BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0401/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Raj Parker

in the arbitration proceedings between

Mr. Vladimir Dasic
c/o Mr. Salim Baki, Serbesti Cad. Seker Palas Apt. No:1 D:6,
34149 Yesilköy, Turkey

- Claimant -

represented by Mr. Salim Baki, attorney at law,
Serbesti Cad. Seker Palas Apt., No:1 D:6, 34149 Yesilköy, Turkey

vs.

Besiktas Jimnastik Kulübü Dernegi
Suleyman Seba Caddesi, No. 48 BJK Plaza,
Akaretler, Besiktas, 34357 Istanbul, Turkey

- Respondent -

represented by Mr. Emin Özkurt, attorney at law,
İnönü Caddesi, No: 35/2, Gümüşsuyu, Beyoğlu 34437,
İstanbul, Turkey

1. The Parties

1.1 The Claimant

1. Mr. Vladimir Dasic (hereinafter the "Claimant") is a professional basketball player from Serbia.

2. In these proceedings, the Claimant is represented Mr. Salim Baki, attorney at law in Yesilköy, Turkey.

1.2 The Respondent

3. Besiktas Jimnastik Kulübü Dernegi (hereinafter the "Respondent") is a professional basketball club in Turkey.

4. The Respondent is represented by Mr. Emin Özkurt, attorney at law in Istanbul, Turkey.

2. The Arbitrator

5. On 14 June 2013, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT") appointed Mr. Raj Parker as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules").

6. Neither of the Parties have raised objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Background Facts

7. On 27 August 2012, the Claimant and the Respondent entered into a contract in relation to the 2012-2013 season (hereinafter the "Contract").

8. The Contract contains, among others, the following provisions:

> *"<u>ARTICLE II – THE CLUB'S OBLIGATIONS</u>*
>
> *1. The Club will pay to the Player a net salary (after taxes) of 330,000 Euro to be paid according to the following payment schedule:*
>
> *After passing the medical examination – 40,000 Euro, not later than September 20, 2012.*
>
> *October 15,2012 - 27,500 Euro*
> *November 15,2012 - 37,500 Euro*
> *December 15,2012 - 37,500 Euro*
> *January 15,2013 - 37,500 Euro*
> *February 15,2013 - 37,500 Euro*
> *March 15,2013 - 37,500 Euro*
> *April 15,2013 - 37,500 Euro*
> *May 15,2013 - 37,500 Euro*
>
> *The money are [sic] guaranteed and will be paid in Euro only.*
>
> *[…]*
>
> *8. The Club agrees that this Agreement is no-cut guaranteed agreement*
>
> *[…]*
>
> *9. The Club will pay to the Player following bonuses:*
>
> *A) <u>EUROLEAGUE</u>*

Top 16 : 10.000€
Final Four : 20.000€
Wining EL Championship : 40.000€

B) <u>PRESIDENT CUP</u>
Winning Presentital [sic] cup: 10.000€

[…]

<u>ARTICLE IV – BREACH OF PREMATURE ENDING OF THE CONTRACT</u>

1. *Under no circumstances other than serious professional misconduct(if Player does not comply with rules and regulations of the Turkish League Federation, the Internal Regulations, FIBA regulations and during testing and doping control) to be notified to the Player by registered mail within 48 hours , can the Club cut the Player.*

If the Club does not make any payment due to the Player within thirty (30) days on the date called for under this contract, Player will not be required to practice or play basketball for the team until the payment is received, but the obligations of the Club shall continue. In the case of scheduled payments not being made to the Player or Agents by the Club within thirty (30) days of the scheduled payment date, The Player will have right to request terminating the contract unilaterally by written notice to the Club. In case of the scheduled payments not being made within the next seven (7) days after such a written notice is received by the Club, the Player will have right to terminate the contract unilaterally by providing the Club with a final written notice of termination. Player shall then be free to sign with the team of his choice in Turkey or anywhere else in the world, and all salary and bonus payments shall be due to Player immediately. Club shall be required to release Player immediately to any team which the Player desires, and Club shall have no right to ask for any transfer fee.

[…]

<u>ARTICLE VII – FINAL CLAUSES</u>

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

9. The Claimant ceased playing for, and attending practices with, the Respondent after 25 December 2012.

10. To date, the Respondent has paid a total of EUR 77,500.00 to the Claimant, pursuant to the Contract.

3.2 The Proceedings before the BAT

11. On 11 April 2013, the Claimant filed a Request for Arbitration in accordance with the BAT Rules. On 15 April 2013, the BAT received the non-reimbursable handling fee of EUR 4,000.00 from the Claimant.

12. By letter dated 2 September 2013, the BAT Secretariat fixed a time limit until 23 September 2013 for the Respondent to file its Answer to the Request for Arbitration. By the same letter, and with a time limit for payment of 16 September 2013, the following amounts were fixed as the Advance on Costs:

"Claimant (Mr Vladimir Dasic) EUR 5,000

Respondent (Besiktas Jimnastik Kulübü Dernegi) EUR 5,000"

13. The Respondent filed, under a granted extension, its Answer to the Request for Arbitration on 1 October 2013.

14. The Claimant paid all the Advance on Costs by 9 October 2013. The Respondent failed to pay its share of the Advance on Costs.

15. On 25 October 2013, the Arbitrator issued a Procedural Order (hereinafter the "First Procedural Order") in which he requested further information from the Claimant.

16. The Claimant submitted his response to the First Procedural Order on 4 November

2013.

17. By Procedural Order dated 12 November 2013, the Arbitrator declared the exchange of documents complete, and requested that the Parties submit detailed accounts of their costs by 19 November 2013.

18. On 18 November 2013, the Claimant submitted the following account of costs:

> "*List of costs*
>
> *Advance on costs*
>
> | | |
> |---|---|
> | *Claimant's Share* | *5,000.00 Euro* |
> | *Respondent's Share* | *5,000.00 Euro* |
>
> *Written Notification costs*
> *(Annexes 2, 3, 7 and 8 of the RFA)*
>
> | | |
> |---|---|
> | *Notary Public fees (822,30-TL)* | *300.00 Euro* |
> | *Translation costs (442,53-TL)* | *162.00 Euro* |
>
> *Legal fees*
>
> | | |
> |---|---|
> | *Non-reimbursable handling fee* | *4,000.00 Euro* |
> | *Attorney Fees* | *11,000.00 Euro* |
> | ***TOTAL*** | ***25,462.00 Euro*** |
>
> "

19. On 23 November 2013, the Respondent submitted the following account of costs:

> "*Pursuant to the procedural order issued on 12 November 2013 in the above referenced matter, Respondents account of costs is submitted below:*
>
> | | | |
> |---|---|---|
> | *Attorney's fees* | *:* | *€15.250,-* |
> | *Other expenses* | *:* | *€ 50,-* |
> | ***Total:*** | | ***€15.300,-*** |
> | | | **=======**" |

20. By email dated 23 November 2013, the BAT Secretariat sent the Claimant's account of costs to the Respondent and requested that the Respondent submit any comments on the Claimant's account of costs by no later than 29 November 2013. The Respondent

did not submit any such comments.

21. By email dated 26 November 2013, the BAT Secretariat sent the Respondent's account of costs to the Claimant and requested that the Claimant submit any comments on the Respondent's account of costs by no later than 3 December 2013. On 2 December 2013, the Claimant submitted a letter to the BAT Secretariat regarding the Respondent's account of costs. In the letter, the Claimant:

    (i) noted that the Respondent had submitted its account of costs 6 days after the deadline provided by the Arbitrator;

    (ii) requested the Arbitrator not to take in account the costs submitted by the Respondent, on the basis of the late submission; and

    (iii) submitted that the Respondent's costs were excessive.

22. Since none of the Parties filed an application for a hearing, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the award on the basis of the written submissions of the Parties.

4. The Parties' Submissions

4.1 The Claimant's Submissions

23. The Claimant asserts that, pursuant to Article II of the Contract, the Respondent was required to make the following payments (among others) to the Claimant:

    (i) a salary payment of EUR 40,000.00 after passing a medical

examination and not later than 20 September 2012;

(ii) a salary payment of EUR 27,500.00 on 15 October 2012;

(iii) a salary payment of EUR 37,500.00 on 15 November 2012; and

(iv) a bonus payment of EUR 10,000.00.

24. However, the Respondent paid only EUR 40,000.00 on 1 October 2012 and EUR 10,500.00 on 22 November 2012 to the Claimant. Consequently, the Claimant sent a letter to the Respondent dated 27 November 2012 (hereinafter, the "Claimant's Warning Letter"), which stated that unless the outstanding salaries and bonus were paid within seven days, the Claimant would terminate the Contract.

25. The Claimant submits that payment of the outstanding salaries and bonus was not made within seven days and so the Claimant was entitled to terminate the Contract in accordance with Article IV of the Contract. The Claimant asserts that he terminated the Contract by letter dated 19 December 2012.

26. On 5 March 2013, the Claimant entered into a contract with a new club, pursuant to which he earned EUR 15,000.00 for the remainder of the 2012-2013 season.

27. The Claimant claims all outstanding salary and bonus payments under the Contract, together with interest, less the EUR 15,000.00 that he earned from his new club.

28. The Claimant's request for relief states:

*"**Request for Relief***

According to the facts submitted above Claimant hereby requests:

1. 272.000 Euro for the unpaid salary and bonuses and an interest

payment at the applicable Swiss statutory rate from the due date of each payment,

2. *Compensation of arbitrations fees and costs,*

3. *A contribution towards his legal fees and expenses."*

29. On 13 June 2013, the Claimant sent an email to the BAT Secretariat stating, inter alia:

> *"As Mr. Dasic is paid 15.000 Euro from his new Club, we hereby renovate our Request for Relief as '257.000 Euro for the unpaid salary and bonuses and an interest payment at the applicable Swiss statutory rate from the due date of each payment' and kindly request the Arbitrator to accept our renovation for the Request for Relief."*

4.2 The Respondent's Answer

30. The Respondent acknowledges that it was late in making certain bonus and salary payments to the Claimant. However, the Respondent submits that the Claimant was not entitled to terminate the Contract.

31. In particular, the Respondent argues that, following receipt of the Claimant's Warning Letter, the Respondent had seven days in which to make the October salary payment of EUR 27,500.00 to the Claimant. It was only if payment was not made within 7 days of receipt of the Claimant's Warning Letter, that the Claimant would be entitled to terminate the Contract in accordance with Article IV of the Contract.

32. The Respondent submits that it instructed its bank to make payment of EUR 27,500.00 to the Claimant on 7 December 2012 and therefore payment was made on the seventh day following receipt of the Claimant's Warning Letter. Hence, the Claimant's purported termination of the Contract on 19 December 2012 was neither valid nor effective.

33. The Respondent submits that it sent the Claimant a warning notice on 9 January 2013 (hereinafter the "Respondent's Warning Notice"), in which the Respondent informed the

Claimant that the Contract was still in force and that the Claimant was in breach of the Contract by failing to attend practice sessions.

34. The Claimant failed to attend several subsequent practice sessions and matches. On 24 January 2013, the Respondent sent the Claimant a second warning notice, requesting the Claimant to fulfil his obligations under the Contract. However the Claimant refused to attend any further practices or matches and so the Respondent sent the Claimant a letter on 13 February 2013, terminating the Contract on the basis that the Claimant had refused to honour the Contract.

35. The Respondent requests that all of the Claimant's claims are dismissed and that Claimant be ordered to pay the arbitration costs as well as the Respondent's legal fees and expenses.

5. Jurisdiction

36. 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).

37. 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

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

5.2 Formal and substantive validity of the arbitration agreements

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

> *"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.*
>
> *2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.*
>
> *3 The validity of an arbitration agreement may not be contested on the grounds that the principal contract is invalid or that the arbitration agreement concerns a dispute which has not yet arisen."*

40. The Contract is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) of the PILA). In particular, the wording "[a]*ny dispute arising from or related to the present contract*" clearly covers the present dispute. In addition, the Respondent did not object to the jurisdiction of BAT.

41. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimant's

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

claim.

6. Discussion

6.1 Applicable Law – ex aequo et bono

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

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

43. 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."*

44. Article VII of the Contract states "[t]*he arbitrator upon appeal shall decide the dispute ex aequo et bono*".

45. In light of the above, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.

46. 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]

47. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives "*a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case*".[5]

48. 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*".

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

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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).

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

6.2 Findings

6.2.1 Termination of the Contract

50. The Respondent does not dispute that it has paid only EUR 77,500.00 to the Claimant. The Claimant admits that it ceased performing its obligations under the Contract from 25 December 2012.

51. The crux of the dispute between the Parties therefore turns on one question: did the Claimant validly terminate the Contract? If the Claimant did validly terminate the Contract, he was not obliged to perform his contractual obligations after 25 December 2012 and is entitled to compensation for the unpaid salaries and bonus. If, however, the Claimant did not validly terminate the Contract, then he breached a fundamental term of the Contract by failing to attend practices and matches after 25 December 2012, and the Respondent was entitled to terminate the Contract when it did so on 13 February 2013.

52. There now follows an analysis of the Claimant's attempt to terminate the Contract. Pursuant to Article IV of the Contract, if the Claimant seeks to terminate the Contract for non-payment of salary, there are four stages in the process:

    (i) the Respondent must be thirty days late in making a payment;

    (ii) the Claimant must then send written notice that it intends to terminate the Contract;

    (iii) the Respondent must then fail to make the payment within a seven day grace period; and

    (iv) if payment is not made within seven days, the Claimant can terminate

the Contract by written notice.

53. Each of these stages will now be examined in turn.

6.2.1.1 Thirty Days Late Payment

54. Pursuant to Article II of the Contract, the Respondent was obliged to pay the Claimant EUR 37,500.00 on 15 October 2012 (comprising EUR 27,500.00 in salary and EUR 10,500.00 as a bonus linked to winning the Presidential Cup). The Respondent admits that it did not pay the Claimant this amount (at least not the full amount) within thirty days of 15 October 2012.

55. The first stage of the termination process was therefore satisfied.

6.2.1.2 Written notice of the Claimant's intention to terminate the Contract

56. On 27 November 2012, the Claimant sent the Claimant's Warning Letter to the Respondent. The Claimant's Warning Letter states that the Respondent failed to make various payments on time and that, unless the Claimant's salary for October 2012 and bonus for winning the Presidential Cup were paid in full within seven days, the Claimant "*shall request termination of the contract*".

57. In its Answer, the Respondent states that the Claimant's Warning Letter "*contained false information*". However, the Respondent has not explained what information it considers to be false. In any event, the Respondent appears to accept in his Answer that the October salary and bonus were due and payable within seven days of receipt of the Claimant's Warning Letter. For example, the Respondent stated in its Answer that it "*examined the issue internally and paid on Friday, December 7, 2012, at 18.50 o,clock the missing salary and bonus amounting EUR 27,000 to the Claimant's well*

know account at Garanti Bank…" and that "*the correct amount was paid right in time to the correct receiver*".

58. The Arbitrator considers that Claimant's Warning Letter satisfied the requirements of Article IV of the Contract. Consequently, the Arbitrator finds that the second stage of the termination process was completed in accordance with the terms of the Contract.

6.2.1.3 Failure to pay within 7 days following written notice

59. The Claimant has submitted evidence to show that the Claimant's Warning Letter was received by the Respondent on 30 November 2012, and the Respondent does not dispute that it received the Claimant's Warning Letter on this day. The Respondent was therefore required to pay the outstanding October salary and bonus within seven days of 30 November 2012 (i.e. by no later than 7 December 2012).

60. The Respondent submits that it instructed its bank to pay the relevant sums to the Claimant at 18.50 on 7 December 2012 and so discharged its obligation to make the payment within seven days. The Respondent argues that the obligation is for the payment to be *made* within seven days, not for the payment to be *received* within seven days.

61. The Claimant submits that the Respondent did not meet its obligation to make the payment within seven days because:

    (i) the payment sent by the Respondent at 18.50 on 7 December 2012 was actually sent to a German bank, and not to the Claimant's bank account in Turkey;

    (ii) the Respondent's SWIFT payment instruction to its bank was made after 18:00 and so does not constitute a transfer made on that day

because it was made outside of working hours; and

(iii) the only evidence that either party has submitted showing that payment was made into the Claimant's account is a bank statement produced by the Claimant showing that the funds appeared in the Claimant's account on 10 December 2012 (not 7 December 2012). Payment was therefore made on 10 December, and not within seven days of the Claimant's Warning Letter.

62. The Respondent counter-argues that the reason the payment was made to a German bank was that the payment was a "Euro-Payment". The Respondent submits that in such circumstances, it is an internal procedure of its bank to transfer the funds to a German bank, which then transfers the funds to the Claimant.

63. Article IV of the Contract provides that the Claimant may terminate the Contract in the event of "*scheduled payments not being made within the next seven (7) days*". The wording of Article IV is imprecise; it does not explicitly state whether the Respondent's payment obligation is satisfied upon giving an instruction to its bank, or upon the Claimant actually receiving the funds in his account.

64. It is for the Arbitrator to interpret the wording and determine whether or not payment was made within the seven day time-period, for the purposes of Article IV. While the SWIFT payment instruction was given by the Respondent on 7 December 2012, it was done so outside of working hours. The Arbitrator finds that this does not constitute "*payment… being made*" to the Claimant on 7 December 2012. Furthermore, the Respondent should have been aware of the risk that its bank would not even begin to process the payment instruction until the next working day, let alone actually transfer the funds to the Claimant's account.

65. The Arbitrator is not persuaded by the Respondent's argument that the payment was a

"Euro-Payment" and that, because of an internal procedure, the Respondent bank was required to transfer the funds to a German bank, and then on to the Claimant. From the evidence presented to the Arbitrator, it appears that such a procedure did not occur when other payments were made from the Respondent to the Claimant. Moreover, the Respondent and the Claimant's bank accounts were both held with the Turkish bank, Garanti. No explanation has been provided as to why the funds would need to be transferred to a German bank (Commerzbank AG), instead of directly from the Respondent's Garanti bank account to the Claimant's Garanti bank account.

66. The Arbitrator's findings are consistent with BAT (then FAT) decision 0054/09 (*Salyers v Azovmash Mariupol Basketball Club*), a case in which a similar issue arose. In that case, the Arbitrator (Mr. Quentin Byrne-Sutton) held that "*the Club must have known that it needed to take precautions to ensure timeliness in payment for an international bank transfer, and the onus was on the Club to ensure that the payment was credited within the promised time limit…*"[6] Mr. Byrne-Sutton's findings were upheld when *Salyers v Azovmash Mariupol Basketball Club* was appealed to the Court of Arbitration for Sport.[7] The sole arbitrator in the appeal (Mr. Mark Hovell) noted that SWIFT payments "*involved the uncertainties of international bank transfers*" and that "*it was always in the Appellant's domain to decide when to put the money into the banking system.*"[8]

67. The Arbitrator accepts the Claimant's submission that the Respondent failed to make the payment within the seven day time-period. Consequently, the Arbitrator finds that the third stage of the termination process was satisfied.

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6 See paragraph 77.

7 See CAS 2010/A/2035.

8 Ibid at paragraph 54.

6.2.1.4 Termination of the Contract by written notice

68. Article IV of the Contract provides:

> "*In case of the scheduled payments not being made within the next seven (7) days after such a written notice is received by the Club, the Player will have right to terminate the contract unilaterally by providing the Club with a final written notice of termination."*

69. On 19 December 2012, the Claimant sent a letter to the Respondent, referring to the Claimant's Warning Letter and to Article IV of the Contract. The letter dated 19 December stated that the Respondent had failed to make payment of the relevant outstanding sums within the seven day period and, as a result, "*we notify termination of the "Professional Basketball Contract" dated 27.08.2012 by this notice*". The Respondent confirmed that it received the letter.

70. The Arbitrator therefore finds that the fourth stage of the termination process was completed in accordance with the terms of the Contract. Accordingly, the Arbitrator finds that the Contract was validly terminated by the Claimant and that the Claimant is entitled to compensation for unpaid salary and bonus.

71. The Respondent sought to argue in its submissions (and in correspondence with the Claimant at the time) that the Contract was in force until the Respondent terminated it on 13 February 2013. As an aside, the Arbitrator notes that the Respondent's acts were not always consistent with this argument. For example, the Respondent did not pay the Claimant its salary for November, December or January. If the Respondent truly believed that that Contract was valid during this period, it begs the question: why did the Respondent not pay salary to the Claimant at that time (particularly for November, during which month the Claimant played in matches and practices for the Respondent)?

6.2.2 Mitigation of the Claimant's losses

72. Under the Contract, the Respondent was required to pay the Claimant a total of EUR 340,000.00 in salary and bonus payments for the 2012-2013 season.

73. The Respondent does not dispute that it has paid only EUR 77,500.00 to the Claimant. This leaves a shortfall of EUR 262,500.00 against the total amount payable pursuant to the Contract.

74. The Claimant submitted that, after it had terminated the Contract, it signed a contract with a new club for the period from 5 March 2013 to 30 June 2013, pursuant to which he earned EUR 15,000.00 in total. In response, the Respondent submitted that "*a player of the Claimant's quality does never play for a EUR 15,000 salary for a 4 month period*" and that "*he got more than… twice as much just for one month from the Respondent.*"

75. The Arbitrator has not been provided with evidence proving that the Claimant's new contract is inauthentic or in some way a sham. However, it is noteworthy that the Claimant was able to command a salary from the Respondent of EUR 330,000.00 for the 2012-2013 season, and then after terminating the Contract on 19 December 2012, only managed to negotiate salary of EUR 15,000.00 for the remainder of the season. Even when taking into account the fact that it is often more difficult for a player to negotiate a contract which commences part of the way through a season, the Claimant has failed to provide convincing arguments as to why his salary with the new club was so low in comparison with the salary provided under the Contract with the Respondent. In light of the above, the Arbitrator considers the Claimant has failed to mitigate his losses adequately.

6.2.3 The level of compensation payable to the Claimant

76. It falls to the Arbitrator to determine the level of compensation payable to the Claimant. In making this determination the Arbitrator has regard to the following factors:

    (i) the Respondent has paid only EUR 77,500.00 of the EUR 340,000.00 payable to the Claimant under the Contract;

    (ii) the Respondent unilaterally breached the Contract, prompting the Claimant to validly terminate the Contract;

    (iii) the Claimant terminated the Contract on 19 December 2012 and did not provide any service to the Respondent thereafter;

    (iv) the Claimant signed a new contract, under which he earned EUR 15,000.00 for the remainder of the 2012-2013 season; and

    (v) in doing so, the Claimant failed to mitigate his loss adequately.

77. As at the date of termination, the Claimant should have been paid EUR 152,500.00 by the Respondent, comprised as follows: EUR 40,000.00 on passing a medical; EUR 27,500.00 for the October salary; EUR 37,500.00 for the November salary; EUR 37,500.00 for the December salary; and EUR 10,000.00 as a bonus linked to the Presidential Cup. The Claimant has only been paid EUR 77,500.00. As a bare minimum, the Claimant is entitled to the difference between the EUR 152,500.00 (which had become payable at the date of termination) and the EUR 77,500.00 that he had in fact received. Hence, as a bare minimum, the Claimant is entitled to EUR 75,000.00 in compensation for unpaid salaries.

78. Article IV of the Contract, which deals with termination of the Contract on the grounds

of unilateral breach by the Respondent, does not expressly provide that salary payments which accrue after the date of termination must be paid by the Respondent to the Claimant upon termination. However, Article II provides that the Contract is a "*no-cut guaranteed agreement*." In accordance with BAT jurisprudence, the Arbitrator considers that the Claimant is entitled to some compensation for salary payments that were due after the date of termination, in addition to the EUR 75,000.00 payable in relation to unpaid salaries that became due prior to termination.

79. The total amount of salary which accrued after termination of the Contract was EUR 187,500.00. From this figure should be deducted the EUR 15,000.00 that the Claimant earned with his new club during the 2012-2013 season. The Arbitrator considers that further sums should be deducted from the figure of 187,500.00 because the Claimant failed to mitigate his losses adequately (as explained in paragraphs 72 to 75 above). The Arbitrator notes that there were still more than five months of the season left when the Claimant terminated the Contract on 19 December 2012. The termination did not take the Claimant by surprise; he began taking steps to terminate the Contract on 27 November 2012 by sending the Claimant's Warning Letter. However, despite the fact that the termination occurred on 19 December 2012, a request by the Serbian Basketball Federation for a letter of clearance to enable the Claimant to join his new club was not made until 18 March 2013, approximately 2 months before the end of the season.

80. Moreover, the value of the Claimant's new contract is meagre when compared with the Contract, particularly given that the timing of the Contract termination meant that Claimant was able to negotiate a new contract at a time when there was activity in the transfer market (namely December to February), as opposed to the last months of the season, when the opportunities to sign for a new club are often more limited. Finally, the Claimant has produced no evidence of the steps he took to negotiate a new contract and thereby mitigate his losses (despite the Arbitrator's specific request for such evidence in the First Procedural Order). Instead, the Claimant submitted that the

entire process was conducted by his agent by telephone. The Claimant also admitted that he did not attempt to find a new club in any country other than Serbia. By doing so, he reduced his chances of adequately mitigating his losses and should bear responsibility accordingly.

81. In light of the above factors and the circumstances of this case, the Arbitrator finds, *ex aequo et bono*, that the Respondent must pay EUR 65,000.00 in relation to unpaid salary which accrued after termination of the Contract. Accordingly, the total compensation that the Respondent must pay to the Claimant for all unpaid salaries and bonus payments is EUR 140,000.00.

6.2.4 Interest

82. The Claimant has requested interest on the unpaid salaries owed to him by the Respondent. Although the Contract does not provide for the payment of default interest, this is a generally accepted principle which is embodied in most legal systems. Indeed, payment of interest is a customary and necessary compensation for late payment, and the Arbitrator considers that there is no reason why the Claimant should not be awarded interest in this case. Also, according to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. The Arbitrator further considers, in line with the jurisprudence of the BAT, that 5% per annum is a reasonable rate of interest and that such rate should be applied from the day following the date on which the Contract was terminated. The Arbitrator therefore awards interest on the sum of EUR 140,000.00 at a rate of 5% per annum from the day following the termination, i.e. 20 December 2012.

7. Costs

83. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the award or communicated to the Parties separately. Furthermore, Article 17.3 of the BAT Rules provides that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

84. On 8 February 2014, considering that, pursuant to Article 17.2 of the BAT Rules, "*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*", and that "*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time*", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised, the BAT President determined the arbitration costs in the present matter at EUR 10,000.00.

85. The Arbitrator notes that the Claimant was successful in establishing the Respondent's liability to pay compensation for unpaid salaries and bonus. The Claimant was, however, awarded significantly less than the amount of compensation that he claimed. The Arbitrator also notes that the Respondent failed to pay its share of the Advance on Costs. Thus, the Arbitrator decides that, in application of Article 17.3 of the BAT Rules and in light of the circumstances of the case, the Respondent shall bear 85% of the costs of the arbitration. Therefore, the Arbitrator decides that the Respondent shall pay to the Claimant EUR 8,500.00 as reimbursement of arbitration costs advanced by the Claimant.

86. The Claimant has claimed EUR 15,462.00 in legal fees and expenses (including the non-reimbursable fee of EUR 4,000.00). The Arbitrator considers that such fees and

costs are excessive for this case, given the volume and content of submissions that were required to be made (for example, the Arbitrator notes that only one procedural order requesting further information from the Parties was made). In the circumstances, the Arbitrator finds that it would be reasonable for the Respondent to pay to the Claimant EUR 8,000.00 as a contribution towards the Claimant's legal fees and expenses, including the non-reimbursable fee.

8. AWARD

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

1. **Besiktas Jimnastik Kulübü Dernegi is ordered to pay to Mr. Vladimir Dasic EUR 140,000.00 as compensation for unpaid salary and bonus, together with interest payable at a rate of 5% per annum from 20 December 2012.**

2. **Besiktas Jimnastik Kulübü Dernegi is ordered to pay to Mr. Vladimir Dasic EUR 8,500.00 as reimbursement of the advance on BAT costs.**

3. **Besiktas Jimnastik Kulübü Dernegi is ordered to pay to Mr. Vladimir Dasic EUR 8,000.00 as a contribution towards his legal fees and expenses.**

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

Geneva, seat of the arbitration, 17 February 2014

Raj Parker
(Arbitrator)