

ARBITRAL AWARD

(BAT 0497/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr Ulrich Haas

in the arbitration proceedings between

Mr. Žygimantas Jonušas

UAB “East Players”
Mėnulių g. 7, 04326 Vilnius, Lithuania

- Claimant 1 -

- Claimant 2 -

both represented by Mr. Linas Jakas and Mr. Antanas Paulauskas,
attorneys at law, Adlex law firm, Gynėjų g. 16, 01109 Vilnius, Lithuania

vs.

Basket Juvecaserta s.r.l.
Via Patturellii 37, 811000 Caserta, Italy

- Respondent -

represented by Mr. Enrico Zorzi, attorney at law, studio legale
Zorzi, Corneli & Di Francesco, Via Nicola Palma 12, 64100 Teramo,
Italy and by its General Manager Mr. Marco Atripaldi

1. The Parties

1.1 Claimant 1

1. Mr. Žygimantas Jonušas is a professional Lithuanian basketball player (hereinafter referred to as “Player” or “Claimant 1”).

1.2 Claimant 2

2. UAB “East Players” (hereinafter referred to as “Agent” or “Claimant 2”) is an agency operated by the FIBA-licensed agent Mr. Sarunas Broga, that represents professional basketball players such as Claimant 1.

1.3 The Respondent

3. Basket Juvecaserta s.r.l. (hereinafter referred to as “Club” or “Respondent”) is a basketball club located in Caserta, Italy.

2. The Arbitrator

4. By letter of 5 February 2014, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren, appointed Prof. Ulrich Haas as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). None of the Parties have raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. On 30 July 2012, the Claimants and the Respondent signed a contract (hereinafter referred to as “the Player Contract”), according to which Respondent engaged Claimant 1 as a professional basketball player for the seasons of 2012/2013 and 2013/2014. Furthermore, the Player Contract provides that the Respondent has to compensate the Agent for its services.

6. Article 4 of the Player Contract provides as follows:

“The net salary to be paid to the Player by Club is One Hundred and Ten Thousand Euros (€ 110,000.00 EUR) per 2012/2013 season and One Hundred and Ten Thousand Euros (€ 110,000.00 EUR) per 2013/2014 season, net of bonuses, Italian social charges, taxes, and any other charges whatsoever.

[...]

The Player has a right to ask the Club to pay part of the salary to his former club as a buy-out for early termination of his previous contract. This must not result in or lead to cost the Club more than the player’s total salary set out in this agreement.

LATE PAYMENTS:

In the event that any scheduled payments are not made by the Club within 10 (ten) days of the applicable payment date, a penalty fee of € 100 (one hundred euros) EUR per day shall be paid to the Player. In the event that any scheduled payments are not made by the Club within 15 (fifteen) days of the applicable payment date, the Player shall give a notice to the Club indicating that the payments have been overdue. In the case the Club continues to not perform its payment obligations, the Player shall not have to perform in any practice sessions or any games until such time as all said payments has been paid. If any scheduled payment is not received by Player’s bank within 20 (twenty) days of the date due, the Player’s performance obligations shall cease, Player shall have the right, at Player’s option, to terminate this Agreement and accelerate all future payments required under this Agreement. In this case, Player shall be free to leave the Club with his FIBA Letter of Clearance as a free agent to play basketball anywhere in the world Player chooses, but the duties and liabilities of Club toward Player and Agent under this

Agreement shall continue in full force and effect. Furthermore, the Club shall have no rights over or with respect to Player, and the Club will not be entitled to request or receive any payments pertaining to the Player playing basketball anywhere in the world. Notwithstanding anything to the contrary contained above, in the event at any time during the term of this Agreement Player fails a FIBA administered doping test Club shall have the right to terminate this Agreement, in which event, Club shall be relieved of all of its obligations and liabilities under this Agreement from and after the date in which Player fails his doping test.

AGENT PAYMENTS:

The Club acknowledges that the Player has an authorised exclusive representative in Player's relations with the Club – "East Players" represented by Mr. Sarunas Broga, FIBA licence no 2007019356, hereinafter referred to as "Player's agent". Whereas, East Players (Sarunas Broga) assisted the Club in locating and contracting with the Player, the Club shall, in addition to the compensation and other payments payable to the Player hereunder, pay a 10% (ten percent) commission fee to the Player's agents according to the invoice issued by the Player's agent to the Club not later than till the 1st of September 2012 (for 2012/2013) season and 1st of September 2013 (for 2013/2014 season). In case of failure by the Club to timely pay any part of fee to any of the Player's agents the provisions of Article "Late Payments" above shall apply. The agent fee has also to be fully paid in case of early termination (due to whatever ground) of this agreement. "

7. On 11 August 2012, Claimant 1 and the Respondent concluded an appendix to the Player Contract (hereinafter referred to as "Appendix 1"). According thereto, the Club agreed to pay EUR 55,000 as a buy-out for early termination of the Player's previous contract with his former club. Accordingly, the salary due to the Player for the basketball season 2012/2013 by the Respondent was adjusted. The relevant parts of Appendix 1 read as follows:

"The Club agrees to pay 55.000 EUR (fifty five thousand euros) buy-out for the Player to the Player's previous club according to the separate agreement the Club and the previous club of the Player. "

The Player agrees with the reduction of his salary for 2012-2013 season from €110,000.00 (one hundred and ten thousand euros) EUR to €60,000.00 (sixty thousand euros) EUR.

[...]



BASKETBALL ARBITRAL TRIBUNAL

"Parties agree to amend the Agreement made on August 10, 2012 between Juve Caserta and Žygimantas Jonušas.

The net salary to be paid to the Player by Club is Sixty Thousand Euros (€60.000.00 EUR) per 2012/2013 season and One Hundred and Ten Thousand Euros (€110.000.00 EUR) per 2013/2014 season net of bonuses, Italian social charges, taxes, and any other charges whatsoever.

During the 2012-13 season the Club agrees to pay the Player according to the following payment schedule

Regular Season

No later than 5 days after player passing medical check: €3000 EUR (three thousand euros)

<i>September 5, 2012</i>	<i>€ 6000 EUR (six thousand euros)</i>
<i>October 5, 2012:</i>	<i>€ 6000 EUR (six thousand euros)</i>
<i>November 5, 2012</i>	<i>€ 6000 EUR (six thousand euros)</i>
<i>December 5, 2012</i>	<i>€ 6000 EUR (six thousand euros)</i>
<i>January 5, 2013</i>	<i>€ 6000 EUR (six thousand euros)</i>
<i>February 5, 2013</i>	<i>€ 6000 EUR (six thousand euros)</i>
<i>March 5, 2013</i>	<i>€ 6000 EUR (six thousand euros)</i>
<i>April 5, 2013</i>	<i>€ 6000 EUR (six thousand euros)</i>
<i>May 5, 2013</i>	<i>€ 6000 EUR (six thousand euros)</i>
<i>June 5, 2013</i>	<i>€ 3000 EUR (three thousand euros)</i>

Total: \$60 000 EUR (sixty thousand euros)

During the 2013-14 season the Club agrees to pay the Player according to the following payment schedule

Regular Season

<i>September 5, 2013:</i>	<i>€ 11 000 EUR (eleven thousand euros)</i>
<i>October 5, 2013</i>	<i>€ 11 000 EUR (eleven thousand euros)</i>
<i>November 5, 2013</i>	<i>€ 11 000 EUR (eleven thousand euros)</i>
<i>December 5, 2013</i>	<i>€ 11 000 EUR (eleven thousand euros)</i>
<i>January 5, 2014</i>	<i>€ 11 000 EUR (eleven thousand euros)</i>
<i>February 5, 2014</i>	<i>€ 11 000 EUR (eleven thousand euros)</i>
<i>March 5, 2014</i>	<i>€ 11 000 EUR (eleven thousand euros)</i>
<i>April 5, 2014</i>	<i>€ 11 000 EUR (eleven thousand euros)</i>

May 5, 2014	€ 11 000 EUR (eleven thousand euros)
June 5, 2014	€ 11 000 EUR (eleven thousand euros)
Total:	€ 110 000 EUR (one hundred and ten thousand)

8. On 8 May 2013, the Player and the Respondent concluded a second appendix to the Player Contract (hereinafter referred to as "Appendix 2"). Regarding Claimant 1's salary compensation, the Appendix 2 stated – *inter alia* – that

"Parties agree that for the season of 2012-2013 Juve Caserta has paid Fifty Five Thousand (€ 55.000,00 EUR) till May 8th 2013 to and it was received by Žygimantas Jonušas and Juve Caserta shall pay the remaining Five Thousand Euros (5.000,00 EUR) to Žygimantas Jonušas until July 1st 2013 to the personal bank account of the Player. ..."

9. On 3 July 2013 the Respondent paid to the Player an amount of EUR 1,711.20.
10. On 6 July 2013, Mr. Marco Atripaldi wrote the following email to the Agent:

*"Hi Sarunas,
This is Marco Atripaldi ... I am the new Gm of Caserta. ... Here in Caserta we have a contract with your player Jonusas Zygyantas: he had a so so season here, and people here told me also about Physical problems that the guy has. So our intention is to find with you and the player a solution to resolve the contract. Please let me know what's your opinion."*

11. By letter dated 20 August 2013, the Agent, acting (also) on behalf of Claimant 1, submitted to the Respondent by email a legal claim regarding outstanding payments. In its letter the Agent requested the Respondent to pay to Claimant 1 the outstanding balance arising from Appendix 2 in the amount of EUR 3,300. Furthermore, the Agent claimed outstanding agent fees dating back to 1 September 2012 in the amount of EUR 7,500. The Agent invited the Respondent to make the outstanding payments by 27 August 2013. The email further advised the Respondent that, according to Article 4 of the Player Contract, the Player and the Agent were entitled to late payment penalties. Finally, the letter states that if *"Juve Caserta will fail, to satisfy its financial obligations to*

Mr. Žygimantas Jonušas and East Players within 7 days, legal action to recover the debt as well as the delay penalty will be taken against Juve Caserta without further notice.”

12. On 25 August 2013 Marco Atripaldi, the General Manager of the Club replied via email to the Agent as follows:

*“Hi Sarunas,
as you have seen, the Club has paid the 7.500 euros of your agency fee for the last season. We cannot do the same for 3.300 euros of the player because we have not an invoice to do it (is what President told me). Now the proposal of Mr Lavazzi is to include this small amount (3.300) in the bigger amount that we must pay to finish the contract. Our proposal for cut the contract is ... Sarunas, I've worked hard to have Lello Lavazzi on this page. Please push the player to accept or we'll have the risk to start a medical/legal war that will not help nobody ...”*

13. With email dated the same day, the Agent responded to Mr. Marco Atripaldi as follows:

*“Dear Marco,
... there is no need for an invoice for 3.300 EUR as it is part of Jonusas' salary for 2013/2014 according to the Appendix No 2. Jonusas was paid 50.000 EUR in the end of April, 5.000 EUR in cash on May 8th when he signed the Appendix No 2 and 5.000 EUR remained to be paid till July 1st 2013. ... Only 1.700 EUR were wired to Jonusas based on Appendix No 2 and 3.300 is still missing ...
Please transfer the remaining debt for 2013/2014 season (3.300 EUR) to Jonusas and will gladly discuss your proposal ... But first the club must cover the debts for 2013/2014 season. ... “*

14. On 27 August 2013 the Agent wrote once more to Mr. Marco Atripaldi:

*“Dear Marco,
... Did Juve Caserta transfer the remaining debt of 3.300 EUR to Žygimantas Jonušas? Today is August 27th 2013. Please, forward us the wire copy before midnight if the transfer was made. Otherwise we will consider the payment as not made.”*

15. With email dated the same day, Mr. Atripaldi responded to the Agent as follows:

“Sarunas,

We can't pay the 3.300 without an invoice. Please sent it to us and we pay immediately ..."

16. On 28 August 2013, the Agent submitted to the Respondent a termination letter, on behalf of the Player for failing to pay the outstanding EUR 3.300 EUR until 27 August 2013.

17. On the same day Mr. Giuseppe Cicala, attorney-at-law, responded on behalf of the Respondent as follows:¹

*"Dear Mr. Sarunas Broga,
As the lawyer of Basketball Juvecaserta srl, I take note of your email about the position of Mr. Jonusas and I dispute – for all legal purposes and consequences – all requests made therein. ... However, without prejudice to all rights, we invite you at the Company's office on September 2, 2013 at 17:00 in order to better clarify, in the presence of both parties, the mutual positions."*

18. On 29 August 2013 the Agent replied to Mr. Giuseppe Cicala as follows:

*"Dear Giuseppe,
Appreciate your email. I think and I hope that Juve Caserta will not need your services and save some money for the needs of the team.
We've received a settlement proposal from Mr Marco Atripaldi which is very close to what the Player is ready to accept (2 options below) ... Please, inform me which option is better to Juve Caserta so I could prepare peace agreement regarding termination compensation for the season 2013/2014.
We will not be able to arrive to your office on September 2nd 2013 as the Player lives in Vilnius, Lithuania. According to the contract Juve Caserta was supposed to purchase him a flight ticket, but failed to fulfil its contractual obligations."*

19. On 9 September 2013 Mr. Marco Atripaldi answered to the Agent as follows:

*Dear Sarunas,
Sorry for the delay ... It is not easy to push lavazzi to an agreement because he thinks can obtain something to the BAT, but I'm working on this. For sure he will*

¹ Translation from Italian into English provided by Claimants.

not accept your proposals, so we must work together to find a different soluzione good for both sides ...” (sic)

3.2 The Proceedings before the BAT

20. On 27 December 2013, Claimants filed a Request for Arbitration in accordance with the BAT Rules. The non-reimbursable fee of EUR 2,000 was received in the BAT bank account on 6 December 2013.

21. On 6 February 2014, the BAT acknowledged receipt of the Request for Arbitration dated 27 December 2013. Furthermore, the BAT invited the Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 27 February 2015 (the “Answer”), and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 17 February 2014 as follows:

<i>“Claimant 1 (Mr Žygimantas Jonušas)</i>	<i>EUR 3,500</i>
<i>Claimant 2 (UAB “East Players”)</i>	<i>EUR 1,000</i>
<i>Respondent (Juvecaserta Basket s.r.l.)</i>	<i>EUR 4,500”</i>

22. On 27 February 2014, the Respondent submitted its Answer to the Request for Arbitration to the BAT Secretariat. The Answer also contained a counterclaim.

23. By Procedural Order of 4 March 2014, the BAT Secretariat adjusted the Advance on Costs in view of the counterclaim filed by the Respondent as follows:

<i>“Claimant 1 (Mr Žygimantas Jonušas)</i>	<i>EUR 3,500</i>
<i>Claimant 2 (UAB “East Players”)</i>	<i>EUR 1,000</i>
<i>Respondent (Juvecaserta Basket s.r.l.)</i>	<i>EUR 6,000”</i>

24. On 26 March 2014, the BAT Secretariat acknowledged receipt of the Parties’ respective shares of the Advance on Costs. Furthermore, the BAT Secretariat – on behalf of the Arbitrator – invited Claimant 1 to provide the Arbitrator by 4 April 2014 with

bank statements from the relevant period in order to demonstrate that he has not received the alleged payments in the amount of EUR 3,300 from Respondent. In addition, the Respondent was invited to explain in detail and within the same deadline the damage it allegedly incurred.

25. The Parties each made their respective submissions by the deadline in accordance with the Procedural Order of 26 March 2014.
26. By Procedural Order dated 9 April 2014, the BAT acknowledged receipt of the Parties' submissions in accordance with BAT's Procedural Order dated 26 March 2014. It also informed the Parties that the Arbitrator had declared the exchange of documents completed. Furthermore, the BAT invited all Parties to submit a detailed account of their costs by no later than 16 April 2014.
27. On 15 April 2014, Claimants submitted their detailed account on costs.
28. On 16 April 2014, Respondent submitted its account on costs in accordance with the Procedural Order of 9 April 2014.
29. On 17 April 2014, the BAT acknowledged receipt of the Parties' accounts of costs and invited them to file their respective comments, if any, by 25 April 2014. None of the parties filed comments within the said deadline.

4. The Position of the Parties

4.1 Claimants' Position

30. Claimant 1 submits the following in substance:

- In the Appendix 2, the Respondent acknowledged an outstanding debt towards the Player in the amount of EUR 5,000 and agreed to pay this amount until 1 July 2013.
- Respondent has paid only part of the outstanding amount, i.e. EUR 1,700, on 3 July 2013. The remaining amount of EUR 3,300 is still outstanding as of today. Article 4 provides that if any scheduled payment is not received within 20 days of the date due, the Player's performance obligation shall cease and the Player shall have the right to terminate the Player Contract.
- Since the Respondent failed to pay the full amount of the remaining salary by 1 July 2013, and failed to do so also thereafter, Claimant 1 rightfully terminated the Player Contract unilaterally on 28 August 2013. In doing so, the Player claims to have acted in good faith, because he had warned the Respondent of the consequences of late payment in his letter dated 20 August 2013. Furthermore, the Player had fixed a new and final deadline for the payment of the outstanding amount until 27 August 2013.
- Respondent, by not complying with its obligations to pay a relatively small amount of the salary, deliberately breached the Player Contract. In accordance with the acceleration clause contained in Article 4 of the Player Contract, Claimant 1 was authorized to accelerate all future payments owed by the Respondent under the Player Contract. Thus, at present, the Respondent – further to the EUR 3,300 – is indebted towards the Player with the remainder of the salary as agreed upon in the Player Contract, i.e. the net sum of EUR 110,000 for the season 2013/2014.
- However, the Player also acknowledges that he is under a duty to mitigate the damage incurred in case of early termination of the Player Contract. In fact, Claimant 1 signed another contract with a Lithuanian Basketball Club for the 2013/2014 season, for which he is to receive EUR 33,000. Claimant 1, thus,

requests to be awarded compensation by Respondent for the 2013/2014 season “only” in the amount of EUR 77,000.

- According to Article 4 of the Player Contract, the Player considers himself entitled to late payment penalties. The clause provides that in case Respondent is 10 days late with its contractual obligations, a penalty fee of EUR 100 per day applies. The late payment penalty that has accrued from 1 July 2013 until the filing of the Request for Arbitration amounts to EUR 17,500. However, Claimant 1 acknowledges the BAT’s jurisprudence, according to which penalties may not exceed the salary in default; i.e. EUR 3,300. Therefore, Claimant 1 requests to be awarded late payment penalties in the total amount of EUR 3,300.
- Since Respondent is in default, Claimant 1 sees himself also entitled to interest payments, calculable at 5% on the outstanding salary of the 2012/2013 season, i.e. EUR 3,300, starting on 1 July 2013, and the outstanding salary for the 2013/2014 season, i.e. EUR 77,000, all of which payments became due by acceleration when the Claimant 1 unilaterally terminated the Player Contract on 28 August 2013.
- In respect of the counterclaim filed by the Respondent, the Player submits that he rightfully terminated the Player Contract and, thus, did not breach the terms of the Player Contract. Respondent, contrary to its submission, did not comply with its contractual obligations by not effectuating payment of the outstanding salary until 1 July 2013. It is also obvious from the letters exchanged between the Agent and the Club that the Respondent did not deem the Player Contract to be still in force after 27 August 2013. In particular, the Player submits that he was never called up by the Respondent for the preparation of the 2013/2014 season. Furthermore, the Respondent did not pay the flight tickets for the Player’s return from Vilnius for the 2013/2014 season. Instead, the Respondent invited the Player to come to its office on 2 September 2013 to discuss and solve the legal issues that had arisen between them in relation to the Player Contract. Finally, if it were true that the Player was still

under contract when he joined the Lithuanian basketball club on 21 September 2013, the Italian Basketball Federation would not have issued the letter of clearance for the Player.

31. Claimant 2 submits the following in substance:

- Claimant 2 was party to the Player Contract entered into with the Respondent for the basketball seasons 2012/2013 and 2013/2014. According to Article 4 of the Player Contract, Claimant 2 is entitled to a commission fee in the amount of 10% of the Player's remuneration for each season covered by the Player Contract, i.e. EUR 11,000 for the 2012/2013 season, and EUR 11,000 for the 2013/2014 season. Claimant 2's right to receive the agent fee was not amended by either Appendix 1 or Appendix 2.
- While Respondent paid Claimant 2 the agent fee for the 2012/2013 season, it failed to do so for the 2013/2014 season. Article 4 expressly states that the agent fee is owed independently of whether or not the Player Contract is terminated prematurely. Thus, the Player's termination of the Player Contract on 28 August 2013 did not affect Respondent's obligation to pay the agent fee to Claimant 2 for the 2013/2014 season. Claimant 2 is, therefore, entitled to EUR 11,000.

32. In their Request for Arbitration, dated 27 December 2013, the Claimants submitted the following requests for relief:

"With regard to all circumstances and legal arguments set forth herein, the Claimants Žygimantas Jonušas and UAB "East Players" hereby request Basketball Arbitral Tribunal:

-To award the outstanding salary in the amount of EUR 3,300.00 (three thousand three hundred euros) plus interest at rate of 5% per annum on such amount for the period starting from 02 July 2013 to the actual day of payment of this amount from the Respondent Basket Juvecaserta s.r.l.. (Basketball club Juvecaserta) in favour of the Claimant I Žygimantas Jonušas;

-To award a compensation in the amount of EUR 77,000.00 (seventy seven thousand euros) plus interest at rate of 5% per annum on such amount for the period starting from 28 August 2013 to the actual day of payment of this amount from the Respondent Basket Juvecaserta s.r.l. (Basketball club Juvecaserta) in favour of the Claimant I Žygimantas Jonušas;

To award the penalty fee in the amount of EUR 3,300.00 (three thousand three hundred euros) from the Respondent Basket Juvecaserta s.r.l. (Basketball club Juvecaserta) in favour of the claimant I Žygimantas Jonušas;

To award the agency fee in the amount of EUR 11,000.00 (eleven thousand euros) plus interest at rate of 5% per annum on such amount for the period starting from 01 September 2013 to the actual day of payment of this amount from the Respondent Basket Juvecaserta s.r.l. (Basket club Juvecaserta) in favour of the Claimant II UAB “East Players”;

-To award legal fees and other expenses incurred by the Claimants Žygimantas Jonušas and UAB “East Players” in connection with the proceedings of arbitration from the Respondent Basket Juvecaserta s.r.l. (Basketball club Juvecaserta) in favor of the Claimants. “

4.2 Respondent's Position

33. The Respondent, in substance, submits the following in relation to the claim submitted by the Player:

- The Respondent disputes Claimants' allegations in their entirety and argues that the Claimants' Request for Arbitration is unlawful and unfounded.
- While Appendix 1 constitutes an amendment of the obligations contained in the Player Contract, Appendix 2 is simply “*a promise of payment and also a recognition of debt*”. This “*promise of payment*” has – according to the Respondent – “*no effect of amending or novation of the obligations*” contained in the Player Contract, except “*for the timing of the payment*”.
- Insofar as Appendix 2 states that Respondent has made payments in the amount of 55,000 EUR until 8 May 2013 and, thus, still owes EUR 5,000 to the Player, the

calculation is wrong. In fact, according to the Respondent the Club – taking into account the last payment made on 1 July 2013 (in the amount of 1,711.20 EUR) has paid a sum total of EUR 60,275.20 to the Player. Thus, on 1 July 2013, there remained no outstanding salaries towards the Player. The reason for this mistake lies in the fact that a “change of property of the Club” had taken place in spring 2013. It is, therefore, likely that prior to the signing of the Appendix 2 the former Club president, Mr. Gervasio, gave Mr Lavazzi, the new President of Juvecaserta, *“wrong information and uncompleted documents about Mr. Jonusas’ economic balance with the Club.”*

- In actual fact, however, the Club, when effectuating the last payment to the Player on 1 July 2013, had paid all outstanding amounts and, thus, fully complied with its financial obligations for the 2013/2014 season. This also follows from the correspondence between the Agent and the Club. In particular, the Club’s lawyer, Giuseppe Cicala, in his communication dated 28 August 2013 stated that *“no exposure can be found about it in the official corporate documents.”* This has been the Club’s position ever since. The same also follows from the Club’s communication dated 9 December 2013, according to which *“no monetary obligations is been breached and Juvecaserta is able to prove, even in front of BAT, all payments received by Mr. Jonusas and his Agent.”*
- It follows from all of the above that Claimant 1 is neither entitled to outstanding salaries in the amount of EUR 3,300, nor to late payment penalties, nor to early termination of the Player Contract.

34. The Respondent submits the following in substance in relation to the claim submitted by the Agent:

- According to the Respondent, Claimant 2 helped and collaborated with Claimant 1 to terminate the Player Contract without cause. Furthermore, Claimant 2 also

represented Claimant 1 during the negotiations with the Lithuanian Club for the season 2013/2014. Should the Arbitrator decide that Claimant 1's termination was rightfully exercised, the Respondent requests that Claimant 2's agent fee for the 2013/2014 season be reduced by the amount that Claimant 2 earned through the new contract for the same season.

- Should the Arbitrator find that a portion of the Agent's fees for the season 2013/2014 was in fact due, the Respondent holds itself entitled to be awarded an equal amount, payable by Claimant 1, to recompense the pecuniary damage suffered by the Respondent.

35. In relation to its counterclaim, the Respondent submits the following in substance:

- Despite the fact that Respondent fulfilled all of its obligations for the season 2012/2013, Claimant 1 terminated the Player Contract on 28 August 2013, thus breaching the Player Contract and the principle of *pacta sunt servanda*. Only a few days later, the Player signed a new contract with another basketball club, thereby definitely violating his contractual obligations with the Respondent. The Claimant did all of this with the help of the Agent. Therefore, both Claimants shall be declared responsible for breaching the Player Contract on 30 July 2012.
- The Respondent claims that, as a result of this breach, it has suffered substantial damage. The actual amount – according to the Respondent – is difficult to calculate. However, the Arbitrator has some discretion in evaluating the quantum of the damage if the exact amount cannot be established because of the nature of the damage. The damage suffered by the Club consists in particular in its “disturbed preparation of the upcoming season”, “additional internal costs and lawyer's fees caused by having to address the problem” and “recruiting fees in finding a replacement for the player”. The Respondent requests the Arbitrator to fix an ex

aequo et bono indemnity that covers all of the above. The Respondent submits that this indemnity should be quantified at a minimum of EUR 20,000.

- Finally, the Respondent finds that the Claimants filed this arbitration in violation of the principles of *bona fide* and *neminem laedere*, due to the lack of any legal basis. Thus, the Respondent requests the Arbitrator to order the Claimants to reimburse any legal fees and any other damages incurred by the Respondent in connection with this Arbitration proceeding.

36. The Respondent has filed the following prayers for relief:

“Basketball Juvecaserta s.r.l. (Club) asks the Arbitrator to take in favour of the Club the following decisions:

-To declare the request for arbitration filed by both the Claimants, unfounded because it lacks the factual and legal (sic)

-To declare that the requests of relief made by both the Claimants in the request for arbitration must all be rejected

-To order the Claimants to pay to the Club all arbitration proceedings costs;

-To order the Claimant to pay to the Club all legal fees and expenses of accrued from this arbitration proceeding (sic)”

37. Respondent's Counterclaim reads as follows:

“Basketball Juvacaserta s.r.l. (Club) asks the Arbitrator to take in favour of the Club the following decisions:

-to ascertain and declare the responsibility of Mr Jonusas and his Agent each within his competence in breach of the contract on July 30th 2012.

-to order Mr Jonusas and his Agent each within his competence compensation for the damage suffered by the Club for the serious breach of the contract, which is quantified in the sum of € 20.000,00, or that the court deems equitable

-to ascertain that the request for arbitration filed by Claimants is vexatious and reckless proposal (sic), or at least in violation of principles of fairness and sportsmanship;

-consequently to condemn the Claimants to compensation for damage suffered by the Respondent to be quantify (sic) on an equitable basis taking into account the total value of the contract at issue;

-if it should it (sic) be determined that a portion of Agent's fee for season 2013/2014 were due order the Player to compensate for pecuniary damages the Club for a sum of equal amount

-to order the Claimants to pay to the club all arbitration proceeding costs;

-to order the Claimants to pay to the Club all legal fees and expenses of accrued (sic) from this arbitration proceeding."

5. Jurisdiction

38. 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).

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

5.1 Arbitrability

40. 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) PILA².

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

5.2 Formal and substantive validity of the arbitration agreement

41. Article 13 of the Player Contract contains an arbitration clause that reads as follows:

“ARBITRATION

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

42. This arbitration clause included in the Player Contract and signed by both Claimants and the Respondent fulfils the formal requirements of Article 178(1) PILA.

43. With respect to substantive validity, the Arbitrator notes that the dispute at hand does not solely arise from the Player Contract, but in addition from the Appendices 1 and 2, which are based on the Player Contract. While Appendix 1 changes the amount of salary owed by Respondent to Claimant 1 for the 2012/2013 season, Appendix 2 changes the due date of the last salary instalment. Neither Appendix 1 nor Appendix 2 contains an arbitration clause to the effect that any disputes deriving from it should be submitted to the BAT. However, the Arbitrator has no hesitation to ascertain that both Appendices relate to and, thus, fall within the scope of, the arbitration clause contained in the Player Contract, since they are intrinsically linked to the Player Contract.³ Furthermore, the Arbitrator notes that the material scope and the substantive validity of the arbitration agreement have not been disputed by the Parties.

³ BAT 0002/07, p. 13.

6. Applicable Law

44. 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”.

45. 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.”

46. The Player Contract is – at least at first sight – somewhat unclear regarding the applicable law. While, on the one hand, Article 12 provides that “*this Agreement shall be governed by the laws of Italy,*” Article 13, on the other hand, states that “*(T)he arbitrator shall decide ex aequo et bono.*”

47. The Arbitrator interprets Article 12 in connection with Article 13 of the Player Contract to mean that the parties have expressly agreed that, when a dispute will be submitted to BAT, it shall be resolved *ex aequo et bono*.⁴ Indeed, it is the nature and purpose of the BAT to provide for a simple, quick and inexpensive means of dispute resolution, and applying *ex aequo et bono* principles as applicable law enables such resolution in kind. In addition, all Parties in this procedure have made reference to the Arbitrator’s powers to decide the dispute at hand *ex aequo et bono*.

⁴ See also BAT 0382/13, p. 12.

48. The concept of *équité* (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage of 1969⁵ (Concordat),⁶ under which Swiss courts have held that “arbitrage en *équité*” is fundamentally different from “arbitrage 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.”⁷

49. In substance, it is generally considered that the Arbitrator, when deciding *ex aequo et bono*, receives

“the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand.”⁸

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

7. Findings

51. Claimant 1 requests payment of the outstanding salary in the amount of EUR 3,300.00 (three thousand three hundred euros) as a remainder for the 2012/2013 season (7.1), late penalty payments in the amount of EUR 3,300 (7.2) as well as interest at a rate of 5% per annum on such amount starting on 2 July 2013 (7.3). Furthermore, Claimant 1 requests the payment of the outstanding salaries for the 2013/2014 season in the

⁵ 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).

⁶ KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 187 PILA N 289.

⁷ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

⁸ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

amount of EUR 77,000.00 plus interest at a rate of 5% per annum on such amount starting on 28 August 2013 (7.4).

52. Claimant 2 requests payment of the outstanding agent fee as well as 5% *“for delay of payment of agent fees arrear counted from the moment the delay started”* (7.5).
53. Respondent requests in its counterclaim in essence the payment of EUR 20,000 from the Player and his Agent for serious breach of the Player Contract (7.6).

7.1 Outstanding Salaries for the 2012/2013 Season

54. It is undisputed that the Player is entitled, under Appendix 1, to a salary for the 2012/2013 season in the amount of EUR 60,000. Appendix 2 states that on 8 May 2013, EUR 5,000 out of this amount is still outstanding and must be paid by the Respondent until 1 July 2013. Respondent submits that it has paid all outstanding amounts by 1 July 2013. In proof thereof, Respondent has submitted – inter alia – receipts signed by the Player. The latter claims that the receipt allegedly signed by him and dated 26 January 2013 is forged. In view of the expert opinion submitted by the Player and in view of the contents of email correspondence exchanged between the representatives of the Club and the Agent, the Arbitrator has serious doubts as to the authenticity of the Player’s signature on the respective receipt. However, the Arbitrator can leave this factual issue unresolved in view of the following legal arguments:
 55. The Arbitrator holds that the purpose of Appendix 2 was not to establish a new obligation of the Club but rather to clarify the legal situation between the Player and the Club concerning their various existing agreements. Accordingly, the Club and the Player found that on 8 May 2013 an amount of EUR 5,000 was still outstanding and that this amount should be paid by the Club to the Player until 1 July 2013. In essence, therefore, Appendix 2 can be qualified as a declaratory acknowledgment of debt.

56. A declaratory acknowledgement of debt takes the effect that a party is prevented from availing itself of any legal defences or objections against the debt, provided that the objections existed already at the time of the conclusion of the acknowledgment of debt and provided that the objections were either known or could have reasonably be known to the respective party. In the case at hand, Respondent claims that it had paid more than EUR 55,000 by 8 May 2013, i.e. when the acknowledgment of debt was signed, in evidence of which it submitted various payment receipts. Hence, according to Respondent, Appendix 2 is based on a miscalculation, or “*misunderstanding*”, which arose because the “*former owner and president, Mr. Gervasio, who signed ... [the Player Contract] and Appendix n. 1 gave to Mr. Lavazzi (the new president) wrong information and uncompleted documents about Mr. Jonusas’ economic balance with the Club*”. The Arbitrator deduces from Respondent’s submissions that its objections against the debt in question rely on facts that were already present at the time of the conclusion of Appendix 2. Furthermore, in the Arbitrator’s view, these objections (which are contested by the Claimants) – even if they were true – could have been known to the Respondent if it had applied reasonable care, since it could have retrieved the alleged documentary evidence of payments made at any time on or before 8 May 2013 without any apparent difficulties. Taking into account all of the above , in particular the fact that the declaratory acknowledgment of debt bears the Respondent’s signature, the Respondent is barred from objecting that any other amount than EUR 5,000 was outstanding on 8 May 2013.
57. Claimant 1 has provided evidence that EUR 1,711.20 were credited on his account on 3 July 2013 and that this amount had been transferred to him by the Respondent. Since Respondent did not provide any proof of further payments made by them after 1 July 2013, the Arbitrator concludes that Respondent is in arrears of EUR 3,288.80 in respect of the salaries to be paid for the 2012/2013 season.

7.2 Late Penalty Fees

58. Article 4 of the Player Contract provides for the payment of late payment penalties in the amount of EUR 100 per day.
59. BAT Arbitrators have frequently dealt with late payment clauses (comparable to the one at hand) in the past. As a general rule, two principles can be derived from that jurisprudence.
60. Firstly, as regards the scope of applicability, late payment clauses are interpreted in a restrictive manner, so as to prevent excessive results. On several occasions, BAT Arbitrators have decided that a respective clause – absent any indications to the contrary in the contract – is intended such that the penalty payments only accrue between the date of late payment and the date by which the respective obligation is or can be terminated⁹. An exception is only made in cases where there is an explicit agreement between the parties that stipulates otherwise and orders late payment fees also to apply once the player's obligation to render his/her services is terminated. At the utmost, BAT Arbitrators are prepared to approve accrual of late payment fees until the filing of the Request for Arbitration¹⁰, provided the creditor has pursued his/her claim in a diligent and timely manner.
61. Secondly, BAT Arbitrators have repeatedly held that late payment clauses are subject to judicial review. For instance, in BAT 0036/09¹¹, the Arbitrator held:

“In most jurisdictions, contractual penalties are subject to judicial review and can be adjusted if they are excessive. Whether a contractual penalty is excessive is

⁹ See the following BAT awards: 0100/10, para 47 et seq.; 0109/10, para 55 et seq.; 0460/13, para 58.

¹⁰ See, *inter alia*, BAT award 0185/11, para 65 et seq.

¹¹ See BAT award 0036/09, para 53 et seq.

usually left to the discretion of the judge and depends on the individual circumstances. As a general rule, a contractual penalty is considered to be excessive if it is disproportionate to the basic obligation of the debtor.”

62. In the case at hand the respective clause in the Player Contract provides that late payment fees can be requested if the payments are not made within 10 days of the applicable payment date. Furthermore, the clause provides that in case payment is not made within 20 days of the due date, the Player is entitled to terminate the Player Contract. In application of the above principles, the Player is, thus, entitled to late payment fees for a maximum of 10 days, i.e. in the amount of EUR 1,000. Since the Player Contract does not explicitly state otherwise, the late penalty fees cannot be claimed for a longer period of time.

7.3 Interests

63. Claimant 1 requests interests of 5% p.a. for the outstanding salaries for the 2012/2013 season as from 2 July 2013. However, according to constant BAT jurisprudence, in order to avoid undue enrichment, a player cannot claim late payment fees and interests for the same periods of time. Thus, only as of 12 July 2013 is the Player entitled to request interests on the outstanding amount of EUR 3,288.80. According to constant BAT jurisprudence, the rate of 5% is equitable.

7.4 Outstanding Salaries for the 2013/2014 Season

64. According to Article 4 of the Player Contract, the Player was entitled to terminate the Player Contract and accelerate all future payments under the agreement, if the Club would be 20 days late with its payment obligations. Since the Club has not paid the salaries in full for the 2012/2013 season up until today, the Player was entitled to request payment of the entire salaries for the 2013/2014 season, i.e. EUR 110,000. The Arbitrator is reinforced in this conclusion by the specific circumstances of this case, namely that the Player had already agreed in the Appendix 2 to postpone the due date

to 1 July 2013 and that he sent three reminders to the club requesting for payment in August 2013, already at a time when he could have exercised his right to terminate the Player Contract without further notice. Instead of executing the payment, the Club insisted on the issuance of invoices for the remaining amount (which is not a condition of payment under the Player Contract or the Appendices) and insisted on connecting the payment to a mutual termination agreement. Against this background, the Arbitrator holds that the Player had just cause to terminate the Player Contract based on the terms of Article 4.

65. According to constant BAT jurisprudence, a player – even if he terminates a contract with just cause – is under an obligation, resulting from general principles of law, to mitigate his damages. In the Arbitrator’s view, considering also that the termination took place late in the summer, the Player complied with this obligation by entering into an agreement with the Lithuanian club for the remainder of the 2013/2014 season. Consequently, the salary earned by the Player (EUR 33,000) must be deducted from the outstanding amounts according to the Player Contract for the respective time period (EUR 110,000). To conclude, therefore, the Arbitrator finds that the Respondent is under an obligation to pay to the Player the amount of EUR 77,000. Since this amount became due after the termination of the Player Contract, the Club is, in addition, obliged to pay 5% interest p.a. on said amount as of 28 August 2013.

7.5 Agent Fee and Interests

66. Article 4 of the Player Contract provides under the heading “AGENT PAYMENTS” that the Club is under an obligation to pay no later than 1 September 2013 (for the 2013/2014 season) a 10% commission fee to Claimant 2. It is undisputed between the Parties that the commission is to be calculated based on the Player’s remuneration for the 2013/2014 season. The amount in question, thus, is EUR 11,000. The clause in the Player Contract furthermore provides that the “*agent fee has also to be fully paid in case of early termination (due to whatever ground) of the Agreement*”. Consequently,

the fact that the Player terminated the Player Contract has no impact on the agent fee due to Claimant 2. Since the Agent did not breach any obligation under the Player Contract, no deductions from said agent fee are justified. Furthermore, the Arbitrator does not consider deductions of undue enrichment to be justified, either. The Respondent submits that “in any case ... the Agent fee for the season 2013/2014 should be reduced to the same earned by the new contract of the player in the same season.” The Arbitrator is not prepared to follow this argument. The agent fee was earned in full by Claimant 2 once the Player entered into a contract with the Respondent. The agent fee is designed to reward the efforts undertaken by the Agent for the respective contract to be concluded. Article 4 only postpones the due date for the payment of part of the agent fee to a later point in time.

67. The agent fee in the amount of EUR 11,000 became due on 1 September 2013. The interest rate claimed by Claimant 2 (5% p.a.) is – according to constant BAT jurisprudence – just and equitable. Thus, the Arbitrator finds that the Respondent is under an obligation to pay 5% interest p.a. on the amount of EUR 11,000 as from 2 September 2013.

7.6 Counterclaim

68. Respondent bases its counterclaim on the allegation that Claimant 1 breached the Player Contract together with Claimant 2 by terminating the Player Contract without just cause. As demonstrated above, Claimant 1 did terminate the Player Contract with just cause. Thus, the counterclaim must be dismissed from the outset.

8. Costs

69. 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.

70. On 19 June 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 9,540.00.
71. Claimant 1 prevailed with nearly all of his claims; Claimant 2 prevailed with all of his claims. In view of the outcome of the dispute it seems fair that all of the fees and costs related to this arbitration be borne by Respondent. The losing party of an arbitration procedure generally also covers its own legal costs and, in addition, those of the succeeding party, provided they do not seem excessive.
72. On 9 April 2014, the BAT requested the Parties to submit an account of their legal costs and expenses. Subsequently, Claimants in an email dated 15 April 2014, submitted their account of costs and claimed
- in favour of Claimant 1: EUR 3,592.50 in legal fees and expenses and EUR 2,000.00 in reimbursement for the non-reimbursable handling fee charged by the BAT-Secretariat;
 - in favour of Claimant 2: EUR 695.75 in legal fees.

73. The Arbitrator finds that the above legal fees and expenses are not excessive and, thus, orders the Respondent to reimburse the Claimants for the respective costs incurred.
74. Given that Claimants paid an Advance on Costs in the amount of EUR 4,500.00, the Arbitrator decides in application of Article 17.3 of the BAT Rules:
- (i) BAT shall reimburse EUR 960.00 to Claimants, being the difference between the costs advanced by the parties and the arbitration costs fixed by the BAT President;
 - (ii) Respondent shall pay EUR 3,540.00 to Claimants, being the difference between the costs advanced by them and the amount to be reimbursed by the BAT.
 - (iii) The Arbitrator considers it appropriate to take into account the non-reimbursable handling fee of EUR 2,000.00 paid by the Claimants. Respondent shall reimburse the Claimants for the payment of the non-reimbursable handling fee.

9. AWARD

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

- 1. Juvecaserta Basket s.r.l. is ordered to pay to Mr. Žygimantas Jonušas outstanding salaries in the amount of EUR 80,288.00 and late penalty fees in the amount of EUR 1,000.00.**
- 2. Juvecaserta Basket s.r.l. is ordered to pay to Mr. Žygimantas Jonušas interest as follows:**
 - 5% p.a. on the amount of EUR 3,288.80, as of 12 July 2013**
 - 5% p.a. on the amount of EUR 77,000.00, as of 28 August 2013**
- 3. Juvecaserta Basket s.r.l. is ordered to pay to UAB “East Players” outstanding agent fees in the amount of EUR 11,000.00 plus interest of 5% p.a. on this amount since 2 September 2013.**
- 4. Juvecaserta Basket s.r.l. is ordered to pay jointly to Mr. Žygimantas Jonušas and to UAB “East Players” the amount of EUR 3,540.00 as reimbursement of the arbitration costs.**
- 5. Juvecaserta Basket s.r.l. is ordered to pay jointly to Mr. Žygimantas Jonušas and to UAB “East Players” the amount of EUR 6,288.25 as reimbursement of their legal fees and expenses.**
- 6. The counterclaim filed by Juvecaserta Basket s.r.l. as well as any other or further-reaching requests for relief are dismissed.**



BASKETBALL
ARBITRAL TRIBUNAL

Geneva, seat of the arbitration, 1 July 2014

Ulrich Haas
(Arbitrator)