BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0436/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Annett Rombach

in the arbitration proceedings between

Galatasaray Spor Kulübü Dernegi
Ali Sami Yen Kompleksi, Türk Telekom Arena Stadyumu,
Kat. 4 Huzur Mahallesi, Seyrantepe/Istanbul, Turkey

- Claimant -

represented by Mr. Mahinur Dengiz and Mr. Burcin Celen,
attorneys at law

vs.

David Gregory Hawkins

- Respondent -

represented by Mr. Malcom Andre Buck and Mr. Jeffrey Grant Lynds,
attorneys at law, Arete Sports Agency, PO Box 345,
Wayne, PA 19087, USA

1. The Parties

1.1 The Claimant

1. Galatasaray Spor Kulübü Dernegi (the “Club” or “Claimant”) is a professional basketball club with its seat in Istanbul, Turkey.

1.2 The Respondent

2. Mr. David Gregory Hawkins (the “Player” or “Respondent”) is a professional basketball player from the United States of America.

2. The Arbitrator

3. On 1 August 2013, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Ms. Annett Rombach as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the "BAT Rules"). Neither 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

4. On 18 July 2012, the Parties entered into a labour contract (the “Player Contract”), pursuant to which the Club engaged the Player as a professional basketball player for the 2012-2013, the 2013-2014 and the 2014-2015 seasons. Pursuant to clause D.1.i. of the Player Contract, the Player’s base salary for the entire contractual term (i.e. three basketball seasons) was agreed at USD 4,350,000.00 (net), to be allocated as follows:

- USD 1,300,000.00 (net) for the 2012-2013 season;
- USD 1,450,000.00 (net) for the 2013-2014 season; and
- USD 1,600,000.00 (net) for the 2014-2015 season.

5. For each season, the salary was to be paid in 10 equal monthly shares as per the payment schedules contained in Clauses D.2 – D.4 of the Player Contract. The respective monthly shares were payable on the 20th of each month (Clause D.2, D.3 and D.4 of the Player Contract).

6. The consequences of a late or non-payment by the Club are addressed in Clause D.1.ii. of the Player Contract, which provides as follows:

> *"The delay of 30 days in payments will not be considered as a material breach of this Agreement. In the event that any scheduled payments are not made by the Club within thirty (30) days of the applicable payment date, the Player has to send written notice to the Club and if the Club does not fulfill financial obligation towards player in total in following seven (7) working days, 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 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."*

7. Subject to the passing of the annual medical examination, the agreed salary was fully guaranteed.

8. Clause C of the Player Contract addressed the "Obligations of the Player". In relevant part, it reads as follows:

> *"6. The Player will obey all the rules of the Turkish Basketball League and the Turkish league management and all the rules of the European association (FIBA and all other competition/leagues applicable rules).*
> *(…)*
> *11. The Player will not ingest any illegal drugs or abuse the use of alcohol.*

> *(…)*
> *14. If for any reason the Player materially violates any of the above rules which materially affect the purposes of this Agreement, the Club retains the right to cancel the contract with no further obligations or consequences. (…)*
> *(…)*
> *18. The Player shall sign and obey the federation official disciplinary codex and regulations. All disciplinary measures and regulations shall be subject to the Turkish Basketball League."*

9. On 10 August 2012, Claimant and Respondent's former club Besiktas Jimnastik Kulübü ("Besiktas") entered into an agreement ("Buy-Out Agreement") regarding the transfer of the Player to the Club. In the Buy-Out Agreement, the Club promised to pay to Besiktas a buy-out fee of USD 500,000.00 for the transfer of the Player to it. The buy-out fee was paid by the Club in two equal instalments on 17 August 2012 and 10 September 2012.

10. On 8 November 2012, the Player's agent sent an e-mail to the Club requesting information on the status of the Player's October salary, which had not been received by then.

11. On 15 November 2012, the Club replied as follows:

> *"I know the situation and I respect. At the beginning of the week, I asked the payment schedule for you to the Club and I got the answer that would be done before this weekend. I will check tomorrow and I will let you know. But as I know, the payment will not cover of your all first payment.*
> *The whole payment will be done by the Club in the first month of 2013. This will be for sure.*
> *I hope you will understand and agree."*

12. On 16 November 2012, Respondent's agent sent Claimant a settlement proposal requesting a total of USD 136,500.00 (the October salary plus an additional amount of USD 6,500.00) to be paid in smaller increments than the Player Contract required.

13. On 20 November 2012, Respondent's counsel, Mr. Lynds, sent Claimant a warning letter, noting that Claimant was in material breach of the Player Contract and notifying it that "*the Player retains the right to terminate this Agreement on 27 November 2012 in accord with the terms of this Agreement, unless Player receives $130,000* [corresponding to the October salary] *and Agent receives $65,000* [corresponding to the October Agent fee instalment] *or* [sic]*, or before November 27, 2012*".

14. On 23 November 2012, the Club presented a payment plan that resulted in the Player receiving payments in November and December totalling USD 135,000.00.

15. On 22 December 2012, Respondent tested positive for [name of substance], a substance prohibited according to Section S.6 of the 2012 WADA Prohibited List (in force at the time), on the occasion of a doping control at a Turkish Basketball League game.

16. On 20 January 2013, Respondent was provisionally suspended as a result of the failed doping test.

17. On 28 January 2013, Claimant entered into a labour contract with Mr. Manuchar Markoishvili (the "Replacement Player") pursuant to which Claimant engaged the Replacement Player as a professional basketball player for the remaining 2012-2013 and the 2013-2014 season. Pursuant to clause 1 of said contract, the Replacement Player's base salary for the 2012-2013 season was agreed at EUR 300,000.00 (net) and the salary for the 2013-2014 season at EUR 700,000.00 (net).

18. On 29 January 2013, the Club agreed on terms with Pallacenestro Cantu S.p.A. ("Cantu") to transfer the Replacement Player to it. The Club agreed to pay a buy-out fee of EUR 500,000.00 to Cantu for the transfer. The buy-out fee was paid by the Club in two instalments on 29 January 2013 (EUR 400,000) and 10 February 2013 (EUR 100,000).

19. On 21 February 2013, Claimant's counsel sent a warning letter to the Club, noting that it was in breach of the Player Contract because of a *"[f]ailure to make salary payments until January 20, 2013 in the amount of $ 320,000.00"* and a *"[f]ailure to make the Agent fee payment in the amount of $ 70,000.00."*

20. On 2 April 2013, the Disciplinary Board of the Turkish Basketball Federation ("TBF") imposed a period of ineligibility of four years on Respondent.

21. On 5 April 2013, Claimant sent a letter to Respondent's counsel, stating the following:

> *"By your letter dated February 21st 2013, you are claiming for the outstanding receivables up to the date January 20th 2013 of Mr. Hawkins and his manager. As you already know, the dope test of Mr. Hawkins performed on the dope sample prior to a Beko Basketball League game came out positive. As a result of his misconduct, he has been punished with a 4 years ban by the Turkish Basketball Federation's Disciplinary Board.*
> *Our Club paid a vast amount of transfer fee to Besiktas Club in order to transfer Mr. Hawkins at the beginning of this season. Moreover; we have invested great on Mr. Hawkins. Since the date of Mr. Hawkins's breach and being subject to inquiry process, he could not take part in the team, and during such period our team has been eliminated from European cups and lost Turkish cup as well. As a result of Mr. Hawkins's act based on his self breach* [sic]*, our Club has encountered significant loss both material and immaterial.*
> *Due to such breach and a 4 years ban, our Club reserves to file compensation claim before national and international jurisdictions. Therefore, in order to make basis for compensation amounts that may arise out of possible compensation claims in the future, we are holding, under the right of detention, the receivables of Mr. Hawkins and of his manager accrued up to January 20th 2013.*
> *Hence, we hereby kindly inform you that we shall not make the payments mentioned in your letter."*

22. On 30 April 2013, Claimant purported to terminate the Player Contract by a "Letter of Notice" (sent to the Respondent and his agent on 2 May 2013), providing:

> *"[…] Accordingly, we hereby notify and notice you that we are terminating the Agreement signed by and between our Club and you, due to your breaches against the clause on "player's undertakings",*

and pursuant to Turkish Basketball federation - Contracted Players' Registration License and Transfer Directive clauses 35/c-d, without being obliged to any indemnification, but save for our any other legal rights."

4. The Proceedings before the BAT

23. On 1 July 2013, Claimant filed a Request for Arbitration (with several exhibits) which was received by the BAT Secretariat on the same day. The non-reimbursable handling fee of EUR 4,988.00 was received in the BAT bank account on 28 June 2013.

24. On 7 August 2013, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 28 August 2013 (the "Answer"), and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 19 August 2013 as follows:

"Claimant (Galatasaray Spor Kulübü Dernegi) *EUR 5,500*
Respondent (Mr. David Gregory Hawkins) *EUR 5,500"*

25. On 27 August 2013, Respondent requested an extension of twenty days to file his Answer, which the Arbitrator granted on 29 August 2013.

26. On 19 September 2013, the BAT Secretariat acknowledged receipt of the full Advance on Costs (with Claimant having substituted for Respondent's share) as follows:

Date	Amount	Received From	Description
13.09.2013	€ 5,467.50	Claimant	Respondent's share of Advance on Costs
15.08.2013	€ 5,459.80	Claimant	Claimant's share of Advance on Costs

27. Further, the Arbitrator informed the Parties that Respondent had failed to submit his Answer on or before 17 September 2013 and granted Respondent a final opportunity to file his Answer to the Request for Arbitration by no later than 26 September 2013.

28. On 19 September 2013, Respondent filed his Answer to the Request for Arbitration and a counterclaim (the "Counterclaim").

29. On 25 September 2013, as a result of Respondent's filing of the Counterclaim, the BAT Secretariat requested Respondent to pay an additional Advance on Costs of EUR 4,072.70.

30. On 14 October 2013, the BAT Secretariat acknowledged receipt of the additional Advance on Costs, paid by Respondent on 3 October 2013.

31. Further, the Arbitrator invited Claimant to comment on Respondent's Answer and Counterclaim by no later than 28 October 2013 and asked Claimant to clarify his request for relief within the same time limit.

32. On 28 October 2013, Claimant submitted its comments (the "Reply").

33. On 13 December 2013, the Arbitrator invited Respondent to submit his comments on Claimant's Reply.

34. On 9 January 2014, Respondent submitted his comments (the "Rejoinder").

35. By Procedural Order of 28 February 2014, the Arbitrator declared the exchange of documents completed and invited the Parties to submit a detailed account of their costs by no later than 3 February 2014.

36. On 3 February 2014, Claimant submitted its account of costs as follows:

> *"1. 5.000 Euro - Handling Fee paid on 27.06.2013*
> *2. 5.500 Euro - Arbitration Fee includes also the Respondent's share paid on 14.08.2013*
> *3. 15.000 Euro - Legal Fees"*

37. On the same day, Respondent submitted the following account of costs:

> *"**$27,280** (approximately **20,187.2 Euro**) in attorney fees for 88.2 hours of work completed by Malcom Andre Buck, Esquire and Jeffrey Lynds, Esquire in accord with the additional attachement.*
>
> ***4.072,7** Euro for the Advance on Cost related to Respondent's Counter Claim.*
>
> ***Total cost requested: 20.000 Euro****
> **Total expenses for the Respondent were 24.259,9 Euro, however, it is the Respondent's understanding that due to the amount in controversy being under one million Euro expenses are capped at 20.000 Euro. If this is not the case, the Respondent requests the full 24.259,9 Euro."*

38. On 3 February 2014, the BAT Secretariat forwarded the cost accounts to the Parties and requested their comments on the other side's account of costs by no later than 7 February 2014. By e-mail of 3 February 2014 Respondent stated that he did not have any objections; Claimant did not file any comments.

39. On 18 March 2014, the Arbitrator re-opened the proceedings and requested Claimant to submit proof that certain transfer sums claimed by it in this Arbitration were indeed made. Claimant submitted bank receipts on 26 March 2014 and 11 April 2014.

40. On 14 April 2014, the Arbitrator invited the Respondent to comment on Claimant's latest submissions by no later than 17 April 2014. The Respondent did not submit any comments within the said deadline.

41. On 22 April 2014, the Arbitrator closed the proceedings.

42. The Parties did not request the BAT to hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the BAT Rules not to hold a hearing and to render the award solely based on the written record before her.

5. The Positions of the Parties

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

5.1 Claimant's Position and Request for Relief

44. Claimant submits the following in substance:

On the main claim:

- The Player materially breached the Player Contract by using illegal substances that led to him being banned from all competitions for four years;
- The Player's breach justified the immediate termination of the Player Contract for just cause;
- Claimant suffered substantial damages as a result of the breach, both materially as well as morally, in particular:
  - Non-amortised costs for acquiring the Player (USD 435,000.00)
  - Costs for replacing the Player (USD 600,000.00)
  - Sporting and marketing losses (USD 250,000.00)
- Respondent's breach of the Player Contract caused these damages, and Respondent must compensate the Club accordingly; no express language in

the Player Contract is needed to hold Respondent liable for Claimant's damages;

- The buy-out fee of USD 500,000.00 Claimant had to pay to the Player's former club, Besiktas, remained almost entirely unamortized, given that Claimant could benefit from the Player's services only for 5 months (out of the contractual term of 3 years);
- As a result of Respondent's suspension, Claimant had to hire the Replacement Player in the middle of the season for a buy-out fee of EUR 500,000.00 and incurred salary costs of EUR 300,000.00 (in total: EUR 800,000.00 or USD 1,120,000.00) for the remainder of the 2012-2013 season. If one subtracts the salary of the Player for the same period (USD 520,000.00) the damage suffered for the required replacement amounts to USD 600,000.00;
- Due to Respondent's misconduct, Claimant lost an important player and was readily eliminated from two competitions. The negative press coverage also damaged the Club's reputation and brand value.

On the Counterclaim:

- Claimant principally acknowledges that Respondent has outstanding salary payment claims, but argues that it is entitled to retain these monies until the fulfilment of its own compensation claims.

45. In his Reply, Claimant submits the following (updated) request for relief:

> *"1. To dismiss the Respondent's claims according to paragraph 1.5 herein.*
>
> *2. To order the Respondent to pay EUR 950.000 + applicable interest as a compensation of materially breaching the Contract.*
> *(USD 435.000 for Non- Amortization)*
> *(USD 600.000 for additional replacement damage)*
> *(USD 250.000 for sporting and marketing losses) […]"*

5.2 Respondent's Position and Request for Relief

46. Respondent, in his Answer and in his Rejoinder, submits the following in substance:

On the main claim:

- The Player Contract does not foresee any remedy for a failed doping test other than the right to terminate the Player Contract "*with no further obligations or consequences*";
- Respondent is not a party to the Buy-Out Agreement between Claimant and Besiktas and did not assume any responsibility for Claimant's choice to promise payment of a buy-out fee. Additionally, Claimant entered into the Player Contract before beginning the negotiations with Besiktas, meaning that Respondent cannot be liable for the buy-out fee;
- Claimant failed to show that adequate actions were taken to replace Respondent, a shooting guard and small forward, by a cheaper and more suitable Player than the Replacement Player, who is listed as a power forward;
- In any event, the Club has not suffered any damages by signing the Replacement Player, because the Replacement Player was – for the period of January 2013 until the end of the 2013-2014 season (the contractual term) – cheaper than Respondent would have been. Had Respondent not breached the Player Contract, the Club would have been obligated to pay higher salaries than it paid the Replacement Player;
- Claimant failed to prove any monetary damages resulting from an alleged loss of reputation or poor sporting performance. Claimant finished the 2012-2013 season quite successful, and there is no evidence that the Club would have achieved different (better) results with Respondent on its roster.

On the Counterclaim:

- Up to date, Respondent has only received USD 455,000.00 of the 2012-2013 salary; whereas half of the November payment, the December payment and the January payment up to 20 January are still unpaid.

47. According to the Answer to the Request for Arbitration and Counterclaim dated 17 September 2013, as amended by Respondent's Comments to Claimant's Response dated 9 January 2014, Respondent submits the following requests for relief:

> *"1. To dismiss the claims against Respondent in the interest of equity and fairness;*
>
> *2. To order the Claimant to pay all past due salaries through January 20, 2013 in the total amount of USD 281,666.00 plus applicable interest;*
>
> *3. To find additional damages in their discretion; […]"*

6. The Jurisdiction of the BAT

48. 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").

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

50. 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.

51. The jurisdiction of the BAT in this dispute follows from Clause H. 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 (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English. (…) The arbitrator (…) shall decide the dispute ex aequo et bono, or in a manner that is fair and equitable in the case at hand."*

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 H. of the Player Contract clearly covers the present dispute. Furthermore, neither of the Parties contested the jurisdiction of the BAT.

54. In view of all the above, the Arbitrator, therefore, holds that she has jurisdiction to decide the claims submitted to her in the present matter.

7. Admissibility of the Counterclaim

55. Art. 11.2 of the BAT Rules provides that the Respondent may file a counterclaim with his Answer. No particular prerequisites apply to the filing of such counterclaim. In particular, the BAT Rules do not provide that claim and counterclaim must show any material link. Furthermore, and in line with the standing BAT jurisprudence on the interpretation of Art. 9.3 of the BAT Rules, the counterclaim is admissible as the Respondent paid its share of the Advance on Costs.

56. The Arbitrator also has jurisdiction to decide over the Counterclaim. Respondent seeks salary payments under the Player Contract. There can be no doubt that the arbitration clause covers such claim.

8. 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 "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."*

59. In Clause H. of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* or in a manner that is fair and equitable in the case at hand without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to her in this proceeding *ex aequo et bono*.

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

9. Findings

61. As an initial matter, the Arbitrator finds that there is no evidence on the record which could cast doubts on the validity of the Player Contract concluded between the Player and the Club.

62. The main issues to be resolved in this arbitration are (i) whether the Club was entitled to terminate the Player Contract for just cause on 2 May 2013 based on the Player's failed doping test (below at 9.1); (ii) to which damage amounts, if any, the Club is entitled on the quantum side of its case (below at 9.2); and (iii) whether the Player's Counterclaim is warranted (below at 9.3).

9.1 Termination of the Player Contract for just cause

63. Pursuant to Clause C.14 of the Player Contract, the Club is entitled "*to cancel the contract with no further obligations or consequences*" if the Player "*materially violates*" certain rules listed under C.1-14, which "*materially affects the purpose of the Agreement.*"

64. Clause C of the Player Contract obligates the Player, *inter alia*, not to "*ingest any illegal drugs or abuse the use of alcohol*" (C.11).

65. It is undisputed between the Parties that on 22 December 2012, the Player tested positive in a doping control for [name of substance], a prohibited substance pursuant to Section S.6 of the applicable 2012 WADA Prohibited List. It is also undisputed that the Disciplinary Board of the Turkish Basketball Federation provisionally suspended the Player on 20 January 2013 and thereafter imposed a ban on him for four years on 2 April 2013, making it impossible for the Player to participate in any official competitions and matches for the rest of his contractual term at the Club.

66. By committing an anti-doping rule violation, the Player breached Clause C (in particular C.11) of the Player Contract, triggering the ban and his incapability of providing his services as a basketball player to the Club for the remainder of the contractual term. There can be no doubt that the presence of a prohibited substance under the WADA List in the Player's body is a "*material breach*" of the Player Contract, and that the resulting ban, which made it impossible for the Player to fulfil his contractual duties vis-à-vis the Club for the entire remaining time of his employment "*materially affects the purpose*" of the Player Contract.

67. Therefore, the Club validly terminated the Player Contract for just cause with immediate effect in accordance with Clause C.14.

68. As a result of that, the Club is entitled to be compensated for the loss it incurred as a result of the Player's breach. In this respect, the Arbitrator notes that she does not accept Respondent's argument that the Player Contract limits Claimant's rights in case of a material breach to the termination of the contract. The language in clause C.14, entitling the Club to terminate the Player Contract "*with no further obligations or consequences*" is meant to clarify that the rights and obligations under the Player Contract cease to be in force after a (valid) termination. The clause is not designated to exclude types of relief otherwise available to the injured party. To deprive the injured party of its right to claim damages as a result of a breach of contract would be highly untypical and require clear language evidencing the Parties' intent to exclude compensatory claims. Such language is not present here.

9.2 Quantum of the Club's claim for damages

69. Because the Player materially breached the Player Contract, which led to the Club's decision to terminate the agreement with immediate effect, the Club is principally entitled to recover the damages it suffered as a result of the premature contract termination and the impossibility to use the Player's services since 20 January 2013.

70. In this arbitration, the Club invokes the following damages:

- Unamortized costs of acquiring the services of the Player;
- Costs of acquiring a replacement for the Player (transfer fee and salary); and
- Sporting and marketing losses.

9.2.1 The established principles of damage calculation

71. In a landmark decision rendered by the CAS in the case *FC Shakhtar Donetsk vs. Matuzalem Francelino da Silva* (the "Matuzalem Case"), the CAS, in 2009, developed and explained the methodology and core principles of damage calculation in the context of contract termination without just cause in the world of sports employment.[1] Although the decision is not directly applicable here, because the CAS's calculation of damages occurred in a football case and was governed by Art. 17 of the FIFA Regulations (which sets out particular, but non-exclusive criteria for the calculation of damages), the core principles and methods derived therein can be relevant for determining the Club's damages under the aegis of equity and fairness in this case. Therefore, the Arbitrator takes guidance from the CAS's findings in *Matuzalem* in calculating the Club's damages in this proceeding.

72. When calculating the compensation due, the arbitrator needs to establish the damage suffered by the injured party, taking into consideration the circumstances of the single case, the arguments raised by the parties, and the evidence produced.[2] The burden of proof for showing the damages suffered and for making sufficient factual assertions is on the injured party.[3] It is commonly acknowledged in the law of damages that the

1 CAS 2008/A/1519 & 1520.

2 CAS 2008/A/1519 & 1520, para 85.

3 CAS 2008/A/1519 & 1520, para 85.

compensation to be awarded should neither fall short of the damages incurred, nor should it over-compensate the injured party.

73. Where compensation is sought for a breach of contract, the arbitrator shall be led by the principle of so-called *positive interest* (or "expectation interest"), i.e. shall aim at determining an amount which puts the injured party in the position it would be in had the contract been performed as agreed and had the breach not occurred.[4]

9.2.2 The value of the Player's services: Remuneration and transfer fee

74. Had the contract been performed properly and had the breach not occurred, the Club – like any other employer – would have benefitted from the services of the Player for the remainder of the contractual term.

75. In the *Matuzalem* Case, the CAS analysed the amount necessary to secure and keep the working force of the Player, taking into consideration – as a starting point – the Player's salary and the transfer fee paid by the Player's new club.[5] While the Arbitrator agrees that the remuneration and transfer fee paid or offered by an interested third party to obtain the Player's services provides a fair indication of the Player's value at the time of the breach, she notes that this method of calculating the Club's damage has not been invoked in this proceeding, and would, in any event, not be easy to apply here. In the *Matuzalem* Case, the CAS was provided with comprehensive evidence as to what third parties were ready to pay or even paid to contract the Player. Here, no such evidence is on the record, and the doping-related ban imposed on the Player, which prohibited him from offering his services to third clubs, would make any

4 CAS 2008/A/1519 & 1520, para 86.

5 CAS 2008/A/1519 & 1520, Sec. 3.3.1. and 3.3.2.

assumption on what a Club would have been willing to pay for obtaining his services after the ban highly speculative.

76. As a result, the Arbitrator will look at other elements, which were specifically invoked in this proceeding, to determine the damages the Club suffered as accurately as possible.

9.2.3 Extra replacement costs

77. In order to determine the Club's "expectation interest", i.e. the Club's interest in the Player's proper fulfilment of the Player Contract for its entire term, the Arbitrator may take into consideration the extra replacement costs the Club had to incur to replace the Player after his ban.[6]

78. Here, this is the transfer fee paid to Cantu for the Replacement Player and the Replacement Player's salary under the labour contract the Club signed with him.

79. Under the jurisprudence of the CAS, such replacement costs are recoverable if several factual elements are proven, including that the Replacement Player was hired in substitution for the Player, which requires that the players are playing in more or less the same position and that the Club decided to hire the Replacement Player because of the Player's breach of contract.[7] Furthermore, the Club must prove that there is a link between the amount of the transfer fee paid for the Replacement Player and the premature termination of the old contract as a result of the Player's breach, i.e. that the transfer sum was required to be paid specifically in order to fill the gap the Player's ineligibility created.[8] If the Club successfully proves these elements, the replacement

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6 See CAS 2008/A/1519 & 1520, Sec. III.5.

7 CAS 2008/A/1519 & 1520, para. 136.

8 CAS 2008/A/1519 & 1520, para. 136.

costs can be legitimately claimed as compensation for the Club's harm resulting from the Player's breach of contract.

80. Based on the record before her, the Arbitrator finds that the mentioned prerequisites are fulfilled and that the transfer fee paid for the Replacement Player and the Replacement Player's salary are costs that can be legitimately considered for the calculation of the Club's damages. The Club secured the Replacement Player's services as a direct consequence of the Player's doping violation, which is indicated by the fact that the Replacement Player's labour contract was signed only 8 days after the suspension of the Player. In publicly available sources, the Replacement Player is listed as a guard, meaning that he more or less plays the same position as the Player. Also, because the Player had a central role in his team (indicated, for example, by an average playing time of 30 min per game and a scoring of 13.6 points per game),[9] it is more than plausible that a club like Respondent seeks an immediate replacement to compensate the loss of quality of its roster.

9.2.4 Unamortized acquisition costs and other expenses

81. Another damages category widely acknowledged in many jurisdictions and under the jurisprudence of the CAS[10] relates to appropriate (acquisition) costs and other expenses a club incurs in reliance on the player's proper performance, which eventually fail to amortize when the contract ends prior to the originally envisioned end date as a result of a breach by that player. Once the breach occurs and once it is clear that the player will not be able to fulfil the contract as promised, costs and expenses

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9 http://basketball.eurobasket.com/player/David_Hawkins/Turkey/Galatasaray_Liv_Hospital_Istanbul/38340 (retrieved on 6 May 2014).

10 CAS 2003/O/482, *Ortega*; CAS 2008/A/1519 & 1520, *Matuzalem*; CAS 2007/A/1298 & 1299, *Webster*; see also CAS 2008/A/1644, *Mutu.*

incurred in reliance on the proper performance of his services throughout the entire contractual term are lost and ought to be recoverable from the Player.

82. Here, these unamortized costs include a portion of the transfer fee which the Club had to pay to Besiktas prior to the beginning of the 2012-2013 season for acquiring the Player's services. To the extent this fee remains unamortized as of the Player's failed doping test, it is principally recoverable under the above-explained principles.

9.2.5 The injured party's choice between the existing damage calculation concepts

83. Claimant requests compensation both for its replacement costs (to obtain the Replacement Player's services) *and* (additionally) the unamortized costs for acquiring the Player. In other words, Claimant asks the Arbitrator to put it into the position it would be in had the Player properly fulfilled his contract (i.e. no replacement costs), *and* – at the same time – to compensate it as if it had never entered into the agreement with the Player (i.e. no transfer fee to Besiktas).

84. This combination is not permissible. The two damages categories claimed by the Club exclude one another. The Club cannot be deemed to have suffered both damages (acquisition costs for the Player on the one hand and replacement costs for replacing him on the other) at the same time. For the purpose of calculating the Club's damages, one has to look at two different scenarios: Either at a (hypothetical) scenario in which the contract would have been performed properly (a "full performance scenario"), or at a scenario in which the Club would have refrained from entering into a contract with the Player at all (a "no contract" scenario).

Under the "full performance scenario", the Club would have incurred the acquisition costs for the Player and the costs for his salary, and both would have fully been amortized. It would, however, not have incurred the costs for replacing the Player (i.e. the transfer sum paid to Cantu and the salary for the Replacement Player), and alleged

lost profits with respect to sporting and marketing. These items are legitimate damage positions under the "full performance scenario". Had the Player fulfilled his contractual obligations, *i.e.*, had he not tested positive to a prohibited substance and had he not been banned for four years, the Club would not have been forced to hire the Replacement Player and could have potentially earned sporting and marketing profits.

85. Under the "no contract scenario", the Club would have incurred costs for acquiring another Player (presumably costs similar to the replacement costs incurred after the Player breached the agreement). It would, however, not have incurred the acquisition costs for the Player, i.e. the transfer fee to Besiktas. This item is a legitimate damage under the "no contract scenario". Had the Club not relied on the Player's proper fulfillment of the contract, it would not have contracted him and would consequently have saved the transfer fee paid to Besiktas.

86. For the purposes of calculating its damages, the injured party needs to choose between these two scenarios. Claimant has made no such choice in its submissions. The arbitrator therefore interprets Claimant's request to the effect that it requests to be compensated under the scenario most favourable to it.

9.2.6 Calculating the Club's damages under the most favourable scenario

87. Claimant's damages under the two scenarios can be calculated as follows:

(a) The "full performance scenario"

88. When calculating damages under the "full performance scenario", one needs to determine what course the events would have taken had the party not breached the contract, and had it fulfilled its contractual obligations properly. Then, the financial situation of the party under this hypothesis has to be compared to its actual financial situation after the breach. This includes deducting any amount the injured party was

able to save as a result of the breach of contract. The breaching party is then liable for the so-determined difference.

89. Claimant, in its submissions, limits the time window for which he calculates his damages to the 2012-2013 season. He does not include the 2013-2014 or the 2014-2015 season. This is legitimate, but warrants for a correction of the calculation presented by Claimant. The transfer fee for the Replacement Player (EUR 500,000.00) cannot be attributed to the 2012-2013 season alone, because the Club received the Replacement Player's services for two seasons, i.e. the (remainder of) the 2012-2013 season *and* the 2013-2014 season. Hence, the transfer fee needs to be attributed to the time for which the Replacement Player was hired proportionally. Assuming that the remaining 2012-2013 season (for which damages are requested) lasted for 6.5 months (five months plus half of the 2013 summer break), and the 2013-2014 season lasted for 10.5 months (nine months plus half of the 2013 summer break) the portion of the transfer fee that can be attributed to the 2012-13 season amounts to EUR 191,177 (rounded).

90. If one now compares Claimant's *actual* expenses with the *hypothetical* expenses (without the breach) for the 2012-13 season, Claimant's damages are as follows: EUR 191,177 in (pro rata) transfer costs plus EUR 300,000.00 in salary payments for the Replacement Player (actual expenses) minus USD 563,334.00 in saved salary payments Claimant was no longer obligated to make to Claimant (hypothetical expenses). Applying an exchange rate of 1.31,[11] Claimant's actual expenses exceeded the hypothetical expenses in the amount of USD 80,107.87 (USD 643,441.87 minus USD 563,334.00), which corresponds to the damage Claimant could be entitled to recover.

[11] The average exchange rate for the first half of 2013 according to www.oanda.com.

91. In addition to the transfer fee and the salary for the Replacement Player, the requested compensation for sporting damages and damages to the Club's brand value (USD 250,000.00) would also constitute a relevant damage under the "full performance scenario", because such (alleged) damage would not have occurred without the Player's breach.

92. However, the Arbitrator finds that she cannot award any damages in this respect, because Claimant, despite having the burden of proof, has not sufficiently substantiated any monetary or immaterial loss resulting from poor sporting performance, or a damage to its image. The allegation that the negative press coverage harmed the Club's image, and that the Club's sporting performance suffered as a result of Respondent's ban is neither quantified in any transparent way, nor is it supported by any evidence. Claimant does not contend that, for example, he lost a sponsor, was unable to find a sponsor, or was otherwise impaired in raising its budget, as a direct result of the Player's misbehaviour. Similarly, the Arbitrator does not see that the Player's ban resulted in a deterioration of the Club's sporting performance. In fact, the Club finished the 2012-2013 season rather successful.

93. Because the claimed compensation for an alleged damage to the Club's image and sporting performance has no merit, Claimant, under the "full performance scenario", can only ask for the amount of USD 80,107.87 (as shown above).

(b) The "no contract scenario"

94. The expenses incurred by Claimant in reliance on the proper performance of the Player Contract which are partially lost due to Respondent's breach and would not have been incurred had Claimant refrained from contracting the Player, can be calculated as follows:

95. Claimant paid an amount of USD 500,000.00 to Respondent's former club Besiktas under the assumption and in the expectation to receive the Player's services for three basketball seasons, i.e. for 31.5 months (3 x 10.5 months).[12] The Player played for 4.75 months (until 21 January 2013), which means that the Club received the value of his services during this time and amortized a portion of USD 75,396.82 (rounded) of the transfer fee (USD 500,000.00 divided by 31.5, multiplied by 4.75). Thus, USD 424,603.18 of the transfer fee remained unamortized.

96. Respondent's argument that he cannot be held liable for transfer costs stemming from an agreement to which he was not a party (the Buy-Out Agreement between Claimant and Besiktas) has no merit. Respondent is liable for damages because he breached the Player Contract, and a "damage" may well exist when the injured party incurred expenses by means of a contract with a third party in the expectation that such expenses will fully amortize as a result of the proper fulfilment of the breached agreement. Whether or not the breaching party participated in that third party contract is irrelevant.

97. Similarly, the Arbitrator rejects Respondent's argument that he is not liable because the Player Contract was signed before Claimant concluded the Buy-Out Agreement. In Clause L of the Player Contract, the Parties explicitly agreed that the validity of the Player Contract would be subject "*to obtaining the Player's federative rights (buy-out rights) from Besiktas Basketball Club*" before 15 August 2012. Respondent was therefore well aware that Claimant would have to come to terms with his former club in order for the Player Contract to become valid. In other words, he knew and accepted that Claimant incurred costs on the occasion of his transfer.

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12 The Arbitrator considers this amount an appropriate transfer sum from a reasonable person's point of view in light of the Player's high market value at the time. Besiktas would not have agreed on Respondent's transfer to Claimant had Claimant not paid the USD 500,000.00.

98. In summary, under the "no contract scenario", the unamortized costs incurred by the Club amount to USD 424,603.18. This is the damage Claimant is entitled to recover under this scenario.

(c)Conclusion

99. Under the "full performance scenario", Claimant's damages are lower than under the "no contract scenario". Therefore, assuming Claimant opts for the more favourable scenario to calculate his damages, the Arbitrator finds that Claimant is entitled to damages in the amount of USD 424,603.18.

9.3 Counterclaim

100. It is undisputed between the Parties that Claimant did not make any salary payments to Respondent from the second half of November 2012 until the Player's suspension on 20 January 2013. Because the Player Contract was in full force and effect during that time, the Player is entitled to the payments stipulated under clause D.2:

- USD 65,000 (net) for the second half of November 2012;
- USD 130,000 (net) for December 2012; and
- USD 86,666 (net) for January 2013 (pro rata until the Player's suspension on 20 January 2013).

101. Therefore, the Player is entitled to a total amount of USD 281,666 (net).

9.4 Interest on the Claim and Counterclaim

102. The Parties request the payment of applicable interest on the outstanding payments.

103. The Player Contract does not provide for any obligation by the Club or the Player to pay interest in case of a non-payment or in the case of damages. However, it is a generally accepted principle embodied in most legal systems and reflected in the BAT jurisprudence[13] that default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. The Arbitrator, deciding *ex aequo et bono* and in accordance with constant BAT jurisprudence, considers an interest rate of 5% per annum to be fair and just to avoid that the parties derive any profit from the non-fulfillment of their obligations.

104. With respect to the starting date, it is necessary to differentiate between Claimant's damages claim and Respondent's salary payment claim.

105. Regarding Claimant's damages claim, the Arbitrator, deciding *ex aequo et bono*, finds that default interest should accrue immediately from the day the damage materialized. This is the time when it became certain that the acquisition costs for the Player would be lost. In the Arbitrator's view, the relevant date in this respect is 2 April 2013, because on this day, the TBF issued its decision to ban the Player from all competitions for four years. Therefore, the Club is entitled to interest as from 2 April 2013.

106. Regarding the Player's salary claim, the Arbitrator finds that default interest should accrue immediately from the day after the stipulated payments became due (the 20th of each month). The payment due dates are explicitly set out in Clause D.2 of the Player Contract so that Claimant knew at what time it was obligated to effectuate the payments.

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13 *See, ex multis*, the following BAT awards: 0092/10, Ronci, Coelho vs. WBC Mizo Pecs 2010; 0069/09,Ivezic, Draskicevic vs. Basketball Club Pecsi Noi Kosariabda Kft; 0056/09, Branzova vs. Basketball Club Nadezhda); 0237/11, Ivanovic, GPK Sports Management Limited vs. Kolossos Rhodes Basketball Club.

107. Claimant's exercise of a retention right in its letter dated 5 April 2013 (quoted above in para. 21) does not change this. While a justified retention right that was properly exercised may cancel a party's obligation to pay interest, the Arbitrator finds that this would not be fair and just in the case at hand. When Claimant exercised his retention right for the first time in April 2013, the claimed salaries had been due already for several months. Claimant had no justification to hold back Claimant's salary in November, December, and January, when the respective instalments became due. The Club should not be allowed to use claims which arose after the Player's salary claims had matured against the latter to stop the accrual of interest on its debts.

9.5 Summary

108. Claimant is entitled to damages in the amount of USD 424,603.18 plus interest of 5% p.a. from 2 April 2013.

109. Respondent is entitled to salary payments in the amount of USD 281,666 plus interest of 5% p.a.

- from 21 November 2012 on the amount of USD 65,000.00,
- from 21 December 2012 on the amount of USD 130,000.00,
- from 21 January 2013 on the amount of USD 86,666.00.

110. All amounts due to Claimant and Respondent are to be understood net of all deductions for social insurance and/or taxes.

10. Costs

111. 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.

112. On 9 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 13,500.00.

113. Considering the outcome and the circumstances of the present case and given that Claimant succeeded with approximately half of its claim, but lost on the Counterclaim entirely, the Arbitrator deems it appropriate that Claimant shall bear 2/3 (= EUR 9,000.00) and Respondent 1/3 (EUR 4,500) of the arbitration costs. Therefore, considering that Claimant paid an advance on costs of EUR 10,927.30 and Respondent an advance on costs of EUR 4,072.70, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

(i) BAT shall reimburse EUR 1,500 to Claimant, being the difference between the costs advanced by the Parties and the arbitration costs fixed by the BAT President;

(ii) Respondent shall pay EUR 427.30 to Claimant, being the difference between the costs advanced by the Respondent and the amount to be borne by it in accordance with the Arbitrator's decision.

114. With respect to the handling fee, which was entirely paid by Claimant (in the amount of EUR 4,988.00), the Arbitrator decides that Respondent shall bear 50% of it, i.e. shall reimburse Claimant in the amount of EUR 2,494.00.

115. Regarding the Parties' requests for reimbursement of attorney's fees and other legal expenses, the Arbitrator finds that each party shall bear its own costs, given that both Parties were in part successful and in part unsuccessful with their legal and factual arguments.

11. AWARD

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

1. **Mr. David Gregory Hawkins is ordered to pay to Galatasaray Spor Kulübü Dernegi USD 424,603.18 net together with interest of 5% p.a. on this amount from 2 April 2013.**

2. **Galatasaray Spor Kulübü Dernegi is ordered to pay to Mr. David Gregory Hawkins USD 281,666.00 net together with interest of 5% p.a.**

   - **from 21 November 2012 on the amount of USD 65,000.00,**
   - **from 21 December 2012 on the amount of USD 130,000.00,**
   - **from 21 January 2013 on the amount of USD 86,666.00.**

3. **Mr. David Gregory Hawkins is ordered to pay to Galatasaray Spor Kulübü Dernegi EUR 427.30 as a reimbursement for the arbitration costs advanced by it.**

4. **Mr. David Gregory Hawkins is ordered to pay to Galatasaray Spor Kulübü Dernegi EUR 2,494.00 as a contribution towards its legal fees and expenses.**

5. **Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 12 June 2014

Annett Rombach

(Arbitrator)