ARBITRAL AWARD

(BAT 0341/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Interperformances, Inc.
Via degli Aceri 14, 47892 Gualdicciolo, Republic of San Marino

represented by Mr. John B. Kern,
JBK International Consulting LLC, Via degli Aceri 14,
47892 Gualdicciolo, Republic of San Marino

- Claimant -

vs.

Mr. Marko Čakarevič

represented by Messrs. Massimo Coccia and Stefano Brustia,
c/o Coccia de Angelis Pardo, Piazza Adriana, 15
00193 Rome, Italy

- Respondent -

1. The Parties

1.1. The Claimant

1. Interperformances, Inc. (hereinafter the “Agency”), is a basketball agency with offices in Gualdicciolo in the Republic of San Marino and other locations. It is represented by Mr. John B. Kern, attorney-at-law practicing in Charleston, USA and Gualdicciolo, San Marino.

1.2. The Respondent

2. Mr. Marko Čakarevič (hereinafter the “Player”), is a professional basketball player from Serbia. He is represented by Mr. Massimo Coccia and Mr. Stefano Brustia, attorneys-at-law in Rome, Italy.

2. The Arbitrator

3. On 21 October 2012, the President of the Basketball Arbitral Tribunal (the "BAT") Prof. Richard H. McLaren appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Arbitration Rules of the BAT (hereinafter the "BAT Rules"). Neither of the parties has raised any objections to the appointment of the Arbitrator nor to his declaration of independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

4. On 6 July 2009, the Agency and the Player entered into a “player representation agreement” by which the Agency undertook to *“represent, advise, counsel and assist the Player in each and all phases related to his engagement by any and all basketball*

clubs worldwide" (hereinafter the "Representation Agreement").

5. Clause 3 (*TERM AND RENEWALS*) of the Representation Agreement provides that:

> *"This Agreement shall begin on the date hereof and will lapse one year thereafter or when the engagement contract negotiated by REPRESENTATIVE on a basketball club on the PLAYER's behalf expires, whichever period is longer. This agreement shall thereafter be deemed automatically renewed for subsequent periods of one year each unless written notice is given by either Party to the other with an advance notice of no less than 15 (fifteen) and no more than 30 (thirty) days prior to the natural expiry date of the Agreement ("the Window Period"). Such non-renewal communication will have to be sent only via registered post service with return receipt to be addressed exclusively to the domicile respectively elected by the Parties under clause 6 herebelow. Failure by either Party to fully and timely comply with the above requirements will result in the non-renewal notice not being valid and enforceable against the other Party except for what stipulated under clause 4 below."*

6. Clause 4 (*IMPROPER NON-RENEWAL NOTICE PENALTY*) of the Representation Agreement provides that:

> *"Should PLAYER in any manner notify REPRESENTATIVE [i.e. the Claimant] outside the Window Period that he does not intend to renew this Agreement upon its expiry, then REPRESENTATIVE will be entitled to immediately collect from PLAYER a penalty fee equal to the commission earned for the last engagement contract negotiated by REPRESENTATIVE on PLAYER's behalf."*

7. At the time of signing the Representation Agreement, the Player was contracted to play for the Serbian club Radnicki Kragujevac. The Agency did not negotiate a playing contract for the Player. Accordingly, the Agency did not negotiate a contract for the Player before the first anniversary of the signing of the Representation Agreement.

8. On 17 April 2011, the Player issued a letter to the Agency (the "Termination Letter"), marked for the attention of Mr. Luciano Capicchioni and Mr. Tanjević, which stated:

> *"Mr. Luciano Capicchioni and Mr. Tanjević*
>
> *I, Marko Čakarevič, born May 13th, 1988 would like to inform you that I am officially terminating our prior agreement for representation and no longer require you or your agency to represent me as a professional basketball player. As of this date I no longer authorize you or your agency to make any business deals on my behalf or to represent me in any way.*

Marko Čakarevič
(sign.)
April 17th, 2011"

9. By a letter dated 19 April 2011, the Agency informed the Player that his purported notice of termination was not accepted. Specifically, the Agency said:

> *"Please be advised that your attempt at termination is contrary to the legal requirements in your contract with Interperformances dated Juy 6th, 2011 (sic).*
>
> *Your letter has been referred to our legal staff for a more comprehensive response in which your responsibilities and our course of action will be further explained."*

10. On 22 June 2011, the Agency, through its legal counsel, replied in more detail to the Termination Letter and demanded the Player to advise the Agency of any contract extension or renewal that he had negotiated, or that some other agent may have assisted. There is no response of the Player on record. On 12 August 2011 and 9 March 2012, the Agency's counsel sent two more warning letters to the Player announcing that the Agency would now commence arbitration.

11. On 9 July 2011, the Player signed a representation agreement with player agent Zoran Savić of Invictus, an agency domiciled in Barcelona, Spain. On 12 July 2011, the Player signed a contract with basketball club BC Partizan Belgrade.

3.2. The Proceedings before the BAT

12. On 3 October 2012, the Agency filed a Request for Arbitration in accordance with the BAT Rules and paid the amount of EUR 3,667.57 as non-reimbursable handling fee (because the non-reimbursable handling fee payable in this matter was only EUR 3,000.00, the overpayment of EUR 667.57 was credited against the Agency's share of the Advance on costs).

13. By letter of 26 November 2012, the BAT Secretariat confirmed receipt of the Request for Arbitration and invited the Agency to submit written statements of (former) repre-

sentatives of the Club, as requested in the Request for Arbitration, by no later than 7 December 2012. By email of 8 December 2012, the Agency's representative replied that it had *"not been able to secure a statement from anyone affiliated with Partizan concerning Mr. Cakarevic's contract."*

14. On 18 December 2012, the BAT Secretariat informed the Parties that the Arbitrator had been appointed and a time limit was fixed for the Player to file his answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 11 January 2013. The BAT Secretariat also requested the Parties pay the following amounts as an Advance on Costs by no later than 2 January 2013:

"Claimant	*EUR 3,332.43*
Respondent	*EUR 4,000.00"*

15. By email of 9 January 2013, the Player's counsel announced that the Player would not pay his share of the Advance on Costs and requested an extension for submitting the Answer until 29 January 2013.

16. On 14 January 2013, the BAT Secretariat informed the Parties that none of them had paid its share of the Advance on Costs and invited the Agency to effect payment of the full amount of the Advance on Costs (EUR 7,332.43) by no later than 21 January 2013.

17. On 17 January 2013, the Arbitrator granted the Player an extension for submitting his answer by 29 January 2013 and also requested the Player to submit, together with the Answer, a copy of his employment contract with BC Partizan Belgrade for the seasons 2011-12, 2012-13 and 2013-14.

18. On 21 January 2013, upon request of the Agency's counsel, the Arbitrator extended the time limit for the payment of the Advance on Costs to 29 January 2013.

19. On 29 January 2013, the Player (through his representative) submitted his Answer to the Request for Arbitration.

20. On 11 February 2013, the BAT Secretariat confirmed receipt of the full Advance on Costs paid by the Agency (EUR 7,332.43).

21. On the same day, after a reminder by the BAT Secretariat, the Player's counsel submitted a copy of the employment contract with BC Partizan Belgrade for the seasons 2011-12, 2012-13 and 2013-14 in Serbian language. He also informed the BAT that the Player could not afford to produce an English translation.

22. On 13 February 2013, the Arbitrator requested the Player confirm whether the Arbitrator's understanding of the salary provisions of the employment contract with BC Partizan Belgrade was accurate. The Player confirmed the Arbitrator's understanding in a statement dated 18 February 2013 which was forwarded to the BAT Secretariat on 20 February 2013. The Player also added further comments in support of his position. The employment contract with BC Partizan Belgrade and the partial translation of the Arbitrator and the Player's statement were forwarded to the Agency on 21 February 2013. The Agency was invited by the BAT Secretariat to provide its comments by 1 March 2013.

23. On 6 March 2013, the Agency submitted a legal brief of 12 pages and amended its Requests for Relief.

24. By procedural order of 8 March 2013, the Arbitrator held the following:

> *1. The Arbitrator takes note of the Respondent's confirmation of the translation of the financial provisions of his contract with BC Partizan Belgrade, namely:*
>
> *1 According to Article 3 of the Contract, the Contract was concluded for three competition seasons, namely the 2011/12 season, the 2012/13 season and the 2013/14 season.*
>
> *2 Article 5 of the Contract stipulates that the salary for the 2011/12 season is EUR 145,000 net, to be paid in ten monthly instalments of EUR 14,500 each beginning on 5*

September 2011 until 5 June 2012.

3 Article 6 of the Contract provides that the salary for the 2012/13 season is EUR 165,000 net, to be paid in ten monthly instalments of EUR 16,500 each beginning on 5 September 2012 until 5 June 2013.

4 Article 7 of the Contract stipulates that the salary for the 2013/14 season is EUR 200,000 net, to be paid in ten monthly instalments of EUR 20,000 each beginning an 5 September 2013 until 5 June 2014.

2. *The Arbitrator admits the Claimant's amendments of its Requests for Relief, namely:*

"1.16 As a result of the Player's improper termination and assumption of an agency agreement not authorized by Interperformances, coupled with the negotiations by the player's other agent within the time period of the PRA, the Claimant has been damaged in the amount of 10% of the value of the player's KK Partizan Belgrade contract, plus interest on this amount which is admitted to be (€51,000.00) at the rate of (€6.99 per diem from August 12, 2011 when demand was made for payment.

2.4 That the Claimant be awarded from the Respondent compensatory damages in the minimum amount of (€51,000.00 as agent's commissions pursuant to the Player Representation Agreement in the amount of ten (10%) percent of the Player's KK Partizan Belgrade contract for the full term of the contract.

2.5 That the Claimant be awarded from the Respondent interest on the foregoing at 5% per annum (€6.99 based upon a principal amount of (€51,000.00), from August 12, 2011 the date of the first demand following the expiration of the Player Representation Agreement, (€2,580.41 as of the date of the filing of this matter), with the full amount of the commissions due as of the time of the contract between the player and the Club."

3. *The Arbitrator does not accept the Statement of the Respondent of 18 February 2013, submitted to the BAT under cover letter of 20 February 2013 and excludes it from the file.*

4. *The Arbitrator does not accept the Claimant's submission of 6 March 2013 (except the amendments of the Requests for Relief) and excludes it from the file. A copy of the Claimant's Submission of 6 March 2013 will be sent to the Respondent for information only but not for further comments.*

5. *No hearing shall be held.*

6. *In accordance with Article 12.1 of the BAT Arbitration Rules, the exchange of documents is herewith declared complete. The Award will be based on the Claimant's Request for Arbitration and the Respondent's Answer, the translation of the financial aspects of the Respondent's contract with BC Partizan Belgrade as confirmed by the Respondent and the respective amendment of the Claimant's Requests for Relief.*

7. *Since the Arbitrator must also rule on the costs in the Arbitral Award, they need to be submitted without delay. Therefore, the Parties are requested to submit a detailed account of their costs until 15 March 2013 [...].*

25. On 14 March 2013, the Player submitted an account of costs as follows:

> *"In terms of legal fees, Mr. Čakarevič has agreed with Respondent's counsel (Messrs. Coccia and Brustia) upon the payment of a lump sum of **EUR 5,625.00** (five thousand six hundred twenty-five Euros) for fees and expenses (i.e. photocopying, telephone calls, miscellaneous). In addition, we must add to the invoice 4% for Social Security charge, which the client being a physical person cannot deduct. Therefore the total is **EUR 5,850.00** (five thousand eight hundred fifty Euros)."*

26. The Agency did not submit an account of costs.

27. By email of 18 March 2013, the BAT Secretariat acknowledged receipt of the Player's account of costs and invited the Agency to submit its comments, if any, on the Player's account of costs by no later than 20 March 2013. By letter of 20 March 2013, the Agency filed such comments and requested the Arbitrator reject the Player's account of costs. In addition, the Agency contended that it was entitled to the recovery of the "cost of the arbitration" consisting of the non-refundable handling fee and all costs of the arbitration assessed to the parties". By letter of 22 March 2013, the Player commented on the Agency's submission.

28. 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 (see also paras. 45 and 46).

4. The Positions of the Parties

4.1. The Agency's Position

29. The Agency's position is essentially that:

- If the Player wished the Representation Agreement not to renew after the 2010/2011 season, then he was required to give notice in accordance with the agreement's terms. Specifically, he was required to give that notice during the Window Period, i.e. between 6 June 2011 and 21 June 2011 (inclusive).

- The Player did not give notice during the Window Period, but before. As a consequence, the Representation Agreement was not terminated but renewed automatically on 7 July 2011 and was in force when the Player negotiated and concluded a new contract with BC Partizan Belgrade.

- The Agency does not ask for the payment of the penalty according to clause 4 of the Representation Agreement because a penalty would relate to *"the commission earned for the last Contract negotiated by Representative on Player's behalf."* However, the contract with Radnicki Kragujevac was signed before the Parties commenced their co-operation.

- The Agency is entitled to claim damages which consist of the commission which it earned because the Player contracted with BC Partizan Belgrade while he was still bound by the Representation Agreement. The commission amounts to 10% of the value of the Player's contract with BC Partizan Belgrade.

- The value of the Player's contract with BC Partizan Belgrade was known only after the submission of the respective contract in this arbitration and amounts to EUR 51,000.00.

30. In the Request for Arbitration, the Agency requested the following relief:

> *"2.1 That the Tribunal accept jurisdiction of this matter and properly serve the Respondent with the Request for Arbitration;*
>
> *2.2 That the Tribunal appoint a qualified arbitrator to decide the matter pursuant to the expedited procedural rules of the BAT;*
>
> *2.3 That the Arbitrator ascertains and determines the exact value and duration of the Contract which the Player negotiated with Partizan during the term of the Player Representation Agreement;*
>
> *2.4 That the Claimant be awarded from the Respondent compensatory damages in the minimum amount of €36,000.00 as agent's commission fees pursuant to the Player Representation Agreement in the amount of ten (1%) percent of the Player's KK Partizan Belgrade contract (said to be €12,000.00 for the 2011-12 season and at least that much in 2012-2013 and again in 2013-14) for the full term of the Player*

Marko Čakarevič's contract with KK Partizan Belgrade);

2.5 That the Claimant be awarded from the Respondent interest on the foregoing at 5% per annum (a minimum of €4.93 per diem based upon a principal amount of €36,000.00) from August 12, 2011 the date of the first demand following the expiration of the Player Representation Agreement, (€2,056.44 as of the date of filing of this matter), with the full amount of the commissions due as of the time of the contract between the player and the Club;

2.6 That the Claimant be awarded from the Respondent all arbitration expenses, including non-refundable handling fees and the costs of the arbitrator;

2.7 That the Claimant be awarded from the Respondent a reasonable attorney's fee to a maximum of €7,500.00 pursuant to Article 17 of the BAT Rules with the Arbitrator requesting the Claimant to provide a calculation of the costs of representation in this matter at the appropriate time;

2.8 That the Claimant be allowed the full capacity of the BAT's discovery tools to obtain information from KK Partizan Belgrade about the contract between the Player and this Club, including, as may be dictated, the opportunity to depose a representative of the Club or compel their attendance at a hearing of this matter;

2.9 That if the Respondent fails and refuses to honour the Award, that the Claimant be authorized to assert a lien on the salaries of the Respondent which are due to him by KK Partizan Belgrade; and

2.10 That the Claimant be awarded such other and further damage, limited to no more than € 100,000.00 as justice requires."

31. By its submission of 6 March 2013, the Agency amended its Requests for Relief as follows:

"1.16 As a result of the Player's improper termination and assumption of an agency agreement not authorized by Interperformances, coupled with the negotiations by the player's other agent within the time period of the PRA, the Claimant has been damaged in the amount of 10% of the value of the player's KK Partizan Belgrade contract, plus interest on this amount which is admitted to be €51,000.00 at the rate of €6.99 per diem from August 12, 2011 when demand was made for payment.

2.4 That the Claimant be awarded from the Respondent compensatory damages in the minimum amount of €51,000.00 as agent's commissions pursuant to the Player Representation Agreement in the amount of ten (10%) percent of the Player's KK Partizan Belgrade contract for the full term of the contract.

2.5 That the Claimant be awarded from the Respondent interest on the foregoing at 5% per annum (€6.99 based upon a principal amount of €51,000.00), from August 12, 2011 the date of the first demand following the expiration of the Player Representation Agreement, (€2,580.41 as of the date of the filing of this matter), with the full amount of the commissions due as of the time of the contract between the player and the Club."

4.2. The Player's Position

32. The Player's position is essentially that:

- The Player resolved the Representation Agreement because his 2-year employment with Radnicki Kragujevac was going to run out and the Agency was not carrying out any activity to find him a new club.

- The agreement with the agency Invictus was signed on 9 July 2011 (i.e. after the expiration of the Representation Agreement) and not on 19 May 2011, as asserted by the Agency and the contract with KK Partizan Belgrade was signed on 12 July 2011, which was also after the expiration of the Representation Agreement. The Player was therefore not in breach of the Representation Agreement.

- The Termination Letter was indeed valid and terminated the Representation Agreement because of two alternative reasons:

    - In a very unusual way, the Representation Agreement, which was drafted by the Agency, provides for a short Time Window of only 15 days during which the Player must notify the Agency if he does not want the agreement to continue for another year. Strangely enough, late notifications are considered invalid, but so too are notifications which are sent too early. Such a requirement is too formalistic and would constitute an abuse of rights if the Player's Termination Letter of 17 April 2011 is declared invalid because it was sent to the Agency too early. Further, the Agency could have asked the Player after the beginning of the Time Window whether he still wanted to terminate the Representation Agreement, which it did not.

    - The Termination Letter can also be understood as immediate termination of the Representation Agreement for just cause. The Player was not satisfied

with the Agency's performance. In actuality, the Agency did nothing to find a new club for the Player after the expiration of his contract with Radnicki Kragujevac. The Agency was therefore in breach of clause 1 of the Representation Agreement which lists the activities to which the Agency had committed itself. Accordingly, the Player was entitled to immediately terminate the Representation Agreement for just cause.

33. In the Answer, the Player requested the following relief:

> *1) To adjudge and declare that the Agency Contract between the Claimant and the Respondent was lawfully terminated or not renewed by the latter with his letter of 17 April 2011;*
>
> *2) Accordingly, to adjudge and declare that the Respondent has no payment obligation whatsoever towards the Claimant under the Agency Contract.*
>
> *3) To dismiss any request for compensatory damages or commission fees and any other motions for relief submitted by the Claimant.*
>
> *4) Only eventualiter as a subordinate ground, in the event that the BAT were to believe that the Respondent's termination letter of 17 April 2011 was not properly or justifiably done, to declare that no damages were caused to the Claimant or to adjudicate a substantial reduction of the amounts requested by the Claimant.*
>
> *5) To order the Claimant to pay the full costs of this arbitration and a contribution towards the Respondent's legal and other costs and, accordingly, impose to Claimants the overall payment of Euro 7.500 as legal and other costs or any other amount the FAT considers equitable."*

5. The Jurisdiction of the BAT

34. 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).

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

36. 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[1].

37. The jurisdiction of the BAT over the dispute results from the arbitration agreement contained in clause 9 (*GOVERNING LAW*) of the Representation Agreement, which reads as follows:

> *"9. GOVERNING LAW*
>
> *In case of disputes on the present Representation Agreement the parties will take all measures to solve them by negotiations recognizing that the arbitration of disputes is a costly and time consuming endeavour. Failing a negotiated resolution, any dispute arising from or related to this Representation Agreement shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the current version of the FAT Arbitration Rules by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland or elsewhere as agreed by the parties and the arbitrator. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The FAT arbitrator and the CAS on appeal shall decide the dispute ex aequo et bono. All submissions and proceedings shall be in English.*
>
> *In the case of the REPRESENTATIVE bringing a claim against the PLAYER, the REPRESENTATIVE shall then be entitled to the immediate provisional remedy from the PLAYER of an attorney's fee of US$10,000. In accord with Articles 17 and 18 of the FAT Arbitration Rules, the parties' rights of appeal are limited to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. The parties waive recourse to the Swiss Federal Supreme Court and Cantonal Courts, except as to apply for formal recognition and enforcement pursuant to the New York Convention of June 10, 1958. In the event that a party to a FAT arbitration or CAS appeal fails to honour the final award or any provisional or conservatory measure, the party seeking enforcement shall have the right to request appropriate sanctions from the FIBA Secretary General as provided in Rule L 2.7 of the FAT Arbitration Rules, including attorneys' fees and costs therefore.*
>
> *Should for any reason the FAT determine not to exercise jurisdiction, the parties agree that in such case the arbitration of disputes arising from or related to this Representation Agreement shall be brought before a single arbitrator pursuant to the Swiss Rules of International Arbitration according to the Law of Switzerland. The place of such arbitration shall be Lugano, Switzerland and the proceedings shall be held in English language. The arbitrator shall decide the dispute ex aequo et bono with reference, as necessary, to the contract law of the State of Illinois."*

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

38. The Representation 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 *"In case of disputes on the present Representation Agreement…"* in the above-mentioned clause 9 of the Representation Agreement covers the present dispute. In addition, neither of the Parties has challenged the jurisdiction of the BAT.

39. Furthermore, at the time of signing of the Representation Agreement, the BAT was still called the "FIBA Arbitral Tribunal (FAT)" while it has changed its name to "BAT". In this respect, Article 18.2 of the BAT Rules specifically provides that "Any reference to BAT's former name "FIBA Arbitral Tribunal (FAT)" shall be understood as referring to the BAT".

40. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Agency's claim.

6. Other procedural issues

6.1. Exclusion of certain submissions of the Parties from the file

41. Upon request of the Arbitrator, the Player submitted his player contract with BC Partizan Belgrade in Serbian language on 11 February 2013 and indicated that he could not afford an English translation. On 13 February 2013, the Arbitrator dispensed with the Player's duty to produce a full translation of said contract but requested he confirm by 20 February 2013 whether the Arbitrator's understanding of the financial provisions in the contract was accurate.

42. By email of 20 February 2013, the Player submitted a statement dated 18 February 2013 in which he confirmed the Arbitrator's understanding of the financial provisions of the contract but also provided further arguments in support of his position.

43. By letter dated 21 February 2013, the BAT Secretariat provided the Agency with the Player's contract with BC Partizan Belgrade in Serbian language, the Arbitrator's translation of the financial provisions and the Player's submission of 20 February 2013 including his statement of 18 February 13 and set a time limit until 1 March 2013 to submit its comments thereto. However, only on 6 March 2013 the Agency submitted a legal brief of 12 pages and amended its Requests for Relief.

44. By order of procedure of 8 March 2013, the Arbitrator excluded the Player's statement of 18 February 2013 (submitted on 20 February 2013) and the Agency's submission of 6 March 2013 from the file, as far as they did not directly answer or comment on the Arbitrator's specific question relating to the translation of the player contract with BC Partizan Belgrade. He did so because of the following reasons:

(a) The Player's submission of 20 February 2013 (including his party statement of 18 February 2013) exceeded the scope of the question which was asked by the Arbitrator.

(b) The Agency's comments of 6 March 2013 were late and the Agency's counsel had neither requested an extension of the time limit expiring on 1 March 2013, nor provided a valid excuse that would justify an *ex post* extension of the time limit. In addition, the Agency's comments of 6 March 2013 constituted a comprehensive reply on the Player's Answer, although the Arbitrator had not invited the Parties to file a full second round of written submissions.

(c) Article 0.2 of the BAT Rules provides as follows: *"Parties wishing to have their disputes decided by the BAT recognise that the BAT Rules are designed to provide for a simple, quick and inexpensive means to resolve these disputes. As a consequence, the BAT Arbitration Rules require cooperation by the parties, in particular with respect to the limited number of written submissions (as a rule one submission per party) and the short time limits to be strictly observed"*,

and Article 7.1 and 7.2 of the BAT Arbitration Rules say: *"Time limits for the filing of written submissions or other procedural acts shall be determined by the Arbitrator by reference to a specific date. The Arbitrator may extend the time limits in exceptional circumstances."* In addition, Article 12.1 of the BAT Arbitration Rules says: *"After the filing of the Request for Arbitration and the Answer, the Arbitrator shall determine in his/her sole discretion whether a further exchange of submissions is necessary. Unless he/she decides that it is necessary, further submissions will not be taken into account"*.

6.2. Admission of the Agency's amended Request for Relief

45. In the Request for Arbitration, the Agency reserved the right to amend its Requests for Relief upon disclosure of the player contract with BC Partizan Belgrade. The Arbitrator finds that the Agency's amendment of its Request for Relief was a consequence of the disclosure of the Player's contract with BC Partizan Belgrade.

6.3. Decision not to hold a Hearing

46. In the Request for Arbitration, the Agency reserved the right to request an appropriate hearing of the facts in this matter but never submitted such a request to date.

47. 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 available because of the following reasons:

    (a) When the Player submitted the player contract with BC Partizan Belgrade, the main purpose for a hearing was already met and the Parties and the Arbitrator became informed about the agreed compensation in that contract.

    (b) The BAT Rules provide for a single exchange of written submissions. Any re-

quest for the production of evidence must be presented as early as possible in the proceedings. The requesting party must demonstrate that the requested evidence is relevant and that it is likely to be in the possession of the other party. The Agency's request for the production of the player contract has been granted because it meets these requirements. However, the Agency's reservation of the right to request a hearing because unidentified representatives of BC Partizan Belgrade might be heard on the contract negotiations is not sufficient for several reasons: (i) the request for a hearing must be unconditional; (ii) the request must be substantiated, which means that the purpose of the hearing and the witness examination must be described; and (iii) if the requested evidence consists of a witness examination at the hearing, the witness must be identified by name.

7. Discussion

7.1. Applicable Law – ex aequo et bono

48. 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".*

49. Under the heading "Law Applicable to the Merits", 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."*

50. As stated above at paragraph 37, the Parties have expressly elected that the Arbitrator shall determine the dispute *ex aequo et bono*.

51. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

52. 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]

53. 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".

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

7.2. Findings

55. The facts as described by the Parties are basically undisputed and lead to the following legal questions:

i. Did the Player's Termination Letter constitute a notice of *immediate termination* of

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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).

the Representation Agreement for just cause or does it have to be understood as a notification to the Agency of the Player's intention *not to renew* the Representation Agreement after 6 July 2011?

ii. Is the Termination Letter invalid because it was submitted *prior* to the beginning of the Window Period of 15 days as stipulated in clause 3 of the Representation Agreement?

iii. If the Termination Letter validly prevented the Representation Agreement from renewal after 6 July 2011, did the Player violate his contractual obligations when he joined the agency Invictus and signed a player contract with BC Partizan Belgrade?

iv. If yes, what are the consequences of such breach?

7.2.1. Did the Player's Termination Letter constitute a notice of immediate termination of the Representation Agreement for just cause or does it have to be understood as a notification to the Agency of the Player's intention not to renew the Representation Agreement after 6 July 2011?

56. The language of the Player's Termination Letter does not explicitly speak of non-renewal or of *immediate* termination of the Representation Agreement. Rather it states:

> *"I (...) am officially terminating the prior agreement for representation and no longer require you or your agency to represent me as a professional basketball player. As of this date I no longer authorize you or your agency to make any business deals on my behalf or to represent me in any way."*

57. On the one hand, the references to the date of the Termination Letter (17 April 2011) and the phrase that the Player did *"no longer require you or your agency to represent me"* may be understood as the Player's intention of an immediate termination of the Representation Agreement. On the other hand, the Termination Letter does not state any grounds for an immediate termination. It does not even express any dissatisfaction

of the Player with the current contractual situation. It simply reflects the Player's intention not to continue the contractual relationship. The Agency's reaction to the Termination Letter demonstrates that the Agency understood the Termination Letter as a notice of non-renewal (albeit such notice was considered invalid) and not as an immediate termination.

58. That was also the primary interpretation of the Player in his Answer, namely that the Player did not want the Representation Agreement to continue after its expiration. It seems that the Player acted accordingly when he signed the agreements with Invictus (9 July 2011) and BC Partizan Belgrade (14 July 2011) after the expiration date of the Representation Agreement (6 July 2011).

59. The Arbitrator finds therefore *ex aequo et bono* that the Termination Letter was not written or understood as a notice of the Player's immediate termination of the Representation Agreement for cause but rather as a notice not to renew this agreement after the expiration date of 6 July 2011.

7.2.2. Is the Termination Letter invalid because it was submitted prior to the beginning of the Window Period as stipulated in clause 3 of the Representation Agreement?

60. Clause 3 (*TERM AND RENEWALS*) of the Representation Agreement provides that the agreement will be automatically renewed for subsequent periods of one year each unless written notice is given by either party to the other with an advance notice of no less than 15 and no more than 30 days prior to the *"natural expiration date of the Agreement"*, i.e. the Window Period. There is no dispute between the Parties about the *"natural expiration date of the Agreement"* which was 6 July 2011 (after being automatically renewed twice). The Window Period which is relevant for the case at hand therefore began on 6 June 2011 (30 days prior to the expiration date) and ended on 21 June 2011 (15 days prior to the expiration date).

61. According to the Representation Agreement, the consequences of a non-renewal notice by the Player outside of the Window Period are twofold: the non-renewal notice is not valid and the Player becomes subject to a penalty. The Agency does not claim any penalties under clause 4 of the Representation Agreement.

62. The same clause including a similar Window Period was the subject of a BAT-case last year.[5] There, the arbitrator found that the Window Period had been explicitly agreed to in the Representation Agreement and was therefore enforceable. In that case, the critical question was when the Window Period actually *ended* (which is not disputed in the case at hand) and whether the non-renewal notice was provided *too late*. There was no issue whether the non-renewal notice was provided *too early* as is crucial in the case at hand. Thus, the Arbitrator finds that the cited decision concerned different facts and does not have any influence on the Arbitrator's decision in the present case regarding the validity of a non-renewal notice alleged to have been sent "too early."

63. The Arbitrator fully respects the principle of *pacta sunt servanda* as the starting point of a decision *ex aequo et bono*. He is, however, also entitled to review whether an agreement, or a part of it, violates basic personal rights and must not be respected. Such a review must focus on the specific agreement and take all relevant circumstances into account.

64. Here, the Arbitrator is faced with the rather unique situation that the Player has been blamed for notifying the Agency *too early* of his desire to not renew the agreement, namely *before* the commencement of the Window Period. While it is understandable that a non-renewal notice may be sent or received too late because the other party must know in good time prior to the expiration of an agreement whether or not the first party has exercised its extension (or non-renewal) option, the Agency has not present-

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5 See BAT 0253/12, Interperformances, Inc. vs. Predrag Samardziski.

ed any explanation as to why a non-renewal notice sent prior to the Window Period may be disadvantageous to the recipient.

65. The Arbitrator cannot see any justifiable interest in a prohibition of a too early non-renewal notice. To the contrary, such a prohibition unduly benefits the recipient because there are only 15 days available to file the non-renewal notice and this makes the termination of the Representation Agreement more difficult: although it is true that the restrictions of the Window Period in clause 3 of the Representation Agreement concern both Parties, it handicaps only the Player. The Agency has little interest in getting rid of a player, even if that player is difficult to transfer. In fact, an agency continues to benefit from a large data-base of players, particularly because it is entitled to commissions whether or not it was actively involved in the negotiation of a new player contract. On the other hand, it is the Player who depends on the Agency's activities and must consider a change if he is not satisfied with its services. The short Window Period prevents the Player from making a change of representation, while in contrast, the Agency has little risk associated with the continuation of the relationship and can only benefit from keeping players under contract.

66. The Arbitrator therefore finds that the prohibition against sending a non-renewal notice in advance of the Window Period as provided for in clause 3 of the Representation Agreement, is not justified by valid reasons. It is unbalanced and disadvantageous only to the Player; it overly restricts the Player's right to terminate the Representation Agreement; and it is highly unusual for contracts of this nature. The effect of such a clause is that it violates the Player's basic personal rights and consequently should not be enforced. The Arbitrator holds therefore, that the Termination Notice should not be considered invalid just because it was submitted too early. Instead, it effectively prevented the renewal of the Representation Agreement after 6 July 2011.

7.2.3. Did the Player violate his obligations under the Representation Agreement when he joined Invictus as another agency and signed a player contract with BC Partizan Bel-

grade?

67. Between the date of receipt of the Termination Letter and the expiration of the Representation Agreement, the Parties were still contractually bound. This also means that the Player was still obliged to observe the exclusivity clause in clause 5 of the Representation Agreement. This clause says:

> *"PLAYER expressly acknowledges and accepts that pending this Agreement, the REPRESENTATIVE shall be the sole and only person and/or entity entitled to act in the name of and on behalf of the PLAYER in connection with the provision of any of the representation services listed under paragraph 1 above. Should PLAYER, directly or through the services of any other person/entity other than the REPRESENTATIVE, enter into or even simply negotiate any engagement deal with any basketball club pending this agreement, then REPRESENTATIVE shall be entitled to claim his commission fee from the PLAYER over any such deal as though it had been actually brokered by the REPRESENTATIVE himself. Such fee will fall due and immediately payable upon simple written request by the Representative to the PLAYER."*

68. The Agency alleges that the Player violated the exclusivity clause when it joined the Invictus Sports Group, which is another sports agency, and then BC Partizan Belgrade during the term of the Representation Agreement. The Player submits that the agency agreement with Invictus was signed only on 9 July 2011 and the player contract with BC Partizan Belgrade on 12 July 2011, i.e. after the expiration of the Representation Agreement on 6 July 2011.

69. Clause 5, first sentence, of the Representation Agreement stipulates an obligation of the Player not to co-operate with another sports agency during the term of that agreement. The second sentence determines the consequences when the Player signs or negotiates in person or with the help of another agent an agreement with another basketball club "pending this agreement."

70. The Player signed the new agency agreement on 9 July 2011, i.e. after the expiry of the Representation Agreement. However, he concedes that he and Invictus *"negotiated the terms of their possible relationship"* before, and the copies from Invictus' website of 18 May 2011 ("MARKO CAKAREVIC joins INVICTUS") and also of 21 May 2011

("Double-double for CAKAREVIC!") indicates that the Player started co-operating with that agency well before the formal signing date of 9 July 2011. The Arbitrator therefore finds that the Player violated Clause 5, first sentence of the Representation Agreement when his cooperation with Invictus was repeatedly and unconditionally communicated well before the termination of the Representation Agreement.

71. The contract between the Player and BC Partizan Belgrade bears the signature date of 12 July 2011. The Agency suspects that the parties negotiated this contract prior to the expiration of the Representation Agreement. The burden to demonstrate that negotiations took place already before 6 July 2011 is upon the Agency. However, it could not provide any written evidence or witness statement which would confirm its suspicion. The Arbitrator has taken note of the short time period of only six days between the expiration of the Representation Agreement (6 July 2011) and signing of the Player's new contract with BC Partizan Belgrade (12 July 2011) but finds that this cannot be considered as sufficient evidence for a breach of contract.

72. The Arbitrator therefore finds that the Player was in breach of the Representation Agreement when he started co-operating with Invictus prior to the expiration of that agreement, but there is no evidence that the Representation Agreement was also breached by negotiating or signing the contract with BC Partizan Belgrade.

7.2.4. <u>What are the consequences of the Player's breach of his duties of loyalty to the Agency?</u>

73. Clause 5 of the Representation Agreement prohibits the Player from co-operating with other agencies or agents and from signing or negotiating an agreement with another basketball club. While Clause 5, second sentence, only describes the consequences of a breach of the obligation not to sign or negotiate an agreement *with another basketball club*, namely payment of a commission to the Agency, the Representation Agreement is silent when it comes to the consequences of a breach of the obligation not to co-

operate *with another agency* before the termination of the Representation Agreement. However, this does not mean that there are no such consequences: the Player's breach of Clause 5, first sentence, entitles the Agency to damages for the harm caused by that Player's breach.

74. It is an established principle in BAT case law that whoever claims damages must prove the damage. The Agency did not claim that it suffered any damage because of the early co-operation of the Player with Invictus. For instance, it did not submit that any clubs which were contacted by the Agency refused to negotiate because they were already negotiating with Invictus, and there is no evidence that the Agency made any efforts finding a new engagement for the Player for the time period after the expiration of his contract with Radnicki Kragujevac. The Agency only referred to the commission fee of 10% which it claimed under clause 5 of the Representation Agreement. Nor did it claim any causal connection between the Player's breach of his duties of loyalty and a possible damage of the Agency.

75. Although clause 5 of the Representation Agreement prohibits the Player from co-operating with another agency, the Agency has failed to demonstrate that it suffered any damage as a result of the Player's breach. Also, there is no liquidated damages clause in the Agreement. Consequently, the Arbitrator dismisses the Agency's claim.

7.3. Further damages

76. The Agency requests further damages *"limited to no more than € 100,000.00 as justice requires."* According to BAT jurisprudence, damages are of compensatory nature and the claimant must demonstrate the loss for which it seeks compensation. The Agency does not substantiate at all for which loss it claims further damages. The Arbitrator therefore dismisses the respective request for further damages.

7.4. Authorisation to assert a lien on the salaries

77. The Agency also requests that *"if the Respondent fails and refuses to honor the Award, that the Claimant be authorized to assert a lien on the salaries of the Respondent which are due on him by KK Partizan Belgrade."* The Representation Agreement does not contain a right of a party to secure its claim by a lien and the Agency does not provide any other basis upon which such authorization could be granted. In view of the above findings, the Agency's claim has been dismissed and this issue has become moot.

7.5. Interest

78. Since the Arbitrator dismisses the Agency's claim in its entirety, the Agency's request for interest on the amounts claimed has become moot and is rejected.

8. Costs

79. 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.

80. On 11 June 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 8,000.00.

81. The Arbitrator notes that the Agency's claim was dismissed in its entirety. The Agency must therefore bear all of the fees and costs of the arbitration, i.e. EUR 8,000.00.

82. With regards to the Parties' costs, the Arbitrator finds that the Player shall be entitled to a contribution towards his legal fees and expenses. The Player requests the payment of legal fees of EUR 5,850.00. The Arbitrator find this amount reasonable but, when considering the conduct of the parties (Art. 17.3 of the BAT Rules), takes also the fact into account that part of the Player's submissions, which should have taken considerable time and resources, were exceeding the Arbitrator's procedural requests and were excluded from the file. The Arbitrator therefore sets the contribution to the Player's legal fees and expenses payable by the Agency to EUR 4,500.00.

9. AWARD

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

1. **The claims of Interperformances, Inc. as against Mr. Marko Čakarevič are dismissed in their entirety.**

2. **Interperformances, Inc. shall bear all the costs of the arbitration amounting to EUR 8,000.00.**

3. **Interperformances, Inc. is ordered to pay to Mr. Marko Čakarevič the amount of EUR 4,500.00 as a contribution to his legal fees and expenses. Interperformances, Inc. shall bear its own legal fees and expenses.**

4. **Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 27 June 2013

Stephan Netzle
(Arbitrator)