BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0480/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Mr. Gerald Fitch
c/o Mr. Richard Faulkner, attorney at law

- Claimant 1 -

Sports Talent
c/o Mr. John Greig, 704 – 228th Ave N.E. Suite 412,
Sammamish, WA 98074, USA

- Claimant 2 -

Hoops Internacional
c/o Mr. Cesar Alonso Gracia, C/ Polo y Peyrolon 43, 46021 Valencia, Spain

- Claimant 3 -

all represented by Mr. Richard Faulkner, attorney at law,
Blume, Faulkner, Skeen & Northam, LSBN 05470,
111 W. Spring Valley Rd. Suite 250, Richardson, TX 75081, USA

vs.

Baloncesto Malaga SAD (a/k/a Unicaja Club Baloncesto)
Avenida Gregorio Diego 44, 29004 Malaga, Spain

- Respondent -

represented by Messrs. Massimo Coccia, Francisco A. Larios and
Mario Vigna, attorneys at law, Coccia De Angelis Pardo & Associati,
Piazza Adriana 15, 00193 Rome, Italy

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1. The Parties

1.1 The Claimants

1. Mr. Gerald Fitch (hereinafter the "Player" or "Claimant 1") is a professional basketball player of US nationality.

2. Sports Talent (hereinafter "Claimant 2") is a sports management agency representing professional basketball players, among others Claimant 1. Claimant 2 is, inter alia, located in the USA, and represented by Mr. John Greig.

3. Hoops Internacional (hereinafter "Claimant 3") is a service management firm for the representation of professional athletes, specializing in basketball players, and representing, among others, Claimant 1. Claimant 3 is located in Spain and represented by Mr. Cesar Alonso Gracia.

1.2 The Respondent

4. Baloncesto Malaga SAD (hereinafter the "Club" or "Respondent") is a professional basketball club located in Malaga, Spain.

2. The Arbitrator

5. By letter of 19 December 2013, 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 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

6. On 25 January 2011, the Player and the Club entered into an employment agreement according to which the Player was engaged as a professional basketball player for the last part of the 2010–2011 season and the entire 2011–2012 season (hereinafter the "Player Contract"). In addition, the Player and the Club entered into another agreement titled *"MANIFIESTO A / EXHIBIT A"* according to which the Club agreed to pay to the Player a salary in the amount of USD 100,000.00 net for the rest of the 2010–2011 season and – in case the Player Contract was not unilaterally rescinded by the Respondent at the end of the 2010–2011 season – USD 500,000.00 net for the 2011–2012 season, as well as other benefits (hereinafter the "Contract Exhibit A").

7. On the same day, Claimants 2 and 3 on the one side and the Club on the other side entered into an agreement (hereinafter the "Agents' Agreement") according to which the Club agreed to pay the amounts of USD 14,000.00 net for "consulting services" for the rest of the 2010–2011 season and – in case the Player Contract was not unilaterally rescinded by the Respondent at the end of the 2010–2011 season – USD 50,000.00 net for the 2011–2012 season.

8. On 15 August 2011, the Player and the Club entered into a further agreement entitled *"ANNEX TO THE CONTRACT SIGNED ON JANUARY 25TH 2011 BETWEEN BALONCESTO MALAGA SAD AND MR. GERALD FITCH"* (hereinafter the "August Annex"), according to which the Player's salary for the 2011–2012 season was modified: "labor salary" of USD 404,399.00 net and "housing concept" of EUR 10,000.00 net.

9. On 7 September 2011, the Player, the Club and the company CREERTRADING – COMERCIO SERVIÇOS, SOCIEDADE UNIPESSOAL LDA executed an agreement

relating to the Player's image rights for the term of 7 September 2011 until 30 June 2012 (hereinafter the "Image Rights Contract").

10. On 20 October 2011, the Player missed a Euroleague match and was sanctioned by the Club with a fine of EUR 3,155.00.

11. On 1 March 2012, the Club's team played against Bilbao Basket. The Parties are in dispute whether or not the Player refused to play in that match. However, it is undisputed that the Player participated in at least two further matches of the Club subsequently.

12. On 29 March 2012, the Club's Board of Directors initiated disciplinary proceedings against the Player. The Club issued a letter informing the Player about these proceedings. The Claimants submit that the Player did not receive any documents pertaining to these disciplinary proceedings and, thus, that the Player had no knowledge of these proceedings until 13 April 2012.

13. On 12 April 2012, the Club unilaterally terminated the Player Contract with immediate effect. Furthermore, it also terminated the Image Rights Contract.

14. By letter of 18 April 2012, Mr. Nir Inbar from the law office ZAG in Tel Aviv, Israel, requested from the Club payment of all outstanding debts to the Claimants. Moreover, he informed the Club that in case of non-payment the Player and Claimants 2 and 3 "*will have no other alternative but to seek for their legal rights and demand any remedy and/or compensation at the FIBA Arbitral Tribunal*".

15. In a letter dated 19 April 2012, the Club responded to Mr. Nir Inbar's letter as follows:

> *"It's not true that Baloncesto Malaga SAD terminated the employment contract with the player without just cause: on March 29, 2012 a letter was delivered in person to his home, providing formal notification that disciplinary proceedings had been initiated. The letter explained the reasons for the disciplinary proceedings and gave*

the player a period of 10 days to submit any appropriate allegations he wished to make against them.

The Player and his representative did not present any argument against the contents of the letter. Therefore, within the appropriate period of time, the Club made the decision to dismiss the player for disciplinary reasons, due to the several serious breaches of involving obligations assumed by the player in his employment contract.

This decision was communicated to the player by registered mail, addressed to his home on April 12, 2012. A copy of this letter was also sent to his representative by email."

3.2 The Proceedings before the BAT

16. On 13 August 2013, the BAT received the Claimants' Request for Arbitration dated 12 August 2013. The non-reimbursable handling fee of EUR 2,985.00 was received in the BAT bank account on 15 November 2013.

17. By letter of 2 January 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 Respondent to file its answer in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 24 January 2014. The BAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs by no later than 17 January 2014:

"Claimant 1 (Mr Gerald Fitch)	*EUR*	*4,500*
Claimant 2 (Sports Talent)	*EUR*	*500*
Claimant 3 (Hoops Internacional)	*EUR*	*500*
Respondent (Baloncesto Malaga SAD)	*EUR*	*5,500"*

18. By letter of 22 January 2014, the BAT Secretariat confirmed receipt of the Respondent's and Claimant 3's shares of the Advance on Costs and informed the Parties that in accordance with Article 9.3 of the BAT Rules, the arbitration would not proceed until the full payment of the Advance on Costs. Therefore, Claimant 1 and Claimant 2 were requested to pay their shares of the Advance on Costs by no later than 31 January 2014.

19. By letter of 12 February 2014, the BAT Secretariat confirmed receipt of the Respondent's Answer and the full Advance on Costs in the total amount of EUR 10,985.00. It also informed the Parties that the Arbitrator had decided to dismiss the Claimants' request for provisional measures and that the full reasoning for this decision would be given in the final award.

20. By letter dated 13 March 2014, the Arbitrator invited the Claimants to comment on the Respondent's Answer by no later than 27 March 2014. Upon Claimants' request for an extension of the deadline to submit their comments, the Arbitrator – in view of the Respondent's consent – decided to grant an extension until 4 April 2014.

21. By email of 7 April 2014, the BAT Secretariat confirmed receipt of the Claimants' comments on the Respondent's Answer (hereinafter the "Reply") and invited Respondent to comment on the latter by no later than 21 April 2014. Upon Respondent's request for an extension of the deadline to submit its comments and in light of Claimants' consent (email of 14 April 2014), the Arbitrator decided to grant an extension until 30 April 2014. On 30 April 2014, the Claimants' counsels requested a further extension of two days, which was granted by the Arbitrator.

22. By email of 6 May 2014, the BAT Secretariat confirmed receipt of the Respondent's comments (hereinafter the "Rejoinder") and requested the Respondent to provide a translation into English of the exhibits produced in Spanish by no later than 13 May 2014. By email of 13 May 2014, the Respondent submitted the requested translations.

23. By letter dated 2 June 2014, the BAT Secretariat informed the Parties about the Arbitrator's decision to declare the exchange of documents complete. The Parties were, therefore, invited to submit a detailed account of their costs by 9 June 2014. In addition, given the length and complexity of this procedure as well as the volume of written documents on record, the parties were requested to pay an Additional Advance on Costs by no later than 11 June 2014 as follows:

"Claimant 1 (Mr Gerald Fitch)	*EUR*	*2,750*
Claimant 2 (Sports Talent)	*EUR*	*250*
Claimant 3 (Hoops Internacional)	*EUR*	*250*
Respondent (Baloncesto Malaga SAD)	*EUR*	*3,250"*

24. By email dated 5 June 2014, the BAT Secretariat acknowledged receipt of the Parties' accounts of costs and invited the Parties to submit their comments, if any, on the cost submissions of the opposing party by no later than 11 June 2014. By email of 6 June 2014, Respondent informed the BAT Secretariat that it had no comments on the Claimants' account of costs. Claimants did not file any comments.

25. By email of 30 June 2014, the BAT Secretariat confirmed receipt of the Parties' Additional Advance on Costs.

26. 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 issue the award on the sole basis of the written submissions.

4. The Positions of the Parties

27. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Arbitrator, however, has carefully considered all the submissions made by the Parties, even if there is no specific reference to those submissions in the following summary.

4.1 Claimants' Position

28. The Claimants submit the following in substance:

29. On Jurisdiction:

- BAT has jurisdiction to hear all of Claimants' claims because they arise from the same agreement, i.e. the Player Contract, which contains an arbitration clause in favour of the BAT ("*any dispute arising from or related to the present contract*"). The Agents' Agreement and the Image Rights Contract are closely connected to the Player Contract. In fact they are to be considered (sub)parts of the Player Contract, with the consequence that the arbitration clause contained in the Player Contract also extends to them.

- The law applicable to the present arbitration is Swiss law. Thus, provisions of Spanish law pertaining – *inter alia* – to the arbitrability of labour law disputes are irrelevant in the present matter.

30. On Admissibility:

- The Player has standing to sue with regard to the monies due under the Image Rights Contract. The Player never gave up his right to be paid his guaranteed salary but rather agreed, by entering into the August Annex, that parts of it be paid through the company "Creertrading".

- The Claimants are not barred from pursuing their claims under the legal principle of "Verwirkung". Claimants did not display any behaviour from which the Club could reasonably derive the notion that they would waive their claims against the Respondent. Instead, the Respondents repeatedly requested that the Club pay the outstanding amounts. Thus, it is entirely baseless that the Claimants failed to exercise their rights for a significant period of time.

31. On Provisional Orders / Injunctive Relief:

- Provisional orders are justified in the case at hand because (a) the Claimants' harm cannot be adequately compensated through a judgment of damages, (b) the harm

suffered by the Claimants substantially outweighs any harm that is likely to result to the Club from a provisional order and (c) because there is a reasonable chance that Claimants will succeed on the merits with their claims.

- Permanent injunctive relief is appropriate because (a) the Club has committed a wrongful act; (b) imminent harm to Claimants and possibly to future employees of the Club is likely; (c) irreparable injury to both Claimants and possibly to future employees of the Club is likely; and (d) because of the absence of other adequate remedies at law.

32. <u>On the merits:</u>

- The Club failed to fully perform its obligations under the contracts agreed upon: In particular, the Club failed to pay the Claimants in full what was due under the contracts and, furthermore, the Club did not provide the Claimants with proper tax certificates.

- The Player did not refuse to play in the match on 1 March 2012. Instead, it was the Club that ordered the former team coach Mr. Mateo not to field the Player because the Club was in the process of "making wholesale changes" to its team following its poor performances in the 2011–2012 season.

- Claimants were not informed about the disciplinary proceedings against the Player and had no knowledge thereof until 13 April 2012, i.e. one day after the unilateral termination of the Player Contract by the Club. The disciplinary proceedings were initiated by the Club only one month after the alleged wrongdoings of the Player.

- The Club's unilateral termination of the Player Contract was illegal and invalid. The reasons for early termination of the Player Contract are exhaustively listed in the latter. None of the grounds provided for in the Player Contract are applicable to the case at hand. Thus, the Club had no authority to terminate the Player Contract. In

particular, the early termination cannot be based on the Club's Internal Rules or on Spanish law. It follows from this that the Club is obliged to pay the Player the entire outstanding amounts as agreed upon under the Player Contract, the August Annex and the Image Rights Contract. The outstanding amounts due to the Player consist of USD 172,590.75 (remuneration) and EUR 4,212.30 (housing expenses).

- Since the Player successfully passed the initial medical examination, Claimants 2 and 3 are entitled to the entire agent fees for both the 2010–2011 and 2011–2012 seasons. The Club failed to pay the instalment due on 15 February 2012 for the 2011–2012 season.

- The Club is obliged to pay interests on the amounts owed to the Player as from 12 April 2012 and on the amounts owed to Claimants 2 and 3 as from 15 February 2012. The applicable rate requested by the Claimants is "the maximum rate permitted under Swiss law".

- The Club was under an obligation to pay taxes on the amounts due and to provide appropriate tax certificates. The Club's failure to provide those documents constitutes a breach of the respective contracts.

- Should the Arbitrator find that the termination of the Player Contract was valid, Claimants in the alternative claim full payment of the Player's salary from 1 to 12 April 2012 and housing expenses for the months of March and April 2012, plus interest on the aforementioned amounts from the dates upon which they have become due.

4.2 Claimants' Requests for Relief

33. In their Request for Arbitration, Claimants request the following reliefs:

*"**i. Mr. Fitch***

(a) $214,609.10 salary + 10,000.00 EUR "Housing concept" for 2011–2012

season plus interest;

(b) 2011 tax certificate for amounts already paid in fiscal year 2011;

(c) 2012 tax certificate for amounts already paid in fiscal year 2012;

(d) tax certificate for the year in which the amount due is paid;

(e) in the alternative to (b), (c), and (d) above, gross payment such that Mr. Fitch is compensated $100,000.00 + $214,609.10 + 10,000.00 EUR net plus interest.

ii. Sports Talent

(a) $12,500.00 for agent fees;

(b) interest on $12,500.00 principal from 15 February 2012 to present;

(c) 2011 tax certificate for amounts already paid in fiscal year 2011;

(d) 2012 tax certificate for amounts already paid in fiscal year 2012;

(e) tax certificate for the year in which the amount due is paid, and

(f) in the alternative, gross payment such that Sports Talent is compensated for all amounts paid and owed, net plus interest.

iii. Hoops Internacional

(a) $12,500.00 for agent fees;

(b) interest on $12,500.00 principal from 15 February 2012 to present;

(c) 2011 tax certificate for amounts already paid in fiscal year 2011;

(d) 2012 tax certificate for amounts already paid in fiscal year 2012;

(e) tax certificate for the year in which the amount due is paid, and

(f) in the alternative, gross payment such that Sports Talent is compensated for all amounts paid and owed, net plus interest."

34. In their Reply, Claimants submit that the Club owes the Player salary of USD 172,590.75 and housing expenses of EUR 4,212.30, without, however, formally amending their Request for Relief.

35. In addition, Claimants filed procedural requests for Provisional Orders and Permanent Injunctive Relief as follows:

*"**Provisional Orders Prior to Final Determination of Arbitration***

[…] Claimants respectfully request a partial final award for security of at least $279,509.10 such sum to be placed in a trust account with the Basketball Arbitral

Tribunal including:

- *(a) the full amount of payment due Mr. Fitch under the Agreement in the amount of $227,909.10 ($214,609.10 salary + $13,300.00 "Housing Concept" (10,000 EUR X 1.33 EUR:USD as of 12 August 2013));;*
- *(b) the full amount of payment due Sports Talent under the Agreement in the amount of $12,500.00 plus interest;*
- *(c) the full amount of payment due Hoops Internacional under the Agreement in the amount of $12,500.00 plus interest;*
- *(d) the maximum amount of attorney's fees allowed by BAT Rules in the amount of 20,000.00 EUR; and*
- *(e) costs and expenses for the arbitration of this claim, including compensation and expenses due the Arbitrator, in an amount to be determined by the Arbitrator."*

"Permant Injunctive Relief Upon Final Determination of Arbitration and Affirmative Reservation of Jurisdiction to Ensure Compliance with Award

[…] Claimants respectfully request the following permanent injunctive relief:

- *(a) barring Club from scouting, recruiting, or signing any and all foreign players for participation in basketball activities for which Club is allowed to participate for the 2013–2014 season, contingent upon full payment of the award owed to Claimants;*
- *(b) barring participation by Club in any practices, trainings, physical preparation, or games for the ACB, or any other basketball activities for which Club is allowed to participate, for the 2013–2014 season, contingent upon full payment of the award owed to Claimants;*
- *(c) barring Club from collecting any and all money or other benefits from sponsors for the 2013–2014 season, contingent upon full payment of the award owed to Claimants;*
- *(d) barring Club from recruiting or signing any and all new sponsors for the 2013–2014 season, contingent upon full payment of the award owed to Claimants;*
- *(e) ordering Club to pay any and all appropriate fees and expenses to the Basketball Arbitral Tribunal;*
- *(f) ordering Club to inform all foreign players for a period of five (5) years in writing in English and/or the player's native language that one (1) or more foreign players have not been timely paid money due them under their contracts with Club;*
- *(g) ordering Club to inform all foreign players in writing for a period of five (5) years in English and/or the player's native language that one (1) or more foreign players have been forced to resort to arbitral proceedings to collect money due them under their contracts with Club;*

(h) *ordering Club to file for a period of five (5) years copies with the president of the Basketball Arbitral Tribunal and/or FIBA of (f) and (g) above, confirmed in writing and signed by both the foreign player and Club;*

(i) *ordering Club to inform for a period of five (5) years all of their sponsors that they have had an arbitral proceeding initiated against them by a foreign player for Club's failure to pay money due the player under his contract with Club;*

(j) *ordering Club to inform for a period of five (5) years every team in the ACB that they have had an arbitral proceeding initiated against them by a foreign player for Club's failure to pay money due the player under his contract with Club;*

(k) *in the event that enforcement action is necessary relating to the award by the Arbitrator of this Arbitration, that the Arbitrator order Club to deposit into a trust account with the Basketball Arbitral Tribunal or, alternatively, to pay directly to the Claimants additional fees in the amount of 50,000.00 EUR for enforcement of the Arbitral Award in Italy*(sic), *Europe, and any other State or Nation under the New York Convention or wherever any Club assets may be found."*

4.3 Respondent's Position

36. Respondent submits the following in substance:

37. On Jurisdiction:

- The BAT lacks jurisdiction for the claims arising from the Agents' Agreement and the Image Rights Contract. Both contracts do not contain a BAT arbitration clause. Furthermore, both contracts do not form part of the Player Contract but are separate and distinct in nature. Thus, the arbitration clause contained in the Player Contract does not extend to these other contracts. In addition, the Image Rights Contract contains a jurisdiction clause. Therefore, extending the arbitration clause of the Player Contract to the Image Right Contract would be in clear contradiction with the parties' will at the time they executed the Image Rights Contract. Finally, the Respondent notes that the company CREERTRADING (party to the Image Rights Contract) and Claimants 2 and 3 (parties to the Agents' Agreement) are neither signatories nor parties to the Player Contract.

- All of the Claimants' claims must be dismissed for lack of arbitrability. The present dispute is a "labour dismissal dispute" or a dispute arising from the resolution of a labour contract. According to Spanish law such disputes relating to an employment contract are not arbitrable. An arbitral tribunal sitting in Switzerland has to take this into consideration when deciding on the dispute.

38. On Admissibility:

- The Respondent submits that the Player has no standing to sue with regard to payments arising from the Image Rights Contract. Furthermore, the Respondent submits that the Claimants failed to timely bring forward their claims and that, therefore, they are estopped from invoking their rights according to the principle of "Verwirkung".

39. On Provisional Orders / Injunctive Relief:

- Claimants failed to provide any evidence whatsoever to support their arguments regarding their requests for Provisional Orders. Furthermore, the Respondent submits that none of the cumulative requirements for granting a provisional measure are met.

- Claimants' Request for Permanent Injunctive Relief is completely inappropriate and unnecessary because they have a more than adequate legal remedy available to them, i.e. compensation for damages. In addition, it would be inappropriate to apply sanctions in accordance with Article 300 of the FIBA Internal Regulations in an "anticipatory manner".

40. On the merits:

- On 1 March 2012, the Player refused to play in the match against Bilbao Basket without valid justification. In the Request for Arbitration the Player argued that he refused to play because outstanding payments had not been paid in full. In the

Reply, however, the Player changed his submissions as to the course of the events. The Player now claims that he did not refuse to play, but that it was the Club that advised the Coach to bench him and that the Player was upset about that. The Respondent qualifies this change of strategy as a "*clumsy attempt […] in order to take back an admission which was fatal to their case*". The Respondent contests that any order was given to the coach, Mr. Mateo, to bench the Player in that match.

- As a consequence of the Player's breach of the Player Contract (and of the Club's Internal Rules, to which the Player Contract makes reference), the Club's Board of Directors initiated disciplinary proceedings against the Player and suspended him temporarily. This fact was properly notified to the Player on 29 March 2012 by "burofax". The Player did not reply to the notification and, therefore, accepted the facts stated therein to be correct. On 12 April 2012, the Club decided to dismiss the Player for the above disciplinary reasons, taking into account that this had been already the Player's "second identical offense of a most serious nature".

- The Club has paid – until the termination of the Player Contract on 12 April 2012 – a total amount of USD 283,082.20 in salaries (September 2011 to March 2012) and EUR 6,000.00 in housing expenses (September 2011 to February 2012) to the Player. After the termination, the Club made available to the Player an additional amount in an escrow with the Malaga Labour Court. However, this "Liquidation and Settlement Deposit" was never withdrawn by the Player although he was informed of it several times. This deposit contained, inter alia, the Player's salary for 12 days of April 2012 (USD 16,175.96) and the housing expenses for March and April 2012 (EUR 2,000.00). The Club admits that it still owes these amounts to the Player.

- In case the Arbitrator finds that further amounts under the Player Contract are due, the Respondent submits that default interests commence only on the due date of each principal instalment and not on the date of the Club's termination of the Player Contract. In any event, no interests are due on the "Liquidation and Settlement Deposit" because the Player could have withdrawn these amounts at any time.

Hence, it is the Player who was in "creditor's default" rather than the Club being in "debtor's default".

- The Club timely paid all taxes due on behalf of the Player to the Spanish tax authorities for the fiscal years 2011 and 2012. Corresponding tax certificates are attached to the Club's Answer as Exhibit R-26. The Agents' Agreement does not require the Club to produce such documents in relation to agent fees.

4.4 Respondent's Request for Relief

41. In its Rejoinder, Respondent requests the following reliefs:

> *"**On a preliminary basis,***
>
> *i. Dismiss all claims by Sports Talent and Hoops Pro Internacional SL arising from the Agency Agreement for lack of jurisdiction;*
>
> *ii. Dismiss the Player's claim for USD 52,849.5* [sic] *for image rights payments arising from the Image Rights Contract for lack of jurisdiction; or, in the alternative, dismiss this claim based on the Player's lack of standing to sue;*
>
> *iii. Dismiss all of the Player's claims based on lack of arbitrability;*
>
> *iv. Dismiss all of the Player's claims based on their untimeliness;*
>
> *v. Dismiss the Claimants' request for a permanent injunctive relief.*
>
> ***Eventualiter, on the merits,***
>
> ***(a) With respect to the Player,***
>
> *i. Hold that the disciplinary proceedings cannot be reopened;*
>
> *ii. Alternatively, hold that the Respondent terminated the Employment Contract with just cause for disciplinary reasons;*
>
> *iii. Hold that no sum is owed to the Player pursuant to the Employment Contract, with the exception of USD 16,175.96 for 12 days of salary for April and EUR 2,000 for housing expenses for March and April, and accordingly dismiss all further Player's claims under the Employment Contract.*
>
> *iv. Hold that the 2011 and 2012 tax certificates for the amounts paid in the fiscal year of 2011 and 2012 have been duly provided to the Player and that no other tax certificates are due to the Player;*
>
> *v. Dismiss all other prayers for relief submitted by the Player.*

(b) With respect to Sports Talent,

i. Hold that no tax certificates are due to Sports Talent;

ii. Dismiss all prayers for relief submitted by Sports Talent.

(c) With respect to Hoops Pro Internacional SL,

i. Hold that no tax certificates are due to Hoops Pro Internacional SL;

ii. Dismiss all prayers for relief submitted by Hoops Pro Internacional SL.

(d) With respect to all of the Claimants,

i. Order all of the Claimants collectively to pay all the costs of this arbitration and a contribution to the Respondent's legal and other costs, which will be precisely quantified at a later stage of these proceedings, or another amount the BAT considers equitable."

42. In its Answer, the Respondent also requested the Arbitrator to dismiss the Claimants' requests for a Provisional Order and for Permanent Injunctive Relief.

5. The Jurisdiction of the BAT

43. 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 (hereinafter "PILA").

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

5.1 The arbitrability of the dispute

45. The Club argues – in particular – that the Player's claims lack arbitrability because labour law disputes are not arbitrable under Spanish law, and that an arbitral tribunal sitting in Switzerland must take these provisions of Spanish law into account. In this context, the Club refers to an arbitral award rendered by the Court of Arbitration for Sports (hereinafter the "CAS") in the case CAS 2011/O/2626.

46. The Arbitrator finds that the question of arbitrability of the dispute – in an arbitration that is international in nature – must be solely examined in light of Art. 177 (1) of the PILA. The provision states as follows:

> *"All pecuniary claims may be submitted to arbitration."*

47. There can be no doubt that the present claims are pecuniary claims and that, thus, the claims are arbitrable according to Swiss law. Whether or not the dispute is arbitrable under the laws of Spain, is irrelevant as the Swiss Federal Tribunal has stated in a comparable case:[1]

> *"Das Bundesgericht hat zwar in seiner Rechtsprechung die Möglichkeit in Betracht gezogen, die Schiedsfähigkeit eines konkreten Rechtsstreits gegebenenfalls mit Blick auf Bestimmungen zu verneinen, die zwingend die staatliche Gerichtsbarkeit vorschreiben und deren Beachtung unter dem Blickwinkel des Ordre public … geboten ist … Dies kann jedoch … nicht dahingehend verstanden werden, dass ohne Weiteres zwingende Bestimmungen einer ausländischen Rechtsordnung zu berücksichtigen wären, mit welcher die Rechtsstreitigkeit Verbindungen aufweist, und die den Begriff der Schiedsfähigkeit möglicherweise enger fassen … . Dass Entscheide internationaler Schiedsgerichte mit Sitz in der Schweiz, die gestützt auf Art. 177 Abs. 1 IPRG einen Rechtsstreit als schiedsfähig erachtet haben, in einem bestimmten Land gegebenenfalls nicht vollstreckt werden können, ist nach dem Willen des Gesetzgebers … hinzunehmen; es ist mithin Sache der Parteien ein solches Risiko abzuwägen. …"*
>
> *(free translation: The jurisprudence of the Swiss Federal Tribunal has contemplated the possibility that the arbitrability of a specific dispute may be denied in light of provisions that mandatorily provide for state court jurisdiction and the compliance of which forms part of the ordre public. This, however, cannot be understood to mean that mandatory provisions of a foreign legal order that construe the term arbitrability more narrowly than Swiss law and to which the dispute is connected must be taken into account when deciding on the question of abitrability. That arbitral awards of international arbitral tribunals having their seat in Switzerland and having ascertained their jurisdiction and the arbitrability of the dispute based on Art. 177 (1) of the PILA may not be enforced abroad is a risk that the Swiss lawmaker has contemplated and accepted; it, thus, is up to the parties to ascertain and weigh up such risk. …".)*

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[1] Swiss Federal Tribunal 4A_388/2012, decision dated 18 March 2013, E. 3.3.

48. To conclude, therefore, the Arbitrator holds that it is sufficient for the present case to be arbitrable according to Swiss law, i.e. Art. 177 (1) of the PILA. Whether or not the provisions of Spanish law prevent the award from being enforced in Spain is not a matter to be taken into account in this arbitration.

5.2 The validity and scope of the arbitration agreement

49. The jurisdiction of the BAT results from the arbitration clause in Clause FIFTEENTH of the Player Contract, which reads as follows:

> *"FIFTEENTH.- Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator upon appeal shall decide the dispute ex aequo et bono."*

50. In accordance with Article 1.1 of the BAT Rules, these rules shall apply whenever the parties to a dispute have agreed in writing to submit the same to the BAT – including by reference to its former name "FIBA Arbitral Tribunal (FAT)". Article 18.2 of the BAT Rules says: *"Any reference to BAT's former name 'FIBA Arbitral Tribunal (FAT)' shall be understood as referring to the BAT."* The Parties' reference to the "FIBA Arbitral Tribunal (FAT)" in Clause FIFTEENTH of the Player Contract is therefore understood as a reference to the BAT.

51. The Player Contract is in written form and, thus, the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

52. With respect to the scope of the arbitration clause contained in the Player Contract, the Arbitrator takes note of the Club's objection to the BAT jurisdiction regarding claims arising out of the Agents' Agreement (see para 5.2.1 below) and the Image Rights Contract (see para 5.2.2 below). Whether or not the arbitration clause contained in the

Player Contract extends to these other contracts is an issue of interpretation. The principles of interpretation according to Swiss law are – as BERGER/KELLERHALS[2] have put it – as follows:

> *"If Swiss law is applied to the arbitration agreement, the first canon of interpretation is that the 'common real intention' (übereinstimmender wirklicher Wille) of the parties is decisive (see CO, Art. 18(1)). In other words, when interpreting an arbitration agreement, the first step is to establish whether the parties, as a matter of fact, have reached a 'natural' consent ('empirical' or 'subjective' interpretation). Only if a 'common real intention' cannot be established, the arbitrators have to apply, in a second step, the 'objective' or 'normative' interpretation. This method aims at establishing the 'presumed intention' (mutmasslicher Wille) of the parties which they had when they entered into the arbitration agreement. This is done by interpreting the parties' statements taking account of their behavior and their respective interests. At the end the meaning given to the respective declarations of the parties is what loyal persons of the same kind as the parties would have given to them in the circumstances existing at the time when they were made (interpretation according to the "principle of confidence 'Vertrauensprinzip')."*

53. Since the Parties have not submitted what their respective subjective will was when entering into the various agreements, the Arbitrator will interpret the contracts according to the so-called principle of confidence ("Vertrauensprinzip"). In doing so, the Arbitrator takes into account the Swiss jurisprudence according to which a rather extensive interpretation is to be followed in determining the scope of an arbitration agreement. Accordingly, it is to be assumed that the parties, "*if they have indeed concluded an arbitration agreement, wish the arbitral tribunal to have broad jurisdiction*".[3]

54. In international arbitration it frequently occurs that between the Parties a "group of contracts" or a "plurality of contracts" have been signed and that only one of these

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[2] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed. 200, no. 415.

[3] Decision of the Swiss Federal Tribunal dated 15 March 1990, BGE 116 Ia 56 E. 3b; Decision of the Swiss Federal Tribunal dated 8 July 2003, BGE 129 III 675 E. 2.3. See also Swiss Federal Tribunal 4C.40/2003 of 19 May 2003, E. 5.3.

contracts contains an arbitration clause.[4] The contracts may form a group of contracts because they all follow a common purpose or because the contracts were entered into consecutively.[5] Where only the "framework agreement" contains an arbitration clause to which the other, related contracts refer, the arbitral tribunal, constituted pursuant to this contract, can also resolve disputes arising out of the other contracts if it can be established that the parties at least implicitly intended to empower the arbitral tribunal to resolve all disputes arising out of a the entire group of contracts.[6] Parties to an ongoing business relationship often successively sign more or less identical contracts. It might occur that one (or more) of these contracts does not contain an arbitration clause whereas the others provide for dispute settlement by arbitration. In such situations, it must be asked whether the parties' discussions, behaviour or prior practice lead to the presumption that the parties implicitly agreed that disputes arising out of the contract not containing an arbitration clause would also be submitted to arbitration. In general, disputes arising out of later legal relationships which are connected to earlier contracts containing an arbitration clause are encompassed by the arbitration agreement.[7] To conclude, therefore, it is generally accepted according to Swiss law that the agreement to arbitrate contained in any given contract, in case of doubt, also covers claims arising from *subsequent legal relationships* between the same parties that are connected to the original contract. This includes, in particular, claims arising from addenda or supplements by which the main contract was changed or amended by mutual agreement.[8]

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[4] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed. 200, no. 474; GIRSBERGER/VOSER, International Arbitration in Switzerland, 2nd ed. 2012, no. 249

[5] GIRSBERGER/VOSER, International Arbitration in Switzerland, 2nd ed. 2012, no. 249.

[6] GIRSBERGER/VOSER, International Arbitration in Switzerland, 2nd ed. 2012, no. 250.

[7] GIRSBERGER/VOSER, International Arbitration in Switzerland, 2nd ed. 2012, no. 251.

[8] BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed. 2010, no. 475.

5.2.1 Jurisdiction regarding Agents' Agreement

55. Analysing the relationship between the Agents' Agreement and the Player Contract and considering all arguments submitted by the Parties, the Arbitrator finds that an interpretation of the respective contracts in light of the "Vertrauensprinzip" speak in favour of extending the arbitration agreement in Clause FIFTEENTH of the Player Contract also to claims arising out of the Agents' Agreement.

56. First, there is a close relationship between both contracts.[9] It is correct that the Player Contract explicitly refers only to the Contract Exhibit A (providing for the Player's compensation) but not to the Agent's Agreement. However, the Player Contract refers to the Player's agents in its Clauses SECOND and SEVENTH. Clause SECOND of the Player Contract provides that the Club is entitled to unilaterally terminate the Player contract for the 2011–2012 season if it has fulfilled all its payment obligations towards the Player and "*to the Player agents*". Moreover, Clause SEVENTH of the Player Contract grants the Player the right to withhold his services ("refrain from participating in team practice sessions and/or games") until the total amount owed to the Player "*and/or the Agents is remitted in full*". These provisions clearly show a close connection between the Player Contract and the amounts requested by Claimants 2 and 3. Furthermore, both contracts – the Player Contract and the Agent's Agreement – were signed at the same time (i.e. on 25 January 2011). In addition, the Preamble of the Agents' Agreement explicitly refers to the Player Contract and explains the role and function of Mr. Greig and Mr. Garcia in respect of the Player Contract ("*DECLARE […] B) That Mr. CESAR ALONSO GARCIA and Mr. JOHN GREIG have participated in the negotiation of this contract.*"). It is, thus, rather obvious to the Arbitrator that the Player

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[9] See for this requirement the consistent BAT jurisprudence: cf., inter alia, BAT 0378/13, arbitral award of 2 December 2013 (N29 et seq. and reference to BERGER/KELLERHALS, International and domestic arbitration in Switzerland, 2nd ed., 2010, no521) and BAT 0257/12, arbitral award of 3 August 2012 (N37 et seq.).

Contract is a *sine qua non* condition to the Agents' Agreement and that both contracts are closely connected to each other as regards their content and timing.

57. Finally, the Arbitrator notes that this close relationship is also evidenced through the form of the respective contracts, since the pages of both contacts are consecutively numbered (Player Contract including Contract Exhibit A go from pages 1 to 13 and the Agents' Agreement from pages 14 to 16). Thus, also with respect to their form both contracts form a unity. Furthermore, the Agents' Agreement does not provide for a different kind of dispute resolution mechanism that could cast any doubt on the presumed will of the parties to extend the arbitration clause contained in the Player Contract also to the Agents' Agreement.

58. The Arbitrator finds, therefore, that the arbitration clause in the Player Contract applies also to the claims of Claimants 2 and 3 against the Club regarding the payment of agent fees (and to ancillary claims such as claims for interests and tax certificates).

5.2.2 Jurisdiction regarding Image Rights Contract

59. The Image Rights Contract does not contain a BAT arbitration clause but, instead, provides for a different dispute resolution mechanism which reads as follows:

> ***"ELEVENTH***
>
> *The incidence that may occur in this agreement will be solved through a law referee by of*(sic) *Málaga Courts according to its status and procedure regiment. Both sides expressed their renounce to judicial way to resolve this contract."*

60. In light of this clause there is no room for an alleged presumed will of the parties that the arbitration clause contained in the Player Contract also extends to the Image Right Contract. This all the more true, since

- The Image Rights Contract is a completely separate document which was executed <u>seven and a half months after</u> the Player Contract was concluded.

- According to the Image Rights Contract (no. 1 of the preamble), CREERTRADING received the Player's image rights only on 4 September 2011, i.e. more than seven months after the Player Contract providing for BAT arbitration was concluded. Thus, – quite differently from previous BAT cases that dealt with image rights agreements – the events at the origin of the claims arising out of the Image Right Contract are not rooted in the Player Contract.

- Finally, there is no evidence on file that the Player and the Club agreed "*that some part of the salary owed to Mr. Fitch for the 2011–2012 season would be paid to an image rights company called Creertrading*" as submitted on page 3 of Claimants' Reply. Claimants failed to evidence or substantiate that payments agreed under the Image Rights Contract were meant to be "part of the salary" of the Player.

61. Thus, the Arbitrator concludes that the Player's claim based on the Image Rights Contract does not fall under the scope of the arbitration agreement contained in the Player Contract. The Player's claim based on the Image Right Contract, therefore, must be rejected for lack of jurisdiction.

5.2.3 Conclusion

62. The Arbitrator finds that he has jurisdiction to adjudicate the Player's claims based on the Player Contract (including the August Annex) and the claims of Claimants 2 and 3 based on the Agents' Agreement. However, the Arbitrator finds that he lacks jurisdiction with regard to all claims based on the Image Rights Contract.

6. Other procedural issues

6.1 Provisional Orders

63. Under both Article 183(1) of the PILA, which is the *lex arbitri*, and Article 10 of the BAT Rules the Arbitrator has the power to render an order for provisional and conservatory measures relating to the issues in dispute.

64. With respect to their request for Provisional Orders, Claimants submit that:

> *"Claimants ask this Tribunal to issue provisional orders prior to the final determination of this arbitration for the Claimants' claims against Club. Provisional orders are appropriate because (a) the harm caused Claimants by the Club is not adequately reparable by an award of damages, (b) such harm substantially outweighs any harm likely to result to Club by an award of provisional orders, and (c) there is a reasonable possibility that Claimants will succeed on the merits of their claims.*
>
> *Upon information and belief, Club has recently distributed funds for the sole benefit of the Club for the 2013–2014 season and not to discharge its obligations for prior seasons. Upon information and belief, Club paid to ACB the amount required to remain in ACB for the 2013–2014 season and for taxes owed. Also, Club will likely attempt to fill out its roster this summer for the beginning of the 2013–2014 season, which will further deplete its funds. Yet Club has failed to remit any payment on its obligations owed for prior seasons. Clearly a reasonable possibility exists that Claimants will succeed on the merits of their claims as the Agreement is guaranteed and none of the Claimants have received the full amount owed".*

65. The Arbitrator finds that the conditions for ordering the requested provisional measures are not met in the present case because the Claimants have not adduced any evidence – beyond asserting that the Club is using its funds/patrimony in manners that are inappropriate and likely to endanger the Club's capacity to pay its alleged debts to the Claimants – to support their affirmations in question, i.e. they have not even brought prima facie evidence thereof; nor provided prima facie evidence that the Club is in a financial and/or legal situation which will prevent it from honouring its debts, if any such exist. Thus, the Claimants have not fulfilled the condition of demonstrating the likelihood of irreparable harm.

66. For the above reasons, no provisional measures were ordered prior to this award and the Claimants' request for Provisional Orders is dismissed.

6.2 Permanent Injunctive Relief

67. With respect to their request for Permanent Injunctive Relief, Claimants submit that:

> *"The Arbitration Tribunal is empowered with vast authority to enforce its awards through broad remedial awards, sanctions, and injunctive relief. Flexibility in the fashioning in BAT arbitration awards is granted by the BAT arbitration clauses, now included in nearly every basketball contract governed by FIBA. Those broad powers are further confirmed by the express grant of authority to decide any disputes 'ex aequo et bono' by the BAT arbitration Rules and the express terms of the Agreement. The BAT Rules provide that the BAT was created to 'provide parties involved in disputes arising in the world of basketball with an efficient and effective means of resolving these disputes.'* ***BAT Rule 0.1.*** *Unfortunately, the BAT website reveals numerous Clubs currently under sanction by FIBA because of unsatisfied or non-complied with arbitral awards. The decision of the Club to pay new obligations instead of discharging older obligations such as those to Claimants suggest that additional measures are essential to ensure proper compliance with the decisions of this Tribunal.*
>
> *Therefore, Claimants ask this Tribunal to award permanent injunctive relief upon final determination by the Arbitrator of the Claimants' claims against Club. Permanent injunctive relief is appropriate because (a) Club has committed a wrongful act; (b) imminent harm to Claimants and future foreign employees of Club is likely; (c) irreparable injury to Claimants and future employees of Club is likely; and (d) there is an absence of an adequate remedy at law."*

68. The Claimants' request for Permanent Injunctive Relief contains eleven prayers for relief, which are lettered (a) – (k)[10].

69. Prayers for relief (a) – (d) and (f) – (k), i.e. ten out of the eleven prayers, are all essentially of the same nature, insofar as they seek in various manners to obtain a form of sanction against the Club, i.e., they request measures to be ordered which extend

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[10] See para. 35 above.

beyond what may be characterized as contractual remedies aimed at obtaining the performance in kind of contractual obligations or damages for non-performance.

70. For a number of reasons, the Arbitrator lacks the power and jurisdiction to adjudicate any of those ten prayers for relief. In this respect, it is noteworthy that the Claimants have partly misunderstood the function and jurisdiction of the BAT when affirming that: "*The Arbitral Tribunal is empowered with vast authority* ***to enforce its awards*** *through remedial awards, sanctions, and injunctive relief*" (emphasis added).

71. An arbitral tribunal only has the power and jurisdiction which are conferred upon it through the parties' consent to the arbitration agreement and through any applicable rules and regulations which affect the scope of that agreement, including any mandatory limitations imposed by the *lex arbitri*.

72. Having been instituted as an independent arbitral tribunal – under Articles 27 and 32 of the FIBA General Statutes – the BAT is not a FIBA judicial body but an independent international organization recognized by FIBA. To some extent, its powers and jurisdiction are defined by the delineation of its competence in the FIBA General Statutes and the FIBA Internal Regulations (hereinafter referred to collectively as the "FIBA Regulations") in relation to FIBA's judicial and non-judicial bodies.

73. Consequently, the standard arbitration clause recommended in the BAT Rules as well as any arbitration clause inserted into a contract which constitutes an agreement to arbitrate in front of the BAT must be interpreted as including the limitations of the BAT's jurisdiction and powers deriving from the FIBA Regulations.

74. It is clear from the FIBA Regulations that all powers to take sports or disciplinary sanctions of any nature against basketball clubs, as well as the competence to examine such sanctions upon appeal, are vested only with FIBA's judicial and non-judicial bodies. In other words, as an independent body, the BAT is not invested by the

FIBA Regulations with any jurisdiction or power to take sanctions or to review sanctions against basketball clubs.

75. In addition, Article 3-300 of the FIBA Internal Regulations lists the sanctions that can be imposed on basketball clubs (and other parties to BAT arbitrations) for failing to honour a BAT award, and Article 3-301 provides that it is FIBA's Secretary General or his delegate who are exclusively competent for taking any such sanctions upon request and that such sanctions may be appealed to the FIBA Appeals' Panel.

76. For the reasons above, the arbitration agreement forming the basis of the Arbitrator's jurisdiction in this case cannot be deemed to confer on him the powers to order the sanctions requested by the Claimants in their prayers for relief (a) – (d) and (f) – (k). Consequently, the Arbitrator lacks jurisdiction with respect to those prayers for relief.

77. Prayer for relief (e) is of a different nature, since it requests "*ordering Respondent to pay any and all appropriate fees and expenses to the Basketball Arbitral Tribunal*". It is not altogether clear what this prayer for relief intends to cover. If it is a reference to the requirement under the BAT Rules that the Respondent pay a share of the Advance on Costs to the BAT Secretariat, then that is a purely administrative matter which is managed by the BAT Secretariat and which, in the present case, has already been duly handled by the BAT Secretariat .

78. If, however, it is a request by Claimants to be awarded arbitration costs and legal expenses, that is a matter which falls within the scope of Arbitrator's jurisdiction as determined by the arbitration agreement and which the Arbitrator shall adjudicate under section 9 of this award.

6.3 Claimants' request to remove documents from the file

79. In their Reply, Claimants requested that several documents submitted by the Club be removed from the file, namely the Club's Exhibit R-19 (letter of 29 March 2012 by which the Club's Board of Directors informed the Player about disciplinary proceedings initiated against the Player) and Exhibits R-18 and R-18a (affidavits of employees of the Club).

80. These exhibits were submitted in accordance with the BAT Rules and the procedural orders rendered by the Arbitrator. Therefore, the Arbitrator sees no reason to remove them from the file and he will consider their content when deciding on the merits of the dispute.

7. Applicable Law – *ex aequo et bono*

81. 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".*

82. 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."*

83. 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[11] (Concordat),[12] 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."*[13]

84. This is confirmed by Article 15.1 of the BAT Rules in fine, according to which the Arbitrator applies *"general considerations of justice and fairness without reference to any particular national or international law"*.

85. In Clause FIFTEENTH of the Player Contract, the Parties have explicitly decided and empowered the Arbitrator to decide the dispute *ex aequo et bono* without reference to any other law. Moreover, neither the Contract Exhibit A and the August Annex nor the Agents' Agreement contain any reference to any other law. Consequently, the Arbitrator will decide the present matter *ex aequo et bono*.

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

8. Findings

87. The Player requests payment of salary and housing expenses with interest on these amounts and corresponding tax certificates (see para 8.2 below). Claimants 2 and 3 request payment of agent fees with interest on these amounts and corresponding tax

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[11] This Swiss statute governed international and domestic arbitration prior to the enactment of the PILA (governing international arbitration) and the Swiss Code of Civil Procedure (governing domestic arbitration).

[12] KARRER, in: Basel Commentary to the PILA, 2nd ed., Basel 2007, Article 187 PILA N 289.

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

certificates (see para 8.3 below). Respondent submitted that Claimants are estopped from pursuing these claims because of the principle of "Verwirkung" (see para 8.1 below).

8.1 The principle of "Verwirkung" (*venire contra factum proprium*)

88. The Arbitrator acknowledges that there are widespread differences in the various legal systems in relation to the legal nature of the concept of "Verwirkung".[14] While some legal systems derive the principle of "Verwirkung" from the prohibition of an unlawful exercise of a right and, thus, qualify the principle as a matter of substantive law, other legal systems consider the principle of "Verwirkung" to be a tacit waiver of the right to assert, or a procedural prohibition of asserting, the claim in question. Given the general acceptance of the principle of "Verwirkung", it would appear just and equitable to the Arbitrator that such a doctrine be adopted by means of *ex aequo et bono* in the context of BAT Arbitration. That said, the question of which of the above legal qualifications is to be followed can be left unanswered here since the Arbitrator holds that the prerequisites of the principle of "Verwirkung" are not fulfilled in the case at hand.

89. The principle of "Verwirkung" requires two prerequisites: (a) that the creditor has failed during a significant period of time to exercise his right and (b) that the debtor had reasonable grounds to rely on the assumption that the creditor would not avail himself of his right or claim in the future.[15] Applying these requirements to the present case, *ex aequo et bono* demands the Arbitrator to take into account the specific circumstances of the case in the context of professional basketball.

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[14] See BAT 0107/10, arbitral award of 12 April 2011 (N55 et seq. with references to legal literature).

[15] See, for instance: BAT 0107/10, arbitral award of 12 April 2011.

90. Regarding the "*significant period of time*", the BAT Rules do not provide for a definite time period after which a claim is barred due to the principle of "Verwirkung". In prior BAT cases, the arbitrators decided objections regarding the principle of "Verwirkung" on a case-by-case basis.[16] The Arbitrator is not prepared to take guidance in national laws either on a comparative basis or in relation to the national laws most closely connected to the dispute at stake. Referring to Article 19 PILA, the Club submits that a mandatory 20-working-day period for labour law disputes under Spanish law has to be taken into consideration. However, any provisions under Spanish law – even assumed that they are mandatory – are not applicable in the present case, since in accordance with Article 187(2) PILA, the Parties explicitly decided and empowered the Arbitrator to decide the dispute *ex aequo et bono.*[17]

91. The Arbitrator finds that with regards to the "*significant period of time*" short periods of time for filing claims with regard to players' salaries are rather uncommon in the environment of professional basketball on an international level. The same is true when looking at disputes in other team sports, in particular football. The Arbitrator notes that in football-related cases the principle of "Verwirkung" only kicks in "*if more than two years have elapsed from the event giving rise to the dispute*."[18] The Arbitrator finds this an equitable concept and, thus, deems that – in principle – for the condition of "*significant period of time*" to be fulfilled a minimum of two years must have elapsed from the occurrences that gave rise to the present dispute until the filing of the Request for Arbitration. The Arbitrator would, however, be prepared to accept a lesser period of time in truly exceptional circumstances, in particular in a case where there was no exchange of correspondence between the claimant(s) and the respondent, i.e., if a

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[16] See, for instance: BAT 0107/10, arbitral award of 12 April 2011 and BAT 0121/10, arbitral award of 29 June 2011.

[17] See Swiss Federal Tribunal 4P.114/2001, decision dated 19 December 2001, E. 2 c bb aaa.

[18] See Commentary on the Regulation for the Status and Transfer of Players, p. 76, http://www.fifa.com/mm/document/affederation/administration/51/56/07/transfer_commentary_06_en_1843.pdf.

respondent is taken by complete ambush when notified of the filing of the Request of Arbitration through the BAT.

92. In the case at hand the Arbitrator finds that the condition of "*significant period of time*" is not fulfilled, since a minimum of two years has not yet elapsed between the occurring of the events and the filing of the Request for Arbitration. In the case at stake, the relevant time period starts with the Club's termination of 12 April 2012 and ends on 13 August 2013 when the Request for Arbitration was received by the BAT. According to Article 9.1 of the BAT Rules, a BAT arbitration commences on the date of receipt of a Request for Arbitration even though, according to Article 9.2 of the BAT Rules, the (already commenced) arbitration does not proceed until receipt of the non-reimbursable handling fee. Thus, the fact that the non-reimbursable handling fee was received in the BAT bank account only on 15 November 2013 does not affect the commencement date of the present BAT arbitration. Consequently, the period of time relevant for the prerequisite "significant period of time" amounts to 16 months. Furthermore, since there has been an exchange of correspondence between the Claimants and the Respondent after the events occurred that gave rise to the dispute, there is no room to shorten the "significant period of time" due to truly exceptional circumstances.

8.2 The Player's claims

93. The Player requests payment of outstanding salaries and housing expenses for the 2011–2012 season (see para 8.2.2 below), interest on these amounts (see para 8.2.3 below) and tax certificates for the payments made by the Club to the Player (see para 8.2.4 below). Whether and to what extent these claims exist is also dependent on whether or not the unilateral termination of the Player Contract by the Respondent on 12 April 2012 was valid or not. Thus, the Arbitrator will start his analysis by looking at this issue first (see para 8.2.1).

8.2.1 Validity of the Club's unilateral termination

94. It is undisputed between the Parties that the Club terminated the Player Contact unilaterally on 12 April 2012. What is disputed between the Parties is, however, what the facts were that caused the termination and whether or not they constituted a valid ground for the early termination of the Player Contract by the Club.

a) Did the Player refuse to play / practice?

95. The Claimant submitted in is Request for Arbitration as follows:

> *"On or about 1 March 2012 Mr. Fitch informed the Club he was exercising his rights under Article Seven of the Agreement to not participate in practices or games until Club made payment in full … On 12 April 2012, with the 15 October 2011 payment, the 5 February 2012 payment, and the "Housing Concept" payments still outstanding, the Club unilaterally terminated the Agreement without justification. Mr. Fitch was advised in writing that the Agreement was terminated."*

96. The Respondent in its Answer acknowledged that there was an incident with the Player on 1 March 2012, which it described as follows:

> *"On 1 march 2012, in the locker room, before a match against the Geskrap Bizkaia Bilbao basket … the Player categorically und unjustifiably refused to wear his basketball garments and to play (probably because of some hostility towards the coach of the Club at the time …). As a result, the coach and others in the locker room had to insistently solicit the Player until, eventually he grudgingly agreed to dress and sit on the bench, with the rest of the team; however, due to the attitude of absolute neglect and rebellion shown before and during the game, it was impossible for the Player to be fielded in that game … Also confirmed in said affidavits is the fact that at no time before or during the game did the Player express that he was exercising a right under the Employment Contract to not participate in practices or games until the Club made certain allegedly outstanding payments."*

97. From these submissions it follows that the Player refused to play / practice as from 1 March 2012. It is not clear, however, what motivated the Player to do so. While the Player submits it was because of outstanding payments, the Club alleges the reason

lay in some hostility between the team coach and the Player. In his Reply to the BAT, the Player radically changes his position, and submits now as follows:

> *"Mr. Fitch never informed Respondent he would sit out of any practices or games in the 2011–2012 season due to Respondent's failure to timely make payment …"*

98. The Arbitrator is not prepared to admit such a reversed account of facts so easily. If a party has specifically submitted a certain fact (in the case at hand to the effect that the Player refused to practice and play as of 1 March 2012) and if this fact has been acknowledged by the other party, the Arbitrator is not prepared to allow a withdrawal or cancellation of the factual submission unless the party proves that the fact previously submitted is untrue <u>and</u> that its original submission was due to a mistake and, thus, was done negligently. In the present case Counsel for the Player submitted that he "*made this misstatement in reliance of Claimant's previous counsel, and Claimants themselves failed to discover the misstatement prior to filing the Request of Arbitration*." Even if one were to accept this explanation, the Player has failed to prove that his original submission of facts is untrue. The Respondent has submitted witness statements by Mr Mario Bàrbara and Mr. Manuel Rubia Verdugo according to which the Player refused to play in the match against Bilbao. The Arbitrator has no doubts as to the credibility of the witnesses. In addition, Mr. Rubia and Mr. Barbàra's statements are supported by the statements of the Player's former Spanish agent, Mr. Tor, who wrote in an email dated 22 August 2012 addressed to Mr. Rubia:

> *"Sabes que mi profesionalidad con vosotros siempre ha sido intachable. Os he ayudado en todo lo que he podido para intentar buscar jugadores para vosotros este año … y no creo que sea justo penalizarme por el comportamiento que ha tenido Gerald."*
>
> *(free translation: You know that my professionalism with you has always been impeccable. I have helped you in everything that I could in order to try to find players for you this year … and I do not believe it is fair to penalise me for the behaviour shown by Gerald [the Player]")*

99. It is, therefore, rather obvious from this email that there has been an incident of misconduct by the Player towards the Club. The Player, on the contrary, has not submitted any evidence which – in the eyes of the Arbitrator – proves that he did not refuse to play in the said match. Little evidentiary weight is to be given to Mr. Fitch's affidavit, since his respective statements (or the statements submitted on his behalf) have been highly contradictory and, therefore, not particularly credible. Furthermore, the sworn statement of the Coach (Mr. Mateo) submitted by the Claimants does not prove that the Player's original submissions were untrue, since Mr. Mateo's statement does not specifically address the occurrences of 1 March 2012, but relates to the Player's general professional attitude and character. Also, Claimants' speculations as to why the Club would have an interest to get rid of the Player are not substantiated and, therefore, constitute no proof that the Player's previous statement of facts was erroneous. The Arbitrator, based on the submissions and the evidence before him, concludes that the Player did refuse to play in the match against Bilbao.

b) Did the refusal to play constitute a valid ground to terminate the Player Contract?

100. According to the Club, the Player's refusal to play constitutes a violation of his "*most basic and fundamental obligation that he, as a professional athlete, had towards the Club – to play*" as provided for in the Player Contract (Clause FIRST) and under Spanish law (Royal Decree 1006/1985). In addition, the Club submits that the refusal to play also constitutes a violation of the Club's Internal Rules (Article 54 et seq.). Claimants submit, in essence, that the Club had no authority under the Player Contract to unilaterally rescind the Player Contract, because the reasons for doing so are exhaustively listed in Clause EIGHT of the Player Contract, and none of those conditions are fulfilled.

101. The Arbitrator finds that Clause EIGHT does not exhaustively list the grounds for unilateral termination of the Player Contract. The Clause basically deals with third

persons that – based on their authority – may exercise an impact on the Player Contract. In particular, the Clause addresses the possibility that the Spanish Basketball Federation, the ACB League or a state authority may issue decisions and/or sanctions against the Player that prevent his ability to provide his full services under the Player Contract to the Club. In such a case the Player Contract provides that – under certain conditions – the Club may terminate the Player Contract even though the Player is not prevented by choice, but by the said third persons from providing the contractual services. In no way does the Clause rule out that other circumstances, in particular violations of duties and obligations under the Player Contract on the Player's part, may constitute a valid ground for unilateral termination, as well. In effect, the Arbitrator finds that the right to unilaterally terminate a contract in case a party to the contract grossly breaches its duties is so self-evident that it need not be specifically provided for in the contract. If a party breaches its obligation to such an extent that the other party cannot reasonably and in all fairness be expected to continue executing the contract, then this party – absent any contrary indications in the contract – is entitled to unilaterally terminate the contract. This view is supported by a reading of Clause THIRD, which – inter alia – states that if "*the Club is aware of … any other disorderly conduct, the Club will be entitled to rescind the contract unilaterally* …".

102. The refusal to play – without valid justification – constitutes a very serious breach of the Player's most basic obligations under the Player Contract. This is all the more true since the events on 1 March 2012 was not the Player's first serious breach of his contractual obligations. Contrary to the Player's submissions, the Club's Internal Rules, to which the Player Contract makes reference, do not exclude or restrict the Club's authority to terminate the Player Contract under the given circumstances. The Arbitrator, thus, finds that the Club was entitled to terminate the Player Contract in view of the instances that occurred on 1 March 2012.

c) Is the Club estopped from evoking the refusal to play?

103. In the case at hand it is questionable whether the Respondent is estopped from basing its termination of the Player Contract on the Player's refusal to play on 1 March 2012. In fact, the Arbitrator takes note that the Player played for the Club's team in at least two matches after 1 March 2012[19]. Furthermore, it is noteworthy that it took almost one month for the Club to initiate disciplinary proceedings against the Player and that the unilateral termination was eventually issued about six weeks after the Player's refusal to play. If a party submits that – due to a breach of the other party's contractual duties – it can no longer reasonably and in all fairness be expected to further execute the contract, it must act in a timely manner. If, on the contrary, the parties continue to exchange their services under the contract as if no breach had occurred, the party that originally would have been entitled to terminate the contract forfeits such right. However, absent any rules in the Player Contract that prescribe a specific time span for the Club to take action, it would not be adequate to apply an overly narrow time limit. The Arbitrator, deciding *ex aequo et bono,* does not deem the relevant time lapse sufficient for him to conclude that the Club waived its right to terminate the Player Contract. In his argumentation, the Arbitrator also takes into account that the Club's Internal Rules, to which the Player Contract makes reference (see Clause THIRD), provide in Article 59 that the statute of limitation is 30 days for serious offenses and 60 days for very serious offenses. In view of this, the Player could not reasonably expect that after 28 March 2012 he was safe from any disciplinary action based on the events of 1 March 2012. According to Counsel for Claimant, the Player never received a translated copy of the said Internal Rules of the Club. He submits that, therefore, those Internal Rules are not applicable to the Player. The Arbitrator is not prepared to follow this reasoning, since the Player had been disciplined according to the Internal Rules previously (24 October 2011) and accepted the disciplinary sanction issued against him

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[19] Official league games on 3 and 11 March 2012: see information on www.eurobasket.com.

without alleging that he had not been provided with an English translation of the Internal Rules on which the disciplinary sanction was based.

d) Was the termination of the Player Contract communicated to the Player correctly?

104. Neither the Player Contract nor the Club's Internal Rules provide for a certain notification procedure in case of disciplinary sanctions and/or termination of the Player Contract. Accordingly, the Arbitrator holds *ex aequo et bono* that proper notification has occurred when and as soon as the letter or message reached the Player's sphere of influence and the Player – under normal circumstances – had the opportunity to obtain knowledge of the contents of said letter or message. There is no need for the addressee to sign or confirm receipt of the letter or message, because otherwise proper notification could not be effected without an addressee's active cooperation. In the case at hand, the burofax was sent to the Player's correct address. However, it could not be delivered to the Player personally. Instead a "notification for pick up" of the burofax was left at his address, advising him where to pick up the letter. The fact that the Player chose not to follow these instructions and did not pick up the letter is immaterial to the fact that the letter/message reached his sphere of influence and that – under normal circumstances – he had every possibility to inform himself of its contents. Thus, the Arbitrator concludes that the instigation of disciplinary proceedings as well as the termination of the Player Contract were properly notified to the Player.

8.2.2 The Player's compensation (salary and "Housing Concept")

105. The Respondent submits in its Answer that it paid the Player for his services from September 2011 until the end of March 2012 a total amount in salaries of USD 283,082.20 and (for the period between September 2011 and February 2012) EUR 6,000 in "housing concept". In their Reply, Claimants confirm that, taking into account an undisputed deduction from the November 2011 instalment, the Player

actually received USD 282,143.25 for salary. The difference of USD 938.95 between the figures submitted by Respondent and Claimants results from a further deduction which the Club made from the January 2012 instalment. According to the Club's submissions, this amount was deducted for "miscellaneous reimbursements owed by the Player to the Club". As the Player did not contest the validity of said deduction, the Arbitrator, deciding *ex aequo et bono*, considers the amount of USD 283,082.20 to be the total salary that the Player was paid. Accordingly, the Arbitrator holds that the Player is only entitled to salaries for the remainder of April 2012, i.e. for the 12 days until the (valid) termination of the Player Contract. This equals a pro rata amount of USD 16,175.96. Furthermore, the Player is owed a remainder of the "housing concept" for the period between 1 March and 12 April, which – calculated pro rata – equals EUR 2,000.

8.2.3 Interest

106. The Player requests default interests on the outstanding amounts at "the maximum [rate] allowed by Swiss Law". The Club submits that it deposited a certain amount with the Malaga Labour Court ("Liquidation and Settlement Deposit") and that no interest is due on this amount because it was the Player's "creditor default" not to withdraw it. Neither the Player Contract (including the Contract Exhibit A) nor the August Annex provide for any interest payments. However, it is a generally accepted principle embodied in most legal systems and reflected in the BAT jurisprudence[20] that default interest can be awarded even if the underlying agreement does not explicitly provide for a respective obligation.

107. When determining the commencement date, the Arbitrator, deciding *ex aequo et bono*, has to consider the circumstances of the case, in particular the long time period

[20] See*, ex multis*, the following BAT awards: 0056/09; 0069/09; 0092/10; 0237/11.

between the termination of the Player Contract and the filing of the Request for Arbitration with the BAT (about 16 months). The Arbitrator finds it fair and reasonable to award default interest from the commencement of the present arbitration, i.e. the receipt of the Request for Arbitration. Consequently, the starting date for default interest is the day after the Request for Arbitration was received by the BAT, i.e. 14 August 2013.

108. In line with constant BAT jurisprudence, the Arbitrator deems an interest rate of 5% p.a. appropriate and proper to prevent the Club from deriving any profit out of the non-fulfillment of its obligations.

109. For the reasons above, the Arbitrator finds that the Player is entitled to interest at a rate of 5% p.a. on his outstanding salary (USD 16,175.96) and outstanding payment for housing expenses (EUR 2,000.00), each from 14 August 2013.

8.2.4 Tax certificates

110. The Player requests tax certificates for amounts paid by the Club in the years 2011 and 2012 and "for the year in which the amount due is paid".

111. Clause FIFTH of the Player Contract provides as follows:

> *"FIFTH.- During the contract period, the Club will provide the appropriate tax documents to the Player, which will indicate the gross dollars paid and the taxes paid on this account. These documents will further show that all of the taxes owed and required in Spain have been paid by the Club."*

112. The Parties are in dispute whether tax certificates for the years 2011 and 2012 were provided prior to the present arbitration. However, at least together with its Answer (Exhibit R-26) the Club submitted those documents. Consequently, the Player's respective requests have been fulfilled and are now moot.

8.3 The claims of Claimants 2 and 3

113. Claimants 2 and 3 request payment of agent fees (see para 8.3.1 below) plus interest on the respective amounts (see para 8.3.2 below), and tax certificates for the payments made by the Club to Claimants 2 and 3 (see para 8.3.3 below).

8.3.1 Agent fees

114. In the Agents' Agreement, the Club and Claimants 2 and 3 agreed on agent fees concerning the Player Contract. Clause FIRST of the Agent's Agreement reads as follows:

> *"FIRST.- BALONCESTO MALAGA SAD shall pay to HOOPS PRO INTERNACIONAL SL and to SPORTS TALENT the next amounts net of all spanish*[sic] *taxes for their consulting services:*
>
> - *REST OF THE 2010–2011 SEASON: FOURTEEN THOUSAND (14.000$USD) DOLLARS NET.*
> - *2011–2012 SEASON (in the event BALONCESTO MALAGA SAD has not executed the rescission option in the Second Covenant of the contract signed with Mr. GERALD FITCH dated January 25th, 2011): FIFTY THOUSAND (50.000$USD) DOLLARS NET.*
>
> *These net amount will be considered earned the moment Mr. GERALD FITCH successfully passes his medical exam upon his arrival in Malaga (Spain) in the 2010–2011 season, but will be paid on April 15th, 2011 for the 2010–2011 season and in two equal payments for the 2011–2012 season (October 15th, 2011 and February 15th, 2012)."*

115. The Arbitrator holds that the prerequisites for payment of the entire agent fees are fulfilled: It is undisputed that the Player passed the initial medical examination and that the Club did not exercise its option to rescind the Player Contract after the 2010–2011 season according to Clause SECOND of the Player Contract.

116. Claimants' submission that the Club failed to pay the last instalment of USD 25,000.00 net due on 15 February 2012 is supported by Mr. Inbar's letter of 18 April 2012 to the Club ("*immediately pay the agents' amounts (USD 25'000 due more than 60 days*

ago)") and subsequent email correspondence between the Club and Claimants. These are strong indications of non-payment of the claimed amounts at the relevant times. Throughout these proceedings, the Club has not adduced any evidence that the outstanding agent fees have been paid in the meantime. The Club, while focusing its submissions regarding the agent fees on the jurisdiction issue, did not contest that it failed to pay the requested amounts.

117. Thus, the Arbitrator finds that the Club is still under an obligation to pay to Claimants 2 and 3 outstanding agent fees in the total amount of USD 25,000.00 net. As the Agent's Agreement does not provide whether the two agencies shall receive different portions of this amount, the Arbitrator holds that Claimant 2 and 3 are entitled to USD 12,500.00 net each.

8.3.2 Interest

118. Claimants 2 and 3 request default interest commencing on 15 February 2012 and that the "amount of interest should be the maximum allowed by Swiss Law".

119. The Agent's Agreement does not provide for any interest payments. However, as already discussed concerning the Player, according to BAT jurisprudence[21] default interest can be awarded even if the underlying agreement does not explicitly provide for a respective obligation.

120. Under the circumstances and deciding *ex aequo et bono*, the Arbitrator finds it fair and reasonable to apply the same commencement date on the agent fees as on the amounts awarded to the Player. Consequently, the commence date for default interest

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[21] See*, ex multis*, the following BAT awards: 0056/09; 0069/09; 0092/10; 0237/11.

is the day after the Request for Arbitration was received by the BAT, i.e. 14 August 2013.

121. In line with constant BAT jurisprudence, the Arbitrator deems an interest rate of 5% p.a. appropriate and proper to prevent the Club from deriving any profit out of the non-fulfillment of its obligations.

122. For the reasons above, the Arbitrator finds that Claimants 2 and 3 are entitled to interest in the rate of 5% p.a. on their outstanding agent fees of USD 12,500.00 each from 14 August 2013.

8.3.3 Tax certificates (alternatively "gross payment")

123. Claimants 2 and 3 request tax certificates for amounts paid by the Club in the years 2011 and 2012 and "for the year in which the amount due is paid". However, they do not submit on which provision their claims are based.

124. The Agents' Agreement does not contain a provision equal to Clause FIFTH of the Player Contract and the latter is not applicable to Claimants 2 and 3 because it explicitly refers to the Player without any mention of his agents. Thus, there is no provision which obliges the Club to provide tax certificates to Claimants 2 and 3. Consequently, the Arbitrator rejects the respective requests.

125. In the alternative, Claimants 2 and 3 request to be awarded *"gross payment such that* [Claimants 2 and 3 are] *compensated for all amounts paid and owed, net plus interest"*. Clause FIRST of the Agent's Agreement stipulates payment of a net amount. Since there are no further provisions that would provide for a gross payment or separate payment of tax amounts to Claimants 2 and 3, the Arbitrator also rejects the alternative request for gross payment.

126. In view of all the above, Claimants 2 and 3 are neither entitled to be provided with any tax certificates regarding their agent fees nor to receive any gross payments.

8.4 Summary

127. The Player is entitled to the amounts of USD 16,175.96 net (outstanding salary) and EUR 2,000.00 net (outstanding payment for housing expenses) plus default interest on both amounts of 5% p.a. from 14 August 2013.

128. Claimant 2 is entitled to the amount of USD 12,500.00 net (outstanding agent fee) plus default interest of 5% p.a. from 14 August 2013.

129. Claimant 3 is entitled to the amount of USD 12,500.00 net (outstanding agent fee) plus default interest of 5% p.a. from 14 August 2013.

9. Costs

130. 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.

131. On 9 September 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 17,465.00.

132. Considering the outcome and the circumstances of the present case, in particular that the Player prevailed with about 1/13 of his original claim (submitted in the Request for Arbitration), that Claimants 2 and 3 prevailed in full with their claims for agent fees but failed with their claims for tax certificates, that Claimants' requests for Provisional Orders and Permanent Injunctive Relief were fully rejected and that the Club's objections on the BAT jurisdiction were partially granted, the Arbitrator finds it fair that 15% of the costs of the arbitration shall be borne by Respondent (EUR 2,619.75) and 85% by Claimants (EUR 14,845.25). Given that the BAT received advance payment on the arbitration costs from Claimants in the amount of EUR 8,715.00 and from the Club in the amount of EUR 8,750.00, the Arbitrator decides in application of Article 17.3 of the BAT Rules that Claimants shall jointly and severally pay EUR 6,095.25 to Respondent, being the difference between the costs advanced and the arbitration costs to be paid by Claimants.

133. Furthermore, the Arbitrator takes note of the accounts of costs submitted by the Parties. Claimants' counsel submitted an account of costs stating professional services in the total amount of EUR 27,600.00 (41.00 hours amounting to EUR 16,400.00 regarding Claimant 1, 14.00 hours amounting to EUR 5,600.00 regarding Claimant 2 and 14.00 hours amounting to EUR 5,600.00 regarding Claimant 3). Respondent's counsels submitted an account of costs as follows:

"ATTORNEYS FEE (e.g. correspondence with the client and the BAT, examination of the dossier and the briefs of the Appellants, legal research, defensive and investigative activity, drafting Answer, drafting Rejoinder, and drafting motions and answers to motions)	*EUR*	*15,000.00*
GENERAL EXPENSES (12.5% of fees)	*EUR*	*1,875.00*
OTHER EXPENSES (e.g. long-distance calls, printing, copying, and faxing)	*EUR*	*225.00*

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SOCIAL SECURITY (4% of fees and expenses)	*EUR*	*684.00*
TOTAL COSTS	*EUR*	*17,784.00"*

134. The Arbitrator holds that the legal fees and expenses submitted by the Respondent seem reasonable (Articles 17.3 and 17.4 of the BAT Rules). In light of the outcome of the proceedings and taking the circumstances of the present case into account, the Arbitrator considers it adequate that Respondent is entitled to a contribution to its legal fees and expenses in the amount of EUR 13,000 while Claimants have to bear their own legal costs and expenses.

10. AWARD

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

1. **The BAT has no jurisdiction to decide upon Claimants' claims based on the Image Rights Contract of 7 September 2011.**
2. **Baloncesto Malaga SAD (a/k/a Unicaja Club Baloncesto) is ordered to pay to Mr. Gerald Fitch the amounts of USD 16,175.96 net and EUR 2,000.00 net, both plus interest of 5% p.a. since 14 August 2013.**
3. **Baloncesto Malaga SAD (a/k/a Unicaja Club Baloncesto) is ordered to pay to Sports Talent the total amount of USD 12,500.00 net plus interest of 5% p.a. since 14 August 2013.**
4. **Baloncesto Malaga SAD (a/k/a Unicaja Club Baloncesto) is ordered to pay to Hoops Internacional the total amount of USD 12,500.00 net plus interest of 5% p.a. since 14 August 2013.**
5. **Mr. Gerald Fitch, Sports Talent Sports Talent and Hoops Internacional are ordered to jointly pay to Baloncesto Malaga SAD (a/k/a Unicaja Club Baloncesto) the amount of EUR 6,095.25 as a reimbursement of the advance on arbitration costs.**
6. **Mr. Gerald Fitch, Sports Talent Sports Talent and Hoops Internacional are ordered to jointly pay to Baloncesto Malaga SAD (a/k/a Unicaja Club Baloncesto) the amount of EUR 13,000 as a contribution towards its legal fees and expenses Mr. Gerald Fitch, Sports Talent Sports Talent and Hoops Internacional shall bear their own legal fees and expenses.**
7. **Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 11 September 2014

Ulrich Haas

(Arbitrator)