BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0294/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Brandon Brown
c/o Mr. Rob Wilson

- Claimant 1 -

Mr. Alex Yam
c/o Mr. Rob Wilson

- Claimant 2 -

represented by Mr. Larry H. Fox
401 E. 80th Street, Suite 17F, New York, NY 10075, USA

vs.

Halcones UV Promotora Deportiva A.C.
Av. de las Culturas Veracruzanas No. 101, Col. Emiliano Zapata C.P.,
91090 Xalapa, Mexico

- Respondent -

1. The Parties

1.1 The Claimants

1. Mr. Brandon Brown (hereinafter referred to as “Claimant 1”) is a professional basketball player, who was retained by the Respondent, Halcones UV Promotora Deportiva A.C. for the 2011-2012 season.

2. Mr. Alex Yam (hereinafter referred to as “Claimant 2”) is a FIBA-certified basketball agent who represented Claimant 1 leading to the latter’s retainer by Respondent. Claimant 2 is a partner of Mr Robert Wilson of “Basketball beyond borders” (hereinafter referred to as “Mr Wilson”).

1.2 The Respondent

3. Halcones UV Promotora Deportiva A.C. (hereinafter referred to as “Respondent”) is a professional basketball club in Xalapa, Mexico.

2. The Arbitrator

4. On 4 July 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 and the Dispute

5. On 30 June 2011, Claimants and Respondent entered into an agreement whereby the latter engaged Claimant 1 to play basketball for the 2011-2012 season ("the Agreement"). The salary of Claimant 1 was agreed at USD 80,000.00, payable in instalments twice per month throughout the lifetime of the Agreement. Mr Wilson was to be paid USD 6,000.00 in two instalments for agency fees.

6. On 23 September 2011, the parties entered into a termination agreement whereby Claimant 1 was to no longer play for Respondent. This termination agreement provided for a payment of an existing due amount of USD 4,800.00 and a severance amount of USD 34,284.00. This termination agreement explicitly states that if the "compensatory monies" are not paid then the Agreement "will be reinstated".

7. Claimant 1 was paid, in total, USD 16,500.00 by Respondent pursuant to the Agreement. Claimant 2 was not paid any sums pursuant to the termination agreement.

3.2 The Proceedings before the BAT

8. Claimants filed a Request for Arbitration dated 4 June 2012 in accordance with the BAT Rules.

9. The non-reimbursable handling fee in the amount of EUR 2,000.00 was paid on 5 March 2012.

10. On 9 July 2012, the BAT informed the Parties that Mr. Klaus Reichert SC had been appointed as the Arbitrator in this matter. Further, the BAT fixed the advance on costs to be paid by the Parties as follows:

"Claimant 1 (Mr. Brandon Brown)	*EUR 3,000*
Claimant 2 (Mr. Alex Yam)	*EUR 500*
Respondent (Halcones UV Promotora Deportiva AC)	*EUR 3,500"*

The foregoing sums were paid as follows (all on behalf of Claimants): 20 July 2012, EUR 488.00; 23 July 2012, EUR 2,988.00; 15 August 2012, EUR 2,753.82; and 17 August 2012, EUR 655.31. The total amount received by BAT was EUR 6,885.13.

11. Respondent did not participate in the arbitration and did not file an Answer, despite several invitations by the BAT to do so.

12. On 12 September 2012, the Parties were invited to submit their statements of costs and were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.

13. On 24 September 2012, Claimants submitted their statement of costs. This was outside the deadline set by the Arbitrator, but following an explanation by Claimants of the reason for the delay, he admitted the submission.

14. Respondent was afforded an opportunity to comment on the costs sought by Claimants but did not take up that opportunity.

15. On 30 October 2012, the Arbitrator sought clarification from Claimants on one point, namely whether Claimant 1 had played elsewhere during the 2011-2012 season and what monies he had received.

16. On 2 November 2012, Claimants stated the following:

> *"Mr. Brown was in Uruguay from November 1, 2011 to February 5, 2012 and received $4,000 per month for a total of $12,000. A copy of such agreement is attached hereto along with a copy of the termination dated February 6, 2012. Thereafter, Mr. Brown*

> *moved to Argentina on Feb 19 and was there for two months at a rate of $8,000 per month until April 18 (when his team lost in the playoffs) and he made a total of $16,000. A copy of such agreement is also attached hereto. In total, Mr. Brown earned $28,000 for the rest of the season after he left Halcones. Please note that the job in Argentina extended six weeks beyond the Club's season in Mexico and most of that job did not overlap with the Mexican season and should not be considered as a mitigation of damages for the Club.*
>
> *We also offer that this shouldn't simply be viewed as a direct economic transaction. Mr. Brown was supposed to play for the Club for the entire season and the actions of the Club caused detrimental harm to his future. When the team breached the terms of the Agreement, it forced Mr. Brown to search for whatever work was available at such point in the season so he could support himself and his family and he bounced from job to job in leagues that many would view as having a lesser reputation. Potential employers now viewing Mr. Brown's resume see a player who played for three teams during the 2011-12 season in somewhat lower leagues and it is viewed detrimentally that he is a player who cannot stick with a team and bounces from place to place. This was caused simply by the Club's negligence and will have a lasting effect on Mr. Brown moving forward so we do not think it is fair to mitigate the Club's damages by Mr. Brown's other employment when you consider that the future damages to Mr. Brown may be far greater than what was earned by those two short term jobs".*

17. Respondent was afforded an opportunity to comment on the foregoing but did not do so within the time allowed.

4. The Positions of the Parties

18. Claimants say that the termination agreement was not performed by Respondent and therefore the originally outstanding amounts due under the Agreement are due to them. There is nothing more complicated in their position in this arbitration than that. The position as regards mitigation is set out above in detail.

19. In their Request for Arbitration, the Claimants requested the following relief:

> *"We request that Claimant be awarded the outstanding amount owed under the Agreement of $63,500 plus interest along with the costs associated with this arbitration and all legal fees incurred. In addition we request that the Additional Claimant be awarded $6,000 plus interest along with costs associated with this arbitration and all legal fees incurred"*

20. As already noted, despite several invitations by the BAT, the Respondent did not participate in this arbitration.

5. The Jurisdiction of the BAT

21. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Club did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.

22. 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).

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

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

25. The jurisdiction of the BAT over the Claimant's claims results from the arbitration clause of the Agreement, which reads as follows (the parties used the old nomenclature for BAT, namely FAT, but this is a distinction without a difference – see Article 18 para.2 of the BAT Rules):

> *"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*

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

Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."

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

27. 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).

28. The jurisdiction of BAT over the Claimant's claims arises from the Agreement. The wording "*Any dispute arising from or related to the present contract* …" clearly covers the present dispute. Further the Arbitrator notes that the parties also included a similar arbitration clause in the termination agreement.

29. For the above reasons, the Arbitrator has jurisdiction to adjudicate Claimants' claims.

6. Discussion

6.1 Applicable Law – ex aequo et bono

30. 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".

31. 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."*

32. As stated above, the Agreement clearly stipulates that: "*[T]he arbitrator shall decide the dispute ex aequo et bono*".

33. 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]

34. 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]

35. 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*."

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

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

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

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

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

6.2 Findings

37. The doctrine of *pacta sunt servanda* (which is 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.

38. It is plain to the Arbitrator that Claimants entered into the Agreement with Respondent in the full and legitimate expectation that the obligations owed to them by Respondent would be duly performed. When the Parties entered into the termination agreement, it was expressed in clear terms that they were going their separate ways for agreed severance sums but that if those sums were not paid, the original financial obligations contained in the Agreement would be reinstated.

39. Respondent has not adhered to its obligations under either the Agreement or the termination agreement. When it failed to make the severance payments provided for in the termination agreement, the financial obligations in the Agreement were revived; a balance of USD 63,500.00 was the sum then remaining due to be paid to Claimant 1. As regards Claimant 2, and more particularly his partner (as to which see further below), Mr Wilson, the agency fee of USD 6,000.00 provided for in the Agreement was not paid.

40. The Arbitrator finds that Claimants' respective claims for USD 63,500.00 and USD 6,000.00 are well founded and there is no indication anywhere on the documents before him which could call into question those liabilities.

41. As regards the claim made by Claimant 2, the Request for Arbitration makes it clear that this sum is stated to be due to Claimant 2 and Mr Wilson as partners, albeit that the Agreement says that the money is to be paid to Mr Wilson. The Arbitrator is accepting the submission and representation of Counsel for Claimants that Claimant 2 and Mr Wilson are partners. The Arbitrator is fortified in the submission as regards

partnership as the title of the Agreement and the parties thereto articulate clearly the close relationship between Claimant 2 and Mr Wilson. The Arbitrator, in awarding the sum of USD 6,000.00, is doing so on the footing, as stated and represented by Counsel in the Request for Arbitration, that Claimant 2 and Mr Wilson are partners. The *dispositif* or curial part of this Award set out below is to be read in that light.

42. The key remaining question is whether Claimant 1's claims should be reduced by reference to the sums (USD 28,000.00) he was paid elsewhere in the 2011-2012 season. Counsel submits that this should not be the case as: a) part of the salary that Claimant 1 earned was at a period after the (normal) expiry of the Agreement and, b) the Player has had to travel around to different clubs in one season and this impacts upon his standing as a player into the future, namely he may be viewed as someone who cannot stick with a club.

43. The Arbitrator has considered the foregoing point carefully. There is long established BAT case law which is to the effect that mitigation is an important factor in the assessment of claims, and sums paid by other clubs to a claimant during a season are often taken into account. The Arbitrator is not inclined to depart from the principle generally seen in that case law. However, the Arbitrator does see a factor in this case which is specific and needs consideration, namely that the Parties did make an agreement to terminate their arrangements but then Respondent did not adhere to those obligations. Having retained Claimant 1 on the original terms of the Agreement, and then later dispensed with Claimant 1 on the terms of the termination agreement, which it then failed to perform, Respondent cannot in such circumstances be afforded the benefit of a full mitigation. The Arbitrator, exercising his powers *ex aequo et bono*, taking also into account that part of the amounts earned by Claimant 1 in Argentina correspondence to a period *after* the term of the Agreement, believes that Claimant 1's claims should be reduced by a sum of USD 14,000.00 which represents half the amount of the monies paid by other clubs to Claimant 1. The amount which is awarded to Claimant 1 is USD 49,500.00.

44. Turning to the claim for interest, it is a universal principle that a party should be compensated in interest for sums due to it. A rate of 5% per annum is viewed by the Arbitrator as just. The question is from what date should interest run?

45. The termination agreement (clause 2) set 30 September 2011 as the date of the first payment of an agreed series of instalments over subsequent months. That first payment was not made by Respondent so it appears just to the Arbitrator that on the day directly afterwards (1 October 2011) Respondent was in breach of the terms of the termination agreement. That is the date from which the Arbitrator holds that interest at 5% p.a. should run on the sum of USD 49,500.00. Similarly, that is the date from which the Arbitrator holds that interest at 5% p.a. should run on the sum of USD 6,000.00 in respect of Claimant 2's claim.

7. Costs

46. 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.

47. On 28 November 2012 – considering that pursuant to Article 17.2 of the BAT Rules "*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*", and that "*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time*", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 4,490.00.

48. Considering that Claimants prevailed in their claims, it is fair that the fees and costs of the arbitration be borne by the Respondent and that it be required to cover its own legal fees and expenses as well as those of the Claimant.

49. The Claimant's claim for legal fees and expenses amounts to USD 6,813.75; this is reasonable and proportionate both by reference to the sums claimed, the sums awarded and the amount of documentation put before the Arbitrator. In addition the Arbitrator will award a figure reflecting the non-reimbursable handling fee of EUR 2,000.00, which is to be borne by the Respondent. The total amount awarded[6] is also below the maximum compensation (EUR 7,500) stipulated in Article 17.4 of the BAT Rules for cases of this value.

50. Given that Claimants paid advances on costs of EUR 6,885.13, as well as a non-reimbursable handling fee of EUR 2,000.00 (which, as noted above, is taken into account when determining Claimants' legal expenses), the Arbitrator decides that in application of article 17.3 of the BAT Rules:

    (i) BAT shall reimburse EUR 2,395.13 to Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the BAT President;

    (ii) Respondent shall pay EUR 4,490.00 to Claimants, being the difference between the costs advanced by them and the amount they are going to receive in reimbursement from the BAT;

    (iii) Respondent shall pay to Claimants USD 6,813.75 and EUR 2,000.00 representing the amount of their legal fees and expenses.

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[6] For the purposes of Article 17.4 of the BAT Rules, the amount of legal fees of USD 6,813.75 is calculated, on the basis of the conversion rate USD/EUR at the time of this award, to be EUR 5,254.

8. AWARD

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

1. **Halcones UV Promotora Deportiva A.C. shall pay Mr. Brandon Brown USD 49,500.00 net for unpaid salary together with interest at 5% p.a. from 1 October 2011.**

2. **Halcones UV Promotora Deportiva A.C. shall pay Mr. Alex Yam USD 6,000.00 net for unpaid agency fees together with interest at 5% p.a. from 1 October 2011.**

3. **Halcones UV Promotora Deportiva A.C. shall pay Mr. Brandon Brown and Mr Alex Yam EUR 4,490.00 as reimbursement for their arbitration costs.**

4. **Halcones UV Promotora Deportiva A.C. shall pay Mr. Brandon Brown and Mr Alex Yam USD 6,813.75 and EUR 2,000.00 as reimbursement for their legal fees and expenses.**

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

Geneva, seat of the arbitration, 6 December 2012

Klaus Reichert SC

(Arbitrator)