



**BASKETBALL**  
ARBITRAL TRIBUNAL

## **ARBITRAL AWARD**

**(BAT 0349/12)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Ulrich Haas**

in the arbitration proceedings between

**Mr. Milovan Rakovic**

represented by Mr. Branko Pavlovic, attorney at law,  
Brace Radovanovica 16, Belgrade, Serbia

**- Claimant -**

vs.

**Basketball Club Zalgiris Kaunas (Vsi Kauno Zalgirio remejas)**  
Donelaicio street 60, 44248 Kaunas, Lithuania

**- Respondent -**

represented by Ms. Jolanta Spakauskaite, legal counsel

## **1. The Parties**

### **1.1 The Claimant**

1. Mr. Milovan Rakovic, is a Serbian professional basketball player (hereinafter referred to as “Player” or “Claimant”).

### **1.2 The Respondent**

2. Basketball Club Zalgiris Kaunas - Vsl Kauno Zalgirio remejas (hereinafter referred to as “Club” or “Respondent”) is a professional basketball club located in Kaunas, Lithuania.

## **2. The Arbitrator**

3. On 22 January 2013, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the "BAT") informed the parties that Prof. Dr. Ulrich Haas had been appointed as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the "BAT Rules"). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

## **3. Facts and Proceedings**

### **3.1 Summary of the Dispute**

4. On 10 July 2011, the Parties signed a contract (hereinafter referred to as “the Player Contract”), according to which Respondent engaged the Player as a professional basketball player for the 2011/2012 season.
5. Article 2 of the Player Contract provides as follows:



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*“For rendering his [the Player’s] services as a basketball player, the Club agrees to pay the Player the following amounts net of all Lithuanian taxes and charges, as follows:*

## **2011/2012 Basketball season**

*The Club agrees to pay the Player a net salary of EUR 700’000,- (Euro Seven hundred thousand) payable as follows:*

*EUR 70.000,- (Euro seventy thousand)-on September 15<sup>th</sup> 2011;  
EUR 70.000,- (Euro seventy thousand)-on October 15<sup>th</sup> 2011;  
EUR 70.000,- (Euro seventy thousand)-on November 15<sup>th</sup> 2011  
EUR 70.000,- (Euro seventy thousand)-on December 15<sup>th</sup> 2011  
EUR 70.000,- (Euro seventy thousand)-on January 15<sup>th</sup> 2012  
EUR 70.000,- (Euro seventy thousand)-on February 15<sup>th</sup> 2012  
EUR 70.000,- (Euro seventy thousand)-on March 15<sup>th</sup> 2012  
EUR 70.000,- (Euro seventy thousand)-on April 15<sup>th</sup> 2012  
EUR 70.000,- (Euro seventy thousand)-on May 15<sup>th</sup> 2012  
EUR 70.000,- (Euro seventy thousand)-on June 15<sup>th</sup> 2012*

*Payments which are made 15 (fifteen) days later than the dates noted shall be subject to a penalty of 0.2 percent from the outstanding sum per day. In case of scheduled payments not being made by the Club more than 40 (forty) days of the scheduled payment, the Player shall be entitled to terminate the Contract and to claim a compensation of damages, or according to his discretion, to suspend the performance of the Contract, i.e., in the latter case, he shall not have to perform in practice sessions or games until all scheduled payments have been made plus appropriate penalties and such non-performance will not be considered a breach of contract.*

*In case of termination of the Contract on the above grounds, upon receipt of a request from the National Federation to issue the Player’s Letter of Clearance, the Club must authorize the Federation to do so unconditionally within 24 (twenty four) hours without charging a transfer fee.”*

6. Article 3 subparagraph e of the Player Contract reads as follows:

*“Bonuses: Based on the performance of the Club during the term of this Agreement, the following bonuses will be paid to the Player:*

<i>LKF Cup champion</i>	<i>EUR 5.000,-</i>
<i>BBL champion</i>	<i>EUR 7.000,-</i>
<i>LKL champion</i>	<i>EUR 10.000,-</i>
<i>Reach Euroleague TOP 16</i>	<i>EUR 10.000,-</i>
<i>Reach Euroleague FINAL FOUR</i>	<i>EUR 15.000,-</i>

*Euroleague champion*  
*VTB UBL champion*

*EUR 30.000,-*  
*EUR 10.000,-*

7. It is undisputed that the Club has paid the salaries for the months of September 2011 until March 2012 in full. The present dispute revolves around the issue of whether the Club has failed to pay to the Player, half the salary for the month of April 2012, the entire instalments due in May and June 2012, and the bonuses under the Player Contract.
8. On 11 September 2012, Claimant submitted a “Players Notice” to the Respondent. The “Players Notice” advised the Respondent that it owed to the Player EUR 175,000 in salaries and EUR 32,000 in bonuses (“LKF Cup championship, BBL champion, LKL champion, Reach Euroleague TOP 16”). Furthermore, the “Players Notice” stated that in order to avoid BAT arbitration, Respondent would be given a final deadline of 27 September 2012 to pay the outstanding EUR 207,000 to the Player, failing which BAT proceedings would be commenced “unilaterally without necessity of any further notice.”

### **3.2 The Proceedings before the BAT**

9. On 9 December 2012, Claimant’s counsel filed a Request for Arbitration (with several exhibits) on behalf of Claimant and in accordance with the BAT Rules. The Non-Reimbursable fee of EUR 4,000 was received in the BAT bank account on 22 November 2012.
10. On 22 January 2013, the BAT informed the Parties that Prof. Dr. Ulrich Haas had been appointed as Arbitrator in this matter, invited the Respondent to file its answer in accordance with Article 11.2 of the BAT Rules by no later than 12 February 2013 (the “Answer”), and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 1 February 2013 as follows:

*“Claimant (Milovan Rakovic)*

*EUR 5,000*

*Respondent (BC Zalgiris Kaunas)*

*EUR 5,000”*

11. On 15 February 2013, the BAT Secretariat confirmed receipt of Claimant’s share of the Advance on Costs (in the amount of EUR 5,000). Furthermore, BAT informed the Parties that Respondent had failed to submit an Answer, and to pay its share of the Advance on Costs. Therefore, BAT also informed Claimant of his right to pay Respondent’s share of the Advance on Costs, in order to ensure that the arbitration proceeded, by no later than 26 February 2013. Finally, Respondent was granted a final opportunity to file an Answer to the Request for Arbitration by no later than 22 February 2013.
12. On 4 March 2013, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs paid by Claimant.
13. On 27 March 2013, the Arbitrator invited Claimant to submit further clarifications concerning the outstanding amounts being claimed. In particular, the Arbitrator requested the Claimant to provide proof of the sporting results of the Respondent’s team in relation to the bonuses claimed.
14. On 14 April 2013, Claimant submitted the requested information.
15. On 9 July 2013, the Arbitrator informed the Parties that the Respondent was given a final deadline of 17 July 2013 to comment on the information provided by Claimant on 14 April 2013. Furthermore, the Parties were informed that once the deadline for Respondent to submit its comments had passed, the exchange of documents would be closed. Thus, the Parties were also invited to provide the Arbitrator with a detailed account of their costs within the above deadline.
16. On 9 July 2013, the Claimant provided his detailed account of costs.

17. On 11 July 2013, the Respondent requested an extension of the deadline to file its comments on the information provided by the Claimant on 14 April 2013.
18. On 15 July 2013, the Claimant objected to an extension of the deadline in favour of the Respondent.
19. On 17 July 2013, the Arbitrator advised the Respondent once more that its comments must be strictly limited to the documents filed by the Claimant on 14 April 2013 and that – in view of Claimants objections – an extension of the deadline could only be granted until 31 July 2013.
20. On 31 July 2013, the Respondent filed an offer for a settlement agreement with the BAT that is entitled “Settlement Agreement 31<sup>st</sup> day of June (sic) of the year two thousand and thirteen Kaunas”. In the cover letter to the settlement agreement the Respondent writes as follows: *“Respondent do not challenge the debt to the Claimant in the amount of 207.000 EUR ... and do not seek to avoid payment of the aforementioned debt. However, problems with the former main sponsors of the respondent (including bankruptcy of main sponsor UKIO BANKAS) resulted in very serious financial difficulties. ....”*.
21. On 1 August 2013, the Claimant rejected Respondent’s settlement offer and requested the BAT to issue the award.

#### **4. The Positions of the Parties**

##### **4.1 Claimant’s Position**

22. Claimant submits the following in substance:



- Player was employed as a professional basketball player by Respondent for the season of 2011/2012. Player received eight monthly instalments until the month of April 2012, namely the seven first instalments (September 2011- March 2012, EUR 70,000 per month) according to Article 2 of the Player Contract, and half (EUR 35,000) of the April instalment. The remaining instalments (which fell due on 15 April, 15 May and 15 June 2012) as well as the earned bonuses based on the sporting results of the Club during the season were not paid.
- On 11 September 2012, Claimant tried to prevent BAT proceedings by sending a notice to Respondent and inviting the latter to fulfil its obligations within a final deadline. However, Respondent did not react to the notice and left Claimant with no other possibility but to file his claim with the BAT.

23. In his Request for Arbitration, Claimant requests the following relief:

*“(...) Player’s salaries and bonuses in total amount of 207.000 EUR, plus interests at 5% per annum from July 1<sup>st</sup> 2012, onwards until final payment, costs of BAT arbitration and legal fees according to the BAT Award which will resolve this dispute.”*

#### **4.2 Respondent's Position**

24. Despite several invitations by the BAT, the Club initially decided not to engage in the arbitration proceedings at hand and did not make any submissions within the time limits set by the Arbitrator in accordance with the BAT Rules. The Arbitrator ensured that Respondent had received all communications from the BAT in conformity with the BAT Rules via fax and email. Only following the procedural order dated 9 July 2013 inviting Respondent to comment on the newly submitted documents by Claimant, did the Respondent react by requesting an extension of the deadline for submitting its comments. After the extension was partly granted, the Respondent submitted a settlement offer and acknowledged the claims filed by the Claimant in the full amount.

## 5. Jurisdiction

25. Pursuant to Art. 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).
26. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

### 5.1 Arbitrability

27. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Art. 177(1) PILA<sup>1</sup>.

### 5.2 Formal and substantive validity of the arbitration agreement

28. Art. 4 of the Player Contract contains an arbitration clause that reads as follows:

***“Dispute***

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

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



29. This arbitration clause included in the Player Contract and signed by both parties thereto is in written form and thus fulfils the formal requirements of Article 178(1) PILA.
30. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity of the arbitration agreement in the present matter under Swiss law (cf. Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” in Art. 4 of the Player Contract clearly covers the present dispute.<sup>2</sup>
31. In addition, the Respondent did not object to the jurisdiction of BAT in its submissions of 11 July and 31 July 2013.
32. In view of all the above, the Arbitrator, therefore, holds that he has jurisdiction to decide the present dispute.

## 6. Applicable Law

33. 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 reads as follows:

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

34. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

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<sup>2</sup> See for instance BERGER/ KELLERHALS: International and domestic Arbitration in Switzerland, Berne 2010, N 466.

*“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.”*

35. Article 4 of the Player Contract provides in relation to the applicable law as follows:

*“[...] The arbitrator shall decide the dispute ex aequo et bono.”*

36. Consequently, the Arbitrator will decide the present matter *ex aequo et bono*.

37. 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 1969<sup>3</sup> (Concordat),<sup>4</sup> 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.”<sup>5</sup>*

38. 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.”<sup>6</sup>*

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

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<sup>3</sup> This Swiss statute governed international and domestic arbitration prior to the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

<sup>4</sup> KARRER, in: Basel commentary to the PILA, 2<sup>nd</sup> ed., Basel 2007, Art. 187 PILA N 289.

<sup>5</sup> JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

<sup>6</sup> POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

## **7. Findings**

40. In essence, Claimant requests the payment of the outstanding salaries (7.1), interests of 5% p.a. on the outstanding salaries (7.2), payment of the outstanding bonuses (7.3), interests of 5% p.a. on the outstanding bonuses (7.4), and the reimbursement of all legal fees related to this litigation (8).

### **7.1 Outstanding salary**

41. Claimant and Respondent are parties to the Player Contract, which was entered into on 10 July 2011.

42. According to Article 2 of the Player Contract, the Player was entitled to monthly salaries in the amount of EUR 70,000. According to the Player Contract, the remuneration fell due on the 15<sup>th</sup> day of the respective month (from September 2011 until June 2012).

43. The Respondent paid Claimant's full salary for the months of September 2011 through March 2012. In April 2012 however, Respondent only paid half of the salary, namely EUR 35,000. The May and June 2012 instalments were not paid at all. There is no evidence on file that would indicate in the present case that Respondent was entitled to withhold payment of the amounts agreed to in the Player Contract. Furthermore, the Respondent in its covering letter to the settlement offer acknowledged the outstanding amounts in full.

44. To conclude, therefore, the Arbitrator finds that the Respondent is under an obligation to pay EUR 175,000 (35,000 + 70,000 + 70,000) in outstanding salaries to the Player.

## 7.2 Interest on outstanding salaries

45. The Player Contract expressly deals with the consequences of late payments in Art. 2, namely that payments which are made 15 days later than the dates noted shall be subject to a penalty of 0.2% from the outstanding sum per day until 40 days after the due date. The Article provides in this regard as follows:

*“Payments which are made 15 (fifteen) days later than the dates noted shall be subject to a penalty of 0.2 per-cent from the outstanding sum per day. In case of scheduled payments not being made by the Club more than 40 (forty) days of the scheduled payment, the Player shall be entitled to terminate the Contract and to claim a compensation of damages, or according to his discretion, to suspend the performance of the Contract, i.e., in the latter case, he shall not have to perform in practice sessions or games until all scheduled payments have been made plus appropriate penalties and such non-performance will not be considered a breach of contract.”*

46. The Arbitrator finds that the Claimant is not entitled to both interests and penalty for late payment simultaneously. For the periods the Player can claim late penalty payments under the Player Contract, no interest on the outstanding amount can be claimed. According to BAT jurisprudence, late penalty payments agreed to by the Parties, can – in principle – only be claimed as long as the contract is still in force. Once, however, the contract is terminated or expires – absent any express provision to the contrary in the contract – no late penalty payments can be requested. In the case at hand, Claimant requests the payment of interests as from 1 July 2012, i.e. as from the expiry of the Player Contract. Thus, the claim for interest is not precluded by Article 2 of the Player Contract.
47. The requested payment of interest as well as the interest rate of 5% p.a. is in accordance with the BAT jurisprudence. According thereto, a rate of 5% p.a. seems appropriate and serves to avoid the Club from deriving any profit from the non-fulfillment of its obligations. Thus, the Arbitrator finds that the Respondent shall pay to Claimant interests on the amount of EUR 175,000 of 5% p.a. as of 1 July 2012.

### **7.3 Outstanding Bonuses**

48. The Player claims bonuses for the season 2011-2012 in the amount of EUR 32,000. Article 3 subparagraph e of the Player Contract provides various bonuses based on the sporting results of the Club. Claimant, upon invitation of the Arbitrator, provided proof for the bonuses related to “LKL Cup champion” (in the amount of EUR 5,000), “BBL champion” (in the amount of EUR 7,000), “LKL champion” (in the amount of EUR 10,000) and “Reach Euroleague TOP 16” (in the amount of EUR 10,000). There is no evidence on file that would allow Respondent to withhold any or all of the bonuses in the amount of EUR 32,000. Furthermore, the Respondent in its cover letter to its settlement offer recognized the outstanding amounts in full. Thus, the Arbitrator concludes that the Claimant is entitled to EUR 32,000 in bonuses.

### **7.4 Interest on Bonuses**

49. Article 3 subparagraph e of the Player Contract provides that all bonuses become due after the last game of the club, which was held and played by Claimant on 13 May 2012. In his Request for Relief, Claimant claims interests on the outstanding bonuses in the amount of 5% p.a. as from 1 July 2012 onwards. This request is in line with the standing jurisprudence of the BAT. Thus, the Arbitrator orders the Respondent to pay the requested interests.

## **8. Costs**

50. 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 legal fees and expenses incurred in connection with the proceedings.

51. On 24 September 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”; 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”, and 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 7,865.00.
52. Considering that Claimant prevailed with all of his claims, the Arbitrator holds it fair that all of the fees and costs related to this arbitration be borne by Respondent and that Respondent be required to cover its own legal costs as well as all of Claimant’s legal costs.
53. Given that Claimant paid both shares of the Advance on Costs in the amount of EUR 5,000 each (in total EUR 10,000), the Arbitrator decides that in application of Article 17.3 of the BAT Rules:
- (i) BAT shall reimburse EUR 2,135.00 to Claimant, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President;
  - (ii) Respondent shall pay EUR 7,865.00 to Claimant, being the difference between the costs advanced by him and the amount to be reimbursed by the BAT.
  - (iii) Furthermore, the Arbitrator considers it appropriate to take into account the non-reimbursable handling fee of EUR 4,000 when assessing the expenses incurred by the Claimant in connection with these proceedings. The Claimant is asking in total for EUR 4,380 in legal fees and expenses, which is reasonable in view of the complexity of the case. Thus, the Arbitrator fixes the contribution towards the





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Claimant's legal fees and expenses at EUR 8,380, which is below the maximum amount provided for in Article 17.4 of the BAT Rules for cases of this value.

## **9. AWARD**

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

- 1. Basketball Club Zalgiris Kaunas (Vsl Kauno Zalgirio remejas) is ordered to pay to Mr. Milovan Rakovic outstanding salaries and bonuses in the amount of EUR 207,000.00 plus interests of 5% p.a. on such amount from 1 July 2012 until payment.**
- 2. Basketball Club Zalgiris Kaunas (Vsl Kauno Zalgirio remejas) is ordered to pay to Mr. Milovan Rakovic EUR 7,865.00 as a reimbursement of the Advance on Costs.**
- 3. Basketball Club Zalgiris Kaunas (Vsl Kauno Zalgirio remejas) is ordered to pay to Mr. Milovan Rakovic the amount of EUR 8,380.00 as a contribution towards his legal fees and expenses. Basketball Club Zalgiris Kaunas (Vsl Kauno Zalgirio remejas) shall bear its own legal fees and expenses.**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 26 September 2013

Ulrich Haas  
(Arbitrator)