BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0197/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Raj Parker

in the arbitration proceedings between

Mr. Hollis Price

- Claimant -

vs.

ALBA Berlin Basketball GmbH
Cantianstrasse 24, 10437 Berlin, Germany

- Respondent -

BASKETBALL
ARBITRAL TRIBUNAL

1. The Parties

1.1 The Claimant

1. Mr. Hollis Price (hereinafter the "Claimant") is a professional basketball player.

2. In these proceedings, the Claimant is represented by Dr. Martin Schimke of Bird & Bird LLP law firm, Carl-Theodor-Strasse 6, 40213 Düsseldorf, Germany.

1.2 The Respondent

3. ALBA Berlin Basketball GmbH (hereinafter the "Respondent") is a German basketball club. It is represented in these proceedings by Mr. Igor Rücker and Dr. Manuel Braun, of Lexton Rechtsanwälte, Kürfürstendamm 220, 10719 Berlin, Germany.

2. The Arbitrator

4. On 2 August 2011, Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the "BAT") appointed Raj Parker as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules").

5. Neither of the Parties has raised objections to the appointment of the Arbitrator or to the declaration of independence issued by him.

3. Facts and Proceedings

3.1 Background Facts

6. On 15 July 2010, the Claimant and the Respondent entered into a contract of employment (hereinafter the "Contract"). The Contract contains, among others, the following provisions:

> "***1. TERM***
>
> *Period; The Club hereby employs the Player for the basketball season 2010-2011. The Agreement is fully guaranteed. It shall commence August 7, 2010 and terminate on the 5th day after the final official game in which the Club participates in the German league in the playing season 2010-2011. After the last game of the club in the German league in the season 2010-2011, the player shall be a free agent, and shall have the right to sign contract with any club for upcoming seasons without any payment to the club (buy out or transfer fee).*
>
> *[…]*
>
> ***2. BASE SALARY***
>
> *For rend[er]ing his services as a basketball player, the Club agrees to pay the Player the fully guaranteed amount of $210,000 (Two Hundred and Ten Thousand American Dollars) net of al German taxes and charges, as follows:*
>
> *The afore mentioned amounts that is player's base salary (net) in the particular playing season mentioned above, will be split as follows:*
>
> | | |
> |---|---|
> | *August 15, 2010* | *: $15,000 (After Passing the Physical Test)* |
> | *September 30, 2010* | *: $20,000* |
> | *October 31, 2010* | *: $20,000* |
> | *November 30, 2010* | *: $20,000* |
> | *December 31, 2010* | *: $20,000* |
> | *January 31, 2011* | *: $20,000* |
> | *February 27, 2011* | *: $20,000* |
> | *March 31, 2011* | *: $20,000* |
> | *April 30, 2011* | *: $20,000* |
> | *May 31, 2011* | *: $20,000* |
> | *June 30, 2011* | *: $15,000* |

Both parties agree that the stop limit for calculating the value of dollars received by Player per month shall be €1 = $1.20.

Club shall be responsible for the payment of all required taxes in Germany, on behalf of Player, including income tax. Player agrees to assist Club in attaining all monies that he may be entitled thru (sic) German tax refunds. This money will become the property of Cub.

3. BENEFITS

[…]

d) Bonuses: *Based on the performance of the Club during the term of this Agreement, the following bonuses will be paid to the player for the season 2010-2011;*

GERMAN LEAGUE

PLAYOFFS	
TO REACH SEMIFINALS	*10.000 USD*
TO REACH FINAL	*10.000 USD*
CHAMPIONSHIP	*10.000 USD*

Euroleague

REACH FINAL 16	*5.000 USD*
REACH FINAL 4	*10.000 USD*
CHAMPIONSHIP	*15.000 USD*

Eurocup

REACH FINAL 4	*5.000 USD*
CHAMPIONSHIP	*10.000 USD*

The bonuses will be paid to the player, within 30 days from their achievement. All the bonuses are net and cumulative.

[…]

5. PAYMENT OF GUARANTEED MONIES

The guaranteed salary payments specified above and all bonuses earned by Player are vested in and owing to Player upon the completion of the execution of this agreement and are not contingent upon anything other than Player providing his services to club in accordance with this agreement and upon Player passing a medical examination as specified in this agreement. Club agrees that this is a one (1) year, no-cut, guaranteed agreement and that club shall not have the right to suspend or release Player in the event that Player does not exhibit sufficient skill or in the event that Player suffers an injury.

[…]

7. NOTICES

All notices and statements provided for herein shall be in writing and shall be deemed given if sent by mail, postage pre-paid, return receipt requested, or by fax, addressed to the parties at the following addresses;

If to the Player: Guy Zucker, Zucker International, PO Box 2919, El Cerrito, CA 94530 USA. Fax: + 1-510-439-2755

If to the Cub: Alba Berlin Basketball Team, Cantianstr 24, D-10437 Berlin – Germany. Fax: +49-30-300-905-99

[…]

11. AGENTS FEE

The club will pay a fee to the player's Agent, Guy Zucker, in the amount of $21,000 (Twenty One Thousand American Dollars) not later than the 15th of October 2010.

Any modification or extension of the contract shall not be valid unless the Player's Agent has approved it. The club will be bound for any possible extension of the contract, to pay the Player's Agent 10% of net salary of the player, agreed in the extensional period. This payment is considered as the part of the player s (sic) salary, and non-executing this obligation at the time, will allow the player and agent to use protected measures, according to the article 5 of this agreement."

7. In February 2011, relations between the Claimant and the Respondent broke down. On 18 February 2011, the Respondent purported to terminate the Contract by letter (hereafter the "First Dismissal Letter"). The Respondent subsequently sent a second termination letter to the Claimant dated 10 March 2011 (hereafter the "Second Dismissal Letter").

3.2 The Proceedings before the BAT

8. On 12 July 2011, the Claimant filed a Request for Arbitration in accordance with the BAT Rules. The BAT received the non-reimbursable handling fee of EUR 2,000.00 from the Claimant on 13 July 2011.

9. By letter dated 10 August 2011, the BAT Secretariat fixed a time limit until 31 August 2011 for the Respondent to file the Answer to the Request for Arbitration. Following a request from the Claimant, this time limit was extended to 9 September 2011, pursuant to Article 7.2 of the BAT Rules. The extension was granted by email dated 19 August 2011.

10. By the same letter of 10 August 2011, and with a time limit for payment of 24 August 2011, the following amounts were fixed as the Advance on Costs:

"*Claimant (Mr. Hollis Price)*	*EUR 5,500*
Respondent (ALBA Berlin Basketball GmbH)	*EUR 5,500"*

11. In a statement submitted to the BAT Secretariat dated 16 August 2011, the Respondent stated that it would not pay its share of the Advance on Costs. The Claimant paid both his share of the Advance on Costs and the Respondent's share of the Advance on Costs (in accordance with Article 9.3 of the BAT Rules) on 22 August 2011.

12. On 9 September 2011, the Respondent filed its Answer to the Request for Arbitration together with a counterclaim (hereinafter the "Counterclaim").

13. On 22 September 2011, the Arbitrator issued a Procedural Order requesting additional information and documentation from each Party (hereinafter the "First Procedural Order"). On 6 October 2011, the Claimant submitted his response to the First Procedural Order. The Respondent submitted its response to the First Procedural Order on the same date.

14. By Procedural Order dated 10 October 2011, the Arbitrator declared the exchange of documents complete, and requested that the Parties submit detailed accounts of their costs by 17 October 2011. By the same Procedural Order, the Arbitrator sent each Party, copies of the Parties' respective responses to the First Procedural Order.

15. On 12 October 2011, the Claimant submitted the following account of costs:

"Legal fees (paid)	*€4,000.00*
Legal fees (pending)	*€3,000.00*
BAT Handling fee	*€2,000.00*
Claimants Advance on Costs	*€5,500.00*
Respondent's Advance of Costs	*€5,500.00*
TOTAL COSTS INCURRED BY THE CLAIMANT	*€20,000.00"*

16. On 17 October 2011, the Respondent submitted the following account of costs:

> *"Based on the agreed hourly charge-out rate the total fee for provision of legal services results in €14,187.50 (plus VAT) (56.75 hours x €250.00)."*

17. By email dated 18 October 2011, the BAT Secretariat invited the Parties to submit any comments on the other Party's account of costs by no later than 24 October 2011. Neither of the Parties submitted any such comments.

18. Since neither of the Parties filed an application for a hearing, the Arbitrator 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 of the Parties.

4. The Parties' Submissions

4.1 The Claimant's Request for Arbitration

19. The Claimant submits that the CEO of the Respondent, Mr Marco Baldi, sent an email to the Claimant on 7 February "releasing" the Claimant from his obligations under the

Contract. The Claimant claims that this action was in breach of the Contract. The Claimant states that the Respondent then re-instated the Claimant on 10 February.

20. The Claimant submits that the team manager of the Respondent, Mr Mithat Demirel (hereinafter the "Team Manager"), met with the Claimant's agent, Mr Guy Zucker (hereinafter the "Agent"), on 15 February 2011 and that the Team Manager informed the Agent that the Claimant was about to be put on an individual training programme (hereinafter the "Individual Training Programme"). The Claimant further submits that the Respondent's coach suggested to the Agent that the Respondent was intending to terminate the Contract. The Claimant submits that neither he nor or the Agent was given a timetable for the Individual Training Programme.

21. The Claimant submits that that he received a telephone call from the Respondent on 17 February 2011 informing him that he had missed practice that morning and that he must attend a practice session that evening. The Claimant states that he did not attend the evening practice.

22. The Claimant submits that he received no further correspondence from the Respondent until the First Dismissal Letter (which he received by hand-delivery on the afternoon of 18 February 2011). The Claimant submits that he found a letter dated 17 February 2011 in his mailbox on the evening of 18 February 2011 (hereinafter the "Warning Letter"). The Warning Letter stated:

> *"Dear Mr. Price,*
>
> *This morning you did not appear to practice and you were missing the whole training unit from 8 to 10am.*
>
> *This represents a serious breach of your duties under your employment contract and the ALBA Club Rules.*
>
> *We will not tolerate such breach of your duties. If such breach of duties will happen again you have to take into account that we will terminate the contract without notice.*

Regards

[…]"

23. The Claimant submits that he did not receive the Warning Letter until after he had received the First Dismissal Letter.

24. Furthermore, the Claimant submits that the Warning Letter did not comply with clause 7 of the Contract, the provision that deals with giving notice under the Contract, nor did it provide the Claimant with "fair warning" of the sanction that would be applied if the Claimant missed another practice session. The Claimant submits that, as a result, the Respondent unilaterally terminated the Contract without just cause by issuing the First Dismissal Letter.

25. The Claimant submits that he is entitled to receive USD 115,000.00 by way of unpaid salary and bonuses due under the Contract for the period from 1 February 2011 to the end of 2010-2011 season.

26. The Claimant's request for relief states:

> *"That the BAT order the Respondent to reimburse him for:*
>
> *- all unpaid salary and bonuses (from 1 February 2011 – the end of season) amounting to USD115,000 with interest at the rate of 5%*
>
> *- the costs of the arbitration (€2,000).*
>
> *- all legal fees and expenses incurred in this matter (details to be provided at the close of proceedings upon request."*

27. The Claimant provided further details of his account of costs (arbitration costs as well as legal fees and expenses) in his submission of 12 October 2011 (see paragraph 15 above).

4.2 The Respondent's submissions

28. The Respondent submits that on 6 February 2011, the Claimant and the Respondent discussed the possibility of a mutually agreed termination of the Contract. The Respondent submits that the Agent agreed with the Respondent that the Claimant would be released from his obligations under the Contract temporarily, so that he would be able to find employment with another club.

29. The Respondent submits that the Agent sent two emails to the Team Manager on 9 February 2011, informing the Team Manager that the Claimant would be returning to his home in the USA shortly.

30. The Respondent claims that both the Claimant and the Agent were made fully aware of a timetable for the Individual Training Programme on or before 16 February 2011.

31. The Respondent submits that the Claimant missed both his individual practice session and the team practice session on 17 February 2011, without notifying the Respondent. This prompted the Respondent to issue the Warning Letter.

32. The Respondent submits that the Warning Letter was delivered to the post-box at the Claimant's apartment in the afternoon of 17 February 2011. The Respondent submits that the Claimant failed to attend a practice session on the morning of 18 February 2011, and so the Respondent terminated the Contract without notice in accordance with the Warning Letter. The First Dismissal Letter was hand-delivered to the Claimant by the Team Manager on 18 February 2011.

33. The Respondent submits that, although the Claimant claims not to have read the Warning Letter prior to receiving the First Dismissal Letter, the Warning Letter was only written as a precautionary measure and therefore was not a "notice" for the purposes of clause 7.

34. The Respondent submits that the Second Dismissal Letter (sent on 10 March 2011) was sent as a precautionary measure and it was sent because the Claimant had left Germany without providing notice to the Respondent.

35. The Respondent's Answer contains a counterclaim against the Claimant for USD 9,118.57. The Counterclaim is stated to comprise the following debts owed by the Claimant to the Respondent:

"*Telephone costs for January 2011*	*EUR 554.83*
Banking costs for return debit costs regarding telephone costs of January 2011	*EUR 7.50*
Telephone cost for March 2011 (basic fee)	*EUR 19.31*
Several Parking tickets	*EUR 35.00*
Club's invoice for Merchandising	*EUR 37.25*
Suffered damages (partial fee for agent)	*USD 8,203.13"*

4.3 The Claimant's response to the First Procedural Order

36. In his response to the First Procedural Order, the Claimant provided evidence that he received three possible offers of employment with alternative clubs between 8 and 16 February 2011. The offer with the highest monthly salary of the three was approximately half the value of the Claimant's monthly salary from the Respondent. The Claimant submits that he did not accept any of the offers, and one reason for this was that none of the salaries offered by the alternative clubs matched the Claimant's salary from the Respondent.

37. The Claimant provided evidence that he booked his return ticket to the USA on 18 February 2011, after he had been dismissed by the Respondent. The Claimant then travelled to the USA the following day.

38. The Claimant admits liability for four of the items listed in the Counterclaim (telephone costs for January 2011, banking costs for return debit costs, several parking tickets and the Respondent's invoice for Merchandising). The Claimant submits that these costs would usually be deducted from his February salary payment, however, the Respondent has failed to make this payment and so the costs have not been deducted. The Claimant denies liability for the telephone cost for March 2011 and the Agent's fee.

5. Jurisdiction

39. 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).

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

5.1 Arbitrability

41. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.[1]

[1] Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

5.2 Formal and substantive validity of the arbitration agreements

42. The existence of a valid arbitration agreement is to be examined in light of Article 178 PILA, which reads as follows:

> *"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.*
>
> *2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law."*

43. Clause 8 of the Contract stipulates:

> ***"8. DISPUTE***
>
> *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 shall decide the dispute ex aequo et bono.*
>
> *Club, Player and Agent agree that the FAT ruling shall be final and cannot be appealed."*

44. The Arbitrator notes that the FIBA Arbitral Tribunal was renamed the Basketball Arbitral Tribunal on 1 April 2011 (see also article 18.2 of the BAT Rules).

45. The Contract is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA.

46. With respect to substantive validity, the Arbitrator considers that there are no indications which could cast doubt on the validity of the arbitration agreements under Swiss law (cf. Article 178(2) PILA). In addition, the parties did not challenge the jurisdiction of BAT in their submissions.

47. In light of the above, the Arbitrator finds that the BAT has jurisdiction to hear this dispute.

6. Discussion

6.1 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",* as opposed to a decision according to the rule of law referred to in Article 187(1). 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. As set out in paragraph 43 above, the Contract stipulates that any disputes arising out of the Contract shall be resolved by the BAT "in accordance with the FAT Arbitration Rules". 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. Clause 8 of the Contract stipulates that "[t]he arbitrator shall decide the dispute ex aequo et bono." Consequently, the Arbitrator shall adjudicate the claim *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*[2] (Concordat),[3] 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."*[4]

52. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives "a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case".[5]

53. 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".

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

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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 P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PILA.

4 JdT 1981 III, p. 93 (free translation).

5 POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

6.2 Findings

6.2.1 Termination of the Contract

55. The Arbitrator finds that the Claimant's release from his obligations under the Contract on 7 February 2011 was temporary and by consent. The Arbitrator finds that both parties wanted to exit the Contract at this time due to the breakdown of the relationship between the Parties. This temporary release did not constitute termination of the Contract since the Contract was reinstated on 10 February 2011.

56. The Claimant submits that the Respondent unilaterally terminated his employment without just cause and in breach of the Contract on 18 February 2011. The Respondent submits that it was entitled to terminate the Contract because it had issued the Warning Letter to the Claimant on 17 February 2011. The Warning Letter provided that if the Claimant missed any further practice sessions, the Respondent would terminate the Contract without notice.

57. The Respondent claims that the Warning Letter was delivered to the Claimant's mailbox after 3.00 pm on 17 February 2011 and so the Claimant would have read the Warning Letter before an individual practice session the following morning. He did not attend the practice session and so the Respondent terminated the Contract by delivering the First Dismissal Letter to the Claimant in person on 18 February 2011.

58. The Respondent submits that the Claimant missed two practice sessions (one session on the morning of 17 February 2011, which was part of the Individual Training Programme, and one team practice session on the evening of 17 February 2011) and as a result, the Claimant was sent the Warning Letter. The Respondent further submits that the Claimant missed a third practice session (on the morning of 18 February 2011, which was part of the Individual Training Programme) and so the Contract was terminated.

59. The Claimant submits that (despite requesting a copy) he was not provided with a copy of the Individual Training Programme and so was unaware that he was required to attend practice sessions on the mornings of 17 and 18 February 2011. The Claimant further submits that he did not receive the Warning Letter until after the practice session on 18 February 2011.

60. The Claimant submits that he asked the Respondent's fitness trainer, Mr Mihajlo Svraka, for a copy of the Individual Training Programme, however Mr Svraka refused, stating that he did not want to get into trouble with the Team Manager. The Respondent submitted a witness statement of the Team Manager, in which the Team Manager states that he gave a copy of the Individual Training Programme to the Agent and that Mr Svraka showed (but did not give) a copy of the Individual Training Programme to the Claimant. The Claimant denies that the Team Manager provided the Agent with a copy of the Individual Training Programme and that Mr Svraka showed him a copy of it. The Claimant states that the first time he saw the Individual Training Programme was when the Respondent produced a copy with his submissions to the BAT.

61. In the First Procedural Order, the Arbitrator asked the Respondent to provide evidence that it had given the Claimant a copy of the Individual Training Programme. The Respondent referred to the Team Manager's witness statement, but provided no further evidence.

62. The Respondent is seeking to prove that it made the Claimant aware of the date and time of the practice sessions set out in the Individual Training Programme. The Arbitrator therefore finds that the burden of proof rests with the Respondent to show that it did this. The Arbitrator finds that the Respondent has failed to discharge the burden of proof and prove that it made the Claimant aware of the date and time of the practice sessions set out in the Individual Training Programme. The Arbitrator therefore accepts the Claimant's submission that it was unaware of the practice sessions on the mornings of 17 and 18 February. The Arbitrator finds that it would be unfair for the

Respondent to sanction the Claimant for failing to attend practice sessions which were set out in the Individual Training Programme. Two of the three practice sessions which the Claimant missed were set out in the Individual Training Programme. Thus, the effect of this finding by the Arbitrator, is that the Claimant is only to blame for missing one of the practice sessions.

63. Furthermore, the Arbitrator finds that the Respondent has not proven that it gave the Claimant sufficient (if any) notice of its intention to terminate the Contract, should the Claimant miss any further practices. The Respondent submits that it left the Warning Letter in the Claimant's mailbox after 3.00 pm on 17 February 2011. The Claimant submits that he checked his mailbox in the evening of 17 February 2011. The Claimant's girlfriend has provided a witness statement stating that she checked the mailbox with him. Both the Claimant and his girlfriend claim that the Warning Letter was not in the mailbox when they checked it. The Respondent has failed to prove that the Claimant received the Warning Notice prior to the morning of the 18 February 2011.

64. The Contract does not provide any specific sanction for the failure to attend practices. There is certainly no provision in the Contract which expressly permits the Respondent to terminate the Contract in the manner in which it did (i.e. by issuing a warning letter and, in the event of a further infraction, issuing a letter of termination). However, it is not disputed that it is an obligation of the Claimant that he must attend practices. It therefore falls to the Arbitrator to determine, *ex aequo et bono*, whether the sanction that was imposed by the Respondent (i.e. unilateral termination of the Contract) was fair and proportionate in the circumstances.

65. The Arbitrator concludes that termination of the Contract was not fair or proportionate in the circumstances. The Arbitrator reaches this conclusion for two reasons. Firstly, for the reasons set out in paragraph 62 above, the Claimant is only to blame for missing one (not three) of the practice sessions. The Arbitrator considers that it would be disproportionate to terminate the Contract on the grounds that the Claimant missed

only one practice session.

66. Secondly, the sanction of terminating the Contract is a very significant one. As a result, the Respondent should, if possible, have provided the Claimant with fair warning that it would impose the sanction if the Claimant continued to fail to fulfil his obligation. It was perfectly possibly for the Respondent to provide fair warning to the Claimant in these circumstances. However, the Arbitrator finds that, the Respondent has been unable to prove that it did provide the Claimant with fair notice of the sanction. The Respondent has been unable to prove that the Claimant did actually receive the Warning Letter before the practice session on 18 February 2011. The Arbitrator notes that there was very little time between when the Respondent claims to have delivered the Warning Letter until the next practice session (less than twenty four hours). Accordingly, the Arbitrator finds, firstly that the Respondent has been unable to prove that the Claimant received the Warning Letter before the practice session on 18 February 2011; and secondly, that it was unfair for the Respondent to terminate the Contract on 18 February 2011 without knowing for certain, whether or not the Claimant had received the Warning Letter.

67. In light of the finding that the termination of the Contract was not fair or proportionate in the circumstances, the Arbitrator finds, *ex aequo et bono*, that the Respondent unilaterally terminated the Contract without just cause.

6.2.2 The Claimant's salary and bonuses for the 2010-2011 season

68. Clauses 1 and 5 of the Contract provide that the Contract is "no-cut" and "fully guaranteed". As such, and on account of the Respondent's unfair termination of the Contract, the Arbitrator finds that the Respondent is liable to pay the Claimant USD 115,000.00 in unpaid salary and bonuses for the 2010-2011 season.

69. The sum of USD 115,000.00 comprises two elements. The first element is made up of

salary earned but unpaid at the time the Contract was terminated (namely, unpaid salary for February 2011). The second element is made up of future salary payments due under the Contract (namely, unpaid salary of USD 20,000.00 for March 2011; unpaid salary of USD 20,000.00 for April 2011; unpaid salary of USD 20,000.00 for May 2011; unpaid salary of USD 15,000.00 for June 2011; an unpaid bonus of USD 10,000.00 for reaching the semi-final of the German League; and an unpaid bonus of USD 10,000.00 for reaching the final of the German League).

6.2.3 The Claimant's duty to mitigate his loss

70. The Claimant has submitted details of three offers that he received from other clubs around the date on which the Respondent terminated the Contract. The Claimant did not accept any of the three offers because the offers did not match the terms of the Contract with the Respondent. The best alternative offer (in terms of monthly salary) that the Claimant received was for between USD 10,000.00 and 12,000.00 per month from the French club Limoges CSP Elite.

71. The Arbitrator finds that the Claimant has a duty to mitigate his loss in this case. The Arbitrator will, therefore, deduct from the award of salary payments due under the Contract an amount which reflects various factors, including: (i) the monthly salary payable under the highest alternative offer received; (ii) the fact that, while indicative offers were obtained, none were in fact confirmed as final offers or indeed concluded as binding agreements; and (iii) there may have been a period of unemployment between leaving the Respondent and joining a new club. The Arbitrator accordingly deducts USD 30,000.00 from the award of salary payments due under the Contract.

72. The total amount payable to the Claimant in relation to salary and bonus payments due under the Contract is therefore USD 85,000.00.

6.2.5 The Counterclaim

73. The Respondent claims USD 9,118.57 for six different costs that the Claimant owes the Respondent. The Claimant has admitted liability for four of the costs listed in the Counterclaim (telephone costs for January 2011, banking costs for return debit costs, several parking tickets and the Respondent's invoice for Merchandising). The Parties agree that these costs total EUR 634.58. The Arbitrator finds that the sum of EUR 634.58 is payable by the Claimant to the Respondent.

74. The Claimant disputes that the remaining two costs that the Respondent claims under the Counterclaim are payable. The first of these is a "[t]elephone cost for March 2011". The Arbitrator finds that the Claimant is not liable to pay this cost because it relates to a cost which was incurred after the Respondent terminated the Contract.

75. The second of the costs is reimbursement of a proportion (USD 8,203.13) of the Agent's fee which the Respondent has already paid to the Agent, pursuant to the Contract. The Arbitrator notes that, unlike the expenses mentioned above, which can be understood as a reduction of the Claimant's claim[6], the claim for reimbursement of the Agent's fee is a separate claim of the Respondent to which the provisions of the BAT Rules apply. Given that the Respondent did not pay its share of the advance on costs, he is not entitled to bring forward a counterclaim in these proceedings (article 9.3 of the BAT Rules, applied *mutatis mutandis* to counterclaims[7]). In any event, however, such a claim by the Respondent would be dismissed by the Arbitrator for the reasons set out below.

76. Clause 11 of the Contract provides that the Respondent shall pay USD 21,000.00 to

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6 See BAT (then FAT) 0088/10 (Baxter, Ames, Yenal v/ Besiktas JK), para. 39.

7 See BAT (then FAT) 0047/10 (Vashington, Fimic v/ PBC Ural Great), para. 45.

the Agent by 15 October 2010. This sum was paid in full. The Respondent submits that, because the Claimant was only employed for 195 days of the 2010-2011 season, the Respondent should receive a refund in relation to the proportion of the Agent's fee which applies to the 125 days the Claimant was not employed under the Contract (i.e. from the point of termination).

77. The Arbitrator finds that no rebate is payable in relation to the Agent's fee, firstly because there is no provision in the Contract to support such a claim, and secondly, because it was the Respondent who terminated the Contract unilaterally and unfairly.

6.2.6 Interest

78. The Claimant claims interest on the unpaid salary and bonus amounts at an interest rate of 5% per annum. Payment of interest is a customary and necessary compensation for late payment and there is no reason why the Claimant should not be awarded interest. The Arbitrator considers that a rate of 5% per annum is a reasonable rate of interest. Furthermore, it is in line with the BAT jurisprudence and should be applied to the outstanding payments.

79. The Arbitrator considers that the interest should be payable from the date on which the payments fell due under the Contract. For the purposes of calculating when the interest is payable from, the Arbitrator has apportioned the deduction of EUR 30,000.00 (which reflects the Claimant's failure to mitigate his loss) to the calculation of the interest payable. Accordingly, the Arbitrator finds, ex aequo et bono, that interest is payable at a rate of 5% per annum as follows:

(i) on USD 20,000.00 from 27 February 2011;[8]

(iii) on USD 10,000.00 from 31 March 2011;[9]

(iv) on USD 10,000.00 from 30 April 2011;[10]

(v) on USD 10,000.00 from 30 May 2011;[11]

(vii) on USD 10,000.00 from 31 May 2011;[12]

(viii) on USD 10,000.00 from 17 June 2011; and[13]

(vi) on USD 15,000.00 from 30 June 2011.[14]

7. Costs

80. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the

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8 In relation to the February salary payment.

9 In relation to the March salary payment.

10 In relation to the April salary payment.

11 In relation to the bonus for reaching the semi-final of the German League. The Respondent reached the semi-final on 30 April 2011. Clause 3 of the Contract provides that "bonuses will be paid to the player, within 30 days of their achievement".

12 In relation to the May salary payment.

13 In relation to the bonus for reaching the final of the German League. The Respondent reached the final on 18 May 2011. Clause 3 of the Contract provides that "bonuses will be paid to the player, within 30 days of their achievement".

14 In relation to the June salary payment.

award or communicated to the Parties separately. Furthermore, Article 17.3 of the BAT Rules provides that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

81. On 5 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 at EUR 11,000.00

82. The Arbitrator notes that the Claimant was successful in establishing his claim in relation to unpaid salary and bonus amounts for the 2010-2011 season, subject to deduction for mitigation of damages. The Arbitrator notes that the Respondent was successful in part in establishing its Counterclaim. The Arbitrator notes, however, that the Claimant was successful in defending the Counterclaim in respect of the Agent's fee and telephone costs for March 2011.

83. The Arbitrator notes that the Respondent refused to pay its share of the Advance on Costs and that Claimant paid both his share of the Advance on Costs and the Respondent's share. The Arbitrator considers it appropriate to take into account the non-reimbursable fee when assessing the expenses incurred by the Claimant in connection with these proceedings. Thus, the Arbitrator decides that in application of Article 17.3 of the BAT Rules, the Respondent shall bear 100% of the costs of the arbitration for the reasons set out in paragraphs 82. The Arbitrator also decides in application of Article 17.3 of the BAT Rules, that the Respondent shall pay to the Claimant a sum representing 75% of his legal costs and expenses for the reasons set

out in paragraphs 82 and 83, including the fact that the Respondent refused to pay its share of the Advance on Costs. Therefore, the Arbitrator decides:

- The Respondent shall pay to the Claimant EUR 11,000.00 being the total amount of the arbitration costs in this matter.

- The Respondent shall pay to the Claimant the amount of EUR 6,750.00 as a contribution towards his legal fees and expenses.

8. AWARD

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

1. **ALBA Berlin Basketball GmbH is ordered to pay to Mr. Hollis Price USD 85,000.00 as compensation for unpaid salary and bonuses for the 2010-2011 season, together with interest payable at a rate of 5% per annum as follows:**

    (i) on USD 20,000.00 from 27 February 2011;

    (ii) on USD 10,000.00 from 31 March 2011;

    (iii) on USD 10,000.00 from 30 April 2011;

    (iv) on USD 10,000.00 from 30 May 2011;

    (v) on USD 10,000.00 from 31 May 2011;

    (vi) on USD 10,000.00 from 17 June 2011; and

    (vii) on USD 15,000.00 from 30 June 2011.

2. **Mr. Hollis Price is ordered to pay to ALBA Berlin Basketball GmbH EUR 634.58 as reimbursement for outstanding expenses.**

3. **ALBA Berlin Basketball GmbH is ordered to pay Mr. Hollis Price EUR 6,750.00 as reimbursement for legal fees and expenses.**

4. **ALBA Berlin Basketball GmbH is ordered to pay Mr. Hollis Price EUR 11,000.00 as reimbursement of the advance on BAT costs.**

5. Any other or further requests for relief are dismissed.

Geneva, seat of the arbitration, 12 December 2011

Raj Parker
(Arbitrator)