ARBITRAL AWARD

(BAT 0232/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Raj Parker

in the arbitration proceedings between

Ms. Renee Montgomery
c/o Wiesel Sports LLC, Post Office Box 1225, Bandon, Oregon 97411 USA

- First Claimant -

Mr. Eric Wiesel
Wiesel Sports LLC, Post Office Box 1225, Bandon, Oregon 97411 USA

- Second Claimant -

LBM Management
Rue de Gaillarmont 591, BE 4030, Liege, Belgium

- Third Claimant -

vs.

Lövér Sport KFT aka UNI Seat Györ
Kiskut Liget, 9027 Györ, Hungary

- Respondent -

1. The Parties

1.1 The Claimants

1. Ms. Renee Danielle Montgomery (hereinafter the "First Claimant") is a professional basketball player of US nationality.

2. Mr. Eric R. Wiesel of Wiesel Sports LCC, P.O. Box 1225, Brandon, Oregon 97411, USA, acts as the First Claimant's agent (hereinafter the "Second Claimant").

3. LBM Management, of Rue de Gaillarmont 591, BE 4030, Leige, Belgium (hereinafter the "Third Claimant") also acts as the First Claimant's agent.

4. In these proceedings, the First Claimant and the Third Claimant are represented by the Second Claimant.

1.2 The Respondent

5. Lövér Sport KFT (UNI Seat Györ), 9027 Györ, Hungary (hereinafter the "Respondent") is a Hungarian professional basketball club.

2. The Arbitrator

6. On 29 December 2011, Richard H. McLaren, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), appointed Mr. Raj Parker as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules").

7. None of the Parties have raised objections either to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and proceedings

3.1 Background facts

8. On 21 March 2011, the First Claimant and Respondent entered into a contract of employment (hereinafter the "Contract"). The Contract contains, amongst others, the following provisions:

> At clause 3:
>
> *"In connection with the Player's employment the Club on behalf of the Player shall make the following arrangements:*
>
> ***a. Transportation.***
>
> *During the term of the present Agreement the Club will provide the Player with three (3) round trip economy plane tickets from Player's city of choice in the USA to Budapest Hungary and back. One of these three ticket will be for a member of the family's player* [sic]
>
> *[..]*
>
> ***c. Housing.***
>
> *The Club agrees to provide at the Club's expense, a personal (not shared) furnished apartment for use by the Player during the term of this Agreement. The apartment shall include the cable or satellite TV with English (American) TV channels, DVD player, telephone, DSL high speed Internet, and modern household appliances such as washer and an electric dryer for her clothing. The Club shall pay all utility costs and maintenance costs of the apartment. Player shall pay costs of phone calls. The Club will provide a Player with a cell phone."*
>
> At clause 4 ("medical exam, injuries"):
>
> *"a. The Club agrees that the Player shall pass a standard medical examination for basketball players, and that the Club's obligations under this Agreement shall be contingent upon Player's passing such examination. Within ten (10 days) of Player's arrival in Gyor, a physician selected by the Club shall conduct this extra medical examination. If Club fails to notify Player and Player's representative of a failed medical examination within ten days of Player's arrival in Gyor, the Player shall then be treated as having passed the medical exam.* [..] *Player shall not be required to participate in any Club practices or physical activities until such medical examination is conducted.* [..] *In addition, Player shall not be required to participate in any Club*

practices or physical activities until the results of such medical examinations are given to Player.

[..]*"*

At Exhibit 1 ("base salary and bonuses"):

"A. Base Salary.

Season 2010-2011 [sic]

For rendering her services as a basketball player, The Club agrees to pay the Player a base salary of 150,000 (one-hundred thousand [sic]) USD for the 2011-2012 season according to the following schedule:

Upon arrival and passing medical exam -- 20.000 (ten thousand [sic]) USD

2011.october 15.	*18.000 USD*
2011.november 15.	*18.000 USD*
2011.december 15.	*18.000 USD*
2012.january 15.	*18.000 USD*
2012.february 15.	*18.000 USD*
2012.marc [sic] 15.	*18.000 USD*
2012.april 15.	*18.000 USD*
2012.april 20.	*4000 USD*

[…]

B. Bonuses for seasons 2011-2012.

Hungarian League

- Reaching 2nd place of the Hungarian League: net 10% of the base salary.

- Winning the Hungarian League: net 15% of the base salary.

Hungarian Cup

- Reaching the 2nd place of the Hungarian Cup: net 5% of the base salary.

- Reaching the 1st place of the Hungarian Cup: net 10% of the base salary.

FIBA Euroleague:

Reaching the Best of 4 of the FIBA Euroleague: net 10% of the base salary.

Reaching the 2nd place of the FIBA Euroleague: 15% of the base salary.

Reaching the 1st place of the FIBA Euroleague: net 20% of the base salary.

[…]

Payments, which are received later than 10 days of the dates noted, shall be subject to a penalty of 20.00 USD per day of delay. In the case of payment not being made by the Club within fifteen days to the Player, the Player, and her representatives shall be entitled to all monies due in accordance with the Agreement, but the Player shall not have to perform in practice sessions or games until all scheduled payments have been made, plus appropriate penalties."

At Exhibit 2 ("Representative's fee"):

"The Club agrees to pay LBM Agency and representative's fee of 15.000 USD – for services rendered on behalf of the Player, Renee Montgomery, before January 20, 2012."

9. The Respondent has not made a number of the payments which were scheduled to be made under the Contract. To date, only one instalment of the First Claimant's salary has been made.

10. On 26 October 2011, by letter sent by the Second Claimant, the First Claimant demanded that she receive all outstanding monies plus interest by 5pm on 28 October 2011 (hereinafter the "Demand Letter"). When this did not happen, the First Claimant did not participate in three basketball practices on 28 and 29 October 2011.

11. On 29 October 2011, in an email sent by its legal representative Dr. Görbe László, the Respondent purported to terminate the Contract on the grounds that the First Claimant's failure to attend practices was a breach of the Contract.

3.2 The Proceedings before the BAT

12. On 11 November 2011, the First Claimant, the Second Claimant and the Third Claimant (together the "Claimants") filed a request for arbitration in accordance with the BAT Rules. On 15 November 2011, the BAT received a non-reimbursable handling fee of EUR 3,000.00 from the Claimants by a bank transfer.

13. By letter dated 11 January 2012, the BAT secretariat fixed a time limit until 1 February 2012 for the Respondent to file an answer to the Request for Arbitration.

14. By the same letter of 11 January 2012, and with a time limit for payment of 25 January 2012, the following amounts were fixed as the Advance on Costs:

"Claimant (Ms. Renee Montgomery)	*EUR 2,500*
Claimant (Mr. Eric Wiesel)	*EUR 1,000*
Claimant (LBM Management)	*EUR 1,000*
Respondent (Lover Sport KFT aka Uni Seat Győr)	*EUR 4,500"*

15. The Claimants paid their share of the Advance on Costs on 24 January 2012 (payment being made by Wiesel Sports LLC). The Respondent failed to pay its share of the Advance on Costs and the Claimants subsequently paid the Respondent's share of the Advance on Costs (in accordance with Article 9.3 of the BAT Rules) on 14 February 2012 (payment being made by Mr. Lejeune).

16. On 5 March 2012, the Arbitrator issued a Procedural Order to both Parties (hereinafter the "First Procedural Order"), acknowledging receipt of the full amount of the Advance on Costs. The First Procedural Order instructed the Parties to submit further information and documentation by 15 March 2012.

17. The Claimants filed their reply on 14 March 2012. The Respondent filed its reply on 16 March 2012. Following a request from the BAT, the Respondent provided a translation into English of one of the documents provided with the Respondent's reply on 21 March 2012.

18. On 2 April 2012, the Arbitrator issued a procedural order to both Parties (hereinafter the "Second Procedural Order") which instructed the Third Claimant and the Respondent to provide certain additional information. The Third Claimant submitted its response on 6 April 2012 and the Respondent submitted its response on 12 April 2012.

19. In an email sent on 17 April 2012, the BAT requested that the Claimants submit two documents which were supposed to have been attached to the Second Claimant's response to the Second Procedural Order, but which had been omitted. These documents were received on 18 April 2012.

20. By Procedural Order dated 25 April 2012, the Arbitrator declared the exchange of documents complete, and requested that the Parties submit detailed accounts of their costs by 7 May 2012. By the same Procedural Order, the Arbitrator sent each Party copies of the Parties' respective responses to the Second Procedural Order.

21. On 26 April 2012, the Claimants sent an email to the BAT stating "*All of Claimants' costs and fees have already been expressed and requested in the in the [sic] briefs that claimants' have previously submitted. There is nothing further to add.*" In the Request for Arbitration the Claimants stated:

> *"I [am] a licensed California attorney in good standing, and I am the representative of MS.MONTGOMERY for this arbitration. As such, I devoted 33.5 hours to the factual and legal research and preparation of the instant brief. I devoted 5.2 hours to research related to the arbitration process and procedure, 10.1 hours to gathering and reviewing all relevant documents in this matter (including creating my client's declaration and assembling the 25 exhibits attached to this declaration), 5.9 hours to preparing my declaration, the petition for arbitration and the factual summary, and 12.3 hours to preparing the legal arguments and claims for relief. I have been a litigating attorney and partner in a California law firm since 1993. My usual billable hourly rate is $250 per hour for litigation matters. Therefore, as principle of WIESEL SPORTS, LLC., I respectfully request a total of $8,375 as legal fees for the representation of MS. MONTGOMERY during the pendency of this arbitration."*

22. In their response to the First Procedural Order, the Claimants stated:

> *"Legal fees necessitated by an Arbitration are specified in the Basketball Arbitral Tribunal Arbitration Rules as recoverable costs (Rule 17). Here, MR. WIESEL, a licensed California attorney in good standing, has already asked for $8,375 in legal fees as more fully explained in the original arbitration brief. Since that time, Mr. Wiesel has devoted an additional 9.3 hours to the review of correspondence and the factual and legal research and preparation of the instant brief (the time spent by MR. WIESEL is fully explained in his attached supplemental declaration, paragraph 12). MR. WIESEL'S usual billable hourly rate is $250 per hour for litigation matters.*

> *(Supplemental declaration of Eric Wiesel, paragraph 12.) Therefore, ERIC WIESEL, as principle of WIESEL SPORTS, LLC., respectfully requests a total of $2,325 as additional legal fees subsequent to and in addition to the preparation of the original arbitration brief.*

23. The Claimants did not make any submissions in relation to their costs in their response to the Second Procedural Order. The Respondent did not submit an account of its costs.

24. By email dated 9 May 2012, the BAT Secretariat invited the Respondent to submit any comments on the Claimants' account of costs by no later than 15 May 2012. The Respondent did not submit any such comments.

25. Since none of the Parties has applied for a hearing, the Arbitrator has decided, in accordance with Article 13.1 of the BAT Rules, to deliver this Award on the basis of the Parties' written submissions.

4. The Parties' submissions

4.1 The Claimants' Request for Arbitration

26. The First Claimant submits that the Respondent failed to make scheduled salary payments for the 2011-2012 season as required by clause 2 of the Contract. The Respondent made one salary payment of USD 18,000.00 on 28 October, 13 days after it was due. A number of further salary payments are now outstanding. The First Claimant seeks payment of all salary due until the release of her players' licence, as well as any contractual penalties due as a result of the Respondent's late payment (as provided for in Exhibit 1b to the Contract).

27. As set out in Exhibit 1a to the Contract, the Respondent was required to make a one-off payment of USD 20,000.00 to the First Claimant *"upon arrival and passing medical exam,"* however this amount was never paid. The First Claimant submits that the

USD 20,000.00 became due on 11 October 2011 when she was first required to practice (contrary to clause 4a of the Contract).

28. The First Claimant submits that it was necessary to send the Demand Letter because of the delay in or failure to make the necessary payments under the Contract. This letter stated that the First Claimant must receive all outstanding monies by 5pm on 28 October 2011, failing which she would exercise her right under the Contract to decline to attend practices until she was paid. The First Claimant submits that those rights had arisen because, by 26 October, the USD 20,000.00 was 15 days late.

29. The First Claimant refused an offer that Mr. Balogh would keep USD 20,000.00 in cash safe for her until banks opened the following week. Having not received the money by the date and time stated in the Demand Letter, the First Claimant missed two practices and one technical session on 28 and 29 October.

30. The First Claimant submits that the Respondent's decisions to terminate her employment on 29 October 2011 and subsequently to refuse to release her player's license entitle her to the remainder of her salary for the 2011-2012 season (being up to USD 150,000.00 in total) until the release of her player's license.

31. The First Claimant submits that, until dismissal, she had fulfilled all her contractual obligations: between 10 and 28 October 2011, she was on time to and participated fully in every practice. Neither she, nor her agents, received any complaint in relation to her conduct prior to her dismissal, and any complaints were only raised once the Respondent received the Demand Letter.

32. The First Claimant also submits that the Respondent failed to reimburse her for shipping costs, and for certain purchases that she made for the apartment, and that these monies remain outstanding.

33. Finally, the First Claimant seeks reimbursement of her air fare back to the US on 15 November 2011, and a cash payment equivalent to the value of two round trip economy plane tickets from Budapest to a US city of her choice, as provided for in the Contract (she claims USD 3,000.00 in this regard).

34. On or about 3 November 2011, the First Claimant flew to Spain. She submits that she did this in an attempt to find an alternative club to play for if the Respondent would release her player's license. Her player's licence was not released at that time, and she flew back to the US on 15 November 2011, purchasing the cheapest fare available.

35. The Claimants' request for relief asserts claims under the following heads and in the following amounts:

Salary	USD 112,000.00 in outstanding ordinary salary payments and USD 20,000.00 due on arrival and passing medical exam.
Contractual penalties	Late payment fees of USD 20.00 per day in respect of each amount owed under the Contract which is more than ten days overdue.
Cost of shipping	USD 2,020.92, which the First Claimant claims the Respondent agreed to reimburse her for.
Purchases for apartment	USD 70.00 spent on items which the First Claimant claims the Respondent agreed to reimburse her for.[1]
Agent commission	USD 15,000.00, to be paid to the Second and Third Claimants.
Reimbursement of arbitration cost	EUR 12,000.00 in total.[2]

1 Subsequently revised to USD 955.08.

Payment of bonuses	The First Claimant seeks payment of any bonuses due under Exhibit 1B to the Contract.
Reimbursement of flights	EUR 4,486.95, being the costs incurred by the First Claimant returning to the United States, and USD 3,000.00, being an amount in respect of flights she was entitled to under the Contract for use by her family.
Attorney's fees	USD 8,735.00[3]
Interest	The Claimants have requested interest at 5% per annum on all amounts awarded in their favour.

4.2 The Claimants' response to the First Procedural Order

36. In the First Procedural Order, the First Claimant was asked to: i) confirm whether she was currently playing for a club other than the Respondent; ii) provide details of the practices she was scheduled to attend but missed; and iii) provide documentary evidence of the purchases that she made for the flat and for which she seeks reimbursement.

37. In response to the First Procedural Order, the First Claimant submitted: i) that she signed a contract to play for Tarsus Belediyesi Spor Kulubu ("Tarsus") on or about 1 March 2012, and attended her first practice with that club on 2 March 2012; ii) that the first time she was required to practice for the Respondent after her medical exam was on the evening of 12 October 2011 (i.e. on the same day as the medical exam); and iii) that she spent USD 955.08 on items for the apartment, for which she seeks reimbursement.

---

2 Comprising EUR 3,000 handling fee, plus further fees of EUR 2,500 for the First Claimant, EUR 1,000 for the Second Claimant, EUR 1,000 for the Third Claimant, and EUR 4,500 for the Respondent.

3 Subsequently, an additional USD 2,325 was claimed.

4.3 The Respondent's submissions

38. The Respondent submits that, by failing to attend practices on 28 and 29 October 2011, and later deciding to leave Hungary without notifying the club, the First Claimant was in breach of her obligations under the Contract. The Respondent submits that it was therefore entitled to terminate the Contract on 29 October 2011.

39. The Respondent also submits that the USD 20,000.00 claimed by the First Claimant had not become due by 28 October 2011 and, consequently, she was not entitled to miss practices. The Respondent submits that, in an attempt to settle the dispute and resolve the issue amicably and out-of-court, it offered payment in cash which the First Claimant refused to accept.

40. The Respondent submits that its delay in paying USD 18,000.00 was due to the First Claimant's refusal to open a Hungarian bank account, which was required by the Hungarian regulations and requested by the club management on several occasions. The Respondent argues that, had this been done, payment would not have been delayed.

41. Furthermore, the Respondent submits that any decision made by the First Claimant to skip practices, as well as her alleged decision to leave the country without warning, was a result of her own plans rather than a response to any contractual breach by the Respondent. The Respondent alleges that the First Claimant had no intention of attending the match on 30 October 2011 and that this was the reason why she refused to accept the cash payment.

42. The Respondent also alleges that the First Claimant's behaviour significantly disturbed the mental state of the team and caused embarrassment which affected sponsor confidence and resulted in major loss of revenue for the team. The

Respondent has not quantified that loss but has requested compensation in respect of it.

4.4 The Second and Third Claimants' response to the Second Procedural Order

43. In the Second Procedural Order, the Arbitrator requested that Mr. Lejeune provide documentary proof of his authority to bring a claim on behalf of LBM Management. In response, the Second and Third Claimants provided evidence that Mr. Lejeune, as owner of LBM Management, was entitled to act and enter into contracts on behalf of LBM Management and its clients.

4.5 The Respondent's submissions

44. The Arbitrator sought clarification from the Respondent in relation to the items purchased for the apartment, for which the First Claimant seeks reimbursement. The Respondent submits that at no time was an agreement reached which may have enabled the First Claimant to purchase items for the apartment for which she was entitled to be reimbursed by the Respondent, and the First Claimant is not entitled to recover the amounts claimed.

5. Jurisdiction

45. 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").

46. 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

47. 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.[4]

5.2 Formal and substantive validity of the arbitration agreements

48. 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 chose by the parties or to the law governing the subject-matter of the dispute, in particular the main Contract, or to Swiss law."*

49. Clause 5 of the Contract stipulates:

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

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

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

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

52. In light of the above, the Arbitrator finds that the BAT is able to determine the present dispute.

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

53. 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 such choice, according to the rules of law which the case has the closest connection. Article 187(2) PILA adds that the Parties may authorise the arbitrators to decide *"en équité,"* as opposed to a decision according to the rule of law referred to in Article 187(2). Article 187(2) PILA is generally translated into English as follows:

> *"the parties may authorise the arbitral tribunal to decide ex aequo et bono."*

54. As set out in paragraph 49 above, the Contract stipulates that any disputes arising out of the Contract shall be resolved by the BAT "in accordance with the BAT 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."*

55. Clause 5 of the Contract stipulates that the *"arbitrator shall decide the dispute ex aequo et bono."* Consequently, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono.*

56. 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*[5] (Concordat),[6] 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."*[7]

57. 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."*[8]

58. This is confirmed by Article 15.1 of the BAT Rules according to which the arbitrator shall apply *"general considerations of justice and fairness without reference to any particular national or international law."*

---

5 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).

6 P.A. Karrer, Basler Kommentar, No.289 ad Art. 187 PILA.

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

8 Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717. pp.625-626.

59. In light of the foregoing matters, the Arbitrator makes the findings set out below.

6.2 Findings – the First Claimant

6.2.1 The Respondent's Answer

60. The Claimants have objected to the Respondent being given any further opportunity to make submissions after having failed to submit an Answer to the Request for Arbitration by 1 February 2012, or to pay its share of the advance on costs. In the circumstances of this case, the Arbitrator has decided that justice would best be served by his considering all of the submissions available to him, notwithstanding the Respondent's failure to comply with the timetable and its payment obligations. The Respondent's conduct in each of these respects has been noted and is reflected in this Award.

6.2.2 Termination of the Contract

61. It is undisputed that the Respondent has not made a number of payments which are provided for in the Contract. The Arbitrator finds that, *prima facie*, that is a breach of clause 2b of the Contract.

62. Whether or not the First Claimant was entitled by 28 October 2011 to decline to attend practices depends on the date on which the Respondent's duty to make any payments then due arose. Insofar as the USD 20,000.00 'arrival' payment is concerned, the date on which it fell due for payment is in dispute.

63. The First Claimant arrived in Hungary on 10 October 2011. The First Claimant has submitted, as has the Respondent, that she had a medical exam on 12 October.

64. The translation of the medical report that the Respondent has provided to the Arbitrator is dated 24 November 2011, although this is apparently an error: the copy of that document in the original Hungarian language appears to be dated 24 October. The medical report also indicates, contrary to the submissions of the First Claimant and the Respondent, that the medical exam was conducted on 24 October. In relation to the medical exam, the Arbitrator finds that i) the exam took place on the afternoon of 11 October; and ii) the results of the exam were not passed on to the First Claimant until 24 October at the earliest, if indeed they were passed to her at all before the commencement of these proceedings, which they may not have been.

65. Under clause 4a of the Contract, the First Claimant is deemed to have passed the medical exam within 10 days after her arrival in Györ (i.e by 20 October 2011), provided she is not informed that she has failed the medical within that 10 day period.

66. The matter is arguably complicated by the fact that, contrary to the contractual terms, the First Claimant was required to attend practices prior to receiving the results of her medical examination. Nevertheless, the Contract does not provide for the USD 20,000.00 to be paid until the player passes the medical exam (or is deemed to have passed the exam in accordance with the terms of the Contract).

67. In the circumstances, the Arbitrator finds that the USD 20,000.00 due *"upon arrival and passing medical exam"* became payable on 20 October 2011, the date on which the First Claimant is deemed under the Contract to have passed the medical exam.

68. The First Claimant submits that as a result of the Respondent's failure to pay the USD 20,000.00, she was entitled by 28 October 2011 to demand payment of all outstanding amounts and to decline to attend practices until such sums were received. Having not received the sums set out in the Demand Letter by 5pm on 28 October, the First Claimant missed one practice and one tactical discussion on that day, and a further practice on 29 October.

69. The First Claimant missed another practice on the morning of 28 October 2011. The Arbitrator finds that the reason for this was that she was with Mr Balogh, the Respondent's general manager, rather than because she was purporting to enforce contractual rights earlier than her representatives had said she would in the Demand Letter.

70. The First Claimant would only have been entitled to miss practice on 28 and 29 October if, at that time, a payment due under the Contract had been 15 days late or more. The USD 20,000.00 only became payable on 20 October and, as of 28 October, the first instalment of salary (due on 15 October) had been paid, albeit 13 days late. Therefore the First Claimant was not entitled to miss practice on 28 or 29 October.

71. The Respondent purported to terminate the Contract on 29 October by email to the Second Claimant. The Respondent asserted that: i) the First Claimant was incorrect in claiming that the USD 20,000.00 was due; ii) the First Claimant should pay the club USD 60,000.00 in damages; and iii) the First Claimant should repay the USD 18,000.00 paid on 28 October.

72. The Arbitrator finds that the Respondent was not justified in dismissing the First Claimant on 29 October, despite the fact that she had missed some practices. The Arbitrator has reached this conclusion in light of the following considerations in particular. First, the First Claimant practiced before receiving the results of her medical examination, despite not being required under the Contract to do so. Second, the First Claimant had an excellent attendance record prior to 28 October and no complaints had been made in relation to her performance or conduct. Third, the First Claimant's conduct was reasonable in relation to the delays with payment until 28 October, which was 13 days after the instalment of salary was due. The payment she did receive on 28 October followed a considerable amount of communication between her, her representatives, and the Respondent. Fourth, the First Claimant's

concern in relation to the Respondent's ability to pay the USD 20,000.00 was reasonable, particularly in light of the Respondent's apparent difficulty in sourcing the funds. In this regard, it is noted that the Respondent did not, at that time, communicate to the First Claimant its view that there was no due date for the USD 20,000.00. Finally, the First Claimant only missed two practices and one technical session. While that was a breach of her obligations under the Contract, it was not a very serious breach. In light of her previous attendance record and conduct, and in light of all of the circumstances considered above, it was not a breach which warranted the termination of her contract.

6.2.3 Salary for the 2011-2012 season

73. In addition to the USD 20,000.00 due upon arrival and passing a medical exam, the First Claimant has also claimed her salary until she finds further employment or for the remainder of the Contract.

74. The Respondent denies that the salary payment made on 28 October should be subject to any penalties on the basis that the First Claimant was reluctant to open a Hungarian bank account, despite many requests being made that she do so. The Respondent asserts that this was why it was unable to transfer the salary due on 15 October.

75. The Arbitrator is not persuaded that the delay in paying the First Respondent was caused by any delay or reluctance on the First Respondent's part to open a bank account in Hungary. The Contract requires that the Respondent "*make all arrangements necessary within banking system to allow the [First Claimant] to transfer funds to an account in a bank designated by the [First Claimant], and pay all the wire transfer fees*". This appears to contemplate that the Respondent should make arrangements to pay the First Claimant into an account of her choosing, which may be outside of Hungary. In those circumstances, it is not relevant whether or not

the First Claimant has opened a Hungarian bank account: the Contract permitted her not to do so and to require that payment be made to an account elsewhere.

76. Nothing has been submitted which persuades the Arbitrator that, if the Respondent had sufficient funds, it would have been unable to effect a wire transfer into a US bank account. Additionally, the Arbitrator notes that on 28 October 2011, the Respondent was able to make a payment of USD 18,000.00 into a bank account in Hungary, but was apparently (and without explanation) unable to make an additional payment of USD 20,000.00 at the same time. On 28 October, the Respondent was not disputing that the USD 20,000.00 had fallen due. In these circumstances, the Arbitrator finds it more likely that the reason for the delay in payment of amounts owed to the First Claimant was that funds were not available rather than that the First Claimant did not have a Hungarian bank account.

77. The Contract is described in clause 1 as a "no-cut contract". In light of this, and the Arbitrator's finding above that the Respondent terminated the Contract without just cause, the Arbitrator finds that the First Claimant is entitled to the USD 20,000.00 which became due on 20 October 2011, and to all outstanding salary payable under the Contract, i.e. USD 132,000.00, subject to her duty to mitigate her losses.

6.2.4 Duty to mitigate loss

78. The Respondent retained the First Claimant's player's license until late January 2012, and it was therefore not possible for her to agree to play for an alternative team prior to that date.

79. The First Claimant submitted in her response to the First Procedural Order that she repeatedly requested that the Respondent release her player's license so that she could find an alternative team. It was only once the Second Claimant contacted the

Respondent's counsel that the license was eventually released by the Respondent on 30 or 31 January 2012.

80. On or about 1 March 2012, the First Claimant signed an agreement to play for Tarsus and she started playing the following day. Under the First Claimant's contract with Tarsus, she will be paid USD 26,500.00 in salary payments for the 2011-2012 season. The First Claimant submitted in her response to the First Procedural Order that she had already earned USD 2,000.00 in bonus payments and could potentially earn more.

81. In the circumstances, the Arbitrator considers that the First Claimant made reasonable efforts to mitigate her losses and, to an extent, has been successful in doing so. Therefore, the First Claimant is entitled to a proportion of her salary for the 2011-2012 season, but not the full outstanding sum of USD 132,000.00. It is appropriate in these circumstances to reduce the award to reflect the fact that the First Claimant secured a new contract at the beginning of March 2012.

82. Consequently, the Arbitrator finds, *ex aequo et bono*, that it is appropriate for the Respondent to pay the First Claimant the sum of USD 83,000.00. This represents outstanding salary due under the Contract (including the USD 20,000.00 payable on passing the medical) from the November 2011 instalment until and including the February 2012 instalment, the latter being reduced to USD 9,000.00 to reflect the fact that the First Claimant signed a contract with Tarsus on 1 March 2012.

6.2.5 Cost of air fares

83. Once she had been dismissed, the First Claimant travelled to Spain. She has submitted that she did this with the aim of finding alternative employment with another team. However, the Respondent did not release the First Claimant's license promptly, and she returned home to the US. Her flight to Spain cost EUR 819.50, and her

subsequent flight from Spain to the United States cost EUR 667.45. The First Claimant has submitted, and the Respondent has not denied, that these were the cheapest available flights.

84. Clause 3a of the Contract provides that the Respondent will cover the cost of the three flights to the USA from Hungary. Therefore the Respondent is, in principle, required to pay for the First Respondent's fare back to the US. That obligation would not necessarily require the Respondent to pay for the First Claimant's flight to Spain prior to her subsequent flight to the US. However, it appears that the First Claimant remained in Spain in an effort to mitigate her losses arising from the Respondent's breach of contract in terminating the Contract. In the circumstances, the Arbitrator has concluded that the Respondent must reimburse the First Claimant for the cost of her flight to Madrid and for her subsequent flight to the US (totalling EUR 1,486.95).

85. The First Claimant also claims cash to the value of 2 return flights to West Virginia, which claim is advanced under clause 3a of the Contract. The provision in clause 3a that the First Claimant is entitled to three round trip economy tickets to any US city, one of which is for use by a family member, appears to have been intended to provide part of the First Respondent's compensation for living and working overseas, by facilitating visits to and from family and friends. In circumstances where the Contract has been terminated early (for whatever reason and whether or not such termination is justified), such compensation is not payable. Therefore, while the Arbitrator finds that the Respondent must reimburse the First Claimant for her air fare to the US, the Arbitrator does not award the Respondent cash to the value of two round trip economy tickets between the US and Budapest.

6.2.6 Respondent's arguments in relation to the USD 20,000.00 payment and its cash offer

86. The Respondent submits that the First Claimant was not due USD 20,000.00 upon arrival and passing the medical exam, but instead argues that the Contract does not provide a date by which payment must be made. Consequently, the Respondent argues, there was no delay in transferring this amount to the First Claimant.

87. The Arbitrator does not accept that argument. The Respondent correctly observes that the Contract does not name a date for payment of the USD 20,000.00. However, it is difficult to see how the obligation to pay the USD 20,000.00 could have any meaning at all if it were not possible to ascertain a date on which such payment became due. In fact, a date on which payment is due can be ascertained from the words "*upon arrival and passing the medical exam*". Payment of the USD 20,000.00 is due on the day a player passes the medical exam (or, in this case, is deemed to have done so under the Contract).

88. Further, the Respondent argues that it attempted to pay the USD 20,000.00 in cash on 28 October (to be kept for the First Claimant until banks opened the following week), but that the First Claimant declined to accept that as payment. The Respondent submits that the reason this arrangement was proposed was that it was unable to make a payment into the First Claimant's bank account in Hungary because Hungarian banks close at 2pm on Friday.

89. The Respondent had managed to effect a USD 18,000.00 bank transfer on 28 October, and has not explained why it was unable to transfer the additional USD 20,000.00 on the same day.

90. In the circumstances, the Arbitrator finds that it was reasonable for the First Claimant not to accept the cash either as payment or as an assurance that payment was imminent. Accordingly, the First Claimant remains entitled to the USD 20,000.00.

6.2.7 Flat expenses

91. Clause 4c of the Contract provides that the Respondent shall provide a "*furnished apartment*" complete with "*a cable or satellite TV, DVD player, telephone, DSL high speed Internet and modern household appliances such as a washer and an electrical dryer for her clothing*" to the First Claimant.

92. The First Claimant submits that the flat was not fully furnished and that she was required to purchase items for which the Respondent promised reimbursement. The First Claimant claims to have sent the relevant receipts to the Respondent, but she has not been reimbursed.

93. The Request for Arbitration refers to a value of approximately USD 70.00 in relation to these expenses and the First Procedural Order requested that the First Claimant provide further details in relation to the value of the purchases and demonstrate that the Respondent agreed to pay for these items. The First Claimant, in her response to the First Procedural Order, revised the amount claimed to USD 955.08.

94. The Respondent submitted, in its response to the Second Procedural Order, that at no time did it agree to reimbursing the Claimant for purchases made for the apartment, and therefore the First Claimant must cover the cost of any such purchases herself.

95. The Arbitrator finds that there is no documentary evidence of such an arrangement being agreed between the parties, either in the Contract itself or otherwise. Therefore, the Arbitrator finds the First Claimant is not entitled to be reimbursed for any money she spent on items for the flat.

6.2.8 Shipping costs

96. The First Claimant submits that she is also entitled to USD 2,020.92 as reimbursement for the cost of shipping two boxes from the US to Hungary.

97. The Respondent has failed to reply to this submission. However, on the basis that such payments are not provided for under the Contract (or any other agreement that has been presented to the Arbitrator), the Arbitrator finds that such costs are not payable.

6.2.9 The loss asserted by the Respondent

98. The Respondent's "statement of defence", dated 12 March 2012, and submitted in response to the First Procedural Order, asserts that the series of events that led to the dismissal of the First Claimant caused *"major loss of revenues for the team"*. The Respondent requests that the Arbitrator "*compel the petitioners to compensate [the Respondent's] damages related to this procedure*". The Respondent has not submitted any particulars or evidence of any such damage.

99. In the email sent by the Respondent dismissing the player on 29 October 2011, the Respondent claimed USD 60,000.00 in damages. This amount was not explained or justified in that email, and a claim to that particular amount has not been repeated in these proceedings.

100. In the circumstances, the Arbitrator does not accept any counterclaim by the Respondent for damages for loss alleged to have been caused by the First Claimant's actions.

6.2.10 Late payment fees

101. The First Claimant claims late payment fees in accordance with the penalty provisions set out in Exhibit 1 to the Contract on all outstanding amounts.

102. Subject to a consideration of the quantum of late payment fees in total (discussed below at paragraphs 106 – 107), and to the First Claimant's mitigation of her loss (discussed above at paragraphs 78 – 82), any applicable late payment fees are properly payable under the Contract's penalty provisions.

103. The Respondent's purported termination of the Contract was not justified (see paragraph 72 above). In the circumstances, the Arbitrator considers that any applicable late payment fees continued to accrue and to be payable until the date the Claimants submitted the Request for Arbitration, i.e. 11 November 2011.

104. Accordingly, late payment fees are owed in relation to the USD 20,000.00 (due on arrival and on passing the medical exam (which was due on 20 October 2011)), in the amount of USD 20.00 per day from 21 October 2011 until 11 November 2011 (i.e. 22 days), being USD 440.00 in total.

105. The payment of the First Claimant's first instalment of salary was paid 13 days late. Accordingly, late payment fees are also owed in relation to the first instalment of the First Claimant's salary, in the amount of USD 20.00 per day from 16 October 2011 until 28 October 2011 (i.e. 13 days), being USD 260.00 in total.

106. The Arbitrator considers that once the position under the Contract in respect of penalty payments has been determined, it is necessary to consider the total amount arrived at to consider whether such an amount is excessive in light of all the circumstances, including in light of the factors referred to in **FAT 0036/09 Petrosean v Women Basketball Club Spartak St Petersburg** and **FAT 0100/10 Taylor v KK Crvena Zvezda**. The total amount so payable in this case would be USD 700.00.

107. The circumstances of each case are different and the Arbitrator must consider the individual circumstances of each case. In the circumstances of this case, deciding the matter *ex aequo et bono*, the Arbitrator does not consider that these penalty payments are excessive, and finds that they are payable.

6.3 Findings – The Second and Third Claimants

108. The Second and Third Claimants, Mr. Eric Wiesel and LBM Management (together and hereinafter the "Representatives") are also seeking relief in this action.

109. The Representatives assert that they are owed USD 15,000.00 by the Respondent in respect of services rendered on behalf of the First Claimant before 20 January 2012.

110. Exhibit 2 to the Contract provides that the Respondent will pay to the Third Claimant a representative's fee of USD 15,000.00. It does not provide for any payment to the Second Claimant.

111. The party named as the Third Claimant in the Request for Arbitration is "*Yves Lejeune as principal of LBM Management*". In their response to the Second Procedural Order, the Claimants provided documentary proof that Mr. Lejeune has authority to bring LBM Management's claim on its behalf.

112. The Third Claimant appears to have performed its obligations under the Contract.

113. In the circumstances, the Arbitrator finds that the Representative's fee is payable in full, and became so payable on 20 January 2012, but that it would be inappropriate to award any part of that fee to the Second Claimant. The Arbitrator recognises that the amount to be paid might, in practice, be shared somehow between the Second Claimant and the Third Claimant, in accordance with the commercial relationship that may exist between them.

6.4 Interest

114. The Claimants have claimed interest at a rate of 5% per annum on all amounts awarded. The Arbitrator finds that payment of interest is a customary and necessary compensation for late payment and there is no reason why the Claimants should not be awarded interest in relation to the amounts awarded, except where alternative compensation is available (see paragraph 115 below). The Arbitrator finds 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 outstanding payments on which payment of interest is appropriate.

115. In relation to the USD 20,000.00 due to the First Claimant on arrival and on passing the medical exam, the Arbitrator has awarded the First Claimant penalty fees from 21 October 2011 until 11 November 2011 inclusive. The Arbitrator finds that it would be inappropriate to award the First Claimant interest on the USD 20,000.00 during that period because the penalty fees serve as sufficient compensation. However, interest at 5% per annum should be paid on that sum from 12 November 2011 until the date that payment is made.

116. In relation to payments of salary due on 15 November 2011 and thereafter, interest should be paid on each amount from the day following the date on which it fell due until the date that payment is made. For the avoidance of doubt, those dates are as follows:

Salary instalment	**Date from which interest is payable**
November 2011 (USD 18,000.00)	16 November 2011
December 2011 (USD 18,000.00)	16 December 2011
January 2012 (USD 18,000.00)	16 January 2012
February 2012 (USD 9,000.00)	16 February 2012

117. For the reasons set out at paragraphs 81 – 82 above, only USD 9,000.00 is payable for February 2012, and no further salary instalments are payable after that.

118. The Arbitrator finds that interest is also payable on the First Claimant's air fares, and that such interest should be payable from the date on which the ticket to the USA was purchased, namely 1 November 2011, until the date that payment is made.

119. The Arbitrator finds that interest is also payable on the Representative's fee, and that such interest should be payable from the day following the date on which the payment fell due under the Contract, namely 21 January 2012, until the date that payment is made.

7. Costs

120. 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 award or communicated to the Parties separately.

121. 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.

122. On 20 July 2012, 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 9,000.00.

123. The Arbitrator notes that: the First Claimant was successful in establishing the majority of her claims; the Second Claimant was unsuccessful in establishing his claim; and the Third Claimant was successful in establishing its claim.

124. The Arbitrator notes that the Respondent did not pay its share of the Advance on Costs. The Arbitrator considers it appropriate to take into account the non-reimbursable fee when assessing the legal expenses incurred by the Claimants in connection with these proceedings. Thus, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

- The Respondent shall pay to the Claimants EUR 9,000.00, being the amount of the costs advanced by the Claimants.

- The Respondent shall pay to the Claimants the amount of EUR 8,000.00 as a contribution towards their legal fees and expenses.

8. Award

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

1. **Lövér Sport KFT aka UNI Seat Györ is ordered to pay Ms. Renee Montgomery the following amounts in respect of her salary:**

   i. **USD 20,000.00 plus interest at 5% per annum from 12 November 2011 until the date that payment is made;**

   ii. **USD 18,000.00 plus interest at 5% per annum from 16 November 2011 until the date that payment is made;**

   iii. **USD 18,000.00 plus interest at 5% per annum from 16 December 2011 until the date that payment is made;**

   iv. **USD 18,000.00 plus interest at 5% per annum from 16 January 2012 until the date that payment is made; and**

   v. **USD 9,000.00 plus interest at 5% per annum from 16 February 2012 until the date that payment is made.**

2. **Lövér Sport KFT aka UNI Seat Györ is ordered to pay Ms. Renee Montgomery penalty payments of USD 20.00 per day from 21 October 2011 until 11 November 2011, being USD 440.00 in total.**

3. **Lövér Sport KFT aka UNI Seat Györ is ordered to pay Ms. Renee Montgomery penalty payments of USD 20.00 per day from 16 October 2011 until 28 October 2011, being USD 260.00 in total.**

4. **Lövér Sport KFT aka UNI Seat Györ is ordered to pay Ms. Renee Montgomery EUR 1,486.95 as reimbursement for air fares, together with interest payable at a rate of 5% per annum from 1 November 2011 until the date that payment is made.**

5. **Lövér Sport KFT aka UNI Seat Györ is ordered to pay LBM Management USD 15,000.00 as compensation for the representative's fee, together with interest payable at a rate of 5% per annum from 21 January 2012 until the date that payment is made.**

6. **Lövér Sport KFT aka UNI Seat Györ is ordered to pay the Claimants EUR 8,000.00 as reimbursement of their legal fees and expenses.**

7. **Lövér Sport KFT aka UNI Seat Györ is ordered to pay the Claimants EUR 9,000.00 as reimbursement of the advance on BAT costs.**

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

Geneva, seat of the arbitration, 2 August 2012

Raj Parker
Arbitrator