BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0285/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Earl Smith

- Claimant -

represented by Mr. Ergun Benan Arseven, Moroglu Arseven,
Odakule Kat: 12 Istiklal Cad. No: 14, Beyoglu, Istanbul, Turkey

vs.

Zhejiang Chouzhou Professional Basketball Club Co., Ltd.
#6 Build, Xingzhenglou, No.153 Tiyuchang Road, Xiacheng District,
Hangzhou, Zhejiang Province, China 310004

- Respondent -

represented by Mr. Antonio Rigozzi, Lévy Kaufmann-Kohler,
3-5 rue du Conseil-Général, P.O. Box 552, 1211 Geneva 4, Switzerland

BASKETBALL
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1. The Parties

1.1 The Claimant

1. Mr. Earl Smith (hereinafter referred to as “Player”) is an American professional basketball player.

1.2 The Respondent

2. Zhejiang Chouzhou Professional Basketball Club Co., Ltd. (hereinafter referred to as “Respondent”) is a professional basketball club in the Province of Zhejiang, China.

2. The Arbitrator

3. On 28 May 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 or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Background Facts and the Dispute

4. On 13 September 2011, Player and Respondent entered into an agreement (hereinafter the “Agreement”) whereby the latter engaged the former to play basketball for the 2011-2012 CBA season. The Agreement provided for a net salary of USD 2,880,000.00; USD 640,000.00 to be paid upon Player’s passing of a physical test before 28 October 2011; and then seven equal fortnightly instalments of USD 320,000.00 starting on 15 December 2011 and concluding on 15 March 2012.

The Agreement also provided for bonus payments depending on certain prescribed on-court successes.

5. Player came to China on 20 October 2011, played for Respondent, and returned to the United States of America on 16 February 2012.

6. In outline, the Parties are in dispute as to what happened during Player's time with Respondent, the circumstances of his departure, whether Respondent owes further monies to Player on foot of the Agreement, and whether Player is liable to Respondent in damages for lost sponsorships.

3.2 The Proceedings before the BAT

7. Player filed a Request for Arbitration dated 4 May 2012 in accordance with the BAT Rules. This was received by the BAT on 7 May 2012. The non-reimbursable handling fee in the amount of EUR 5,000.00 was paid on 2 May 2012.

8. On 4 June 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 (Mr. Earl Smith)	*EUR 7,000*
Respondent (Zhejiang Chouzhou Professional Basketball Club Co., Ltd.)	*EUR 7,000"*

The foregoing sums were paid as follows: Player paid EUR 5,000.00 on 6 June 2012 (having earlier paid EUR 2,000.00 more than the necessary amount for the non-reimbursable handling fee); Respondent paid EUR 6,980.00 on 7 June 2012.

9. On 10 August 2012, Respondent delivered the Answer together with a Counterclaim.

The deadline for filing the Answer had been extended by the Arbitrator upon application by Respondent.

10. On 13 August 2012, the Arbitrator informed the Parties that a second round of submissions was necessary.

11. On 28 September 2012, Player delivered his second round submission. The deadline for filing that document had been extended by the Arbitrator upon application by Player.

12. On 5 November 2012, Respondent delivered its second round submission. The deadline for filing that document had been extended by the Arbitrator upon application by Respondent.

13. On 14 November 2012. the Arbitrator wrote to the Parties as follows:

> *"The Arbitrator notes the various procedural requests and would like to put forward the following suggestion for the parties' consideration. Subject to the parties' views on this suggestion, the Arbitrator proposes to indicate his conclusion on whether the document referred to as the "Settlement Agreement" binds Claimant or not. The Arbitrator would then ask the parties for their positions on the dispute in the light of that conclusion on this one issue.*
>
> *The Arbitrator requests the parties to submit their observations by no later than Thursday, 22 November 2012."*

14. The deadline of 22 November 2012 for the Parties to submit their observations was extended, following application by Player, and absence of objection of Respondent, to 29 November 2012.

15. On 29 November 2012 Player submitted his observations on the Arbitrator's suggestion, stating he did not agree to the suggestion and providing, amongst others, that "in the interest of time, [Player] hereby kindly requests that the Arbitrator evaluates the dispute at hand in whole and indicates the conclusion on all claims simultaneously."

16. On 29 November 2012, Respondent submitted its observations on the Arbitrator's suggestion:

> *"The Respondent has no objection to the Arbitrator's proposal to indicate his preliminary conclusion on whether the Settlement Agreement is binding or not. Such acceptance is of course subject to the reservation that, as suggested by the Arbitrator, the parties will be entitled to provide their position on the dispute following this conclusion. The Respondent also reserves the right to examine any witnesses on issues relating to the Settlement Agreement if a hearing is in fact held in these proceedings."*

17. On 6 December 2012, the Arbitrator wrote to the Parties in the following terms:

> *"The Arbitrator wishes to thank the parties for their observations on the suggestion he made on 14 November 2012. For convenience the suggestion was as follows:*
>
> *"The Arbitrator notes the various procedural requests and would like to put forward the following suggestion for the parties' consideration. Subject to the parties' views on this suggestion, the Arbitrator proposes to indicate his conclusion on whether the document referred to as the "Settlement Agreement" binds Claimant or not. The Arbitrator would then ask the parties for their positions on the dispute in the light of that conclusion on this one issue."*
>
> *Taking into account the particular circumstances of this case, the observations of the parties, and the Arbitrator's procedural powers as provided for in the BAT Rules, the Arbitrator wishes to inform Counsel and the parties that he has decided to inform the parties of his final conclusion on the issue noted above.*
>
> ***His final conclusion is that the Settlement Agreement <u>does bind</u> Claimant.***
>
> *The precise reasons underlying this final conclusion will be set out in the Award in due course.*
>
> *The Arbitrator therefore directs Counsel to make such observations and submissions as they deem fit in light of this conclusion. In particular, the Arbitrator wishes to know the parties' positions as a consequence of this final conclusion.*
>
> *The parties are requested to submit their positions by no later than Thursday, 13 December 2012."*

18. Following an extension of the deadline for the filing of the Parties' positions, both sides made their submissions on 17 December 2012.

19. On 19 December 2012, the Arbitrator wrote to the Parties in the following terms:

"The Arbitrator herewith invites both parties to comment on the other side's submission by no later than Friday, 11 January 2013. However, the Arbitrator wishes to note that his decision as regards the conclusion of the Settlement Agreement will not be reversed. The Procedural Order of 6 December 2012 was not an invitation to ask for reconsideration of the decision indicated therein, but rather an opportunity afforded to the parties to make submissions in light of a final conclusion on an issue of importance.

Therefore the Respondent is not invited to respond to the submissions of the Claimant which seek to reverse the decision of the Arbitrator on the conclusion of the Settlement Agreement.

The Claimant is specifically asked to address two points made by the Respondent: (a) the Settlement Agreement does not preclude the Respondent's Counterclaim; and (b) the Respondent's renewed suggestion that the Arbitrator seek to bring about a settlement. The Claimant can, of course, address all other points made by the Respondent as it sees fit."

20. Following an extension of the deadline for the filing of the Parties' positions, both sides made their submissions on 25 January 2013.

21. On 28 January 2013, the Arbitrator wrote to the Parties in the following terms:

"In accordance with Article 12.3 of the BAT Rules, the Arbitrator is "authorized to attempt to bring about a settlement to the dispute". Given that both parties have in their submissions expressly requested the Arbitrator to attempt to bring about a settlement if he believes settlement is possible, the Arbitrator has decided to continue the proceedings with settlement negotiations moderated by him.

The parties are invited to inform the Arbitrator by no later than Wednesday, 30 January 2012 whether they prefer a meeting in person (to be held in London) or a telephone conference. Within the same time limit, the parties are requested to indicate their availabilities on the following dates (each between 3 p.m. and 6 p.m. Swiss time):

[seven dates offered]

In case the parties prefer a meeting in person, the Arbitrator would also be available on 26 March 2013 in Vienna.

Please note that the parties are not required to participate personally in the settlement negotiations as long as they are represented by a person who is authorized to conclude a settlement agreement."

22. On 30 January 2013, Player stated as follows:

> *"In response to the Procedural Order dated January 28th, Claimant prefers a meeting via conference call. However prior to the conference call we need to discuss with the client and his agents, and unfortunately client's schedule in February is not available due to the NBA season. Therefore we kindly request that the meeting is organized in March at an available date for both parties and the Arbitrator."*

23. On 30 January 2013, Respondent stated as follows:

> *"We refer to your email of 28 January below, informing the parties that the Arbitrator has decided to continue the proceedings by way of settlement negotiations moderated by him. The Respondent notes as a preliminary matter that whilst it requested that any settlement discussions occur prior to a hearing, it does not consider it worthwhile to engage in such discussions unless the Claimant is truly willing to negotiate a mutually agreeable outcome, and unless the discussions are conducted in person. The Respondent also notes that the Club will be unable to attend any settlement negotiations in person, however agrees to be duly represented by Counsel at such negotiations. Accordingly, and in light of the Club and its Counsels' previous commitments, the Respondent agrees to settlement negotiations provided that these are conducted in person on 5 or 6 February 2013."*

24. On 1 February 2013, the Arbitrator wrote to the Parties in the following terms:

> *"As a compromise between both sides, the Arbitrator suggests that an in-person meeting be held (as requested by Respondent); but in March instead of February (as requested by Claimant).*
>
> *Therefore, the parties are invited to inform the Arbitrator by Wednesday, 6 February 2013 whether they agree on a meeting in person to be held on 26 March 2013 in Vienna.*
>
> *Once again, the parties are reminded that they are not required to participate personally in the settlement negotiations as long as they are represented by a person who is authorized to conclude a settlement agreement."*

25. On 5 February 2013 Player stated as follows:

> *"In response to Arbitrator's procedural order dated 1 February 2013 on the above referenced case, we kindly request that the settlement negotiations are made via conference call. All counsels of Claimant will attend to the negotiations however, counsels of Claimant reside in USA and Turkey, and are unable to attend a hearing in-person in Austria due to long distance. Therefore, we kindly request a conference call be held for the settlement negotiations."*

26. On 6 February 2013, Respondent stated that neither of its Counsel were able to be in Vienna on 26 March 2013.

27. On 6 February 2013, the Arbitrator wrote to the Parties in the following terms:

> *"The Arbitrator notes the replies from the parties (copies attached) on a suitable date and mode for a meeting with him to seek a settlement of the arbitration pursuant to Article 12.3 of the BAT Rules. It is apparent that this will not be presently achievable, namely securing a date and mode which is acceptable to both sides.*
>
> *The Arbitrator has also noted that the Claimant has made what seems to be a new case (encapsulated in paragraph 27 of the Claimant's submissions of 25 January 2013) alleging breach of the Settlement Agreement.*
>
> *It therefore appears to the Arbitrator that the Respondent must have an opportunity to reply to that case. The Respondent is given until Wednesday, 6 March 2013 to file its reply.*
>
> *Finally, the parties should note that the Arbitrator is considering that the circumstances and significance of the case as presently articulated by both sides (claims and counterclaims), notwithstanding the finding by him as regards the settlement agreement, merit the holding of a hearing. At the same time as a hearing it would also be possible to hold the process under Article 12.3 of the BAT Rules. The Arbitrator is minded, at present, to consider that a hearing would take place in New York after the conclusion of the current season's play for the Claimant's club. Of course the seat of the arbitration would remain at all times in Geneva."*

28. On 6 March 2013, Respondent filed its submissions on foot of the direction dated 6 February 2013.

29. On 7 March 2013, the Arbitrator wrote to the Parties in the following terms:

> *"The Arbitrator has considered the submissions and is of the view that there is scope for him to assist the parties with a settlement. However, as the Arbitrator has already ascertained that getting both sides physically to one place for such discussions is not possible, he has decided to convene the parties by telephone. No more than two persons will be required on the call from each side, and those persons must have confirmed to the BAT prior to the telephone call that they have the fullest authority to settle the case. The Arbitrator wishes to emphasize that there can be no restrictions on their authority.*
>
> *The Parties are herewith requested to inform the Arbitrator by no later than Wednesday, 13 March 2013 about their availability on the following days:*
>
> *[five dates offered]*

30. On 13 March 2013, Player stated as follows:

> *"In response to the Procedural Order dated March 7, 2013, we would like to state that since this settlement conference call is aimed to hear the final words of parties, Player needs to be in a proximity for us to be able to have a final settlement. However Player's current involvement in continuing NBA season does not allow us to ensure such proximity with the Player in a conference call before the end of June. Hence we kindly request a hearing be held with settlement purposes after the end of June 2013, either in person or via conference call."* [This was later corrected to state that Player's availability was at the end of July.]

31. On 14 March 2013, Respondent stated as follows:

> *"As per the Procedural Order issued by the Arbitrator on 7 March 2013, we hereby confirm that counsel for the Respondent will be available to attend a settlement conference by phone on **12 April 2013**. In light of the significant time differences involved, we propose that it would be appropriate to hold the conference at 14:00 Geneva time (i.e. 13:00 GMT). Whilst counsel for the Respondent will have full authority to settle the dispute (as required), this would allow the relevant parties to be contactable during the settlement conference."*

32. On 19 March 2013, the Arbitrator wrote to the Parties in the following terms:

> *"In view of the Parties' submissions, the Arbitrator suggests that a telephone mediation conference be held in the week of 15 July 2013 on the understanding that the counsel on the call would have full authority and have, for consultation purposes, their clients available to speak with them, but not on the telephone call which is to be for counsel only.*
>
> *The Parties are now invited to inform the Arbitrator by no later than Monday, 25 March 2013 whether they agree with his suggestion, and to indicate their availability for the week of 15 July 2013."*

33. On 25 March 2013 Player stated as follows:

> *"In response to the Procedural Order dated 19 March 2013 in the above-referenced matter, we agree with arbitrator's suggestion for a telephone mediation conference and hereby confirm our availability for the week of 15 July 2013, and if possible, later in that week."*

34. On 27 March 2013 (following an extension of the deadline by the Arbitrator) Respondent stated as follows:

> *"The Respondent confirms that it agrees with the Arbitrator's proposal for a mediation telephone conference, however it does not agree with the proposed timing of same. The Respondent does not consider that the fact that the Player participates in the NBA*

warrants the postponement of the proceedings until July 2013. The Respondent notes that this is particularly so in circumstances where the proposed conference will be conducted by telephone. Given the ease with which such a conference could be conducted, such a delay seems unnecessary. With respect to the suggested dates for the conference, the Respondent also wishes to note that its counsel is unavailable for the entire week of 15 July 2013 due to teaching commitments at the FIFA Master (the week in question being the week of finals for that program). The Respondent also wishes to note that the present Procedural Order (and the significant delay which would be caused by its implementation) has once again arisen as a result of the Claimant's unwillingness to cooperate in efficiently resolving these proceedings. In fact, this request from the Claimant means that the parties would be waiting a further 4 months before having a mediation conference in these proceedings, which may not even necessarily result in a full and final resolution of the dispute. Nor is this the first occasion on which the Claimant's procedural conduct has produced such a result. In these circumstances, the Respondent respectfully submits that in the unlikely event that it is ordered to pay any amount to the Claimant in these proceedings, such amount should in no way be subject to pre-award interest. The Respondent submits that any award of interest prior to the date of the final resolution of the proceedings would be wholly unjustifiable in the face of the significant procedural delays caused by the Claimant and would certainly be at odds with the principle of ex aequo et bono applicable to these proceedings."

35. On 27 March 2013, the Arbitrator wrote to the Parties in the following terms:

"In view of the parties' replies, a mediation date by telephone in July is not possible. Bearing in mind previous efforts to arrange a mediation, it appears to the Arbitrator that a mediation is not practicably possible in general.

The Arbitrator will review the entire file and revert to the parties in early course."

36. On 2 April 2013, the Arbitrator wrote to the parties, inviting them to submit their statements of costs by 8 April 2013. In the same letter, the parties were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules. In addition, the Arbitrator stated as follows:

"We acknowledge receipt of the Claimant's letter of 29 March 2013 which is attached for the information of the Respondent (comment is not invited from the Respondent).

Please be informed that the Arbitrator has now reviewed again all documents submitted by the parties including, in particular, the documents received since 6 February 2013. Given that both parties have presented their arguments exhaustively in writing, and taking into account the practical difficulties of securing a telephone conference for a mediation, the Arbitrator has decided in accordance with Article 13.1 of the BAT Arbitration Rules that no hearing shall be held and that he will issue an Award on the basis of the written submissions and evidence.

[…]

Furthermore, the Arbitrator has decided that the Award shall not be confidential in accordance with Article 16.4 of the BAT Arbitration Rules as he sees no reason to depart from the default position."

37. On 5 April 2013, Player sought reconsideration of the Arbitrator's decisions not to hold a hearing and that any award would not be confidential. Player further requested a hearing. This was the first occasion upon which Player had requested a hearing (as noted in paragraph 15 above, Player had previously stated that "in the interest of time, [Player] hereby kindly requests that the Arbitrator evaluates the dispute at hand in whole and indicates the conclusion on all claims simultaneously"), but this request was made only after the Arbitrator had declared the exchange of documentation to be closed.

38. On 8 April 2013, Player submitted his statement of costs.

39. On 15 April 2013 (following an extension of the deadline), Respondent submitted its statement of costs and also its position on Player's request that there be a hearing and that any award would be confidential.

40. On 29 April 2013 (following an extension of the deadline), Player submitted his observations on Respondent's statements of costs. Player reiterated his request for a hearing in late summer 2013.

41. On 21 May 2013, the Arbitrator wrote to the Parties in the following terms:

"The Arbitrator has carefully considered the position as regards the Claimant's request for a hearing. The position remains as already stated[1], namely that there will not be a

[1] See paragraph 36 above, which records the Arbitrator's communication to the Parties noting his consideration of the position and Article 13.1 of the BAT Arbitration Rules. Article 13.1 states as follows (in relevant part): "No hearings are held in arbitration proceedings under these Rules unless one of the parties requests a hearing and/or the Arbitrator decides to hold a hearing." As is clear from the language of this

hearing. Also, as already stated, the award will be public in the normal course. The parties will receive the award in due course."

42. The letter dated 21 May 2013 was the last step taken in this arbitration prior to the delivery of this award. No further point was made, or sought to be made by the Parties after 21 May 2013.

4. The Positions of the Parties

43. As already noted in paragraph 6 above, the Parties are in dispute over a wide range of matters. The positions of the Parties on each issue (as they have emerged during the course of this arbitration), insofar as such positions are germane to their disposition, will be described in Section 6.2 below. For present purposes, the respective requests for relief sufficiently articulate the basic positions of the Parties in this arbitration.

44. Player has requested the following relief in his Request for Arbitration:

1. USD 1,078,500.00, comprising of USD 1,060,000.00 for unpaid salary and USD 18,500.00 for unpaid bonuses, together with interest; and

2. Costs, legal fees, and expenses.

45. Respondent has requested the following relief in its Answer:

1. A rejection of Player's prayers for relief;

2. USD 1,222,220.00 (or other amount deemed equitable by the Arbitrator) on foot of its Counterclaim for damages for lost sponsorships, together with interest;

Article, a party may request a hearing but that is not determinative; when a party requests a hearing the Arbitrator must also decide to hold a hearing.

3. Costs and legal fees; and

4. Any other remedy deemed fair and equitable.

5. The Jurisdiction of the BAT

46. 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).

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

48. 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[2].

49. The jurisdiction of the BAT over Player's claims is stated to result from the arbitration clause (Article 5) of the Agreement, which reads as follows:

> *"In the event of any dispute in relation to this Agreement, Club agrees to contact Player's Representative in an attempt to negotiate the dispute prior to any action. Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal ("BAT") in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be 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."*

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

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

51. 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).

52. The Parties have not at any stage, throughout the course of this arbitration, called into question the Arbitrator's jurisdiction. Further, Respondent has asserted a counterclaim for damages for lost sponsorship, and Player has fully joined issue on the merits of that counterclaim without reservation.

53. For the above reasons, the Arbitrator has jurisdiction to adjudicate Player's claims and Respondent's Counterclaims.

6. Discussion

6.1 Applicable Law – ex aequo et bono

54. 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".*

55. 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."*

56. As stated above (paragraph 49), the Agreement clearly stipulates that: "*[T]he arbitrator*

shall decide the dispute ex aequo et bono".

57. 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[3] (Concordat)[4], 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."*[5]

58. 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."*[6]

59. 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*."

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

6.2 Findings

61. By way of preliminary observation, the doctrine of *pacta sunt servanda* (which is

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3 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).

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

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

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

consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the principle by which the Arbitrator will examine the positions of the Parties.

62. This arbitration commenced as a relatively straightforward unpaid salary and bonus claim. However, as the arbitration evolved during the course of the submissions, the matters which were actually and truly in dispute between the Parties were, in the Arbitrator's assessment, as follows:

(a) Issue 1 - did the Parties agree to an early termination of the Agreement, and if so, upon what terms ("Settlement Agreement");

(b) Issue 2 - did Respondent owe anything to Player on foot of the Settlement Agreement;

(c) Issue 3 - did Respondent breach the Settlement Agreement with the result that Player was entitled to the full amount of his original claim; and

(d) Issue 4 - did the Settlement Agreement preclude Respondent from asserting the Counterclaim and if not, does the Counterclaim succeed or fail.

Issue 1 - did the Parties agree an early termination of the Agreement, and if so, upon what terms ("Settlement Agreement")

63. By way of introduction to Issue 1, the Arbitrator notes the following three, general, factors:

(a) Player is a globally-known star NBA player, excelling at the highest possible level in the US both before and after his time with Respondent;

(b) the Agreement was for the 2011-2012 CBA season with payments to Player running from October 2011 to March 2012; and

(c) the NBA lock-out postponed the start of the 2011-2012 NBA season for some months, concluding on 8 December 2011.

64. The assertion that the Parties brought the Agreement to an early conclusion was first made by Respondent in its Answer.

65. Respondent submitted that in late November 2011, it became aware that there was a tentative deal in place to bring the NBA lock-out to an end. Respondent further submitted that Player wished to return to the US and the NBA in light of the end of the lock-out. Respondent also submitted that there were complications involving the CBA Regulations and giving Player the required clearance to return to the NBA.

66. Respondent submits that at the beginning of January 2012, it discussed an amicable termination of the Agreement, with various terms and settlement proposals being put forward. After 28 January 2012, Respondent says that the Parties began seriously negotiating.

67. Respondent submits that between 28 January 2012 and 1 February 2012, the Parties negotiated a specific settlement agreement according to which:

(a) Player would be permitted to leave Respondent after the final regular season game and the All Star Game, and would be granted a letter of clearance after all play for that season was completed – as the discussions evolved, the requirement for Player to participate in the All Star Game was not carried through;

(b) In consideration for the early release, Player would: forfeit any salaries after the date he left Respondent, pay any fines which had accrued, train and play to assist

the team reach the play-offs, and refrain from bringing family members to games.

68. Respondent says that on 28 January 2012 during a telephone conference, the Chinese Agent (Zhao Gang) informed Mr. Funiciello (another of Player's Agents) that the amount of the fines would be in excess of the remaining salary which had not been waived. After this occurred, Mr. Funiciello is stated to have responded that Mr. Rose (another of Player's Agents) had requested that those fines be reduced.

69. Respondent says that on or about 31 January 2012, the Chinese Agent spoke to its General Manager who is stated to have been of the view that consideration would be given to reducing the fines if the play-offs were reached.

70. Respondent says that on 2 February 2012 it signed a document setting out settlement terms and sent the document to Player's agents (the document was attached to the Witness Statement of Zhao Bing, Annex 15). That document's terms are summarised as follows:

    (a) Article 1 states that its effective date is 2 February 2012, that the parties will follow its terms, and provided that if neither party breaches this "Settlement Agreement, this shall serve to nullify the remaining points in the previous player contract executed by player, agent and club";

    (b) Article 2 sets out the obligations of Player, noting the approval of Respondent to the mutual termination of the Agreement and referring to the pending receipt by Player of his letter of clearance within 48 hours of the conclusion of the 2011-2012 CBA Season. It also notes that Player will play for Respondent until the final regular season game on 15 February 2012 and immediately afterwards he is permitted to return to the US. Player is to be given his entire salary for this "pay period" minus any accrued fines. Other provisions were made about participation by Player in team activities, and a request that Player's family

would not be permitted to accompany the team;

(c) Article 3 provides for a full guarantee for all scheduled settlement payments and in the event of default of such payment, the original payment obligations in the Agreement would be reinstated;

(d) Article 4 provides for net of tax payments together with consequential matters relating to certificates and also for business class airfares for Player's return to the US;

(e) Article 5 is a dispute-resolution clause which provides for BAT arbitration;

(f) Article 5A refers to media statements and includes a provision that "[N]either party shall make any statements disparaging the other party during and after the term of this Settlement Agreement";

(g) Article 6 is a an entire agreement clause; and

(h) Article 7 provides for execution in counterparts.

71. Respondent says that on 7 February 2012, the Chinese Agent emailed Mr. Funiciello the commitment letter required by the CBA in order to grant the Letter of Clearance and give effect to the settlement. An email exchange was attached to the Witness Statement of Zhao Bing, Annex 16, which includes correspondence from Mr. Funiciello to Mr. Rose about the Letter of Clearance:

> *"leon*
>
> *this document needs to be signed by JR so allow him to sign that , but for your protection if you would have someone that reads Chinese view it."*

72. Respondent then submits that on 8 February 2012, it received an executed copy,

signed by Mr. Rose, of the document referred to at paragraph 70 above. This document was attached to the Witness Statement of Zhao Bing, Annex 17. Respondent notes that changes had been made, but in its submissions it says that the material terms had not been altered – especially with respect to the relationship between the Player and the Respondent – and therefore it considered that the terms had been settled by the Parties.

73. Respondent notes that on 10 February 2012, its team lost a match which meant that there was no chance of the play-offs being reached. Respondent emailed Player's agents to say that it was arranging for his return on 16 February 2012.

74. Respondent says that on 11 February 2012, its General Manager asked Player to counter-sign the document (referred to at paragraph 70 above) however Player refused stating that one of his agents (CAA, namely Mr. Rose) had not told him that he needed to sign it. This is stated as direct testimony by Mr. Zhao Bing (Witness Statement, paragraph 35).

75. On 16 February 2012, Player left Respondent.

76. Player's response to the case being made by Respondent that a settlement agreement was made between the Parties was set out in Section G of his second round submission on 28 September 2012.

77. Player says that an agreement must be signed by all parties in order for there to be a valid and binding obligation. As Player never signed the document, there was no "meeting of the minds."

78. Player concedes that "the Settlement Agreement was heavily negotiated over a significant period of time."

79. Player states "[T]he Settlement Agreement executed between the Club and the Agent goes nothing further than an agreement to the detriment of a third part and is incompatible with the notions of equity." Player cites certain BAT jurisprudence as demonstrating the limits of authority.

80. No witness testimony accompanied Player's second round submission. Specifically, Player did not challenge the witness testimony of Zhao Bing regarding the events of 11 February 2012, namely, Player stating that he had not been told by his agent that he needed to sign the document.

81. Respondent countered in its second submission with reference to the operation of the law of agency, and the effects of actual or apparent authority. It also submits that there was a "meeting of minds" as all the relevant factors were present: offer, agreement, consideration, and intention.

82. Respondent cites BAT 238/2011 (as did Player) drawing attention to the following part:

> *"Since the Respondent and Player did not act with the explicit or implicit consent or authority of Claimant when signing the Termination Agreement, the consequences thereof can also not be attributed to Claimant based on the latter's will."*

83. Respondent says that there was a course of dealing and authority granted to Player's agents which was never withdrawn. It states that there was no indication on the date of the signature on the document that Mr. Rose lacked sufficient authority.

84. Respondent cites BAT 184/2011 (as did Player), in distinguishing it from the present case, by saying that in BAT 184/2011 there was no indication that the player was made aware of the settlement, and that also the agent was not a signatory to the original contract (which is not the case with the Agreement where the Player's Agents are signatories).

85. Respondent submits that Player acted consistent with the terms of the document.

86. The Arbitrator specifically notes that on 29 November 2012, Player stated (in his Counsel's letter of that date) that he had submitted his position on the invalidity of the Settlement Agreement in Section G of his second round submissions. Player did not seek to add in any way to his submissions on the issue.

87. As already noted, the Arbitrator informed the Parties on 6 December 2012 of his conclusion on the Settlement Agreement, namely that it was binding.

88. The Arbitrator's conclusion was based upon the submissions and evidence received by him up to that point as broadly summarised just above. The Arbitrator notes in passing that after he indicated his conclusion on the issue, Player sought to revisit aspects of the issue. Those points were made too late and the Arbitrator made his decision on the basis of the clear set of submissions made by the Parties in accordance with the procedures adopted in this case. If Player wanted to make additional points about the Settlement Agreement, the place to have done so was in his second round submission, and certainly, at the very latest, when writing on 29 November 2012 in answer to the Arbitrator's invitation for comment upon the suggestion made on 14 November 2012.

89. Player explicitly accepts that his agent signed the Settlement Agreement, and that it had been heavily negotiated. It appears that his sole reason, in substance, to say that the Settlement Agreement did not bind him was that he did not sign it.

90. Player does not deny that he knew that his agents were negotiating a termination of the Agreement. That is a relevant factor, and it was entirely open to him in this case to testify by way of witness statement that, for example, he knew nothing of the negotiations being conducted by his agents, or that when asked to sign the Settlement Agreement, he would have evinced surprise at its existence. The submissions made on his behalf do not state that he was unaware of what was going on.

91. The BAT authority which was put before the Arbitrator is distinguishable from the

present case. Those cases involve purported settlements without the knowledge of the relevant third party. That is not the case here.

92. In this arbitration, the Player's agents are parties to the Agreement. That is the clearest demonstration of a significant involvement by the agents in the original contractual arrangements and their authority vis-a-vis Player.

93. There is no evidence of any kind which suggests that Player was being kept in the dark as to what was going on in the negotiations. In fact, Player does not make this case.

94. It is a telling factor that Player did not explicitly (or even impliedly) impugn the authority of his agents in his second round submissions. It is also a telling factor that even when the BAT jurisprudence was specifically argued by Respondent to be distinguishable in relation to authority, Player did not seek to make any further submissions.

95. The Arbitrator is persuaded that the agents did have the Player's authority to sign the Settlement Agreement. The fact that the agents are named parties on the face of the Agreement and signatories thereto, carrying out the important function of a player's representative, is a strong indication of authority. Furthermore, the fact that the agents were permitted by Player to engage in heavy negotiations as regards an early termination of the Agreement, is a further indicator of authority. Finally, at no stage is there any evidence adduced by Player which shows that, at that time, he impugned the signature by his agent on the Settlement Agreement on 8 February 2012.

96. It is noteworthy that neither agent has testified in this arbitration, nor has any specific or relevant reference as regards their authority been made in submissions as to what they were doing in the run-up to 8 February 2012.

97. Both agents could have said in this case that they were negotiating subject to the Player's ultimate and final authority, or that they were negotiating on the basis that

there was no deal until there was a signature by Player on the document. Neither of them testified, nor was there, for example, a contemporaneous email from either of them to say that as Player had not signed the Settlement Agreement, there was no deal. Their silence at the time in February 2012, and their silence in this arbitration, is a strong factor against any suggestion that their authority was limited when they negotiated the Settlement Agreement.

98. There is no suggestion that Player has parted company from the agents or that they were not available to testify if Player had elected to present their evidence. Player did not do so, and that is an evidential and forensic choice made by him.

99. Separately and independently from the authority argument successfully invoked by Respondent, it is also clear to the Arbitrator that Player conducted himself in accordance with the Settlement Agreement. Simply put, he left China on 16 February 2012 and returned to the NBA. His departure from China on 16 February 2012 is precisely in accordance with the Settlement Agreement, a basic term of which was to put a premature end to the Agreement.

100. In summary, the Arbitrator holds that the Parties entered into the Settlement Agreement, and that this brought the Agreement to an early conclusion. The terms of the Settlement Agreement are those as signed on 8 February 2012 (Witness Statement of Zhao Bing, Annex 17).

Issue 2 - did Respondent owe anything to Player on foot of the Settlement Agreement

101. Article 2 of the Settlement Agreement is the key provision as regards the Parties' arrangements for the conclusion of the financial affairs as between them. It says, in part, "the player will be given his entire salary for this pay period [up to 15 February 2012] minus any accrued fines, and costs that have arisen during his time in CHINA...". This means that any salary payments provided for in the Agreement which were due to

have been made after 15 February 2012 were no longer payable.

102. Those salary payments, originally payable after 15 February 2012, totalled USD 640,000.00 (Article 3 of the Agreement, two equal instalments of USD 320,000.00, 28 February 2012 and 15 March 2012). This figure of USD 640,000.00 is clearly referenced in Article 3 of the Settlement Agreement as Player's "former salary"; that Article provides for a default position in the event that a Letter of Clearance is not obtained. The use of the phrase "former salary" is an overwhelming indication that the final two instalments were waived.

103. The Arbitrator does not see that there are any ambiguities about what the Parties agreed to in the Settlement Agreement. The Parties agreed to go their separate ways, with Player waiving his last two instalments of salary and agreeing to have deducted from any owing salary payments, accrued fine and costs.

104. Respondent submits that as of 15 February 2012, the outstanding salary due to Player was USD 420,000.00 but that as the fines were in excess of that amount, it decided not to seek the balance from Player and considered the matter closed.

105. Respondent submits that Player's agent (CAA – Mr. Rose) requested a copy of the list of the fines, and this was sent in early March 2012. This list of fines, totalling USD 600,000.00, was attached to the Request for Arbitration (Exhibit C5). The fines were mostly due to Player missing practice sessions.

106. Respondent supports its position by presenting extensive witness testimony from players and officials describing Player's absence from practice sessions. Respondent also produces a list of missed practice sessions (Exhibit R13).

107. Player submits that the warning letters and fines were not sufficiently detailed, and did not come in a timely fashion. Player submits that the warning letters and fine list were

delayed intentionally in bad faith on the part of Respondent. Following the Arbitrator's indication of his conclusion on whether the Settlement Agreement was entered into by the Parties, Player drew attention to the fact that on 29 January 2012, Respondent stated that the accrued fines and costs were USD 340,000.00. Player then submits that the correct calculation of fines and costs should be USD 216,000.00. Given that this amount is less than the total remaining salary payment of USD 420,000.00 on foot of the Settlement Agreement, the failure to pay this sum to Player is a breach thereof, and thereby the obligation to pay the full original amount under the Agreement is reinstated.

108. Player does not dispute the right of Respondent to apply fines, but submits that this right needs to be applied in a timely fashion.

109. Player submits that Respondent's approach (as regards fines) does not protect his personal rights in line with the FIBA Code of Ethics. Specifically, Player says that the size of the fines imposed interferes with his personal rights.

110. Respondent counters with the submission that the amount of accrued fines and costs stated on 29 January 2012 is not determinative; the testimony of the General Manager is that Player was informed that the fines accumulated would exceed any remaining salary; the email of 29 January 2012 also refers to the requirement of the return of the Agents' Fee of USD 140,000.00 in addition to fines of USD 340,000.00 (a term which Respondent says was removed by Player's Agent from the Settlement Agreement); and that the Settlement Agreement is not limited in its terms to what was stated on 29 January 2012.

111. The foregoing summarises in non-exhaustive and outline form, the positions of the Parties, and it is noted by the Arbitrator that the issue and number of fines was addressed with great particularity and length in the submissions.

112. The correct starting point is the Settlement Agreement itself and the relevant language

used: "....minus any accrued fines, and costs that have arisen during his time in CHINA..". This is what the Parties bargained for when they went their separate ways and the Arbitrator must interpret that bargain in a manner consistent with the principles agreed, namely *ex aequo et bono*.

113. A good faith and just reading of the Settlement Agreement clearly suggests to the Arbitrator that Player's entire time in China is to be taken into account when considering the fines and costs to be deducted from the final salary amount of USD 420,000.00.

114. The next step in this process is to examine the provisions of the Agreement as regards Respondent's right to impose fines. This is found in Article 3 and the language is quite particular: "For any absence from practices or games without reason, Club reserves the right to fine Player accordingly; USD 20,000 for missing one game without reason and USD 10,000 for missing one practice without reason."

115. The language in Article 3 of the Agreement does not impose any particular deadline on Respondent to impose a fine (and therefore the BAT jurisprudence cited by Player is clearly distinguishable). The language in fact gives quite a wide discretion to Respondent by the words "Club reserves the right....". Had Player wanted certainty about deadlines for fines after, for example, a missed practice, then appropriate language might have been inserted; but it was not, and the rather open-ended ability of Respondent to impose fines is what was agreed.

116. The Settlement Agreement does not alter Respondent's right to fine Player as found in Article 3 of the Agreement. Again, had Player wanted certainty about this matter, he could have sought to have specific language put into the Settlement Agreement either clarifying the precise number of fines, or changing Respondent's right (as noted above, expressed in wide terms) to impose fines. Player did not do so in the Settlement Agreement. The email of 29 January 2012 does not form part of the Settlement

Agreement, nor does it oust the ability of Respondent to levy fines as found in the Agreement.

117. As the outstanding salary due to Player at the time he left China was USD 420,000.00, the key question is whether Respondent has demonstrated that there is evidence to support fines up to that amount. Any fine which goes beyond a total of USD 420,000.00 is irrelevant.

118. The Arbitrator notes the evidence put before him (across several witness statements and in documentary exhibits) by Respondent. The Arbitrator also notes the position of Player as regards this evidence. The summary prepared by Respondent at Exhibit R14 when filing its Answer is helpful and sets out on one page, the core testimony of eight witnesses regarding the non-attendance by Player at a number of practice sessions. The specific table which is found at Exhibit R13 is also helpful and identifies, with precision, the practice sessions missed. Respondent therefore threw down the evidential gauntlet to Player in the Answer and there was a clear opportunity for Player to meet the highly specific factual case being made.

119. Player did not choose to address the specifics of Exhibit R13 in particular and the large amount of witness testimony of players and coaching staff of Respondent. No testimony was forthcoming from Player, or anyone on his behalf, which specifically contradicted the facts described on each line of Exhibit R13.

120. Weighing carefully the evidential value of the case put by Respondent, and taking into account the absence of cogent and specific evidence to the contrary on each line of the missed practice table, the Arbitrator is satisfied that Exhibit R13 is proven to be an accurate record of Player's missed practices.

121. There are more than 42 instances of missed practices listed on Exhibit R13. The Agreement specifically allows for a fine of USD 10,000.00 for missed practices, and

therefore Player's outstanding salary is extinguished completely by operation of the Settlement Agreement.

122. For completeness, the Arbitrator does not accept the argument made by Player in relation to the FIBA Code of Ethics. Quite apart from the fact that the Arbitrator is not satisfied that the Code has any role in a contractual dispute as between a player and a club, the argument advanced by Player to the effect that a fine of USD 10,000.00 for a missed practice does not protect his personal rights cannot succeed. The facts of this case and the circumstances of the Agreement do not support such a proposition. Player's salary was agreed at USD 640,000.00 net per month. This is a very substantial salary and investment by Respondent. Reserving the right to levy a fine of USD 10,000.00 in the event of a missed practice is not only proportionate in the overall scheme of the Agreement, but an entirely sensible position to take by Respondent. Player can have no quarrel with the agreed sum for fines. Further, no issue was taken by Player in the Settlement Agreement as to the provisions in the Agreement for fines.

123. In summary, the Arbitrator finds and holds that Respondent did not owe the Player any sums on foot of the Settlement Agreement.

Issue 3 - did Respondent breach the Settlement Agreement with the result that Player was entitled to the full amount of his original claim

124. Player submits that Respondent breached the Settlement Agreement and in particular Article 5A thereof in relation to non-disparagement. Player submits that the public disparagement of him by Respondent resulted in the Settlement Agreement being set aside and the full payment obligations contained in the Agreement being restored.

125. In passing, the Arbitrator notes that Player also argued that the Settlement Agreement was breached by Respondent by reason of non-payment of monies due on foot thereof. However, as already held under the heading of Issue 2, Respondent did not

owe Player any monies on foot of the Settlement Agreement so therefore this argument of Player does not arise.

126. Player draws the Arbitrator's attention to Article 5A of the Settlement Agreement and in particular the following provision: "[N]either party shall make any statements disparaging the other party during and after the term of this Settlement Agreement."

127. Player submits that Respondent's General Manager made negative public statements about him after his return to the US. Player relies for support in this regard, on report from Yahoo! Sports dated 23 February 2012 by Eric Freeman. This article cites another report, this time written by Jon Pastuszek at NIUBBALL.com (via SLAM), which in turn appears to cite a report published by Netease. This report by Netease repeats comments made by Mr. Zhao Bing of Respondent about deductions made from Player's salary. The specific words used appear, from the Yahoo! Sports page, to be as follows: *… the team was simply enforcing a clause in Smith's signed contract and that the team gave him ample warning throughout…. This was the arrangement when he came to the team….Every practice we let him know. If he expressed to us that he wasn't going to come to practice, we'd tell him that in accordance with our contract, we're deducting money from your salary. And he'd always get back to us with, 'Whatever. If you're going to take it, then just take it'*. There is also apparent reported comment that Zhao Bing repeatedly told Player about the seriousness of the situation, but that he continued with the attitude that it was an unimportant issue for him.

128. Respondent counters with a witness statement of the journalist from Netease who testifies that she overheard the remarks in a private context.

129. Disparage is a specific and serious word; it is understandable that the Parties would desire that either would refrain from making comments of such a nature at the end of their contractual relationship. Viewed in its proper context, and looking at the terms of the Settlement Agreement through the prism of justice and equity, it appears clear to

the Arbitrator that the Parties contracted to stop one another from making remarks in public which would demean the other. A simple repetition of things which happened during Player's time in China in fairly uncontroversial language falls well short of the sort of negative and unfairly critical tone which disparagement would require.

130. Having carefully assessed the language set out in paragraph 129 above (assuming that it was indeed said by a person within Respondent so thereby giving every possible assumption to Player's case on this issue) the Arbitrator does not see how these words can reasonably bear a meaning which would come any way close to the negative and unpleasant standard of disparagement.

131. The Arbitrator therefore holds that Respondent did not breach the Settlement Agreement. Player's case that the Settlement Agreement should be set aside (for whatever reason) and that the payment provisions of the Agreement be reinstated, is dismissed.

Issue 4 - did the Settlement Agreement preclude Respondent from asserting the Counterclaim and if not, does the Counterclaim succeed or fail.

132. Respondent has asserted a counterclaim for damages in its Answer. Respondent sets out the headings of its Counterclaim in paragraphs 152-153 of the Answer by articulating the following obligations on the part of Player:

(a) To attend all practices and games;

(b) To refrain from damaging the image of the Respondent's Team and Sponsors;

(c) To avoid disputes with coaching staff and/or being rude or fighting with staff/officials;

(d) To refrain from breaching the rules of the CBA league and of the Club;

(e) To work hard in practices and games with full ability and effort and help the team achieve victories; and

(f) To conduct himself according to the highest standards of honesty, morality, fair-play and sportsmanship.

133. Respondent says that Player "repeatedly and systematically breached these obligations". The Answer and subsequent pleadings go over many events which occurred during Player's time in China. These have generated considerable dispute on the evidential file, however the question for the Arbitrator is whether any of that matters after the Settlement Agreement.

134. Player says that the Settlement Agreement put an end to the relationship between the Parties and any surrounding causes of action. It also points out that Respondent did not reserve its rights in the text of the Settlement Agreement.

135. Respondent says that the Settlement Agreement does not waive its rights to bring a claim for damages and its scope was simply limited to the settlement of the remaining salary and playing obligations of Player.

136. It appears clear to the Arbitrator that items mentioned above in paragraph 132 (save for an issue to which the Arbitrator shall return) were potentially live matters at the time the Parties entered into the Settlement Agreement. The Arbitrator uses the word potentially deliberately; whether the issues raised by Respondent were supported by evidence, or validly asserted and legitimate complaints, is not determinative. No view is expressed for present purposes on whether Respondent has carried its burden of proof on the claims made. Rather, the more important point is whether these claims (even if only valid in the opinion of Respondent) which were reasonably ascertainable at the time of

the making of the Settlement Agreement were extinguished when the Parties entered into that contract.

137. All of the items mentioned in paragraph 132, and in particular items (a), (c), (d), (e) and (f), can only have been matters which would have crystallised by the time the Parties entered into the Settlement Agreement. Item (b), insofar as it had crystallised at that point in time is also similarly captured.

138. Turning to the Settlement Agreement itself, even its title with the word "Settlement" conveys the clear intention of the Parties to sort out their affairs as they stood at that moment.

139. Article 5A provides that Respondent would provide an extensive and thorough letter to Player's Agent about his extreme professionalism and phenomenal attitude while with the Respondent. Respondent's chairman or head coach are promised as being available as a reference, with the reason for the split being different philosophies.

140. The Arbitrator also notes again that the Settlement Agreement preserved Respondent's wide right to levy fines, which has inured to its substantial benefit, namely wiping out a salary claim by Player of USD 420,000.00.

141. The Arbitrator also notes though that the Settlement Agreement did not contain a release of all claims for all time. Such releases are common in settlement agreements in order to provide a complete and clean break between parties, however the Settlement Agreement did not have such a release.

142. A just and equitable interpretation of the Settlement Agreement (and such is mandatory given the provisions of Article 5 thereof) leads the Arbitrator to the view that every potential complaint (whether well-founded or not, and no finding is to be inferred by the Parties on whether any were well-founded) which was known to Respondent at the

time it entered into the Settlement Agreement was waived and released.

143. There remains one aspect of the Counterclaim, namely Respondent's claim that it lost sponsorship in relation to both the 2011-2012 and 2012-2013 seasons and it seeks redress, in part, for those losses from Player. The reason that the Arbitrator is treating these claims separately from those already addressed above, is that they appear (in some respects) to have arisen and emerged after the Settlement Agreement. Insofar as they are not captured by the Settlement Agreement then they will be assessed for their validity.

144. By way of introductory comment, the Arbitrator is of the view that these claims are serious matters. Respondent is submitting that one player caused substantial financial losses by, in effect, driving sponsors away and hindering the performance of the team on-court so that expected success-related bonuses were also lost.

145. The Arbitrator appreciates that there may well be situations in which, given the nature of an allegation of wrongful (in the widest sense) conduct, and in the light of the position of the person concerned, an adjudicator would be reluctant to find the allegation proved in the absence of a sufficient weight of positive evidence – as opposed to pure probabilities or circumstantial inferences. In the light of the system of BAT arbitration (namely, ruling according to *ex aequo et bono*), the particular circumstances of each case would be determinative.

146. In relation to its losses Respondent relies upon the witness testimony of Mr. Zhao Bing, paragraph 46. This paragraph breaks down the alleged losses as follows:

(a) loss of sponsorships due to the Respondent's poor performance with a promise of substantial payments if a minimum ranking of 8th place was reached;

(b) loss of two sponsors due to poor performance and the negative publicity generated

by Player and his family – letters from sponsors are exhibited in that regard;

(c) loss in 2011-2012 ticket sales;

(d) depreciation in Respondent's license merchandise; and

(e) wasted marketing expenses and subsequent additional marketing expenses to repair the damage caused by Player.

147. In support of the causal nexus between these losses and the actions of Player, Respondent submits, in relation to the loss of sponsorship and bonus entitlements, these were as a result of the on-court performance of the team. Respondent draws the Arbitrator's attention to the proposition that Player's performances were "particularly poor" during the last five games of the regular season which resulted in defeats and thereby excluded it from the play-offs. Respondent further submits that the loss of sponsorship for the prospective 2012-2013 season was as a result of the on-court and off-court behaviour of Player.

148. Taking each head of Respondent's counterclaim in turn:

Loss of sponsorships due to the Respondent's poor performance with a promise of substantial payments if a minimum ranking of 8th place was reached

Respondent seeks to blame Player for the consecutive run of losses at the end of the 2011-2012 Season. Respondent submits that Player played particularly poorly. This is an unsustainable allegation to make. The Arbitrator is in no position to judge Player's performance in five high-level basketball matches, much less decide that his performance descended to a level which triggered contractual liability. Teams have winning streaks and losing streaks, that is the nature of professional sport. This head of claim is dismissed.

Loss of two sponsors due to poor performance and the negative publicity generated by Player and his family – letters from sponsors are exhibited in that regard

As with the previous claim, it is impossible for the Arbitrator to decide whether a player has caused a whole professional basketball team to perform poorly so as to trigger contractual liability on his part. To do so would be to second-guess the athletic performance of a globally-famous and supremely talented basketball player. That is a proposition which is untenable. Quite apart from that factor, the evidence proffered is insufficient. While a company may have a corporate opinion that a basketball player's performance was poor (and only states that as a conclusion), that is simply its opinion. Similarly, any publicity associated with Player or his family may not have been to that company's taste, but that is its own choice. Professional basketball is a vigorous and passionate sport, with a voracious media surrounding it. What may be negative news to one person's or company's taste, may be quite different in eyes of others. This claim is dismissed.

Loss in 2011-2012 ticket sales; depreciation in Respondent's license merchandise; and wasted marketing expenses and subsequent additional marketing expenses to repair the damage caused by Player

These claims are conveniently addressed together as they are of a fairly similar nature. They are effectively commercial matters internal to Respondent. The Arbitrator sees no evidence or argument which could sustain these claims as, in effect, Respondent is alleging that commercial failings (which are an inherent risk in every season and in every hire of a new professional player in every professional team sport) are to be substantially ascribed to Player. Put differently, Respondent took a calculated commercial gamble by bringing Player to China to play for it; it did not work out the way it had hoped for and it has to take that failure as an aspect of the commercial realities of professional sport. Further, there is no proof of conduct to the sort of standard which would be necessary for an allegation of such a grave and unusual nature as would

sustain the case being made. It also appears to the Arbitrator that these items (or the potential for these items to exist) should reasonably have been known to Respondent at the time it entered into the Settlement Agreement.

149. For all the aforementioned reasons, Respondent's counterclaim is dismissed.

150. The Arbitrator notes, for completeness, that he has perused and taken into account all materials, evidence, exhibits and submissions placed before him (whether referred to specifically in this Award or not). This Award, however, only refers to evidence and arguments that the Arbitrator considers necessary to explain his reasoning.

7. Costs

151. 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.

152. On 11 November 2013 – 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 14,980.

153. The Parties have not succeeded in the claims they have made against each other; the

Parties have succeeded in the defence of the cases brought against them. While the majority of the arbitration was taken up with Player's claim and its defence by Respondent, the Arbitrator also notes that the Counterclaim was one of considerable seriousness in both its scope and size.

154. Having considered the matter very carefully, and taking all the circumstances into account (including the fact that each Party paid 50% of the arbitration costs), the Arbitrator holds that the fairest and most equitable outcome is that each side bears its own legal fees and arbitration costs.

8. AWARD

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

1. **The claims of Mr. Earl Smith as against Zhejiang Chouzhou Professional Basketball Club Co., Ltd. are dismissed.**

2. **The claims of Zhejiang Chouzhou Professional Basketball Club Co., Ltd. as against Mr. Earl Smith are dismissed.**

3. **Mr. Earl Smith is to bear his own legal and arbitration costs.**

4. **Zhejiang Chouzhou Professional Basketball Club Co., Ltd. is to bear its own legal and arbitration costs.**

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

Geneva, seat of the arbitration, 13 November 2013

Klaus Reichert
(Arbitrator)