



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0190/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Javaris Crittenton,
c/o Priority Sports & Entertainment, 325 N La Salle Dr # 650,
Chicago, IL 60654, USA

Represented by Mr. Brad Ames, Priority Sports & Entertainment,
325 N La Salle Dr # 650, Chicago, IL 60654, USA

- Claimant -

vs.

Zhejiang Guangsha Basketball Club,
169 Road Stadium, 310004 Hangzhou, Zhejiang, China

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Javaris Crittenton (hereinafter the “Player”) is a professional basketball player of US nationality. He is represented by Mr. Brad Ames, FIBA certified agent in Chicago, USA (hereinafter the “Player’s Agent”).

1.2 The Respondent

2. Zhejiang Guangsha Basketball Club (hereinafter the “Club”) is a professional basketball club located in China. It is represented by its General Manager, Ms. Ye Xiangyu.

2. The Arbitrator

3. On 28 June 2011, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”) appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. On 26 October 2010, the Player and the Club entered into a contractual agreement whereby the Club engaged the Player for the 2010-2011 basketball season (hereinafter the “Player Contract”).
5. The Parties agreed that the Player Contract should be a no-cut, fully-guaranteed

agreement and that the Player should receive for his services in the 2010-2011 season, a net salary in the amount of USD 550,000.00. The compensation was to be paid in several instalments, i.e. one instalment of USD 70,000.00 upon passing the physical examination and six monthly instalments of USD 80,000.00 each. In addition, the Player was entitled to further amenities including bonus payments and a furnished apartment.

6. The Player Contract commenced on 1 November 2010. After his arrival, the Player was subjected to a physical examination and began training and playing for the Club. On 9 November 2010, the Club asked the Player to sign the Club's team fine rules (hereinafter the "Team Fine Rules"). After some amendments were made, the Player signed the Team Fine Rules on 12 November 2010.
7. During a practice session on 22 November 2010, the Player suffered an injury to his _____. By letter of 24 November 2010, the Club informed Mr. Wallace Prather, a FIBA certified agent who was involved in the negotiations between the Player and the Club and who had also co-signed the Player Contract, about the Player's injury and the treatment by the Club's doctor. In this letter, the Club also noted that the doctor had found no sign of injury, and Club's coach considered the Player to be fit for playing. Nevertheless, the Player refused to play and wanted to rest. The letter further advised that the Club reserved "the right to take further actions."
8. By letter of 2 December 2010, the Club informed the Player that due to his "*misconduct behaviour on the second practice of December 1st, 2010*", he would be fined in accordance with the Team Fine Rules. In a letter of the same day, the Club informed Mr. Prather about the imposed fine in the amount of 8% of the Player's monthly salary and providing further explanation regarding the situation that had triggered the fine.
9. On 20 December 2010, the Player's Agent sent a letter to the Club denying any alleged violations. In the following days, further correspondence was exchanged between the

Club, the Player, and the Player's Agent, including the Club's response of 23 December 2010. In that response, the Club informed the Player's Agent of another (alleged) misbehaviour of the Player that had occurred on 27 December 2010.

10. By letter to the Player's Agent dated 30 December 2010, the Club terminated the employment of the Player as follows:

"Dear Mr. Brad Ames,

[...]

The Club informs you and Player that we are terminating the agreement ("Agreement") between Club and Player dated October 26, 2010 on December 23, 2010. The reason we release the Player is because of not reporting an injury prior upon arrival and prior to his arrival along with behavioral issues that brought discredit to the team and its management. He was constantly disobeying requests by the team to practice and only practiced when he wanted to practice. Additionally, Player admitted he would not be able to make it through an entire season if the coach continued with his two a day practices in the preseason, which constitutes the Player not being 100% healthy to perform his job duties as a professional basketball player like the other players of the team.

[...]

Sincerely,

Ye Xiangyu

General Manager of

Zhejiang Guangsha Basketball Club"

11. Further correspondence was then exchanged between the Player's Agent and the Club in an attempt to reach a mutual settlement of the matter. This attempt ultimately failed resulting in the Club's letter dated 5 January 2011 which reads in its relevant parts as follows:

"Dear Mr. Brad Ames,

This will be the final notice from Zhejiang Guangsha Basketball Club (Hereinafter referred to as "Club") to you with regards to Javaris Crittenton ("Player"). [...] If Player does not leave in a timely fashion which will be January 7th, we will no longer be responsible for the players return flight home, along with his housing and the player will begin to pay the

costs for staying in the apartment along with his flight return home. [...]

Player was released not because of lack of skill or being injured on the court, but because when he reported to the team he never disclosed he had a _____ injury and had _____ surgery.

[...]

*Sincerely,
Ye Xiangyu
General Manager of
Zhejiang Guangsha Basketball Club”*

12. The Player then returned to the USA. In February 2011, he joined the Dakota Wizards, a basketball team in the NBA Development League based in Bismarck, North Dakota, USA. There the player played 21 games and received salaries in the total amount of USD 13,600.00.
13. The correct amount paid by the Club to the Player until 29 December 2010 is under dispute. The Player states that he received USD 220,400.00 while the Club states that it paid a total amount of USD 226,900.00 for salary, bonuses and reimbursement of visa fees. It is undisputed that no further payments were made to the Player from 30 December 2010 until today.

3.2 The Proceedings before the BAT

14. On 6 June 2011, the BAT received a Request for Arbitration dated 24 May 2011 filed by the Player’s Agent on behalf of the Player.
15. On 28 June 2011, the BAT Secretariat sent a confirmation letter to the Parties. The confirmation letter was not received by the Club. On 2 August 2011, the BAT Secretariat sent its letter to the Parties again in which it confirmed receipt of the Request for Arbitration as well as the payment of the non-reimbursable handling fee of EUR 3,938.15 received in the BAT bank account on 10 June 2011 and informed the

Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Club to file its answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 23 August 2011. The BAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs by no later than 16 August 2011:

<i>"Claimant (Mr. Javaris Crittenton)</i>	<i>EUR 6,000</i>
<i>Respondent (Zhejiang Guangsha Basketball Club)</i>	<i>EUR 6,000"</i>

16. On 20 August 2011, the Club submitted its Answer together with 16 exhibits.
17. By email of 28 August 2011, the Club's General Manager submitted a press report regarding the Player.
18. By letter of 21 September 2011, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs in a total amount of EUR 11,992.00 (EUR 5,992.00 paid by the Player and EUR 6,000.00 paid by the Club). In the same letter, the Arbitrator requested the Parties to provide responses to specific questions by no later than 3 October 2011.
19. By letter of 11 October 2011, the BAT Secretariat acknowledged receipt of the Club's response and noted that the Player had failed to submit a reply. In the same letter, the Arbitrator declared the exchange of documents complete and invited the Parties to submit a detailed account of their costs by 18 October 2011.
20. On 18 October 2011, the Club submitted a document titled "Detailed Account of Club's Costs" which contained a table showing the Club's payments to the Player from 15 November to 29 December 2010.
21. On 20 October 2011, the Arbitrator once more invited the Parties to submit an account of their costs which should include any fees and expenses that were connected to the

present arbitration proceedings by no later than 25 October 2011.

22. On 24 October 2011, the Club submitted an account of costs as follows:

“As requested, Zhejiang Guangsha Basketball Club submits a summary of costs related to this arbitration hereto.

Amount Spent	Purpose
<i>EUR € 6,000.00</i>	<i>Advance on Costs</i>
<i>RMB ¥300.00</i>	<i>Documents Translation Fees</i>
<i>RMB ¥50,000.00</i>	<i>Legal Fees</i>

23. On 25 October 2011, the Player’s Agent presented a list of the Player’s expenses in this arbitration consisting of the BAT handling fee (EUR 4,000.00) and his share of the Advance on Costs (EUR 6,000.00). No account of any legal fees was submitted.
24. By email of 7 November 2011, the Club stated that it had no comments on the Player’s account of costs. The Player did not comment on the Club’s account of costs.
25. By letter of 14 November 2011, the Arbitrator requested the Player to submit copies of the employment contract(s) he entered into with the basketball club Dakota Wizards and any other team/entity from 5 January 2011 until the date of the letter. On 17 November 2011, the Player’s Agent replied and forwarded a copy of the Player’s employment contract with the NBA Development League, LLC.
26. On 23 November 2011, the BAT Secretariat forwarded the Player Agent’s submission to the Club. The Club was invited to submit any comments by no later than 28 November 2011.
27. On 28 November 2011, the Club submitted its comments.

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

4. The Positions of the Parties

4.1 The Claimant's Position

29. The Player submits the following in substance:

- a) The Player Contract was a no-cut, fully-guaranteed agreement that could not be terminated for lack of skill or injury of the Player. None of the exceptions from the no-cut guarantee, in particular Article III of the Player Contract, have been met. Terminating the Player Contract before the agreed termination date was therefore a breach of contract by the Club.
- b) The Club's allegation that the Player failed to notify the Club of a _____ injury upon or prior to reporting to the team is contested because the Player passed the physical examination and was called for participation in practices and games. It is obvious that the Player was healthy when he joined to the team.
- c) The three incidents stated by the Club as further reasons for the termination are individually and collectively, insufficient to justify a termination of a fully-guaranteed agreement. The Player's refusal to participate in practice was a consequence of his injury suffered in practice on 22 November 2010. This is not a sufficient reason for terminating the Player Contract. The Player did not disobey the orders of the Club's coach, nor did he contradict the coach or the assistant coach in public. Thus, a fine of 8% of the Player's salary is excessive and ought not to have been imposed on the Player. Regardless, the Team Fine Rules are vague in their wording and are therefore, unenforceable.

- d) The Player further submits that the very reason of the early termination of the Player Contract was that the Club was unhappy with his performance and wanted to replace him. The decision to dismiss the Player was made on or before 25 December 2010 which is demonstrated by statements of the Club's GM, Ye Xiangyu in an interview.¹ However, underperformance is not an accepted ground for early termination of the guaranteed, no-cut contract. The rather insignificant incident of 17 December 2010 which was reported to the Player and the agent only on 23 December 2010, i.e. six days later, was spurious and could not justify the early termination of the Player Contract.
- e) Given that the Player received only USD 220,400.00 from the Club, he is entitled to further payments in the total amount of USD 392,631.82 as stated in detail in the Request for Relief.
30. In his Request for Arbitration dated 24 May 2011, the Player requests the following relief:

"Claimant(s) request(s):

- 1) Immediate payment from Club to Player for the remainder of the fully-guaranteed base salary in the amount of Three Hundred Twenty-Six Thousand Six Hundred US Dollars (\$326,600.00 USD);*
- 2) Immediate payment from Club to Player in the amount of Three Thousand US Dollars (\$3,000.00 USD) owed per Article IV(B)(a) of Agreement for regular season victories while Player was on the team;*
- 3) Immediate payment from Club to Player in the amount of Fifteen Thousand US Dollars (\$15,000.00 USD) per Article IV(B)(a) of Agreement for the regular season victories Player was improperly restrained from participating in due to the improper Agreement termination;*
- 4) Immediate payment from Club to Player in the amount of Forty-Six Thousand Eight*

¹ The Player seems to refer to an interview which was published on 25 December 2010 on www.niuBall.com, which reports about news from Chinese basketball. The article "Zhejiang cuts Javaris Crittenton, replacement Tre Kelley scores 54", on <http://www.niuball.com/2010/12/zhejiang-cuts-javaris-crittenton-replacement-tre-kelley-scores-54/>.

Hundred US Dollars (\$46,800.00 USD) for late payment penalties per Article IV(A) of Agreement;

5) Immediate payment from Club to Player for reimbursement in the amount of One Thousand Two Hundred Thirty-One US Dollars Eighty-Two Cents (\$1,231.82 USD) that Player spent on Visas for Player's family per Article XIII of Agreement;

6) Immediate payment from Club to Player and Agent for the BAT application fee, plus any additional costs of arbitration, legal fees, and/or expenses related to this BAT case;

7) Immediate payment from Club to Player of any penalty the Arbitrator deems equitable for late payments of Player bonuses; and

8) Immediate payment from Club to Player of any all other amounts the Arbitrator finds equitable in light of the improper Agreement termination."

4.2 Respondent's Position

31. The Club submits the following in substance:

- a) The Player and the Player's Agent failed to inform the Club about the Player's previous _____ injury. The Club was therefore entitled to terminate the Player Contract according to Article IX (last paragraph) of the Player Contract.
- b) Three further events eventually led to the termination of the Player Contract:
 - i. after his _____ injury of 22 November 2010, the Player refused to exercise and insisted on additional rest although he was found perfectly fit to play by the coach and the team doctor. This led to a warning letter dated 24 November 2010;
 - ii. on 1 December 2010, the Player demonstrated unprofessional behaviour when he disregarded the Club coach's and/or the assistant coach's instructions and criticized the coach in front of the team leading to an early termination of the practice. This incident was reported by letters to the Player and Mr Prather of 1 December 2010 and also led to a fine according to the Team Fine Rules; and

- iii. a similar incident took place on 17 December 2011 when the Player refused to play as instructed by the assistant coach and openly demonstrated his discontent with the assistant coach's directions. This was reported to the Player's Agent by letter of 23 December 2010.
- c) The Player's behaviour towards the Club's coach and other Club staff revealed that the Player was unable to "obey the requirements of the Coach and the management of the Club". The fine imposed on the Player in accordance with the Team Fine Rules, which were signed by the Player in November 2010, was justified and enforceable. Contrary to the Player's Agent's allegation, the Player was provided with a signed copy of the Team Fine Rules in December 2010.
- d) The three incidents described above, entitled the Club to terminate the Player Contract according to No. 23 of the Team Fine Rules. Taking into consideration the warning letter of 24 November 2010, and the imposed fine following the second incident, the termination was "necessary and inevitable" and in no way excessive. As a consequence, the Club is entitled to withhold any further salary or bonus payments for the time after the termination.
- e) The claimed bonus payments for victories in which the Player participated were paid by the Club. The respective bonus receipts were signed by the Player.
- f) The claimed reimbursement for fees regarding visa for the Player's family is contested. The Player's family never came to China before the termination of the Player Contract.
- g) The Club's original letters to the Player's Agent dated 23 December 2010 and to Mr. Prather dated 24 November and 23 December 2010, were signed only by the Club's General Manager. However, when the Player was denying any misbehaviour and contesting the fine, the Club's head coach; the assistant

coach; the weight trainer; ten Chinese players; and one foreign player (14 people in total) witnessed the respective situations and confirmed the events of 1 and 17 December 2010 by signing the three letters on 24 December 2010.²

32. Notably, the Club does not address the allegation of the Player that the very reason for his dismissal was his insufficient performance and the Club's desire to replace him while the three incidents were only used as pretext to cancel the Player Contract.
33. The Club not only rejects the Player's claim for compensation but requests payment of a penalty to be determined by the Arbitrator because of the "discredit" the Player afflicted to the Club, and a further payment of amounts "the Arbitrator finds necessary".
34. In its Answer dated 20 August 2011, the Club requested the following relief:

"Counter Claim

Respondent requests:

- 1) *According to Article IX on Agreement and Rule 23 on Team Fine 2010-11, the Player shall realize his terrible insubordinations, the breach of Agreement and accept the decision of termination;*
- 2) *Player is not entitled to the remainder of the base salary in the amount of Three Hundred Twenty-Six Thousand Six Hundred US Dollars (\$326,600 USD). Therefore, no late payment shall be paid in the amount of Forty-Six Thousand Eight Hundred US Dollars (\$46,800.00 USD);*
- 3) *Player is not entitled to the bonuses for regular season victories in the amount of Fifteen Thousand US Dollars (\$15,000.00 USD)*
- 4) *Player is not entitled to reimbursement in the amount f(sic) One Thousand Two Hundred Thirty-One US Dollars Eighty-Two Cents (\$1,231.82 USD) that Player spent on Visas for his family;*
- 5) *Immediate reimbursement from Player and Agent to Club for the BAT application*

² By letter of 29 September 2011, the Club explained to the Arbitrator that the letters dated 24 November, 2 December and 23 December 2010 were sent without the signatures of the coaches and the other players to the Player's Agent. The coaches and other players confirmed their consent to these letters by signature on 24 December 2010.

fee, plus any additional costs of arbitration, legal fees, and/or expenses related to this BAT case;

- 6) *Immediate payment from Player and Agent to Club of any penalty the Arbitrator deems equitable in light of discredit to the Club; and*
- 7) *Immediate payment from Player and Agent to Club of any and all other amounts the Arbitrator finds necessary.”*

5. The Jurisdiction of the BAT

35. 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).
36. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
37. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.³
38. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in clause X of the Player Contract, which reads as follows:

“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 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.

Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS),

³ Decision of the Swiss Federal Tribunal 4P.230/2000 dated 7 February 2001, cons. 1, reported in ASA Bulletin 2001, p. 523 et seq., with reference to the decision of the Swiss Federal Tribunal dated 23 June 1992, BGE 118 II 353, 356, cons. 3b.

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 Sports (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.

Player shall also be granted the authority to resolve any and all disputes with the Chinese Basketball League office. Seeking mediation through the CBA League Office in no way interferes with the proceedings with the Arbitral Tribunal and each individual mediation committees (sic) are separate and several from one another. Player shall have the right to seek both mediation committees.”

39. 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)”*” (emphasis in the original). The Parties’ reference to the “FIBA Arbitral Tribunal (FAT)” in clause X of the Player Contract is therefore understood as a reference to the BAT (see also article 18.2 of the BAT Rules).
40. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
41. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that 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 clause X of the Player Contract clearly covers the present dispute.⁴
42. In addition, the Player’s option to file a claim with the Chinese Basketball League office does not affect the jurisdiction of the BAT over the dispute because clause X of the Player Contract expressly stipulate the Player’s right to file his claim with the BAT in

⁴ See for instance BERGER/ KELLERHALS: International and domestic Arbitration in Switzerland, Berne 2010, N 466.

any event.

43. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Player's claim.

6. Other Procedural Issues

44. Primarily, the Club requests BAT to reject all of the Player's claims, to oblige the Player to bear the costs of the arbitration award and to compensate the Club for its legal fees and expenses. However, No. 6 – 7 of the Club's Request for Relief constitute a counterclaim by which the Club asks for the payment of a penalty at the Arbitrator's discretion and further amounts to be determined by the Arbitrator.
45. Specifically, No. 2 – 4 of the Club's Request for Relief directly refer to the Player's Request for Relief. The Club's additional request in No. 1 of its Request for Relief (*"According to Article IX on Agreement and Rule 23 on Team Fine 2010-11, the Player shall realize his terrible insubordinations, the breach of Agreement and accept the decision of termination"*) does not constitute a separate claim by the Club against the Player, but rather is the inevitable consequence of a dismissal of the Player's claim. The same is true for No. 5 of the Player's Request for Relief, namely the Request for reimbursement of the arbitration costs and its legal fees.
46. However, No. 6 and 7 of the Club's Request for Relief constitute counterclaims. Counterclaims may be settled in the same arbitration proceedings if they are covered by the same arbitration agreement.⁵ According to Article 11.2 of the BAT Rules counterclaims are admissible and must be raised together with the Answer. The Club's counterclaims are directly related to the Player Contract and subject to the arbitration agreement contained in the Player Contract.

⁵ BERNHARD BERGER/FRANZ KELLERHALS, *International and Domestic Arbitration in Switzerland*, Second Edition, n 490.

47. Therefore, the Arbitrator finds that he has jurisdiction to decide upon the Player's claim and the Club's counterclaim.

7. Applicable Law – *ex aequo et bono*

48. 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".

49. 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."

50. In their arbitration agreement in clause X of the Player Contract, the Parties have expressly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.

51. 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 1969⁶ (Concordat)⁷

⁶ 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).

⁷ KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Article 187 PILA N 289.

under which Swiss courts have held that arbitration “*en équité*” is fundamentally different from arbitration “*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.”⁸

52. 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”.

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

8. Findings

8.1 Termination of the Player Contract

54. The Club terminated the Player Contract by letter dated 30 December 2010 (the “Termination Letter”). The Arbitrator finds that the termination was effective on the date of receipt of the termination letter and cannot apply retroactively (i.e. as of 23 December 2010 as set out in the Termination Letter). The Arbitrator makes this finding regardless of the fact that the Player was given permission to be absent from all Club activities from 23 December 2010 on.

55. The main issue is whether or not the Club was entitled to terminate the Player Contract before the regular termination date as provided for in Clause II of the Player Contract (i.e. the end of the 2010-2011 CBA season).

56. The Club presents various reasons and events why it was entitled to terminate the

⁸ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

Player Contract early, namely that the Player: (1) had failed to report his prior _____ injury and surgery when he arrived at the Club; and (2) that he had repeatedly disregarded the directions of the coach and the assistant coach and skipped training sessions at his own discretion. On the other hand, the Player says that the reasons for his dismissal were only put forward as a pretext because the true ground was the Club's desire to replace him by another player (Mr. Tre Kelley), which it actually did as of 25 December 2010.

8.1.1 Failure to report the prior _____ injury

57. Undisputedly, the Player suffered from an injury of his _____ before he joined the Club. This injury required two surgeries and made it impossible for him to play during the 2009-2010 season. There is no evidence that the Player or the Player's Agent formally notified the Club of this previous injury and surgery. The Player passed the Club's medical examination on 4 November 2010 without any reservation and started exercising and playing with the Club's team.

58. The Club admits that the information about the previous injury and the surgery was publicly available. The Arbitrator finds therefore that the Club must accept that it knew or ought to have known of the previous injury and surgery. In addition, the Player was only obligated to notify the Club about "*previous injuries and/or illness which may prevent him to play for the Club at any time during the term of this agreement*"⁹. No medical evidence was submitted which would demonstrate that it was the previous _____ injury that prevented the Player from performing his contractual duties, nor that it was this same previous injury that forced him to rest.

59. The Player nevertheless claims that he could not participate in the morning training

⁹ See Clause IX, last paragraph of the Player Contract.

session of 9 November 2010 (i.e. at a very early stage of the season and still before the accident of 22 November 2010) because his _____ was sore. This “*raised a red flag to [the] Club.*”¹⁰ However, the Club did not order a re-examination of the Player, nor did it notify the Player that it considered his medical condition as a violation of Clause IX of the Player Contract. Likewise, the Club did not – despite the fact that it could – immediately terminate the Player Contract. The Arbitrator finds therefore that the Club is not entitled to rely on the previous injury when it terminated the Player Contract on 30 December 2011.

8.1.2 Unprofessional behaviour

60. The Club also relies on the Player’s alleged unprofessional behaviour in justifying the fine and subsequent termination of the Player’s Contract. The Club lists three infractions of the Player Contract and the Team Fine Rules:

- i. The Player insisted that he could not play because of the right _____ injury which he suffered on 22 November 2011 although the coach and the team doctor could not find any visible signs of this injury. This incident was subject to the warning letter to Mr Prather dated 24 November 2010. The warning letter was later confirmed by the signatures of 14 witnesses (personnel and players);
- ii. On 1 December 2010, the Player was allegedly hit by an elbow check which made him very angry. It is this elbow check that led to his refusal to follow the coach’s instructions. He even “*contradicted coach publicly.*” This incident then triggered a warning letter by the Club and a fine of 8% of the Player’s December salary. The warning letter was also confirmed by the signatures

¹⁰ See page 4 of the Club’s Answer.

of the above 14 witnesses (personnel and players).

iii. During the preparation training for the game of 17 December 2010, the Player disregarded certain instructions and subsequently refused to participate in training. The Player also verbally abused the assistant coach. Another warning letter was sent to the Player's Agent on 23 December. This letter was later confirmed by signatures of the above 14 witnesses (personnel and player).

61. The Player's Agent protested against the allegations by letters dated 20, 24 and 27 December 2010. The Player's Agent did not deny the facts reported by the Club but rather said that in his and the Player's opinion, these infractions did not justify a fine and *"none of these infractions amount[ed] to a breach of the Agreement."*¹¹
62. On the evidence presented, the Arbitrator concludes that the incidents as reported by the Club took place. It is the seriousness of the infractions which is in dispute: were the incidents severe enough to entitle the Club to impose a fine and then terminate the Player Contract?
63. The Arbitrator finds that the Team Fine Rules are an integral part of the Player Contract although they were signed only about two weeks after the Player Contract. They have been discussed with, and signed by, the Player. This finding is in line with Clause IX ("Player's Duties"), sub ¶ h, and Clause XIV ("Entire Agreement") of the Player Contract. The Arbitrator also finds that the Team Fine Rules are sufficiently clear according to the standards applicable to disciplinary rules of a sports association.
64. When it comes to deciding whether the infractions were serious enough to justify a fine,

¹¹ See for instance, second paragraph of the Player Agent's letter of 27 December 2010 to the Club.

the Arbitrator notes that the Player was not fined following the first infraction. It was not until he disregarded a written warning that he was fined. According to a generally accepted principle in disciplinary law, the Club was entitled to impose the fine after the second incident. However, the Arbitrator also finds that the Player's behaviour in front of the entire team as described in the Club's letter to Mr Prather was unacceptable and called for the announced reaction of the Club. As a consequence, the Arbitrator holds that the fine imposed on the Player was entirely justified.

65. The Arbitrator then turns to the question whether the infractions also justified the termination of the Player Contract. Clause III describes the Player Contract as a "guaranteed agreement" which means that the Club cannot dismiss the Player because of an injury suffered during his engagement with the Club or unsatisfactory sporting results. The mere desire to replace the Player by another player because of underperformance would therefore not have been a sufficient ground for dismissing the Player.
66. The "guarantee" does not prevent the Parties from unilaterally terminating the Player Contract for other reasons, if they are explicitly stated in the Player Contract itself, or due to a material breach of the Player Contract by the other party. The burden of proof in such cases rests entirely on the party terminating the contract, in this case, the Club.
67. In the Termination Letter, the Club relied entirely on the Player's repeated misbehaviour which resulted in separate infractions of the Team Fine Rules. In contrast, the Club's letter of 5 January 2011 refers to the Player's alleged concealment of a previous injury when joining the team. Finally, the Club also quotes Clause 23 of the Team Fine Rules stating that "*[i]f there is a third offence, the club can suspend the player without pay and/or cancel the players contract.*"
68. As already held above, the Arbitrator finds that the Club has not proven the fact and the effects of the alleged concealment of the previous injury. Accordingly, it cannot serve

as a ground for a fine or for the premature termination of the Player Contract. This leaves the Arbitrator to determine whether the three “incidents” when considered together could justify a termination of the Player Contract according to Clause 23 of the Team Fine Rules.

69. The Arbitrator finds that the first and the second incident of 22 November and 1 December 2010 were infractions severe enough to justify a fine and, together with a third material infraction, a premature termination of the Player Contract. The Arbitrator finds it difficult to accept the third incident of 17 December 2010 as a sufficient reason to dismiss the Player. Firstly, while the first two incidents were immediately notified to the Player and/or his agents, the third incident was brought to the attention of the Player’s Agent only six days after it actually happened. Secondly, the Club waited another five days until it eventually terminated the Player Contract. According to generally accepted labour law principles, an immediate termination of a contract must be pronounced *without delay* once the reasons for the immediate termination are met in the eyes of the terminating party, which means period of approximately two days. A delay of five days is therefore definitely too long. Thirdly, the interview with the Club’s General Manager cited by the Player¹², which has not been disputed by the Club, casts doubts on whether it was really that third incident that caused the Club to terminate the Player Contract. The article rather casts suspicion that the fate of the Player may have been sealed long before.
70. The Arbitrator understands that the relationship between the Club and the Player became strained because of the reported incidents which may have obstructed the Club’s endeavours to build a strong and homogenous team. On the other hand, the Club hired the Player based on a guaranteed agreement. In doing so, it assumed a certain risk that the Player would not fully meet its expectations. The Arbitrator does not

¹² See footnote 1.

accept the Club's premature termination of the Player Agreement on 30 December 2010 particularly because the alleged third incident did not qualify as a "third offence" as required by Clause 23 of the Team Fine Rules and because the combined "offences" did not render the contractual relationship unacceptable for the Club.

8.2 Damages

71. The Player is entitled to damages because of the unjustified termination of the Player Contract. When calculating the damages, the starting point is the amount the Player would have earned if the Player Contract had not been cancelled but carried on until the agreed termination date. This amount has to be adjusted by any earnings the Player obtained during the remaining term of the Player Contract. The Arbitrator must also have regard to any other relevant circumstances that might require an adjustment in the consideration of fairness.

8.2.1 Salary

72. The Player was paid the salary instalments until the end of December 2010 from which the fine of 8% of the December instalment (i.e. USD 6,400.00) was deducted.

73. According to the Player, he obtained USD 70,000.00 on 7 December 2010; a further USD 80,000.00 also on 7 December 2010; and lastly, USD 73,400.00 on 30 December 2010, corresponding to the agreed December instalment of USD 80,000.00 minus the fine of 8%.

74. According to the Club, until 31 December 2010, the Player was paid USD 70,000.00 on 15 November 2010, USD 80,000.00 on 25 November 2010 and USD 73,600.00 on 29 December 2010, corresponding to the agreed December instalment of USD 80,000.00 minus the fine of 8%. In addition, the Club contends that the Player was paid bonuses for victories achieved on 10, 15 and 22 December 2010 (USD 1,000.00 each) and a

reimbursement of Player's visa fees (USD 300.00). Therefore, the Player was paid the total amount of USD 3,300.00.

75. There is a difference of USD 200.00 between the December 2010 salary paid and the December 2010 salary claimed. However, when the Club stated in the Termination Letter that it had paid USD 73,600.00, the Player's Agent confirmed on 2 January 2011 that the Player acknowledged receipt of USD 73,600.00.¹³ Thus, no further salary payment is due until the termination date.
76. The remaining salary to be paid to the Player under the Player Contract amounts to USD 320,000.00. The amount the Player earned with his new basketball club must be deducted from the USD 320,000.00 figure. According to the Player Agent's additional submission of 17 November 2011, the Player received USD 13,600.00 from the NBA Development League for playing with his new club Dakota Wizards. Therefore, the actual damages would amount to USD 306,400.00.
77. When assessing the compensation, the Arbitrator must not only take the damage sustained into account but also the circumstances and the degree of fault of the parties. The Arbitrator finds that the incidents that eventually led to the Club's dismissal of the Player were, to a great extent, attributable to the Player. It was his behaviour which increasingly burdened the relationship with the Club until it saw no other alternative but to terminate the Player Contract. This must be reflected in the calculation of the damages. Since the contribution cannot be mathematically calculated, the Arbitrator will determine, *ex aequo et bono*, a flat amount which shall include all claims and reasons for reduction and which he considers fair and appropriate under the circumstances.

¹³ See page 2 of the Player Agent's letter of 2 January 2011 to the Club's General Manager.

8.2.2 Bonus

78. The Player also claims bonus payments of USD 3,000.00 for the team's victories while the Player was still under contract. This claim has not been disputed. However, the three payment vouchers submitted by the Club show that these payments have actually been made. The Player's claim for bonus payments while he was still under contract must therefore be denied.
79. In principle, the Player is also entitled to the bonus payments due during the remaining term of the Player Contract. Again, this claim must be adjusted because of earnings otherwise made and other circumstances which may require a reduction of the bonus payments. The Arbitrator will take the bonus claim into account when finally determining the flat compensation due to the Player.

8.2.3 Visa Costs

80. The Player also claims reimbursement of costs for the visas for his family in the amount of USD 1,231.82. The Club responds that it had reimbursed the visa costs of the Player in the amount of USD 300.00 but that no further costs needed to be reimbursed since the Player's family never came to China and did not need a visa. Actually, the Player did not submit any evidence for the visa costs. The claim for the additional visa costs must therefore be denied.

8.2.4 Late Payment Penalty

81. According to Clause IV of the Player Contract, the Player shall be entitled to a late payment penalty of USD 200.00 per day, starting after a waiting period of seven days after the maturity dates for the contractually agreed payments.
82. The BAT has consistently held that such penalty clauses are subject to review by the

Arbitrator so as to ensure that they are not excessive.¹⁴ The Arbitrator finds that an amount of USD 200.00 per day is not excessive because it is not disproportionate to the Club's basic obligation stipulated in Clause IV of the Player Contract.

83. When determining the commencement date of the requested late payment penalty, the Arbitrator considers that the first instalment not paid by the Club to the Player was the amount of USD 80,000.00 and was due on 25 January 2011. Clause IV of the Player Contract stipulates a waiting period of 7 days. Therefore, the late payment penalty commences on 2 February 2011.
84. Furthermore, since penalty clauses like Clause IV of the Player Contract are to be considered as "a dissuasive measure to prevent late payments and as a form of sanction in case of delay together with the Player's right not to participate in practices and games,"¹⁵ the Arbitrator finds that the period during which the late payment penalty is due ends on the date of the Request for Arbitration, i.e. 24 May 2011.
85. Because the Arbitrator will calculate the damages based primarily on considerations of equity, the same must apply to the late payment penalty. Therefore, the Arbitrator will take into consideration the late payment penalty when determining, *ex aequo et bono*, a flat amount that he considers to be fair and appropriate under the circumstances.

8.2.5 Flat Compensation

86. Taking all above elements into account, *inter alia* the undisputed incidents of 22

¹⁴ See for instance BAT 0158/11, Stimac vs. KK Crvena Zvezda Beograd ("Red Star"); 0114/10, U1st Sports Overseas Ltd., U1st Sports Atlanta LLC vs. Club Baloncesto Valladolid SAD; 0086/10, Queenan vs. Basketball Club Pecsi Noi Kosariabda Kft; 0036/09, Tigran Petrosean, TP Sports vs. WBC "Spartak" St. Petersburg.

¹⁵ See for instance BAT 0109/10, Plaisted vs. Basketball Club Zadar (KK Zadar) and BAT 0100/10, Taylor vs. KK Crvena Zvezda.

November and 1 December 2010, the Arbitrator, deciding *ex aequo et bono*, finds it just and equitable to determine the amount to be paid by the Club to the Player at USD 185,000.00. This amount includes, on the one hand, all considerations concerning the remaining salary and any bonuses which may have become due during the remaining term of the Player Contract as well as any late payment fees. On the other hand, it also takes the circumstances and the degree of fault of the Player into account, which contributed to the failure of the contractual relationship between the Parties.

9. Counterclaim

87. The Club requests that the Player must pay a penalty at the discretion of the Arbitrator because he damaged the reputation of the Club when he constantly disregarded the Coach's instructions. However, the Club does not specify, let alone prove, the asserted reputational damage any further. The Arbitrator finds that this counterclaim is unsubstantiated and must be dismissed. The same applies to the second counter claim for a "payment of any and all amounts the Arbitrator finds necessary." The Club does not provide for any explanation or indication about the nature or quantum of the payments which are expected by the Club.

10. Costs

88. 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.

89. On 18 December 2011 - 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 11,992.00.

90. Considering the circumstances of this case and that the Player prevailed by about 50% and given that the Player paid an advance on costs of EUR 5,992.00 while the Club paid an advance on costs of EUR 6,000.00, the Arbitrator finds it fair that the Player and the Club bear the fees and costs of the arbitration in the respective amount advanced by them (Article 17.3 of the BAT Rules).
91. Furthermore, considering that the Player paid a non-reimbursable handling fee of EUR 3,938.15 without claiming further legal fees while the Club stated legal fees and costs in the total amount of CNY 50,300.00¹⁶, in application of Article 17.3 of the BAT Rules the Arbitrator finds it adequate that both parties bear their own legal fees and other expenses.

¹⁶ Corresponding to EUR 5,310.00 (exchange rate of 6 June 2011, i.e. the date of receipt of the Request for Arbitration by the BAT).

11. AWARD

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

- 1. Zhejiang Guansha Basketball Club shall pay to Mr. Javaris Crittenton the amount of USD 185,000.00.**
- 2. The costs of the arbitration shall be borne by Mr. Javaris Crittenton and Zhejiang Guansha Basketball Club as advanced respectively and each party shall bear its own legal fees and costs.**
- 3. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 27 December 2011

Stephan Netze
(Arbitrator)