BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0378/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Denys Lukashov

- Claimant -

vs.

Budivelnyk Basketball Promoters Inc.
Ziatoustivska St. 10 – 2, office 2, 01135 Kyiv, Ukraine

- Respondent 1 -

Budivelnyk Properties Inc.
Ziatoustivska St. 10 – 2, office 2, 01135 Kyiv, Ukraine

- Respondent 2 -

BSC Budivelnyk Ltd.
Ziatoustivska St. 10 – 2, office 2, 01135 Kyiv, Ukraine

- Respondent 3 -

BASKETBALL
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1. The Parties

1.1. The Claimant

1. Mr. Denis Lukashov (hereinafter the “Player”) is a professional basketball player of Ukrainian nationality. He is not represented by counsel in this arbitration.

1.2. The Respondents

2. Budivelnyk Basketball Promoters Inc. (hereinafter the “Company” or “Respondent 1”) is a business entity related to BSC Budivelnyk Ltd (hereinafter the “Club” or “Respondent 3”), a professional basketball club playing in the Ukrainian Super League.

3. Budivelnyk Properties Inc. (hereinafter “Respondent 2”) is another business entity related to the Club.

2. The Arbitrator

4. On 21 October 2012, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), Prof. Richard H. McLaren, appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Arbitration Rules of the BAT (hereinafter the "BAT Rules"). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

5. On 10 September 2010, the Player and the Company entered into a “non-cut guaranteed” agreement by which the Player undertook to play with the Club for two

competition seasons, namely the 2010/2011 season and the 2011/2012 season (hereinafter the "Player Contract"). According to Article 4 of the Player Contract, the Company agreed to pay to the Player a compensation of USD 80,000.00 net for the 2010/2011 season and USD 100,000.00 net for the 2011/2012 season. The compensation was to be paid in monthly instalments of USD 9,000.00 from 1 October 2010 until 01 May 2011, a further payment of USD 8,000.00 on 1 June 2011 and monthly instalments of USD 10,000.00 from 1 September 2011 until 01 June 2012. In addition, the Player Contract provides for certain bonuses which would become due if the Club achieved certain defined sporting results.

6. Article 4.4 of the Player Contract contains an opting-out clause, allowing the Player to *"dismiss his obligation to the club for the remainder of the contract."* The opting-out was subject to the Player's written notification "before June 30th 2011" and a payment of the Player to the Club of USD 50,000.00.

7. Article 10.2 of the Player Contract includes an undertaking of the Club that it *"guarantees for execution of any financial obligation of Company towards Player, from this contract. In case of dispute, the Player has right to request execution of the financial obligation from this contract from Company, or directly from the Club."*

8. By notice of 20 March 2012, the Claimant requested from the Company and the Club, the payment of the Player salary instalments in the amount of USD 24,600.00 from December 2011 until February 2012.

9. By letter of 4 April 2012, Respondent 2 rejected the Player's claim because of the Player's alleged failure to participate in any Club activities *("training sessions, official games, advertizing* [sic] *companies and etc.")* without any explanations. As a consequence, the Club terminated the Player Contract *"with just cause, on 25 January 2012"* and discontinued the payments to the Player.

10. The Player Contract also provides for the payment of agent fees (Article 11). However, contrary to the Player's statement in the Request for Arbitration, these fees were not claimed in his letter to the Club of 20 March 2012. They are also not included in the Player's requests for relief and therefore not subject to the present dispute.

11. According to publicly available sources, the Player was not under contract with another club during the rest of the 2011/2012 season.

3.2. The Proceedings before the BAT

12. On 6 February 2013, the BAT Secretariat received the Player's Request for Arbitration of the same date. The non-reimbursable handling fee of EUR 2,000.00 was received in the BAT bank account on 17 January 2013.

13. By letter of 22 April 2013, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties of the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Respondents to file their answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 13 May 2013. The BAT Secretariat also requested that the Parties pay the following amount as an Advance on Costs by no later than 3 May 2013:

"Claimant (Mr Denys Lukashov)	*EUR 4,500*
Respondent 1 (Budivelnyk Baskeball Promoters Inc.)	*EUR 1,500*
Respondent 2 (Budivelnyk Properties Inc.)	*EUR 1,500*
Respondent 3 (BSC Budivelnik)	*EUR 1,500"*

14. By letter of 3 May 2013, Respondent 1 informed the BAT Secretariat that the Club did not have the necessary funds to pay its share of the Advance on Costs. In addition, Respondent 1 stated that it was the only Respondent in this arbitration whereas Respondents 2 and 3 "should be withdrawn from this dispute" since they were not parties to the Player Contract.

15. By letter of 13 May 2013, the BAT Secretariat confirmed receipt of the Player's share of the Advance on Costs and the Answer of the Respondents, informed the Parties of the Respondents' failure to pay their share of the Advance on Costs and that the arbitration would not proceed until receipt of the full amount of the Advance on Costs. Therefore, the BAT Secretariat invited the Player to pay the Respondents' share of the Advance on Costs by 22 May 2013.

16. By letter of 3 June 2013, the BAT Secretariat acknowledged receipt of the amount of EUR 9,000.00 for the Advance on Costs which was paid entirely by the Player. Moreover, the Parties were informed that the Arbitrator had decided to declare the exchange of documents complete. The Parties were therefore invited to submit a detailed account of their costs by 14 June 2013.

17. Neither party submitted a statement of costs within the time limit set.

18. The Parties did not request that the BAT hold a hearing. The Arbitrator therefore decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the award on the basis of the written submissions available.

4. The Positions of the Parties

4.1. The Claimant's Position

19. The Player submits the following in substance:

- All three Respondents are liable for the payments claimed under the Player Contract: Respondent 1 signed the Player Contract, Respondent 2 acted in the name and on behalf of Respondent 1, and Respondent 3 guaranteed the payment of the Player's salary and other compensations in Article 10.2 of the Player Contract.

- The Club failed to pay the Player the agreed and guaranteed compensation in the total amount of USD 73,800.00 which includes salaries from December 2011 to June 2012 (USD 64,000.00), bonuses (USD 5,000.00) and the expenses for the use of the car (USD 4,800.00).

- The Player requested payment of the outstanding amounts by letter of 20 March 2012. By letter of 4 April 2012, Respondent 2 rejected the Player's claim and stated that the Player Contract was "discontinued" because the Player did not participate in the training sessions and the games of the Club since 14 December 2011 without any explanation or excuse for his absence, and therefore violated his obligations under the Player Contract.

- In fact, the Player suffered from _____ pain starting in September 2011. He continued to play despite the fact that the pain worsened. From mid-December 2011, he could not exercise or play anymore, but was still present during the team's training sessions. In January 2012, the Player was medically examined and a _____ was diagnosed. As a consequence, the Club did not allow the Player to play any longer. From February 2012 on, the Player underwent medical treatment at his own cost.

- The _____ was obviously a consequence of the *"longtime physical load during the Claimant's professional career with the Club"*. However, the Player recovered and was able to play basketball with another club from August 2012 on.

- The Player's injury did not allow the Club to stop the contractually agreed payments or to terminate the Player Contract since the parties agreed on a guaranteed no-cut agreement.

4.2. The Claimant's Request for Relief

20. In his Request for Arbitration, the Player requests:

> *"(a) Payment of the salaries (64 000 USD), bonuses (5 000 USD) and expenses on an automobile use (4 800 USD), in total 73 800 USD.*
>
> *(b) Reimbursement of BAT handling fee.*
>
> *(c) Reimbursement of BAT advance arbitration costs."*

4.3. The Respondents' Position

21. The Respondents submit the following in substance:

- Only Respondent 1, which signed the Player Contract, is a party to this arbitration but not Respondent 2 or Respondent 3.

- According to the Player Contract, the Player was entitled to the agreed salary to the extent that he complied with his contractual obligations. Article 4.1 of the Player Contract says: *"The volume of monthly payments is defined according to the certificate of the executed works (the subparagraph c, point 2.1.)".* Undisputedly, the Player was injured and did not participate in any activities of the Club from 14 December 2011 until the end of the 2011/2012 basketball season. He did not provide any explanations for his absence. The Club repeatedly requested the Player to resume his work for the Club – without success. That is why the Club terminated the Player Contract and discontinued the payments.

- It is true that the Parties signed a non-cut agreement and that basically, the Player was entitled to the agreed salary also if he was injured. However, the Player Contract provides that the salary is due only if the Player gets injured

while practicing with or playing for the Club. The salary was not due if the Player violated his contractual duties as in this case when the Player was absent without any explanation to the Club.

- As a consequence, the Player is only entitled to the salaries as long as he provided his services to the Club. Since the Player disappeared on 14 December 2011, the Club was not obliged to pay any salaries after that date.

- The Player is not entitled to any bonus since he violated the Player Contract which was then correctly terminated by the Club. Besides that, the Club won the UBL Cup only in 2009 but not in 2011.

- The compensation for the car costs of USD 4.800,00 is not due because the Player left the Club without any explanations or permissions on 14 December 2011 and after his departure, he no longer needed a car to provide his services to the Club.

4.4. The Respondents' Request for Relief

22. The Respondents request the Basketball Arbitral Tribunal (to):

"1. Allow the Club to provide parties of the dispute with Internal regulations on basketball club Budivelnyk Kyiv translation to English in further stages of arbitral proceedings;

2. The reject player's Mr. Denys Lukashov claim for 73 800 USD, reimbursement of BAT fees and cost fully;

3. Order the player Mr. Denys Lukashov to pay Joint-stock international company BUDIVELNYK BASKETBALL PROMOTERS INC. legal costs before the Basketball Arbitral Tribunal."

5. The Jurisdiction of the BAT

23. Pursuant to Article 2.1 of the BAT Rules, *"[t]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland"*. Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).

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

25. The Arbitrator finds that the dispute is of a financial nature and arbitrable within the meaning of Article 177(1) PILA.

26. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Article 12 of the Player Contract, which reads as follows:

> *"12.1. The parties agree to solve all their conflict situations by negotiations. If any dispute between the parties is not resolved by way of negotiations then it shall be resolved in accordance with the FIBA Arbitral Tribunal (FAT) as follows:*
>
> *Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by an single arbitrator appointed by the FAT President.*
>
> *The seat of the arbitration shall be in 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 in be English.*
>
> *Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The decisions of FAT and CAS upon appeal shall*

decide the dispute ex aequo et bono."

27. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA. The Arbitrator also considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording *"[a]ny dispute arising from or related to the present contract"* in Article 12.1. of the Player Contract covers the present dispute. The Respondent 1 does not object to the BAT jurisdiction. However, it claims that Respondent 2 and Respondent 3 are not parties to this Arbitration.

28. It is true that the arbitration clause in Article 12 of the Player Contract refers only to "the Parties." The Parties have been defined in the Player Contract as the Respondent 1 and the Player. However, according to Article 10.2. of the Player Contract, Respondent 3 undertook to *"guarantee (...) for execution of any financial obligation of Company* (i.e. Respondent 1) *towards the Player from this contract. In the case of dispute, the Player has the right to request execution of the financial obligation from this contract from Company, or directly from the Club."* The Player Contract was then also signed by Respondent 3, without any reservation.

29. The applicable Swiss Arbitration Law is rather liberal when it comes to the extension of a formally valid arbitration agreement to a third party. The arbitral tribunal needs only to establish if the third party, whether explicitly or implicitly, has stated its intention to be bound to the relevant arbitration agreement. An extension to a third party may be justified if the third party intervened in the conclusion or performance of the main contract in such a way that the party which is seeking the extension, had legitimate

reasons worth protecting to assume that a third party thereby, in fact and law, intended to become a party to the main contract, including the arbitration agreement therein.[1]

30. The Arbitrator has no doubt that Respondent 3 (i.e. the Club) was expected to be included in the arbitration agreement contained in the Player Contract not only because it was the beneficiary of the Player's services, but also because it participated as a guarantor *"for execution of any financial obligation of [Respondent 1] and towards Player, from this contract"* which allowed the Player to request payment directly from the Club (Art. 10.2 of the Player Contract) and also signed the Player Contract which contained the arbitration agreement.

31. The Arbitrator finds that the arbitration agreement also extends to Respondent 2. Although it is true that Respondent 2 was not a party to the Player Contract, and did not assume any obligation towards the Player, it acted as a representative of Respondent 1 and issued all communications which were relevant in fact and in law for the present dispute (see also para. 43 below). The Arbitrator therefore concludes that the arbitration agreement in Article 12 of the Player Contract includes all Respondents as well as the Player. This does not, however, prejudice the question of the Respondents' financial liability for the Player's claims which is an issue of the merits of the case.

32. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Player's claims against the Respondents.

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1 BERNHARD BERGER/FRANZ KELLERHALS, International and domestic arbitration in Switzerland, 2nd edition, N521.

6. Applicable Law – ex aequo et bono

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

> *"the Parties may authorize the arbitral tribunal to decide ex aequo et bono".*

34. 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."*

35. In the arbitration agreement in Article 12 of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono.*

36. 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[2] (Concordat),[3] under which Swiss courts have held that "arbitrage en équité" is fundamentally different from "arbitrage en droit":

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2 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

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

> *"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."*[4]

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

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

38. The Respondents argue also on the basis of the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles") without explicitly arguing that these UNIDROIT Principles would reflect the applicable law. The Arbitrator finds however that he is not bound by the UNIDROIT Principles but rather by the Player Contract which provides for sufficiently specific regulations for the controversy between the Parties which are not overruled by the UNIDROIT Principles, and the Parties' explicit reference to the principle of *ex aequo et bono*.

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

7. Findings

40. The Player claims outstanding compensation for the 2011/2012 season, a bonus payment because of the Club's success in the Ukrainian basketball cup and reimbursement of the car costs.

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

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

7.1. The Respondents' standing

41. The Player's claim is based on the Player Contract which mentions Respondent 1 or "the Company" as the Player's counterparty. The claimed payments are obligations of Respondent 1 which is undisputedly a party to this arbitration.

42. According to Article 10.2 of the Player Contract, Respondent 3 *"guarantees for execution of any financial obligation of Company towards Player, from this contract. In case of dispute, the Player has the right to request execution of the financial obligation from this contract from Company, or directly from the Club."* The claimed amounts are now in dispute. The Player is therefore entitled to request payment from both, Respondent 1 and 3, and Respondent 3 has become jointly and severally liable together with Respondent 1 for any payments under the Player Contract eventually determined by the Arbitrator. As a consequence, Respondent 3 may advance all arguments which speak against its liability, whether or not such arguments had also been presented by Respondent 1.

43. Respondent 2 has not been named as a party to the Player Contract. It has, however, issued at least two letters in response to the Player's request for payment of the overdue salaries. In these letters, Respondent 2 explicitly referred to Respondents 1 and 3 and also reiterated the position of the Club in this dispute. The Arbitrator therefore finds that Respondent 2 acted in the name and on behalf of Respondents 1 and 3, but not in its own name or on its own behalf. Respondent 2 must therefore only be considered as a representative or proxy of Respondents 1 and 3 (which did not dispute the content of the communication of Respondent 2) and not as a direct or indirect party to the Player Contract. The Player does not claim any other legal basis which he considers applicable when it comes to its claim against Respondent 2. The Arbitrator finds therefore that Respondent 2 cannot be made liable for the Player's claims.

7.2. The termination of the Player Contract

44. Undisputedly, the Player attended the team's training sessions and games from October 2010 until 14 December 2011. On that day, he stopped his sporting activities because of a severe _____ pain which, as it turned out later, was caused by a _____. The Respondents then state that the Player disappeared without further notice, while the Player submits that he continued to be present "at the sideline" until the team's staff excluded him from the basketball hall in mid-January 2012, i.e. after the medical exams.

45. The documents provided by both parties indicate the following course of events:

    (a) The Player had to stop his sporting activities because of his _____ pain on 14 December 2011. On the same day, he was medically examined at the Kiev Center of Sport Medicine (Claimant's Exhibit 12) by which a _____ was diagnosed.

    (b) Further medical examinations were carried out on 14, 18 and 27 January 2012 all of which confirmed the Player's _____ disorder (see the respective protocols submitted by the Player). At least the result of the examination of 27 January 2012 was also communicated to the Club as confirmed by the protocol submitted by the Respondents.

    (c) The Player also submitted an undated letter by which Respondent 3 called on the Player to resume his services to the Club. The Respondent 3 reserved the right to terminate the Player Contract if the Player did not return to the team within 3 days, and to withhold any salary payments for the period during which the Player did not provide his services. Considering the content of that letter and the known circumstances the Arbitrator assumes that this letter must have been sent to the Player by the end of December 2011.

(d) The Club then sent monthly notices to the Player, stating that he "was absent for unknown reasons". These notices cover the period from 14 December 2011 until 30 May 2012.

(e) By letter of 20 March 2012, the Player requested the payment of his outstanding salaries. The Player's letter does not mention the fact that he had been prevented from exercising or playing with the Club since December 2011. Respondent 2 reacted by letter dated 4 April 2012 and stated that Respondent 3 considered the Player Contract to be terminated since the Player had disregarded the (undated) warning letter mentioned in the preceding paragraph. However, the letter of Respondent 3 does not contain a specific termination date.

(f) On 25 April 2012, Respondent 2 sent another letter to the Player, re-iterating the Clubs position that the Player Contract was considered terminated because of the Player's absence from the Club and his failure to resume his services despite the explicit warnings. Again, no specific termination date was mentioned.

46. The Arbitrator finds that the available documents are somewhat contradicting: While the Club must have been aware of the Player's injury, it repeatedly claimed that the Player was "absent for unknown reasons." It is difficult to understand why the Club continued to send such absence notices until the end of May 2012 despite its alleged understanding that the Player Contract was terminated five or six months earlier. The exact termination date is, however, impossible to determine since there is no termination notice on record which would reflect the will of Respondent 1 or 3 to terminate the Player Contract, and the warning letters of Respondent 2 dated 4 and 25 April 2011 do not mention such a date.

47. On the other hand, the Arbitrator also notes that the Player did not undertake much to resolve that confusion: There is no evidence that he requested the Club to provide medical care when his injury was diagnosed as provided for in the Player Contract, nor

that he offered to Respondent 1 or 3 his contractually agreed services in case he was still able to provide them despite his injury. The Arbitrator also finds it disturbing that the Player did not submit any evidence of protest against the Club's monthly notices of absence, and that his request for payment of the outstanding salaries of 20 March 2012 does not mention the reason for his absence, i.e. the _____ pains.

48. Under the circumstances, especially because of the failure of any sufficiently clear termination notice and because of the Club's ongoing notices of absence until end of May 2012, the Arbitrator does not accept that Respondent 1 terminated the Player Contract. The Arbitrator finds that the Player Contract expired at the end of the 2011/2012 basketball season, i.e. the end of the Ukraine Basketball Championships 2011/2012, as determined by Article 3.1 of the Player Contract.

49. The Arbitrator also reviewed the argument contained in the undated letter of Respondent 1 mentioned in para. 45 (c) above that the Player's disappearance could be regarded as an exercise of the opting out clause of Article 4.4 of the Player Contract. However, there is no evidence that the Player intended to leave the Club in the middle of the season 2011/2012. In any event, no written notice as required by Article 4.4 of the Player Contract was produced in this arbitration.

7.3. The Player's right to the salary payments

50. As a consequence, the Player is in principle entitled to the salaries and fees agreed in Article 4 of the Player Contract. As held in para. 42 above, the payment obligations apply jointly and severally to both, Respondent 1 and 3.

51. The Player Contract has been qualified as a no-cut guaranteed agreement (Article 4.3), which means that the payments remain due even if the Player is unable to exercise or play because of an injury. Respondent 1 was released from this obligation only if *"the injury (was) discovered during a medical examination."* The Arbitrator understands that

this exception can only mean that a pre-existing medical condition was identified by the standard medical examination upon the Player's arrival for the 2010/2011 season, as stipulated by Article 8.1 of the Player Contract. It cannot, however, mean that injuries discovered during any medical examination would entitle Respondent 1 to cut the Player's salary because such an understanding would render the whole provision moot.

52. The Player submits that his _____ pain was not pre-existing but appeared only after he joined the Club. Respondent 1 and 3 bear the burden of proof that the Player's injury was pre-existing and discovered at the medical examination. No such evidence was submitted in this arbitration. The Arbitrator also notes that the Player was fit to play with another team after the Summer break 2012, which indicates that his _____ injury was rather temporary and not permanent which speaks against a pre-existing medical condition.

53. The Respondents have not claimed that the Player earned (or failed to earn) any other income during the remaining term of the Player Contract, nor have publicly available sources indicated that the Player obtained new employment before the beginning of the season 2012/2013.

54. Accordingly, the Arbitrator holds that the Player is in principle entitled to the claimed salaries for the 2011/2012 season.

7.4. Bonus

55. With regards to the bonus claimed, the Arbitrator finds that the Club was indeed noted as "Ukrainian Cup Winner 2012".[6] The Respondents' reference to the UBL Cup which the Club won in 2009 and which is indicated on the Wikipedia-Website provided by the

[6] See website „Eurobasket.com" (http://basketball.eurobasket.com/team/Budivelnyk_Kyiv/411?Page=5).

Player, is irrelevant. According to Article 4.2 of the Player Contract, the Player is therefore in principle entitled to the respective bonus.

7.5. Car costs

56. The Player is also claiming compensation for his car costs for the remaining period of the Player Contract. Article 6 of the Player Contract provides that the *"Company will provide the Player 800 dollars per month during 10 months for a fully insured automobile for use by the Player during the contract period."* The Player does not indicate whether he "used" an automobile during the period when he was still under contract with the Club but did not participate in any of the Club's activities. The Arbitrator understands that the Club's contribution for the car has been granted as a compensation for the costs which the Player incurred when providing his services to the Club. When the Player stopped playing with the team, that compensation was no longer justified. The Arbitrator finds therefore that the Player is not entitled to the claimed compensation for the car costs.

7.6. Summary

57. This leaves the Player's claim for the remaining salary and the bonus payment in the total amount of USD 68,000.00. When determining the amount of the compensation payable to the Player, the Arbitrator cannot disregard the fact that according to the available evidence, the Player's behavior contributed to the controversy – especially his absence and the apparent lack of communication during his rehabilitation. In any event, the Player would have had the duty to mitigate the damages of the Respondents 1 and 3 for which there is no evidence on record. The Arbitrator therefore finds *ex aequo et bono* that these factors must lead to a reduction of the otherwise due compensation by 1/3. Hence, the Player is entitled to USD 45,333.35, to be paid jointly and severally by Respondents 1 and 3. The Player has no claim against Respondent 2.

8. Costs

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

59. On 19 November 2013 – considering that pursuant to Article 17.2 of the BAT Rules "the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator", and that "the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 9,000.00.

60. Considering the requests for relief, the outcome and the circumstances of the present case, the Arbitrator finds it fair that 2/3 of the fees and costs of the arbitration shall be borne by the Respondent 1 and 3 (EUR 6,000.00) and 1/3 by the Player (EUR 3,000.00).

61. Given that the Player paid the full Advance on Costs in the amount of EUR 9,000.00, in application of Article 17.3 of the BAT Rules the Arbitrator decides that Respondent 1 and 3 must jointly and severally pay EUR 6,000.00 to the Player, i.e. the difference between the advance on costs paid by the Player and the share of the arbitration costs that the Player must actually bear (EUR 3,000.00).

62. Furthermore, the Arbitrator takes note that the Player requests reimbursement of the amount of EUR 2,000.00 (non-reimbursable handling fee). Considering the circumstances of the present case (Article 17.3. of the BAT Rules), in particular the reliefs granted compared to the reliefs sought, and the fact that no party has claimed a compensation towards its legal fees, the Arbitrator deems it appropriate that every party bears its own legal costs except for a contribution of EUR 2,000.00 towards the Player's legal costs. This amount corresponds to the portion of the non-reimbursable handling fee. Consequently, the Respondent 1 and 3 shall jointly and severally pay to the Player the amount of EUR 2,000.00.

9. AWARD

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

1. **Budivelnyk Basketball Promoters Inc. and BSC Budivelnik Ltd. are ordered to pay, jointly and severally, to Mr. Denys Lukashov the amount of USD 45,333.35.**

2. **Budivelnyk Basketball Promoters Inc. and BSC Budivelnik Ltd. are ordered to pay, jointly and severally, to Mr. Denys Lukashov the amount of EUR 6,000.00 as a reimbursement of his advance on arbitration costs.**

3. **Budivelnyk Basketball Promoters Inc. and BSC Budivelnik Ltd. are ordered to pay, jointly and severally, to Mr. Denys Lukashov the amount of EUR 2,000.00 as a contribution towards his legal fees and expenses. Budivelnyk Basketball Promoters Inc., Budivelnyk Properties Inc. and BSC Budivelnik Ltd. shall bear their own legal costs.**

4. **The claim of Mr. Denys Lykashov against Budivelnyk Properties Inc. is dismissed.**

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

Geneva, seat of the arbitration, 2 December 2013

Stephan Netzle

(Arbitrator)