the XLB Agency. The XLB Agency and Mr. Tarle are also represented by Dr. Meznar.
3. Side by Side (hereinafter the “SBS Agency”) is a professional basketball agency located in Milan, Italy. Mr. Stefano Meller is an agent working with the SBS Agency. The SBS Agency and Mr. Meller are also represented by Dr. Meznar.
4. The Arbitrator understands from the Parties’ written submissions that Claimants 2 and 3 are the agencies (XLB Agency and SBS Agency) and not the agents (Mr. Niksa and Mr. Meller) acting on their behalf. This has not been questioned by the Respondent. XLB Agency and SBS Agency together are hereinafter referred to as the “Agencies”.

1.2. The Respondent

5. Basket Barcellona S.r.l. (hereinafter the “Club”) is a professional basketball club located in Barcellona Pozzi di Gotto, Italy. During the period of time which is relevant for this dispute, the Club’s team played in the Italian LegaDue Championship. The Club is represented by Mr. Florenzo Storelli, attorney-at-law in Lucca, Italy.

2. The Arbitrator

6. On 22 October 2012, 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

7. On 24 July 2011, the Player entered into an employment agreement with the Club (hereinafter the "Player Contract") for two basketball seasons. The Player Contract was signed by all parties and the Club agreed to pay the Player a fully guaranteed salary of EUR 200,000.00 net for the 2011/2012 season and EUR 220,000.00 net for the 2012/2013 season payable according to the payment schedule in Article 2 of the Player Contract. In case *"any scheduled payment is not received by Player's bank within thirty five (35) days of the due date, the Player's performance obligations shall cease"* and the Player *"shall have the right, at Player's option, to terminate this Agreement and accelerate all future payments required under this Agreement"* (Article 2 of the Player Contract).
8. Article 3 of the Player Contract contains a buy-out clause which entitled the Player and the Club to terminate the Player Contract after the end of the 2011/2012 basketball season if the Club was still playing in the Italian LegaDue Championship for the 2012/2013 season. The termination right was subject to certain formalities and had to be exercised within a certain period of time and against payment by the terminating party to the other party of a one-off compensation of EUR 20,000.00.
9. According to Article 13 of the Player Contract, the "Agent" was entitled to a commission fee of EUR 20,000.00 net for the 2011/2012 season payable in two equal instalments on 30 September and 30 November 2012 and of EUR 22,000.00 net for the 2012/2013 season payable in two equal instalments on 30 September and 30 November 2013. Furthermore, Article 15 of the Player Contract stipulated that *"[a]ny modification of this Agreement must be in writing and signed by both Club and Player [...]* and this

Agreement shall be the only Agreement submitted to the arbitrator referred to in Paragraph 12 above.”

10. In the fall of 2011, the Player started playing with the Club’s team. As submitted by the Club, the Club suffered financial difficulties in the 2011/2012 season which did not allow a timely payment of Player’s due salary as agreed in Article 2 of the Player Contract.
11. By email of 5 March 2012 to a certain Mr. Sandro Santoro, Mr. Meller of the SBS Agency requested the Player’s unpaid salary instalments for January and February 2012 and announced that in case of non-payment, the Player would use his right to terminate the Player Contract and accelerate all future payments required under the Player Contract.
12. On 16 April 2012, the Club transferred an amount of EUR 32,966.00 to the Player’s bank account. The transfer voucher submitted by the Claimants refers to “RATA 02 E 03 DEL 2012.”
13. On 11 July 2012, Mr. Meller of the SBS Agency and Mr. Tarle of the XLB Agency sent an email to the Club’s President, claiming the outstanding salary instalments for April, May and June 2012 in the total amount of EUR 46,500.00. In addition, they wrote:

“Moreover, we acknowledge that none of the parties has exercised the right as per paragraph 3 of the Agreement between mr. Lukauskis and Basket Barcellona S.r.L. to buy out and terminate the Agreement for the 2012-2013 season and the contract is now in full force and effects.

With this letter we wish to inform you about Mr. Lukauskis decision to terminate the Agreement between mr. Lukauskis and your Club Basket Barcellona S.r.L., according to the clause in paragraph 2. of the Agreement and accelerate all past and future due payments (including all salary and agent’s fee payments for the 2012/2013 basketball season) and appeal to the Basketball Arbitrary Tribunal and include legal fees, arbitration costs and damaged as part of our arbitration.” (sic)

14. On 27 July 2012, the Club transferred an amount of EUR 49,449.00 to the Player’s bank account. The Parties did not explain the difference between the invoiced amount of EUR 46,500.00 and the paid amount of EUR 49,449.00.

15. By letter of 9 August 2012, the Club invited the Player for a medical check at the Club's registered office on 16 August 2012 as preparation for the 2012/2013 season.
16. On 10 August 2012, Mr. Meller of the SBS Agency and Mr. Tarle of the XLB Agency sent a further email to the Club's president referring to their "termination" email of 11 July 2012. They asked for payment of the agreed salaries for the 2012/2013 season amounting to EUR 220,000.00 and agent fees of EUR 22,000.00 for the 2012/2013 season. Mr. Meller and Mr. Tarle also stated that they were "*ready to discuss, at this point, of an eventual settlement*" but in case of no settlement, the Claimants would file a claim with the BAT within 7 days.
17. By letter dated 27 August 2012, addressed to the Player and Mr. Meller of the SBS Agency, Mr. Donato Tommaso, the Club's "L'Amministratore Unico", declared:

"Further to my last communication on August 21st last year, given the lack of presence in Barcellona P.G. on August 22nd last year, this is the immediate termination of any contractual relationship with the company that I represent, and its exclusive responsibility.

We reserve the right to refer the matter to the competent authorities for compensation for all damages caused by its breach."
18. Between the end of August and December 2012, Mr. Tarle of the XLB Agency contacted several basketball agents in order to place the Player with a basketball club in Europe.
19. On 27 September 2012, the Player entered into an employment agreement with the Spanish basketball club "Valencia Basket" for one month, i.e. until 28 October 2012. The Player was granted a fully guaranteed salary of EUR 15,000.00 net.
20. On 3 January 2013, the Player entered into an employment agreement with the Turkish basketball club "Tofas Bursa" for the rest of the 2012/2013 season. The Player was granted a fully guaranteed salary of EUR 55,000.00 net.

3.2. The Proceedings before the BAT

21. On 25 September 2012, the BAT Secretariat received the Claimants' Request for Arbitration. The non-reimbursable handling fee of EUR 4,000.00 was received in the BAT bank account on 18 September 2012.
22. By letter of 22 October 2012, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about 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 12 November 2012. The BAT Secretariat also requested the Parties pay the following amounts as an Advance on Costs by no later than 2 November 2012:

<i>"Claimant 1 (Mr. Mindaugas Lukauskis)</i>	<i>EUR 4,000</i>
<i>Claimant 2 (Side by Side)</i>	<i>EUR 1,000</i>
<i>Claimant 3 (XL Basketball Agency)</i>	<i>EUR 1,000</i>
<i>Respondent (Basket Barcellona)</i>	<i>EUR 6,000"</i>

23. On 12 November 2012, the Club submitted its Answer and a counterclaim (hereinafter the "Counterclaim") together with several exhibits.
24. By letter of 15 November 2012, the BAT Secretariat acknowledged receipt of the Answer and the Counterclaim. In addition, it acknowledged receipt of the Player's, the SBS Agency's and the Club's shares of the Advance on Costs and informed the Parties about the XLB Agency's failure to pay its share. The XLB Agency was urgently requested effect payment of its share of EUR 1,000 by no later than 26 November 2012.
25. By letter of 20 November 2012, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs and informed the Parties that the proceedings would continue. Furthermore, the Parties were requested to provide further information and documents specified by the Arbitrator. In addition, the Parties were requested to inform the BAT about their willingness to participate in settlement negotiations moderated by

the Arbitrator. Otherwise, the proceedings would continue with a second round of written submissions.

26. By letter of 10 December 2012, the BAT Secretariat acknowledged receipt of documents and information submitted by the Parties in accordance with BAT's Procedural Order of 20 November 2012.
27. By letter of 17 December 2012, the BAT Secretariat informed the Parties about the Arbitrator's decision to continue the proceedings with settlement negotiations by phone. Conference calls took place on 14 and 22 January 2013 and thereafter the Parties continued negotiating without moderation of the Arbitrator. By emails dated 25 January 2013, the Claimants and the Club informed the BAT Secretariat that the Parties had not found an agreement to settle their dispute.
28. By letter of 14 March 2013, the BAT Secretariat informed the Parties that the proceedings would continue with a second round of written submissions. The Arbitrator then requested the Claimants submit a further document and to comment by no later than 25 March 2013 on the Club's Answer and Counterclaim and other submissions filed by the Club (hereinafter the "Claimants' Reply"). In accordance with Article 9.3 of the BAT Rules, in view of the Counterclaim the BAT Secretariat requested the Club pay by no later than 25 March 2013, an amount of EUR 2,000.00 as additional Advance on Costs and informed the Parties that in case of non-payment the Counterclaim would be deemed withdrawn.
29. By letter of 2 April 2013, the BAT Secretariat acknowledged receipt of the additional Advance on Costs and the Claimants' Reply with exhibits. Furthermore, the Respondent was invited to comment by no later than 12 April 2013 on Claimants' Reply (hereinafter the "Respondent's Rejoinder").
30. By letter of 24 April 2013, the BAT Secretariat acknowledged receipt of Respondent's Rejoinder and informed the Parties about the Arbitrator's decision to declare the exchange of documents complete. Furthermore, the Parties were invited to submit a detailed account of costs by no later than 2 May 2013.

31. By letter dated 30 April 2013, the Claimants submitted their account of costs which reads as follows:

- “1. non-reimbursable handling fee, in the amount and manner as paid by all three Claimants*
- 2. advance on Claimant’s costs, in the amount and manner as paid by all three Claimants*
- 3. 4.750,00 EURO – Lawyer’s handling fee (for 3 clients), based on hourly fee of a senior attorney (250,00 eur/hour, 19 hours for preparation of the claim, response, communication to the Clients and telephone conferences)”*

32. On 2 May 2013, the BAT Secretariat acknowledged receipt of the Respondent’s account of costs which reads as follows:

<i>“- Advanced on costs of the procedure</i>	<i>Euro</i>	<i>8.000,00</i>
<i>- N.2 of statement of defence</i>		<i>3.000,00</i>
<i>- Examination and study acts</i>		<i>3.000,00</i>
<i>- Communications between parts and arbitrator (ex: conference call, e mail, etc.)</i>		<i>1.000,00</i>
<i>Total</i>		<i>15.000,00</i>
<u><i>with any additional sums as required by law</i></u>		

33. By email of 2 May 2013, the Arbitrator invited the Parties to submit their comments, if any, on the opposite party’s account of costs by no later than 8 May 2013. The Parties did not submit any comments.

34. The Parties did not request the BAT hold a hearing. The Arbitrator therefore 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 available.

4. The Positions of the Parties

4.1. The Claimants’ Position

35. In the Request for Arbitration and their Reply, the Claimants submit the following in substance:

- According to Article 2 of the Player Contract, the Player was entitled to terminate the Player Contract due to the Club's failure to pay outstanding salary instalments for April, May and June 2012 within 35 days after the due date. The termination notice also fulfils all formal requirements, in particular, with respect to representation of the Player by his agents. Hence, the Player Contract ceased to exist on 11 July 2012.
- The Player never consented to the delay of the salary payments for April, May and June 2012. In fact, he repeatedly inquired about these delays and reminded the Club to fulfil its contractual obligations. The Player also never communicated his intention to leave the Club by the end of the 2011/2012 season and consequently never obtained the Club's consent to do so.
- When the Player received the invitation to attend the medical check on 16 August 2012, the Player was no longer under contract with the Club and had no more obligations towards the Club. Therefore, the Club's invitation letter of 9 August 2012 and also its "termination" of 27 August 2012 had no legal effect whatsoever.
- The Italian Civil Code is not applicable because the Parties expressly agreed to have their dispute decided *ex aequo et bono*. This also applies to the "Accordo Collettivo Legadue" (hereinafter the "Collective Agreement") which had never become part of the Player Contract.
- The Agencies are entitled to agent fees for the 2012/2013 season according to Articles 2 and 13 of the Player Contract stipulating a guaranteed agent commission of EUR 22,000.00 because of the lawful termination of the Player Contract by the Player.
- The Club's Counterclaim, based on the Player's non-attendance in the pre-season in August 2012, is unfounded because the Player Contract was terminated and became ineffective on 11 July 2012. Furthermore, the alleged damage in the total amount of EUR 80,000.00 is unsubstantiated as it is completely unclear how the alleged violation of image rights took place and what the actual damage is.

4.2. The Claimants' Request for Relief

36. In their Request for Arbitration, the Claimants request the following relief:

"1. According to the 2nd Article of the Agreement dated 24h of July 2012, the Respondent shall pay the amount of 220.000,00 EUR Net of all applicable taxes plus interests at the applicable rate as a customary and fair compensation for the late payment since 25.9.2012 to the first Claimant.

2. According to the 2nd and 13th Article of the Agreement dated 24h of July 2012, the Respondent shall pay the amount of 22.000,00 EUR Net of all applicable taxes plus interests at the applicable rate as a customary and fair compensation for the late payment since 25.9.2012 to the second and third Claimant jointly.

The Respondent shall reimburse the Claimants the costs of these arbitral proceedings, including legal fees and expenses incurred in the connection with the proceedings."

37. The Claimants did not submit an explicit request for relief concerning the Counterclaim. However, the Claimants' Reply dated 23 March 2013 states, inter alia:

"Furthermore, the counterclaim is not substantiated. [...]: the Respondent failed to meet its burden of proof with respect to the extent of the (material or immaterial) damage sustained."

4.3. The Respondent's Position

38. In the Answer and its Rejoinder, the Club submits the following in substance:

- Due to the Club's financial difficulties in the 2011/2012 season, the Club communicated to the Player that the salary payments for April, May and June 2012 would be delayed. The Club also explained to the Player the procedures and terms of payments, i.e. payment at the end of July 2012, which was accepted by the Player by verbal authorization. On the agreed date, the Club paid what it then owed. In August 2012, it called the Player for the pre-season preparations and understood that the Claimants' email of 11 July 2012 was revoked by the acceptance personally expressed by the Player.
- The Player communicated his intention to leave the Club at the end of the 2011/2012 season. The then General Manager of the Club, Mr. Sandro

Santoro confirmed the Club's consent, and the Player and the Club agreed to dissolve the Player Contract by mutual consent. Hence, the Player's later termination notice constitutes a flagrant violation of the general principles of fairness and good faith.

- According to Article 1326 et seq. of the Italian Civil Code, "*communications of contractual cancellation, are strictly personal manifestations of the will of the subject policyholder, which, as such, must be made personally by the same and cannot be delegated to others, except by the express and specific power of attorney*". Therefore, the Claimants' termination notice of 11 July 2012 is invalid and void because this email was not sent by the Player but by his agents without any signature of the Player and without the evidence of a special power of attorney.
- The clause providing the Player with the right to unilaterally terminate the Player Contract in case of delay in payment (Article 2 of the Player Contract) is void. It does not correspond to the Collective Agreement which, by general law, prevails over individual contracts and which can also be used as basis for an *ex aequo et bono* judgment. The Collective Agreement, in fact, provides the Player with the right of unilateral termination but he was then only entitled for salary payments until the end of the respective season or, if earlier, until the conclusion of a new contract.
- The Player breached the Player Contract when he failed to appear at the pre-season 2012/2013 in August 2012. Therefore, the Player has to compensate the Club for the damages caused by his breach. Such damages can be quantified as EUR 30,000.00 for "violation of the image right of the Club" and EUR 50,000.00 for "non-use of the player's performance".
- The Player signed a contract with Valencia Basket on 27 September 2012 for one month and a contract with Tofas Bursa on 3 January 2013 for the rest of the 2012/2013 season. The Player's request for the full amount of the

2012/2013 salary is unfair and contrary to law and equity, especially considering the merely slight delay of payments at the end of the 2011-2012 season. In any event, the Player cannot be entitled to more than three salary instalments for the three months during which he was not under contract with another club in the 2012/2013 season (September, November and December 2012).

4.4. The Respondent's Request for Relief

39. In its Answer and Counterclaim, the Club requests the following relief:

"1) *in thesys*, stating that the communication of Lukauskis's agents sent on 11 July 2012 is invalid and ineffective and, consequently, that the same player breached the contract of July 24, 2011, not showing up at the meeting of the Club Consequent, reject the claim made by Lukauskis against the Club and condemn him to reimburse all damages caused to the Club, as above quantified or to the extent that will be of Justice.

2) *in the alternative*, declare that the conduct by the athlete Lukauskis violated the principles of fairness and good faith, and consequently, that the same player breached the contract of July 24, 2011, not showing up at the meeting of the Club Consequent, reject the claim made by Lukauskis against the Club and condemn him to reimburse all damage caused to the Club, as above quantified or to the extent that will be of Justice.

3) *in further alternative*, declare that the penalty clause contained in paragraph 2 of the Agreement of 24 July 2011 is invalid and ineffective and, therefore, reject the claim performed by the player and however, confirm the excessiveness of the same, and reduce it suitably according to equity and justice."

5. The Jurisdiction of the BAT

40. 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).

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

42. 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.
43. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Article 12 of the Player Contract which reads as follows:

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

44. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
45. The Arbitrator notes that the Player Agreement has been signed by all Parties of this arbitration proceeding. Furthermore, the Arbitrator considers that there is no 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 or related to the present Agreement” in Article 12 of the Player Contract covers the present dispute.
46. The Parties did not object to the BAT jurisdiction.
47. For the above reasons, the Arbitrator finds that he has jurisdiction to decide the present dispute and to adjudicate all of the Parties’ claims including the Counterclaim.

6. Other Procedural Issues

6.1. Counterclaim

48. Together with its Answer, the Club filed a Counterclaim for the payment of EUR 50,000.00 because of the alleged violation of the Club’s image rights in the amount of EUR 80,000.00.

49. According to Article 11.2 of the BAT Rules, the Club is entitled to submit a Counterclaim together with the Answer. The Counterclaim concerns the same Parties as the Claimants' claim and is subject to the same arbitration agreement. It is also closely related to the subject matter of the Claimants' claim. The Club has paid its share of the Advance on Costs. The Claimants have not disputed the admissibility of the Counterclaim which will therefore be decided in the framework of this arbitration procedure.

7. Applicable Law – *ex aequo et bono*

50. 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".

51. 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."

52. In the arbitration agreement in Article 12 of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to him *ex aequo et bono* and not consider any national law, in particular not Italian law as addressed by the Respondent in its Answer.

53. 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

54. 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.

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

8. Findings

8.1. Is Player entitled to salary for the 2012/2013 season in the amount of EUR 220,000.00?

56. The Player requests payment of his salary for the second season of the Player Contract, i.e. the 2012/2013 season, despite the fact that he has not played with the Club during this time period. The Player relies on Article 2 of the Player Contract which stipulates a right to terminate the Player Contract if the Club is delayed with “*any scheduled payment (which) is not received by Player’s bank within thirty-five (35) days*”

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.

of the date due. Under the same circumstances, he may also accelerate all future payments required under the Player Contract”.

57. According to the payment schedule in Article 2 of the Player Contract, payments of EUR 20,000.00 were due on 10 April, 10 May and 10 June 2012. The Player claimed only EUR 46,500.00 which seems to be the amount which was open after the Club’s prior salary payments until April 2012. The Club was in default of these payments after 35 days, i.e. on 15 May, 14 June and 15 July 2012.
58. It was not until 27 July 2012, that the Player received a payment from the Club of EUR 49,449.00. That payment was already late. On the other hand, there is no explanation in the file why the Club paid an amount which was EUR 2,949.00 higher than the invoiced amount. However, the Club expressly confirmed that its payment of EUR 49,449.00 covered “any amount relating to the rates of May, June and July 2012” and did not claim the repayment of above difference. The Arbitrator therefore accepts that the Parties are settled with regard to the salary payments due for the 2011/2012 season, whatever the reason for the difference of EUR 2,949.00 may have been.
59. The Club submits that the Player orally agreed to the late payment which is however disputed by the Player. The Club offers to hear the prior Club Manager Mr. Alessandro Santoro as a witness. However, Article 15 of the Player Contract provides that “*any modification of this Agreement must be in writing and signed by both Club and Player*” and “*that the Contract which shall control the relationship between the Parties shall be this Agreement and this agreement shall be the only Agreement submitted to the Arbitrator referred to in paragraph 12 above*”. There is no such written evidence on record which would confirm the Player’s consent to delayed salary payments. Thus, the Arbitrator finds a witness statement of Mr. Santoro of little help.
60. The Arbitrator therefore finds that the Club’s payment of EUR 49,449.00 on or after 27 July 2012 must be considered late.

61. On 11 July 2012, Mr. Meller and Mr. Tarle sent an e-mail to the President of the Club “on behalf of the Player” and declared termination of the Player Contract in application of Article 2 of the Player Contract.
62. The Club submits that according to Italian law a notification of termination of the Player Contract must be notified in person or with an explicit and specific power of attorney. The Arbitrator notes that this arbitration proceeding is subject to *ex aequo et bono*. The Parties have not agreed on the application of Italian law. In addition, the Club was well aware that the two Agencies were entitled to act in the name and on behalf of the Player, as already indicated in the preamble of the Player Contract. Also the correspondence prior to the notification of termination was exchanged between the Agencies and the Club without any objection from the Club. The Arbitrator therefore finds that the termination notification has been validly sent by the Agencies and is therefore binding upon the Player.
63. The Club also submits that Article 2 of the Player Contract contains a penalty clause which violates the Italian “collective agreement” according to which a Player is entitled only to the remaining salary of the pending season during which the Player Contract has been terminated. The Player contests that the collective agreement has been agreed as a part of the Player Contract. It is yet true that Article 14 of the Player Contract refers to the collective agreement: “*Club expressly renounce to apply the reduction of the Player’s Base Salary in the amount of 20% as stipulated by the Collective Bargaining Agreement Lega/GIBA, in case of demotion to the lower division championship at the end of the championship’s regular season, during the duration of this Agreement*” (sic). However, the Arbitrator finds that Article 14 of the Player Agreement excludes, rather than accepts, the application of the collective agreement.
64. The Club also submits that Article 2 of the Player Contract is a penalty clause which is disproportionate and excessive and violating the principle of fair play. The Arbitrator does not agree: Article 2 of the Player Contract does not contain any unusual or disproportionate provisions and it has been signed by the Club which is therefore bound also by this Article 2.

65. Finally, the Club replies that the termination of the Contract had been agreed upon by the Player and the Club because the Player intended to leave. The notification of termination of 11 July 2012 was therefore in bad faith and contrary to the prior oral agreement. As stated above (para. 59), Article 15 of the Player Contract expressly stipulates that every agreement between the Parties must be in writing and no such written agreement on an early termination of the Player Contract has been provided by the Club.
66. According to the BAT jurisprudence, any alternative income earned by the Player during the remaining term of the Player Contract must be deducted from the compensation because of the early termination of the Player Contract. Accordingly, EUR 15,000.00 earned from “Valencia Basket” and EUR 55,000.00 earned from “Tofas Bursa” must be deducted from the Player’s claim which results in a remaining claim of EUR 150,000.00.
67. According to the BAT jurisprudence, not only the salaries actually earned during the remaining term of the Player Contract must be deducted, but also the hypothetical income which the Player failed to earn, e.g. because he did not search in good faith for a new employment, must be taken into calculation. Indeed, the Player contacted several agents to find an alternative employment already in November and December 2012, as demonstrated by the agents’ emails in Claimants’ Exhibit 11. The Player can therefore not be blamed for having remained passive and the Arbitrator does not see a reason to deduct a hypothetical income from the compensation due by the Club.
68. When determining the compensation, the Arbitrator will also review the specific circumstances that may justify an adjustment of the compensation which has been mathematically calculated. The Club submits that the Player was actually willing to change clubs after his first year with the Respondent. The Club’s payment delay was a convenient chance to leave for free and to obtain some additional payment instead of exercising his right to leave the Club against payment of EUR 20,000.00 as stipulated in the buy-out-clause of Article 3 of the Player Contract. The Club also complains that it was unfair and too harsh that the Player terminated the Player Contract and

accelerated the remaining salary for the entire contractual term immediately after the date when the salary payment was due – especially since the Club then paid the open salaries a few days later.

69. The Arbitrator does not share the Club's view: there is no indication that the Player intended to leave the Club and bypassed the buy-out-clause in bad faith. As a matter of fact, the Club was late with the salary payments already in January and February 2012 and it paid the salaries only upon a written reminder of the Player in which the termination of the Player Contract was threatened. Before the Player eventually terminated the Player Contract on 11 July 2012, the Club was again in arrears with salary payments for no less than three months. Payments were then made only after the Player had sent its notice of termination. The Player can therefore not be blamed of an abusive or overly formalistic exercise of his termination right which might require a reduction of the compensation payable by the Club.
70. To sum up, the Arbitrator does not see a reason to reduce the compensation due to the Player with the sole exception of the deduction of the salaries otherwise earned during the remaining term of the Player Contract. Consequently, the Player is entitled to payment of EUR 150,000.00 from the Club.

8.2. Are Claimants 2 and 3 entitled to agent fees for the 2012/2013 season in the amount of EUR 22,000.00?

71. The Claimants request payment of the agent fee for the 2012/2013 season although the Player did not play with the Club during this period. The Claimants refer to Article 13 of the Player Contract according to which they are entitled for a compensation of the "services of locating and contracting the Player" in the amount of EUR 22,000.00 for the second season, payable in two equal instalments on 30 September and 30 November 2012. According to the wording of the Player Contract, the entire agent fee was therefore earned when the Player and the Club signed the Player Contract and not for further services. The Player Contract was signed on 24 July 2011 and the agent fee for the second season became payable on 30 September and 30 November 2012.

72. Article 13 of the Player Contract provides that the Club is not obliged to pay an agent fee for the 2012/2013 season if the Player exercised the buy-out-clause. That buy-out-clause was not exercised and therefore the Club remained obliged to pay agent fees to the Agencies as agreed in the Player Contract.
73. When the Player left the Club, the Agencies attempted to place the Player with other clubs. In fact, the Player then signed contracts with Valencia Basket and Tofas Bursa. Both contracts provide for an agent fee, namely EUR 1,500.00 according to Article 13 of the agreement with Valencia Basket and USD 5,500.00 according to Article 12 of the agreement with Tofas Bursa. XLB Agency participated in these agent fees with 50% which must be deducted from the agent fee due by the Club. Accordingly, from the entire agent fee of EUR 22,000.00, an amount of EUR 750 (Valencia) and USD 2,750.00 = EUR 2,054.00⁵ (Tofas) must be deducted.
74. The remaining agent fee due by the Club to the Agencies amounts therefore to EUR 19,196.00.

8.3. Is the Club entitled to damages in the amount of EUR 80,000.00?

75. The Club claims damages from the Claimants because the Player did not appear at the medical check in August 2012 and did not participate in the preparation of the upcoming season. The claim in the amount of EUR 80,000.00 consists of EUR 30,000.00 for “violation of the image right of the Club” and EUR 50,000.00 for the “non-use of the Player’s performance”. However, the Club does not further substantiate or demonstrate the claimed damage.
76. The Arbitrator has already found that the Player was entitled to terminate the Player Contract because of the Club’s payment delay. As a consequence, the Player’s contractual obligations to participate in the medical examinations and the team’s

⁵ Exchange rate of 15 February 2013, i.e. the date on which the agent fee to be paid by Tofas was due.

training and matches did no longer exist. Failing a breach of contract, the Arbitrator finds that the Club is not entitled to damages.

77. The Counterclaim must therefore be dismissed.

9. Interest

78. The Claimants request interest “at the applicable rate” on the claimed amounts from 25 September 2012, i.e. the date of the Request for Arbitration.

79. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest⁶. Although the Player Contract does not provide for the payment of default interest, this is a generally accepted principle which is embodied in most legal systems. However, it is also generally accepted that the obligee has to expressly request payment of interest from the obligor.

80. Deciding *ex aequo et bono* and taking into consideration that the Claimants request interest only from the day when the Request of Arbitration was received by the BAT, i.e. 25 September 2012, the Arbitrator finds that the starting date for the calculation of the default interest shall be this day.

81. The awarded amounts to the Player for compensation (EUR 150,000.00) and to the Agencies for agent fee (EUR 19,196.00) are still outstanding. Therefore, the Claimants are entitled to interest on these amounts from 25 September 2012 until payment.

82. Regarding the interest rate, the Arbitrator, still deciding *ex aequo et bono* and in line with BAT jurisprudence, considers interest in the rate of 5% p.a. to be fair and equitable in the present case without reference to any national law.

⁶ See, *ex multis*, the following BAT awards: 0328/12, *Dunston, Excel Sports, BeoBasket, Kapazoglou vs. Aris BSA 2003*; 0291/12, *Drucker, BeoBasket vs. Sutor Basket Montenegrano*; 0092/10, *Ronci, Coelho vs. WBC Mizo Pecs 2010*; 0056/09, *Branzova vs. Basketball Club Nadezhda*

83. Consequently, the Arbitrator finds that the Player is entitled to interest of 5% p.a. on the amount of EUR 150,000.00 since 25 September 2012 and the Agencies to interest of 5% p.a. on the amount of EUR 19,196.00 since 25 September 2012.

10. Costs

84. 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.
85. On 16 July 2013 - 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 14,000.00.
86. Considering the requests for relief and the outcome of the Request for Arbitration and the Counterclaim and the circumstances of the present case, the Arbitrator finds it fair that 80% of the fees and costs of the arbitration shall be borne by the Club, i.e. EUR 11,200.00, and 20% by the Claimants, i.e. EUR 2,800.00.
87. Given that the Player paid an advance on costs of EUR 4,000.00, the Agencies together paid an advance on costs of EUR 2,000.00 in total and the Club an advance on costs of EUR 8,000.00, in application of Article 17.3 of the BAT Rules the Arbitrator decides that the Club must reimburse EUR 3,200.00 to the Claimants, i.e. the difference between the advance on costs paid by the Claimants (EUR 6,000.00) and the share of the arbitration costs that the Claimants must actually bear (EUR 2,800.00).

88. Furthermore, the Arbitrator considers it adequate that the Claimants are entitled to a contribution towards their legal fees and other expenses (Article 17.3. of the BAT Rules). The Arbitrator notes that the BAT received the amount of EUR 4,000.00 as non-reimbursable handling fee from the Claimants and that they stated further legal costs and expenses in the amount of EUR 4,750.00, totalling to EUR 8,750.00. The Club claimed legal costs and expenses in the amount of EUR 7,000.00. When fixing the parties' contributions, the Arbitrator deems it appropriate to take the Parties' statements of costs and the outcome of this arbitration into account. The contribution to be paid by the Club to the Claimants, after deduction of the Club's claim of contribution against the Claimants, is therefore fixed at EUR 6,000.00, while the Club shall bear its own legal costs.

11. AWARD

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

- 1. Basket Barcellona S.r.l. is ordered to pay to Mr. Mindaugas Lukauskis the amount of EUR 150,000.00 net plus interest of 5% p.a. on this amount since 25 September 2012.**
- 2. Basket Barcellona S.r.l. is ordered to pay jointly to XL Basketball Agency (Mr. Niksa Tarle) and Side by Side (Mr. Stefano Meller) the amount of EUR 19,196.00 net plus interest of 5% p.a. on this amount since 25 September 2012.**
- 3. Basket Barcellona S.r.l. is ordered to pay jointly to Mr. Mindaugas Lukauskis, XL Basketball Agency (Mr. Niksa Tarle) and Side by Side (Mr. Stefano Meller) the amount of EUR 3,200.00 as a reimbursement of their advance on arbitration costs.**
- 4. Basket Barcellona S.r.l. is ordered to pay jointly to Mr. Mindaugas Lukauskis, XL Basketball Agency (Mr. Niksa Tarle) and Side by Side (Mr. Stefano Meller) the amount of EUR 6,000.00 as a contribution towards their legal fees and expenses.**
- 5. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 31 July 2013

Dr. Stephan Netzle
(Arbitrator)