ARBITRAL AWARD

(BAT 0256/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Coach

- Claimant 1 -

Agency

- Claimant 2 -

vs.

Club

- Respondent -

1. The Parties

1.1 The Claimants

1. Mr. Coach is a professional basketball coach, who was retained by the Respondent, the Club, for four seasons as and from the 2011-2012 season.

2. The Agency is a basketball agency located at _____. Claimant 2 represented Claimant 1 leading to the latter's retainer by the Respondent. Mr Agent is the principal of Claimant 2.

1.2 The Respondent

3. The Club (hereinafter referred to as "the Respondent") is a professional basketball club in _____.

2. The Arbitrator

4. On 13 March 2012, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert SC as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator, to his declaration of independence or his conduct of this Arbitration.

3. Facts and Proceedings

3.1 Summary of the Background and the Dispute

5. On 16 June 2011, Claimant 1 and the Respondent entered into an agreement whereby

the latter engaged Claimant 1 to be its coach for four seasons of the _____ league beginning with the 2011-2012 season ("the Agreement"). His salary was agreed at USD 700,000.00 net per season for 2011-2012 and 2012-2013, and at USD 800,000.00 net per season for 2013-2014 and 2014-2015. By any measure these figures are substantial. In addition, Claimant 1 was to receive a substantial array of benefits and also the potential for significant bonus payments depending upon whether or not certain defined successes were achieved on court. The Agreement also provides for a "Representative Fee" for Claimant 2, set at 10% of Claimant 1's salary. The Agreement provided that this fee was deemed to be part of Claimant 1's salary. The arbitrator also notes that Claimant 1 held at the time of the making of the Agreement, and continues to hold, the highly prominent and important position in _____ (and globally) of head coach to the national Olympic men's basketball team.

6. Claimant 1 commenced his duties as coach as per the Agreement, but a few months into its term, things went significantly and spectacularly awry. Over a brief few days, namely from 18 December 2011 to 4 January 2012, the parties fell out, argued, negotiated, and then the Agreement was terminated by the Respondent.

7. For reasons which will be elaborated upon later in this Award, it is not necessary to go into the precise detail of each and every event surrounding the reasons why the Parties are in dispute and why the Agreement was terminated. A myriad of reasons and competing factors, including perceptions of clashes of culture, were proffered by the parties in the course of the case; however, as the case has progressed, it has become clear to the Arbitrator that a few key elements are determinative of this case. These will be discussed in detail below. The Arbitrator wishes to make clear however, that he has read and carefully considered every document placed before him and also taken into account the lengthy oral argument and testimony adduced on 5 September 2012.

8. For present purposes, the key background points are described in the following paragraphs.

9. The Agreement and Claimant 1's employment was terminated by Respondent in early January 2012 (the exact date is not of particular importance). The dispute which ultimately led to this termination (or denouement) broke out on 18 December 2011 when the Respondent appears to have intimated to Claimant 1 that his precise status as coach was going to change. The Respondent appears to have not really taken to the Claimant 1's style of coaching, or felt that it should have a greater control over what he did or did not do. The Respondent intimated to Claimant 1 that he was not going to be head coach in the sense of the "commander" at court side, but rather that he would have (as is often described) an "upstairs" role. This was not to Claimant 1's liking and precipitated a vigorous interaction between the parties.

10. The myriad details of who said what to whom and what was meant are superfluous to this Award, notwithstanding the amount of time the Parties dwelt upon them in the written and oral part of this case. The key point is that as and from 18 December 2011, the Parties quickly descended into an increasingly antagonistic position *vis-à-vis* each other. This manifested itself most particularly in the stream of correspondence flowing from the pen of Mr Agent (which alternated between conciliatory and belligerent).

11. One particular aspect of this period which is most important, is that shortly after the dispute broke out, the Claimants were looking for a significant severance payment or agreed sum to bring the Agreement to an end. Mr Agent specifically drew up a draft severance agreement on 27 December 2011 requesting a payment of USD 1,500,000.00. The Respondent was apparently not interested in paying the sort of sums which the Claimants wanted at that stage.

12. The Parties spent much time in this arbitration on matters such as Claimant 1's behaviour during matches, his handling of players, his travelling on national team matters and so on. While these matters, at best, give some context to the Parties' relationships at the material time, the Arbitrator does not believe it appropriate for him to second guess the actions of highly experienced sporting professionals in the heat of

battle absent, for example, proof of bad faith or other particularly serious intervening factor.

13. The Claimants bring this case, by reason of the termination of the Agreement, seeking all of the monies which they say would have accrued to them had there been full performance. The Respondent denies all liability and also has challenged jurisdiction relying upon _____ [the Club's national] law and employment rules (as regards Claimant 1) and pointing to the fact that Claimant 2 is not a party to the Agreement.

3.2 The Proceedings before the BAT

14. The following summary of the proceedings identifies the key steps in this case. There was a myriad of communications in this case and not all of these are recorded in this Award. Only those which the Arbitrator has determined are of principal relevance are set out.

15. The Claimants filed a Request for Arbitration dated 13 February 2012 in accordance with the BAT Rules.

16. The non-reimbursable handling fee in the amount of EUR 7,000.00 was paid on 15 February 2012.

17. On 14 March 2012, the BAT informed the Parties that Mr. Klaus Reichert SC had been appointed as the Arbitrator in this matter. Further, the BAT fixed the advance on costs to be paid by the Parties as follows:

"Claimant 1 (Mr. Coach)	*EUR 10,000*
Claimant 2 (Ageny)	*EUR 2,000*
Respondent (Club)	*EUR 12,000"*

The foregoing sums were paid as follows: 16 March 2012, EUR 12,000.00 (Claimants' share) paid by Claimant 1; and 11 April 2012, EUR 11,985.00 (Respondent's share) paid by _____.

18. On 23 April 2012, the Respondent filed its Objections to Jurisdiction. On 25 April 2012, the Respondent filed its Answer. The jurisdiction issues raised were threefold and the gist of these were as follows: (a) a local contract signed between the parties; (b) _____ [the Club's national] law requiring local resolution of employment disputes; and (c) Claimant 2 is not a party to the arbitration agreement. The Respondent requested a hearing.

19. On 2 May 2012, the Claimants filed their Reply.

20. On 1 June 2012, the Respondent filed its Rejoinder.

21. On 6 June 2012, the Arbitrator sent the following communication to the Parties (quoted in relevant part):

> *"In view of the Respondent's request to hold a hearing, the Arbitrator herewith requests the Claimant to state his position on this request by no later than Monday, 11 June 2012. The Claimant's comments shall be strictly limited on the Respondent's request to hold a hearing and no further submissions will be considered at this point. Upon receipt of the Claimant's response, the Arbitrator will decide on the Respondent's request in accordance with Article 13 of the BAT Arbitration Rules."*

22. Following an immediate response from the Claimants, and duly considering same, the Arbitrator determined as follows:

> *"Having carefully considered the parties' positions on this issue, and in accordance with Article 13 of the BAT Arbitration Rules, the Arbitrator has decided that it will be necessary to hold a hearing. The physical place of the hearing shall be Munich, Germany (this is not a designation of the seat of the arbitration), and the hearing shall be conducted on a single day."*

23. Following further communications with the Parties, the date for the hearing was fixed

for 5 September 2012.

24. On 19 July 2012, the Parties were sent detailed information concerning the arrangements for the hearing, and deadlines for the remaining steps to be taken.

25. On 1 August 2012, the Respondent indicated who would be present on its side for the hearing.

26. On 15 August 2012, the Respondent filed its pre-hearing submissions and a summary of the witness testimony to be adduced by its two witnesses. Of particular importance for aspects of this Arbitration […], the Respondent filed a copy of an email received by an individual by the name of "Roger" within its organisation on 21 December 2011 from an email address benjamin.corhen@fiba.us.com (hereinafter "the bogus email"). The bogus email, on its face, suggests that it was from the Legal Affairs Manager of FIBA (the current occupant of that post is a Benjamin Cohen – not "Corhen") and contains, in substance, an apparent desire on the part of the Legal Affairs Manager of FIBA that the dispute between the parties be settled and a request that relevant information about the dispute be sent to the author by the Respondent. It is important to note that this email was sent just a few days after (as noted above) the dispute between the parties had broken out. At the same time Mr Agent was sending much correspondence to the Respondent.

27. The bogus email has the following features:

    a. The author, masquerading as the Legal Affairs Manager of FIBA, states that he has received multiple communications from a FIBA registered agent, Mr Agent about his client, Claimant 1;

    b. The author says that the "breach has been logged with us";

c. The author invites the Respondent to submit anything in support of its position;

d. The author suggests that "we" (connoting FIBA) identified an aspect of the contract between Claimant 1 and the Respondent in favour of Claimant 1;

e. The author, critically, asks for any document which Claimant 1 might have signed in relation to a new position and says that this "would be extremely helpful to us at FIBA if you could submit such a document";

f. The author says that it is not a FIBA position to take any position until an arbitration has been filed;

g. The author says that "we" (again, masquerading as FIBA) are extending the right to you (Respondent) to place items on the record to be addressed if an arbitration does take place; and

h. Finally, and most extraordinarily, the author is unequivocal in stating that it is FIBA's sincere hope that the dispute will be resolved as the matter involves an Olympic coach in an Olympic year, and further asks that Respondent states "for the record" whether its position is that it does not wish to settle or discuss.

28. As already noted, the principal point of the correspondence directed to the Respondent from Mr Agent appeared to be a fervent desire on his part to obtain a substantial severance payment for his client. While there is nothing particularly blameworthy or legally objectionable about someone attempting to drive a hard bargain, the timing, context, tone and tenor of Mr Agent's correspondence is of importance.

29. It is worth noting that the Respondent specifically did not, at the stage of the filing of its pre-hearing submissions, make any allegations about the provenance of the bogus email.

30. On 15 August 2012, the Claimants filed their pre-hearing submissions.

31. On 22 August 2012, the Claimants indicated who would be present at the hearing.

32. On 31 August 2012, the Arbitrator issued the following direction to the Parties (relevant extracts):

> *"1. […]*
>
> *2. The Arbitrator directs the Respondent to immediately provide by attachment to an email the original (not PDF or otherwise) of the email from "Corhen" (Index 2 of the Respondent's August submissions) to all recipients so that it can be seen on screen as it would normally appear by a recipient and also to allow everyone to see its electronic properties.*
>
> *3. The Claimants' Counsel is invited to confirm or deny the FIBA agency status of Mr Agent which the Respondent states in its August submissions by way of a yes or no answer. No further elaboration is directed.* [The Claimants confirmed that Mr Agent was not a FIBA agent at the material times notwithstanding his clear declarations to the contrary in correspondence to the Respondent during the short period when the parties were in dispute]
>
> *4. […]"*

33. The hearing took place on 5 September 2012 in Munich, Germany. The Parties were asked by the Arbitrator at the outset whether they had any objections to the procedure adopted to date in the case. Both sides, through their counsel, indicated without reservation that they had no such objections. Thereafter, the Arbitrator invited Roger, the person who had received the bogus email, to log onto his Gmail account and demonstrate its existence. This was done by Roger in the presence of the Arbitrator and the bogus email was seen by the Arbitrator in the Inbox in its place on 21 December 2011. The Arbitrator was therefore satisfied that the bogus email was indeed received on 21 December 2011 by Roger. The Arbitrator informed the parties

that he was going to make investigations as to the identity of the person behind the bogus email. Following an opportunity given to the Parties to consider the position (including a short recess to allow the parties consult in private with their counsel) they each indicated their willingness and consent to the Arbitrator undertaking this investigation.

34. The hearing proceeded with the Parties making oral submissions on jurisdiction. The Parties then made oral submissions on the merits. The following witnesses testified (by way of direct testimony and then under cross examination): Claimant 1, Mr Agent, Mr _____ (Roger) and Mr _____ [an official of the Club]. It is of particular importance that each of the witnesses confirmed in unambiguous terms that they knew nothing of the bogus email. The Arbitrator specifically asked each witness about the bogus email and he was left in no doubt whatsoever that each of them testified that they had no connection of any kind whatsoever to its being sent to Roger.

35. At the conclusion of the witness testimony, the Parties were consulted by the Arbitrator as to the timing of post hearing submissions and a direction was made orally in that regard. The Parties were also consulted by the Arbitrator regarding the text of an Order which he proposed issuing to an entity in the United States of America (further details of which are set out later in this Award). Finally, the Parties were asked by the Arbitrator at the conclusion of the hearing whether they had any objections to the procedure adopted. Both sides, through their counsel, indicated without reservation that they had no such objections.

36. After the conclusion of the hearing, on 5 September 2012, the Arbitrator caused an Order to be issued and sent to _____ [two webhosting companies], who appeared to be the hosting companies behind the email address benjamin.corhen@fiba.us.com. […] Those companies were directed to deliver the following information:

    1. *the identity of the person or persons or entity or entities which directly or indirectly*

owned and/or controlled and/or operated and/or had access rights to the email address benjamin.corhen@fiba.us.com for the time period 15 December 2011 to 25 December 2011 inclusive; and

2. *the identity of the person or persons or entity or entities which directly or indirectly owned and/or controlled and/or operated and/or had access rights to the domain www.fiba.us.com for the time period 15 December 2011 to 25 December 2011 inclusive; and*

3. *the identity of the person or persons or entity or entities which directly or indirectly brought about the creation of the domain www.fiba.us.com.*

37. On 6 September 2012, the Arbitrator received an email from a _____, Paralegal at _____ [one of the webhosting companies] setting out certain information in response to the Order of 5 September 2012. […]

38. On 12 September 201,2 the Arbitrator informed the Parties in the following terms (in part):

> *"Upon consideration of its contents, the Arbitrator caused an investigation to be undertaken as to the information contained in that email. Both postal addresses do not appear to be genuine. The telephone number in the United States also appears not to be genuine. However, the last contact detail, namely a mobile telephone number in Turkey did appear to be genuine. Upon direction from the Arbitrator, the BAT Secretariat rang this number on Monday. A man answered but no comprehensible information could be gleaned from him. Upon further direction from the Arbitrator, the BAT Secretariat sent an SMS to the Turkish telephone number and also an email in like terms to benjamin.corhen@fiba.us.com. A print-out copy is attached. There has been no response to this SMS and email. Given the seriousness of the matter, the Arbitrator is presently considering whether to set in train a process by which the Turkish Courts would be requested to order the Turkish mobile telephone company concerned to identify the name and address of the owner of this telephone number. The Arbitrator will inform the parties in due course of his decision as regards his decision in relation to this Turkish telephone number. If the parties wish to make any comments they are at liberty to do so together with their post-hearing brief. These comments should not exceed 2 (additional) pages."*

[…]

39. On 13 September 2012, the Claimants and the Respondent filed their Post Hearing Briefs.

40. On 19 September 2012, the Arbitrator issued a further Order […] to _____ [the two webhosting companies] following consultation with the Parties. The following information was directed to be produced to the Arbitrator:

> *(1) the date upon which the email address benjamin.corhen@fiba.us.com was created; and*
>
> *(2) the identity of the person or persons or entity or entities which made the payment for the creation and any subsequent maintenance payments of the email address benjamin.corhen@fiba.us.com; and*
>
> *(3) the identity of the person or persons or entity or entities made the payment for the creation and any subsequent maintenance of the domain www.fiba.us.com; and*
>
> *(4) the IP address from which the login to the account of benjamin.corhen@fiba.us.com was performed when sending the said email to [Roger's email address] on 20 December 2011.*

41. No response was received within the time permitted. On 27 September 2012, the Arbitrator informed the Parties as follows:

> *"The Arbitrator wishes to inform the parties that there has been no reaction from the entities in the United States to his most recent Order. It appears to the Arbitrator that the _____ [one of the webhosting companies] has had a change of heart and its initial co-operation has, for some reason, changed. Thus, both in the United States and in Turkey, those who may well have detailed knowledge of the benjamin.corhen@fiba.us.com email address are not giving the necessary co-operation. The Arbitrator has decided to make enquiries first in the United States as regards what may or may not be possible with the aim of identifying who is behind the email. The Arbitrator has made some preliminary enquiries as to the possibility of obtaining a court order in Florida against _____ [one of the webhosting companies] and those enquiries have led to the initial view that a provision of the US Federal civil procedure rules (28 U.S.C. § 1782) is indeed available to him as arbitrator to obtain US-style*

discovery. The Arbitrator is now making further enquiries as to the retention of local counsel in Florida and will revert to the parties with progress and will canvass their views prior to any retention of such counsel."

42. On 28 September 2012, the Arbitrator issued a preservation order to _____ [the webhosting companies]. This was acknowledged by the aforementioned _____ [Paralegal] on 28 September 2012 in the following terms:

"The legal hold and document preservation is in effect as of this date."

The Parties were informed of this development on 8 October 2012.

43. On 9 October 2012, the Arbitrator issued the following letter (in relevant part) to _____ [the webhosting companies]:

"The purpose of this letter is to afford _____ [the webhosting companies] one final opportunity to furnish to me the information ordered by me in my Order of September 19th, 2012, namely:

1. ***the date upon which the email address benjamin.corhen@fiba.us.com was created; and***

2. ***the identity of the person or persons or entity or entities which made the payment for the creation and any subsequent maintenance payments of the email address benjamin.corhen@fiba.us.com; and***

3. ***the identity of the person or persons or entity or entities made the payment for the creation and any subsequent maintenance of the domain www.fiba.us.com; and***

4. ***the IP address from which the login to the account of benjamin.corhen@fiba.us.com was performed when sending the said email to [Roger's email address] on 20 December 2011.***

*If this information is not supplied, as directed, to me at _____ [the Arbitrator's email address] **by 5pm Geneva time on Tuesday, October 16th, 2012**, then I will proceed to have US Attorneys seek the necessary orders against _____ [the webhosting companies] pursuant to **28 U.S.C. § 1782** which provides as follows: (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested*

person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege. (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

Please note specifically that I have already taken preliminary advice from leading US Attorneys who specialize in this field of law and have an office in Miami (with an eye to an application to the relevant courts in Florida). I, as an arbitrator duly appointed in an international arbitration seated in Geneva, Switzerland, am an "interested party" within the meaning of 28 U.S.C. § 1782.

This letter constitutes a final opportunity afforded by me to _____ [the webhosting companies] to avoid the necessity of a court order being sought pursuant to 28 U.S.C. § 1782. In the event that the information is not produced to me by the aforementioned deadline then this letter will be presented to the relevant court and relied upon, as appropriate."

44. On 11 October 2012, _____ [the Paralegal] sent a spreadsheet ("the Spreadsheet") of information. […] Amongst many items of information disclosed, Mr Agent (in particular his credit card) was indicated as the person who had paid for the fiba.us.com domain and the benjamin.corhen@fiba.us.com email address.

45. On 12 October 2012, the Parties were informed of the information received from _____ [the webhosting companies] and also received a copy of the Spreadsheet. The Parties were invited to comment.

46. On 12 October 2012 the Claimants commented as follows:

"As you can imagine, the answer from _____ [one of the webhosting companies] is particularly surprising to me. After consulting with Mr Agent about the email that _____ [one of the webhosting companies] sent him on 27 September 2012, it appears that, after the BAT hearing held in Munich, Mr Agent has done some research

and found out that his credit card had been charged with costs relating to the domain FIBA.US.COM. He has filed a complaint with his credit card company, which in turn has requested _____ [one of the webhosting companies] for additional information with regard to this payment. The email of 27 September 2012 is the answer to Mr Agent further to the complaint filed with the credit card company. It has to be noted that Mr Agent has been placed under a silence order by the credit card company in order to preserve full confidentiality on this matter. Should he breach such silence order, the credit card company would no longer guarantee his rights to privacy. This is why he has not reported anything in that respect, neither to me, neither to the BAT.

In any event, the response of _____ [one of the webhosting companies] is eloquent: "Mr Agent has not been a part of that domain and has no control on the account for FIBA.US.COM and we view this account as being established fraudulently and the account and domain has since been shut down, we apologize for any inconvenience."

This shows the following in my view:

1) *Mr Agent has clearly nothing to do with regard to "FIBA.US.COM"*

2) *Mr Agent has been the victim of a fraud and someone has succeeded in charging his credit card in order to create an artificial link between him and the above-mentioned domain.*

3) *It appears that someone has an interest in creating the appearance that Mr Agent is the author of the fraudulent email dated 21 December 2011.*

4) *Both Claimants keep having difficulties in understanding why it took the Respondent so much time to submit the fraudulent email to the BAT.*

I have no further comment to do at this stage on the results of your investigation. However, I respectfully reserve my clients' rights to express their views, if needed, on any possible observation made by the Respondent.

My clients also hope that, with the conclusion of this investigation, the award on the merits will be issued shortly and that the resolution of this dispute will not be further delayed."

47. On 19 October 2012, the Respondent commented on the Spreadsheet and the Claimants' response. In relevant part, the Respondent stated as follows:

"Due to the technical nature of this investigation and the technical aspects involved, we strongly believe that any findings, evidence or information available so far should be assessed on the basis of reasonableness and common sense in order to reach a logical explanation for the events that have taken place. The use of common sense and logic, supported by technical evidence, has been confirmed as means of coming to judicial conclusions in several occasions by sport arbitration tribunals [cf. CAS 2011/A/2490, Köllerer v. ATP, WTA, ITF, GSC; CAS 2011/A/2621, Savic v. PTIOs].

On this basis we find that there is already sufficient ground to logically identify a connection between Mr. Agent and the domain FIBA.US.COM, and consequently to the email of 21.12.2011, considering the following established facts, which are related to his conduct and his interests in the dispute:

1. Costs relating to this domain have been charged to Mr. Agent's credit card.

2. Mr. Agent failed to find out and report in reasonably due time any alleged fraudulent charge on his credit card and failed to cooperate with the Arbitrator

3. Mr. Agent contacted _____ [one of the webhosting companies] secretly on the side of the investigation, after the Hearing.

4. _____ [one of the webhosting companies] gave information to Mr. Agent about refund of amounts and the shutting down of the domain.

In the same vein the arguments put forward by Claimant should be dismissed on the following grounds:

1. There is no evidence to support the conclusion by _____ [one of the webhosting companies] that Mr. Agent "has clearly nothing to do with regard to "FIBA.US.COM",

2. There is no evidence, yet, as to whether Mr. Agent has been the victim of a credit card fraud and who might be the mastermind behind it.

3. There is no evidence or indication that an unknown person might have the ability and the interest in creating an appearance that Mr. Agent is the author of the fraudulent email of 21.12.2011.

Finally, the relevance of this fraudulent email to the merits of the dispute is undeniable and extremely important:

1. The sender was perfectly informed about the details of the case and the relationship between the parties at the time.

2. The wording and the arguments in this email seem to be suspiciously similar to the ones Mr. Agent himself is using in his correspondence with the Club around the time when the email was sent, as well as in the Request for Arbitration he filed before BAT.

3. The suggestions made in this email were in line with the efforts and the interests of both Claimants at that point in time, namely, to incite the Club engage into settlement discussions and to push for a termination settlement with the best possible amount of compensation.

Without doubt, a fake FIBA warning against the Club at that time could only serve the interests of both Claimants, who insisted on an immediate contract termination and payment of settlement. So, in spite of Claimants' urge for a quick award, we strongly believe that the ongoing investigation is of the outmost importance to the merits of the

dispute and therefore, we respectfully request that the Arbitrator pursues further the investigation also in light of the new findings that have emerged so far.

Notwithstanding the above, we find that there is already convincing evidence pointing logically to the direction of a connection between Mr. Agent and the domain "FIBA.US.COM" and the fraudulent email of 21.12.2011, given his conduct and his interests in the dispute. This should be seriously weighed in consideration of the merits and in particular in connection to the circumstances of termination of the Employment Agreement on 5.01.2012 and the degree of fault of the parties in the failure of the employment relationship."

48. On 22 October 2012, the Claimants commented on the Respondent's position:

"The Claimants are not surprised by the Respondent's insistence and energy in trying to elaborate further accusations against the Coach and his Agent. While, objectively, the fraudulent email seems to be an event of less importance for the Respondents than for the BAT, the Club's perseverance to put the blame on Mr Agent appears as a last resort strategy to try to avoid their liabilities with regard to the breach of the employment contract and its consequences.

Regarding the Respondent's arguments relating to the use of common sense and logic, the Claimants trust that the application of the principle ex aequo et bono does not exclude the compliance with the general principles of the burden of proof and of the probatio diabolica. If it is the Respondent's case that Mr Agent is the author of the fraudulent email, then the burden of proof rests on the Club to prove it. Likewise, it is not for the Agent to prove that he is not the author of such fraudulent email, although the results of the investigation tend to reach such conclusion, in view of the answers given by _____ [one of the webhosting companies] further to the sub poena orders and of the confirmation provided by the credit card company about the fraud that Mr Agent as been the victim of.

The Claimants reiterate their willingness to cooperate in any further evidentiary measures that the Arbitrator might order, if he deems it appropriate. They also consider that this matter should now be decided on the merits without granting the Respondents any further opportunity to delay the compliance of its duties."

49. On 22 October 2012, the Arbitrator sent the following communication to the Parties:

"The Arbitrator thanks the parties for their various comments and observations on the information received from _____ [the webhosting companies].

1. The Arbitrator wishes to have the Claimants' views on the following two items which appear on the spreadsheet which have not been referred to by the parties in their submissions:

(a) On the first sheet ("benjamin.corhen") the Arbitrator notes the contents of Row 1. In

particular the Arbitrator refers to:

20/12/2011 01:49 order_confirmation _____ [the Agent's email address]

This seems to indicate that on 20 December 2011 the order confirmation went to Mr Agent's email address. This is the same email address used by Mr Agent in this arbitration. Please comment in such manner as seen fit and, if felt appropriate, attach any documents in relation thereto.

(b) On the second sheet ("fiba.us.com") the Arbitrator notes the contents of cell R23. The parties will recollect that the Arbitrator directed _____ [the webhosting companies] to identify the relevant IP address. The IP address stated on the spreadsheet is 99.243.104.53. IP addresses are readily checked on the internet and the Arbitrator has consulted www.whatismyipaddress.com, www.geobytes.com/iplocator.htm, and http://domaintz.com/tools/hosting-history/ (just as a random sample of many IP look up sites available). The search on each returns a result which pinpoints the IP address as being located in _____. That is the same town or city stated to be the address of Mr Agent. Please comment in such manner as seen fit and, if felt appropriate, attach any documents in relation thereto.

2. The Claimants are at liberty to send such documents or exhibits as they see fit in relation to the spreadsheet."

50. On 24 October 2012, the Claimants responded in the following manner: (a) a covering email from Counsel; and (b) and accompanying letter from Mr Agent.

51. The covering email from Counsel (referred to in paragraph 50 above) stated the following:

"This is to acknowledge receipt of the email of 22 October 2012.

Given the complexity of the matter and the subjectivity of the suspicions directed at Mr Agent, the latter has decided to respond personally to the questions posed by Arbitrator in the last Procedural Order. Please find enclosed his letter accordingly.

The only thing that I would add is that it is very doubtful, to say the least, that _____ [one of the webhosting companies] may be suspected of having lied to or mislead the Arbitrator on questions which were put to it within a subpoena order, knowing the serious consequences that could derive from such a purported lie/misleading answer.

As a proper witness, _____ [one of the webhosting companies] has confirmed that Mr Agent has nothing to do with the domain "FIBA.US.COM" and that he has been the victim of a fraud. If requested by the BAT, _____ [one of the webhosting companies] could

also confirm the statements contained in the attached letter from Mr Agent."

52. The letter from Mr Agent stated the following:

> *"I requested of our representation to allow me to personally answer your most recent request and extend myself and hopefully clarify some of these issues below are the answers to your most recent questions posed.*
>
> *1. I was asked about the confirmation email and did not receive and or open it and this has been confirmed. This is an email that I have no knowledge of in any way. It is my understanding that on the spreadsheet received the columns marked "N" and "O" that are marked "NO" and "NO" in cell 1 on the Benjamin.corhen page after my email address is listed are meant to confirm that the confirmation email was not received and not opened.*
>
> *2. I live in _____ [the city or town identified by the IP address] but this is not my IP address and I have no association or knowledge of it. The validity of this IP was also investigated and it is also my understanding that the IP listed was the IP used to create the domain but not to send the email in question and feel that this is what this spreadsheet states.*
>
> *Overall again I would like to state that I have no knowledge of this Domain, the email in question and I have had nothing to do with its existence or actions and I have been the victim of fraud.*
>
> *Furthermore As suggested by the Respondent in its last submission dated 12 October 2012 (bottom of page 4), I am prepared to have a private conversation with the Arbitrator in order to answer any possible questions and disclose any relevant information, if available, relating to this matter, so that the confidentiality of my private information could be fully secured.*
>
> *I am willing to extend myself in any way possible to confirm and outline what has clearly been stated by the domain company _____ to be a fraud and in any way to assist in clarifying any issues that might still remain."*

53. On 26 October 2012, the Parties were notified as follows by the Arbitrator:

> *"The Arbitrator thanks the Claimants for their email and accompanying letter from Mr Agent which is attached for the Respondent's attention. The Arbitrator notes the contents and taking into account his direction of 22 October 2012 and the opportunity afforded therein, the exchange of documents is declared completed pursuant to Article 12.1 of the BAT Arbitration Rules. Since the Arbitrator must also rule on the costs in the Arbitral Award, they need to be submitted without delay. Therefore, please ensure that you submit a detailed account of your costs until Wednesday, 31 October 2012."*

54. The Claimants submitted their statement of costs on 31 October 2012. The

Respondent submitted its statement of costs on 31 October 2012 (and was asked thereafter to provide copies of underlying receipts which was completed on 5 November 2012). Each side was afforded an opportunity to comment. Neither did so within the time allowed.

55. On 19 November 2012, the BAT sent the following notification to the Parties on behalf of the Arbitrator:

> *"1. Please be advised that neither party filed comments on the opposite party's account of costs.*
>
> *2. Having taken into account the particular circumstances of this case and taking into account his procedural powers as provided for in the BAT Rules, the Arbitrator wishes to inform Counsel and the parties that he has come to the following final conclusions on the following matters:*
>
> *2.1 He dismisses the jurisdiction challenge as regards Claimant 1 – therefore he has jurisdiction over Claimant 1's claims.*
>
> *2.2 He upholds the jurisdiction challenge as regards Claimant 2 – therefore he has no jurisdiction over Claimant 2's claims.*
>
> *2.3 He holds that Mr Agent was the author of the email dated 21 December 2011.*
>
> *The detailed reasoning behind these conclusions will be set out in the Award in due course.*
>
> *The Arbitrator directs Counsel to provide further submissions as a consequence of these findings. The deadline for these submissions is Monday, 26 November 2012."*

56. In addition, further Advances on Costs of EUR 2,500.00 for each side were directed. These were duly paid by the Parties.

57. On 26 November 2012, both sides duly filed submissions.

58. On 27 November 2012, the Arbitrator afforded both sides an opportunity to comment on the submissions of the other, and also to add, if they wished, to their claims for costs.

59. On 3 December 2012 both sides duly filed comments. No additional claims for costs were made.

4. The Jurisdiction of the BAT

60. 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).

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

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

63. The jurisdiction of the BAT over the disputes results from the arbitration clause contained under "11. IN EVENT OF DISPUTE" of the Agreement, which reads as follows (in relevant part):

> *"Any dispute arising from or related to the present contract shall be resolved by arbitration, and 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. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and the CAS upon appeal shall decide the dispute ex aequo et bono."*

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

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

65. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration clause under Swiss law (referred to by Article 178(2) PILA).

66. The jurisdiction of BAT over the Claimants' claims arises from the Agreement. The wording "[*A]ny dispute arising from or related to the present Agreement* …" covers the present disputes and the relief sought (which looks for payment of monies under the Agreement). However, the jurisdiction challenges brought by Respondent (noted at paragraph 18 above) will be considered in the first part of section 5.2 below.

5. Discussion

5.1 Applicable Law – ex aequo et bono

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

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

68. 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."*

69. The Agreement clearly stipulates that: "*[T]he arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono*".

70. 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]

71. 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*."

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

5.2 Findings

5.2.1 Respondent's challenge on Jurisdiction

73. Regarding the jurisdictional challenge brought by Respondent, the Arbitrator cannot ascertain any reason why it should succeed as regards Claimant 1. There is no argument advanced by Respondent which could displace the BAT arbitration clause in the Agreement. While Claimant 1 did enter into a local contract for the purposes of

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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).

registration (as is often the case in international basketball employment agreements), there is no indication whatsoever in the local contract that would lead to the conclusion that the Agreement was to be superseded or annulled or in any way disturbed. It is not possible to ascertain any such intention from the terms of the local contract. It is the view of the Arbitrator that very explicit language would be required to bring an arbitration agreement to an end and instead, for Claimant 1, to have his rights and entitlements subject to local law. There is no such explicit language.

74. No sustainable or substantial argument was made which could demonstrate that _____ [the Club's national] law or local employment tribunals trumped the Agreement and the BAT arbitration clause.

75. The Parties signed the Agreement and, at least for the first few months before things went awry, performed it according to its terms. The local contract also has radically different (*vis-à-vis* the Agreement) terms of payment indicated on its face, and at no stage did Respondent suggest that it was going to abide by those monetary provisions rather than those in the Agreement.

76. The jurisdiction challenge brought by Respondent as against Claimant 1's claims is dismissed.

77. As regards the jurisdiction challenge concerning the claim of Claimant 2, this is upheld. Claimant 2 is not a party to the Agreement. It is not listed as a party and does not sign as a party. Of course there are provisions in the Agreement which confer benefits on Claimant 2, but, as will be elaborated upon below, there are specific terms which distinguish this case from other BAT jurisprudence. In particular, the Parties arranged their affairs in manner which makes it clear to the Arbitrator that all rights and obligations, if required to be adjudicated upon or enforced, were solely to be a matter between Claimant 1 and the Respondent.

78. The significance of the successful jurisdiction challenge is more apparent than real as, already noted, the remuneration for Claimant 2 is deemed by the Agreement to be part of the salary of Claimant 1. The Parties to the Agreement specifically agreed this mechanism (namely that the benefits which were to flow to Claimant 2 were to be deemed as part of Claimant 1's salary) which shows very clearly that there is a precise allocation of rights and obligations as between Claimant 1 and the Respondent. That precise allocation necessarily, in the Arbitrator's mind, excludes the more general and diffuse assertion by Claimant 2 as regards the right which it wishes to directly enforce even though it is not a party to the arbitration agreement.

79. In the end, though, the fact that the Agreement expressly says that the benefits conferred on Claimant 2 can be asserted by Claimant 1 renders, in substance, the point made by Respondent on jurisdiction to be a distinction without a difference. Claimant 2 may not be a party to the arbitration agreement but its rights are taken up by Claimant 1 (as they have been in this Arbitration). In reality Claimant 2 is in no different position substantively as if it were itself a party to the arbitration agreement.

80. Nonetheless, the Arbitrator holds that there is no jurisdiction over Claimant 2's claims, but notes specifically that Claimant 1 is asserting a salary claim which is, in effect, Claimant 2's claim. The Arbitrator clearly has jurisdiction to deal with that claim.

5.2.2 General Introduction to the substantive issues

81. The fact that the Parties agreed for arbitration *ex aequo et bono* infuses every aspect of the case. The requirement and mandate to arrive at a just and equitable outcome is one which is found throughout BAT jurisprudence and is a cornerstone of international basketball contractual arrangements. Parties to such contracts must behave in a fashion not only consistent with their contractual arrangements (*pacta sunt servanda*)

but also behave consistent with justice, equity, and clean hands. This does not mean that parties must cede legitimate commercial advantage or positions, or indeed drive a hard bargain if necessary. One party's cultural approach to a contract may be viewed with suspicion or even hostility by another, but that is no reason for one culture to trump another in such circumstances.

82. What is required, however, is that parties behave with a reasonable modicum of honour and decency common to all civilised nations. Without such standards of behaviour then there would be little point in parties agreeing to have their BAT contracts regulated according to the principles of *ex aequo et bono*. The system of basketball contracts which have at their foundation a system of arbitration according to such principles means that there can be no ethical wasteland insofar as parties are concerned. Commercial arrangements in basketball governed by BAT clauses cannot tolerate a free-for-all where any behaviour is allowed pass without censure.

83. Similarly, as to the conduct and behaviour of parties during the course of a BAT arbitration, there is no ethical wasteland where "anything goes". International arbitration has as its international legal support the New York Convention, and parties simply cannot do whatever they wish merely because they are away from the public glare of a state court. To countenance such a state of affairs would allow an international convention to be subverted. BAT arbitration will not and cannot tolerate a party attempting to play hard and fast. As with the substantive position under BAT contracts already noted, this does not mean that a party cannot fight with every legitimate tactic at its disposal.

5.2.3 Sequence of further topics

84. The Arbitrator will address the following points, which after a great deal of consideration, he believes is the appropriate sequence: (a) who is responsible for the bogus email; (b) the consequences for the claim brought by Claimant 1 for Claimant 2;

and (c) Claimant 1's claims.

(a) Responsibility for the bogus email

85. The bogus email is a matter of particular importance for the Arbitrator. While it did come onto the record at a later point in the written pleadings, and this is something which the Claimants sought to make much of, this does not detract ultimately from its importance. The Arbitrator is content to accept the Respondent's explanation that it did not appreciate its significance at an earlier stage.

86. The fact is that the bogus email has been put on the record and at the hearing both sides testified in the most unambiguous terms that they knew nothing of its provenance. The nature of the bogus email, together with its timing, is of particular relevance to the Arbitrator particularly when he has to adjudicate upon this dispute in a manner consistent with the Agreement's mandate, namely *ex aequo et bono*.

87. First, it is worth considering the bogus email itself. It is a fraud. There is no other way of describing it. It is a disgraceful and shocking, albeit clumsy, attempt by its author to portray it as a communication from a person of particular standing and importance in the world governing body for basketball. It has the semblance of authenticity with the logo and "get up" of a real FIBA email or communication. The web address (fiba.us.com) was close to the authentic fiba.com web address, and unquestionably was procured with an eye to misleading a recipient into thinking that its source was a genuine FIBA communication. Lest there be any doubt, the real Mr Benjamin Cohen has confirmed to Respondent on 16 July 2012 that he did not send the bogus email.

88. Secondly, the terms of the bogus email on 21 December 2011 show a detailed knowledge on the part of its author of the dispute which had broken out some days beforehand between the parties. The bogus email could not have been written by someone who was an independent and disinterested third party – and certainly was not

written by the real legal counsel to FIBA. For example, the author of the bogus email writes: At this time we are simply extending the right to you which Mr. Agent has taken advantage of, of placing items on the record to be addressed if an arbitration does take place. In closing we will state, especially in a Olympic year involving an Olympic coach, it is our sincere hope that all matters are resolved before ever coming to FIBA by the parties involved. Mr. Agent has expressed an interest in engaging in settlement discussions of the contract involved and states for the record that the teams position is to not settle or discuss. This is a relevant factor to be borne in mind.

89. Thirdly, the bogus email has a strong sense in favour of the Claimants and looks like nothing other than an attempt by its author to cow or heavily influence the Respondent into a favourable settlement. It also clearly suggests that Mr Agent was in contact with the author – the "Benjamin Corhen" masquerading as the FIBA legal counsel.

90. Fourthly, the bogus email attempts (and this is perhaps its most outrageous and disgraceful feature – the Arbitrator uses these words after a great deal of consideration) to fool Respondent into sending documentation and its position *vis-à-vis* Claimant 1 to "Benjamin Corhen". This is nothing else than an attempt to obtain private, and possibly at that stage, confidential information for "dispute advantage". This is an attempted subterfuge of a particularly reprehensible nature gravely offending every basic principle of good faith and behaviour.

91. Fifthly, the fact that the bogus email did not achieve its desired effect of bringing about a settlement between the Parties is neither here nor there. The Respondent did not consider it of importance at the time it decided to terminate the Agreement and this renders it of no contemporaneous significance in January 2012 (at least as far as the Respondent was concerned at the time).

92. However, the significance of the bogus email has increased dramatically by reason of subsequent events in this case. Its true authorship has emerged (see below for the

findings) by reason of the investigation conducted by the Arbitrator; something which would not have been readily or as easily ascertainable to Respondent in December 2011.

93. The bogus email has particularly temporal significance as it was sent in a crucial period between the outbreak of the dispute and the final termination of the Agreement. It was intimately tied up with the matters in play between the Parties at that time, and sought to influence their outcome (though did not have a contemporaneous influence).

94. Further, it also has to be seen in the context of the correspondence sent by Mr Agent to the Respondent. The Arbitrator will return to the contemporaneous significance later in this Award.

95. Sixthly, developing the previous point further, it appears to the Arbitrator that any process of adjudicating a dispute *ex aequo et bono* requires a very careful examination of the conduct of the parties at the material time in order to render a result which comports with justice and equity. In the present case, the bogus email falls squarely in the material period of the dispute between the Parties.

96. Having put the bogus email into its general context, the Arbitrator will now examine the evidence as to who was behind it.

97. The Spreadsheet received from _____ [the webhosting companies] is unambiguous. It implicates explicitly Mr Agent and the email address he has used throughout this case. That email address is indicated as the underlying email address for the account. The evidence obtained by the Arbitrator, albeit with some difficulty and after much correspondence with _____ [the webhosting companies], is clear. Mr Agent's credit card is stated to be the source of funds for the bogus email and the bogus website.

98. Tellingly, the IP address disclosed by _____ [the webhosting companies] leads one to _____. _____ is the place of residence of Mr Agent. On any analysis the response of _____ [the webhosting companies] as contained in the Spreadsheet unquestionably points to Mr Agent as the person behind the bogus email.

99. Counsel's protestations about the burden of proof, and whether this has been carried by Respondent, do not comport with the record in this Arbitration. The Arbitrator, with the explicit and continuing consent (and participation) of the Parties, obtained this information and evidence from the United States.

100. The question which then logically follows is whether the explanations which have been furnished by Mr Agent stand up to scrutiny. They will be taken in turn.

101. First, the Claimants' Counsel stated the following:

> *"After consulting with Mr Agent about the email that _____ [one of the webhosting companies] sent him on 27 September 2012, it appears that, after the BAT hearing held in Munich, Mr Agent has done some research and found out that his credit card had been charged with costs relating to the domain FIBA.US.COM. He has filed a complaint with his credit card company, which in turn has requested _____ [one of the webhosting companies] for additional information with regard to this payment. The email of 27 September 2012 is the answer to Mr Agent further to the complaint filed with the credit card company. It has to be noted that Mr Agent has been placed under a silence order by the credit card company in order to preserve full confidentiality on this matter. Should he breach such silence order, the credit card company would no longer guarantee his rights to privacy. This is why he has not reported anything in that respect, neither to me, neither to the BAT."*

102. The email referred to appears on the third sheet of the Spreadsheet and is dated 27 September 2012. It appears to be from _____ [one of the webhosting companies] to Mr Agent setting out details of a refund to his credit card and then there is the following apparently exculpatory text (which is relied upon with all the earnestness which the Claimants can muster):

> *"Mr. Agent has not been a part of that domain and has no control on the account for FIBA.US.COM and we view this account as being established fraudulently and the*

account and domain has since been shut down, we apologize for any inconvenience."

103. It is stated that Mr Agent did some research after the hearing in Munich as regards his credit card and apparently discovered that his card had been charged with costs associated with FIBA.US.COM. The Arbitrator finds this position or submission to be unsustainable. The domain was established in December 2011 and for Mr Agent's position to be true, it would require the Arbitrator to believe that Mr Agent did not notice a charge on his credit card for these sums for a period of nine months or more. Also in this regard, in the last submission made by Claimants, documentation seemingly coming from a credit card company to Mr Agent does not support his point, and indeed shows his position to be riven with inconsistencies.

104. The Arbitrator had the benefit of observing Mr Agent during his testimony and also has seen the tenor of his written style. It is simply impossible for the Arbitrator to believe that a man with Mr Agent's eye for detail, his ease with the electronic mediums of communication, his fluency of writing and his general command (at least this was the clear impression during his testimony) of every pertinent fact, would overlook a charge of this nature on his credit card only to discover it many months later.

105. The Arbitrator is told that Mr Agent has initiated a complaint with his credit card company and this is what prompted the email from _____ [one of the webhosting companies]. The Arbitrator is further told that the credit card company has placed Mr Agent under a silence order. The Arbitrator views this submission as unsustainable. It is not credible to suggest that an unnamed credit card company could gag its customer to such an extent so as to render a party to an international arbitration, where the stakes are high (and the arbitrator is mandated to rule *ex aequo et bono*), completely mute.

106. The Arbitrator is told that Mr Agent's credit card company would no longer guarantee his privacy if he discloses details of what is going on. This is similarly unsustainable. The Arbitrator simply cannot believe such an argument that Mr Agent would place

some unsubstantiated and nebulous privacy argument above the conduct of this arbitration where his company is seeking very substantial sums of money.

107. Secondly, the Arbitrator is told the following:

> *"In any event, the response of _____ [one of the webhosting companies] is eloquent: "Mr. Agent has not been a part of that domain and has no control on the account for FIBA.US.COM and we view this account as being established fraudulently and the account and domain has since been shut down, we apologize for any inconvenience."*
>
> *This shows the following in my view:*
>
> 1) *Mr Agent has clearly nothing to do with regard to "FIBA.US.COM"*
> 2) *Mr Agent has been the victim of a fraud and someone has succeeded in charging his credit card in order to create an artificial link between him and the above-mentioned domain.*
> 3) *It appears that someone has an interest in creating the appearance that Mr Agent is the author of the fraudulent email dated 21 December 2011.*
> 4) *Both Claimants keep having difficulties in understanding why it took the Respondent so much time to submit the fraudulent email to the BAT."*

This is irrelevant and only seeks to sow confusion where there is none. Respondent did not appreciate the email at the time and the Arbitrator accepts that position.

108. Thirdly, Mr Agent wrote the following by way of personal explanation and sent by his Counsel:

> *"1. I was asked about the confirmation email and did not receive and or open it and this has been confirmed. This is an email that I have no knowledge of in any way. It is my understanding that on the spreadsheet received the columns marked "N" and "O" that are marked "NO" and "NO" in cell 1 on the Benjamin.corhen page after my email address is listed are meant to confirm that the confirmation email was not received and not opened."*

Mr Agent makes unsubstantiated points and believes that simply by writing the foregoing makes it so. He did not attach any supporting documentation (notwithstanding the clear opportunity to do so) and speculates as to what the meaning

of the words “NO” and “NO” mean in the columns referred to on the Spreadsheet. There is no header or label for these columns, and Mr Agent does not substantiate in any way whatsoever where his “understanding” derives from or how he comes to say what he says.

> *“2. I live in _____ but this is not my IP address and I have no association or knowledge of it. The validity of this IP was also investigated and it is also my understanding that the IP listed was the IP used to create the domain but not to send the email in question and feel that this is what this spreadsheet states.”*

Mr Agent makes this statement without adducing any of evidence. He simply states that this is not his IP address – critically he proffers no explanation as to how an IP address located in _____ comes to be on the Spreadsheet. He again reaches for the crutch of an “investigation” yet does not elaborate. An IP address unquestionably located in _____, the same place as Mr Agent’s residence, is identified as the IP address of the computer which created the domain (on Mr Agent’s submission). The Arbitrator is of the clear opinion that the IP address location points squarely to Mr Agent’s direct involvement in the matter.

The Arbitrator views the location (_____) of the IP address associated with this domain (on Mr Agent’s own submission) as being an evidential factor of powerful weight and force. No other plausible explanation is conceivable and ties Mr Agent conclusively to the bogus email and the bogus domain.

> *“Overall again I would like to state that I have no knowledge of this Domain, the email in question and I have had nothing to do with its existence or actions and I have been the victim of fraud.”*

This is a general attempt to rehash the victim theory. It does not stand up to the any scrutiny.

> *“Furthermore As suggested by the Respondent in its last submission dated 12 October 2012 (bottom of page 4), I am prepared to have a private conversation with the Arbitrator in order to answer any possible questions and disclose any relevant information, if available, relating to this matter, so that the confidentiality of my private information could*

be fully secured."

There is no such suggestion by Respondent that Mr Agent would have a private conversation with the Arbitrator. Mr Agent's proposal is improper. It is inconceivable that the Arbitrator would allow one party to have a dialogue in private at which the Respondent would be excluded and have no opportunity to test what was being said.

> *"I am willing to extend myself in any way possible to confirm and outline what has clearly been stated by the domain company _____ to be a fraud and in any way to assist in clarifying any issues that might still remain."*

This statement has to be viewed in the context of the stance of Mr Agent discussed already. It does not stand up to scrutiny.

109. Mr Agent's arguments which attempt to say that the bogus email (and the underlying bogus domain) was not his creation are dismissed in their entirety.

110. Mr Agent's attempts, after the finding on the bogus email was communicated to the parties, to try to reverse this conclusion have been carefully considered in every way by the Arbitrator. They do not displace, in any way, the Arbitrator's conclusion on the bogus email. These arguments and the few documents, such as they are, are far too little and far too late. The hints at a criminal investigation remain just that, hints.

111. Quite apart from the insubstantial nature of Mr Agent's arguments and the clear implication of him on the face of the Spreadsheet, the Arbitrator also views the surrounding circumstances of the bogus email to be overwhelmingly indicative of Mr Agent being behind this scheme.

112. The fluency of language contained in the bogus email (when one takes into account the fact that the Respondent's personnel consisted entirely of persons for whom English is, at best, a second language) has the feel and style of a person immersed in the English language. Further, the Arbitrator has had the direct benefit of hearing and seeing Mr

Agent testify before him in Munich. This has given the Arbitrator a clear opportunity to get an in-depth feel for Mr Agent's demeanour and use of language. This opportunity of hearing his live testimony over a considerable period of time, in the Arbitrator's assessment of the circumstances of the bogus email, leads overwhelmingly to the conclusion that Mr Agent was its author. The Arbitrator also has read carefully the emails being sent at the time by Mr Agent to Respondent and there is a similar feel to the language. Again this is of particular assistance in establishing the true authorship of the bogus email.

113. Finally, the objectives of the bogus email (already described above) are overwhelmingly in favour of the position of Mr Agent (and his client). No interpretation, regardless of how elastic or indulgent, could possibly view the bogus email as being favourable in tone or content towards Respondent.

114. In summary, the Arbitrator finds that as a matter of fact, Mr Agent procured the web address (fiba.us.com) and the email address (benjamin.corhen@fiba.us.com). The Arbitrator finds also as a matter of fact that Mr Agent authored and sent the bogus email. The Arbitrator is comfortably satisfied, and to a very high degree of satisfaction, of these findings.

115. It cannot go unmarked that Mr Agent has lied to the Arbitrator in his oral testimony and in his submissions. There can be no gloss or explanation which can excuse this conduct.

(b) Consequences for the claim asserted by Claimant 1 on behalf of Claimant 2

116. As already noted in the jurisdiction section, Claimant 1 is asserting a salary claim which effectively represents the claim of Claimant 2 to agency fees. The Arbitrator will now assess this claim in the light of the Parties' submissions, particularly by reference to the true authorship of the bogus email.

117. In late December 2011, the Parties were at loggerheads and Claimants were looking for a large pay off. Mr Agent was in [his country of residence] and Claimant 1 was in _____ [the country in which the Club has its seat] at this time. Mr Agent seems, in the Arbitrator's assessment, to have been trying to alternatively cajole or bully Respondent into settlement at various stages, but was doing so from a great distance and was not physically present to know exactly what was going on. This probably, in the Arbitrator's assessment, made Mr Agent nervous and he was not as close to the action as he thought would be necessary.

118. At the same time Claimant 1 was himself negotiating with Respondent in _____ [the country in which the club has its seat] many thousands of miles away from Mr Agent.

119. As already described, the bogus email sought to force a solution upon Respondent to pay off Claimants and also to obtain, by deceitful means, documentation and information. This was done by Mr Agent.

120. What is also relevant is that in the bogus email Mr Agent explicitly invoked the then upcoming London Olympics as a reason for Respondent to settle. The nature of this tactic speaks for itself.

121. Mr Agent's authorship of the bogus email is incompatible with proper standards of behaviour associated with the good faith requirements which permeate an international basketball contract governed by BAT arbitration and *ex aequo et bono principles*.

122. The Arbitrator is of the view that claims being asserted by a party in an international arbitration (particularly where the underlying contract is an international arrangement where *ex aequo et bono* is mandated) can be assessed as to their admissibility. This is a process well established in international arbitration where claims which are tainted by illegality, bad faith, fraud, fraudulent misrepresentation and so on, are denied *in limine*.

Arbitral tribunals have more often based their decisions on universal values in using various formulations such as “good morals”, “bonas mores”, “ethics of international trade” or “transnational public policy”. Of course caution must be exercised so as to ensure that only those situations which clearly transgress specific policy grounds are rendered inadmissible.

123. This comports with international public policy that claims tainted by such acts cannot and should not be entertained by a tribunal sitting under the law (and with the international legal backing of the New York Convention). Otherwise such tainted claims could be giving international standing and enter the international legal order via an award which would be presumptively valid and enforceable globally.

124. As already discussed, the bogus email (and all of its various implications) is intimately related to the short series of events which led to the claims being made in this Arbitration. It was sent in the period of time when the Parties where at loggerheads and Claimants were pushing for a large pay-off. Had Respondent buckled and sent a response to the bogus email, Mr Agent would have been immediately in possession of information which would have been of significant and decisive advantage to him at that time. Mr Agent’s sending of the bogus email may also have been successful in the securing of a large pay-off; it did not but that is not germane.

125. As already noted, during this period, Mr Agent was in _____ [his country of residence] sending an array of emails to Respondent and also in constant contact with Claimant 1 trying, at all times, to find out who was saying what to whom in _____ [the country in which the club has its seat].

126. The Arbitrator must have regard to the Parties’ respective actions during the crucial period which led up to the termination in early January 2012. The explicit choice of *ex aequo et bono* reinforces the importance of the parties’ behaviour. The Arbitrator also derives importance from the doctrine of “clean hands” which is an important factor in

his assessment of such matters which considering a dispute subject of *ex aequo et bono* principles.

127. The key point for the purposes of this discussion on admissibility is whether the bogus email so irretrievably taints this claim (i.e. the salary claim being asserted by Claimant 1 for Claimant 2) that it cannot be entertained.

128. Again, lest there be any doubt, aggressive and unrelenting correspondence, hard bargaining, tactical manoeuvring and other sorts of behaviour may be distasteful to one culture, but perfectly acceptable to another culture. Such behaviour does not render claims inadmissible. Such behaviour may lead to parties breaking contracts, or falling out with one another. That is a feature of business.

129. It is of an altogether different level of importance to a claim when someone with a very significant financial interest in a contract decides, in order to attempt to further such interests and seek to enhance a particular position (in this case, a rapid and favourable termination of the Agreement), to engage in a subterfuge of an unambiguously illegal nature.

130. The attempted subterfuge here was nothing other than an attempt to undermine the Respondent by the use of a false, fraudulent and misleading email address. This behaviour falls squarely in the period of time which the Arbitrator must consider for the purposes of assessing the claim being made.

131. Online fraud is a scourge of the modern world. The instances of bogus email accounts and persons hiding behind phoney addresses seeking monetary or other, worse, advantage, is a daily and regrettable feature of life.

132. The subversion of online facilities and web domains to illegal and dubious purposes is something to which all right-thinking persons and authorities are implacably opposed.

Any form of indulgence or flexibility to online fraud or creation of totally misleading web domains would risk the undermining of both global e-commerce and the integrity of one of the principal means of modern communication.

133. It appears clear to the Arbitrator that international public policy, good faith, good morals, or any other formulation of the concept, cannot countenance online fraud. It is offensive and illegal.

134. The bogus email falls foul of the foregoing. There is no need for further elaboration as it is as plain as could be; Mr Agent, while in _____ [his country of residence] in late December 2011, procured a web domain and email address which masqueraded as that of FIBA and its law officer in order to send an email to _____ [the country in which the club has its seat] to attempt to skew distant events in his favour.

135. Secondly, the privacy, sensitivity and confidentiality of a party's internal stance as regards an impending legal claim is one which is protected by all civilised nations.

136. When a party is threatened with a claim, it will in all probability, wish to assess its position with its advisors and not believe that it is at risk of its private, and probably privileged and confidential, thoughts being transmitted to the opponent.

137. There are innumerable variations and refinements of this theme to be found in the world's legal systems, however the Arbitrator is of the view that it is universally accepted that no party that finds itself in a dispute should be put into a position where it is at risk that its position *vis-à-vis* such a dispute is leaked to the other side by a subterfuge. Any indulgence towards such a subterfuge would inevitably lead to the rights of litigants to private legal advice being eroded.

138. The bogus email transgresses the foregoing in a particularly unpleasant and devious manner. Apart from trying to trick Respondent into sending documentation which Mr

Agent would not have available to him (which is bad enough), it attempts to obtain the position of Respondent as regards a possible settlement with Claimant 1. This would immediately have undermined Respondent in its dealings with Claimants.

139. The bogus email also transgresses the foregoing as it foreshadows the potential for an arbitration (which of course has turned out to be the case) and seeks to trick Respondent into sending to "Mr Corhen" (directly into the hands of Mr Agent) documents and information of a valuable nature for the purposes of that case. In effect, Mr Agent wanted to force Respondent into paying up, or trick it into showing its private hand to him for his own advantage in an arbitration.

140. The Arbitrator, taking all of the foregoing discussion into account, has reached the conclusion that the salary claim asserted by Claimant 1 on behalf of Claimant 2 cannot be admitted for adjudication. To permit this claim to proceed would have the effect of sanctioning the conduct detailed above.

141. BAT arbitration, *ex aequo et bono*, and international public policy, cannot be open to Mr Agent (noting again that in substance, this salary claim really belongs to his company) by reason of the bogus email. It was an act which was an online fraud and attempted perversion of the course of justice; it fell squarely within the time frame of relevant actions of the parties; it was entirely directed towards the attempted achievement of a substantial pay-off; and, most tellingly, it was prescient about a potential arbitration and sought to gain a wholly illegitimate advantage to the detriment of Respondent in case the matter went to BAT. This latter point most particularly and intimately involves the bogus email in this claim.

142. The Arbitrator is of the view that this claim is inextricably linked not just to the Agreement but to the acts of the parties in the period from when the dispute broke out to the termination in early January 2012. The bogus email poisons and infects this salary claim.

143. The claim made by Claimant 1 on behalf of Claimant 2 is therefore held by the Arbitrator to be inadmissible and therefore dismissed.

144. In any event, justice, equity, and good faith cannot allow this claim to succeed.

(c) Claimant 1's claims

145. First, as a threshold point, Respondent argues that the bogus email must also be ascribed to Claimant 1 as Mr Agent was his agent. It points to the close relationship between Mr Agent and Claimant 1 together with all the normal indicia of an agency relationship.

146. Claimant 1 counters, by way of analogy, that a client cannot be held liable for the attempted fraud of his lawyer. This is, in substance, the argument which is often seen in many legal systems that an agent's authority has certain limits, and certainly does not extend to illegal or fraudulent acts.

147. The Arbitrator does note that Mr Agent and Claimant 1 have had a long professional relationship. However, regardless of how close such a relationship might be between an agent and a client, the usual boundaries of agency still apply; namely that a fraud or other illegal act committed by the agent is not within his or her usual (or however one might term it) authority and cannot be ascribed to the principal.

148. The Arbitrator is of the view that the only way in which a principal can normally be made liable for the illegal or fraudulent acts of his or her agent could be as follows:

    a. The actual authority granted actually allows for such conduct – a somewhat theoretical notion as it would create a strange agency indeed;

b. The principal ratifies the conduct after it occurs and thereby directly implicates themselves in the illegality or fraud; or

c. The principal, having found out about the fraud or illegality, remains mute and stands idly by.

149. The foregoing is not a closed or fixed set of tests, but rather what the Arbitrator believes is generally seen in many countries.

150. In this case, Claimant 1 has immediately disassociated himself from the bogus email and the acts of Mr Agent in that regard. The Arbitrator accepts the submission that he did not know anything about the true authorship of the bogus email. There is no indication anywhere in the file or in the evidence which could demonstrate the contrary. There is also no evidence put forward by Respondent which could implicate Claimant 1 on any of the approaches set out in paragraph 148 above.

151. Therefore, as a threshold point, the Arbitrator holds that Claimant 1 did not know about the true authorship of the bogus email. The bogus email will therefore have no part or role of any kind whatsoever in the assessment of Claimant 1's claim.

152. Notwithstanding the amount of material and arguments put forward by the Parties, the key question as regards the claim of Claimant 1 is whether or not Respondent was justified in terminating the Agreement in January 2012. Either Respondent had a legitimate reason to terminate or it did not.

153. The Agreement has a specific section on the right of Respondent to terminate which included: expiration (not applicable), mutual agreement (not applicable), failure by Claimant 1 to register (not applicable), violation by Claimant 1 of the _____ [Club's national law] constitution and regulations (not applicable), and violation by Claimant 1 of _____ [Club's National Federation] and Respondent's regulations.

154. The Arbitrator is of the view that Parties should be kept to their contract (*pacta sunt servanda*) as this is a basic notion of justice. Respondent specifically agreed to certain grounds which could trigger a right to terminate. It did not, for example, agree with Claimant 1 that it could terminate if, at a later stage, it did not like the coaching style, or the personality, or other analogous situations.

155. While there may well have been a clash of cultures in play, and this came across in evidence at the hearing, that is not sufficient to trigger the termination provisions in the Agreement.

156. Similarly, there may well have been abrasive encounters between Claimant 1 and those in authority with the Respondent (and the Arbitrator appreciates that loss of face – and the aversion thereto – was quite possibly a human factor at work on all sides) but, again, those are not justifiable termination events. The Agreement is quite specific and does not include any provision which might allow for termination on the grounds of a bad or abrasive relationship.

157. Respondent placed much emphasis on the rather rowdy home game on 18 December 2011 and how the authorities were concerned about social upheaval. Whilst again, the Arbitrator does carefully note the points made about how such matters and events are dealt with in a _____ [country in which the Club has its seat] context, that still does not come within the clear and specific termination events set out in the Agreement. If Respondent had wished to have a significant level of discretion as regards termination events (such as the rowdiness or emotions of the fans) then it should have sought to include that in the Agreement.

158. The fact, as appears to be clear to the Arbitrator, is that the Parties bargained for specific, black-letter, termination scenarios. They did not bargain for termination in the event that Claimant 1 and those in authority in the Respondent (or indeed those who hold authority over such persons) did not get on.

159. As already noted earlier in this Award, the Arbitrator is not inclined to second guessing the decisions of a highly experienced coach in how he afforded free time to players, how he handled his squad and so on, absent proof of bad faith or a wilful disregard of clear rules. Thus, much of the discussion in the case about such matters is not germane to whether or not the termination was lawful. Also, the evidence of Claimant 1 and on behalf of the Respondent about his leaving the city for a period was not conclusive either way, and indeed did not strike the Arbitrator as being of any particular weight or force.

160. It has struck the Arbitrator with some force that Claimant 1 was not an unknown commodity in _____ [the country in which the club has its seat] prior to his being retained by the Respondent. Indeed he was and is well known, and the Respondent must have had some fairly clear understanding of the nature of the person it was hiring. To use a phrase, Claimant 1 is not a "shrinking violet" and this must have been known to the Respondent; yet it sought out and hired Claimant 1 on exceptionally generous and guaranteed terms. Perhaps it later came to regret that decision as Claimant 1's temperament and approach was not, as it transpired, compatible with the Respondent's intrinsic characteristics. This was described by the Respondent in its post hearing submissions as not operating as "a purely commercial enterprise". However, the Agreement is in clear and commercial terms, and it certainly now appears clear to the Arbitrator that the alignment of expectations of Respondent and Claimant 1 was not as it might have been. Nonetheless, that misalignment is not something which can be ascribed to Claimant 1.

161. The Respondent wanted him, sought him out, must have known (from his pre-existing coaching roles in _____ [country in which the Club has its seat]) his approach, and then offered him exceptionally generous commercial terms.

162. The Arbitrator has also carefully perused Articles 74-81 of the Club Rules which were relied upon by the Respondent. These are a wide ranging set of obligations of any

coach of the Respondent to run the team, not do anything to damage its reputation and so on and so forth. The same points apply as already discussed above concerning the marked reluctance of the Arbitrator to second guess a coach's decisions and approach.

163. The key to the whole dispute is, in reality, the rowdy game on 18 December 2011. Claimant 1 was "fired up" and passionate, and similarly so with the crowd and the Respondent's officials. The Respondent's superiors from outside the club were concerned.

164. The Arbitrator sees this as simply a natural inflaming of passions which regularly surround a high level and fast flowing sport like basketball. It is not the function of an Arbitrator in a dispute such as this, to step in and say that a certain level of passion for the game is acceptable, but some other level of passion is not. High level sport is intrinsically an activity which makes otherwise level-headed and even introverted persons express themselves with vigour. Indeed, as already noted above, the Respondent must have known that it was hiring a coach with a seemingly boundless passion for the game. Therefore, in summary, short of a coach directly and explicitly inciting a crowd to violence (and with clear proof of such activities), the Arbitrator is not persuaded by the argument that Claimant 1's exuberance on 18 December 2011 is any reason to validly terminate the Agreement.

165. The Arbitrator has formed the view, based on the evidence, that on 18 December 2011, the Respondent (either upon instruction from its superiors in the local government or with an eye to their wishes) simply decided to move Claimant 1 sideways as he was not to their liking and they were concerned about political stability and so on. Thereafter things went rapidly downhill with antagonistic negotiations ultimately resulting in termination.

166. Notwithstanding all of this, the Arbitrator has come to the conclusion that there was no valid termination event open to the Respondent in January 2012 and, therefore, the

termination of the Agreement was not just. The relationship may well have broken down, but that does not absolve or evaporate contractual rights freely entered into.

5.2.4 Quantum & Interest

167. Claimant 1 was due to be paid USD 100,000.00 on 1 January 2012. He was not paid this money by the Respondent. The fact that the Parties were at that stage trying to negotiate a termination of their relationship cannot be a valid reason for the Respondent to have failed to have paid that sum which was then unquestionably due and owing. The Arbitrator holds that Claimant 1 is entitled to an award in the amount of USD 100,000.00 and interest at 5% per annum running as and from 2 January 2012 (being the usual rate of interest awarded in BAT jurisprudence).

168. Claimant 1 then seeks all his agreed salary for subsequent seasons, namely USD 700,000.00 for 2012-2013, USD 800,000.00 for 2013-2014, and USD 800,000.00 for 2014-2015.

169. The Arbitrator accepts the evidence of Claimant 1 that this was the sort of money that he cannot make anywhere else. This was a very generous and lucrative contract, and it may well be that no such deal will present itself again for quite some time.

170. The Arbitrator also is mindful of the fact that mitigation is much more difficult for a coach than a player. A team needs many players, but only one head coach. Thus, Claimant 1 would certainly not find it easy to readily secure alternative employment and also he has his duties as the _____ [country in which the Club has its seat] national coach to take into account. His market is now _____ [country in which the Club has its seat], and not elsewhere.

171. These are very specific and unique circumstances.

172. However, this does not immediately result in the conclusion that all sums must be paid to Claimant 1 in full as if the Agreement had been performed all the way to its conclusion. The Arbitrator is mindful of the following key factors which he believes are necessary to take into account in arriving at a compensation figure which comports with justice and equity in this specific case. These are: (a) the fact that Claimant 1 will not have to undertake the highly charged and complex task of being a top level coach with the Respondent over the next several years; and (b) there is a significant value in having money now rather than a larger sum in the future.

173. Developing point (a) somewhat further, the Agreement required Claimant 1 to undertake a great deal of work over the seasons in order to secure his remuneration. This was not simply a deal by which he could sit back and watch the money roll in. There is, in the Arbitrator's mind, a value to be placed upon having the actual burden of the work being lifted from Claimant 1's shoulders.

174. Developing point (b) a little further, it is a widely accepted concept in the field of business, economics, and indeed simple common sense, that getting an amount of money now is worth more to the recipient than awaiting a point in the future for a larger amount.

175. With these factors in mind, the Arbitrator considers that it is just and equitable to discount the 2012-2013 salary of USD 700,000.00 by a factor of 25% (which results in a figure of USD 525,000.00).

176. With these factors in mind, the Arbitrator considers that it is just and equitable to discount the 2013-2014 salary of USD 800,000.00 by a factor of 50% (which results in a figure of USD 400,000.00).

177. With these factors in mind, the Arbitrator considers that it is just and equitable to discount the 2014-2015 salary of USD 800,000.00 by a factor of 75% (which results in

a figure of USD 200,000.00).

178. Thus, the total compensation for the 2012-2013, 2013-2014 and 2014-2015 seasons is USD 1,125,000.00. The Arbitrator holds and assesses that that this figure represents a just and equitable amount referable to the wrongful termination of the Agreement by the Respondent for those seasons. The Arbitrator also holds that the discount rates applied are just and equitable by reference to the factors set out above and the unique circumstances of this case.

179. The question then arises as to interest. The rate of 5% is appropriate. The Arbitrator has considered carefully as to the date upon which interest should run and what would comport with the justice of the case. He has come to the conclusion that interest will run on USD 1,125,000.00 at a rate of 5% as and from 30 days after the date of this Award.

180. Finally, Claimant 1 also seeks further items (bonuses, travel expenses and translation fees) in the Request for Arbitration.

181. The Arbitrator dismisses the claim by Claimant 1 for bonuses. The bonus provisions require defined success on court (winning the _____ [Club's national league] Finals) with USD 200,000.00 per win. The fact is that Claimant 1's contractual relationship ended in January 2012 and it would be too remote and speculative for him to expect bonus payments to be awarded to him long after he had left.

182. As regards travel expenses (air tickets), the Agreement provides that the Respondent will provide three round-trip business air tickets per season. The Arbitrator is of the view that this is a benefit which does not convert into salary or compensation in the event that Claimant 1 does not actually make the journeys. The evidence before the Arbitrator does not show that Claimant 1 travelled, but rather other _____ [of the Coach's] family members. The claim for air tickets is dismissed.

183. The claim for translation fees in the amount of USD 2,000.00 is dismissed as there is no evidence before the Arbitrator to substantiate this amount.

6. Costs

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

185. On 18 December 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 to be EUR 28,970.00.

186. The outcome of this Arbitration requires careful apportionment of costs. Claimant 1 has prevailed in his claim. Claimant 2 has lost. It appears just to the Arbitrator that Claimant 1 be awarded his costs as against the Respondent. It appears just to the Arbitrator that a proportion of Respondent's costs be awarded against Claimant 2.

187. Claimants' claim for costs and expenses amounts to CHF 24,756.15. The Arbitrator assesses this sum to be fair and reasonable in the context of the dispute and the complexity of the matter.

188. Respondent's claim for costs and expenses amounts to _____. The Arbitrator assesses this sum to be fair and reasonable in the context of the dispute and the complexity of the matter.

189. The Arbitrator proposes to order that half the Claimants' costs of CHF 24,756.15 (CHF 12,378.08) be paid by the Respondent to Claimant 1 in addition to a figure representing half of the non-reimbursable handling fee (EUR 3,500.00). Claimant 2 is responsible for the balance of these costs.

190. The Arbitrator proposes to order that half the Respondents' costs of _____ (namely _____) be paid by Claimant 2 to Respondent. Respondent is responsible for the balance of these costs.

191. As regards the advances on costs, the Arbitrator decides that in application of article 17.3 of the BAT Rules:

    (i) The Respondent shall pay Claimant 1 EUR 7,242.50; and

    (ii) Claimant 2 shall pay the Respondent EUR 7,242.50.

7. AWARD

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

1. **The Club shall pay Mr. Coach the sum of USD 100,000.00 net for unpaid salary amounts together with interest at 5% as and from 2 January 2012.**

2. **The Club shall pay Mr. Coach the sum of USD 1,125,000.00 net together with any interest which may accrue at 5% as and from 30 days after the date of this Award.**

3. **There is no jurisdiction as regards the claims made by the Agency.**

4. **The claim made by Mr. Coach for salary representing the agency fees of the Agency is dismissed.**

5. **The Club shall pay Mr. Coach the sum of CHF 12,378.08 and EUR 3,500.00 as reimbursement for his legal fees and expenses.**

6. **The Club shall pay Mr. Coach the sum of EUR 7,242.50 as reimbursement for his arbitration costs.**

7. **The Agency shall pay the Club _____ as reimbursement for its legal fees and expenses. The Agency shall bear its own legal fees and expenses.**

8. **The Agency shall pay the Club EUR 7,242.50 as reimbursement for its arbitration costs.**

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

Geneva, seat of the arbitration, 28 December 2012

Klaus Reichert SC

(Arbitrator)