



**BASKETBALL**  
ARBITRAL TRIBUNAL

**ARBITRAL AWARD**

**(BAT 0506/14)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Stephan Netzle**

in the arbitration proceedings between

**Mr. Petar Popovic**

c/o Bill A. Duffy international, Inc.  
507 N. Gertruda Ave., Redondo Beach, CA 90277, USA

**- Claimant 1 -**

**Bill A. Duffy International, Inc.**

507 N. Gertruda Ave., Redondo Beach, CA 90277, USA

**- Claimant 2 -**

both represented by Mr. Billy J. Kuenzinger, BDA Sports Management,  
700 Ygnacio Valley Rd. Suite 330, Walnut Creek, CA 94598, USA

vs.

**BC Aliaga Petkim**

Ataturk Mahallesi Gunes Sokak No. 25, 35800 Izmir, Turkey

**- Respondent -**

## **1. The Parties**

### **1.1. The Claimants**

1. Mr. Petar Popovic (hereinafter the “Player”) is a professional basketball player of Serbian nationality.
2. Bill A. Duffy International, Inc. (hereinafter the “Agency”) is a basketball agency located in Redondo Beach, USA.

### **1.2. The Respondent**

3. BC Aliaga Petkim (hereinafter the “Club”, and collectively with the Claimants the “Parties”) is a professional basketball club located in Izmir, Turkey.

## **2. The Arbitrator**

4. On 7 February 2014, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren, appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

## **3. Facts and Proceedings**

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

5. On 20 June 2013, the Player and the Club entered into an employment agreement for the 2013/2014 season (hereinafter “the Player Contract”). The Player was entitled to a guaranteed salary of EUR 200,000.00 “net of any Turkish taxes” for the entire season 2013/2014, payable in ten equal instalments per month, and a bonus payable if the Club would reach the play-offs. In addition, the Parties agreed on certain benefits for

the Player including the Club's obligation to pay for medical and dental expenses incurred by the Player and his direct family members.

6. In the Player Contract, the Club also agreed to pay the Agency an annual agent fee equal to 10% of the Player's net salary in the respective season, i.e. EUR 20,000.00 for the 2013/2014 season.
7. Until 24 November 2013, the Player participated in seven official games with the Club's team. He was paid a total of EUR 40,000.00 up until 13 November 2013 after which he did not receive any further salary payments.
8. On 25 October 2013, the Player suffered an injury during practice, but continued practicing and playing until 29 November 2013 when he underwent surgery.
9. On 2 December 2013, the general manager and the assistant coach of the Club informed Mr. Nikos Spanos, the Agency's representative in Greece and Turkey, that they intended to release the Player from the team.
10. The Club's representatives did not make themselves available for further discussions on the Player's future with the Club.
11. The Agency sent two payment reminders to the Club. By letter of 15 December 2013, it gave notice of the payment defaults and, on 21 December 2013, declared to the Club that the Player was "entitled to his immediate and unconditional release". In addition, the Agency requested the payment of the full salary for the entire 2013/2014 season.
12. The Club did not respond to these notices.
13. Since April 2014, the Player is playing with the team of Metalac Valjevo (SRB).

### 3.2. The Proceedings before the BAT

14. On 9 January 2014, the Player filed a Request for Arbitration in accordance with the BAT rules. A non-reimbursable handling fee of EUR 4,500.00 was received in the BAT bank account on 13 and 15 January 2014. Given that the paid handling fee exceeded the handling fee due according to Article 17.1 of the BAT Rules by EUR 1,500.00, that overpayment was taken into account for the Claimants' share of the Advance on Costs.
15. By letter dated 17 February 2014, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Club to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 10 March 2014. The BAT Secretariat also requested that the Parties pay the following amounts as Advance on Costs by no later than 27 February 2014:
- |  |                   |
|--|-------------------|
| <i>"Claimant 1 (Mr. Petar Popovic)</i>               | <i>EUR 4,500</i>  |
| <i>Claimant 2 (Bill A. Duffy International Inc.)</i> | <i>EUR 500</i>    |
| <i>Respondent (BC Aliaga Petkim)</i>                 | <i>EUR 5,000"</i> |
16. No answer was submitted by the Club. By letter to the Parties dated 12 March 2014, the Arbitrator granted a final opportunity to submit the Answer by 17 March 2014.
17. The Player paid his share of the Advance on Costs and substituted for the Club's non-payment.
18. By letter of 1 April 2014, the BAT Secretariat informed the Parties that the Club had failed to submit an answer to the Request for Arbitration within the extended time limit. The Parties were therefore invited to submit a detailed account of their costs by 8 April 2014.
19. On 2 April 2014, the Claimants submitted an account of costs which included attorney's fees in the amount of EUR 468.00.

20. The Club did not submit any account of costs nor did it file any comments on the Claimants' account of costs.
21. Upon request of the Arbitrator, on 14 May 2014 the Player provided his employment agreement with Metalac Valjevo to the BAT Secretariat and also stated that he had not obtained other income between November 2013 and April 2014. The BAT Secretariat forwarded same to the Club for comments. The Club did not provide any comments. The Arbitrator also asked the Claimants about any agent fees that had been paid by Metalac Valjevo. The Claimants did not respond to that question.
22. 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 deliver the Award on the basis of the submissions available.

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

##### **4.1. The Claimants' Position**

23. The Player submits the following in substance:
  - The Player is entitled to salary payments of EUR 200,000.00 for the 2013/2014 season. To date, the Club has paid a total amount of only EUR 40,000.00 to the Player. The unpaid difference of EUR 160,000.00 is still due to the Player.
  - When the salaries for November and December 2013 were overdue, the Player's representative notified the Club of these delays.
  - By the second demand letter of 21 December 2013, the Player's representative informed the Club that the Player was now entitled to his immediate and unconditional release, that he would not participate in any further activities of the Club, that the Letter of Clearance should be issued and that the full salary amount for the entire 2013/2014 season was due and had to be paid to the Player.
  - As a consequence of the injury which the Player suffered during practice on 25 October 2013, he had to visit a doctor for MRI and therapy. The doctor's costs of

EUR 231.00 were paid by the Player. According to Article 3.7 of the Player Contract, the Club's is obliged to cover all medical costs related to the Player's activities with the Club.

- Finally, it was the obligation of the Club to provide the Player's family with the necessary residency documents. The Club failed to do so which required the family to leave Turkey by 23 December 2013.

#### **4.2. The Agency's Position**

- 24. The Agency submits that the agreed agent fee of EUR 20,000.00 which was agreed in Article 5 of the Player Contract was not paid and is therefore still due for payment.

#### **4.3. The Claimants' Request for Relief**

- 25. In their request for arbitration, the Claimants requested the following relief:

*"The Club currently owes Claimant, Petar Popovic the following:*

1. 160,000.00 EUR for the 2013/2014 season
2. 213.00 EUR for the medical bills for the 2013/2014 season

*The Club currently owes Claimant, Bill A. Duffy International, Inc. the following:*

1. 20,000.00 EUR for the agent fee pertaining to the 2013/2014 season

*For both Claimants, costs of this action plus attorney's fees."*

#### **4.4. The Respondent's Position and Request for Relief**

- 26. Despite several invitations by the BAT, the Club did not engage in these arbitration proceedings. It also did not make any submissions within the time limits set by the Arbitrator in accordance with the BAT Rules.

## 5. Jurisdiction

27. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not make any submissions in relation to the merits of this case, he will examine his jurisdiction *ex officio* on the basis of the record as it stands.
28. 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).
29. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
30. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.
31. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in clause 11, 3<sup>rd</sup> para. of the Player Contract which reads as follows:

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

32. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA. The Arbitrator also considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present Agreement” in clause 11, 3<sup>rd</sup> para. of the Player Contract covers the present dispute.

33. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Claimants' claim.

## **6. Other procedural issues**

### **6.1. Respondent's failure to submit an Answer**

34. 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.<sup>1</sup> However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

35. 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 the Player's Request for Arbitration, to the Player's contract with Metalac Valjevo, to his claim on costs and the accuracy of the figures provided by him. The Club, however, chose not to participate in this arbitration.

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

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

---

<sup>1</sup> See, *ex multis*, the following BAT awards: 0001/07; 0018/08; 0093/09; 0170/11; 0391/13.

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

37. 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.”*

38. In the arbitration agreement in clause 11, 3<sup>rd</sup> para. 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 him *ex aequo et bono*.

39. 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 1969<sup>2</sup> (Concordat),<sup>3</sup> 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.”<sup>4</sup>*

40. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

*“the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand”.<sup>5</sup>*

41. In light of the foregoing matters, the Arbitrator makes the following findings.

---

<sup>2</sup> 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).

<sup>3</sup> KARRER, in: Basel commentary to the PILA, 2<sup>nd</sup> ed., Basel 2007, Art. 187 PILA N 289.

<sup>4</sup> JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

<sup>5</sup> POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

## 8. Findings

### 8.1. Outstanding Player salaries

42. The Player requests payment of EUR 160,000.00 for outstanding salaries. According to clause 2.1 of the Player Contract, the Player was entitled to monthly salary payments of EUR 20,000.00. As submitted by the Player, these payments had been made for the months of September and October 2013. The monthly salaries since November 2013 remained unpaid. In this context, the Arbitrator notes that the Player Contract contains numerous typos with respect to the years but it is obvious from the other content of the Player Contract that all dates in the Player Contract refer to the 2013/2014 season. The dates in clause 2.1 must therefore be adjusted accordingly (i.e. November 15, 2013; December 15, 2013; January 15, 2014; February 15, 2014; March 15, 2014; April 15, 2014; May 15, 2014 and June 15, 2014).
43. On the date of the Request for Arbitration, only the unpaid salary payments for November and December 2013 (i.e. EUR 40,000.00) were already due.
44. For the then future payments, the Player relies on the last paragraph of clause 2.1 of the Player Contract which reads as follows:
- “In the event that any scheduled payments are not made by the Club within 30 days of the applicable payment date, the Player’s performance obligations shall cease. Player shall have the right, at Player’s option, to terminate this Agreement after sending a 5 days notice and accelerate all future payments required under this Agreement and Player shall be free to leave Turkey with his FIBA Letter of Clearance to play basketball anywhere in the world Player chooses, but the duties and liabilities of Club under this Agreement shall continue in full force and effect”.*
45. The Player refers to his letter of 15 December 2013 by which he notified the Club of the outstanding payments and requested settlement of these duties within 5 days, and to the letter of 21 December 2013 by which he then exercised the termination option and accelerated the payment of the full amount due for the entire 2013-2014 season after no payment was received.

46. The respective sentences in the letter of 21 December 2013 read as follows:

*“(...) Due to the failed payments, Aliaga Petkim is now in breach of contract. Pursuant to Clause 10. Breach, of the agreement, demand is made for a full payment of the entire agreement in the amount of 160,000 Euros, and 213 Euros for medical bills to Mr. Popovic and 20,000 Euros to Bill A. Duffy International, Inc. Aliaga Petkim shall also grant the unconditional release to Mr. Popovich and the LoC shall be issued to the player immediately.*

*Based on the breach Mr. Popovich considers the contract terminated. (...)”*

47. The Arbitrator finds that the Player validly exercised his option to terminate the Player Agreement when he first notified the Club of the outstanding payments and then, when no payment was made within 5 days, terminated the Player Contract on 21 December 2013 and accelerated the remaining salary for the rest of the 2013-2014 season which amounts to EUR 160,000.00.

48. According to standing BAT jurisprudence with respect to the mitigation of damages, any income the Player earned during the remaining season covered by the Player Contract must be deducted. Upon request of the Arbitrator, the Player submitted its employment agreement with Metalac Valjevo which stipulates a salary for the months of April and May 2014 of EUR 6,000.00 each. For June 2014, the Valjevo-contract provides for a daily compensation of EUR 200 “until the day of the last official game.” The Serbia Super League was scheduled to end on 31 May 2014. A number of games have been postponed because of severe weather conditions in Serbia. Under the circumstances, the Arbitrator finds it fair to take the two monthly salaries for April and May 2014 into account but to disregard any further matches which will eventually be played in June 2014 and for which the Player may also be compensated. The Player submits that he did not obtain any other income between November 2013 and April 2014, which has not been disputed by the Club. The Arbitrator accepts the Player’s submission and, thus, from the Player’s salary claim against the Club the amount of EUR 12,000.00 must be deducted, resulting in a final claim of EUR 148,000.00.

## 8.2. Medical costs

49. The Player also requests reimbursement of medical costs of EUR 213.00, which became necessary because of an injury suffered during practice on 25 October 2013. As proof for the medical expenses, the Player submits a number of bank statements that include payments to doctors and radiologists without any further explanations. The amounts of these payments do not correspond to the claimed amount. The Arbitrator therefore finds that the claim for reimbursement of medical costs is not sufficiently substantiated and must therefore be dismissed.

## 8.3. Outstanding Agent Fee

50. Undisputedly, the Agent Fee of EUR 20,000.00 that was agreed to in clause 5 of the Player Contract has also remained unpaid. The Agent Fee is due in full if it was considered as a commission for bringing the Player to the Club. If, however, the Agent Fee was considered as a compensation for services which the Agency was supposed to perform during a certain period of time, the Agent Fee is only due *pro rata* of the period of time during which the Agency performed its services.
51. According to Clause 5 of the Player Contract, the Agent Fee amounted “to 10% of the PLAYER’s net salary for each season in the future in which the PLAYER is employed by the CLUB. For the 2012-2013 season” (*recte*: the 2013-2014 season) an Agent Fee of EUR 20,000.00 was agreed. That means that the Agent Fee was considered to be an annual compensation for the Agency’s services instead of a one-time intermediary’s fee.
52. The Agent Fee of EUR 20,000.00 became payable by the Club on 1 November 2012. That amount remains due even if the Player Contract was terminated early, because it was the Club’s breach which prevented the Agency from performing its services.
53. It is established in BAT jurisprudence that the principles of mitigation of damages also extend to agents and agency fees. In that regard, the contract with Metalac Valjevo does not contain any provision on agent fees nor did the Club request that the claimed

Agent Fee should be reduced. The Agency remained silent when the Arbitrator asked whether Metalac Valjevo paid an agent fee. The Arbitrator finds that an agent fee of 10% of the Player's net salary is standard in professional basketball, and it would have been up to the Agency to demonstrate that a lower or no agent fee had been agreed with Metalac Valjevo. Since the Agency preferred not to provide any information on the agent fee paid by Metalac Valjevo, the Arbitrator takes an assumed agent fee of 10% of the Player's salary into calculation (i.e. EUR 1,200.00) which must be deducted from the Agent Fee claimed from the Club. Therefore, the Agent Fee payable by the Club amounts to EUR 18,800.00.

#### **8.4. Summary**

54. The Player is entitled to EUR 148,000.00.

55. The Agency is entitled to EUR 18,800.00.

#### **9. Costs**

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

57. On 8 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”, and that “the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the

BAT President determined the arbitration costs in the present matter to be EUR 10,000.00.

58. Considering the circumstances of the present case (Article 17.3. of the BAT Rules), the Arbitrator deems it appropriate that the entire costs of the arbitration shall be borne by the Club.
59. Given that the Advance on Costs of EUR 10,000.00 were entirely paid by the Claimants, in application of Article 17.3 of the BAT Rules the Arbitrator decides that the Club shall pay the full amount of the arbitration costs of EUR 10,000.00 to the Claimants.
60. Furthermore, the Arbitrator considers it adequate that the Claimants are entitled to the payment of a contribution towards their legal fees and other expenses (Article 17.3. of the BAT Rules). The account of costs submitted by the Player's counsel states legal fees and expenses in the total amount of EUR 3,468.00 (including the non-reimbursable handling fee of EUR 3,000.00). The Arbitrator holds it adequate to take into account this amount when assessing the Player's reasonable legal expenses. The Club did not submit any account of costs. After having reviewed and assessed all the circumstances of the case at hand, the Arbitrator fixes the contribution towards the Claimants' legal fees and expenses at EUR 3,468.00, which does not exceed the maximum amount of legal fees and expenses under Article 17.4 of the BAT Rules.

## **10. AWARD**

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

- 1. BC Aliaga Petkim is ordered to pay to Mr. Petar Popovic the net amount of EUR 148,000.00.**
- 2. BC Aliaga Petkim is ordered to pay to Bill A. Duffy International, Inc. the net amount of EUR 18,800.00.**
- 3. BC Aliaga Petkim is ordered to pay jointly to Mr. Petar Popovic and Bill A. Duffy International, Inc. the amount of EUR 10,000.00 as a reimbursement of the advance on arbitration costs.**
- 4. BC Aliaga Petkim is ordered to pay jointly to Mr. Petar Popovic and Bill A. Duffy International, Inc. the amount of 3,468.00 as a contribution towards their legal fees and expenses. BC Aliaga Petkim shall bear its own legal costs.**
- 5. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 11 June 2014

Stephan Netzle  
(Arbitrator)