



**BASKETBALL**  
ARBITRAL TRIBUNAL

**ARBITRAL AWARD**

**(BAT 0441/13)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Ms. Annett Rombach**

in the arbitration proceedings between

**Mr. Justin Hamilton**

**- Claimant 1-**

**ASM Sports**

920 Undercliff Avenue, Edgewater, NJ 07020, USA

**- Claimant 2 -**

both represented by Mr. Guillermo Lopez Arana and  
Mr. Mikel Abete Vecino, Attorneys at Law,  
c/ Maestro Ripoll 9, 28006 Madrid, Spain

vs.

**KK Cibona Zagreb**

Savska Cesta 30, 10000 Zagreb, Croatia

**- Respondent -**

represented by its Director, Mr. Domagoj Čavlović

## **1. The Parties**

### **1.1 The Claimants**

1. Mr. Justin Hamilton (the "Player" or "Claimant 1"), is a professional basketball player from the United States of America who also holds the Croatian citizenship.
2. ASM Sports (the "Agency" or "Claimant 2") is a basketball agency situated in Edgewater, N.J. USA.

### **1.2 The Respondent**

3. KK Cibona Zagreb (the "Club" or "Respondent") is a professional basketball club with its seat in in Zagreb, Croatia.

## **2. The Arbitrator**

4. On 16 October 2013, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the "BAT") appointed Ms. Annett Rombach as arbitrator (the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the "BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

## **3. Facts and Proceedings**

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

5. On 10 August 2012, the Parties entered into a labour contract (the "Player Contract"), pursuant to which Respondent engaged the Player as a professional basketball player for the 2012-2013 season. Pursuant to Clause 2 of the Player Contract, the Player was

to receive a base salary of USD 180,000 net, to be paid in monthly shares according to the following payment schedule:

“- August 20, 2012	\$ 9.000,00 (nine thousand) net of any taxes
- September 15, 201[2]	\$ 18,000.00 (eighteen thousand) net of any taxes
- October 15, 201[2]	\$ 18,000.00 (eighteen thousand) net of any taxes
- November 15, 201[2]	\$ 18,000.00 (eighteen thousand) net of any taxes
- December 15, 201[2]	\$ 18,000.00 (eighteen thousand) net of any taxes
- January 15, 201[3]	\$ 18,000.00 (eighteen thousand) net of any taxes
- February 15, 201[3]	\$ 18,000.00 (eighteen thousand) net of any taxes
- March 15, 201[3]	\$ 18,000.00 (eighteen thousand) net of any taxes
- April 15, 201[3]	\$ 18,000.00 (eighteen thousand) net of any taxes
- May 15, 201[3]	\$ 18,000.00 (eighteen thousand) net of any taxes
- June 1, 201[3]	\$ 9.000,00 (nine thousand) net of any taxes”

6. Clause 2 of the Player Contract further provides that

*“Club agrees that this Agreement is fully guaranteed agreement [...] In the event that any scheduled payments are not made by the Club within fifteen (15) days of the applicable payment date, the Player shall immediately be entitled to payment of his full Base Salary as specified above [...]. In addition, if any scheduled payment is not received by Player within thirty (30) days of the due date, the Player’s performance obligations shall cease, Player shall have the right, at the Player’s option, to terminate this Agreement and accelerate the 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 duties and liabilities of Club toward Player and Agent under this Agreement shall continue in full force and effect.”*

7. Clause 4 of the Player Contract adds the following with respect to tax obligations:

*“Club agrees to make all payments of Croatian taxes of any nature (including, but not limited to, income taxes) on behalf of the Player. All bonus payments paid to Player hereunder shall be fully net of all Croatian taxes. All commission payments paid by Club to Agent shall be net and free of any Croatian taxes which shall be paid by the Club. The payments for Croatian taxes on behalf of the Player will be in addition to all other payments required to be made to Player under this Agreement and will be fully guaranteed by Club in the same manner that all payments to Player are guaranteed hereunder. It is understood that Club shall be required to provide to Player with [sic] a tax certificate evidencing that*

*all Croatian taxes have been paid by Club on behalf of Player as provided in this Paragraph [4] when requested by Player or Agent."*

8. Pursuant to Clause 12 of the Player Contract, the Club was obligated to pay the amount of USD 18,000 (net) as agent fee to Claimant 2 by 1 October 2012. Additionally, Clause 12 provides the following:

*"Failure by Club to make Agent's fee payments as and when due shall relieve the Player of his obligation toward Player and Agent. In addition, if scheduled commission payments are not paid by the Club as and when due, Player shall have the right, at Player's option to terminate this Agreement and accelerate all future payments 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."*

9. At the time of the conclusion of the Player Contract, the Player was in possession of a U.S. passport. At some point during the 2012-2013 season, the Player obtained the Croatian citizenship. It is disputed between the Parties when exactly this happened.
10. On 18 September 2012, Claimant 2 sent an email to the Club informing it that the Player had yet to receive his August 2012 salary and that if a payment was not *"credited into mr. Hamilton' [sic] bank account on or before September 23, 2012, then our client, Justin Hamilton, will use his right to sit out practice and games until such payments shall be made and credited. Failure to make the due payments, shall lead to possible unilateral termination of the contract by Mr. Hamilton."*
11. On 25 September 2012, the Club remitted the August 2012 salary of USD 9,000 to the Player's American bank account.
12. On 18 October 2012, Claimant 2 sent an email to the Club informing it that the Player had yet to receive his September 2012 salary and that if a payment was not *"credited into Mr. Justin Hamilton's bank account on or before October 22, 2012, then our client, Justin Hamilton, will use his right to sit out practice and games until such payments*

*shall be made and credited. Failure to make the due payments, shall lead to possible unilateral termination of the contract by Mr. Hamilton."*

13. On 19 October 2012, Respondent replied to Claimant's e-mail as follows:

*"I just wanted to write to you that we are having hard end of the year and please give us few more days from the deadline of 22nd. We plan to pay all the depth till the end of next week. Please understand the situation the economy In Croatia is and hard times we are facing. Things are going forward, and the club is more and more stabile each day."*

14. On 29 October 2012, the Club remitted the September 2012 salary of USD 18,000 to the Player's American bank account.

15. On 27 November 2012, Claimant 2 sent an email to the Club informing it that the Player had yet to receive "due payments" and that if such payments were not "credited into Mr. Justin Hamilton's bank account on or before December 6th 2012, then our client, Justin Hamilton, will use his right to sit out practice and games until such payments shall be made and credited. Failure to make the due payments, shall lead to possible unilateral termination of the contract by Mr. Hamilton."

16. On 14 December 2012, the Club remitted a payment of USD 18,000 (corresponding to the October salary) to the Player's Croatian bank account.

17. On 8 January 2013, the Club remitted a payment of USD 18,000 (corresponding to the November salary) to the Player's Croatian bank account.

18. On 17 January 2013, Claimant 2 sent an e-mail to the Club stating the following:

*"This email shall serve as written notice that, should the due payments, according to the signed contract dated August 10th, 2012, not be made and credited into Mr. Justin Hamilton's bank account on or before January 21st 2013, then our client, Justin Hamilton, will use his right to terminate the contract. According to the provisions of the contract, Mr. Hamilton would then still be*

*owed his full salary and would also be allowed to play for another club and Mr. Justin Zanik would then still be owed his full agent's fee. We are looking forward for the prompt resolution of this matter."*

19. On 22 January 2013, the Player sent a letter to the Club purportedly terminating the Player Contract and demanding that a letter of clearance be issued immediately (the "Termination Letter"):

*"Following the previous communications regarding the situation of the Player Mr. Justin Hamilton and due to the fact that your Club has not given a satisfactory response, Mr. Justin Hamilton hereby exercises his right to terminate the agreement signed on August 10th 2012 between Basket ball Club Cibona Zagreb and Mr. Justin Hamilton for the following reasons:  
As of the date of the present communication, Mr. Hamilton has not received the following scheduled payments due as agreed on the Agreement: [listed the November 15, December 15 and January 15 payments]."*

20. Subsequently, a dispute arose between the Player and the Croatian Basketball Federation ("CBF") about the Player's right to join a club in Latvia which was interested in the Player's services.
21. On 1 February 2013, FIBA, upon the Latvian Basketball Association's ("LBA") request, decided that the Player was not under a valid contract in Croatia and was free to register with a club in Latvia (the "FIBA Decision"). The FIBA Decision is based on the following legal reasons:
- On the date the Termination Letter was served on the Club (i.e. on 22 January 2013), the Club was more than 30 days late in paying the December 2012 salary instalment. Because Clause 2 of the Player Contract entitles the Player to terminate his agreement with the Club in case any payment is late for at least 30 days, default on the December salary was sufficient ground to terminate the Player Contract;
  - The Club has the burden of proof to establish that it was entitled to withhold the owed salary payments;

- The Club did not successfully establish that it was allowed to withhold payment of salary due to the Player's failure to provide certain information for the payment of taxes. The tax payment obligation is separate from the salary payment obligation, and the Club had managed to make four payments to the Player between September 2012 and January 2013.
22. Following the FIBA Decision, the Player joined the Latvian Club VEF Riga under a contract signed already on 22 January 2013 (the "Second Player Contract").
23. Under the Second Player Contract, the Player's remuneration was agreed as per the following payment schedule:

***"2012- 13 Season Eighty One Thousand USD (\$ 81,000.00 USD) net of any taxes***

- |                       |  |
|-----------------------|--|
| - February 15, 201[3] | \$18,000.00 (eighteen thousand) net of any taxes |
| - March 15, 201[3]    | \$18,000.00 (eighteen thousand) net of any taxes |
| - April 15, 201[3]    | \$18,000.00 (eighteen thousand) net of any taxes |
| - May 15, 201[3]      | \$18,000.00 (eighteen thousand) net of any taxes |
| - June 15, 201[3]     | \$9,000.00 ([nine] thousand) net of any taxes"   |

24. On 6 February 2013 the Player and his new club agreed on Annex I to the Second Player Contract whose relevant part read as follows:

*"On this February 6th 2013 parties hereby agree to amend the Agreement with following:*

- A) *Parties confirm by signing of this Annex 1 they mutually agree to change the amount of the base salary. Club shall pay to Player for the 2012/2013 basketball season from \$ 81,000.00 USD (eighty one thousand/00 USD) net of taxes to \$ 64,840.00 USD (sixty four thousand eight hundred forty) net of taxes to be paid according to the following payment schedule:*

- |                       |  |
|-----------------------|--|
| - February 15, 201[3] | \$15,000.00 (fifteen thousand) net of any taxes                  |
| - March 15, 201[3]    | \$15,000.00 (fifteen thousand) net of any taxes                  |
| - April 15, 201[3]    | \$15,000.00 (fifteen thousand) net of any taxes                  |
| - May 15, 201[3]      | \$15,000.00 (fifteen thousand) net of any taxes                  |
| - June 15, 201[3]     | \$4.840.00 (four thousand eight hundred forty) net of any taxes" |

### 3.2 The Proceedings before the BAT

25. On 9 August 2013, the BAT Secretariat received Claimants' Request for Arbitration (with several exhibits). The non-reimbursable handling fee of EUR 2,990.00 was received in the BAT bank account on 8 August 2013.

26. On 23 October 2013, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 13 November 2013 (the "Answer"), and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 13 March 2013 as follows:

<i>"Claimant 1 (Mr. Justin Hamilton)</i>	<i>EUR 3,000</i>
<i>Claimant 2 (ASM Sports)</i>	<i>EUR 1,000</i>
<i>Respondent (KK Cibona Basketball)</i>	<i>EUR 4,000"</i>

27. On 13 November 2013, Respondent submitted its Answer to the Request for Arbitration.

28. On 12 December 2013, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs as follows:

Date	Amount	Received from	Description
25.11.2013	3.985,00 €	U1st Sports Los Angeles	Advance on Costs
06.11.2013	1.000,00 €	U1st New York LLC	Advance on Costs
06.11.2013	3.000,00 €	Justin A Hamilton	Advance on Costs

29. With correspondence dated the same day, the Arbitrator invited Claimants to comment on Respondent's Answer.

30. On 7 January 2014 (after the Arbitrator had granted an extension of the initial time limit), Claimants submitted comments on Respondent's Answer.
31. On 20 January 2014, Claimant 1 submitted the Second Player Contract and Annex I thereto.
32. Despite an invitation from the Arbitrator, Respondent did not comment on Claimants' submission of 20 January 2014.
33. On 13 February 2013, Claimants submitted the following account of costs:

*"- Arbitral fees:*

- |  |         |
|--|---------|
| • <i>Handling fee:</i>                         | 3,000 € |
| • <i>Advance on costs (Claimants)</i>          | 4,000 € |
| • <i>Advance on costs (Respondent's share)</i> | 4,000 € |

- |  |         |
|--|---------|
| - <i>Legal report</i>                        | 1,000 € |
| - <i>Legal advising during the procedure</i> | 850 €   |
| - <i>Translations</i>                        | 100 €   |
| - <i>Copies of documents</i>                 | 50 €    |

**TOTAL: 13,000 EUROS"**

34. Respondent did neither file an account of his own costs nor did it comment on Claimants' cost account.
35. The Parties did not request the BAT to hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the BAT Rules not to hold a hearing and to render the award solely based on the written record before her.

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

36. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this award, the Arbitrator has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award or in the discussion of the claims below.

##### **4.1 Claimants' Position and Request for Relief**

37. Claimants submit the following in substance:

- Respondent constantly delayed salary payments to the Player despite several reminders by the Player's agent to make the outstanding payments;
- Only after the Player had sent the Termination Letter (on 22 January 2013), he received information from the Club that the November 2012 payment (on which the termination was, *inter alia*, based) had been made on 8 January 2013.
- The Player was still entitled to terminate the Player Contract due to the Club's delay in paying the outstanding salaries.
- The Club always justified these delays with its alleged economic problems, it never invoked the breach of legal payment requirements by the Player until the beginning of these proceedings;
- The Player has never refused to comply with any requirement under Croatian law; he in fact learned about certain legal requirements invoked by Respondent only after the termination of the Player Contract;
- The Player did not hold a Croatian Passport or Croatian National ID card at the time he terminated the Player Contract.

38. Pursuant to the Request for Arbitration, Claimants submit the following request for relief:

*"1.-To award the claimants with:*

*Immediate payment by the Respondent of 135,000.00 USD net, corresponding to:*

*-Claimant 1: 117,000 USD*

*-Claimant 2: 18,000 USD*

*2.-To award the Claimants with the full costs of this arbitration plus reasonable attorney's fees."*

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

39. Respondent submits the following in substance:

- The Player unilaterally terminated the Player Contract although he himself was responsible for Respondent's inability to make the salary payments;
- The Player had obtained the Croatian citizenship on 27 September 2012 and was therefore obligated to register as a Croatian player with the Croatian Basketball Association pursuant to article 100 of the Croatian Basketball Association Registration Book of Rules;<sup>1</sup>
- As a registered Croatian player, the Player was obligated to follow and respect the legal rules and regulations of the Republic of Croatia;
- Pursuant to Article 7 of the Book of Rules on the Sports Activities Register ("BRSAR"), the Player was obligated to issue invoices to the Club based on which the Club could then perform the payments, taxes, surtaxes and the Value Added Tax;

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<sup>1</sup> This provision provides that "[t]he player without a legal Republic of Croatian citizenship acquires the status of a foreign player".

- The Player had been asked repeatedly to comply with this law, *i.e.* to issue invoices, but failed to do so;
- Thus, the Player made it impossible for Respondent to make salary payments in compliance with the requirements of Croatian law. If Respondent had paid the Player according to the Player Contract, it would have committed “*an offence punishable by law*”.

## 5. The Jurisdiction of the BAT

40. Pursuant to Art. 2.1 of the BAT Rules, “[*t*]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland”. Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (“PILA”).
41. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
42. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Art. 177(1) PILA.
43. The jurisdiction of the BAT in this dispute follows from Clause 11 of the Player Contract, which reads as follows:

*“Any disputes arising [sic] or related to the present Agreement shall be submitted to the FIBA Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved definitely 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 (PIL), 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.”*

44. The agreement is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA.
45. 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 or related to the present contract” in Clause 11 of the Player Contract clearly covers the present dispute. Furthermore, Respondent did not contest the jurisdiction of the BAT.
46. In view of all the above, the Arbitrator, therefore, holds that she has jurisdiction to decide the claims submitted to her in the present matter.

## **6. Applicable Law – *ex aequo et bono***

47. 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”.*

48. 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.”*

49. In Clause 11 of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to

any other law. Consequently, the Arbitrator will decide the issues submitted to her in this proceeding *ex aequo et bono*.

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

## **7. Findings**

51. As an initial matter, the arbitrator finds that there is no evidence on the record which could cast doubts on the validity of the Player Contract concluded between the Player and the Club. The main issues to be resolved are (i) whether the Player was entitled to terminate the Player Contract on 22 January 2013 due to an alleged payment default by the Club (see below at 7.1), and (ii) to which payments, if any, Claimants are entitled on the quantum side of their case (see below at 7.2).

### **7.1 Was the Player entitled to terminate the Player Contract on 22 January 2013?**

52. The legal requirements for an early and immediate termination of the Player Contract are set out in Clause 2, which provides that *“if any scheduled payment is not received by the Player thirty (30) days of the date due, the Player’s performance obligations shall cease, Player shall have the right, at the Player’s option, to terminate this Agreement and accelerate the payments required under this Agreement”*.

53. The Player bases the termination of the Player Contract on 22 January 2013 on the alleged non-payment of the November 2012, December 2012 and January 2013 salary instalments.

54. The January 2013 salary had become due on 15 January 2013 (Clause 2 of the Player Contract). The 30-day period provided for in the Player Contract had not elapsed on 22 January 2013, which means that the Club’s delay in paying the January salary did not serve as a reason to terminate the Player Contract.

55. The November 2012 salary (which became due on 15 November 2012) was paid by the Club on 8 January 2013. Although the Club was late for more than 30 days at the time it eventually made the payment, this obligation had been fully satisfied when the Player terminated the Player Contract on 22 January 2013. The Player cannot sanction the Club's significant payment delay by means of immediate contract termination "after the fact", *i.e.* after the payment was (with whatever delay) received. Even if the Player was entitled to terminate the Player Contract as soon as the Club was late in paying the November salary by more than 30 days, his right to exercise the termination option vanished when he received the (late) payment.
56. The December 2012 salary became due on 15 December 2012. Accordingly, the Club was late by more than 30 days at the time the Player delivered the Termination Letter on 22 January 2013. Under the Player Contract, it is sufficient for a termination of the contract that "*any scheduled payment*" is not received by the Player within thirty days of the due date. The Arbitrator finds that one monthly salary is not a negligible or completely insubstantial amount and therefore justifies the termination of the Player Contract with immediate effect in accordance with the contractual language.<sup>2</sup>
57. While the Club does not deny the above-described payment obligation, it argues that it could not remit any payments because the Player failed to provide the necessary documentation in order for the Club to meet its legal obligations regarding the payment of taxes under Clause 4 of the Player Contract. The Club had allegedly reminded the Player several times to provide the information, without any response.
58. As an initial matter, the Arbitrator notes that Respondent bears the burden of proof for the successful establishment of any defence against a payment claim the existence of which is principally undisputed. Based on the reasons below, the Arbitrator finds that

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<sup>2</sup> Regarding the issue of contract termination when the outstanding amounts are smaller than one monthly salary see BAT 0383/13 (Dikeoulakos et al. vs. CSM Targoviste), para. 79 et seq.

Respondent failed to meet its respective burden, and that the reasons invoked by it to justify the non-payment cannot be accepted.

59. First, the Arbitrator notes that the Player Contract – the primary source of law addressing Respondent’s payment obligations vis-à-vis the Player – does not provide for any of the information duties allegedly resting on the Player under Croatian law. Specifically, no obligation to issue invoices to the Club as a prerequisite for salary payments is stipulated in the Player Contract. Pursuant to Clause 2 of the Player Contract, the Club *“agree[d] to pay the Player a fully guaranteed Base Salary, net of any applicable taxes”* in several instalments on specific dates. Separately, in Clause 4 of the Player Contract, the Club *“agree[d] to make all payments of Croatian taxes of any nature ... on behalf of the Player”* and confirmed that the tax payments shall be *“in addition to all other payments required to be made to Player ... and will be guaranteed by the Club in the same manner that all payments to Player are guaranteed”*.
60. The Player Contract shows that Respondent’s obligation to pay taxes is separate from its obligation to pay the Player’s salary. Even if Respondent had not had the necessary information or documents to make the required tax payments (for which there is no indication, as described further below), Respondent has not shown why this would entitle it to withhold the (net) salary payments from the Player.
61. Second, the evidence submitted by Respondent also does not prove that the Player was obligated to issue invoices under Croatian law. Respondent’s reference to the BRSAR does not support any such obligation. The BRSAR sets forth *“the contents, the way of conduct and the procedure concerning the entry and deletion from the Register of Sports Activities”* for legal entities and natural parties (Art. 1 BRSAR). Art. 7 BRSAR, on which Respondent relies in particular, describes the entry procedure for an application to the register. It says nothing about the alleged duty to issue invoices or provide information with respect to salary or tax payments. Additionally, Respondent

does not explain why – in its opinion – salary and tax payments cannot be made without an invoice, or, why this would constitute a punishable offence by law.

62. Third, the e-mail exchange between the Player's agents and the Club confirms that the Club, at the time, justified its non-payment with economic difficulties it was allegedly struggling with. It was not before the beginning of the BAT proceedings that Respondent suddenly argued Croatian law requirements that the Player had allegedly breached, resulting in the Club's inability to make any payments to the Player. In BAT Case 0184/11, the Arbitrator was confronted with a similar argument by the respondent Croatian Club, and he rejected it based on the following reasoning:

*"If the reason for withholding payments provided to the Claimant at the time was the financial condition of the Respondent, it is inequitable for the Respondent to later claim that the reason was that the Claimant had not registered with the Ministry of Sport. If the Claimant had been told at the time that the reason payments were being withheld was because he was not registered, it is very likely that he would have registered."<sup>3</sup>*

63. The Arbitrator concurs with this reasoning, also given that Respondent did not submit any evidence that it ever communicated to the Player that he would have to issue invoices at the time. If the Player had been told that the reason payments were being withheld was because he had not issued invoices, it is very likely that he would have issued invoices.
64. Lastly, Respondent did not establish why it could make salary payments to the Player – absent of invoices – for the months of August, September, October and November, but not December (and January).<sup>4</sup>

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<sup>3</sup> BAT 0184/11 (Bilan vs. KK Zadar), para. 85.

<sup>4</sup> See also BAT 0184/11 (Bilan vs. KK Zadar), para. 86.

65. In view of these arguments, the dispute between the parties about when exactly the Player obtained the Croatian Citizenship or was registered as a Croatian Player can be left undecided, particularly in light of the fact that the Club made at least three payments to the Player without respective invoices *after* the date on which the Player, on the Club's own account, became a Croatian Citizen.
66. As a result, the Arbitrator finds that Respondent's breach justified the termination of the Player Contract on 22 January 2013.<sup>5</sup> Therefore, Claimants are principally entitled to compensation for the losses caused by the early termination of the Player's employment.

#### **7.2 To which amounts are Claimants entitled on the quantum side of their case?**

67. The quantum side of Claimants' case consists of two positions: (i) Player's outstanding salaries before the contract was terminated and salary payments for the remainder of the 2012-2013 season (22 January to June 2013); and (ii) agent fee payments in favour of Claimant 2 for the 2012-2013 season.

##### **i. Outstanding and accelerated salary payments in favour of the Player**

68. The consequences of early contract termination are addressed in Clause 2 of the Player Contract, which sets forth that in case of an early termination, the Player may "*accelerate the payments required under this Agreement*".
69. Accordingly, all outstanding payments under the Player Contract became due on 22 January 2013, except for the December 2012 and January 2013 payment, which had already become due on 15 December 2012 and 15 January 2013, respectively. The

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<sup>5</sup> In light of this finding, it can be left undecided whether the non-payment of the agent fee is a valid reason for terminating the Player Contract for all parties.

Player is contractually entitled to the amount of USD 117,000.00 (6x USD 18,000.00 for December 2012 to May 2013 plus 1x USD 9,000.00 for June 2013) for the relevant period of time.

70. However, according to generally accepted principles of the law of damages and also of labour law, any amounts which the Player earned or might earn by exercising reasonable care during the remaining term of the Player Contract must be deducted.<sup>6</sup>
71. In accordance with these principles, the Arbitrator must calculate the compensation which is due by the Club for the period between the actual termination date and – following Claimants’ request for relief – the end of the 2012-2013 season.
72. The Player took up a position with the Latvian club VEF Riga starting in February 2013. Pursuant to the (amended) payment schedule of the Second Player Contract, the Player was to receive a total amount of USD 64,840.00 net under this agreement (USD 15,000.00 for the months of February, March, April and May 2013, respectively, and USD 4,840.00 for the month of June 2013). This amount has to be deducted from the Player’s compensation claim against the Club.
73. The Player purports to have received only USD 60,000.00 under the Second Player Contract and not the full amount of USD 64,840.00, which should be considered for the calculation of his compensation in this proceeding. The Arbitrator disagrees. While there may be case scenarios in which non-paid amounts by a player’s new club can be credited to the player’s compensation claim against the old club, e.g. where it is impossible for the player or would impose an unreasonable burden on him to enforce his claim against the new club, such scenario must be established and proven by the claimant. Here, the Player has neither explained why VEF Riga has not paid him in full

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<sup>6</sup> These principles are also reflected in the BAT jurisprudence, see e.g. ex multis BAT Award 237/11 (Ivanovic, GPK Sports Management Limited vs. Kolossos Rhodes Basketball Club).

nor what efforts he undertook to enforce his claim against the new club. Therefore, the Arbitrator, deciding *ex aequo et bono*, finds that the agreed salary under the Second Player Contract (rather than the amounts actually received) must be deducted from the Player's compensation.

74. In summary, the Player is entitled to compensation payments in the amount of USD 52,160.00 (USD 117,000.00 minus USD 64,840.00).

**ii. Agent fee payments in favour of Claimant 2**

75. Claimant 2 requests payment of the agent fee in the amount of USD 18,000.00 (net) for the 2012-2013 season under Clause 12 of the Player Contract. That payment became due on 1 October 2012. It is undisputed that Respondent did not make this payment.

76. Claimant 2's agent fee claim remains unaffected by the Player's termination of the Player Contract, because this termination was caused by the Club's breach. It would be unfair to burden the agent with the negative consequences arising out of a contract termination that was provoked solely by the Club's misbehaviour, i.e. by the Club's failure to fulfil its payment obligations vis-à-vis the Player. The Agency has fully provided the services it owed under the Player Contract, and the Club's actions that led into the early termination of the agreement cannot go to the Agency's detriment. In fact, the Club should have paid the agent fee to Claimant 2 long before the Player Contract was terminated. Pursuant to Clause 12 of the Player Contract, the full agent fee became due on 1 October 2012, meaning that the Club had been late in making this payment for more than three months when the Player terminated his employment in January 2013.

77. In summary, the Arbitrator finds that Claimant 2 is entitled to payment of the outstanding 2012-2013 agent fee in the amount of USD 18,000.00.

### **7.3 Summary**

78. Claimant 1 is entitled to an amount of USD 52,160.00 (net) in salaries for the 2012-2013 season.

79. Claimant 2 is entitled to the agent fee in the amount of USD 18,000.00 (net) for the 2012-2013 season.

### **8. Costs**

80. 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.

81. On 25 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*”; that “*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time*”, and taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 7,985.00.

82. Considering the outcome and the circumstances of the present case and given that Claimants partly succeeded with their claims (due to their failure to deduct the amounts stipulated under the Second Player Contract from their compensation claim), the Arbitrator deems it appropriate that Respondent shall bear 75% of the arbitration costs.

The Arbitrator has considered that – even though Claimants are in principle entitled to the full amounts under the Player Contract – it is known BAT practice to deduct any amounts which the parties earned or might earn by exercising reasonable care during the remaining term of the contract. Thus, Claimants were under the obligation to only ask for the difference in salary from the outset of their claim. Rather than complying with the known rules of damage mitigation, Claimants only disclosed the Second Player Contract upon the express request by the Arbitrator, which justifies a reduction of Claimants' claim for reimbursement of the arbitration costs advanced by them.

83. Therefore, considering that Claimants paid the full advance on costs in the amount of EUR 7,985.00, in application of Article 17.3 of the BAT Rules, the Arbitrator decides Respondent shall reimburse Claimants in the amount of EUR 5,990.00 for the costs advanced by the latter.
84. Furthermore, the Arbitrator considers it adequate that Claimants are entitled to the payment of a contribution towards their legal fees and other expenses (Article 17.3. of the BAT Rules). The Arbitrator deems it appropriate to take into account, in accordance with the above reasoning, 75% of the non-reimbursable handling fee of EUR 2,990.00 and 75% of further legal costs of EUR 2,000.00 when assessing the expenses incurred by the Claimants in connection with these proceedings. Accordingly, the Arbitrator fixes the contribution towards Claimants' legal costs at EUR 3,742.50. Respondent shall bear its own legal costs in their entirety.

## **9. AWARD**

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

- 1. KK Cibona Zagreb is ordered to pay to Mr. Justin Hamilton USD 52,160.00 net.**
- 2. KK Cibona Basketball is ordered to pay to ASM Sports USD 18,000.00 net.**
- 3. KK Cibona Basketball is ordered to pay jointly to Mr. Justin Hamilton and ASM Sports EUR 5,990.00 as a partial reimbursement of the arbitration costs advanced by them.**
- 4. KK Cibona Basketball is ordered to pay jointly to Mr. Justin Hamilton and ASM Sports EUR 3,742.50 as a contribution towards their legal fees and expenses.**
- 5. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 27 May 2014



Annett Rombach  
(Arbitrator)