ARBITRAL AWARD

(BAT 0283/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Raj Parker

in the arbitration proceedings between

Mr. Justin Ray Giddens
c/o CAA Sports, 162 Fifth Avenue, 7 Floor,
New York, NY 10010, USA

- Claimant -

vs.

Valencia Basketball Club S.A.D.
Pavelló de la Font de Sant Lluis, Avda. H.H. Maristas,
16-467013 Valencia, Spain

- Respondent -

BASKETBALL
ARBITRAL TRIBUNAL

1. The Parties

1.1 The Claimant

1. Mr. Justin Ray Giddens (hereinafter the "Claimant") is a professional basketball player from the USA.

2. In these proceedings, the Claimant is represented by Ms. Jennifer Duberstein of CAA Sports, 162 Fifth Avenue, 7 Floor, New York, NY 10010, USA, and Ergun Benan Avseven and Asli Ersanli of Moroglu Arseven, Odakule Kat: 12 Istiklal Cad. No: 142 Beyoglu, Istanbul, Turkey.

1.2 The Respondent

3. Valencia Basketball Club S.A.D. (hereinafter the "Respondent") is a Spanish professional basketball club.

4. In these proceedings, the Respondent is represented by Mr. Fernando Miguel Crespo Champion of Garrigues Abogados & Asesores Tributarios, SLP, Pza. del Ayuntamiento, 29 – 46002 Valencia.

2. The Arbitrator

5. On 27 May 2012, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT") appointed Raj Parker as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules").

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

3. Facts and Proceedings

3.1 Background Facts

7. On 5 January 2011, the Claimant, the Respondent and the Claimant's agent at the time, Priority Sports and Entertainment (hereinafter the "First Agent"), entered into a contract of employment written in the Spanish language (hereinafter the "Spanish Contract").

8. On the same day, the Claimant, the Respondent and the First Agent entered into a contract of employment written in the English Language (hereinafter the "English Contract"). The English Contract contains, among others, the following provisions:

> *""The Club agrees to pay Player a fully guaranteed net Base Salary (including image payments) of $110,000.00 USD for the 2010/2011 basketball season in accordance with the payment schedule set forth below. All payments to Player hereunder must be made in United States Dollars in accordance with wire transfer instructions or other instructions to be provided by the Player from time to time. The payment schedule is as follows:*
>
> *<u>2010/2011</u>*
>
> | | |
> |---|---|
> | *February 5, 2011* | *$14,000.00 USD* |
> | *March 5, 2011* | *$14,000.00 USD* |
> | *April 5, 2011* | *$14,000.00 USD* |
> | *May 5, 2011* | *$14,000.00 USD* |
> | *May 15, 2011* | *$20,000.00 USD (image payment)* |
> | *June 5, 2011* | *$14,000.00 USD* |
> | *July 1, 2011* | *$20,000.00 USD* |
>
> *The payment of the guaranteed Base Salary, as stated in this Paragraph 2, to Player is not contingent upon anything other than the Player*

passing the Club's physical examination given within seventy-two (72) hours after Player's arrival, and the Player not materially breaching this Agreement.

[…]

Club agrees that this Agreement is a rest-of-season (2010/2011) fully guaranteed agreement. In this regard, even if Player is removed (except for reasons described in the preceding paragraph) or released from the Club or this Agreement is terminated or suspended by Club due to Player's lack of or failure to exhibit sufficient skill, Player's death, illness, injury or other mental or physical disability (whether incurred on or off the court) or for any other reason whatsoever other than Player's direct and material breach of this Agreement, Club shall nevertheless be required to pay to Player, on the dates set forth above, the full amounts set forth above for the 2010/2011 season. The Player agrees to make himself available for insurance examinations in order to allow the Club to purchase a policy of disability insurance, it being understood that the above guarantee is not contingent upon the purchase of or Club's ability to procure such policy.

It is agreed that any payment to Player pursuant to the above shall be subject to an interest penalty of Twenty Euro (€20.00 EUR) per day for each day after said payment was due. In the event that any scheduled payments are not made by the Club within seven (7) days of the applicable payment date, the Player shall not have to perform in any practice sessions or any games until such time as all of said payments have been paid. In addition, if any scheduled payment is not received by Player's bank within twenty (20) days of the date due, the Player's performance obligations shall cease, Player shall have the right, at Player's option, to terminate this Agreement and accelerate all future payments required under this Agreement, and Player shall be free to leave Spain with his FIBA Letter of Clearance to play basketball anywhere in the world Player chooses, but the duties and liabilities of Club under this Agreement shall continue in full force and effect.

[…]

The parties agree that Player's physical examination will be administered and fully completed within seventy-two (72) hours after Player's arrival in Spain (it being acknowledged that once Player passes his physical for the 2010/2011 season, this Agreement becomes a rest-of-season fully guaranteed agreement for skill and injury). The Player will not be required to participate in any Club practices or games until the Club sends to Player's agent, Brad Ames of Priority Sports & Entertainment ("Agent") written notification certifying (in the form of Exhibit A hereto) that the Player has passed the Club's physical examination for the 2010/2011 season and that the Agreement is now in full force and effect. If Player participates in any of Club's practices or games for the

2010/2011 season prior to Club fulfilling its obligations immediately above, Player shall be deemed to have unconditionally passed his physical examination.

[…]

5.(a) Transportation. Club shall provide Player an allowance equal to $2,500.00 US Dollars for Player to purchase airplane tickets for Player, Player's family, or anyone Player chooses. It is understood that Player, if he chooses, may purchase his own airplane tickets and Club will wire transfer to Player the cost of said tickets immediately upon presentation of an invoice to Club.

[…]

(c) Apartment. The Club shall provide the Player a fully furnished large three (3) bedroom air-conditioned apartment for his exclusive use during the entire period of this Agreement and for a period of five (5) days thereafter. Such apartment's furnishings shall include all normal reasonable items, including a king size bed, washer and dryer, one (1) color television, and high speed internet access. The Player must approve of the assigned apartment. The Club shall be responsible for all payments associated with the assigned apartment including but not limited to rent, taxes, electricity, water, gas, telephone and high speed internet service installation, etc. up to €1,000.00 EUR per month. If rent in Player's selected apartment exceeds €1,000.00 EUR per month, Player shall be responsible for the difference. Player shall be responsible for telephone and internet bills.

[…]

(e) Athletic Equipment. The Club shall provide the Player with all equipment necessary for him to pursue his basketball related activities. Basketball shoes, as required, shall be included with the equipment thus provided by the Club. Player agrees to wear and use equipment and apparel provided by Club for all official engagements with Club.

[…]

7. The Player agrees to:

(a) Report at times and places fixed by the Club in reasonably good physical condition.
(b) Keep himself in reasonably good physical condition throughout the season.

[…]"

9. On 18 January 2011, the First Agent received a letter from the Respondent stating that the Respondent intended to terminate the "*contract*" between the Claimant and the Respondent on the grounds that the Claimant had not maintained the "*necessary physical conditions*" in accordance with Article 7 of the employment contract.

10. On 19 January 2011, the First Agent responded to the Respondent's letter, stating that the Claimant and the First Agent did not accept the Respondent's attempt to terminate the "*agreement by and between Club and Player*".

3.2 The Proceedings before the BAT

11. On 24 April 2012, the Claimant and the First Agent filed a Request for Arbitration in accordance with the BAT Rules. The BAT received the non-reimbursable handling fee of EUR 2,998.00 from the Claimant on 30 April 2012.

12. By letter dated 31 May 2012, the BAT Secretariat fixed a time limit until 22 June 2012 for the Respondent to file the Answer to the Request for Arbitration. By the same letter, and with a time limit for payment of 12 June 2012, the following amounts were fixed as the Advance on Costs:

"Claimant 1 (Mr. Justin Ray Giddens)	*EUR 3,500*
Claimant 2 (Priority Sports)	*EUR 1,500*
Respondent (Valencia BC S.A.D.)	*EUR 5,000"*

13. The Respondent paid his share of the Advance on Costs on 11 June 2012. On 15 June 2012, the Claimant and the First Agent submitted a request for extension of time for Advance on Costs until 21 June 2012. The Arbitrator granted the requested extension on the same day.

14. On 22 June 2012, the First Agent informed the BAT Secretariat that it was withdrawing all complaints and demands against the Respondent.

15. The Claimant paid EUR 5,000.00 for the Claimant's share of the Advance on Costs on 22 June 2012.

16. The Respondent filed its Answer to the Request for Arbitration together with a counterclaim (hereinafter the "Counterclaim") on 22 June 2012. On 27 June 2012 the Respondent submitted a Modification of Counterclaim, withdrawing all of its complaints and claims against the First Agent.

17. On 3 July 2012, the Arbitrator issued a Procedural Order (hereinafter the "First Procedural Order") inviting the Claimant to submit his comments on the Respondent's Answer to the Request for Arbitration and to respond to the Respondent's Counterclaim by no later than 17 July 2012. The Arbitrator also expressly authorised the Claimant to amend his Request for Arbitration, in light of the fact that the First Agent was no longer representing him.

18. On 13 July 2012 the Claimant submitted a request for a reasonable extension of time for filing his answer to the Counterclaim. On the same day, given the change in the Claimant's representation, the Arbitrator granted an extension of time for the Claimant to reply to the First Procedural Order until 24 July 2012. On 24 July 2012, the Claimant submitted his reply to the First Procedural Order.

19. The Arbitrator issued a second Procedural Order (hereinafter the "Second Procedural Order") on 2 August 2012 requesting additional information and documentation from both parties by no later than 23 August 2012. On 22 August 2012, the Respondent submitted its reply to the Second Procedural Order, and on 23 August 2012, the Claimant submitted his reply to the Second Procedural Order. On 24 August 2012, the Claimant submitted an additional exhibit to his reply to the Second Procedural Order.

20. On 6 September 2012, the Arbitrator issued a third Procedural Order (hereinafter the "Third Procedural Order") requesting additional information and documentation from

both parties by no later than 17 September 2012. On 17 September 2012, the Claimant and the Respondent submitted their respective responses to the Third Procedural Order.

21. By Procedural Order dated 19 September 2012 (hereinafter the "Fourth Procedural Order"), the Arbitrator declared the exchange of documents complete, and requested that the Parties submit detailed accounts of their costs by 28 September 2012.

22. On 27 September 2012, the Respondent submitted the following account of costs:

> *"…my client deposited the advance funds initially requested, in the amount of €5,000*
>
> *[…]*
>
> *the fee note prepared by counsel from the Spanish law firm that has been conducting the defense of Valencia Basket Club, SAD in Spain, in the amount of SEVENTEEN THOUSAND THREE HUNDRED AND TWENTY-THREE EUROS THIRTY EURO CENTS (€17,323.30*
>
> *[…]*
>
> *the fees incurred by Jean Marguerat (a lawyer at the firm Froriep Renggli) who was also involved in preparing the legal defense of Valencia Basket Club, SAD., fees amounting to CHF 5,611.40*
>
> *[…]*
>
> *the total amount for the translation service is equal to €4,962.74, of which €861.30 of this amount corresponds to VAT (21%)*
>
> *[...]*
>
> *Consequently, Valencia Basket Club, SAD has incurred expenses totalling €27,077.23, which does not include the time, work and effort invested by the in-house staff at Valencia Basket Club, SAD to prepare the Club's defense…"*

23. On 28 September 2012, the Claimant submitted the following account of costs:

"Description	*Payment date*	*Amount*
Handling Fee	*30 April 2012*	*EUR 3.000,00.-*

Advance on Costs (Claimant's Share)	*22 June 2012*	*EUR 5.000,00.-*
Attorney Fee (10% of the Amount in Dispute +VAT)	*-*	*USD 21.000,00.-"*

24. By email dated 28 September 2012, the BAT Secretariat sent the Parties' respective account of costs to one another and requested that the Parties submit any comments on the other side's account of costs by no later than 4 October 2012.

25. The Claimant did not submit any comments on the Respondent's account of costs. On 4 October 2012, the Respondent provided submissions on the Claimant's account of costs.

26. Since neither of the Parties filed an application for a hearing, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the award on the basis of the written submissions of the Parties.

4. The Parties' Submissions

4.1 The Claimant's Request for Arbitration

27. The Claimant submits that he arrived at the Respondent club in good physical condition. The Claimant states that he was deemed to have passed the physical examination required under the English Contract by playing in a practice session held by the Respondent.

28. The Claimant submits that the English Contract, and not the Spanish Contract, is the contract which governs the relations between the Claimant and the Respondent. The Respondent's termination of the English Contract was improper because he had met all of his obligations under the English Contract. The Claimant submits that his obligation under Article 7 of the English Contract to arrive at the Respondent in "*reasonably good*

physical condition" should be construed narrowly.

29. The Claimant states that the results of the fitness test produced by the Respondent as evidence of the Claimant's lack of physical conditioning is inappropriate evidence for several reasons. Firstly, the results are not "*sufficiently radical to warrant the Club's termination*". Secondly, the fitness test did not take into consideration all relevant factors. Thirdly, even if it is accepted that the fitness test did take into consideration all relevant factors, the Claimant's results were similar to the team average.

30. The Claimant submits that the true reason that the Respondent terminated the English Contract was that the Claimant was signed to replace an injured player, who was expected to miss the remainder of the 2010-2011 season. When the injured player appeared to be recovering from injury more quickly than anticipated, the Respondent considered that the Claimant would become surplus to requirements and so fired the Claimant.

31. The Claimant claims that he was not paid any of his salary by the Respondent and so he claims for: all of his unpaid salary from the Respondent for the 2010-2011 season; penalty payments on such salary; and the cost of a plane ticket used by the Claimant to return to the USA. The Claimant's request for relief states:

> *"**Request for Relief***
>
> *[...]*
>
> *Claimant(s) request(s):*
>
> *1) Immediate payment from Club to Player for the remainder of Player's fully-guaranteed base salary, in the amount of One Hundred Ten Thousand US Dollars ($1100,000.00 USD);*
>
> *2) Immediate payment from Club to Player in the amount of Fifty Thousand Four Hundred Sixty Euro (€50,460 EUR) owed to Player for interest penalities per Article 2, Paragraph 5 of Agreement;*

> *3) Immediate payment from Club to Player per Article 5a) of Agreement, for reimbursement in the amount of Eight Hundred Seventy Five US Dollars Ten Cents ($875.10 USD) for the airlines ticket Player purchased for his return flight to the United States following Club's improper termination of Agreement;*
>
> *4) Immediate payment from Club to Agent in the amount of Five Thousand Five Hundred US Dollars ($5,500.00 USD) for Agent's commission per Agents' Commission addendum;*
>
> *5) Immediate payment from Club to Agent in any amount the Arbitrator deems equitable for interest penalities accrued as a result of Club's failure to pay Agent's commission;*
>
> *6) Immediate reimbursement from Club to Player and Agent for the BAT application fee, plus any additional costs of arbitration, legal fees, and/or expenses related to this BAT case; and*
>
> *7) Immediate payment from Club to Player and Agent of any and all other amounts the Arbitrator finds equitable in light of Club's improper Agreement termination."*

32. In his response to the First Procedural Order, the Claimant maintained the above request for relief, save that the claims relating to the Agent were withdrawn.

4.2 The Respondent's submissions

33. The Respondent does not dispute that it has not paid the Claimant any salary for the 2010-2011 season, or that it has not reimbursed the Claimant for the plane ticket to the USA.

34. The Respondent submits that the Claimant appeared "*worryingly tired and exhausted*" at his first practice sessions and was "*totally unfit*". The Respondent's trainer, Mr Pedro Cotoll Suarez, (hereinafter the "Respondent's Trainer") claimed following fitness tests that it would take four to six weeks for the Claimant to get fully fit.

35. The Respondent has submitted results from the fitness test that it gave to the Claimant and has submitted evidence published in the media and by the Claimant himself

through social media, that the Claimant ate unhealthy food prior to joining the Respondent. The Respondent claims that in the thirteen days between leaving his previous club in Poland and joining the Respondent, the Claimant "*devoted himself to worsening his physical condition, with a diet unrelated to the practice of sport and even totally unhealthy for a normal person.*" The Respondent claims that the Claimant admitted to the Respondent's Trainer that he had not kept fit prior to joining the Respondent.

36. The Respondent submits that the physical examination which the Claimant underwent was a medical examination and not a test of fitness for the purposes of Article 7 of the English Contract and/or the Spanish Contract.

37. The Respondent asserts that the English Contract is not the operative contract that governs the relationship between the Claimant and the Respondent, but instead the Spanish Contract governs the relationship. Article 7 of the Spanish Contract provides that the Claimant must arrive at the Respondent club "*physically fit to compete at the highest level*". Furthermore, the Respondent submits that the First Agent and the Claimant himself were made aware that the Respondent required the Claimant to arrive at the Respondent club in the "*highest level*" of physical conditioning. The Respondent submits that in circumstances where it was signing a player at a crucial point in the season (just prior to the qualification being determined for the Copa del Rey), it was a pre-requisite that such a player would arrive in the highest physical condition, in any event.

38. The Respondent claims that the Claimant breached Article 7 of the Spanish Contract because he was in such poor physical condition. As a result, the Respondent was justified in terminating the Spanish Contract.

39. The Respondent further submits that the English Contract and the Spanish Contract were supposed to contain the same provisions, however the Claimant and/or the First

Agent acted fraudulently by arranging translations which contained different standards of fitness required of the Claimant under Article 7 of each contract.

40. The Respondent claims that the Claimant acted in bad faith by waiting for a year and four months following the termination of the employment contract before filing his Request for Arbitration. The Respondent claims that the late payment penalty (totalling EUR 50,460.00) sought by the Claimant in his request for relief is excessive.

4.3 The Respondent's Counterclaim

41. The Respondent submits that the Claimant breached the provisions of the Spanish Contract and has acted in bad faith. The Respondent claims that it has suffered loss and damage as a result. The Respondent has therefore made a counterclaim against the Claimant as follows:

(i) a hotel bill for the Claimant for the time that he was in Spain, amounting to EUR 689.46;

(ii) a cellular phone bill which the Claimant left unpaid, amounting to EUR 1,009.498;

(iii) two pairs of sports shoes paid for by the Respondent and costing EUR 260.00 in total;

(iv) two months' rent on a flat that the Respondent arranged for the Claimant, amounting to EUR 3,000.00;

(v) the cost of a flight from Warsaw to Valencia so that the Claimant could sign the English Contract and the Spanish Contract, amounting to EUR

516.63;

(vi) the costs associated with signing a new player in place of the Claimant, totalling EUR 65,91.80; and

(vii) EUR 100,000.00 as compensation for the negative impact that the Claimant's breach of contract had on team practices, the team's performance during matches and the image of the Respondent.

42. In the request for relief in the Respondent's Counterclaim, the Respondent claims:

- *"Costs from cell phone and upkeep of the Player €, sport shoes and rental €4.958,958.*
- *Costs of the trips from Warsaw to Valencia to sign the agreement €516,63.*
- *Signing of a new Player to cover his absence: €65.915.80.*
- *Impossibility of signing a player in the Top 16 until the 4th match, impossibility of carrying out training sessions normally, and discredit to the image of the Club: €100.000."*

4.4 The Claimant's response to the Respondent's Counterclaim

43. In response to the Counterclaim, the Claimant stated that he was not informed of the Respondent's urgent need for a new player in the period before he signed, nor were any representations made to him that he was required to arrive in the highest level of physical conditioning. Furthermore, the Respondent was fully aware of the Claimant's level of fitness, having seen him play for his previous club immediately before signing for the Respondent. The Claimant submits that he could not have lost his good conditioning in the three weeks between the date on which he left his old club and the date on which the Respondent terminated the English Contract.

44. The Claimant submits that he began playing for a team in the NBA development league just two and a half weeks after the termination of the English Contract, playing close to 40 minutes in each of his first games for the new club. This, the Claimant argues, is further evidence that he was in good physical condition at the time the English Contract was terminated.

45. The Claimant also denies admitting to the Respondent's Trainer that he had not kept fit prior to joining the Respondent.

46. The Claimant submits that he maintained the highest level of his own fitness and so the employment contract was terminated without just cause. Accordingly, the Respondent's claims for the costs associated with signing a new player in place of the Claimant, and compensation for the negative impact that the Claimant's breach of contract had on team practices, matches and the image of the Respondent are not justified.

47. The Claimant denies that the costs of: the hotel bill, the cellular phone bill, two pairs of sports shoes, two months' rent and the flight from Warsaw to Valencia are payable, on the basis that it is the responsibility of the Respondent under the English Contract to pay each of those amounts.

48. The Claimant denies that the Spanish Contract was fraudulently mis-translated into the English Contract. The Claimant submits that the English Contract is the operative contract, and not the Spanish Contract, by virtue of Article 12 of the English Contract.

49. The Claimant refutes the allegation that it has acted in bad faith and submits the reason that it did not file its Request for Arbitration sooner was because the First Agent had insisted that the Parties try to resolve the dispute through negotiation.

5. Jurisdiction

50. 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).

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

52. In order to determine whether a valid arbitration agreement exists between the Parties, it is necessary first to determine which agreement governed the contractual relationship between the Claimant and the Respondent. The Claimant asserts that the English Contract was the operative agreement, whereas the Respondent claims that the Spanish Contract was the operative agreement.

53. The Respondent submitted that either the Claimant or the First Agent acted fraudulently in arranging a translation of the Spanish Contract into English when preparing the English Contract. In the Second Procedural Order the Arbitrator requested that the Respondent submit evidence of such fraud. However, in response, the Respondent did not submit any evidence of fraudulent evidence, stating instead that "*what is requested here is a proof of a negative*" and that "*it is impossible to provide evidence of a negative, i.e. of the fact that… the contracts did not faithfully reflect the outcome of the negotiations*". Respectfully, the Arbitrator disagrees with the Respondent's analysis. If the Respondent alleges that the Claimant and/or First Agent acted fraudulently and the Claimant denies that allegation, the onus is on the Respondent to provide evidence proving that the Claimant and/or First Agent acted fraudulently. Such evidence would not be "*proof of a negative*"; indeed it would be evidence that the Claimant and/or First Agent took positive steps (or deliberately made misleading omissions) in order to deceive the Respondent.

54. The Arbitrator finds that the Respondent has failed to prove that either the Claimant or the First Agent acted fraudulently in arranging a translation of the Spanish Contract.

55. The Claimant argues that the English Contract is the operative contract because Article 12 of the English Contract states:

> *"In the event Player at anytime executes any documents written in the native tongue of Club, it is understood that in the event of a conflict between the terms and conditions of such other documents and the terms and conditions of this Agreement, the terms and conditions of this Agreement shall absolutely control."*

56. The Respondent submits that Article 12 of the Spanish Contract contains the same provision as Article 12 of the English Contract, and so Article 12 of the English Contract is not determinative. However, the Arbitrator finds that Article 12 of the Spanish Contract is simply a direct translation of the English Contract. It is therefore meaningless because the Spanish Contract already is in the "native tongue" of the Respondent (i.e. Spanish). Clearly, the clause is intended to apply only to a contract that is not drafted in Spanish.

57. The Arbitrator notes that Article 14 of the English Contract provides that an official Spanish League contract will be executed by the Parties, however, the English Contract is expressly stated to be the agreement which governs the relationship between the Parties. Article 14 of the English Contract states:

> *"It is understood that Player and Club shall execute an official Spanish League contract that states that Player's payment is $110,000.00 USD net of all Spanish taxes for the 2010/2011 season. Each of Player and Club agree that the contract which shall control the relationship between the parties shall be this Agreement."*

58. In the circumstances and in particular, as a consequence of Article 12 of the English Contract, the Arbitrator finds that the English Contract is the agreement which governs the contractual relations between the Parties.

59. The Arbitrator notes in passing that, in any event, Article 11 of the Spanish Contract contains a dispute resolution clause granting jurisdiction to the BAT to resolve disputes arising out of the Spanish Contract.

5.1 Arbitrability

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

5.2 Formal and substantive validity of the arbitration agreements

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

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

62. Article 11 of the English Contract stipulates:

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

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

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

64. The English Contract 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 are no indications which could cast doubt on the validity of the arbitration agreements under Swiss law (cf. Article 178(2) PILA). In particular, the wording "*[a]ny disputes arising from or related to the present contract*" in Article 11 of the English Contract covers the present dispute.

66. In addition, the Parties did not challenge the jurisdiction of BAT in their submissions.

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

6. Discussion

6.1 Applicable Law – ex aequo et bono

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

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

69. 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."*

70. As set out in paragraph 62 above, Article 11 of the English Contract stipulates that "*the arbitrator shall decide the dispute ex aequo et bono*". Consequently, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.

71. 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]

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

73. This is confirmed by Article 15.1 of the BAT Rules *in fine* according to which the

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

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

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

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

arbitrator applies "*general considerations of justice and fairness without reference to any particular national or international law*".

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

6.2 Findings

6.2.1 The applicable contract

75. For the reasons set out in paragraphs 52 to 58 above, the Arbitrator finds that the English Contract is the agreement which governs the contractual relations between the Parties.

6.2.2 The termination of the English Contract

76. The Claimant's claim is predicated on the submission that the English Contract was terminated without just cause. The Respondent's defence and Counterclaim is predicated on the submission that the employment contract between the Parties was validly terminated because the Claimant did not meet the standard of physical conditioning required under the employment contract.

77. The required standard of physical conditioning is set out in Article 7 of the English Contract, which provides that the Claimant must report to the Respondent "*in reasonably good physical condition [and] keep himself in reasonably good physical condition throughout the season"*. The question for the Arbitrator to determine, therefore, is this: did the Claimant arrive at the Respondent club in reasonably good physical condition?

78. The Respondent submits that the Claimant told the Respondent's Trainer at a practice session that he was not fit. The Claimant denies this.

79. The Respondent has submitted a statement from the Respondent's Trainer in which the Respondent's Trainer states that the Claimant was in "*poor physical condition*". The Claimant denies that he was in poor physical condition for the short time that he spent with the Respondent.

80. The Respondent has also submitted results from a fitness test, which the Respondent argues show that the Claimant was in poor physical condition. The Claimant argues that the results do not prove that he was not in reasonably good physical condition. The tests state that the Claimant:

    (i) scored an "8" with regard to aerobic capacity, compared to average of "9.6" for perimeter players in the team;

    (ii) scored a "10.5" with regard to anaerobic capacity, compared to average of "13.2" for perimeter players in the team;

    (iii) had a body fat percentage of 13.1, compared to average of 11.5 for perimeter players in the team;

    (iv) had a muscle percentage of 49, compared to average of 47.8 for perimeter players in the team; and

    (v) had an upper body strength to body weight ratio valuation of 2.54, compared to average of 2.51 for perimeter players in the team.

81. The Arbitrator finds that the results are not conclusive evidence that the Claimant was

not in reasonably good physical condition. The Claimant is not required to be in better physical condition than other players on the team (although the average results for other players is instructive in determining what level of fitness is deemed "reasonable"). The question for the Arbitrator to determine is whether, taken as a whole, the results show that the Claimant is so far below the average level of fitness that he cannot be said to be in reasonably good physical condition.

82. Similarly, the Arbitrator does not consider that the photographs and media reports regarding the Claimant's diet are, of themselves, sufficient to prove that the Claimant was not in reasonably good physical condition when he joined the Respondent.

83. The Arbitrator notes that in certain areas (such as aerobic and anaerobic capacity) the Claimant's results are below the average for players in the team which share his position, however in others (such as muscle percentage) they are above the average for perimeter players in the team. The Arbitrator considers that different players will have different strengths and weakness, so it is not sufficient to simply show that the Claimant's results are below average in certain areas. The Arbitrator considers that the Respondent has not shown conclusively that the Claimant's results prove that the Claimant was not "*in reasonably good physical condition*."

84. The Respondent has argued that because of the time of the season that the Claimant signed for the Respondent and because of the identity of the league in which the Respondent played, the test of "*reasonably good physical condition*" should be construed as meaning "*physically fit to compete at the highest level*". Furthermore, given the circumstances in which the Claimant was signed, there was an implied condition that the Claimant would be at the highest level of fitness.

85. The Arbitrator does not agree with the Respondent's submissions. The Arbitrator acknowledges that the requirement to be in reasonably good physical condition should be read in the context of a professional basketball player playing in one of the sport's

leading leagues. In this sense, "*reasonably good physical condition*" requires a level of conditioning much higher than would be required in circumstances where the player in question was, for example, an amateur player. However, the Arbitrator does not agree with the Respondent that the circumstances in which the Claimant was signed mean that "*reasonably good physical condition*" should be construed as meaning "*physically fit to compete at the highest level*". There is clearly a difference between a professional athlete who is *reasonably* fit and one who is at the *highest level* of fitness. It is possible for an athlete to be in "*reasonably good physical condition*" (judged objectively and with regard to the level of fitness that would be typically and reasonably required of a professional basketball player competing in competitions such as the Euroleague and the Spanish league), but at the same time not be at the 'highest level' of fitness for a professional basketball player; the latter standard is a higher one. The Arbitrator considers that if the Parties had intended that the Claimant was required to be at the highest level of fitness, this should have been stipulated in the English Contract. However, the standard of fitness required under the English Contract was "*reasonably good physical condition*" and the Arbitrator considers that the Respondent has failed to prove that the Claimant did not meet this standard.

86. Further, the Arbitrator rejects the Respondent's assertion that there was an implied condition that the Claimant would be at the highest level of fitness. The English Contract specified the level of conditioning required of the Claimant (as indeed did the Spanish Contract – see paragraph 37 above). If the Parties had intended or agreed that the Claimant would be at the highest level of fitness, then the English Contract should not have been drafted differently from the Spanish Contract.

87. The Claimant submitted that the true reason that the Respondent terminated the English Contract was that the Claimant had been signed to replace an injured player, however the injured player appeared to be recovering from injury more quickly than the Respondent had expected. The Arbitrator has been provided with no evidence to support this argument. Moreover, the fact that the Respondent went to the additional

expense of signing a replacement player after firing the Claimant suggests that the Claimant's assertion is incorrect.

88. In light of the Arbitrator's finding that the Claimant did not breach Article 7 of the English Contract, the Arbitrator considers that the Respondent terminated the English Contract without just cause. Article 2 of the English Contract states:

> *"The payment of the guaranteed Base Salary, as stated in this Paragraph 2, to Player is not contingent upon anything other than the Player passing the Club's physical examination given within seventy-two (72) hours after Player's arrival, and the Player not materially breaching this Agreement.*
>
> *[…]*
>
> *If Player participates in any of Club's practices or games for the 2010/2011 season prior to Club fulfilling its obligations immediately above, Player shall be deemed to have unconditionally passed his physical examination."*

89. It is not in dispute that the Claimant participated in the Respondent's practice sessions. The Arbitrator therefore finds that the Claimant was deemed to have passed the physical examination. In accordance with Article 2 of the English Contract, the Arbitrator finds that the base salary of USD 110,000.00 payable under the English Contract is due from the Respondent to the Claimant.

6.2.3 Duty to mitigate loss

90. The Arbitrator considers that the Claimant had a duty to mitigate the loss he suffered when the Respondent terminated the English Contract. The Arbitrator finds that by signing for a new club (the New Mexico Thunder Birds), the Claimant did discharge this duty to a certain extent. However, the Claimant's salary with his new club was only USD 19,000.00 for the rest of the 2010-2011 season (in comparison with a salary of USD 110,000.00 from the Respondent for a similar length of time). The Claimant has not shown that he made attempts to find a more lucrative contract than the one offered by the New Mexico Thunder Birds. The Arbitrator notes that the Claimant did not play

any games for the Respondent and attended only a limited number of practice sessions before the English Contract was terminated.

91. The Arbitrator considers that if, as he claims, the Claimant was in reasonably good physical condition for a professional player in the Spanish league (as is his posited case), he should have been able to find a new club that would have paid him a considerably higher salary. In this sense, the Claimant did not mitigate all of the losses that he suffered. For this reason, the Arbitrator finds, *ex aequo et bono*, that the amount of unpaid salary that the Respondent must pay to the Claimant should be reduced to USD 20,000.00.

6.2.4 Penalty payments

92. The Claimant has claimed penalty payments totalling EUR 50,460.00 on the salary which was unpaid by the Respondent. Article 2 of the English Contract provides:

> *"It is agreed that any payment to Player pursuant to the above shall be subject to an interest penalty of Twenty Euro (€20.00 EUR) per day for each day after said payment was due."*

93. In light of the above provision, and given that the Respondent failed to pay any salary under the English Contract, the Arbitrator considers that the penalty payment is, *prima facie*, payable by the Respondent.

94. It therefore falls to the Arbitrator to determine whether such penalty is excessive in light of all the circumstances, and in light of the factors referred to in *FAT 0036/09 Petrosean v Women Basketball Club Spartak St Petersburg* and *FAT 0100/10 Taylor v KK Crvena Zvezda*.

95. The facts of each case are different and the Arbitrator must consider the individual circumstances of each case. In this case, the Arbitrator has particular regard to the

following factors:

a. the size of the penalty payment in comparison to the outstanding salary that is owed; and

b. the fact that the Claimant filed his Request for Arbitration more than 15 months after the English Contract was terminated.

96. The Claimant submitted that it took more than 15 months to file the Request for Arbitration because the First Agent was engaged in settlement negotiations with the Respondent for this time. However, the Claimant has not shown why such a long time was required to carry out settlement negotiations.

97. In the circumstances of this case, the Arbitrator considers that a penalty payment of EUR 50,460.00 is excessive. The Arbitrator considers that it is acceptable for the Parties to engage in settlement negotiations for a period of time before a Request for Arbitration is filed (and indeed such negotiations should be encouraged). However, in this case, the length of the time has not been justified. The Arbitrator considers that, in the circumstances of this case, a period of 50 days would have been justifiable. Accordingly, the Arbitrator finds that a penalty payment of USD 20.00 per day for a period of 50 days (i.e. a total of USD 1,000.00) is payable by the Respondent to the Claimant.

6.2.5 The plane fare

98. The Claimant claims USD 875.10 from the Respondent in respect of a plane fare to the USA. The Respondent does not dispute that it has not paid this sum. Article 5 a) of the English Contract provides:

"Transportation. Club shall provide Player an allowance equal to $2,500.00 US Dollars

for Player to purchase airplane tickets for Player, Player's family, or anyone Player chooses. It is understood that Player, if he chooses, may purchase his own airplane tickets and Club will wire transfer to Player the cost of said tickets immediately upon presentation of an invoice to Club."

99. In light of the above provision, and given that the Respondent terminated the English Contract without just cause, the Arbitrator finds that the sum of USD 875.10 is payable by the Respondent to the Claimant in respect of the plane fare.

6.2.6 The Counterclaim

100. The Respondent claims EUR 65,91.80 from the Claimant in respect of costs associated with signing a new player in place of the Claimant, as well as EUR 100,000.00 as compensation for the negative impact that the Claimant's breach of contract had on team practices, matches and the image of the Respondent. In light of the Arbitrator's finding that the Respondent terminated the English Contract without just cause, the Arbitrator finds that these elements of the Counterclaim fail.

101. The Respondent further claims from Claimant:

(i) EUR 260.00 in respect of two pairs of sports shoes paid for by the Respondent;

(ii) EUR 3,000.00 in respect of two months' rent on a flat that the Respondent arranged for the Claimant;

(iii) EUR 516.63 in respect of a flight from Warsaw to Valencia; and

(iv) EUR 689.46 in respect of a hotel bill for the Claimant for the time that he was in Spain, until rental accommodation was made available.

102. The Arbitrator notes the following provisions of Article 5 of the English Contract:

> "*5.(a) Transportation. Club shall provide Player an allowance equal to $2,500.00 US Dollars for Player to purchase airplane tickets for Player, Player's family, or anyone Player chooses. It is understood that Player, if he chooses, may purchase his own airplane tickets and Club will wire transfer to Player the cost of said tickets immediately upon presentation of an invoice to Club.*
>
> *[…]*
>
> *(c) Apartment. The Club shall provide the Player a fully furnished large three (3) bedroom air-conditioned apartment for his exclusive use during the entire period of this Agreement and for a period of five (5) days thereafter. Such apartment's furnishings shall include all normal reasonable items, including a king size bed, washer and dryer, one (1) color television, and high speed internet access. The Player must approve of the assigned apartment. The Club shall be responsible for all payments associated with the assigned apartment including but not limited to rent, taxes, electricity, water, gas, telephone and high speed internet service installation, etc. up to €1,000.00 EUR per month. If rent in Player's selected apartment exceeds €1,000.00 EUR per month, Player shall be responsible for the difference. Player shall be responsible for telephone and internet bills. If, at the conclusion of the Term of this Agreement, Club claims that Player has caused damage to the apartment and Player is responsible financially for this damage, Club shall notify Player and Player's Agent by fax or email within twenty (20) days after the conclusion of the Term of this Agreement, Club shall have no rights whatsoever to withhold salary or seek payment from Player related to damage to the apartment.*
>
> *[…]*
>
> *(e) Athletic Equipment. The Club shall provide the Player with all equipment necessary for him to pursue his basketball related activities. Basketball shoes, as required, shall be included with the equipment thus provided by the Club. Player agrees to wear and use equipment and apparel provided by Club for all official engagements with Club.*"

103. In light of the above provisions, the Arbitrator finds that the Respondent was responsible for the costs of the Claimant's accommodation, sports shoes and flights (up to a limit of USD 2,500.00). Accordingly, and given that the Respondent terminated the English Contract without just cause, the Arbitrator finds that the elements of the Counterclaim set out in paragraph 101 above fail.

104. Finally, the Respondent claims EUR 1,009.498 in respect of a cellular phone bill which the Claimant left unpaid. The phone bill that Respondent produced as evidence of this

debt did not show that the Claimant was responsible for the amount of EUR 1,009.498. In the Third Procedural Order, the Arbitrator informed the Respondent that it was not clear how the supporting evidence it had provided in relation to the phone bill supported its claim. The Arbitrator requested that the Respondent provide an explanation of the supporting evidence and/or provide further evidence to support its claim.

105. The Respondent did not provide further submissions or evidence which clarified or proved how the Claimant was responsible for the phone bill. Accordingly, the Arbitrator finds that this element of the Counterclaim fails.

7. Costs

106. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the award or communicated to the Parties separately. Furthermore, Article 17.3 of the BAT Rules provides that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

107. On 29 October 2012, considering that, pursuant to Article 17.2 of the BAT Rules, "*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*", and that "*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time*", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised, the BAT President determined the arbitration costs in the present matter at EUR 10,000.00.

108. The Respondent submitted that it should not be required to pay to the Claimant the full amount of EUR 5,000.00 in relation to the Claimant's share of the arbitration costs, nor any amount in relation to the non-reimbursable fee of EUR 2,998.00 because it had not been shown that the Claimant paid those sums on his own account, without assistance from the First Agent. The Arbitrator notes that Claimant's share of the arbitration costs and all of the non-reimbursable fee have been provided to the BAT (whether from the Claimant or the First Agent). The Arbitrator considers that these sums should be treated as if they have been advanced by the Claimant alone. The Claimant may have financial arrangements in place with the First Agent in relation to the sums, but that is not a matter which concerns this arbitration.

109. The Arbitrator notes that the Claimant was successful in establishing his claim. Thus, the Arbitrator decides that in application of Article 17.3 of the BAT Rules, the Respondent shall bear 100% of the costs of the arbitration. Further, the Arbitrator considers it appropriate to take into account the non-reimbursable fee (EUR 2,998.00) when assessing the expenses incurred by the Claimant in connection with these proceedings. The Claimant has claimed USD 21.000,00 for legal fees (not including the non-reimbursable fee of EUR 2,998.00). The Arbitrator considers that such fees and costs are excessive for this case, particularly given the level of complexity of the case. In the circumstances, the Arbitrator finds that it would be reasonable for the Respondent to pay to the Claimant EUR 8,002.00 (representing legal fees and translation costs) and EUR 2,998.00 (representing the non-reimbursable fee). Therefore, the Arbitrator decides:

(i) the Respondent shall pay to the Claimant EUR 5,000.00, being the amount of arbitration costs advanced by the Claimant; and

(ii) the Respondent shall pay EUR 11,000.00 to the Claimant, as a contribution towards the Claimant's legal fees and expenses.

8. AWARD

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

1. **Valencia Basketball Club S.A.D. is ordered to pay to Mr. Justin Ray Giddens USD 20,000.00 as compensation for unpaid salary for the 2010-2011 season.**

2. **Valencia Basketball Club S.A.D. is ordered to pay to Mr. Justin Ray Giddens late payment penalties in the amount of USD 1,000.00.**

3. **Valencia Basketball Club S.A.D. is ordered to pay to Mr. Justin Ray Giddens USD 875.10 in relation to the plane fare.**

4. **Valencia Basketball Club S.A.D. is ordered to pay to Mr. Justin Ray Giddens EUR 11,000.00 as reimbursement for his legal fees and expenses.**

5. **Valencia Basketball Club S.A.D. is ordered to pay to Mr. Justin Ray Giddens EUR 5,000.00 as reimbursement of the advance on BAT costs.**

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

Geneva, seat of the arbitration, 5 November 2012

Raj Parker
(Arbitrator)