ARBITRAL AWARD

(BAT 0345/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

FC Bayern München e.V.
Säbener Straße 51-57, 81547 Munich, Germany

- Claimant -

represented by Mr. Marko Pesic, Sports Director,
Siegenburger Straße 45, 81373 Munich, Germany

vs.

Mr. Je'Kel Foster

- Respondent –

represented by Mr. Sébastien Ledure, attorney at law,
Boulevard du Régent 37-40, 1000 Brussels, Belgium

1. The Parties

1.1. The Claimant

1. FC Bayern München e.V. (hereinafter the “Club”) is a sports club with various sports departments, inter alia basketball, and is located in Munich, Germany. The Club is represented by its Sports Director, Mr. Marko Pesic.

1.2. The Respondent

2. Mr. Je’Kel Foster (hereinafter the “Player”) is a professional basketball player of US nationality. He is represented by Mr. Sébastien Ledure, attorney at law in Brussels, Belgium.

2. The Arbitrator

3. On 23 November 2012, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), Prof. Richard H. McLaren, appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). Neither of the Parties has raised any objections to the appointment of the Arbitrator nor to his declaration of independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

4. On 30 June and 1 July 2011, the Parties signed an employment agreement (hereinafter the “Player Contract”) for the basketball season 2011/2012 (i.e. from 1 August 2011 to 30 June 2012) and the basketball season 2012/2013 (i.e. from 1 July 2012 to 30 June 2013). For the 2011/2012 season, the Club agreed to pay to the Player the amount of

EUR 333,300.00 gross. For the 2012/2013 season, the Player Contract provided for an annual salary of EUR 330,960.00 gross. In addition, the Club agreed to pay a monthly allowance for the rent of the Player's apartment up to EUR 1,300.00 net – which in September 2011 was increased to EUR 1,600.00 – and further benefits such as a car and flight tickets (Clause 6 of the Player Contract).

5. According to Clause 10 para. 4 of the Player Contract, the Player was entitled to unilaterally terminate the Player Contract and to leave the Club at the end of the 2011/2012 season *"[...] if he informs the Club latest until 14 days after the last official season game in written form, that he wants to terminate the contractual relationship with the Club and if he pays an amount of $ 40.000,00 (Dollar) until July 15th to the Club."*

6. On or before 15 September 2011, the Club signed a lease agreement for an apartment in Munich for a period of five years (15 September 2011 to 15 September 2016). This apartment was ceded to the Player for use while he was with the Club. The rent amounted to EUR 2,100.00 and included the basic rent of EUR 1,700.00, the rent for the parking space of EUR 70.00 and a retainer for the operating costs of EUR 330.00 subject to annual settlement, and was paid by the Club. A security in the amount of 3,000.00 was deposited on account of the Player.

7. The Player started training and playing with the Club's team for the 2011/2012 season. The Club's first official game of the 2011/2012 season took place on 3 October 2011 and the last official game on 17 May 2012. The Player left the apartment on 23 May 2012.

8. By email of 7 July 2012, the Club invited the Player to attend a training camp for the 2012/2013 season which took place on 9 and 10 July 2012 in Chicago, USA. The Player did not attend that training camp.

9. By email of 11 July 2012 to the Player, the Club expressed its disappointment about the Player's failure to attend the training camp and informed him that he had to be in Munich on 1 August 2012 for the beginning of the 2012/2013 pre-season preparations. On the same day, in reply to this email, the Player's agent, Ms. Shokuohizadeh, informed the Club as follows:

> *"Dear Marko*
>
> *[...] I Have to refer to the Fact that My Client have notified you regarding exercising his option to terminate the existing agreement with your club, according the buy out clause by paying the amount of $40.000 Due 15th of July 2012 the agreement would be terminated. You are well aware and informed about this option and I hope you will respect it. [...]*
>
> *In Addition, I have also asked you to please forward me the Club bank info which I have yet received. Please also be aware that we are acting in good faith, just applying the clause in our contract which clearly states that Mr Foster has option to leave the club with the buy out sum to be paid until 15th of july 2012!*
>
> *[...]*
>
> *Sincerely,*
>
> *Iman Shokuohizadeh"* [sic]

10. By email of 12 July 2012, the Club replied to the Player's agent as follows:

> *"Dear Iman*
>
> *please note that according to §10 paragraph 4 of the employment contract, the termination is only valid*
>
> *- if it is declared in written form 14 days after the last official season game*
> *- and 40,000 $ are paid until 15 July.*
>
> *The first condition has not been met, since your client did not declare termination within 14 days after the last game.*
>
> *Therefore, the employment contract is still in force. Your client needs to arrive in Munich on 1 August, otherwise he will continue breaching his contractual obligations.*
>
> *[...]"*

11. On 12 and 13 July 2012, further email correspondence between the Parties about the validity of the Player's termination of the Player Contract took place. *Inter alia*, the Player's agent announced a wire transfer of USD 40,000.00 to the Club and the Club requested the Player again to be in Munich on 1 August 2012.

12. On 13 July 2012, the Player transferred USD 40,000.00 referenced as *"Buyout compensation for Je'kel Foster"* to the Club. By email of 18 July 2012, the Club confirmed receipt of USD 40,000.00 in its bank account and informed the Player's agent that this money transfer would not change anything with regard to the Player Contract and requested the necessary bank account information to return the USD 40,000.00 payment to the Player.

13. By emails of 23 and 29 July 2012, the Club asked the Player for information to arrange his trip to Munich on 1 August 2012 the latest. Neither the Player nor his agent replied, and the Player did not come to Munich.

14. By email of 2 August 2012, the Club expressed its disappointment about the Player's absence and announced that a contractual penalty would be imposed on the Player.

15. By registered mail of 14 August 2012 and by email of 16 August 2012, the Club sent a letter titled "Termination without notice" to the Player. This letter reads as follows:

> *"Dear Mr. Foster,*
>
> *we herewith terminate the Employment Agreement from 30.06.2012 with immediate effect for just cause.*
>
> *King regards*
>
> *Bern Rauch*
> *Vice President"*

16. By letter of 27 September 2012, the Club informed the Player that it had been notified of a request of the Belgium Basketball Federation to the German Basketball

Federation, asking for the Letter of Clearance for registration of the Player with the Belgium club "Belgacom Spirou". The Club informed the Player that their contractual relationship could be settled by payments of USD 40,000.00 for damages and additional EUR 23,422.64 for "over-payments" to the end of the 2011/2012 season until 1 August 2012 and that the requested Letter of Clearance would be issued thereafter. The Player did not accept the Club's conditions.

3.2. The Proceedings before the BAT

17. On 13 November 2012, the BAT Secretariat received a Request for Arbitration filed by Mr. Marko Pesic on behalf of the Club. The non-reimbursable handling fee of EUR 1,988.00 was received in the BAT bank account on 14 November 2012.

18. By letter of 23 November 2012, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties of the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Player to file his answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 14 December 2012. The BAT Secretariat also requested the Parties pay the following amounts as an Advance on Costs by no later than 4 December 2012:

"Claimant (FC Bayern München)	*EUR 4,500*
Respondent (Mr. Je'Kel Foster)	*EUR 4,500"*

19. By letter of 13 December 2012, the Player's counsel asked for a two week extension of the time limit to submit the Answer. On 14 December 2012, the Arbitrator requested the Club inform the BAT Secretariat by no later than 18 December 2012, whether it agreed with the requested extension. By email of 17 December 2012, the Club objected to the Player's request.

20. On 18 December 2012, the BAT Secretariat informed the Parties about the Arbitrator's decision to extend the time limit for submission of the Answer by one week, i.e. until 21

December 2012, and that all other procedural directions set by letter of 23 November 2012 remained in force.

21. By letter of 20 December 2012, the BAT Secretariat acknowledged receipt of the Club's share of the Advance on Costs and informed the Parties of the Player's failure to pay his share and that the arbitration would not proceed until receipt of the full amount of the Advance on Costs. Therefore, the BAT Secretariat requested the Player once again pay his share by no later than 31 December 2012.

22. By letter of 10 January 2013, the BAT Secretariat confirmed receipt of the Player's Answer. By the same letter, it informed the Parties that the Player had failed to pay his share of the Advance on Costs and noted again that, in accordance with Article 9.3 of the BAT Rules, the arbitration would not proceed until the full amount of the Advance on Costs was received. Therefore, the Club was requested to effect payment of the Player's share of the Advance on Costs in the amount of EUR 4,500.00 by no later than 21 January 2013.

23. By letter of 30 January 2013, the BAT Secretariat confirmed receipt of the full Advance on Costs (paid in full by the Club).

24. By the same letter, the Parties were informed that the Arbitrator had decided to declare the exchange of documents complete. The Parties were therefore invited to submit a detailed account of their costs by 6 February 2013.

25. On 1 February 2013, the Club informed the BAT that it did not claim any further legal costs.

26. On 6 February 2013, the Player's counsel submitted an account of costs and indicated that he spent 41 hours on the case. He then asked *"with respect to our international hourly rates, we herewith kindly request the reimbursement of Respondent's legal*

expenses up to the maximum contribution of seven thousand five hundred Euro (7.500) €) in accordance with article 17.4 of the BAT Rules."

27. On 7 February 2013, the BAT Secretariat acknowledged receipt of the Parties' accounts of costs and invited them to submit their comments, if any, on these account of costs by no later than 14 February 2013.

28. The Parties did not comment on the accounts of costs.

29. The Parties did not request the BAT hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the BAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions available.

4. The Positions of the Parties

4.1. The Claimant's Position

30. The Club submits that it had made payments to the Player which exceeded the contractually agreed compensations. The Club is claiming re-payment of the overpayments. These overpayments consist of the following:

a) The Parties agreed on a gross salary for the 2011/2012 season of EUR 333,300.00 corresponding to net payments (after deduction of e.g. taxes and social security costs) of EUR 200,000.00. The Club paid an amount of EUR 177,094.23 as salary for the period from August 2011 to May 2012, i.e. the last month when the Player provided his services. Furthermore the Club made extraordinary payments and advance payments to the Player in the amount of EUR 42,850.66, which adds up to 219,944.89 and exceeds the contractually agreed amount by EUR 19,944.89.

b) The Club paid the full contractual apartment rent of EUR 2,100.00 per month, although according to the Player Contract, the Club was obliged to pay only EUR 1,600.00. Hence, the Club paid a monthly surplus of EUR 500.00 during 9.5 months, corresponding to a total of EUR 4,750.00.

c) Furthermore, the Club covered the Player's parking tickets and fuel bills in the amount of EUR 322.93. The Club also requests the re-payment of the cleaning costs for the Player's apartment of EUR 1,124.62 and telephone bills of EUR 280.20 which had been paid by the Club.

d) The items a) – c) amount to EUR 26,422.64. From this amount, the rent deposit of EUR 3,000.00, which was paid on account of the Player to the landlord, may be deducted. This results in an open amount of EUR 23,422.64.

31. The Club then submits that the Player's termination of the Player Contract was belated because it was notified only on 11 July 2012, well after the expiration of the contractually agreed period of 14 days after the last official game which took place on 17 May 2012. Furthermore, the Player made the buyout payment of USD 40,000.00 only on 16 July 2012 and not on 15 July 2012 as stipulated in the Player Contract. The Club did not accept the buyout payment but returned it to the Player's account. Hence, the Player Contract was not terminated based on the buyout provision of Clause 10 para. 4.

32. The Player did not attend the training camp in July 2012, nor did he follow the Club's request to be present in Munich on 1 August 2012. The Player, therefore, violated his contractual duties and the Club was entitled to terminate the Player Contract without notice. However, the Player's breach of contract caused damage to the Club, which amounts at least to USD 40,000.00 (i.e. EUR 31,558.92) corresponding to the amount which the Player would have had to pay if he had correctly applied the buyout provision of Clause 10 para. 4 of the Player Contract.

33. Thus, the Club claims a total payment of EUR 54,981.56 consisting of the reimbursement of above overpayments of EUR 23,422.64 and damages of EUR 31,558.92.

4.2. The Claimant's Request for Relief

34. In its submission of 13 November 2012, the Club requests the following relief:

> *"1. That the BAT exercises jurisdiction over the dispute arising from the employment contract between Claimant and Respondent.*
>
> *2. That the BAT President appoints a suitably qualified Arbitrator to preside over this matter.*
>
> *3. That the matter be determined pursuant to the doctrine of ex aequo et bono in keeping with the Rules, customs and practices of the BAT:*
>
> *4. That the Arbitrator finds that Respondent has to pay the sum of at least EUR 54,981.56. This results out of the fundamental breach of contract and the suffered damages by Claimant not less than USA 40,000.00 (current rate of exchange dated on November 13th, 2012: EUR 31.558,92) and the reimbursement of the overpaid salary in the amount of EUR 23,422.64 to Claimant.*
>
> *5. That the Arbitrator awards Claimant all costs of this Arbitration proceedings as well as a reasonable sum for the attorneys' fees, expenses and witness fees in accord with BAT Arbitration Rules 17.3 and 17.4 and the practices of this Tribunal, including in reliance upon the Affidavit of the undersigned counsel for the Claimant as to the extent of the Claimant's expenses and fees."*

4.3. The Respondent's Position

35. First of all, the Player submits that, the Request for Arbitration is inadmissible because Clause 11 of the Player Contract requires that legal action must be taken within 3 months upon termination of the Player Contract. The Player acknowledges that his termination did not fully meet the termination requirements according to Clause 10 para. 4 because the termination was not notified within 14 days upon the last official game of the 2011/2012 season. However, the Player timely transferred the buyout

payment of USD 40,000.00 to the Club. Hence, the Player Contract ended upon receipt of the buyout payment.

36. Even if the Player Contract was not terminated in application of the buyout provision, the Player was still entitled to terminate the employment contract at any time, as it is a general principle in employment law that an employee cannot be forced to stay in an employment against his will. When the Player did not attend the training camp, it was clear for the Club that the Player intended to terminate the Player Contract. This intention was confirmed by the agent's emails from 12 and 18 July 2012 to the Club and the Player's absence from the training in Munich as from 1 August 2012. The termination date of the Player Contract was therefore either the date of the email by which the will to terminate the Player Contract was expressed (i.e. 12 July 2012) or the date when the Player refused to come to Munich (i.e. 1 August 2012). Therefore, the Club's Request for Arbitration from 13 November 2012 has not been lodged within the time limit of three months as provided by Clause 11 of the Player Contract.

37. With respect to the amounts claimed by the Club, the Player submits the following:

- The Parties agreed to an annual gross salary of EUR 333,300.00 for the 2011/2012 season which corresponds to a net salary of USD 290,000.00. The Club made salary payments from August to May 2012 amounting to EUR 219,944.89. When applying the exchange rates at the time of the respective payments, the Player received USD 293,755.62. Accordingly, the Club's overpayment amounts only to USD 3,755.62 which is acknowledged by the Player.

- The Player is not ready to pay the difference between the agreed allowance for the rent of EUR 1,600.00 and the effective rent paid by the Club of EUR 2,100.00. The Club never asked the Player to pay the difference of EUR 500.00 per month.

- The Player acknowledges the fuel bill paid by the Club amounting to EUR 52.93. Regarding the parking tickets of EUR 270.00, the Player acknowledges only EUR 70.00. The remaining amount of EUR 200.00 consists of service charges which have been added in handwriting to the police reports and for which there is no evidence.

- The Club then claims reimbursement of the costs for the cleaning of the apartment in the amount of EUR 1,124.62. The respective invoice relates to cleaning services provided on 7 and 8 August 2012 which was more than two months after the Player's departure. In the meantime, the apartment was rented out to other players of the Club.

- The invoice for cleaning services also includes an amount of EUR 234.50 for repairing the dishwasher in the apartment. There is no evidence that the Player caused the malfunction of the dishwasher. The Player was rather entitled to a properly functioning dishwasher. The Player notified the Club about the malfunction of the dishwasher in January 2012.

- The Player acknowledges the Club's claim for reimbursement of EUR 280.20 for telephone bills.

- As a general objection, the Player finds that he was not obliged to any reimbursement of payments paid or advanced by the Club (i.e. rental advances, fuel bill, cleaning services, repair services, traffic penalties and telephone bills) because the latter was neither contractually nor legally compelled to make such payments.

38. With respect to the damages of USD 40,000.00 which are now claimed by the Club, the Player refers to BAT 0041/03 para. 80 where it was held that unpaid buyout compensations cannot be considered as damage suffered by the Club. Furthermore,

the Club can only request compensation for damage actually suffered and proven, as set out in BAT 0041/03 para. 82. No economic damage has been demonstrated by the Club.

39. Concerning the alleged sporting damage, the Player submits that the Club added two new players to the team after 15 July 2012 and one after 1 August 2012. This implies that Respondent's breach of contract did not cause any sporting damage to the Club.

4.4. The Respondent's Request for Relief

40. In its Answer, the Player requests in principle, the following relief:

> *"- Claimant's Request for Arbitration is declared inadmissible; and*
>
> *- Claimant shall indemnify Respondent for incurred legal expenses (including compensation for attorney's fees) up to an amount to be determined by Respondent's Counsel."*

In the alternative the Player requests the following:

> *"- Respondent is not liable to pay to Claimant any compensation for breaching the Agreement;*
>
> *- Respondent is liable to pay Claimant an amount of three thousand seven hundred fifty-five US dollars sixty-two cent (3.755,62 $) as reimbursement for overpaid salaries;*
>
> *- Respondent is liable to pay Claimant an amount of four hundred and three Euro thirteen cent (403,13 €) as reimbursement for a fuel bill, traffic penalties and telephone bills; and*
>
> *- Claimant shall indemnify Respondent for incurred legal expenses (including compensation for attorney's fees) up to an amount to be determined by Respondent's Counsel in the course of the BAT proceedings."*

5. The Jurisdiction of the BAT

41. 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).

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

43. 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.

44. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Clause 12 para. 6 of the Player Contract, which reads as follows:

> *"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* [sic] *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 bono."*

45. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA. The Arbitrator also considers that there is no other indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording *"[a]ny dispute arising from or related to the present contract"* in Clause 12 para. 6 of the Player Contract covers the present dispute.

46. The Player did not object to the BAT jurisdiction.

47. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Club's claims.

6. Applicable Law – *ex aequo et bono*

48. 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".*

49. 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."*

50. In the arbitration agreement in Clause 12 para. 6 of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to him *ex aequo et bono*.

51. 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 of 1969[1] (Concordat),[2] under which Swiss courts have held that "arbitrage en équité" is fundamentally different from "arbitrage en droit":

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1 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).

2 KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 187 PILA N 289.

> *"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."*[3]

52. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

> *"the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand".*[4]

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

7. Findings

7.1. Late Request for Arbitration

54. The Player claims that the Club submitted its Request for Arbitration late and for this reason, the claim must be dismissed as stipulated in Clause 11 of the Player Contract which provides as follows:

> *"§ 11 Expiration*
>
> *To ensure planning and legal certainty mutual claims arising from the present Contract shall be made in writing within six months from the due date or – in case the contractual relationship is terminated – within three months from termination. In case claims are not lodged in due time, they shall be considered expired provided such expiration is not excluded by coercive legal provisions. Claims pursuant § 3 are explicitly excluded from this clause.*
>
> *In case the other Party refuses the claim or fails to testify within three months from the date when the claim was made, the claim shall expire unless it is lodged in court within three months from the date of such refusal or expiration. This shall also apply to payment claims that may become due during a dismissal protection suit or depend on its outcome.*

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3 JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

4 POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

The exclusion shall not apply in cases where the claim is based on liability due to intent."

55. The Player states that the Request for Arbitration was submitted on 13 November 2012 which is not within the 3-month time frame provided for in Clause 11 of the Player Contract. Said time-limit must be calculated from the Player's termination notice of 12 July 2012.

56. Whether the requirements of Clause 11 of the Player Contract are met must be reviewed by the Arbitrator based on the Club's statements of facts because they constitute the foundation of its claims. The differing view of the Player (e.g. concerning the date of termination of the Player Contract) must be taken into consideration when the merits of the case are decided.

57. Clause 11 of the Player Contract does not require a party to submit a Request for Arbitration or to initiate another legal procedure within three months upon the termination of the Player Contract. Clause 11 actually contains two time limits: First, a party must lodge a claim which means that it must make a request for financial or other performance to the other party. That must be done within three months upon termination of the Player Contract. Once such a claim has been made and rejected by the other party, the claiming party must file a formal complaint with a court. This also includes the initiation of an arbitral procedure according to Clause 12 of the Player Contract.

58. The Arbitrator finds that the Request for Arbitration was not time-barred. This conclusion results from the calculation according to Clause 11 para. 1 and 2 of the Player Contract: On 2 August 2012, the Club announced to the Player that a penalty would be imposed because the Player did not show up. On 14 August 2012, the Club notified the Player about the termination of the Player Contract. This means that any claims related to this termination had to be submitted on or before 13 November 2012. Then, the Club would have had another three months to file a lawsuit. This second time

limit would have started earlier if the Player would have refused the Club's claims. However, no such refusal or protest is on record.

59. Actually, on 13 November 2012, the Club not only formulated its claims but also submitted its Request for Arbitration. It has therefore complied with the requirements of Clause 11 paras. 1 and 2 of the Player Contract. Hence, the Club's Request for Arbitration was not filed late and is therefore admissible.

60. The same conclusion results from the application of Clause 11 para. 3 of the Player Contract which provides that the above "*exclusions" shall not apply in cases where the claim is based on liability due to intent."* In other words, if a party submits that the other party intentionally breached the Player Contract and if it files a claim because of such breach, the claiming party is not barred from filing a law suit also after the expiration of the time limits of Clause 11 para. 1 and 2.

61. The Club complains that the Player did not follow the call of the team to attend the pre-season training camp and to participate in the preparation of the first games in August 2012. According to the Club, this constituted a breach of the Player Contract. As a consequence, the Club is claiming damages. The Player does not deny that he received the calls but he refused to follow them. Such behaviour is clearly intentional. The Club's request based on the alleged intentional breach of contract by the Player is sufficient to fulfil the requirement of Clause 11 para. 3 of the Player Contract and to oblige the Arbitrator to hear the merits of the case irrespectively of the point of time when the Request for Arbitration was lodged. This does, however, not prejudice the outcome on the merits of the case.

7.2. Termination of the Player Contract

62. The Player submits that the Player Contract was terminated either after he failed to participate in the pre-season training camp of 9 July 2012 or when his agent notified

the Club on 12 July 2012 about the Player's intention to terminate the employment based on the buyout clause of Clause 10 para. 4 of the Player Contract or when the Player did not follow the Club's order to come to Munich on 1 August 2012. According to the Player, the Player Contract was terminated regardless of whether such termination was justified or not.

63. In the Arbitrator's view, neither the fact that the Player did not show up at the pre-season training camp or on 1 August 2012, nor the agent's communication to the Club on 12 July 2012 constituted a clear and unconditional notification of the Player's will to terminate the Player Contract.

64. The Player further submits that he terminated the Player Contract in application of Clause 10 para. 4 which allowed him to back out against a buyout payment of USD 40,000.00. In order to exercise the buyout option of Clause 10 para. 4 of the Player Contract, the Player had to notify the Club in writing within 14 days after the last official season game (i.e. until 1 June 2012) and to pay the buyout fee until 15 July 2012 to the Club. These two conditions must be met cumulatively: while the timely notification is important to allow the Club to plan the composition of the team for the next season and replace a player who intends to leave, the payment of the buyout fee constitutes the execution of the buyout option which had to be announced within the time limits agreed in the Player Contract.

65. There is no evidence on record that the Player notified the Club within the contractual time limit. Thus the first condition of the buyout was not met and it does not have to be reviewed whether the second condition of Clause 10 para. 4, i.e. the payment of the buyout fee was made in time. As a result, the Arbitrator finds that the Player did not properly exercise the buyout option when he notified the Club about his leave only on 12 July 2012, i.e. more than a month after the expiration of the time window provided by Clause 10 para. 4 of the Player Contract.

66. While the Player purported to terminate the Player Contract by the Agent's notice of 12 July 2012, such notice constituted a breach of contract: neither was the termination notified within the buyout period, nor did the Player present any grounds which could have justified an early termination. As a consequence of such breach, and considering the Player's continuous absence from the Club's activities despite several invitations, the Club was entitled to terminate the Player Contract on 14 August 2012. The Player is therefore responsible for any damage suffered by the Club as a result of his breach of the Player Contract.

7.3. Quantum

7.3.1. Return of payments made in favour of the Player

67. It is undisputed that the Club fulfilled its contractual obligations until the Player's notice of 12 July 2012 and that it even made payments to, or in favour of, the Player which exceeded its contractual obligations. However, the Player finds that the Club cannot claim return of such payments because it had no legal obligation to make such payments and did so voluntarily.

68. The Arbitrator does not agree. There is no evidence that the Club intended to pay the Player more than what was agreed in the Player Contract or that it intended to provide the Player with an additional gratuity. Any payments in excess of the contractually agreed amounts for which there is no other legal basis, constitute an unjust enrichment and can be claimed. Likewise, the Club is also entitled to demand repayment of such amounts which the Club paid for the benefit of the Player. A claim such as this would be excluded if the enriched party demonstrates that the other party waived its right to reclaim. No such waiver has been asserted or demonstrated by the Player.

69. The following payments in favour of the Player have been reclaimed by the Club in this arbitration:

7.3.1.1. Advance of extraordinary salary payments

70. It is undisputed by the Parties that the contractually agreed salary for the 2011/2012 season amounted to EUR 333,300.00 gross and that after all applicable deductions for tax, social security, EUR 200,000.00 would actually have to be paid out to the Player. The Parties also agree that the Player received monthly salary payments in the amount of EUR 177,094.23. In addition, he also received three additional payments, namely EUR 15,000.00 as an advance payment in October 2011, EUR 26,250.66 as an extraordinary payment in April 2012 and EUR 1,600.00 as further advance payments throughout various dates during the entire 20122/2012 season. Undisputedly, the Player received EUR 219,944.89 as salary payments from the Club. The Club claims that the difference of EUR 19,944.89 must be repaid to the Club.

71. The Player accepts that payments of EUR 19,944.89 were made in excess of the agreed salary. However, he then argues that the Player initially requested a salary of USD 290,000.00 net which was agreed by the Club, but for practical reasons converted to EUR 200,000.00 net. To determine whether the Player actually received what the Parties agreed to, the amounts paid in EUR must be converted to USD at the exchange rates applicable at the respective payment dates. This leads to an overpayment of only USD 3,755.62 which must be returned to the Club, as the Player concedes.

72. The Arbitrator does not accept the Player's argument, for the following reasons: (1) According to the letter of 24 June 2011 (Exhibit 2 to the Request for Arbitration), the parties agreed that an exchange rate of EUR 1 = USD 1.45 applied throughout the Player Contract. It may well be that the Player who is a US citizen, indicated his "market value" in USD at the commencement of the negotiations. However, it was agreed in the Player Contract that he would be paid in EUR. On the other hand, the parties never agreed on an adjustment of the EUR-payments to the actual USD exchange rates. (2) There is no evidence on record which would indicate that the

parties agreed on a *later* adjustment of the paid salaries to the actual USD exchange rates – whether in favour of the Player or in favour of the Club. (3) There is no evidence on record that the Player ever requested the adjustment of his salaries to the actual USD exchange rates *while he was still under contract*. The Arbitrator therefore rejects the Player's argument that the USD exchange rate must be taken into calculation. As a result, the Player must reimburse the overpayment of EUR 19,944.89 to the Club.

7.3.1.2. Rent of the apartment

73. The Club then claims the difference between the rent actually paid for the apartment used by the Player (EUR 2,100.00) and the allowance which was added to the Player's salary for accommodation (EUR 1,600.00). The difference for the time period between 15 September 2011 and 30 June 2012 amounts to EUR 4,750.00.

74. The Player maintains that he was given an apartment and it was never agreed that he must pay the difference between the allowance for accommodation and the actual rent.

75. The wording of Clause 6 para. 1, second subparagraph, of the Player Contract indicates that the Parties agreed that the Player would have to pay the full rent for the *"3 bedroom apartment in Munich"* and would receive from the Club only an allowance towards the rent. There is no evidence that the Player ever opposed to the way in which he was being charged for the use of the apartment. It rather seems plausible to the Arbitrator that the accommodation allowance was increased to mitigate the difference to the actual rent which was charged to the Player and that the difference between the accommodation allowance of EUR 1,600.00 and the full rent of EUR 2,100.00 had to be paid by the Player.

76. The salary account statements (Exhibit 4 of the Request for Arbitration) indicate that from September 2011 on, the difference between the accommodation allowance of EUR 1,600.00 and the full rent of EUR 2,100.00 (i.e. EUR 500.00) was correctly

deducted from the Player's net salary, each month. As a consequence, the monthly salary to which the Player was entitled decreased by EUR 500.00, or EUR 4,750.00 calculated on the entire use of the apartment of 9.5 months. This amount shall be taken into account when calculating the total amount that the Player was entitled to receive by the Club (see para. 86 below).

7.3.1.3. Traffic Penalties/Fuel bills

77. The Club claims that it paid parking tickets and fuel bills in the amount of EUR 322.93 which must be repaid by the Player. The Player accepts the fuel bill in the amount of EUR 52.93 and a parking ticket in the amount of EUR 70.00. According to the Player, the difference consists in service charges for several warnings. The Club does not explain the details of the traffic penalties. It seems that the parking ticket was issued only after the Player had left Munich. It was addressed to the Club and it is unknown when and how the Club notified the Player. The Arbitrator finds that the Club could have easily avoided the service charges if it had paid the parking ticket right away and claimed the respective amount from the Player, and holds that the Player shall only reimburse an amount of EUR 122.93 for fuel and parking tickets to the Club.

7.3.1.4. Cleaning of the apartment, repair costs

78. The Club requests an amount of EUR 1,124.62 as costs for the cleaning of the apartment and the repair of a dishwasher. The Player does not contest the amount of the bill for cleaning services. However, he submits that he left the apartment already on 23 May 2012 while the cleaning bill dates of 7 and 8 August 2012, that no inspection report was filed and that the apartment was rented out to other players before these dates. The dishwasher was indeed broken but not because of the Player's fault.

79. The Arbitrator finds that the Player must bear the cleaning costs. It is an obligation of the tenant or sub-tenant to hand-over the apartment in a cleaned condition and the

Player has not demonstrated that this was done. He left the apartment unexpectedly and cannot blame the Club for not having inspected the premises.

80. The same applies to the dishwasher. The Arbitrator finds that minor repair work of appliances must be paid by the tenant, irrespectively of whether he caused the defect and that the Player must therefore bear the repair costs for the dishwasher.

7.3.1.5. Phone bills

81. The Arbitrator notes that the Player accepts the phone bills paid by the Club in the amount of EUR 280.20.

7.3.2. Damages

82. The Club submits that it suffered damage because of the Player's breach of the Player Contract. The damage consists of the loss of the buyout fee of USD 40,000.00. The Club also asserts that because of the departure of the Player it was “forced to sign a new player”. However, it does not indicate whether the replacement of the Player by another one led to a financial loss.

83. In line with consistent jurisprudence of BAT, the claimant must prove the existence and the quantum of the damage claimed. The Club has neither demonstrated nor substantiated any damage except the loss of the buyout fee. Although it is true that the Player could have exercised his contractual buyout option and actually transferred the buyout fee to the Club, the latter did not accept the payment and returned it to the Player.

84. The buyout fee does not constitute a contractual penalty or liquidated damages which becomes due whenever a player walks away from a contract. Such a penalty may well be agreed in the player agreement, but it was not in the present case. The buyout fee

is rather the price due for an early termination of the Player Contract by the Player within a clearly defined time window. The Club neither accepted the Player's termination which was not in line with Clause 10 para. 4 of the Player Contract, nor the buyout payment. When the Player still left the Club, he was in breach of the Player Contract and became liable for any damage caused by his departure which may be higher or lower than the buyout fee. However, such damage must be demonstrated by the Club. Failing any evidence of damage the Arbitrator rejects the Club's damage claim.

85. The Arbitrator also notes that the Club announced a penalty according to Clause 5 para. 4 of the Player Contract. However, no such penalty was ever imposed.

7.4. Summary

86. The Arbitrator finds that the Club was not obliged to cover the difference between the accommodation allowance and the actual rent in the amount of EUR 4,750.00 and to pay certain bills of the Player (fuel, parking tickets, cleaning of the apartment and repair of the dishwasher and phone bills) in the total amount of EUR 1,527.75 which adds up to EUR 6,277.50. While the rent surplus was deducted from the monthly salary, the other bills which the Club paid *in lieu* of the Player were not. This leads to the following calculation:

(a) The payment to which the Player was entitled must be reduced from EUR 200,000.00 by EUR 4,750.00 to EUR 195,250.00. This reflects the Club's correct deduction of EUR 500.00 per month for the difference between the accommodation allowance and the actual rent.

(b) The amount of EUR 195,250.00 has then to be compared to the payments actually made to the Player, namely EUR 219,944.89, which results in an overpayment of EUR 24,694.89.

(c) The bills paid by the Club *in lieu* of the Player in the amount of EUR 1,527.75 must be added, leading to an overpayment of EUR 26,222.64.

(d) From this total, the rent deposit of EUR 3,000.00 which was paid by the Player must be deducted. The remaining amount of EUR 23,222.64 has to be paid by the Player to the Club.

8. Costs

87. 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.

88. On 15 March 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 8,996.00.

89. Considering the requests for relief, the outcome and the circumstances of the present case, the Arbitrator finds it fair that each party shall bear 50% of the fees and costs of the arbitration, i.e. EUR 4,498.00.

90. Given that the Club paid the full Advance on Costs in the amount of EUR 8,996.00, in application of Article 17.3 of the BAT Rules the Arbitrator decides that the Player must reimburse EUR 4,498.00 to the Club, i.e. the difference between the advance on costs paid by the Club and the share of the arbitration costs that the Club must actually bear.

91. The Club was represented by its own sports director. It did not engage a legal counsel and did therefore not claim legal costs. However, it has paid the non-reimbursable handling fee of EUR 2,000.00. The Respondent was represented by legal counsel and claims compensation for legal services. Considering the outcome and circumstances of the case, the Arbitrator considers it therefore adequate and fair that the Parties shall bear their own legal fees and expenses.

9. AWARD

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

1. **Mr. Je'Kel Foster is ordered to pay to FC Bayern München e.V. the amount of EUR 23,222.64 net.**

2. **Mr. Je'Kel Foster is ordered to pay to FC Bayern München e.V. the amount of EUR 4,498.00 as a reimbursement of its advance on arbitration costs.**

3. **Each party shall bear its own legal fees and expenses.**

4. **Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 20 March 2013

Stephan Netzle
(Arbitrator)