BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0315/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Chris Hernandez
c/o Octagon, Inc., 7950 Jones Branch Drive,
Suite 700N, McLean, VA 22107, USA

- Claimant 1 -

Octagon, Inc.
7950 Jones Branch Drive, Suite 700N, McLean, VA 22107, USA

- Claimant 2 -

both represented by Mr. Alex Saratsis and Mr. Paul Haase, Octagon, Inc.,
7950 Jones Branch Drive, Suite 700N, McLean, VA 22107, USA

vs.

Halcones UV Promotora Deportiva A.C.
Av. de las Culturas Veracruzanas Num. 101,
Colonia Emiliano Zapata C.P., 91090 Jalapa, Veracruz, Mexico

- Respondent -

1. The Parties

1.1 The Claimants

1. Mr. Chris Hernandez (hereinafter referred to as “Claimant 1”) is a professional basketball player, who was retained by the Respondent, Halcones UV Promotora Deportiva A.C., for part of the 2010-2011 season and the 2011-2012 season.

2. Octagon, Inc. (hereinafter referred to as “Claimant 2”) is a basketball agency who represented Claimant 1 leading to the latter’s retainer by Respondent.

1.2 The Respondent

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

2. The Arbitrator

4. On 9 September 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 7 January 2011, Claimant 1 and Respondent entered into an agreement whereby the latter engaged Claimant 1 to play basketball for the then remaining part of the

2010-2011 season and the 2011-2012 season ("the Agreement"). The Agreement was "fully guaranteed" (as per clause 1 of the Agreement).

6. The salary of Claimant 1 was agreed at USD 240,000.00, payable net in equal instalments of USD 10,000.00 on twenty-four designated dates (as per clause 3 of the Agreement) throughout the lifetime of the Agreement. This equated to a monthly salary of USD 20,000.00 net. The Parties agreed to "fines" of USD 100.00 per day if payments were more than five days late. In the event of 15 days delay in payment, Claimant 1 would be entitled to withhold his services. In the event of 30 days delay in payment, Claimant 1 would be entitled to terminate the Agreement "and all contracted monies (past and future) will become immediately due and payable to the Player" (as per clause 4(A) of the Agreement). Bonus payments were provided for in the event of certain defined successes. Finally, Respondent agreed to make certain facilities available to Claimant 1, namely an apartment, insurance, meal allowances, and travel. Finally, a 10% agency fee was agreed in favour of Claimant 2.

7. On 25 November 2011, the Parties entered into an agreement entitled "Agreement between parts" ("the Loan Agreement") whereby Claimant 1 was to henceforth play for another Mexican club, namely Pioneros on a loan arrangement at a rate of USD 16,000.00 net per month. The Agreement was to remain in force so that if Pioneros did not honour its commitments to Claimant 1, Respondent would be fully liable for its original obligations. In addition, Respondent agreed to pay Claimant 1 a monthly net sum of USD 4,000.00 so that he would continue to have the full USD 20,000.00 net per month.

8. In the Loan Agreement, Respondent agreed to pay USD 24,000.00 to Claimant 2 by no later than 31 December 2011 for agency fees which was a further acknowledgement of the 10% agency fee stipulated in the Agreement. Respondent also confirmed its, then, presently due and owing amount to Claimant 1, namely USD 45,320.00 made up of USD 42,000.00 (salary), USD 1,750.00 (food money), USD 1,120.00 (rent

reimbursement) and USD 450 (baggage charges).

9. Claimant 1 was not paid the acknowledged sum of USD 45,320.00.

10. Claimant 1 was not paid the monthly amounts of USD 4,000.00 (described in paragraph 7 above) in full and USD 7,186.00 remains due and owing. Claimant 1 also points out that as of 3 June 2012, Respondent was 150 days delinquent in its payment to him and therefore USD 15,000.00 (150 days x USD 100.00) is due by way of penalties.

11. Claimant 2 was not paid the agency fee of USD 24,000.00.

3.2 The Proceedings before the BAT

12. Claimants filed a Request for Arbitration dated 14 September 2012 in accordance with the BAT Rules. A combined Request for Arbitration for two cases was filed on 7 August 2012 and by order of the President of BAT, the matters were deconsolidated on 10 September 2012.

13. The non-reimbursable handling fee in the amount of EUR 2,000.00 was paid on 31 July 2012.

14. On 17 September 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. Hernandez)	*EUR 3,000*
Claimant 2 (Octagon, Inc.)	*EUR 1,000*
Respondent (Halcones UV Jalapa)	*EUR 4,000"*

The foregoing sums were paid as follows (all on behalf of Claimants): 27 September 2012, EUR 4,000.00; and 23 October 2012, EUR 4,000.00.

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

16. On 12 November 2012, the Parties were invited to submit their statements of costs by 23 November 2012 and were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.

17. On 13 November 2012, Claimants submitted their statement of costs claiming EUR 7,795.00. Respondent did not submit any costs.

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

19. On 10 January 2013, the Arbitrator sought clarification from Claimants on one point as regards the relief sought (whether it was overlapping with case BAT 0323/12). This was satisfactorily answered by Claimants on 11 January 2013.

4. The Positions of the Parties

20. Claimants say that the money due to them has not been paid. They advance two bases of argument in the Request for Arbitration: (a) breach of contract, which speaks for itself, and (b) unjust enrichment, namely Respondent accepted the benefit but has not paid and is therefore correspondingly unjustly enriched.

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

    1. USD 52,506.00 for Claimant 1 (which is the sum of USD 45,320.00 noted at

paragraph 8 above and USD 7,186.00 noted at paragraph 10 above);

2. USD 15,000.00 for Claimant 1 for delinquent payment "fines";

3. USD 24,000.00 for Claimant 2; and

4. Costs, fees, expenses including reasonable attorneys' fees.

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

5. The Jurisdiction of the BAT

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

24. 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).

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

26. 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].

27. The jurisdiction of the BAT over Claimants' claims results from the arbitration clause of the Agreement, which reads as follows (the reference to FAT is the former name of BAT; see also Articles 1 and 18 of the BAT Rules):

> *"This Agreement shall be subject to the laws of Swiss and the regulation of FIBA and Court of Arbitration for Sport (CAS); 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 definitely in accordance with the FAT Arbitration Rules. The arbitrator shall decide the dispute ex aequo et bono. Awards of the (FAT) can be appealed to the Court of Arbitration for Sport (CAS) upon appeal shall be excluded. [sic] The party that fails to prevail shall pay the costs, expenses and reasonable attorney's fees of the opposing party."*

28. The Loan Agreement also has an arbitration clause:

> *"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, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

29. The Agreement and the Loan Agreement are in written form and thus the arbitration clauses fulfil the formal requirements of Article 178(1) PILA.

30. 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 clauses in the Agreement and the Loan Agreement under Swiss law (referred to by Article 178(2) PILA).

31. The jurisdiction of BAT over the claims arises from the Agreement and the Loan

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

Agreement. The wording found in both agreements "*Any dispute arising from or related to the present contract* …" clearly covers the present dispute save for a matter which will be discussed below (paras. 35 – 45) in further detail.

32. The Arbitrator notes that Claimant 2 is not stated to be a party to either the Agreement or the Loan Agreement. The title of each contract does not include Claimant 2 as a party.

33. In the title of the Agreement, Claimant 1 is stated to be represented by Chris J Emens and Alexandros Saratsis (the latter person is identified in this arbitration as being a representative of Claimant 2). In the body of Agreement 1 there is a 10% agency fee agreed to by Respondent. Messrs Emens and Saratsis sign the Agreement as "Player Representative" and directly below is printed "Honor Witness". No reference to "Octagon, Inc." is in the Agreement.

34. In the title of the Loan Agreement, there is no reference to Claimant 2 or indeed Messrs Emens and Saratsis. However, in clause 3, Respondent agrees to pay Claimant 2 all agent fees. Finally, at the bottom of the Loan Agreement, there is a signature for Messrs Emens and Saratsis with the word "Agent" directly below, and then "Octagon Basketball". The words "Honor Witness" do not appear as they did in the Agreement.

35. The question therefore arises as to whether Claimant 2 is a valid party to the arbitration agreements.

36. First, it appears to the Arbitrator that the Parties were quite specific in the Agreement as to how the agent or agents would be viewed as to their status, namely as "honor witness" rather than Parties. These words "honor witness" denote in their ordinary meaning something quite different from a party who is taking on obligations or benefits to a contract. The Arbitrator also notes that no reference of any kind is made to Octagon in the Agreement and it is simply not possible to discern any intention or

reason that the corporate entity, Octagon, Inc., is a party to the arbitration agreement. The Arbitrator is of the view that the Parties to the Agreement (Claimant 1 and Respondent) have clearly delineated who is and who is not a party. Claimant 2 is not a party, and the agents are specifically described as “honor witness”.

37. Secondly, the Loan Agreement is of a different nature entirely. By this stage, Respondent has encountered financial difficulties, and is in default of its obligations to Claimant 1 (and indeed has not paid the agency fees set out in the Agreement).

38. There is an explicit commitment to pay Octagon the agency fees to which it had originally committed itself in the Agreement. Critically, Messrs Emens and Saratsis sign again, but this time, there is no qualification of “honor witness” and they are plainly signing, on such terms, for Octagon Basketball. It appears therefore that the Parties chose not to make such an express delineation or designation of the status of signatories as they did in the Agreement.

39. The title of the Loan Agreement does describe who the parties are, and this does not include Claimant 2. Thus, the net question now for the Arbitrator is whether in the circumstances of the Loan Agreement just described Claimant 2 can be a valid party to the arbitration agreement.

40. The Arbitrator has had the benefit of considering BAT jurisprudence on this topic and refers to case 0257/12, paras. 37-39 inclusive of the Award in that case. In summary, once an arbitration agreement complies with the formal requirements with respect to its initial signatories, the extension of that arbitration agreement to other parties does not need to satisfy such requirements. Extension in such circumstances requires a legal relationship between the third party and the initial parties to the arbitration agreement which must be of a certain intensity to justify the extension.

41. In the context of the Loan Agreement, Claimant 2 is plainly the agent of Claimant 1,

and has signed the document in which there is an express assumption of liability by Respondent to Claimant 2 for long outstanding agency fees arising from the Agreement. In these circumstances, and noting the express change of language of the signature page in the Loan Agreement, namely the dropping of the use of the words "honor witness", the Arbitrator considers it justified to extend the arbitration clause in the Loan Agreement to encompass Claimant 2 as a party.

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

6. Discussion

6.1 Applicable Law – ex aequo et bono

43. 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".*

44. 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."*

45. The Agreement clearly stipulates that: "*[T]he arbitrator shall decide the dispute ex aequo et bono*".

46. The arbitration clause in the Agreement makes reference to being subject to the "laws

of Swiss" which might possibly mean that the parties chose Swiss law as governing their substantive obligations. However, later in that same clause is an express choice, consistent with the standing international basketball contractual practice (in cases where the parties have selected BAT as their forum for disputes), of *ex aequo et bono*. In addition, there is no reference to Swiss law in the arbitration clause in the Loan Agreement, where the parties have exclusively selected the application of *ex aequo et bono*. The Arbitrator interprets the arbitration clauses in the Agreement and the Loan Agreement, therefore, as mandating clearly an adjudication pursuant to *ex aequo et bono* principles.

47. 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]

48. 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]

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

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

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

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

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

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

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

6.2 Findings

51. 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.

52. The Claimants' bases of claim, breach of contract and unjust enrichment, appear to the Arbitrator to amount to the same thing. A party cannot have the benefit of a contract without the corresponding burden. A party cannot commit in a written to contract to certain things and then not do them. These are all the concepts well established in BAT jurisprudence and while the articulation of the counts in the Request for Arbitration are similar to a common law approach to contract claims, the overall approach of *pacta sunt servanda* combined with justice and equity comports more with the express choice of *ex aequo et bono* in an international basketball context.

53. The Loan Agreement is a key document in the assessment of the merits of this case. It unequivocally shows that Respondent was in default of its obligations under the Agreement and this necessitated the action of moving Claimant 1 on a loan arrangement to another club. Respondent unequivocally accepted its liabilities to both Claimant 1 and Claimant 2. No reading of the Loan Agreement could yield up any other conclusion.

54. The Arbitrator finds that Claimant 2's claim for USD 24,000.00 is well founded. This is explicitly and unequivocally accepted on the face of the Loan Agreement by Respondent.

55. The Arbitrator finds that Claimant 1's claim for USD 52,506.00 is well founded. The sums (as set out above) are accepted as correct and the Loan Agreement explicitly records Respondent's obligations to Claimant 1 in respect of historical sums due under the Agreement and then an obligation to make a monthly payment of USD 4,000.00 to make up the difference between the salary paid by Pioneros and the USD 20,000.00 set in the Agreement. This latter obligation was partly performed by Respondent but left Claimant 1 short by an amount of USD 7,186.00.

56. Finally, the Arbitrator turns to the claim by Claimant 1 of 150 days' worth of penalties of USD 100.00.

57. First, the Arbitrator notes that there is no claim for interest. This is a relevant factor.

58. Secondly, the Arbitrator has considered the overall position of Claimant 1 in relation to the original guaranteed contract salary of USD 240,000.00. The Loan Agreement confirmed an amount of USD 42,000.00 by way of unpaid salary, and thereafter USD 7,186.00 was unpaid by Respondent in relation to the monthly "top up" payments it undertook. Thus, Claimant 1 has been left short of his total agreed salary by an amount of USD 49,186.00. This is just over 20% of his total salary. By any analysis this is a substantial proportion.

59. Thirdly, the Arbitrator has to consider whether USD 15,000.00 is a just and equitable penalty, notwithstanding the provisions of the Agreement, in the circumstances of the case taking all of the foregoing factors into account. USD 15,000.00 represents, in the Arbitrator's assessment of the justice and equity of the matter, a penalty which is larger than the circumstances warrant and reduces this to USD 10,000.00. Claimant 1 is awarded USD 10,000.00 in respect of this head of claim.

7. Costs

60. 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.

61. On 19 February 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 7,460.00.

62. 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 Claimants.

63. The Claimants' claim for legal fees and expenses amounts to EUR 7,795.00, divided up as follows: EUR 4,720.00 for Claimant 1's claim and EUR 3,075.00 for Claimant 2's claim.

64. Claimant 1's claim was for USD 67,506.00 in total, which is approximately EUR 53,100.00 as per the costs claim dated 13 November 2012. The BAT Rules (Article 17.4) place a maximum costs contribution of EUR 7,500.00 for a claim of this magnitude. The Arbitrator considers that a claim of EUR 3,750.00 is reasonable and

proportionate both by reference to the sums claimed, the sums awarded and the amount of documentation put before the Arbitrator. This claim was unopposed.

65. Claimant 2's claim was for USD 24,000.00 in total, which is approximately EUR 18,875.00 as per the costs claim dated 13 November 2012. The BAT Rules (Article 17.4) place a maximum costs contribution of EUR 5,000.00 for a claim of this magnitude. The Arbitrator considers that a claim of EUR 2,500.00 is reasonable and proportionate both by reference to the sums claimed, the sums awarded and the amount of documentation put before the Arbitrator. This claim was unopposed.

66. 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.

67. Given that Claimants paid advances on costs of EUR 8,000.00, 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 fees and expenses), the Arbitrator decides that in application of article 17.3 of the BAT Rules:

    (i) BAT shall reimburse EUR 540.00 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 7,460.00 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 EUR 3,750.00 to Claimant 1 and EUR 2,500.00 to Claimant 2 and EUR 2,000.00 jointly to both Claimants representing the amount of their legal fees and expenses.

8. AWARD

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

1. **Halcones UV Promotora Deportiva A.C. shall pay Mr. Chris Hernandez USD 52,506.00 net for unpaid salary and expenses.**

2. **Halcones UV Promotora Deportiva A.C. shall pay Mr. Chris Hernandez USD 10,000.00 for late payment penalties.**

3. **Halcones UV Promotora Deportiva A.C. shall pay Octagon, Inc. USD 24,000.00 for unpaid agency fees.**

4. **Halcones UV Promotora Deportiva A.C. shall pay Mr. Chris Hernandez and Octagon, Inc. EUR 7,460.00 as reimbursement for their arbitration costs.**

5. **Halcones UV Promotora Deportiva A.C. shall pay EUR 3,750.00 to Mr Chris Hernandez and EUR 2,500.00 to Octagon, Inc. and EUR 2,000.00 jointly to Mr. Chris Hernandez and Octagon, Inc. as reimbursement for their legal fees and expenses.**

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

Geneva, seat of the arbitration, 26 February 2013

Klaus Reichert SC

(Arbitrator)