



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0381/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Basketball Nymburk A.S.

Komenského 589, 288 02 Nymburk, Czech Republic

- Claimant -

represented by Mr. Jakub Kotrba, attorney at law,
Advokátní kancelář Jansta, Kostka spol. s.r.o.,
Těšnov 1/1059, 110 00 Praha 1, Czech Republic

vs.

Mr. Adrian Glenn Abrams

- Respondent -

1. The Parties

1.1 The Claimant

1. Basketball Nymburk A.S. (hereinafter also referred to as “the Club” or “the Claimant”) is a professional basketball club in the Czech Republic.

1.2 The Respondent

2. Mr. Adrian Glenn Abrams is a professional basketball player (hereinafter referred to as “the Player” or “Respondent”).

2. The Arbitrator

3. On 18 April 2013, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Quentin Byrne-Sutton 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 or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. On 13 May 2012, the Player signed an employment agreement (the “Agreement”) with the Club, whereby the Player was engaged for the 2012/2013 season.
5. The commission to be received by the Player’s agent (the “Agent”) was stipulated in an Exhibit A to the Agreement (the “Exhibit A”), which was signed on the same date.
6. On 20 August 2012, the Player and the Club signed the latter’s disciplinary regulations

for the 2012/2013 season (hereafter the “Disciplinary Code”).

7. After passing the medical examination, during which various prior injuries to his ankles were noted, the Player began practicing and playing for the Club.
8. Internal emails between the Player and the Agent between October and November 2012 evidence that the Player began suffering quite seriously from an ankle and was consulting the team doctor for treatment, including requesting an MRI.
9. According to those internal emails, he was in pain and worried that practicing/playing would prevent him from recovering and might make the injury worse. He also stated that he felt he could not perform properly and be useful to the team due to the injury. His Agent told him to take the injury seriously and take whatever measures were necessary to prevent it from deteriorating. Despite this situation, he continued to perform but sat out certain practices and played only a short time in various games. He did not seem satisfied with the Club’s medical support and was wondering about returning to the USA to consult a specialist there. However, no evidence was adduced that he officially complained to the Club at the time about his dissatisfaction with the medical care or his situation or that he put the Club on notice in any manner.
10. On 23 November 2012, the Player sent an email to the representatives of the Club indicating that he was sorry but that he had to leave immediately to the USA to attend a serious family matter without knowing what the timetable would be for his return.
11. The same day the Club insisted that *“We need to know exactly the date of your return, we can’t let open your spot for unlimited time. We’ll talk this afternoon”* and the Player replied, *“I understand the team has to carry on. But right now I cannot determine a return date. But ok we will talk this afternoon”*.
12. Between 23 and 27 November 2012, the Club tried to obtain more information about what was going on by addressing emails to the Player and the Agent.

13. On 24 November, the Club emailed the Player that it was giving him permission to leave the team to attend family matters but that he must return by Saturday, 1 December 2012.
14. The Player did not respond initially but the Agent indicated he was trying to make contact with the Player.
15. In its emails to the Agent, the Club emphasized that although it understood the Player's private situation and his dilemma, it needed to know as soon as possible when he would be returning because it had to plan and determine how to cope with the situation during what was an important period of the season.
16. In its second email to the Agent (dated 24 November), the Club criticized the Agent for not having informed it of the problem and for not answering faster.
17. The Agent replied the same day, indicating he had been on the road and was having difficulty reaching the Player.
18. On 27 November, the Agent wrote to the Club as follows:

"We have finally got in contact with AJ. He said that his father is doing better but he still has problems with his ____ and AJ is afraid to leave him. He could not give us a definite date when he will be ready to return to Nymburk but I feel that it will definitely not be before Christmas. I propose that we make an agreement to freeze AJ's contract and all salary payments until January 1st. Would that be acceptable to you? Is it possible that you could be interested in Maurice Hampton to replace AJ? Maurice is in Greece and unhappy because his team is having financial problems. I think that he would be willing to accept a 1 month contract with you while AJ is away. Again, I am really sorry for the problems that this has caused you".
19. The Club answered the same day saying it was not interested in Maurice Hampton and that although it has sympathy for the Player's personal situation, professionally the Club needed him and still required him to return by the beginning of December 2012.
20. Between 29 November and the end of December 2012, a new stage in the correspondence between the Club, the Agent and the Player began.

21. The parties tried to agree on a provisional arrangement to regulate the period during which the player would be absent, while at the same time the Club began attaching notice letters to its emails, whereby it warned the Player that contractual penalties would be applied pending his return and that his contract would be terminated if an adequate arrangement were not achieved.

22. In a notice letter of 29 November 2012, after insisting that the Player return by the beginning of December or be deemed in breach of contract, the Club concluded:

“The Club hereby kindly strongly ask you to, without delay, clarify, explain and remedy the whole situation, mainly starting fulfilling your obligations as arising from the Agreement in full as of November 30, 2012. Otherwise the Club will have no option to commence respective legal steps, probably including the termination of the Agreement, claiming the contractual penalties and damages, etc.”

23. The same day, the Agent replied:

“I read the letter from your legal department and AJ has read it as well. We have talked with him today. He feels really bad about leaving you without a player during this important period of games but while his father his (sic) sick, he cannot give a definite date when he will be ready to return to the Czech Republic. He is afraid about leaving and then his father getting sicker. He feels this is something he could regret for the rest of his life [...] I would like to propose that we freeze AJ’s contract starting immediately for one month. If you agree I can write up the paperwork immediately and have it signed by AJ. The club will be able to stop all payments to him and then at the end of December, if he has not come back to the team you will have the option to terminate the contract completely or freeze the contract for another month. This way you will still be able to bring another player in to replace AJ with a one month tryout period but you will have the first option on retaining AJ’s services when he is ready to come back to play. Please let me know what you think”.

24. On 5 December 2012, the Club made a written proposal, whereby it accepted, under certain conditions, that the Player extend his absence until 27 December 2012 (his right to remuneration being frozen during that period), while reserving the right to apply financial penalties and to terminate the Contract if the Player did not return on the fixed date.

25. On 7 December 2012, the Agent responded:

“I talked with AJ yesterday and discussed your letter with him and the possible solutions

that you proposed. Unfortunately his father is still in a bad condition and he will have to return to hospital for another surgery on January 7th. AJ said that he cannot come back before then so he asked if it will be possible to freeze the contract until January 15th. He is really sorry for leaving the club in this difficult position but he said that he really needs to be there for his family right now. Please let me know what you think”.

26. On 10 December, the Club replied that it could not accept a later date (than 27 December) for the Player’s return; and thereafter, on 13 December 2012, the Club sent the Player a notice letter wherein it stated that, since an agreement had not been reached as to a new date for his return, he was deemed in breach of contract for missing practices and games since 30 November 2012, because the Club had only given him leave until that date. In the letter, it claimed contractual penalties in an amount of USD 23,000 for the scheduled practices and games missed up until that date. It requested that the amount be paid by 21 December 2012 at the latest and encouraged the Player to resume the performance of his contract.
27. By letter of 29 December 2012, the Club terminated the Contract and concluded as follows:

“The Club has repeatedly asked you in writing to remedy multiple repeated serious breach of the Agreement and to start fulfilling your obligations as arising from the Agreement in full. As of the date of this termination no remedy occurred [...] Due to your multiple repeated serious breach of the Agreement (that have not been remedied though the Club repeatedly asked you in writing to do so) the Club has no option than to hereby, according to the Agreement, immediately terminates (sic) the Agreement”

28. In that letter, the Club claimed further penalties for the additional scheduled practices and games missed until that date, making the total amount being claimed USD 71,000.
29. On 14 and 16 January 2013, the Club sent two notice letters to the Player regarding the non-payment of the penalties/damages claimed by it (amounting to USD 71,000) until that date, and indicated that additional damages in an amount of USD 24,100 had also been incurred for the “agent fee paid to the agent of the player replacing A. Abrams” (8.100 USD), the “agent fee paid to the agent of A. Abrams” (USD 13.500) despite the Contract having not been fulfilled and the “costs of lawyer services” (USD 2,500). In these letters, the Club specified that it would be filing a claim with the

BAT failing payment by the Player of the penalties/damages.

30. According to the documents filed as evidence by the Club in these proceedings, the Club engaged a new player (Demond Carter) to replace the Player, in relation to which the new player's agent issued invoices to the Club for his fees, which were scheduled for payment in two installments on 31 December 2012 (invoice of USD 4,100) and 30 January 2013 (invoice of USD 4,000).
31. On 17 January 2013, the Agent replied on behalf of the Player, contesting that any penalties/damages were due and stating among others:

"I must ask you to cease your communications to my client demanding the payment of excessive amounts of money to your club's bank account. The termination of his contract by your club is the end of this matter. My client cannot be held liable for any further damages and he will not respond further to your demands. My client is certainly not responsible for reimbursing the club for your legal fees or for my commission which was paid for services already rendered, "The negotiation of the contract of Adrian Glen Abrams for the 2012-2013 season, " with no condition that such contract must be completed to term". (sic)

32. Faced with the Player's foregoing position, the Club decided to file a Request for Arbitration with the BAT to claim damages.

3.2 The Proceedings before the BAT

33. On 26 February 2013, the Claimant filed a Request for Arbitration dated 22 February in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 2,000 on 12 February 2013.
34. On 24 April 2013, the BAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

<i>"Claimant (Mr. Adrian Glenn Abrams)</i>	<i>EUR 5,500</i>
<i>Respondent (Basketball Nymburk A.S.)</i>	<i>EUR 5,500"</i>

35. On 30 April 2013, the Claimant paid its share of the advance on costs and on 24 May 2013 substituted for the Respondent's non-payment of his share.
36. On 21 June 2013, the Respondent filed his Answer, which included a counterclaim.
37. By Procedural Order of 1 July 2013, the Parties were informed that a second round of briefs was being fixed.
38. By a second Procedural Order of the same day, the Parties were informed that, in keeping with the BAT Arbitration Rules, the amount of advance on costs was being readjusted to account for the counterclaim and that in case of non-payment of the additional amount fixed, the counterclaim would be deemed withdrawn.
39. On 4 July 2013, the Claimant filed its second brief in reply to the Respondent's answer and counterclaim.
40. By Procedural Order of 10 July 2013, the Respondent was invited to file his comments on the Claimant's second submission by 17 July 2013.
41. By Procedural Order of 23 July 2013, the Parties were informed that since the Respondent had not paid the fixed advance on fees required for the counterclaim, the Respondent's counterclaim was deemed withdrawn. The Respondent was also granted a final opportunity to file its second reply brief by 29 July 2013.
42. On 29 July 2013, the Player submitted the following:

"I have nothing further to add since my counterclaim will not be considered without an advance on costs which is difficult for me to pay now while I am in the transitional stage between careers. Regarding my ankle injury, please consider only that I did not play anywhere for the end of the 2012-2013 season and unless something changes, I will not play professionally ever again. This is not easy because I still love basketball".
43. By Procedural Order of 7 August 2013, the proceedings were closed and the Parties invited to submit their statements of costs.

44. On 13 August 2013, the Claimant submitted its statement of costs.
45. The Respondent filed no statement of costs.
46. By Procedural Order of 19 August 2013, the Respondent was invited to file any observations it might have on the Claimant's statement of costs. The Respondent did not file any observations.

4. The Positions of the Parties

4.1 The Claimant's Position

47. In a nutshell and in substance, the Club contends that:
 - The Player breached his contractual obligations and defaulted by not returning to the Club by the end of the leave initially granted to him and by subsequently refusing to accept 27 December 2012 as a compromise date for his return.
 - Due to those breaches, under article 1 of the Agreement, the Club was entitled to put the Player on notice and to levy penalties/fines as a disciplinary sanction for his non-performance (missing practices and games) from 1 December 2012 onwards, as provided in its Disciplinary Code.
 - Given the Player's abandonment of the Club, it was also entitled, in accordance with article 4.1 of the Agreement, to cease paying his salaries, such right being cumulative with the right to levy penalties/fines as a disciplinary sanction for missing practices and games.
 - Nothing in the terms of the Disciplinary Code prevented the Club from sanctioning the Player with financial penalties despite the fact that it had stopped paying him. In fact, it should be noted that the Club would have had the discretion to interpret the Disciplinary Code in a stricter manner and to fix higher penalties, meaning that it

applied the Disciplinary Code in a fair manner.

- Finally, as a result of the Player's non-return to the Club despite repeated notices and warnings, it was entitled to validly terminate the Contract when it did (by letter of 29 December 2012) as stipulated in article 1 of the Agreement.
- The Arbitrator has jurisdiction to decide on the financial penalties being claimed on the basis of the Club's Disciplinary Code because the Player signed those rules and they form part of the terms of his Contract, which contains a reference to BAT arbitration.
- The Agent did not diligently fulfil his duties by not initially informing the Club of the Player's departure.
- In any event, the Agent's fees are not due because the Club terminated the Player's contract for cause. The Club is therefore entitled to claim as damages from the Player, an amount equivalent to the fees it paid to his Agent.
- In addition, the Club is entitled to claim as damages, the expenses it incurred in legal fees to address the Player's breaches of contract and the cost of having to pay the fees of the agent of the replacement player that the Club had to engage due to the Player's abandonment.
- The Player cannot invoke injury as a justified reason for having left the Club, nor can he complain about the Club's medical care, because at the time of the facts in November 2012, he never mentioned such a reason for returning to the USA (the only motive invoked having been his father's serious health problem).
- Furthermore and in any event, contrary to what the Player now alleges, he was never forced to practice or play, and the Club's medical care was perfectly adequate, while at the same time, it is noteworthy that the Player's medical examination upon his arrival had revealed prior problems with his ankles, meaning

that he had decided to play at his own risk.

48. In its Request for Arbitration dated 22 February 2013, the Claimant requested the following relief:

*"1) Contractual Penalties amounting in total to **\$ 71,000 USD** and consisting of:*

(i) a penalty of \$ 54,000 USD for four Mattoni NBL missed games (i.e. four times \$ 13,500 USD)

(ii) a penalty of \$ 5,000 USD for five missed team events, these being three missed VTB United League games and two missed Eurocup games (i.e. five times \$ 1,000 USD); and

(iii) a penalty of \$ 12,000 USD for twenty four missed practices units (i.e. twenty four times \$ 500 USD).

*2) Damages incurred to Claimant amounting in total to **\$ 31,331 USD** and consisting of:*

(i) a sum of \$ 8,100 USD as the agent's fee paid to the agent of the player replacing the Respondent;

(ii) a sum of \$ 13,500 USD as the agent's fee paid to the agent though the Agreement was not fulfilled;

(iii) a sum of \$ 2,500 USD as the value of legal services provided to the Claimant with regard to the Respondent's arbitrary and not previously permitted abandonment of the Club;

(iv) a sum of \$ 7,231 USD as the value of legal services provided to the Claimant with regard to the filing of this Request for Arbitration.

3) A full contribution to the arbitration costs borne by the Claimant."

4.2 The Respondent's Position

49. In a nutshell and in substance, the Player contends that:

- The Arbitrator lacks jurisdiction because the Club's damage claim is based on the Club's Disciplinary Code, which the Agent did not receive before the Player was requested to sign it and which does not include any reference to arbitration under

the auspices of the BAT.

- In any event, the Disciplinary Code is inapplicable in the present case because it only provides the Club with the discretion to impose fines on players in the form of a deduction from their salary, up to 100% of such remuneration, whereas in this case, the Player received no salary during the period, as he was absent from the team prior to his Contract being terminated. Consequently, there was no salary to deduct a fine/penalty from.
- In addition, *“By no means did AJ Abrams agree to any system of sanctions which would require him to makes (sic) payments to the club by wire transfer for any transgression or violation of team rules”*.
- Aside from his need to urgently be with his father, he discovered during a medical visit while back in the USA *“... that the ankle injury he suffered while playing for the club had not been treated correctly, that he should not have been given clearance to play and that because of this bad medical care he needed to have surgery about 3 months ago”*, which was ultimately the reason for him not returning to the Club.
- Furthermore, the inadequate medical care by the Club and its pressure on him to play despite his injury was dangerous and caused him permanent damage.

50. In his Answer of 21 June 2013, the Player submitted a counterclaim linked to the physical damage allegedly caused to him by negligent medical care of the Club. However, it was deemed withdrawn due to the non-payment of the required advance on costs.

5. The Jurisdiction of the BAT

51. 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).

52. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
53. 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
54. The jurisdiction of the BAT is provided in article 7 of the Agreement, 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 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.”
55. The foregoing arbitration agreement is in written form and thus fulfils the formal requirements of Article 178(1) PILA.
56. With respect to its substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).
57. The Arbitrator finds that, contrary to the Respondent’s contention, the foregoing arbitration agreement does cover the entire scope of the Club’s claims against the Player because the Disciplinary Code is referred to under article 3 (e) of the Agreement and clearly forms part of its terms as appendix 1 to the Agreement. Consequently, it is not necessary for the Disciplinary Code to contain a distinct arbitration clause in favour of the BAT for the Arbitrator to have jurisdiction.

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

58. Furthermore, because the Club has not filed a claim against the Agent, but rather is requesting that the Player reimburse to the Club the agency fees it paid to the Agent – as part of the damages allegedly suffered by the Club – the Agreement and its article 7 also cover that part of the claim.
59. For the above reasons, the Arbitrator has jurisdiction to adjudicate the claims submitted by the Club against the Player.

6. Discussion

6.1 Applicable Law – ex aequo et bono

60. 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”.

61. 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.”

62. Article 7 of the Agreement provides that if and when any dispute is submitted to the BAT: *“The arbitrator shall decide the dispute ex aequo et bono”.*
63. Accordingly, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Parties in this arbitration in front of the BAT.

64. 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'arbitrage² (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

65. 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

66. 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*”.

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

6.2 Findings on the Merits

68. The Arbitrator notes first and foremost, that because the Player’s counterclaim is deemed withdrawn in application *mutatis mutandis* of Article 9.3 of the BAT Rules and consistently with BAT practice, it will not be considered.

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.

69. As a second preliminary matter, the Arbitrator finds that the Player has not established that the reason for which he did not return to the Club after his departure to the USA on 23 November 2012 was that it had forced him to play on an injured ankle in October-November 2012 and/or that it had provided him with inadequate medical support during that period.
70. Indeed, in his personal email exchanges and his Agent's email exchanges with the Club on 23 November 2012 regarding his sudden departure and in the following exchanges with the Club between that date and the termination of the Agreement on 29 December 2012, neither he nor his Agent ever mentioned medical reasons or any fault of the Club as the motive for his departure to the USA or his need to prolong his stay there.
71. The sole motive invoked and relied on by them at the time to explain his departure to the USA and his wish/need to stay there longer than expected, i.e. until mid-January 2013, was the seriousness of his father's ailment and the difficulty of predicting how it would evolve before the additional surgery scheduled for 7 January 2013 had taken place.
72. Moreover, although the documents filed by the Player in these proceedings do indicate that he was having problems with an ankle injury and was becoming weary of the Club's treatment, they only demonstrate that he was internally sharing with his Agent some worries and dissatisfaction, not that he was formally complaining to the Club and/or intending to leave it due to the injury or inadequate medical care.
73. The Arbitrator's finds therefore that the only established reason for which the Player decided to depart to the USA on 23 November 2012 and to thereby temporarily interrupt performing in practices and games for the team, was his father's serious health problem.
74. In that connection, a first question is whether the Player's departure and his subsequent requests to postpone his return for quite a long period (ultimately until 15

January 2012), may be deemed a breach of contract that entitled the Club to terminate the Agreement for cause on 29 December 2012.

75. It goes without saying that, morally and personally speaking, the Player's decision to give priority to his ailing father for as long as the latter's vital health required, was commendable and no doubt wise.
76. Furthermore, the Arbitrator finds that the evidence adduced demonstrates that in taking and implementing that decision, the Player acted in a fair and transparent manner with the Club, clearly stating the reasons for his sudden departure to the USA and the difficulty for him to predict when he would be able to return, while his Agent attempted to propose fair and constructive solutions, including an immediate suspension of the Player's right to any remuneration and the proposal to seek a temporary replacement for the Player. The Player tried to communicate personally with the Club despite his difficult situation and was gentlemanly in the manner of excusing himself for putting the Club in a predicament at an important point in the season, while overall his Agent was very responsive to the Club.
77. Although the Agreement does not expressly address the situation that arose, the Arbitrator finds that implicitly and for reasons of fairness, a certain degree of tolerance (to be examined on a case-to-case basis) may be required for the absence of a player based on such motives as those invoked, i.e. the sudden occurrence of a life-threatening ailment affecting a very close relative. In that connection, it is noteworthy that the Club never questioned or disputed the Player's statements that his father had fallen seriously ill or asked the Player for any medical proof thereof, while at the same time the Player regularly informed the Club of the developments relating to his father's ailment. Thus, in this case, the Arbitrator finds it is established that the Player's father suffered a sudden life-threatening ailment.
78. In the particular circumstances of this case as established, the Arbitrator finds it is fair to not consider the unexpected departure of the Player, in and of itself, as a breach of

contract or to characterize it as an “*arbitrary abandonment*” of the Club as defined in article 4.1 of the Agreement.

79. In fact, although the Club voiced its concern due to the point in the season when the Player’s sudden absence arose, in practice the Club itself adopted the foregoing standpoint by initially giving the Player permission to return to the Club by 1 December 2012, i.e. by effectively giving him leave for a week, and by subsequently accepting – under certain conditions – that he only return by 27 December.
80. However, for reasons of his own (linked to the fact that his father was going to undergo further surgery on 7 January 2013), the Player insisted he needed more time and stated that he would not be able to return to the team before 15 January 2013, which would have implied a total of nearly eight weeks of absence.
81. The Arbitrator finds it understandable and fair that for a basketball club in the middle of a season, a leave of such duration was not acceptable for it and made planning very difficult, meaning that it had good cause to terminate the Agreement as a result of the Player’s refusal to return to the team by the date of 27 December 2012 as requested by the Club.
82. In other words, legally and contractually speaking, the Club could not be expected to accept without restriction, the absence of the Player and a prolonged uncertainty as to the date of his return.
83. For the above reasons, the Arbitrator finds that – although the Player cannot be deemed to have committed an “*arbitrary abandonment*” of the Club in the meaning of article 4.1 of the Agreement (which in its wording and spirit tends to cover the case of an ill-intentioned and definitive departure) – he did default in his performance of the Agreement by not accepting the reasonable deadline (of 27 December 2012) proposed by the Club for his return, and therefore the Club’s termination of Agreement on 29 December 2012 must be deemed valid and for cause. Furthermore, the termination was preceded by several formal warnings and was thus implemented fairly by the Club.

84. In this relation, the Arbitrator notes that in its defence arguments, the Player did not contest the Club's right to terminate the Agreement when it did.
85. This leads to the central issue of this case, which is whether the Club is entitled to claim the financial penalties and damages it is invoking.
86. With respect to financial penalties for the Player missing practice sessions and games between 23 November and the termination of the Agreement (29 December), i.e. during his absence in the USA, the Club is claiming a total amount of **USD 71,000** based on its application and interpretation of the terms of its Disciplinary Code.
87. The Club is arguing in substance that the circumstances in which the Player missed those practice sessions and games amount to a disciplinary offense which is covered by the scope of the Disciplinary Code, and which according to the latter's terms may be sanctioned with penalties/fines corresponding to those decided by the Club in this case and notified to the Player in December 2012. The Club contends that it was entitled to cumulate applying such financial penalties and withholding his entire salaries for the corresponding period. The Player contests the Club's foregoing interpretation of the Disciplinary Code and its right to levy penalties in addition to withholding his pay.
88. The Arbitrator finds for the following reasons combined that the financial sanctions envisaged under the Disciplinary Code may clearly not be cumulated with the Club's right to cease paying the Player's salary due to him *de facto* leaving the team or due to any other form of default or breach:
- Article 1 of the Agreement formulates the disciplinary sanctions as the first stage of remedy that the Club can normally apply in case of a breach of contract by the Player.
 - Indeed, according to article 1 of the Agreement, only in the case of "*repeated violations of the Player which are not remedied*" may the Club terminate the Agreement with the consequence that "*... upon the date of such termination ...*

all obligations of both parties shall cease”.

- Thus, in the foregoing situation, the disciplinary sanction would necessarily precede the extinction of the obligation to pay the Player his salary.
- According to its terms, article 4.1 of the Agreement envisages the case of particularly serious breaches of contract, such as drug abuse or the “*arbitrary abandonment*” of the Club, which as a result lead directly to the Player’s loss of entitlement to his salary, implying that such remedy is not intended to be cumulative with financial penalties but rather to constitute a more serious contractual remedy for a particularly serious breach.
- Furthermore, the wording of the Disciplinary Code makes it clear that financial sanctions are of variable amounts and are always deducted from the Player’s salary, up to a amount of “*100% of monthly salary*”, which logically implies that the total amount of a monthly salary is a cap; i.e. that the penalty is not intended to be cumulative with the more serious sanction provided under article 4.1 of the Agreement of the Player immediately losing his entire entitlement to being paid.

89. For the above reasons and because the Club had already stopped paying the totality of the Player’s salary as of the end of October 2012 – i.e. did not pay any part of his November or December salaries (and has not paid them since) as result of him leaving the Club – the Club’s claim to be paid in addition penalties in an amount of USD 71,000 as a sanction for practice sessions and games missed between 23 November (date of his departure) and 29 December 2012 (date of termination of the Agreement), shall be entirely dismissed.

90. Concerning the amount of **USD 8,100** being claimed as damages for the amount of fee the Club had to pay to the agent of the player replacing the Respondent (the “new agent”), the Arbitrator notes that according to the evidence adduced, the first part of such fee (USD 4,100) was due on 31 December 2012, i.e. after the date of termination

of the Player's Agreement. Thus, the cost for the Club of this fee is paid essentially in consideration for the new agent's activity in securing a replacement player for the Club for the outstanding part of the 2012/2013 season, i.e. for the period following the Club's termination of the Player's contract.

91. Since, as noted below, the Arbitrator finds that the amount the Club paid to the Player's Agent for the corresponding period, i.e. for the period after the Player left the Club, is not due by the Club and must be reimbursed, the Arbitrator finds that the amount of the agency fee paid to the new agent may not be characterized as a damage in this case – the purpose of damages being to put the contractual party having suffered a breach in the position it would have enjoyed without the breach (in this case the Club would have had to pay one agent's fees in any event) and not to enrich it. Consequently, general principles of damages, which are based on fairness and justice, do not require that the Player pay the club any compensation in this connection, and that part of the claim will be dismissed.
92. As to the amount of **USD 13,500** being claimed from the Player as a form of non-amortized cost of having had to fully pay his agent despite the Player deciding of his own accord to suspend his performance on 23 November 2012 and then not reintegrating the team within the reasonable deadline fixed by the Club, the Arbitrator finds that it is fair to consider part of the cost of that fee as damages, i.e. an amount proportional to that part of the season during which the Player did not play for the Club, i.e. in this case 60% of the season (six out of ten months) corresponding to an amount of USD 8,100 (60% of USD 13,500). The Club shall therefore be awarded an amount of USD 8,100 as damages in compensation for that cost.
93. Finally, given the unusual situation the Club had to cope with when the Player departed for the USA and decided not to return until he deemed fit, and the Club's corresponding need to consult a lawyer to assess the situation and urgently seek a solution for its team, the Arbitrator finds that the amount of the Club's lawyers' fees prior to the arbitration, in an amount of **USD 2,500**, are reasonable and may be deemed an

additional cost/damages suffered because of the Player's decisions. The Club will therefore be awarded an amount of USD 2,500 as damages in compensation for that cost.

7. Costs

94. 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.
95. On 9 November 2013 – considering that pursuant to Article 17.2 of the BAT Rules “*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*”, and that “*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time*”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 11,000.00.
96. In the particular circumstances of this case, the Arbitrator finds that it is fair and just that the parties share the costs of the arbitration and that both parties cover their own legal fees and expenses linked to the arbitration.
97. In reaching that conclusion the Arbitrator has taken account of a number of factors.
98. It is clear from the evidence that the Player did not arbitrarily abandon the Club or depart to the USA to seek an advantage. On the contrary, it was for morally commendable reasons and understandable personal motives (the wish to be with his

father when the latter's life was at risk for medical reasons) that the Player left on 23 November 2012 and finally decided he could not return to the Club until 15 January 2013. At the same time, the Player and his Agent acted fairly and cooperatively during the Player's absence, trying to be creative in seeking solutions which would allow the Club to find a replacement player on a temporary or definitive basis and not making any claims for the Player's salary.

99. During that period in November-December 2012, the Club also adopted a pragmatic and fair approach, seeking a reasonable compromise between supporting the Player and the need to continue performing as a professional basketball team.
100. However, the Arbitrator finds that within the foregoing context and given the terms of the Agreement, the Club was mistaken in deciding to fine the Player large amounts as disciplinary penalties in addition to withholding his salaries for the months of November and December.
101. The Club having no valid ground to cumulate those amounts, it is comprehensible that the Player refused to pay the fines, which subsequently became the Club's major claim in this arbitration. Without that particular claim, which the Arbitrator has deemed unfounded, the arbitration might not have taken place and an arrangement might have been reached with respect to the other much smaller amounts in dispute. Furthermore, only part of those smaller amounts and a very minor proportion of the overall claim has been admitted.
102. For the above reasons the Arbitrator decides *ex aequo et bono* that the costs of arbitration shall be shared equally between the parties and that neither party shall contribute to the legal fees and expenses of the other, except for the non-reimbursable handling fee of EUR 2,000, which shall also be borne in equal shares.
103. In light of the foregoing and given that the Claimant paid its advance on arbitration costs of EUR 5,500 as well as the Respondent's equivalent share and a non-reimbursable handling fee of EUR 2,000 (which constitutes part of the Claimant's legal



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fees and expenses), the Arbitrator decides that in application of article 17.3 of the BAT Rules:

- (i) the Respondent shall pay the Claimant EUR 5,500, being 50% of the total arbitration costs;
- (ii) the Respondent shall pay the Claimant EUR 1,000, being 50% of the non reimbursable handling fee.

8. AWARD

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

- 1. The Arbitrator has jurisdiction with respect to the claims submitted by Basketball Nymburk A.S.**
- 2. Mr. Adrian Glenn Abrams shall pay Basketball Nymburk A.S. USD 10,600 as damages.**
- 3. Mr. Adrian Glenn Abrams shall pay Basketball Nymburk A.S. EUR 5,500 for the arbitration costs.**
- 4. Mr. Adrian Glenn Abrams shall pay Basketball Nymburk A.S. EUR 1,000 for the non-reimbursable handling fee.**
- 5. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 15 November 2013

Quentin Byrne-Sutton
(Arbitrator)