



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0439/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Christian Burns

Hart Sports Management

Mr. Michael Hart, 909 Ellison Avenue,
Point Pleasant, NJ 08742, USA

Players Group

Mr. Massimo Raseni, Via Montefiori Levi 7,
13900 Biella, Italy

all represented by Mr. Richard Faulkner
Blume, Faulkner, Skeen & Northam, LSBN 05470,
111 W. Spring Valley Rd. Suite 250, Richardson, TX 75081, USA

vs.

S.S. Sutor Srl

Via Martiri d'Ungheria 108,
63812 Montegranaro (FM), Italy

- Claimant 1 -

- Claimant 2 -

- Claimant 3 -

- Respondent -

1. The Parties

1.1 The Claimants

1. Mr. Christian Burns is a professional basketball player (hereinafter also referred to as “the Player” or “Claimant 1”).
2. Hart Sport Management (Mr. Michael Hart), hereinafter referred to as “HART” or “Claimant 2”, is the Player’s main agent.
3. Players Group (Mr. Massimo Raseni), hereinafter referred to as the “Players Group” or “Claimant 3”, also acting as agent, is a partner in Italy of HART.
4. Claimants 1, 2 and 3 are referred to jointly as the “Claimants”.

1.2 The Respondent

5. S.S. Sutor Srl (hereinafter also referred to as “the Club” or “Respondent”) is a professional basketball club in Montegranaro, Italy.

2. The Arbitrator

6. On 16 October 2013, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter 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

7. On 22 July 2012, the Club and the Player entered into an Agreement (the “Agreement”) for the 2012/2013 season, whereby the latter would receive a total salary of USD 140,000, to be paid in installments between 10 October 2012 and 10 June 2013 (as set out in the payment schedule under Article IV of the Agreement), plus the possibility of earning a bonus of USD 15,000 if the Club managed to remain in the Italian League A, to be paid within 15 days from the end of the season (as provided in Article V of the Agreement).
8. According to Article VII of the Agreement, all the amounts due to the Player were free of tax and *“Tax receipts of tax deposits shall be provided to the Player at the end of each fiscal year”*.
9. Since the Club’s results did permit it to remain in the Italian League A for the following season (2013/2014), the total sum of contractual remuneration in principle owed to the Player amounted to USD 155,000.
10. Based on his bank statements adduced as evidence, the Player affirms that a number of the due payments were made late and that others were never made, meaning that the total amount received by him by the end of the season only amounted to USD 87,044.71. The last payments received by the Player from the Club date from May 2013.
11. Thus, according to the Player, the balance of salary owed by the Club is USD 52,955.29, and in addition the bonus of USD 15,000 is owed and remains unpaid, making the total outstanding remuneration owed to him under the Agreement **USD 67,955.29**.
12. On 22 July 2012, the Club also entered into an Agreement with the Player’s agents

(the “Agents’ Agreement”), whereby it undertook to pay HART and the Players Group USD 7,000 on 15 October 2012 and USD 7,000 on 15 November 2012 to be split between the two agents (Article 4 of the Agents’ Agreement). Article 4 of the Agents’ Agreement also stipulated that if the foregoing fees were paid late “... *the club will have to pay Players Group and/or HART an interest of 1% per month, whereas a part of the month will be regarded as the whole month*”.

13. Claimants 2 and 3 affirm that the Club did not make either of the two foregoing payments.
14. In early March 2013, the Player had a meeting with the Club’s management to discuss the late payment issue.
15. According to the Player, no concessions were made to the Club during the meeting and on 6 March 2013, the Claimants’ Counsel sent a first notice letter to the Club invoking a breach of contract due to late payments and demanding that the Club settle its dues by 11 March 2013, failing which, the Player would consider terminating his Agreement and file a claim with the BAT.
16. On 11 March 2013, the Club’s management replied by email that it believed the notice to be overridden by an understanding that had been achieved during the meeting with the Player, which had enabled the latter to voice his concerns and overcome his doubts.
17. The same day, the Claimants’ Counsel responded that “... *the meeting between the Club and Mr. Burns did not result in any modification of the Club’s obligation to Mr. Burns. No agreement or understanding between the parties renders the letter ineffective*”.
18. The Claimants declare that thereafter a number of conversations took place between the Player’s agents and the Club regarding the late payments and that after sitting out of practice for a few days the Player decided to continue playing until the end of the

2012/2013 season because he was performing at a high level and feared it would be difficult to find another team so late in the season, in particular if the Club did not diligently remit his Player's card. He therefore played for the Club until the end of the season in May 2013.

19. On 17 June 2013, the Claimants' Counsel sent another notice letter to the Club requesting payment of all the principal amounts being claimed in this arbitration and stating that if one third of the total outstanding amount as specified in the letter was not paid by 21 June 2013, a demand for arbitration would be filed with the BAT.

3.2 The Proceedings before the BAT

20. The Claimants filed a Request for Arbitration dated 26 June 2013, in accordance with the BAT Rules, and the BAT received the non-reimbursable handling fee of EUR 2,000.29 on 25 July 2013.
21. On 11 November 2013, the BAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the Advance on Costs to be paid by the Parties as follows:

<i>"Claimant 1 (Mr. Christian Burns)</i>	<i>EUR 3,500</i>
<i>Claimant 2 (Hart Sports Management)</i>	<i>EUR 1,000</i>
<i>Claimant 3 (Players Group Srl)</i>	<i>EUR 1,000</i>
<i>Respondent (S.S. Sutor Srl)</i>	<i>EUR 5,500"</i>

22. In the foregoing letter, the BAT also underlined that: "*The Answer shall be filed by the Respondent in accordance with Art. 11.2 of the BAT Rules by no later than **Monday, 2 December 2013***" and reminded the parties that "[...] according to Art. 14.2 of the BAT Rules the Arbitrator may proceed with the Arbitration even if the Respondent fails to submit an Answer or to submit his Answer in accordance with Art. 11.2 of the BAT Rules".

23. On 12 November 2013, the Claimants filed a “*Request for Reconsideration of Advance on Costs*” based on exceptional circumstances.

24. On 15 November 2013, the BAT informed the Claimants that, given the exceptional circumstances invoked, the Advance on Costs was being adjusted as follows, while confirming that the previously decided procedural deadlines remained unchanged:

<i>“Claimant 1 (Mr. Christian Burns)</i>	<i>EUR 3,500</i>
<i>Claimant 2 (Hart Sports Management)</i>	<i>EUR 500</i>
<i>Claimant 3 (Players Group Srl)</i>	<i>EUR 500</i>
<i>Respondent (S.S. Sutor Srl)</i>	<i>EUR 4,500”</i>

25. On 21 November 2013, the Claimants paid their portion of the Advance on Costs.

26. The Respondent failed to pay its portion of the Advance on Costs and to submit an Answer within the fixed deadlines or to communicate with the BAT in any manner in that connection.

27. By Procedural Order of 4 December 2013, the Claimants were given the opportunity to substitute for the Respondent’s non-payment of its portion of the Advance on Costs. At the same time, the procedural order stipulated that the Respondent is

*“... granted a **final** opportunity to file an Answer to the Request for Arbitration by no later than **Friday, 13 December 2013**. The Respondent is hereby given notice of the fact that, in accordance with Article 14.2 of the BAT Rules, if the Respondent fails to submit an Answer the Arbitrator may nevertheless proceed with the arbitration and deliver an award”.*

28. Despite the foregoing extension of the deadline, the Club failed to submit an Answer.

29. On 13 and 21 December 2013, the Claimants paid part of the balance of the Advance on Costs, however EUR 500 remained outstanding.

30. By Procedural Order of 18 December 2013, the Claimants were granted a further extension until 3 January 2014 to pay the remaining balance of the Advance on Costs.

31. On 20 December 2013, the Claimants filed a “*Request for Expedited Award Without Reasons and Accounting of Attorney’s Fees*”. In their Request the Claimants requested that

“...this tribunal immediately close these proceedings and issue an award without reasons for the full amount claimed by Claimants, including all attorney’s fees already incurred and reasonable and necessary fees for the future collection of the award ”.

32. Five exhibits (A, B, C, D and E) were attached to the Claimants’ foregoing Request. Exhibit A was proof of the payment of the balance of the Advance on Costs. Exhibit B was a letter dated 13 November 2013 from the Club to the Claimants’ attorneys disputing their claims. Exhibit C was an “*Accounting of Attorney’s Fees*”. Exhibit D was a copy of the notice letter of 6 March 2013 sent to the Club by the Claimants. Exhibit E was a copy of the notice letter of 17 June 2013 sent to the Club by the Claimants. Exhibit F was a letter dated 24 September 2013 from the Club to the Claimants’ attorneys relating to a parallel case.
33. By Procedural Order of 23 December 2013, the BAT confirmed that the full Advance on Costs had been paid and informed the Claimants with respect to their Request dated 20 December 2013 that:

“The Arbitrator has decided to reject this request because it is clear from both the language and logic of the BAT Arbitration Rules - and is also in conformity with the practice of the BAT - that the proceedings advance in the normal manner if and when a claimant substitutes for a respondent’s non payment of its share of the advance on costs; the purpose of the rule being to enable enough funding to be available for ordinary proceedings including a reasoned award even if a respondent partially or fully defaults. Article 16 of the Rules serves a different purpose. It is designed to allow for the issuance of awards without reasons - subject to the possibility of subsequently requesting the reasons - but only when the amount in dispute does not exceed EUR 30,000; such condition not being fulfilled in this case”.

34. By Procedural Order of 14 January 2014, the Claimants were requested to answer questions put by the Arbitrator and to file related documents.
35. On 20 January 2014, the Claimants submitted their response to the questions.
36. By Procedural Order of 22 January 2014, the Respondent was given the opportunity to

comment on the Claimants' response and both parties were invited to submit their statements of costs.

37. On 29 January 2014, the Claimants filed their statement of costs. The Respondent did not submit any comments on the Claimants' submission of 20 January 2014 or file any statement of costs.

4. The Positions of the Parties

4.1 The Claimants' Position

38. The Claimants have formulated three categories of claims. They are requesting damages for breach of contract and the delivery of tax receipts (A), provisional measures (B) and permanent injunctive relief (C).

A. Damages for Breach of Contract and Delivery of Tax Receipts

39. With regard to their damage claims, the Claimants submit in substance that they duly fulfilled their contractual duties and did not receive in exchange the contractually-provided remuneration, i.e. that the Club breached its contractual obligations and must fully compensate the Claimants. They argue that the amounts owed are net of tax and that therefore corresponding tax receipts must be delivered by the Club.
40. In that relation, the Claimants formulated the following requests for relief in their Request for arbitration:

"i. HSM

(a) \$7,000.00 for agent fees;

(b) Interest of 1% per month on \$3,500.00 principal, compounded monthly, from 15 October 2012 to present;



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(c) Interest of 1% per month on \$3,500.00 principal, compounded monthly, from 15 November 2012 to present;

(d) Tax certificate for the year in which the amount due is paid, or in the alternative, gross payment such that HSM is compensated \$7,000.00 net plus interest.

ii. Players Group

(a) \$7,000.00 for agent fees;

(b) Interest of 1% per month on \$3,500.00 principal, compounded monthly, from 15 October 2012 to present;

(c) Interest of 1% per month on \$3,500.00 principal, compounded monthly, from 15 November 2012 to present;

(d) Tax certificate for the year in which the amount due is paid, or in the alternative, gross payment such that Players Group is compensated \$7,000.00 net plus interest.

iii. Burns

(a) \$52,955.29 in salary payments;

(b) \$15,000.00 for bonus for team remaining in Serie A for 2013-2014 season;

(c) Interest on the full principal amounts at the maximum allowed by Swiss Law;

(d) 2012 tax certificate for amounts already paid in fiscal year 2012;

(e) 2013 tax certificate for amounts already paid in fiscal year 2013;

(f) tax certificate for the year in which the amount due is paid;

(g) in the alternative to (d), (e), and (f) above, gross payment such that Mr. Burns is compensated \$67,955.29 net plus interest"

B. Provisional Measures

41. With respect to their request for provisional measures, the Claimants submit that:

"... Provisional orders are appropriate because (a) the harm caused by Respondent is not adequately reparable by an award of damages, (b) such harm substantially outweighs any harm likely to result to Respondent by an award of provisional orders, and (c) there is a reasonable possibility that Claimants will succeed on the merits of his claims. Upon information and belief, Respondent has recently distributed funds for the sole benefit of



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the Club for the 2013-2014 season and not to uphold its obligations for the 2012-2013 season. Upon information and belief, Respondents paid to the Italian League the amount required to remain in Serie A for the 2013-2014 season and for taxes owed. Also, Respondent will likely attempt to fill out its roster this summer for the beginning of the 2013-2014 season, which will further deplete its funds. Yet Respondent has failed to remit any payment on its obligations owed for the 2012-2013 season. Clearly a reasonable possibility exists that Claimants will succeed on the merits of their claims as the Agreement is no-cut and guaranteed and none of the Claimants have received the full amount owed”.

42. In that relation, the Claimants formulated the following requests for relief in their Request for arbitration:

“A partial final award for security of at least \$104,880.29 be placed in a trust account with the Basketball Arbitral Tribunal including:

(a) the full amount of payment due Mr. Burns under the Agreement in the amount of \$67,955.29;

(b) the full amount of payment due HSM under the Agreement in the amount of \$7,000.00;

(c) the full amount of payment due Players Group under the Agreement in the amount of \$7,000.00;

(d) the maximum amount of attorney’s fees allowed by BAT Rules in the amount of \$22,925.00; and

(e) costs and expenses for the arbitration of this claim, including compensation and expenses due the Arbitrator, in an amount to be determined by the Arbitrator.”

C. Permanent Injunctive Relief

43. With respect to their request for permanent injunctive relief, the Claimants submit that:

“The Arbitration Tribunal is empowered with vast authority to enforce its awards through broad remedial awards, sanctions, and injunctive relief. This flexibility of fashioning remedies through arbitral awards is granted to the Arbitrator via the BAT arbitration clauses, now included in nearly every basketball contract governed by FIBA, and the “ex aequo et bono” authority granted to the Arbitrator by the BAT arbitration rules and the express terms of the Agreement. The BAT rules provide that the BAT was created to “provide parties involved in disputes arising in the world of basketball with an efficient and effective means of resolving these disputes.” BAT Rule 0.1. However, the BAT website reveals numerous Clubs currently under sanction by FIBA because of unsatisfied or non-



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complied with arbitral awards. Consequently, additional measures are essential to ensure proper compliance with the decisions of this Tribunal. Thus, Claimants seek permanent injunctive relief be awarded upon final determination by the Arbitrator of the Claimants' claims against Respondent. Permanent injunctive relief is appropriate because (a) Respondent has committed a wrongful act; (b) imminent harm to Claimants and future foreign employees of Respondent is likely; (c) irreparable injury to Claimants and future employees of Respondent is likely; and (d) there is an absence of an adequate remedy at law".

44. In that relation, the Claimants formulated the following requests for relief in their Request for Arbitration:

"(a) barring Respondent from scouting, recruiting, or signing any and all foreign players for participation in basketball activities for which Respondent is allowed to participate for the 2013-2014 season, contingent upon full payment of the award owed to Claimants;

(b) barring participation by Respondent in any practices, trainings, physical preparation, or games for the Italian League, or any other basketball activities for which Respondent is allowed to participate, for the 2013-2014 season, contingent upon full payment of the award owed to Claimants;

(c) barring Respondent from collecting any and all money or other benefits from sponsors for the 2013-2014 season, contingent upon full payment of the award owed to Claimants;

(d) barring Respondent from recruiting or signing any and all new sponsors for the 2013-2014 season, contingent upon full payment of the award owed to Claimants;

(e) ordering Respondent to pay any and all appropriate fees and expenses to the Basketball Arbitral Tribunal;

(f) ordering Respondent to inform all foreign players for a period of five (5) years in writing in English and/or the player's native language that one (1) or more foreign players have not been timely paid money due them under their contacts with Respondent;

(g) ordering Respondent to inform all foreign players in writing for a period of five (5) years in English and/or the player's native language that one (1) or more foreign players have been forced to resort to arbitral proceedings to collect money due them under their contracts with Respondent;

(h) ordering Respondent to file for a period of five (5) years copies with the president of the Basketball Arbitral Tribunal and/or FIBA of (f) and (g) above, confirmed in writing and signed by both the foreign player and Respondent;

(i) ordering Respondent to inform for a period of five (5) years all of their sponsors that they have had an arbitral proceeding initiated against them by a foreign player for Respondent's failure to pay money due the player under his contract with Respondent;

(j) ordering Respondent to inform for a period of five (5) years every team in the Italian League that they have had an arbitral proceeding initiated against them by a foreign player for Respondent's failure to pay money due the player under his contract with Respondent;

(k) in the event that enforcement action is necessary relating to the award by the Arbitrator of this Arbitration, that the Arbitrator order Respondent to deposit into a trust account with the Basketball Arbitral Tribunal or, alternatively, to pay directly to the Claimants additional fees in the amount of 50,000.00 Euros to pursue enforcement of the Arbitral Award in Italy, Europe, and any other State or Nation under the New York Convention or wherever assets of Respondent may be found".

4.2 Respondent's Position

45. As previously stated, despite several invitations to do so, the Club has not made any submissions in these proceedings.

5. The Jurisdiction of the BAT

46. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands¹.

A. Damages for Breach of Contract and Delivery of Tax Receipts

47. 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).

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

¹ ATF 120 II 155, 162.

49. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.²

50. The Claimants are invoking the jurisdiction of the BAT over the dispute on the basis of the arbitration clauses contained under Article IX of the Agreement and Article 6 of the Agents' Agreement, which are identical and read as follows:

“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 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.”

51. The foregoing arbitration agreements are in written form and thus fulfil the formal requirements of Article 178(1) PILA.

52. With respect to their substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreements under Swiss law (referred to by Article 178(2) PILA).

53. Furthermore, the Arbitrator finds that the two arbitration agreements combined cover the subject matter of the claim between all the named Parties.

54. For the above reasons, the Arbitrator finds he has jurisdiction to adjudicate the Claimants' claims against the Club.

B. Provisional Measures

55. Under Article 183(1) of the PILA, which is the *lex arbitri*, and Article 10 of the BAT Arbitration Rules, the Arbitrator has jurisdiction to make an order for provisional and

² Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

conservatory measures relating to the issues in dispute.

56. Therefore the Arbitrator finds he has jurisdiction to decide upon the provisional measures being requested by the Claimants.

C. Permanent Injunctive Relief

57. The Claimants' request for permanent injunctive relief contains eleven prayers for relief, which are lettered from C - (a) to (k).
58. Prayers for relief C - (a) to (d) and C - (f) to (k), i.e. ten out of the eleven prayers, are all essentially of the same nature, to the extent they seek in various manners to obtain a form of sanction against the Club, i.e. they request measures to be ordered which extend beyond what may be characterized as contractual remedies aimed at obtaining the performance in kind of contractual obligations or damages for non-performance.
59. For a number of reasons, the Arbitrator lacks the powers and jurisdiction to adjudicate any of those ten prayers for relief.
60. In that respect, it is noteworthy that the Claimants have partly misunderstood the function and jurisdiction of the BAT when affirming that: "*The Arbitral Tribunal is empowered with vast authority to enforce its awards through remedial awards, sanctions, and injunctive relief*" (emphasis added).
61. An arbitral tribunal only has the powers and jurisdiction which are conferred upon it via the parties' consent to the arbitration agreement and any applicable rules and regulations which affect the scope of that agreement, including any mandatory limitations imposed by the *lex arbitri*.
62. The BAT having been instituted by FIBA as an independent arbitral tribunal – under Articles 27 and 32 of the FIBA General Statutes, the BAT is not a FIBA judicial body but an independent organization recognized by FIBA – the BAT's powers and

jurisdiction are partially defined by the delineation of its competence in the FIBA General Statutes and the FIBA Internal Regulations (hereinafter referred to collectively as the “FIBA Regulations”) in relation to FIBA’s judicial and non-judicial bodies.

63. Consequently, the standard arbitration clause recommended in the BAT Rules as well as any arbitration clause inserted into a contract which constitutes an agreement to arbitrate in front of the BAT must be interpreted as including the limitations of the BAT’s jurisdiction and powers deriving from the FIBA Regulations.
64. It is clear from the FIBA Regulations that all powers to take sports or disciplinary sanctions of any nature against basketball clubs, as well as the competence to examine such sanctions upon appeal, are vested only with FIBA’s judicial and non-judicial bodies. In other words, as an independent body, the BAT is not invested by the FIBA Regulations with any jurisdiction or powers to take sanctions or to review sanctions against basketball clubs.
65. In addition, Article 3-300 of the FIBA Internal Regulations lists the sanctions that can be imposed on basketball clubs (and other parties to BAT arbitrations) for failing to honour a BAT award, and Article 3-301 provides that it is FIBA’s Secretary General or his delegate who are exclusively competent for taking any such sanctions upon request and that such sanctions may be appealed to the FIBA Appeals’ Panel.
66. For the above reasons, the arbitration agreements forming the basis of the Arbitrator’s jurisdiction in this case cannot be deemed to confer on him the powers to order the sanctions requested by the Claimants in their prayers for relief C - (a) to (d) and C - (f) to (k).
67. Consequently, the Arbitrator lacks jurisdiction with respect to those prayers for relief.
68. Prayer for relief C - (e) is of a different nature, since it requests “*ordering Respondent to pay any and all appropriate fees and expenses to the Basketball Arbitral Tribunal*”.

69. It is not altogether clear what the foregoing prayer for relief intends to cover. If it is a reference to the requirement under the BAT Rules that the Respondent pay a share of the Advance on Costs to the BAT Secretariat, that is an administrative matter which is managed by the BAT Secretariat and, in the present case, the BAT Secretariat has already duly handled this matter.
70. If it is a request by the Claimants to be awarded arbitration costs and legal expenses, that is a matter which falls within the scope of Arbitrator's jurisdiction as determined by the arbitration agreements examined under section 5(A) of this award and which the Arbitrator shall adjudicate under section 8 of this award.

6. Other Procedural Issues

71. Article 14.2 of the BAT Rules specifies that "*the Arbitrator may [...] proceed with the arbitration and deliver an award*" if "*the Respondent fails to submit an Answer.*" The Arbitrator's authority to proceed with the arbitration in case of default by one of the parties is in accordance with Swiss arbitration law and the practice of the BAT.³ However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
72. This requirement is met in the present case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules. It was also given sufficient opportunity to respond to Claimants' Request for Arbitration, and to their Account on Costs. Respondent, however, chose not to participate in this Arbitration.

³ See *ex multis* BAT cases 0001/07; 0018/08; 0093/09; 0170/11.

7. Discussion

7.1 Applicable Law – *ex aequo et bono*

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

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

74. 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.”

75. Article IX of the Agreement and Article 6 of the Agents’ Agreement include a sentence providing that if and when any dispute is submitted to the BAT: “*The arbitrator shall decide the dispute ex aequo et bono*”.

76. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Claimants against the Club in this arbitration in front of the BAT.

77. 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’arbitrage⁴ (Concordat)⁵, under

⁴ 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).

⁵ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

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.”⁶

78. 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*”.
79. In light of the foregoing considerations, the Arbitrator makes the findings below.

7.2 Findings

A. Provisional Measures

80. The Arbitrator finds that the conditions for ordering the provisional measures being requested are not met in the present case because – beyond asserting that the Club is using its funds/patrimony in manners that are inappropriate and likely to endanger the Club’s capacity to pay its alleged debts to the Claimants – the latter have adduced no evidence to support their affirmations in question, i.e. have not even brought *prima facie* evidence thereof; nor provided *prima facie* evidence that the Club is in a financial and/or legal situation which will prevent it from honouring its debts if they exist. Thus, the Claimants have not fulfilled the condition of demonstrating the likelihood of irreparable harm.
81. For the above reasons, no provisional measures were ordered prior to this award and the Claimants’ request for provisional measures will be dismissed.

⁶ JdT 1981 III, p. 93 (free translation).

B. Damage Claim and Request for Tax Receipts

82. Despite having had ample opportunity to make submissions, the Respondent did not contest the Claimants' allegations as to the facts of their claims on the merits, nor did it challenge the evidence adduced in that connection.
83. Furthermore, on their face, the content of the (Player's) Agreement and of the Agents' Agreement, the bank statements filed and the notice letters sent to the Club, all confirm the reality of the Claimants' allegation that despite the Player playing for the Club for the entire 2012/2013 season, he is still owed a total of **USD 67,955.29** (USD 52,955,29 in outstanding salaries + USD 15,000 as a bonus) under Articles IV and V of the Agreement, whereas Claimants 2 and 3 are each still owed **USD 7,000** under the terms of Article 4 of the Agents' Agreement.
84. Consequently, the foregoing amounts will be awarded on the basis that they are contractually owed and in application of the principle *pacta sunt servanda*.
85. Article VII of the Player's Agreement expressly stipulates that all the contractual remuneration is net of all Italian tax and that a receipt of the tax deposits made by the Club shall be delivered to the Player at the end of each fiscal year. Consequently, the amounts awarded shall be net of tax, and because the end of the 2012 and 2013 fiscal years have passed since the Agreement was signed, the Player's request for receipts of tax deposits will be granted for those two years.
86. However, the Agents' Agreement is silent in that respect and contains no indication that the amounts owed are net of tax. The Arbitrator finds that net payments cannot be presumed in the absence of any evidence to the contrary, and will therefore dismiss the requests of Claimants 2 and 3 to be awarded the sums due net of tax and to receive tax receipts.
87. With respect to the principal amounts being awarded to the Player and in keeping with BAT jurisprudence, interest at 5% per annum will be awarded on those sums. In the

circumstances of this case, the Arbitrator finds it fair that such interest run from 11 June 2013 onwards for the total amount being claimed, i.e. from the day after the final salary payment became due according to the Agreement.

88. Concerning the principal amounts being awarded to Claimants 2 and 3, Article 4 of the Agents' Agreement expressly provides that an interest rate of 1% per month will apply to any late payment of the stipulated fees. Because that interest rate (amounting to 12% per annum) is not unreasonably high, and bearing in mind the principle *pacta sunt servanda*, the Arbitrator finds it fair to apply the contractual interest rate on the amounts owed, from the day after they became due, i.e. from 16 October and 16 November 2012 onwards.
89. That said, the Arbitrator finds that, in fairness, there is no reason for the interest thus awarded to be compounded in any manner. Therefore, the request for compound interest will be dismissed.

8. Costs

90. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
91. On 14 March 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 to be EUR 9,000.00.

92. Considering that the Claimants prevailed in less than half of their multiple prayers for relief of various nature and that addressing the Claimants' prayers for relief in question was time consuming, the Arbitrator finds it is fair that 75% of the fees and costs of the arbitration be borne by the Club and that it be required to cover its own legal fees and expenses as well as make a contribution to those of the Claimants in an amount representing 75% of the Claimants' legal fees deemed admissible and reasonable.
93. Given that the Claimants paid advances on costs of EUR 9,000 as well as a non-reimbursable handling fee of EUR 2,000.29 (which will be taken into account when determining the Claimant's legal fees and expenses), while the Club failed to pay any advance on costs, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:
- (i) The Club shall pay EUR 6.750 to the Claimants, being 75% of the costs advanced by the Claimants.
 - (ii) The Club shall pay to the Claimants EUR 10,000 (2,000.29 for the non-reimbursable fee + 7,999.71 for legal fees) representing a contribution to their legal fees and other expenses. The total amount awarded does not exceed the maximum compensation stipulated 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. S.S. Sutor Srl shall pay Mr. Christian Burns an amount of USD 67,955.29, net of tax, as contractual damages, plus interest at 5% per annum on such amount from 11 June 2013 onwards.**
- 2. S.S. Sutor Srl shall deliver to Mr. Christian Burns tax certificates for all the sums paid to him relating to the fiscal year 2012 and for all the sums paid to him relating to the fiscal year 2013.**
- 3. S.S. Sutor Srl shall pay Hart Sports Management an amount of USD 3,500 as contractual damages, plus interest at 1% per month on such amount from 16 October 2012 onwards.**
- 4. S.S. Sutor Srl shall pay Hart Sports Management an amount of USD 3,500 as contractual damages, plus interest at 1% per month on such amount from 16 November 2012 onwards.**
- 5. S.S. Sutor Srl shall pay Players Group an amount of USD 3,500 as contractual damages, plus interest at 1% per month on such amount from 16 October 2012 onwards.**
- 6. S.S. Sutor Srl shall pay Players Group an amount of USD 3,500 as contractual damages, plus interest at 1% per month on such amount from 16 November 2012 onwards.**
- 7. S.S. Sutor Srl shall pay jointly to Mr. Christian Burns, Hart Sports Management and Players Group an amount of EUR 6,750 as a partial reimbursement of their arbitration costs.**
- 8. S.S. Sutor Srl shall pay jointly to Mr. Christian Burns, Hart Sports Management and Players Group an amount of EUR 10,000 as a contribution to their legal fees and expenses.**
- 9. Any other or further-reaching requests for relief are dismissed.**



BASKETBALL
ARBITRAL TRIBUNAL

Geneva, seat of the arbitration, 19 March 2014

Quentin Byrne-Sutton
(Arbitrator)