



**BASKETBALL**  
ARBITRAL TRIBUNAL

**ARBITRAL AWARD**

**(BAT 0418/13)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Ms. Annett Rombach**

in the arbitration proceedings between

**Mr. Othello Hunter**

represented by Mr. David Lee, attorney at law,  
2017 East 74th St, Brooklyn, NY 11234, USA

vs.

**Club Baloncesto Valladolid SAD**  
Pabellón Pisuerga, Plaza Mejico, s/n, 47014 Valladolid, Spain

**- Claimant -**

**- Respondent -**

## **1. The Parties**

### **1.1 The Claimant**

1. Mr. Othello Hunter (the “Player” or “Claimant”), is a professional basketball player of U.S. nationality.

### **1.2 The Respondent**

2. Club Baloncesto Valladolid SAD (the “Club” or “Respondent” and together with Claimant the “Parties”) is a professional basketball club located in Valladolid, Spain.

## **2. The Arbitrator**

3. On 30 July 2013, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the “BAT”), appointed Ms. Annett Rombach as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the “BAT Rules”). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

## **3. Facts and Proceedings**

### **3.1 Summary of the Dispute**

4. On 14 September 2012, the Parties entered into a contract (the “Player Contract”), pursuant to which the Club engaged the Player as a professional basketball player for the basketball season 2012-2013.



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5. In Clause 2 of the Player Contract, the Club agreed to pay the Player a fully guaranteed base salary of USD 230,000.00 net of any applicable taxes for the entire season, payable in accordance with the following schedule:
- USD 15,000.00 upon the Player's arrival in Spain after passing the medical examination;
  - USD 13,750.00 on 19 October 2012;
  - USD 28,750.00 on 19 November 2012;
  - USD 28,750.00 on 19 December 2012;
  - USD 28,750.00 on 19 January 2013;
  - USD 28,750.00 on 19 February 2013;
  - USD 28,750.00 on 19 March 2013;
  - USD 28,750.00 on 19 April 2013;
  - USD 28,750.00 on 19 May 2013.
6. Clause 2 of the Player Contract also contains provisions addressing a breach of any of the Club's payment obligations. The relevant language reads as follows:

*"[...] It is agreed that any payment to the Player [...] shall be subject to an interest penalty of One hundred US Dollars (\$ 100.00) per day for each day after the tenth (10<sup>th</sup>) day said payment was due. Payment to the Player shall be deemed to be made when the payment is received by the Player's Payment Destination. In the event that any scheduled payments or the agent's fees payments are not made by the Club within twenty (20) days of the applicable payment date, the Player shall be immediately entitled to payment of his full Base Salary as specified above, and shall not have to perform in any practice sessions or any games until such time as all of said payments and appropriate interest penalties have been paid. In addition, if any scheduled payment is not received by Player's bank within twenty (20) days of the date due, the Player's performance obligations shall cease, Player shall have the right, at Player's option, to terminate this Agreement and accelerate all future payments required under this Agreement. In this case, Player shall be free to leave the Club with his FIBA Letter of Clearance as a free agent to play basketball anywhere in the world Player chooses, but the duties and liabilities of Club*



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*toward Player and Agent under this Agreement shall continue in full force and effect [...].”*

7. After the Player Contract took effect, Claimant received the following payments on the following dates:
  - USD 14,965.00 on 4 October 2012;
  - USD 13,715.00 on 11 October 2012;
  - USD 28,735.00 on 10 December 2012;
  - USD 28,735.00 on 17 January 2013.<sup>1</sup>
8. No further payments were received by the Player.
9. On 18 February 2013, the Player did not participate in the 6 pm practice session. On 19 February 2013, the Player did not participate in the 11 am practice session.
10. On 19 February 2013 at 1:40 pm, the Player’s Spanish agent sent an e-mail to the Club, which, in the English translation submitted by Claimant, reads as follows:

*“Please accept this letter as official notification that you have breached the contract dated Sept 14, 2012 between yourself and player Othello Hunter  
Payment was due on Jan 19, 2013 of \$28,750usd. Same has not been received. As per the terms of the contract late payments of \$100 per day are incurred for every day late after 10 days. The contract further states that after payment being 20 days late "player shall be immediately entitled to FULL BASE SALARY and shall not have to participate in any practice sessions or games". "Players performance obligation shall cease".” [sic]*

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<sup>1</sup> The difference between the amounts the Player actually received and the amounts stipulated under the Player Contract constitutes bank charges, which were apparently applied on the money transfers. Because these (relatively small) minus amounts are not subject to Claimant's claim in this arbitration, it can be left undecided whether Claimant or Respondent is liable for these charges.



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11. The Player attended the 6 pm practice session on 19 February 2013 and the practice sessions on 20 February 2013. As of 22 February 2013, the Player did not appear at any practice sessions or games. He eventually left Valladolid. During that time, the Player received a text message (undated) on his cell phone from a woman named “Alba”, who Claimant alleges was his landlord, stating the following:

*“Hi! Things haven’t changed, your managers don’t answer the phone and don’t pay so speak with them buy you have to leave the flat if it’s possible, this weekend. we’re really sorry about the situation...” [sic]*

12. On 7 March 2013, the Club sent an e-mail to Claimant’s counsel attaching a letter dated 4 March 2013, informing him that the Club’s board had decided to open a file (a so-called *expediente informativo*) regarding his repeated absences from practices and games.
13. By facsimile of 11 March 2013, the Club informed the Spanish league (“ACB”) about the opening of the file against the Player:

*“Hereby we want to Inform to the ACB that the player Othello Hunter still has a current contract with Club Baloncesto Valladolid, SAD.*

*Club Baloncesto Valladolid, SAD has no official and reliable communication by the player or his agent about the termination of his contract with this Club.*

*Finally we want to Indicate that the Club Baloncesto Valladolid directive staff, meeting in special session dated March 2, 2013, agreed to open an Informative expedient regarding the repeated absences of Othello Hunter from practices and games. This expedient is still open at this moment.” [English translation submitted by Respondent]*

14. By letter of 13 March 2013, the Club again informed the Player of the opening of the file in the following manner:

*“Hereby we inform you the opening of a prior contradictory expedient, which will follow the procedure established in Articles 8 and following*



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*of the General Regulation of the Disciplinary Regulations that governing statutes and Competitions ACB and Articles 54 and following of the Internal Regulations of Valladolid Basketball Club SAD.*

*The expedient is opened as a result of:*

*- The repeated absences from practices on 18 February at 18.00 hours and on 19 February at 11.00 hours.*

*- Failure to submit to the call of the game Blancos de Rueda-Unicaja Malaga of February 23*

*The Directive Board at a special meeting that was hold on February 4, 2013, took the decision to open an informative expedient to the player, which was communicated by email to their agents, David Lee and Oscar Garcia on 27 March at 18.43 hours .*

*Given that the fault was considered VERY SERIOUS, and could be resulted of player's dismissal, is the reason why the club informed to the player about the opening of the expedient and was given to him ten working days from the receipt of this communication to submit a writing document, if desired, a discharge claiming as it deems appropriate and propose the evidences to his defense.*

*After this period it will continue the processing of the expedient to be studied by the Directive Board, in accordance with Article 8 of the General Rules of Disciplinary Regime of the Statutes and Regulations Governing Competitions ACB and Internal Regulations Valladolid Basketball Club, SAD."*

15. On or before 13 March 2013, Claimant received an offer from a club in Israel. The Basketball Federation of Israel ("IBBA") requested a letter of clearance from the Spanish Basketball Federation ("FEB").
16. On 13 March 2013, the FEB formally denied the letter of clearance request, arguing that the Player was still under a valid contract with the Club until 30 June 2013.
17. On 28 March 2013, the Player's agent, Mr. Grose Zeev, requested FIBA's intervention with the aim to receive the letter of clearance on behalf of the Player.
18. On 4 April 2013, FIBA, after it had heard both Parties, decided that *"the Player is under contract to play for the Club beyond the scheduled transfer date. The refusal of the*

*letter of clearance by the Spanish Basketball Federation is thus justified*” (the “FIBA Decision”). In summary, the FIBA Decision is based on the following legal considerations:

- The e-mail of 19 February 2013 sent by the Player’s agent (quoted above at para. 10) does not qualify as a notice of termination, since it purports to trigger other consequences of non-payment and not the termination of the Player Contract;
- The simple reference to the right to abstain from practices and games in case of a breach of contract does not imply a termination of the Player Contract;
- General considerations of justice and fairness require the Player to act in good faith and clarify his position towards the Club. The mere absence from training sessions and games without any further word cannot lead to a termination of the contract;
- Even if the termination notice were not required to be in written form, no evidence is on the record that would suggest an oral termination of the agreement.

19. By letter dated 13 April 2013, the Club informed the Player that

*“[...] after completion of the period that was given in the notice of initiation of prior contradictory expedient (dated March 13, 2013), and without having received any letter / communication of discharge, the Club Basketball Valladolid SAD [...] has decided to open a evidence period of five working days from the date of communication of this opening.*

*After that evidence period of five days, and under what will be appropriate, Club Basketball Valladolid SAD will communicate the resolution of the prior contradictory expedient.”*

20. By letter dated 23 April 2013 (delivered to Claimant by e-mail of 26 April 2013), the Club imposed a sanction of 60 days without pay on the Player and dismissed him.

21. On 27 August 2013, Claimant's Spanish agent, Mr. Óscar García, sent an e-mail to Respondent stating (in the English translation submitted by Respondent) that "*there was never any official request claimed the rights of the player.*" [sic]

### **3.2 The Proceedings before the BAT**

22. On 21 March 2013, Claimant filed a Request for Arbitration together with several exhibits in accordance with the BAT Rules, which was received by the BAT Secretariat on 2 April 2013. The non-reimbursable handling fee of EUR 3,000 was received in the BAT bank account on 22 May 2013.
23. On 7 August 2013, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 28 August 2013 (the "Answer"), and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 19 August 2013 as follows:

<i>"Claimant (Mr. Othello Hunter)</i>	<i>EUR 5,000</i>
<i>Respondent (CB Valladolid SAD)</i>	<i>EUR 5,000"</i>

24. On 28 August 2013, Respondent filed its Answer.
25. By letter to the Parties dated 2 September 2013, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs (minus a deduction for bank charges regarding Claimant's share). In Accordance with Article 4.1 and 4.2 of the BAT Rules, the Arbitrator requested Respondent to submit English translations of several exhibits which had been produced only in the Spanish language, and further sought clarification on the nature of one particular document referred to by Respondent as the "Internal Rules" of the Club.

26. On 9 September 2013, Respondent provided the requested translations and information (the “Additional Documents”).
27. By Procedural Order dated 19 September 2013, the Arbitrator forwarded Respondent’s Answer and the Additional Documents to Claimant, declared the exchange of documents completed and invited the Parties to submit a detailed account of their costs.
28. On the same day, Claimant requested leave to submit comments on Respondent’s Answer.
29. By Procedural Order dated 20 September 2013, the Arbitrator reopened the proceedings and invited Claimant to comment on Respondent’s Answer.
30. On 25 September 2013, Respondent filed an account on costs.
31. On 30 September 2013, Claimant filed comments to Respondent’s Answer, together with several exhibits (“Claimant’s Reply”).
32. On 2 October 2013, the Arbitrator invited Respondent to comment on Claimant’s Reply.
33. On 22 October 2013, within the (extended) deadline, Respondent filed comments to Claimant’s Reply (“Respondent’s Rejoinder”).
34. By Procedural Order dated 2 December 2013, the Arbitrator declared the exchange of documents completed and (again) invited the Parties to submit a detailed account of their costs by no later than 9 December 2013.
35. On 3 December 2013, Claimant submitted the following account on costs:



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- “1. 3,000 Euros non reimbursable filing fee.  
2. 4,928.61 Euros for advanced costs.

Total costs 7,928.61 Euros.

As and for legal fees, hours incurred were as follows:

1.5 hours for preparation and filing of arbitration request

3 hours for review of response to procedural orders, emails, review respondent's submissions

10 hours claimant's reply to respondent's answer.

Total 14.5 hours

Billing rate 500 Euros per hour

Total legal fees incurred 7,250 Euros

Total expenditure for costs and fees 15,178.61 Euros.”

36. On 5 December 2013, Respondent submitted the following (updated) account on costs:

**HONORARIOS**

<i>Description</i>	<i>Salidas €</i>
<i>Background study, consultation, writing and submission of claims, as well as the necessary documentation for submission to the BAT (Basketball Arbitral Tribunal) in the Claim expedient of Mr. Othello Hunter to Valladolid Basketball Club SAD</i>	<i>5.500,00</i>
<b>TOTAL</b>	<b>5.500,00€</b>
<b>SUPLIDOS</b>	
<b>TOTAL</b>	<b>0,00€</b>

**TOTALES €**

**I.V.A. 21%** **1.155,00**

<i>Suplidos</i>	<i>0,00€</i>
<i>Total Minuta (s.e.u.o.)</i>	<i>6.655,00</i>
<i>Provisión de fondos</i>	<i>0,00</i>
<hr/>	
<i>Líquido a mi favor (s.e.u.o.) €</i>	<i>6.655,00</i>
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37. On 6 December 2013, both Parties were invited to submit their comments on the other side's account of costs by no later than 11 December 2013. Neither Claimant nor Respondent submitted any comments.

38. As neither of the Parties requested a hearing, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to render the award based on the written record before her.

#### **4. The Positions of the Parties**

39. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this award, the Arbitrator has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award or in the discussion of the claims below.

##### **4.1 Claimant's Position and Request for Relief**

40. Claimant submits the following in substance:

- The Club was continuously late in making the contractually owed payments and failed to make any payments at all after 15 January 2013;

- Before 18 February 2013, the Player himself and his counsel notified the Club that the Player would not be practicing if the Club did not pay him the outstanding amounts by 18 February 2013;
- The Club knew and it was very clear to it that, as a result of no payment having been received on or after 18 February 2013, the Player left the team and terminated the Player Contract. In this respect, Claimant points to the following:
  - In mid-February 2013, Claimant's counsel made clear to the Club that the Player would leave the team and terminate the Player Contract in case of a continued payment default;
  - Claimant's counsel, by phone, spoke to a Club's representative on 18, 22 and 23 February 2013, informing the Club that the Player would be leaving the team. Claimant submits telephone logs as proof that the phone calls indeed took place;
  - Various newspaper articles published between late February and early April 2013 confirm that the Player left the team and was replaced by a new player signed by the Club in early April;
- Agent Garcia's Statement that Claimant never communicated the termination of the Player Contract to the Club is not credible and false;
- The Club also failed to pay the Player's rent. Player was requested to leave the apartment by his landlord in February;
- The termination of the Player Contract does not require an official (written) notice.

41. In his Request for Arbitration, Claimant requests the following relief:

"1 LETTER OF CLEARANCE

2 BALANCE OF ALL MONIES OWED UNDER THE CONTRACT WHICH REFLECT ALL PAYMENTS DUE FROM JAN19,2013 TO MAY 19, 2013 EQUALS \$ 143750

- 3 PENALTIES OF \$ 100 PER DAY FOR EACH LATE PAYMENT RECEIVED AND STILL ACCRUING FOR PAYMENTS NOT MADE TO DATE \$ 4,200
- 4 [deleted by Claimant]
- 5 MONIES FOR LOSS OF INCOME FROM PROSPECTIVE JOB OFFERS LOST DUE TO TEAMS REFUSAL TO PROVIDE LETTER OF CLEARANCE \$ 25000
- 6 ATTORNIES FEES AND FILING COSTS
- 7 SANCTIONS FOR TEAMS VIOLATION OF FIBA RULES BY FAILING TO PROVIDE LETTER OF CLEARANCE AND FOR CONDUCT DEFAMATORY TO THE PLAYER” [sic]

#### **4.2 Respondent's Position and Request for Relief**

42. Respondent submits the following in substance:

- The Player’s absences from the training sessions on 18 and 19 February occurred without prior announcement;
- During a practice session on 20 February 2013, the Player told the Coach that *“he intended to continue at the club until the end of the season”*;
- The Player eventually left the Club in late February without any communication, and he never officially terminated the Player Contract;
- The Club does not owe the Player any salary payments beyond what has been paid in 2012 and in January 2013. The sanction imposed on the Player as a result of the disciplinary proceedings (2 months without pay) deprived the Player of his January and February salary;
- The Player Contract was terminated as of 28 February 2013 as a result of the dismissal sanction imposed on the Player;
- The Club did not owe any rent payments to the Player’s landlord.

43. The Club, in its Answer, submits the following request for relief:



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***“First.-*** Valladolid Basketball Club S.A.D. DOES NOT OWE any salary to Mr. Othello Hunter, due to the sanction imposed on him by the Expedient UNDER Very Serious fault behavior and breach of the contract. The Expedient was followed according to the Internal Rules of Valladolid Basketball Club S.A.D., under the Rules of the Association of Basketball Clubs Spain (ACB) and under FIBA rules.

***Second.-*** The days of delay that are claimed by the player, there ARE NOT which those claim in his letter.

***Third.-*** Because there are not delay in the payments to the player, he can not claim for the interests.

***Fourth.-*** Because there is no reason for this complaint, the COSTS OF ARBITRATION COURT EXPENSES and ATTORNIES FEES and FILING COSTS can not be claimed.

***Fifth.-*** Valladolid Basketball Club S.A.D. RESERVE their rights to ask for Mr. Othello Hunter the payments of the costs and legal expenses paid by the Club.

***Sixth.-*** The player can not ask for a compensation for lost wages and/or offers received because Valladolid Basketball Club SAD. ALWAYS has acted according to the law, and FIBA recognized this proper procedure in a letter dated April 13, 2013.

***Seventh.-*** There can be no sanction to Valladolid Basketball Club S.A.D. by FIBA, because there was no breach any rights or anyone has been defamed by the Club, simply it has defended the rights of Basketball Club Valladolid S.A.D. in the conduct of Mr. Othello Hunter.”

### 5. The Jurisdiction of the BAT

44. Pursuant to Art. 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”).
45. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

46. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Art. 177(1) PILA.
47. The jurisdiction of the BAT is addressed in Clause 11 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 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.”*
48. The arbitration agreement is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA.
49. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity of the arbitration agreement in the present matter under Swiss law (cf. Article 178(2) PILA).
50. However, the Arbitrator finds that Claimant’s request no. 1 for the issuance of a letter of clearance does not fall within the jurisdiction of the BAT. Dissonances regarding a Player’s eligibility to transfer internationally (i.e. to be granted a letter of clearance) constitute a license dispute which falls within the exclusive competence of FIBA.<sup>2</sup> Therefore, the Arbitrator finds that she has no jurisdiction to issue a decision on Claimant’s request no. 1.

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<sup>2</sup> In this respect, the Arbitrator also points to Article 3-97 of the FIBA Internal Regulations, which determine that letter of clearance disputes shall be decided by the Secretary General of FIBA. In fact, Claimant himself reverted to FIBA in April 2013 to obtain a letter of clearance from the FEB. Claimant did not exercise his right to appeal the FIBA Decision before the competent bodies, i.e. the FIBA Appeals Panel and thereafter the Court of Arbitration for Sport.

51. For the same reason, the Arbitrator finds that the BAT has no power to impose disciplinary sanctions on parties for violating the FIBA Internal Regulations. Such disciplinary power belongs to the competent sports organisation, in this case FIBA, the rules of which were allegedly violated. Therefore, the Arbitrator finds that she has no jurisdiction to issue a decision on Claimant's request no. 7.
52. With respect to all other requests (no. 2,3, 5 and 6), the wording "[a]ny dispute arising from or related to the present contract" in Clause 11 of the Player Contract clearly covers the present dispute. Furthermore, Respondent did not object to the jurisdiction of the BAT.
53. For the above reasons, the Arbitrator has jurisdiction to decide over Claimant's requests, except for requests no. 1 and 7, demanding the issuance of a letter of clearance and the imposition of sanctions, respectively.

## **6. Applicable Law – *ex aequo et bono***

54. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the arbitrators to decide "*en équité*" instead of choosing the application of rules of law. Article 187(2) PILA reads as follows:

*"the parties may authorize the arbitral tribunal to decide ex aequo et bono".*

55. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

*"Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law."*

56. In Clause 11 of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono*. Consequently, the Arbitrator will decide the issues submitted to her in this proceeding *ex aequo et bono*.
57. In light of the foregoing considerations, the Arbitrator makes the findings below.

## 7. Findings

58. Claimant seeks the following compensation in this arbitration:
- Outstanding salaries for January to May 2013;
  - Late payment penalties; and
  - Compensation for the “*loss of income from prospective job offers*” as a result of the Club’s “*refusal to provide [a] letter of clearance*”.
59. Claimant’s entitlement to these amounts is closely related to two questions, namely whether or not the Club breached the Player Contract (below at 7.1), and whether or not the Player validly terminated his employment as a result thereof (below at 7.2). Once the Arbitrator has resolved these two questions, she will turn to the quantum side of Claimant’s case and address the specific items mentioned above (below at 7.3).

### 7.1 Did the Club breach any of its obligations under the Player Contract?

60. It is undisputed that the Player received the monthly salaries for October, November and December 2012. It is also undisputed that the Player did not receive any further salary payments for the 2012-2013 season.
61. The Club argues that the Player is not entitled to any payments beyond the December 2012 salary, because – as per its decision in the disciplinary proceedings initiated against the Player after his repeated absences from practices and games – the

Player's salary for January and February 2013 was suspended and the Player dismissed as of 1 March 2013.

62. The Arbitrator rejects the Club's argument. She finds that the disciplinary sanctions are ineffective because the Club had no right to impose them on the Player. It was the Club which first breached the Player Contract by failing to honour its payment obligations, and the Player was fully justified in abstaining from practices and games due to the Club's payment default.
63. Pursuant to Clause 2 of the Player Contract, the monthly salary instalments were due on the 19<sup>th</sup> of each month. On 18 February 2013 – when the Player remained absent from a practice session for the first time – the Club was 30 days late with the Player's January salary.
64. The Club's payment delay triggered the rights established in Clause 2 of the Player Contract. Specifically, the Player Contract provides that in case of a payment delay by at least 20 days, the Player *"shall not have to perform in any practice sessions or games until such time as all of said payments and appropriate interest penalties have been paid."*
65. In accordance therewith, the Player's refusal to participate in the Club's practice sessions on 18 and 19 February 2013 was legally justified. The Player was also entitled to remain absent from all subsequent practice sessions and games, because the Club did not pay any of the salary instalments that became due after 18 February 2013 (i.e. the February, March, April and May instalments).
66. The fact that the Player re-appeared for a practice session on 20 February 2013 in the apparent trust that the Club would satisfy the outstanding payment obligations did not affect the Player's right to skip practices and games again after that date in light of the Club's continued payment default. Specifically, the Player's temporary return to the team's practice sessions cannot be interpreted as a forfeiture of his contractual right to stay away from subsequent practices and games without any (additional) evidence

suggesting that the Player indeed intended to provide his services to the Club despite the latter's payment delay. In this context, Respondent's allegation that the Player told the Coach on 20 February 2013 that "*he intended to continue at the club until the end of the season*" is unsubstantiated and disputed. Respondent fails to proffer any evidence for that assertion (e.g. a witness statement from the coach), and the Arbitrator finds that the Player's (unconditional) promise to stay with the team and render his services with no prospect of receiving the contractually owed salary would run against logic and is thus highly unlikely.

67. The Player's right to abstain from practices and games was not contingent on the termination of the Player Contract or on any form of a prior notice. During these arbitration proceedings, the Parties extensively briefed on whether the Player (explicitly or implicitly) terminated the Player Contract in February 2013, or whether he should have at least notified the Club of his intent to abstain from practices. The Arbitrator finds that this discussion is irrelevant in light of the clear and unambiguous language of the Player Contract, pursuant to which in the event of a payment delay by at least 20 days, "*the Player shall be immediately entitled to payment of his full Base Salary ... and shall not have to perform in any practice sessions or games.*" Additionally, "*the Player's performance obligations shall cease, Player shall have the right, at the Player's option, to terminate this Agreement and accelerate all future payments required under this Agreement.*"
68. It is clear from this language that no termination or any other kind of notice was required for the Player to abstain from practice sessions and games. This is consistent with the common contractual practice in basketball allowing a player to sit out of practices and wait for the club to pay him, but who still considers himself bound by the contract.
69. In view of the Player's legal entitlement to skip practices and games, the Club had no right to open disciplinary proceedings and impose sanctions on the Player. The Club's internal regulations, in Article 2, make clear that only an unjustified absence from a

training session can be subject to disciplinary sanctions. Additionally, it follows from the generally accepted principle of contract law that a party must have complied with its own contractual obligations before it may request performance from its counter party<sup>3</sup> or – in this case – impose disciplinary sanctions on the other party.

70. Finally, the Arbitrator wishes to clarify that the Club's decision in the disciplinary proceedings is not binding on her.
71. The Club's disciplinary regime, which is incorporated in its internal rules and regulations (a copy of which was to be signed by the Player),<sup>4</sup> is an integral part of the employment relationship between the Club and the Player. The Parties' employment relationship is subject to a full and unlimited review by the Arbitrator. It is the core task of the Arbitrator, as part of her mandate to decide on any dispute "arising from or related to" the Player Contract, to analyze all questions concerning the Parties' contractual relationship, including whether or not the Club was entitled to impose disciplinary sanctions on the Player. It is inherent in the Parties' agreement that such sanctions may be effectively imposed only if they are justified under the Club's internal rules signed by the Player, and the Player did not waive his fundamental right to a judicial review of these issues.
72. In summary, the Arbitrator finds that the Club breached its contractual obligations by not paying the January 2013 salary (and any subsequent salary instalments) in time, and that the Player was fully justified in abstaining from practices and games without any form of (termination) notification being required for a proper exercise of his contractual right to cease performance.

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<sup>3</sup> See also FAT Award 0021/08.

<sup>4</sup> See Clause 7 d) of the Player Contract: "*The Player agrees to: [...] Comply with the Club's internal rules and regulations. Player must be provided with a copy of the Club's rules in English upon Player's arrival in Spain, and Player must sign the Club's internal rules and regulations.*"

**7.2 Did the Player validly terminate the Player Contract as a result of the Club's breach of contract?**

73. The next question that impacts at least some of the compensation claims at issue here is whether Claimant validly terminated the Player Contract as a result of the Club's payment default. Pursuant to Clause 2, if a payment is delayed by at least 20 days (which was the case here), the Player "*shall have the right ... to terminate this Agreement and accelerate all future payments*". It is clear from this language that the Player had a legal right to terminate the Player Contract immediately in mid-February, when he decided to sit out of practices and games due to the Club's failure to pay his January salary.
74. The question vigorously disputed between the Parties is whether or not the Player properly exercised this right, *i.e.* whether he gave a proper notice to the Club that he would terminate his employment with it. The Player alleges that he personally and his counsel told the Club orally that he would leave the team if the payment default continued, and that these statements formed a valid termination notice. The Club denies these allegations and submits that the Player communicated quite the contrary, namely that he intended to stay with the team until the end of the season.
75. The burden of proof on whether or not the Player Contract was successfully terminated lies on Claimant. Specifically, it is Claimant's responsibility to prove that it sent and that the Club received a notice that unequivocally evidences the Player's intent to terminate the contract and accelerate all future payments thereunder.
76. The Arbitrator finds that Claimant failed to provide sufficient evidence of a termination notice meeting these requirements. Neither is there any written communication on the record evidencing a contract termination, nor is the Arbitrator convinced that the Player terminated his employment orally.

77. With respect to a written communication, the Arbitrator concurs with the FIBA Decision that the e-mail the Player's agent sent to the Club on 19 February 2013 does not terminate the employment, but purports to trigger other consequences of non-payment. The e-mail officially notifies the Club that it is in breach of the Player Contract. In this respect, it refers only to those parts of Clause 2 of the Player Contract that address penalty payments, acceleration of future salaries and the Player's right to sit out of practices and games. Termination is neither mentioned nor can it be reasonably inferred from the wording of the e-mail. That the e-mail was not intended to be a termination notice is also demonstrated by the fact that the Player returned to practice on 19 and 20 February 2013.
78. Even if one assumed that the termination did not need to be in written form, the Arbitrator, based on the record as it stands, is not convinced that Claimant exercised his right to terminate as clearly and unambiguously as it must be expected under the circumstances. The FIBA Decision correctly points out that general principles of fairness and justice require the Player to act in good faith and clarify his position towards the Club, especially when the events are taking place in the middle of the season. The mere fact of the Player not appearing for practice without any other notice cannot be interpreted as a termination of the contract.
79. As far as Claimant purports that his counsel informed the Club of the Player leaving the Club by phone, the Arbitrator finds that these allegations, which are disputed by Respondent, are not sufficiently substantiated. The phone logs offered by Claimant may, at best, demonstrate that one or more phone calls took place after 20 February 2013 (the last time Claimant submits he practiced with the team) between Claimant's counsel and a Club representative, but they do not and cannot prove what was discussed during these calls. The newspaper articles reporting the Player's departure only demonstrate that the Player indeed left the team, but not that a proper termination notice was delivered to the Club.

80. While the Arbitrator acknowledges that it is certainly more difficult to prove that a legally relevant notice was given verbally rather than in written form, she notes that it would have been easy for the Player to clarify his position towards the Club in writing. A (brief) e-mail or letter stating the Player's intent to terminate the Player Contract with immediate effect would have sufficed to evidence that the Club was notified of the termination in an appropriate manner. In fact, and as evidenced in BAT jurisprudence, it is common for basketball players to exercise legal rights triggering significant consequences – such as the termination of their employment with a Club – in writing, either in person or through their agents or counsels. Claimant's choice not to follow this practice, but instead to invoke oral communications that he cannot reliably prove, must go to his detriment.
81. Therefore, after evaluating the Parties' arguments and behaviours on the basis of the record as it stands, the Arbitrator concludes that the Player did not exercise his right to terminate the Player Contract, and that the agreement remained in force beyond February 2013 until it regularly expired at the end of the 2012-2013 season.

### **7.3 Quantum**

82. For the purpose of addressing the various compensation items mentioned in Claimant's request for relief, the Arbitrator – following the analysis above – assumes that:
- the Club breached the Player Contract by failing to pay any salary as of January 2013; and
  - that the Player did not properly exercise his right to terminate the Player Contract.

**i. Outstanding salary payments**

83. Because all outstanding salary payments for the 2012-2013 season have become due by now, the Player is principally entitled to receive these payments (5x USD 28,750 = USD 143,750 for the months of January 2013 to May 2013).
84. However, according to generally accepted principles of the law of damages and also of labour law, any amounts which the Player earned or might have earned by exercising reasonable care during the remaining term of the Player Contract must be deducted.<sup>5</sup>
85. While these principle are certainly applicable when a Player terminated his contract with a club and is free to look for new employment, the question arises whether and to what extend a Player who opts not to terminate his contract (despite his Club's breach of its payment obligations) might be under a similar obligation to mitigate the damage to the Club by terminating his employment and look for new opportunities.
86. The Arbitrator finds that any answer to this question must, under the governing principles of *ex aequo et bono*, look at the specific circumstances of the case, particularly in view of the fact that the Player Contract principally permits the Player to sit out and wait for the Club to pay him. As per the written terms of the Player Contract, the right to terminate his employment as a result of the Club's payment default was "*at Player's option*", but not his duty.
87. However, in view of the specific facts of this case, the Arbitrator is of the opinion that justice and fairness warrant a reduction of Claimant's outstanding salary. On Claimant's own account, he wanted to leave the team as of March 2013, when he started looking for new employment opportunities. An Israeli Club was apparently interested in hiring the Player, and Claimant requested a letter of clearance and even involved FIBA to

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<sup>5</sup> These principles are also reflected in the BAT jurisprudence, see e.g. *ex multis* BAT Award 237/11.

obtain one. Because Claimant failed to express his intent to terminate the Player Contract in a clear and unambiguous manner at the time, he is also responsible for FIBA's refusal to issue the letter of clearance and his inability to join a club that was obviously interested in his services. Instead of properly terminating the Player Contract – something that one would expect from a Player who found a new club and is no longer paid by the old one – the Player forewent this opportunity and continued to sit out of Respondent's games, practices and other activities.

88. In light of these very specific circumstances, the Arbitrator finds it justified to reduce the Player's compensation by 2 monthly salaries, also given that he did not have to perform during a period of four months.
89. Therefore, the Player is entitled to salary payments in the amount of 3x USD 28,750 = USD 86,250.

**ii. Late payment penalties**

90. Clause 2 of the Player Contract provides for "*an interest penalty of One hundred US Dollars (\$ 100.00) per day for each day after the tenth (10<sup>th</sup>) day [a] payment was due.*" This constitutes a contractual penalty, i.e. a flat fee for each day of a late payment to be cumulatively calculated without limitation as long as the salary has not been paid.<sup>6</sup> BAT arbitrators have frequently dealt with this type of penalty clause. Two principles can be derived from their jurisprudence.
91. First, penalty clauses and the time window for which they can be applied should generally be interpreted narrowly in order to prevent excessive results. In this respect, BAT arbitrators have decided that absent any indication to the contrary, penalty should principally accrue only between the contractually stipulated starting date (here: after the

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<sup>6</sup> BAT 0238/11.



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10<sup>th</sup> day of the due date) and the date the Player chose to terminate the contract.<sup>7</sup> In the event that the Player did not terminate his employment – as in the present case – the latest point BAT arbitrators accept late payment penalties to accrue is the date of receipt of the request for arbitration by the BAT Secretariat.<sup>8</sup>

92. Second, BAT jurisprudence confirms that penalty clauses are subject to judicial review and can thus be adjusted if they are excessive.<sup>9</sup> As a general rule, a contractual penalty is considered to be excessive if it is disproportionate to the basic obligation of the debtor.
93. Under these principles, the Arbitrator finds that the Player is entitled to late payment penalties from the 10<sup>th</sup> day after the due date of a late or non-payment until the date payment was received for the November and December 2012 salaries, and until receipt of the Request for Arbitration by BAT for all other salary instalments which are still outstanding today. The calculation of the late penalties is reflected in the following schedule:

Payment Due	Penalties			
	Starting Date	End date	Days late	Penalty Amount (USD)
19 November 2012	29 November 2012	10 December 2012	12	1,200
19 December 2012	29 December 2012	17 January 2013	20	2,000
19 January 2013	29 January 2013	2 April 2013	64	6,400
19 February 2013	1 March 2013	2 April 2013	33	3,300

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<sup>7</sup> BAT 0100/10.

<sup>8</sup> BAT 0185/11.

<sup>9</sup> BAT 0036/09.



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19 March 2013	29 March 2013	2 April 2013	5	500
19 April 2013	29 April 2013	2 April 2013	--	--
19 May 2013	29 May 2013	2 April 2013	--	--
<b>TOTAL</b>				<b>13,400</b>

94. In relation to the salary payments the Player is entitled to receive (USD 86,250), this amount is not disproportionate.

95. Finally, the Arbitrator notes that in awarding an amount of USD 13,400 in late payment penalties, she does not act *ultra petita* despite Claimant's handwritten addition of the number "\$ 4,200" next to his request for late payment penalties. The request specifically asks for a penalty for "each late payment recived [sic] and still accruing for payments not made to date" (emphasis added), which makes clear that Claimant seeks a penalty payment for the entire term of late or non-payment. Against this clear language, the subsequently added number of USD 4,200 is obviously a calculation error and must be disregarded.

**iii. Compensatory payments for loss of income from prospective job offers**

96. Claimant's request no. 5), seeking compensation for loss of income from prospective job offers, is directly based on the fact that the Club refused to issue a letter of clearance to the Player. Because such refusal was justified at the time, Claimant's requests are *prima facie* baseless and can be rejected out of hand.

**7.4 Summary**

97. Claimant is entitled to an amount of USD 86,250.00 (net) in salaries and an amount of USD 13,400.00 (net) in late payment penalties, i.e. to a total amount of USD 99,650.00 (net).

## 8. Costs

98. 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 legal fees and expenses incurred in connection with the proceedings.
99. On 25 February 2014 – 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*”; 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*”, and 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 9,540.
100. Considering the outcome and the circumstances of the present case and given that Claimant prevailed in the preponderant part of his claims, the Arbitrator deems it appropriate that Respondent shall bear 70% of the arbitration costs and that Respondent be required to cover its own legal costs.
101. With respect to Claimant’s legal costs in the amount of EUR 7,250 EUR, the Arbitrator finds it appropriate to reduce the amount Respondent shall bear to EUR 4,250, given that some of Claimant’s requests proved meritless or extended beyond BAT’s jurisdiction.
102. Additionally, pursuant to Articles 17.1 and 17.3 of the BAT Rules and in light of the foregoing considerations, Claimant shall be entitled to 70% of the handling fee, which qualifies as “other expenses” incurred in connection with the present arbitration.

103. Given that Claimant paid EUR 4,928.61 and Respondent paid EUR 5,000.00 of the Advance on Costs, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

- (i) BAT shall reimburse EUR 388.61 to the Claimant, being the difference between the Advance on Costs and the arbitration costs fixed by the BAT President;
- (ii) Respondent shall pay EUR 1,678 to Claimant as a partial reimbursement for the arbitration costs advanced by him (70% of EUR 9,540 equals EUR 6,678, minus EUR 5,000 already paid by Respondent as Advance on Costs);
- (iii) Furthermore, as stated above, the Arbitrator considers it appropriate to take into account 70% (= EUR 2,100) of the non-reimbursable handling fee of EUR 3,000, paid by Claimant, when assessing the expenses incurred by Claimant in connection with these proceedings. Hence, because the Arbitrator considers an amount of EUR 4,250 for Claimant's legal fees and expenses to be reasonable, the Arbitrator fixes the contribution towards Claimant's legal fees at EUR 6,350.



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**9. AWARD**

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

1. **Club Baloncesto Valladolid SAD is ordered to pay to Mr. Othello Hunter USD 99,650.00 net.**
2. **Club Baloncesto Valladolid SAD is ordered to pay to Mr. Othello Hunter EUR 1,678.00 as a reimbursement of the arbitration costs advanced by him.**
3. **Club Baloncesto Valladolid SAD is ordered to pay to Mr. Othello Hunter EUR 6,350.00 as a contribution towards his legal fees and expenses.**
4. **Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 11 March 2014

A handwritten signature in blue ink, appearing to read 'Annett Rombach'.

Annett Rombach  
(Arbitrator)