



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0487/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Annett Rombach

in the arbitration proceedings between

Mr. K.C. Callero

- Claimant 1 -

Mr. Zachary Andrews

- Claimant 2 -

vs.

S.S. Sutor Srl

Viale Zaccagnini 108, 63812 Montegranaro, Italy

- Respondent -

1. The Parties

1.1 The Claimants

1. Mr. K.C. Callero (the “Agent” or “Claimant 1”) is an agent for basketball players with his residence in Spain.
2. Mr. Zachary Andrews (the “Player” or “Claimant 2”) is a professional basketball player of U.S. nationality.

1.2 The Respondent

3. S.S. Sutor Srl (the “Club” or “Respondent”, and together with Claimants the “Parties”) is a professional basketball club located in Montegranaro, Italy.

2. The Arbitrator

4. On 21 January 2014, 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 nor to her declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. On 14 July 2012, the Club delivered a financial proposal to the Agent regarding the engagement of the Player for two basketball seasons (2012-13 and 2013-14). The proposal included, *inter alia*, the following:

“Annual salary

- Season 2012/2013..... \$ 85.000,00
- Season 2013/2014*..... \$ 100.000,00

[...]

Agency Fees

- Season 2012/2013..... \$ 8.500,00
- Season 2013/2014*..... \$ 10.000,00”

6. On 18 July 2012, the Parties entered into a contract (the “Player Contract”), pursuant to which the Club engaged the Player as a professional basketball player for the season of 2012-2013, it being understood *“that the contract will continue for the 2013-2014 seasons so long as the club remains Lega-A1 (Italy 1st division)”* (Clause 10 of the Player Contract).

7. The Club agreed to pay the Player a base salary of USD 85,000 (net) for the 2012-2013 season, payable pursuant to the following payment schedule (Clause 3 A of the Player Contract):
 - 20 August 2012: USD 4,250 (after having passed medical examinations);
 - 15 September 2012: USD 4,250;
 - 15 October 2012: USD 8,500;
 - 15 November 2012: USD 8,500;
 - 15 December 2012: USD 8,500;
 - 15 January 2013 USD 8,500;
 - 15 February 2013 USD 8,500;
 - 15 March 2013 USD 8,500;
 - 15 April 2013 USD 8,500;
 - 15 May 2013 USD 8,500;
 - 15 June 2013 USD 8,500.

8. Clause 9 of the Player Contract provides as follows:

“During the contract period, all compensation is considered GUARANTEED to the Player by the Club. Under no circumstance shall the club be allowed to penalize the player by withholding any salary amount to the Player because of poor performance by the team or failure to remain in Lega-A.

In the event the Player cannot perform as a professional basketball player due to diminished skills, sickness, injury, should in no way affect his right to receive the entire amount of compensation detailed in the Third clause of the present agreement.

In the case of any offences by the player against doping regulations or against public laws (criminal acts), the Club has the right to terminate the contract without any further obligations.

If the Club unilaterally rescinds the present contract without justification, the Player will have the right to receive the totality of the salary amounts stipulated in the Third clause of this present contract”.

9. Furthermore, Clause 10 provides that the Player Contract was to continue for the 2013-2014 season under the condition that the Club remained in *Lega-A1*. In this case, the Player was to receive a salary of USD 100,000 and a new bonus, while “[a]ll other conditions for the 2013-14 season will remain the same as the 2012-13 season”.
10. According to Clause 3 C of the Player Contract, the Agent was to receive an agent fee of USD 8,500 (net), due and payable on 30 September 2012.
11. In Clause 11 of the Player Contract, the Club agreed to pay a late fee of EUR 50 per day if any payment of the Player’s salary or the agent fee became more than 5 days late.
12. On 20 August 2012, the Player received a cash payment of USD 4,250.
13. On 17 September 2012, the Player injured his knee and was not able to play in the first three games of the regular season. He returned to the team for the fourth game on 21 October 2012.
14. On 30 September 2012, the Player received a payment of USD 4,250.

15. According to the Claimants, on 28 October 2012, after the fifth game of the regular season, the Club told the Agent that it wanted to terminate the Player's employment, because it had hired a new player and did not intend to use the Player's services any longer. The Player did not agree to terminate the Player Contract.
16. Between 1 and 14 November 2012, the Club and the Agent had several telephone conversations in which, according to the Agent, the Club repeated that it did not plan with the Player anymore, that he would not play in any future official league games and that the Club wanted to terminate his employment as soon as possible. Again, the Player refused to agree on a termination of the Player Contract.
17. During a friendly match on 15 November 2012 against an Italian 2nd league team, with less than three minutes remaining on the clock, Claimant 2 and a player from the opposing team had a physical confrontation, upon which the referee ended the game. No criminal or other charges were filed against the Player.
18. On 20 November 2012, the Player received a letter from the Club, which provides as follows:

"[I]n reference to what happened last Thursday, November 15, 2012 during the scrimmage against Fileni Jesi to "PalaRossini", where your action resulted in the interruption of the match, the Club S.S. Sutor S.r.l. want to informed you that steps will be taken as provided by Collective Labor Agreement.

*For this reason, **you are suspended from all activities** waiting for the club to take the decisions and measures relating to your conduct during the scrimmage mentioned.*

Then the Club, in the person of its President and Legal Representative Mr. Tiziano Basso, reserves the right to apply sanctions provided in Article 26.11 of the same collective labour agreement.

The Club intends to start a disciplinary proceeding for your behavior and, for this reason, I invite you to exculpate or otherwise to furnish reason for your unlawful conduct, within 5 days of receipt of this, or you can choose to hear by the Club also with the assistance of a defender in accordance with article

28.1 and 28.2 of Collective Agreement signed between the Italian Basketball Federation, the League Series A and GIBA

*In the meantime, **you'll have to get back at your home in the United States** after having withdrawn the compensation accrued to date and waiting for the official communications of the Club.” (emphasis in the original)*

19. On 21 November 2012, the Agent sent an e-mail to the Club on behalf of Claimant 2, stating the following:

“It is my understanding that my client Zach Andrews was defending himself against an attack from the player on Jesi's team. Zach informed me of his actions directly following the "practice or exhibition game". Zach explained to me that the player from Jesi tried to punch him first, Zach moved out of the way, and then the player tried to hit him again and Zach then defended himself from the player to stop the attack.

For the last 5 days Zach has been participating with the team in practices and also traveled with the team to the game last weekend and nobody from the club notified either Zach or myself that any disciplinary actions would be necessary. [...]"

20. On 23 November 2012, both the Player and the Agent received payments of USD 8,500, respectively. No further payments were made by the Club to the Player or the Agent after this date.
21. On 24 November 2012, the Player returned to the United States.
22. On 2 January 2013, the Agent requested from the Club outstanding salaries, late fees and a letter of clearance to allow the Player to play for the Club LA Defenders in the NBA Development League (“NBADL”).
23. On 7 January 2013 the Club informed the Claimants that it would release the Player if he signed an “Act of Resolution” to resolve the contract, which the Player refused.

24. On 14 January 2013, upon the Agent's request, FIBA issued a letter of clearance to the NBADL, which stated the following:

"On 7 January 2013 FIBA requested a letter of clearance for the above-mentioned player who last played with a club affiliated to the Federation of Italy. However we did not receive an answer to date.

[...]

Therefore FIBA considers that the player is not subject to a validly binding contract in [Italy] and releases the player thus authorising him to play in the NBA Development League as the deadline for a response as per the FIBA/NBADL agreement has already expired."

25. On the same day, the Player signed a contract with the LA Defenders (the "2nd Player Contract") for the remaining season. Pursuant to the 2nd Player Contract, the Player was to receive a total amount of USD 19,000.00.
26. On 30 January 2013, the Club informed the Player that it intended to initiate disciplinary proceedings against him for signing with another club while still being under contract with it. On 3 February 2013, the Club sent a letter to the Player stating, *inter alia*:

"Hereby and with reference to the disciplinary complaint sent on 30.01.2013, inform you the dismissal for Just Cause (...).

The Dismissal has immediate effect (...)."

27. The Agent, on behalf of the Player, responded by e-mail of the same day, justifying the Player's decision to leave the Club and sign with a new team.
28. On 18 August 2013, the Player signed a contract with the Club Osaka Evessa (the "3rd Player Contract") for the 2013-2014 season which provides for annual remuneration in the amount of USD 58,800.00.

3.2 The Proceedings before the BAT

29. On 11 December 2013, the BAT Secretariat received a Request for Arbitration (with several exhibits) of the same date. The non-reimbursable handling fee of EUR 3,000 was received in the BAT bank account on 12 December 2013.
30. On 28 January 2014, 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 (the “Answer”), and fixed the amount of the Advance on Costs to be paid by the Parties as follows:
- | | |
|---|-------------------|
| <i>“Claimant 1 (Mr. K. C. Callero)</i> | <i>EUR 1,000</i> |
| <i>Claimant 2 (Mr. Zachary Andrews)</i> | <i>EUR 3,500</i> |
| <i>Respondent (S.S. Sutor Srl)</i> | <i>EUR 4,500”</i> |
31. By letter to the Parties of 20 February 2014, the BAT Secretariat informed the Parties that Respondent had failed to submit its Answer within the time limit and granted a final opportunity to submit the Answer. It further acknowledged receipt of Claimants’ share of the Advance on Costs.
32. On 11 March 2014, the Parties were informed that Respondent had failed to submit its Answer in accordance with the BAT’s correspondence.
33. On 8 April 2014, the BAT Secretariat acknowledged receipt of the full amount of the advance on costs (with Claimant 2 having substituted for Respondent’s share) and noted that Respondent had failed to submit an Answer to the Request for Arbitration despite its respective invitations. Claimants were requested to provide further information which the Arbitrator considered necessary.

34. On 18 March 2014, Claimants provided additional explanations and documents in response to the Arbitrator's request. Despite an invitation by the BAT Secretariat, Respondent did not comment on Claimants' additional submissions.
35. By procedural order dated 29 April 2014, the Arbitrator requested Claimants to provide a complete copy of the 3rd Player Contract.
36. On 1 May 2014, Claimants submitted a complete copy of the 3rd Player Contract.
37. On 13 May 2014, the Arbitrator declared the exchange of documents completed and invited the Parties to submit a detailed account of their costs.
38. By e-mail of 15 May 2014, Claimants submitted the following account of costs:

- <i>Non-reimbursable handling fee:</i>	€ 3.000,00
- <i>Advance on Costs (Claimant):</i>	€ 4.500,00
- <i>Advance on Costs (Respondent):</i>	€ 4.500,00
<i>TOTAL:</i>	€ 12.000,00

39. On 21 May 2014, the BAT Secretariat forwarded Claimants' account of costs to Respondent and invited it to comment on it. No comments were filed by Respondent.
40. 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.

4. The Positions of the Parties

4.1 Claimants' Position and Request for Relief

41. Claimant 1 submits that the Club was late in paying the agent fee for the 2012-13 season, which entitles him to a late fee of EUR 50 per day according to Clause 11 of the Player Contract.

42. Claimant 1 further alleges that he is entitled to an agent fee for the 2013-2014 season (USD 10,000) as well as a late fee in the amount of EUR 50 per day as of the sixth day after the due date.
43. Claimant 2 submits that the Club did not make certain salary payments due under the Player Contract despite several reminders and efforts to receive the outstanding payments. He also requests late fees with respect to the late and outstanding payments.
44. In their Request for Arbitration, Claimants request the following relief:

“Mr. Zachary Andrews

Outstanding salary payments for season 2012-13 = \$63.000,00usd

Outstanding salary payments for season 2013-14 = \$100.000,00usd

Outstand[ing] bonus payment for Team staying in Lega-A = \$5.000usd

Late Payment fee 2nd salary payment €500,00 Euros

Late Payment fee 3rd salary payment €1.650,00 Euros

Late payment fees for all other salary payments still accruing at €50 Euros per day for each payment after payment becomes 5 days late.

Cost of Arbitration: To be determined

Mr. K.C. Callero

Late payment fee on agent payment = €2.450,00 Euros. Payment due September 30th 2012, payment made November 23'd 2012 (49 days of €50,00 per day late fees).

Agent fee 2013-14 \$10,000.00usd due September 30th 2013.

Late payment fees accruing at €50 Euros per day for late payment of agent fee.

Legal fees: To be determined”

4.2 Respondent's Position and Request for Relief

45. Despite several invitations by the BAT, the Club neither engaged in the arbitration proceedings at hand, nor did it make any submissions within the time limits set by the Arbitrator in accordance with the BAT Rules.

5. The Jurisdiction of the BAT

46. As a preliminary matter, the Arbitrator wishes to emphasize that, since Respondent did not make any submissions in relation to the merits of this case, she will examine her jurisdiction *ex officio* on the basis of the record as it stands.

47. 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).

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

49. 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.

50. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Clause 3 A) of the Player Contract, which – in relevant part – reads as follows:

“Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT 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 (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English."

51. In accordance with Article 1.1 of the BAT Rules, these rules "*shall apply whenever the parties to a dispute have agreed in writing to submit the same to the BAT – including by reference to its former name "FIBA Arbitral Tribunal (FAT)"* (emphasis added). Article 18.2 of the BAT Rules says: "*Any reference to BAT's former name "FIBA Arbitral Tribunal (FAT)" shall be understood as referring to the BAT.*" The Parties' reference to the "*FIBA Arbitral Tribunal (FAT)*" in Clause 3 A of the Player Contract is therefore understood as a reference to the BAT.
52. The Agreement is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA.
53. 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 Clause 3 A of the Player Contract clearly covers the present dispute.
54. Finally, the Arbitrator notes that the jurisdiction of BAT has not been contested by either Claimants or Respondent. In view of all the above, the Arbitrator, therefore, holds that she has jurisdiction to decide the present dispute.

6. Other Procedural Issues

55. 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.¹ However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

56. This requirement is met in the present case. The Club 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, their reply to the Arbitrator's Procedural Order and to their Account on Costs. Respondent, however, chose not to participate in this arbitration.

7. **Applicable Law – *ex aequo et bono***

57. 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".

58. Under the heading "Law Applicable to the Merits", Article 15 of the BAT Rules sets forth the following:

"15.1 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.

15.2 If according to the arbitration clause the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the

¹ See *ex multis* BAT cases 0001/07; 0018/08; 0170/11.

rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate.”

59. The Player Contract does neither contain a reference to ex aequo et bono nor to any other set of applicable substantive law rules. It does, however, reference the BAT Arbitration Rules, including Article 15. Article 15.1 BAT Rules makes clear that ex aequo et bono principles shall apply *“unless the parties have agreed otherwise.”* No such agreement *“otherwise”* is present in the case at hand. An agreement *“otherwise”* in accordance with Article 15.1 BAT Rules (second part) requires that the Parties either (positively) choose a substantive law different from ex aequo et bono, or (negatively) provide that ex aequo et bono shall not apply to the merits of their dispute. When the parties are entirely silent with respect to the applicable law, Article 15.1 BAT Rules is triggered, and ex aequo et bono applies to the dispute.
60. Article 15.2 BAT Rules confirms this interpretation. Its reference to situations where the arbitrator *“is not authorized to decide ex aequo et bono”* includes the same scenarios described in the previous paragraph.
61. In light of the foregoing considerations, the Arbitrator makes the findings below.

8. Findings

62. Claimants request the following relief (to be addressed by the Arbitrator in turn below):
- Payment of outstanding Player salaries for the 2012-13 and 2013-14 seasons (below at 8.1);
 - Payment of a bonus to the Player for staying in the first Italian league after the 2012-13 season (below at 8.2);
 - Payment of an agent fee for the 2013-14 season (below at 8.3); and
 - Late payments on the Player salaries and agent fee (8.4).

8.1 Player salaries for the 2012-13 and 2013-14 seasons

63. According to the Player Contract, the Player was entitled to a base salary of USD 85,000 (net) for the 2012-13 season and USD 100,000 (net) for the 2013-14 season. He alleges that the amounts of USD 63,000 (for the 2012-13 season) and USD 100,000 (for the 2013-14 season) are still outstanding, and that he is entitled to these amounts because of the Club's breach of contract by way of payment acceleration.
64. The (somewhat unusual) payment acceleration mechanism in Clause 9 (fourth paragraph) of the Player Contract, sets forth that the Player shall be entitled to receive the "*totality of the salary amounts*" promised under the Player Contract "*[i]f the Club unilaterally rescinds the present contract without justification*".
65. The questions that need to be answered in this respect are whether the Club's conduct as of November 2012, in particular the Player's suspension as a result of the incident in the friendly match and his forced return to the United States, constitutes a "*unilateral rescission*" of the Player Contract, and whether any such contract rescission happened "*without justification*". The Arbitrator answers both questions in the affirmative.
66. First, the Arbitrator believes that the term "*unilaterally rescind*" is to be understood broadly, *i.e.* is intended to cover any actions by the Club which the Player could reasonably understand to be aimed at a factual termination of his employment. Such actions are not limited to express (oral or written) termination statements, but also cover other types of behaviours indicating to a reasonable person, in one or the other fashion, that the Club was no longer interested in employing the Player. The purpose of Clause 9 of the Player Contract is to protect the Player's salary claims in certain cases where the Player does not perform as expected (or at all). Clause 9, first and second paragraph, makes clear that the Player's salary shall be fully guaranteed and cannot be affected by poor performance, diminished skills, injury or similar impairments to the

Player's performance. The Club shall not be able to escape its payment obligations merely because it is unhappy with the Player's performance or because the Player no longer plays a role in its sporting strategy. The Player's right to demand payments on an accelerated basis in case of a unilateral rescission of the Player Contract flanks the salary guarantee that Clause 9 provides on behalf of the Player.

67. Based on the facts submitted by Claimants, which Respondent has not disputed and the truth of which the Arbitrator has no reason to put in doubt, considering the documents submitted during this proceeding, the Arbitrator is of the opinion that the Club, by the end of the year 2012, had created a situation in which the Player could reasonably assume that the Club was no longer interested in his services. In particular, the following actions by the Club, taken in their entirety, suggest this:

- As of the end of October 2012, the Club openly communicated to the Agent and the Player that it wished to terminate the employment with the Player, because it had hired a new Player;
- Specifically, in November, the Club told the Player that it did not plan with him for the future, that he would not play any more official matches, and that it intended to terminate his contract as soon as possible;
- On 20 November 2012, the Club suspended the Player for an indefinite period of time "*waiting for the club to take the decisions and measures relating to [his] conduct*" at the friendly match, and told him he will "*have to get back at [his] home in the United States*";
- By the end of the year 2012, the Club owed the Player salary payments for two months (USD 17,000), and the Player had no reason to assume that the Club would make any further payments after his (indefinite) suspension in November 2012 and the Club's failure to clarify its position towards him;
- After his return to the United States (24 November 2012), the Club left the Player in a state of uncertainty by failing to clarify its position regarding the Player's future at the Club. There is also no indication that the Club made any

effort to further investigate the fight incident and come to a decision regarding potential disciplinary measures in a timely manner;

- In January 2013, the Club stated that it was willing to release the Player against the signing of an Act of Resolution.

68. The overall picture created by the Club's continuous line of actions could only indicate to the Player that the Club wanted to get rid of him. Specifically, the Player had reason to believe that the Club attempted to use the incident at the friendly game as a pretext for disciplinary proceedings and potentially a termination of the Player Contract. Also, by early January 2013, the Club had not paid the Player's November and December 2012 salaries. Under these circumstances, applying principles of justice and fairness, it is evident for the Arbitrator that the Club's actions can only be viewed as a "*unilateral rescission*" of the Player Contract.
69. Second, the Arbitrator notes that the Club's decision to rescind the Player Contract by signalling the Player that he would no longer be a part of the team and no longer be paid cannot be justified by the fight incident during the friendly game. Irrespective of whether the Club was allowed to open disciplinary proceedings because of the Player's on-court fight – which the Player described as an act of self-defense – it acted against its duty of good faith when it left the Player in a complete state of uncertainty for weeks, despite the fact that the Player had promptly responded to the Club's invitation to explain the incident in writing only one day after he was notified of the opening of the file. If the Club felt that the Player's behaviour during the match justified disciplinary sanctions, it would have been obligated to make a respective decision in a reasonably expedient manner, and to communicate with the Player during the period of his suspension clearly and unambiguously. In reality, the Club did nothing to this extent.
70. In addition, the Arbitrator doubts that the on-court fight incident alone, as it is described in the submissions on record, would have justified the Club to terminate the Player's employment. Pursuant to Clause 9 (third paragraph) the Club's right to terminate the

Player Contract prematurely and with immediate effect was limited to anti-doping violations and criminal acts. The incident as it is described – as an act of self-defense – does not resemble any of these.

71. Therefore, the Club's factual rescission of the Player Contract is unjustified, and the prerequisites triggering the accelerated payment mechanism in Clause 9 (fourth paragraph) are fulfilled.
72. For the sake of completeness, the Arbitrator notes that, at the very latest, the Club would have unilaterally rescinded the Player Contract by sending the termination notice on 3 February 2013. Since this termination likewise happened without justification, it would also have (albeit a few weeks later) triggered payment acceleration under Clause 9 (fourth paragraph) of the Player Contract.
73. As a consequence, the Player is principally entitled to receive all salaries for the entirety of the contractual term. Since Clause 10 provides for a continuation of the Player Contract into the 2013-2014 season with a salary of USD 100,000.00 in case the Club remained Lega-A1 (which it did), the Arbitrator finds that Clause 10 also covers the salary payments of the 2013-2014 season. In general, the Player is therefore entitled to his full salary for the 2012-2013 and 2013-2014 seasons.
74. According to generally accepted principles of the law of damages and also of labour law, which are consistent with an *ex aequo et bono* resolution of the dispute, any amounts which the Player earned or might earn by exercising reasonable attempts to find other work during the remaining term of the Player Contract must be deducted.²

² These principles are also reflected in the BAT jurisprudence, see e.g. *ex multis* BAT 0237/11.

75. The Player signed the 2nd Player Contract with the LA Defenders in January 2013. Under the 2nd Player Contract, the Player was to receive a total amount of USD 19,000 net for the remainder of the season. For the 2013-14 season, the Player agreed to a total amount of USD 58,800.00 net under the 3rd Player Contract with a Japanese team. These amounts (USD 77,800 in total) have to be deducted from the outstanding salary amounts the Club owed the Player under the Player Contract (85,000 USD – 17,000 USD already received = 68,000 USD for 2012-13, and 100.000 USD for 2013-14).
76. In summary, the Player is entitled to (accelerated) salary payments in the amount of USD 90,200.00 (USD 168,000.00 – USD 77,800).

8.2 Bonus for staying in the first Italian league after the 2012-13 season

77. The Player also requests a bonus payment (USD 5,000) “*for staying in the league*” in accordance with Clause 3 of the Player Contract.
78. The Arbitrator finds that this claim is not justified under the circumstances at hand. The Player only played in two games for the Club and left the team very early in the season. It would be unfair to award him an additional – performance related – compensation when he did apparently contribute almost nothing to the achievement of the sporting goal.
79. Also, the Player does not suffer any hardship from the denial of bonuses, because his financial rights are sufficiently protected under the acceleration mechanism provided for in the Player Contract. The Player indeed benefits from these protections in the case at hand, receiving his full salary compensation for the entirety of the envisioned term of the Player Contract (minus the amounts earned at his new teams).

80. Therefore, the Player is not entitled to receive USD 5,000 as a bonus for the Club's staying in the league.

8.3 Agent fee for the 2013-14 season

81. The Agent claims an agent fee in the amount of USD 10,000 for the 2013-14 season (= 10% of the Player salary).

82. The Arbitrator finds that the Agent is not entitled to this fee. No such obligation is stipulated in the Player Contract. The Club's (unsigned) offer letter of 14 July 2012 (quoted at para 5 above), which includes an agent fee in the amount of USD 10,000 for the 2013-2014 season, is not determinative because it is a unilateral offer that was later superseded by the signing of the Player Contract. Claimants do not proffer any evidence showing a mutual agreement between the Parties with respect to an agent fee for the 2013-14 season. Therefore, no such fee can be awarded.

8.4 Late payment penalties

83. Clause 11 of the Player Contract provides for a late payment penalty of EUR 50 per day "*if any of the player's salary or the agent's fee becomes more than 5 days late*". This constitutes a contractual penalty, i.e. a flat fee for each day of a late payment to be cumulatively calculated without limitation as long as the salary or agent fee has not been paid.³ BAT arbitrators have frequently dealt with this type of penalty clause. Two principles can be derived from their jurisprudence.

84. First, penalty clauses and the time window for which they apply should generally be interpreted narrowly in order to prevent excessive results. In this respect, BAT arbitrators have decided that absent any indication to the contrary, a penalty should

³ BAT 0238/11.

principally accrue only between the contractually stipulated starting date (here: as of the sixth day after the due date) and the date the Player or the Club chose to terminate the contract.⁴ In the event that the Player did not terminate his employment the latest point BAT arbitrators accept late payment penalties to accrue is the date of receipt of the request for arbitration by the BAT Secretariat.⁵

85. Second, BAT jurisprudence confirms that penalty clauses are subject to judicial review and can thus be adjusted if they are excessive.⁶ As a general rule, a contractual penalty is considered to be excessive if it is disproportionate to the basic obligation of the debtor.
86. Under these principles, the Arbitrator finds that the Player is entitled to late payment penalties as from the 6th day after the due date of a late or non-payment until the date payment was received for the September and October 2012 salaries, and, for all other salary instalments which are still outstanding today, until FIBA granted the Player a Letter of Clearance and Player signed the 2nd Player Contract (14 January 2013). The calculation of the late penalties is reflected in the following schedule:

Payment Due	Penalties			
	Starting Date ("more than 5 days late")	End date	Days late	Penalty Amount (EUR)
15 September 2012	21 September 2012	29 September 2012	9	450
15 October 2012	21 October 2012	22 November 2012	33	1,650

⁴ BAT 0100/10.

⁵ BAT 0185/11.

⁶ BAT 0036/09.

15 November 2012	21 November 2012	14 January 2013	55	2,750
15 December 2012	21 December 2012	14 January 2013	25	1,250
TOTAL				6,100

87. In relation to the salary payments the Player is entitled to receive for that time period (USD 34,000), the amount of EUR 6,100 is not disproportionate.
88. With respect to the late payment of the agent fee the same principles apply. The agent fee was due on 30 September 2012. Therefore, the period for late fees started on 6 October 2012 and ended on 22 November 2012 (the day before payment was received), thus lasting 48 days and amounting to a late fee of EUR 2,400 in total. In relation to the agent fee the Agent was to receive for the 2012-2013 season (USD 8,500), this amount is not disproportionate.

9. Summary

89. The Agent is entitled to late payment penalties in the amount of EUR 2,400.
90. The Player is entitled to salary payments in the amount of USD 90,200, and late payment penalties of EUR 6,100.

10. Costs

91. 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.

92. On 28 August 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 9,000.00.
93. Considering that Claimants’ claims were largely justified in principle, but had to be adjusted downwards on the quantum side, the Arbitrator – deciding *ex aequo et bono* – deems it appropriate that 75% of the fees and costs related to this arbitration be borne by Respondent and that Respondent be required to cover its own legal costs.
94. Given that Claimants paid both shares of the Advance on Costs in the amount of EUR 4,500 each (in total EUR 9,000), the Arbitrator decides that in application of Article 17.3 of the BAT Rules:
- (i) Respondent shall pay EUR 6,750 to Claimants as a reimbursement of 75% of the arbitration costs advanced by them;
 - (ii) Furthermore the Arbitrator considers it appropriate to take into account the non-reimbursable handling fee of EUR 3,000 when assessing the expenses incurred by Claimants in connection with these proceedings. Hence, and in light of the fact that Claimants do not claim any other legal fees, the Arbitrator fixes the contribution towards the Claimants’ legal fees and expenses at EUR 2,250 (= 75% of EUR 3,000).

11. AWARD

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

- 1. S.S. Sutor Srl is ordered to pay to Mr. K.C. Callero EUR 2,400.00 in late payment penalties.**
- 2. S.S. Sutor Srl is ordered to pay to Mr. Zachary Andrews USD 90,200.00 (salaries and bonus) and EUR 6,100.00 (late payment penalties).**
- 3. S.S. Sutor Srl is ordered to pay to Mr. K.C. Callero and Mr. Zachary Andrews, jointly and severally, EUR 6,750.00 as a reimbursement of the arbitration costs advanced by them.**
- 4. S.S. Sutor Srl is ordered to pay to Mr. K. C. Callero and Mr. Zachary Andrews, jointly and severally, EUR 2,250.00 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, 3 September 2014

Annett Rombach
(Arbitrator)