



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0428/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Mr. Marko Popović,

represented by Mr. Obrad Fimić,
Zlota 11/2, 00-019 Warsaw, Poland

and

Mr. Obrad Fimić,
Zlota 11/2 street, 00-019 Warsaw, Poland

vs.

Všj Kauno Žalgirio Klubas,
Karaliaus Mindaugo pr. 49, LT-44333, Kaunas, Lithuania

represented by Mrs. Jolanta Špakauskaitė, attorney at law,
and Mr. Paulius Motiejunas, Director

- Claimant 1-

- Claimant 2-

- Respondent -

1. The Parties

1.1 Claimant 1

1. Mr. Marko Popović, is a professional Croatian basketball player (hereinafter referred to as “Player” or “Claimant 1”).

1.2 Claimant 2

2. Mr. Obrad Fimić (hereinafter referred to as “Agent” or “Claimant 2”, and together with Claimant 1, the “Claimants”), is a FIBA-licensed agent who represents professional basketball players worldwide, among others Claimant 1.

1.3 The Respondent

3. Všj Kauno Žalgirio Remejas (hereinafter referred to as “Club” or “Respondent”) is a basketball club located in Kaunas, Lithuania. The Club is represented by its Director, Mr. Paulius Motiejunas.

2. The Arbitrator

4. On 2 August 2013, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren, appointed Prof. Dr. Ulrich Haas 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

5. On 10 August 2011, the Claimants and the Respondent signed a contract (hereinafter referred to as “the Player Contract”), according to which Respondent engaged the Player as a professional basketball player for the seasons 2011/2012 and 2012/2013. Furthermore, the Player Contract provided that the Respondent compensate the Agent for his efforts.

6. Article 2 of the Player Contract provides as follows:

“The Club agrees to pay the Player a fully guaranteed Base Salary, net of applicable taxes, of EUR 600.000,00 Euros (six hundred thousand/00 Euros) net of any applicable taxes for the 2011/2012 basketball season and EUR 600.000,00 Euros (six hundred thousand/00 Euros) net of any applicable taxes for the 2012/2013 Basketball season in accordance with the payment schedule set forth below. All payments to Player hereunder must be made in Euros in accordance with wire transfer instructions to be provided by the Player from time to time. The payment schedule is as follows; provided, however, in the event any payments or payments set forth below are scheduled to be paid after Club’s last official Lithuanian League game, said payment or payments shall instead be due and payable within five (5) days after the Club’s last official Lithuanian League game:

*Payment Schedule
Season 2011/2012:*

<i>September 15, 2011</i>	<i>€ 60.000,00 Euro</i>
<i>October 15, 2011</i>	<i>€ 60.000,00 Euro</i>
<i>November 15, 2011</i>	<i>€ 60.000,00 Euro</i>
<i>December 15, 2011</i>	<i>€ 60.000,00 Euro</i>
<i>January 15, 2012</i>	<i>€ 60.000,00 Euro</i>
<i>February 15, 2012</i>	<i>€ 60.000,00 Euro</i>

<i>March 15, 2012</i>	<i>€ 60.000,00 Euro</i>
<i>April 15, 2012</i>	<i>€ 60.000,00 Euro</i>
<i>May 15, 2012</i>	<i>€ 60.000,00 Euro</i>
<i>June 15, 2012</i>	<i>€ 60.000,00 Euro</i>



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Season 2012/2013:

September 15, 2012	€ 60.000,00 Euro
October 15, 2012	€ 60.000,00 Euro
November 15, 2012	€ 60.000,00 Euro
December 15, 2012	€ 60.000,00 Euro
January 15, 2013	€ 60.000,00 Euro
February 15, 2013	€ 60.000,00 Euro
March 15, 2013	€ 60.000,00 Euro
April 15, 2013	€ 60.000,00 Euro
May 15, 2013	€ 60.000,00 Euro
June 15, 2013	€ 60.000,00 Euro

The payment of the guaranteed Base Salary is not contingent, as stated in Paragraph 2, to Player is not contingent upon anything other than the Player passing the Club's physical examination. Club agrees that this Agreement is a two (2) basketball season (2011/2012 and 2012/2013) fully guaranteed agreement. In this regard, even if Player is removed or released from Club or this Agreement is terminated or suspended by Club due to Player's lack of or failure to exhibit sufficient skill, Player's death, illness, injury, or other mental or physical disability (whether incurred on or off the court) or of any other reason whatsoever other than Player's direct and material breach of this Agreement, Club shall nevertheless be required to pay to Player and Agent, on the dates set forth above, the full amounts set forth above. Player agrees to make himself available for insurance, it being understood that the above guarantee is not contingent upon the purchase of or Club's ability to procure such policy. In the event that any scheduled payments are not made by the Club within 15 (fifteen) days of the applicable payment date, the Player shall give reasonable notice to the Club. In case the Club does not perform its payments obligations with a period indicated in the reasonable notice, the Player shall not have to perform in any practice sessions or any games until such time as all of the said payments have been paid. In addition, if any scheduled payment is not received by Player's bank within 30 (thirty) days of the date indicated in the Player's notice, the Player's performance obligations shall cease, Player shall have the right, at Player's option, to terminate this Agreement and accelerate all future payments required under this Agreement. In this case, Player shall be free to leave the Club with his FIBA Letter of Clearance as a free agent to play basketball anywhere in the world Player chooses, but his duties and liabilities of Club toward Player and Agent under this Agreement shall continue in full force and effect. Furthermore, the Club shall have no rights over or with respect to Player, and the Club will not be entitled to request or receive any payments pertaining to the Player playing basketball anywhere in the world. Notwithstanding anything to the contrary above, in the event at anytime during the term of this Agreement Player fails a FIBA administered doping test Club shall have the right to terminate this Agreement, in which event, Club shall be relieved of all its obligations and liabilities under the Agreement from and after the date in which the Player fails his doping test." (sic)



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7. Article 5 of the Player Contract reads as follows:

“Bonuses.

In addition to the guaranteed Base Salary to be paid to Player in Paragraph 2 above, the Club shall pay the Player the following bonuses, net of any taxes (collectively, “Bonuses”), for each specific goal listed in this Paragraph 7 that is achieved by the Club and/or Player, for each season of the contract:

Lithuanian Championship

To win 10.000,00 Euro (Ten thousand Euro)

Lithuanian Cup

To win 5.000,00 Euro (Five thousand Euro)

BBL League

To win 5.000,00 Euro (Five thousand Euro)

VTB League

Entering Final 4 5.000,00 Euro (Five thousand Euro)

Entering Finals 7.500,00 Euro (Seven thousand five hundred Euro)

To win 10.000,00 Euro (Ten thousand Euro)

Euroleague

To qualify for the Top 16 10.000,00 (Ten thousand Euro)

To qualify for the Top 8 15.000,00 (Fifteen thousand Euro)

To qualify to the Final Four 20.000,00 (Twenty thousand Euro)

To win 30.000,00 (Thirty thousand Euro)

All Bonuses earned under this Paragraph 5 are net of any taxes and will become due and payable to Player at the end of each basketball season and will be fully guaranteed hereunder.

The Club shall make all payments for Lithuanian taxes of any nature (including, but not limited to, income taxes) on any payments made to the Player under this Paragraph 6.”

8. Article 11 of the Player Contract reads as follows:

“Agents Fee

For services of locating and contracting the Player, the Club shall pay to Agent commission fee in the amount of € 60.000,00 Euros (sixty thousand Euros) Net of taxes for the 2011/2012 season basketball season on September 15th 2011 and



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the amount of € 60.000,00 Euros (sixty thousand Euros) Net of taxes for the 2012/2013 basketball season on September 15th 2012 in case the Club chooses option to keep the player for the 2012/2013 basketball season.

In the event that any scheduled payments are not made by the Club within 15 (fifteen) days of the applicable payment date, the Agent shall give reasonable notice to the Club. In case the Club does not perform its payment obligations with a period indicated in the reasonable notice, the Player shall not have to perform in any practice sessions or any games until such time as all of the paid payments have not been paid. In addition, if any scheduled payment is not received in Agent's bank within 30 (thirty) days of the date indicated in the Agent's notice, the Player's performance obligation shall cease, Player shall have the right, at Player's option, to terminate the Agreement and accurate all future payments required under this Agreement. In this case, Player shall be free to leave the Club with his FIBA Letter of Clearance as a free agent to play basketball anywhere in the world Player chooses, but the duties and liabilities of Club toward Player and Agent under this Agreement shall continue in full force and effect. Furthermore, the Club shall have no rights over or with respect to Player, and Club will not be entitled to request or receive any payments pertaining to the Player playing basketball anywhere in the world.

Club shall pay ten percent (10%) of the agreed Player's base salary to the Agents for any future agreement (new or change of essential terms) between Club and Player."

9. According to the Claimants, after the end of the season 2012-2013, the following arrears of salaries, bonuses and fees to both Claimant 1 and Claimant 2 remained unpaid:

"Claimant 1:

-Salaries: € 263.000,00 Euros net

-Bonuses

-for the Lithuanian League (LKL), first place: € 10.000,00 Euros net

-for reaching top 16 in the Euroleague: € 10.000,00 Euros net

-for reaching the Semifinals of the VTB league: € 5.000,00 Euros net

-Apartment expenses: 10.000,00 Lit

TOTAL of € 288.000,00 Euros net and 10'000 Lit

Claimant 2: TOTAL of € 112.500,00 Euros net

3.2 The Proceedings before the BAT

10. On 20 June 2013, Claimants filed a Request for Arbitration in accordance with the BAT Rules. The non-reimbursable fee of EUR 4,000 was received in the BAT bank account on 17 June 2013.
11. On 2 August 2013, the President of the BAT appointed Prof. Dr. Ulrich Haas as Arbitrator in these proceedings in accordance with Article 8.1. He accepted the appointment on 3 August 2013.
12. On 8 August 2013, the Arbitrator requested the Claimants to clarify their requests for relief by no later than 12 August 2013. In particular, the Arbitrator asked Claimants to specify whether or not their Request for Arbitration was intended as a settlement offer, a Request for Arbitration or a request for a consent award.
13. On 12 August 2013, the Claimants requested an extension of the deadline to respond to the directions of the Arbitrator. The extension of the deadline was granted by the Arbitrator.
14. On 13 August 2013, Claimants specified their requests for relief as follows:

“Claimants requests:

Claimant 1 one requests that Respondent pays owed amount of:

-288.000 (two hundred eighty eight thousand) Euro net

-10.000 (ten thousand) Litas net

Claimant 1 agrees that Respondent finalizes payments to him during the term of one year from the moment since this Request was submitted. This



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one year starting by September 2013, paid in 12 (twelve) equal monthly instalments.

Claimant 1 demands that Respondent pays interest [sic] of 5% for the payment delay on salaries and bonuses arrears, from the moment they were late by schedule of Contract signed between the Claimant 1 and the Respondent;

Claimant 2 requests that Respondent pays to him remaining amount of agent's fee 112.500 (one hundred twelve thousand five hundred) Euro net, during the term of one year (by the end of year 2014), in equal monthly instalments beginning with September 2013.

Claimant 2 demands that Respondent pays interest of 5% for delay of the payment of agent's fee arrear counted from the moment the delay started according to the Contract of Claimants with Respondent;

Claimants request that Respondent reimburses to him 4.000 (four thousand) Euro of non-reimbursable handling fee that he paid to BAT.

Claimants request that Respondent bares [sic] all legal costs brought upon by the BAT's Arbitrator.

Claimants request that Respondent reimburses to them costs born for legal assistance and lawyer consultations respective this case.

Claimants demand that allowance for delay of payments stipulated in payment schedules for Claimant 1 and Claimant 2 in BAT's award shall be no longer than SEVEN business days.

Should Respondent refuse to pay, or it stops payments to either of Claimants, or shall the payments be delayed longer than 7 (SEVEN) business days, Claimants shall send to Respondent and to BAT Arbitrator a letter of notice with request to impose fines and sanctions on Respondent by BAT tribunal and/ or FIBA authorities, until the whole debt is paid.

No other requests for damage compensation will be requested.” (sic)

15. On 14 August 2013, the BAT acknowledged receipt of the Request for Arbitration dated 20 June 2013 and of the amendment to the Request for Arbitration received on 13 August 2013. Furthermore, the BAT invited the Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 4 September 2013 (the “Answer”), and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 23 August 2013 as follows:



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<i>“Claimant 1 (Mr Marko Popovic)</i>	<i>EUR 4,000</i>
<i>Claimant 2 (Mr Obrad Fimic)</i>	<i>EUR 1,000</i>
<i>Respondent (BC Zalgiris Kaunas)</i>	<i>EUR 5,000”</i>

16. On 24 August 2013, Mr. Obrad Finić informed the BAT via email as follows:

*“I have to inform you and bring new facts regarding case BAT 0428/13 (...) and it concerns ‘6. Advance on Costs
The parties shall pay by no later than Friday, 23 August 2013 an advance on costs (Art. 9.3. of the BAT Rules) as follows:*

Claimant 1 (Mr Marko Popovic) EUR 4,000

Claimant 2 (Mr Obrad Fimic) EUR 1,000

Respondent (BC Zalfiris Kaunas) EUR 5,000’

The Respondent (Club Žalgiris from Kaunas) came out with initiative to make and sign a settlement with both Claimants, and to start paying soon according to the schedule proscribed in this settlement which is going to be signed between parties.

Therefore,

I have request to the BAT secretariat and to honourable Arbitrator to withhold BAT process temporarily until the Wednesday 4th of September 2013 in order to give the time to the Respondent to start paying according to planned settlement.

Should the Respondent fail to do so by indicated date, we would proceed with BAT and pay the advance on costs of Arbitration.

Please confirm that you understand our request.”

17. On 26 August 2013, the BAT informed the Parties that the requested stay of the time limit for payment of the Advance on Costs was granted until 4 September 2013.

18. On 4 September 2013, the Respondent made the following request:

“However, as set out below, the Respondent seeks an extension of time limit pursuant to the Clause 7.2 of BAT Arbitration rules. The Respondent’s request is made for the following reasons:



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1. During the period from 26th August 2013 to 23th September 2013, the Respondent's director Mr. Paulius Motiejunas is not available due to his trip with the Lithuanian Basketball National team as the Head of the National team to the last preparation friendly games and later – participation in European Basketball Championship, which will be held in Slovenia from 4th to 22th September, 2013.

2. Moreover, as the BAT was informed on 24th August, 2013 by Mr. Obrad Fimic - the representative to the Claimants that the Respondent made an offer to the Claimants to solve the dispute by the Settlement agreement.

3. The question regarding the Settlement agreement was discussed with the Claimants, just right after the contract of Claimant 1 with the Respondent was expired. The Respondent's director Mr. Paulius Motiejunas was trying to reach the settlement with Mr. Obrad Fimic – the representative to the Claimants and to find a compromise for all Parties of the dispute. Also the letter asking to review the claim and give a reasonable time to repay the debts was sent to the Claimant 1 – Mr. Marko Popovic. Hereby, the Respondent informs that the question regarding the Settlement agreement is still pending and the Parties hope that the Settlement agreement could be reached between the Claimants and the Respondent.

4. Unfortunately, the Respondent is regret to acknowledge that the Respondent has no financial possibilities to pay all or part of the debt claimed by the Claimants at the moment, starting from 4th September, 2013 as it was indicated in the email to BAT from Obrad Fimic – the representative

to the Claimants on 24th August, 2013.

(...)

6. In accordance to aforementioned above and on the basis of Clause 7.2 of BAT Arbitration Rules, the Respondent hereby kindly asks for an extension of time limits set for filing the answer of the Respondent and to withhold BAT process temporarily until the final discussions of the Parties regarding the Settlement agreement. Should the Parties fail to reach the Settlement agreement, within 30 days, i.e. by 4th October, 2013, further proceedings should continue in accordance with BAT Arbitration Rules.”

19. With letter dated 4 September 2013, the BAT invited the Claimants to comment on Respondent's request by no later than 5 September 2013. It also informed the Claimants that the time limit to file the Answer was stayed pending a decision on Respondent's request.

20. With letter dated 5 September 2013, the Claimants opposed Respondent's request for a stay. The letter reads as follows:

"Both Claimants have same position and are of opinion that, since the Respondent in face of Mr. Paulius Motiejunas did not agree with Claimants proposal

- to make payment of debts within 1 (one) year as primarily suggested by Counsel of the Claimants,

or, as later suggested by Counsel to Claimants,

- to make payment wihtin 15 (fifteen months) in order to make it easier to the Respondent, and

Respondent denied both proposals and keeps insisting to fulfill payments to both Claimants during 24 months, both, Claimant 1 and Claimant 2 can not afford this kind of streched schedule of payments to them.

Therefore, we do not see that Respondent and Mr. Paulius Motiejunas will change their mind after October 4th 2013, and Claimant 1 and Claimant 2 consider this discussion about settlement between them and Respondent finished and closed.

Claimants do not need any more time for discussion. Claimants proposal is to begin with BAT procedure immediately, after the advance on costs is paid to BAT's account of course."

21. With letter of the same day, the BAT Secretariat on behalf of the Arbitrator informed the Parties that the request for a stay of the proceedings was rejected. Furthermore, the deadline to file the Answer was fixed until 13 September 2013. Finally, the parties were requested to effect payment of their respective shares of the Advance on Costs within the same time limit.
22. On 13 September 2013, Respondent submitted its Answer to the Request for Arbitration. The Answer contained a settlement offer addressed to the Claimants.
23. With email dated 16 September 2013, the Claimants rejected the settlement offer made by Respondent. The email reads as follows:

“these offers to Claimants from the Respondent are not in the best interest of either of Claimants since Respondent has few of high budget player acquired recently for the next season, so Claimant 1 and Claimant 2 do not wish to become last on pay list because the Respondent has to pay highly paid current players.

Therefore our Request for relief stay the same and we have to reject offer for settlements that Respondent proposed.” (sic)

24. By Procedural Order of 17 September 2013, the BAT informed the Parties that Claimants had paid their shares of the Advance on Costs as well as Respondent’s share. Furthermore, the BAT informed the Parties that the exchange of documents was completed and invited the Parties to submit a detailed account of their costs by no later than 4 October 2013.
25. On 27 September 2013, the Claimants submitted their account of costs.
26. On 7 October 2013, the BAT invited the Respondent to comment on Claimants’ account of costs by no later than 11 October 2013.
27. On 11 October 2013, Respondent submitted its comments on Claimants’ account of costs and requested the Arbitrator to *“to issue procedural order with the demand for the Claimants to provide detailed calculations of the legal costs as well as all relative documents, such as evidence that certain amounts were paid to Counsel/Attorney at law/Lawyers ...”*.
28. By Procedural Order of 15 October 2013, the BAT acknowledged receipt of Respondent’s comments and ordered Claimants to provide *“a detailed calculation that explains their claim for legal fees in the amount of EUR 6,000, and to submit documents (such as invoices) supporting that calculation, both by no later than 21 October 2013”*.

29. On 21 October 2013, Claimants requested an extension of the time limit for the submission of a detailed calculation explaining the claim for legal fees and documents supporting that calculation.
30. On 22 October 2013, the BAT informed the Parties that the Arbitrator had granted the requested extension until 28 October 2013.
31. On 28 October 2013, Claimants made an additional submission regarding their account of costs.
32. On 29 October 2013, the BAT invited the Respondent to comment on Claimants' additional submissions by no later than 1 November 2013.
33. On 29 October 2013, the Respondent requested an extension of the time limit to comment on Claimants' submissions.
34. On the same day, the BAT granted the extension of the deadline and invited the Respondent to comment on Claimants' submissions by no later than 6 November 2013.
35. On 6 November 2013, Respondent submitted its comments.
36. On 7 November 2013, Claimants submitted an unsolicited response to Respondent's comments.
37. On the same day, the BAT informed the Parties about the Claimants' submission of the unsolicited response. It further informed the Claimants that since the information contained in the submission could have already been presented in the response to the procedural orders of 15 October and 26 October 2013, the

Arbitrator had decided not to admit the submission on file. Furthermore, the Parties were invited to refrain from filing any further unsolicited submissions.

38. On 8 November 2013, Claimants made further unsolicited submissions with respect to their legal fees.
39. On 11 November 2013, the BAT informed the Parties about the Claimants' unsolicited submissions. It further informed the Parties that in view of the exchange of submissions having been closed, and given that the Claimants had been given ample opportunity to make submissions on their account of costs, the Arbitrator had decided that these submissions would not be taken to the file.

3.3 Claimants' Position

40. Claimant 1 submits the following in substance:
 - Claimant 1 was employed as a professional basketball player by Respondent for the seasons 2011-2012 and 2012-2013. The Player fulfilled all of his obligations arising out of the contract for the term of the Player Contract. For the season 2012-2013, the Player received a total of EUR 337,000 from the Respondent. This amount covers the salaries due for the months of September 2012 through January 2013 and includes a partial instalment for the month of February 2013 in the amount of EUR 37,000. The remaining amount for the month of February (EUR 23,000) as well as the salaries for the months of March through June 2013 (EUR 240,000) were not paid by the Respondent. In addition, the Club failed to pay to the Player bonuses for winning the Lithuanian League (EUR 10,000), for reaching the top 16 in the Euroleague (EUR 10,000), and for reaching the semi-finals of the VTB league (EUR 5,000). Finally, Respondent owes Claimant 1 Litas 10,000 as a contribution to the rent of his apartment. In total, the Club owes Claimant 1

EUR 288,000 in outstanding salaries and bonuses, and Litas 10,000 for Claimant 1's apartment.

41. Claimant 2 submits the following in substance:

- Claimant 2 was party to the Player Contract entered into with the Respondent for the basketball seasons 2011-2012 and 2012-2013. According to Article 11 of the Player Contract, Claimant 2 is entitled to an agent fee in the amount of EUR 120,000 net for the two seasons. Even though Claimant 2 fulfilled all of his obligations arising out of the Player Contract, the Respondent only paid part of the agent fee. Thus, the Respondent owes outstanding agent fees to Claimant 2 in the amount of EUR 112,500.

42. In the letter dated 13 August 2013 the Claimants specified their requests for relief as set out in para. 14 above.

3.4 Respondent's Position

43. The Respondent submits the following in substance:

- The Respondent does not challenge a debt owed to Claimant 1 in the amount of EUR 287,129 (outstanding salaries, bonuses, contribution to apartment) and a debt to Claimant 2 in the amount of EUR 112,500.
- The Respondent is making all possible efforts in order to pay off the debts it owes to the Claimants.
- The Respondent proposed a settlement agreement to the Claimants on 24 August to solve the dispute. It included a payment schedule with monthly instalments over the next 24 months.

- However, the Claimants have rejected this proposal on the basis that the proposed settlement agreement substantially deviates from the payment schedule proposed by the Claimants.
- Claimants knew of the difficult financial situation of the Respondent since the beginning of the discussions relating to the settlement agreement.
- The Respondent therefore asks the BAT Arbitrator to consider these facts when deciding upon a payment schedule.

4. Jurisdiction

44. 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).
45. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

4.1 Arbitrability

46. 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) PILA¹.

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

4.2 Formal and substantive validity of the arbitration agreement

47. Article 10 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 arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties’ domicile. The seat of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.”

48. This arbitration clause included in the Player Contract and signed by the three parties to the Contract fulfils the formal requirements of Article 178(1) PILA.
49. 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 Article 10 of the Player Contract clearly covers the present dispute.² Furthermore, the validity of the arbitration agreement has not been contested by the Parties throughout the proceedings.

² See for instance BERGER/ KELLERHALS: International and Domestic Arbitration in Switzerland, Berne 2010, N 466.

5. Applicable Law

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

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

51. Under the heading “Applicable Law”, Article 15.1 of the BAT Rules reads as follows:

“Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.”

52. Article 10 of the Player Contract provides in relation to the applicable law as follows:

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

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

54. 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 1969³ (Concordat),⁴ under which Swiss courts have held that “*arbitrage en équité*” is fundamentally different from “*arbitrage en droit*”:

³ 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



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“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.”⁵

55. 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.”⁶

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

6. Findings

57. In essence, Claimant 1 requests the payment of the outstanding salaries and bonuses (6.1), “5% interests for the payment delay on salaries and bonuses arrears, from the moment they were late by schedule of Contract ...” (6.2), and payment for the costs of the apartment in the amount of 10,000 Litas (6.3).
58. Claimant 2 requests payment of the outstanding agent fee (6.4) as well as 5% “for delay of payment of agent fees arrear counted from the moment the delay started” (6.5).
59. Both Claimants provide in their requests for a specific payment schedule (6.6).

(governing domestic arbitration).

⁴ KARRER, in: Basel Commentary to the PILA, 2nd ed., Basel 2007, Article 187 PILA N 289.

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

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

6.1 Outstanding salary and bonuses

60. Respondent does, in principle, not challenge the debt towards Claimant 1 and expressly stated that it “*does not seek to avoid the reimbursement of this debt*”. However, Respondent also stated that it “*does not challenge the debt to Claimant 1 in the amount of 287.129 EUR*”. Respondent does not explain the difference in figures, in particular why it acknowledges EUR 821 less than requested by Claimant 1. Specifically, the Respondent does not contest the factual allegations of Claimant 1 that lead to the outstanding amounts requested by the latter. In view of the submission and the evidence before him, the Arbitrator, thus, orders Claimant 1 to pay outstanding salaries in the amount of EUR 263,000 in outstanding salaries. Furthermore, Respondent is ordered to pay Claimant 1 EUR 25,000 for earned bonuses.

6.2 Interest on outstanding salaries and bonuses

61. Claimant 1 requests interests of 5% p.a. for the outstanding salaries and bonuses from the moment they were late according to the Player Contract. The Player Contract does not provide for any interests in case of late payment. However, the payment of interest as well as the interest rate of 5 percent is in accordance with *ex aequo et bono* principles and with the constant BAT jurisprudence. According thereto, a rate of 5% p.a. as from the moment the monies fell due is deemed appropriate and apt to prevent the debtor from deriving any profit out of the non-fulfillment of its obligations. Thus, the Arbitrator finds that the Respondent is under a duty to pay to Claimant 1 interests of 5% p.a. on the following amounts:

EUR 23,000	As of 16 February 2013
EUR 60,000	As of 16 March 2013

EUR 60,000	As of 16 April 2013
EUR 60,000	As of 16 May 2013
EUR 60,000	As of 16 June 2013

62. Since Claimant 1 did not stipulate when the bonuses became due, the Arbitrator is only prepared to grant interest for the outstanding bonuses as of the expiry of the Player Contract, i.e. 5 days after the finals game in the 2012/2013 season (cf. Article 1 of the Player Contract). Since the last game was played on 28 May 2013, the Player Contract expired on 2 June 2013. Hence, Claimant 1 is entitled to interests at a rate of 5% on the amount of EUR 25,000 as of 3 June 2013.

6.3 Contributions to the costs of the apartment

63. Article 4 para. c. of the Player Contract states that the Club shall reimburse the Player 2,000 Litas per month for the monthly rent of Player's apartment. Claimant 1 claims that up to date Respondent still owes him a contribution to the rent of the apartment in the amount of 10,000 Litas. Respondent admitted the debt in its Answer to the Request for Arbitration. The Respondent is therefore ordered to pay Claimant 1 the amount of 10,000 Litas.

6.4 Outstanding Agent's fee

64. The Respondent admitted the debt in the amount of EUR 112,500 towards Claimant 2. Respondent is, therefore, ordered to pay to Claimant 2 outstanding Agent's fees in the amount of EUR 112,500.

6.5 Interests on Agent's fee

65. According to Article 11 of the Player Contract, Claimant 2 is entitled to EUR 60,000 for the 2011-2012 and EUR 60,000 for the 2012-2013 seasons. So far, Respondent has paid to Claimant 2 an amount of only EUR 7,500. Claimant 2 has failed to specify whether the EUR 7,500 were paid by Respondent in relation to the first or second instalment. Absent any indications on the contrary, the amount is set off against the first instalment. According to Article 11 of the Player Contract, the first instalment was due to Claimant 2 on 15 September 2012, while the second instalment was due on 15 September 2013.
66. Even though the Player Contract does not provide for any interest payments in case of late payment, Claimant 2 is entitled to interests. This follows from *ex aequo et bono* principles as well as from constant BAT jurisprudence. According thereto, a rate of 5% p.a. is deemed appropriate and apt to prevent the Club from deriving any profit out of the non-fulfillment of its obligations. Thus, the Arbitrator finds that the Respondent is under a duty to pay to Claimant interest of 5% p.a., calculated on the amount of EUR 52,500 as of 16 September 2012 and 5% p.a. on the amount of EUR 60.000 as of 16 September 2013.

6.6 Modalities of payment

67. In principle, a creditor can claim outstanding monies as from the moment in time the amounts become due. Respondent has no right to contest its duty to effect immediate payment of the outstanding amounts under the Player Contract. In particular, a debtor's tense financial situation is no valid excuse for deferring payments owed to a creditor. In the case at hand, however, Claimants do not ask for immediate payment of the total monies due to them, but instead for payment (as far as the outstanding salaries, bonuses and agent fees are concerned) *"during the term of one year ... in equal monthly instalments beginning with*

September 2013". The Claimants basically request that the outstanding amounts be paid to them in 12 equal monthly instalments starting "by *September*", which the Arbitrator understands to mean "by 1 of *September*". Furthermore, the Claimants request that "*allowance for delay of payments stipulated in payment schedules for Claimant 1 and Claimant 2 ... shall be no longer than SEVEN business days*".

68. The Arbitrator notes that he is bound by the Claimants' requests and cannot stipulate *extra or ultra petita*. However, the Arbitrator also notes that the request is not sufficiently precise and clear, inasmuch as the Claimants demand that the BAT award stipulate on the "*allowance for delay payments*". Lack of clarity exists, firstly, concerning Claimants' intended meaning of "business day"; secondly, concerning the question of which place of domicile/seat, the debtor's or the creditor's, should determine the qualification of a "business day". Lastly, the request for an "*allowance*" of "*no longer than SEVEN business days*" leaves the Arbitrator with a wide range of discretion. Taking in consideration all of the above, and to avoid any further disputes as to whether or not payments are being effected in a timely manner, the Arbitrator abstains from according any "*allowance*" in case of delayed payments. Thus, the payment schedule is determined as follows:

69. Payments to Claimant 1:

1 September 2013	EUR 24,000 and Litas 833.33 ⁷
1 October 2013	EUR 24,000 and Litas 833.33

⁷ Namely EUR 288,000 / 12 = 24,000. Also, Litas 10,000 / 12 = 833.33.



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1 November 2013	EUR 24,000 and Litas 833.33
1 December 2013	EUR 24,000 and Litas 833.33
1 January 2014	EUR 24,000 and Litas 833.33
1 February 2014	EUR 24,000 and Litas 833.33
1 March 2014	EUR 24,000 and Litas 833.33
1 April 2014	EUR 24,000 and Litas 833.33
1 May 2014	EUR 24,000 and Litas 833.33
1 June 2014	EUR 24,000 and Litas 833.33
1 July 2014	EUR 24,000 and Litas 833.33
1 August 2014	EUR 24,000 and Litas 833.33

70. Payments to Claimant 2:

1 September 2013	EUR 9,375 ⁸
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⁸ Namely EUR 112,500 / 12 = 9,375.



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1 October 2013	EUR 9,375
1 November 2013	EUR 9,375
1 December 2013	EUR 9,375
1 January 2014	EUR 9,375
1 February 2014	EUR 9,375
1 March 2014	EUR 9,375
1 April 2014	EUR 9,375
1 May 2013	EUR 9,375
1 June 2014	EUR 9,375
1 July 2014	EUR 9,375
1 August 2014	EUR 9,375

71. When fixing such payment schedule, the Arbitrator is well aware that the Player Contract does not provide for such a schedule. However, the Arbitrator holds that a creditor is not constrained to ask for payment at the exact time the debt becomes due. Instead, a creditor is free to ask for payment at a later point in time. Even if the creditor does so, the debtor is not prevented from paying the outstanding amounts as soon as they become due. It is true, in principle, that a

creditor cannot ask the debtor to make partial payments (unless expressly agreed between the Parties). Considering the specific circumstances of the case, in particular the fact that Respondent claims to be in a difficult financial situation and has itself brought forward a proposal for partial payments, the Arbitrator is prepared to support Claimants' request for payment by instalments, because it is in the sole interest of the Respondent.

7. Costs

72. 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.
73. On 20 December 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 8,855.00.
74. Claimant 1 and Claimant 2 prevailed with all of their claims, and it seems fair that all of the fees and costs related to this arbitration be borne by Respondent. The losing party of an arbitration procedure generally also covers its own legal costs and, in addition, those of the succeeding party, provided they do not seem excessive.

75. On 17 September 2013, the BAT requested the parties to submit an account of their legal costs. Subsequently, Claimants in an email dated 27 September 2013, submitted their account of costs and claimed EUR 6.000 in legal fees and EUR 4.000 in reimbursement for the non-reimbursable handling fee charged by the BAT-Secretariat.
76. The Respondent objected to the Claimants' account of costs. It submitted that the amount of EUR 6.000 is excessive, since Claimants were not represented by legal counsel. Respondent requested the BAT to order the Claimants "*to provide detailed calculations of the legal costs, as well as all the relevant documents, such as evidence that certain amounts were paid to Counsels/Attorneys at law ...*".
77. On 28 October, following a procedural order issued by the BAT Secretariat on behalf of the Arbitrator, Claimant 2 submitted an invoice from the law firm Maminski & Wspólnicy Sp.K in the amount of EUR 25,000 for services allegedly rendered to the Player and to the Agent.
78. With letter dated 22 October 2013, Respondent was given an opportunity to comment on this invoice. The Respondent did so on 6 November 2013.
79. In light of the Parties' submissions, the Arbitrator decides that apart from the non-reimbursable fee no contribution shall be awarded towards Claimants' legal fees and expenses. The purpose of such contributions is to cover expenses incurred by a party; it is not, however, to sanction that party's undue enrichment. It is rather obvious to the Arbitrator that the Claimants' submissions in these proceedings were made without the aid of legal advice, in particular the fact that, contrary to the BAT' procedural order, no detailed breakdown was provided by Claimants, and in view of the contradicting figures submitted (EUR 6,000 and

25,000), the Claimants' request for a contribution towards their legal fees must be refused.

80. Given that Claimants paid both Parties' 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 1,145.00 to Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the BAT President;
- (ii) Respondent shall pay EUR 8,855.00 to Claimants, being the difference between the costs advanced by them and the amount to be reimbursed by the BAT;
- (iii) The Arbitrator considers it appropriate to take into account the non-reimbursable handling fee of EUR 4,000 paid by the Claimants. Respondent shall reimburse the Claimants for the payment of the non-reimbursable handling fee.

8. AWARD

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

- Všj Kauno Žalgirio Klubas is ordered to pay to Mr. Marko Popović outstanding salaries, bonuses and contribution to the costs of his apartment according to the following schedule:**

1 September 2013	EUR 24,000 and Litas 833.33
1 October 2013	EUR 24,000 and Litas 833.33
1 November 2013	EUR 24,000 and Litas 833.33
1 December 2013	EUR 24,000 and Litas 833.33
1 January 2014	EUR 24,000 and Litas 833.33
1 February 2014	EUR 24,000 and Litas 833.33
1 March 2014	EUR 24,000 and Litas 833.33
1 April 2014	EUR 24,000 and Litas 833.33
1 May 2014	EUR 24,000 and Litas 833.33
1 June 2014	EUR 24,000 and Litas 833.33



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1 July 2014	EUR 24,000 and Litas 833.33
1 August 2014	EUR 24,000 and Litas 833.33

2. **Všj Kauno Žalgirio Klubas is ordered to pay to Mr. Marko Popović interests according to the following schedule:**

5% p.a. on the amount of EUR 23,000	as of 16 February 2013
5% p.a. on the amount of EUR 60,000	as of 16 March 2013
5% p.a. on the amount of EUR 60,000	as of 16 April 2013
5% p.a. on the amount of EUR 60,000	as of 16 May 2013
5% p.a. on the amount of EUR 60,000	as of 16 June 2013
5% p.a. on the amount of EUR 25,000	as of 3 June 2013

3. **Všj Kauno Žalgirio Klubas is ordered to pay to Mr. Obrad Fimić outstanding agent fees according to the following schedule:**

1 September 2013	EUR 9,375
1 October 2013	EUR 9,375
1 November 2013	EUR 9,375



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1 December 2013	EUR 9,375
1 January 2014	EUR 9,375
1 February 2014	EUR 9,375
1 March 2014	EUR 9,375
1 April 2014	EUR 9,375
1 May 2013	EUR 9,375
1 June 2014	EUR 9,375
1 July 2014	EUR 9,375
1 August 2014	EUR 9,375

- 4. Všj Kauno Žalgirio Klubas is ordered to pay to Mr. Obrad Fimić interests of 5% p.a. as of 16 September 2012 on the amount of EUR 52,500 and interests of 5% p.a. as of 16 September 2013 on the amount of EUR 60,000.**
- 5. Všj Kauno Žalgirio Klubas is ordered to pay jointly to Mr. Marko Popović and Mr. Obrad Fimić the amount of EUR 8,855 as reimbursement of their arbitration costs.**
- 6. Všj Kauno Žalgirio Klubas is ordered to pay jointly to Mr. Marko Popović and Mr. Obrad Fimić the amount of EUR 4,000 as reimbursement of the non-reimbursable handling fee.**



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

Geneva, seat of the arbitration, 23 December 2013

Ulrich Haas
(Arbitrator)