BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0824/16)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Jeffrey Curtis Ayres

- Claimant -

represented by Mr. Peter R. Ginsberg, Attorney at Law,
80 Pine Street, New York, NY 10005, USA

vs.

Shanxi Fenjiu Basketball Club
Chinese Basketball Association 11 Floor Athletes
Apartment Shanxi Sports Center
Jiankang Beijie, Jinyuan District Taiyuan,
Shanxi 030032, PR China

- Respondent -

represented by Messrs. Peter-John Vickers and Dieter Gessler,
attorneys at law, Dufourstrasse 101, 8034 Zürich, Switzerland

1. The Parties

1.1 The Claimant

1. Mr. Jeffrey Curtis Ayres (“Player”) is an American professional basketball player.

1.2 The Respondent

2. Shanxi Fenjiu Basketball Club (“Respondent”) is a professional basketball club in Shanxi, China.

2. The Arbitrator

3. On 20 April 2016, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert, SC as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the "BAT Rules").

3. Facts and Proceedings

3.1 Summary of the Dispute

4. On 6 and 7 August 2015, Player and Respondent, respectively, signed an agreement (“the Agreement”) whereby Respondent engaged Player to play basketball for the 2015-2016 season. The salary of Player was agreed at a guaranteed, net, amount of USD 1,200,000.00, payable in eight equal instalments of USD 150,000.00 on certain prescribed dates. Additionally, it was agreed that Player was to be paid certain prescribed bonuses by reference to on-court successes, and also he was to be provided a range of defined benefits such as housing and flights.

5. Player arrived in China in September 2015, passed a medical examination arranged by Respondent, and commenced playing. Within a few weeks Player was asked by Respondent to try out with a number of different clubs. Respondent made this request of Player as it wished to terminate the Agreement. These try outs did not lead to Player finding a different club.

6. In October 2015, following the try outs, Player was assigned to train with players and/or a team within Respondent below that of the main or senior team. During the course of this training, Player says that he sustained an injury to ____. There then followed a debate as between the Parties as to the extent of or existence of such an injury, involving also questions of diagnosis. Also around this time Player was seen to use a mobile telephone while sitting court side during a training session. All of these matters begat correspondence flowing between the Parties.

7. For purposes of this Summary of the Dispute, the following letters are of relevance:

   - a warning letter dated 13 October 2015 issued by Respondent with the following core text: "*On October 13th, 2015, at the start of the team warming up training in the afternoon, the player Jeffrey Ayres played mobile phone in the court. This is a violation of the Article 8 of the first chapter in Shanxi Fenjiu Professional Basketball Club administrative regulations which prohibits players from taking mobile phone to the training court……According to the ARTICLE 6 in the contract signed by the two sides, a WARNING is given to the player.*"

   - a warning letter dated 14 October 2015 issued by Respondent with the following core text: "*On 14th October 2015, the player made a request to Duan Chao who is the team translator that he could not attend the morning training because he had pain in his ____. The club placed high attention immediately and made arrangement without delay. In order not to delay the player' condition, the team doctor had checked in the first place and proposed to go to the hospital for*

further examination diagnosis. Then the club arranged vehicles and entourage to take Jeffrey Ayres to Shanxi Academy of Medical Sciences Shanxi Da Yi Hospital but the diagnosis showed no abnormalities. Jeffrey Ayres reported false sick and did not participate in team training which violated the Article 7 of the first chapter the training management in Shanxi Fenjiu Professional basketball Club administrative regulations. According to the Article 6 in the contract signed by the two sides, a WARNING is given to the player." (sic)

- a warning letter dated 15 October 2015 issued by Respondent with the following core text: "*In the afternoon of October 14th 2015, since the diagnosis showed no abnormalities, doctors from the Shanxi Academy of Medical Sciences Shanxi Da Yi Hospital and the club both decided that Jeffrey Ayres was under normal physical condition and was able to receive training. Yet, the player still reported to Duan Chao, the team translator, that he had a ____ and could not take the afternoon training. Jeffrey Ayres reported false sick and did not participate in team training which violated the Article 7 of the first chapter the training management in Shanxi Fenjiu Professional basketball Club administrative regulations. According to the sixth clause in the contract signed by the two sides, a WARNING is given to the player." (sic)*

- a Notice dated 19 October 2015 issued by Respondent with the following core text: "*According to the doctor's diagnosis and the team doctor confirmed that the ____ injury you said does not affect the normal training. Now the club to inform you that: On the basis of the contract, you can make the second medical diagnosis which is on your own expense. Please be sure that you have to submit your second diagnostic results to the club by tomorrow (October 20th, 2015) before 18:00. Otherwise, you will be held responsible for all the serious consequences. In the second medical diagnosis, our club shall provide convenient conditions to the player such as vehicles, etc. And our staffs including Duan Chao who is the team translator will also cooperate." (sic)*

- a Notice dated 21 October 2015 issued by Respondent with the following core text: *"Due to the fact that Jeffrey Ayres has repeatedly violated the rules and regulations of the club, refusing taking medical re-check, attending training or asking for leave permission without any proof of being injured or ill. According to the Management Regulations of Shanxi Fenjiu Professional Basketball Club and Article six of the contract, the Club officially notified as follows, The contract we signed with Mr. Jeffrey Ayres on 7th August, 2015 is terminated right now. The player shall settle the relevant procedures with the Club before 27th October please." (sic)*

8. Respondent's termination of the Agreement has brought about this arbitration. By the time the termination took place, Respondent had paid USD 300,000.00 to Player. The main claim, which is described later in this Award, on the part of Player is for the balance of the contracted-for salary, namely, USD 900,000.00. At the heart of the dispute between the Parties is the question as to whether or not the termination by Respondent of the Agreement by its Notice dated 21 October 2015 was justified.

3.2 The Proceedings before the BAT

9. On 25 March 2016, Player filed a Request for Arbitration of that date in accordance with the BAT Rules.

10. The non-reimbursable handling fee in the amount of EUR 7,000.00 was paid on 29 March 2016.

11. On 22 April 2016, the BAT informed the Parties that Mr. Klaus Reichert, SC had been appointed as the Arbitrator in this matter. Further, the BAT fixed the advance on costs to be paid by the Parties as follows:

"Claimant (Mr Jeffrey Curtis Ayres) *EUR 9,000.00*

Respondent (Shanxi Fenjiu Basketball Club) EUR 9,000.00 "

The foregoing sums were paid as follows: 2 May 2016, EUR 8,791.34 by Player; 5 May 2016, EUR 8,985.00 by Respondent; and 11 May 2016, EUR 209.00 by Player.

12. Respondent filed its Answer on 20 June 2016.

13. Player filed his second submission on 6 July 2016.

14. Respondent filed its second submission on 20 July 2016.

15. By Procedural Order dated 26 July 2016, the Arbitrator decided that a hearing in person was necessary.

16. On 1 August 2016, Player applied to adduce further photographic evidence.

17. Having considered correspondence received from the Parties subsequent to the Procedural Order of 26 July 2016, the Arbitrator, by Procedural Order dated 5 August 2016 proposed the following:

> *"A hearing will be held in Munich on 26 August 2016.*
>
> *All persons who are able to come to Munich on that day will attend the hearing in person.*
>
> *Any persons who are unable to come to Munich on that day will make themselves available by video conference. Given the time difference between Munich and China, this would also enable persons in China to join after close of business, which should exclude any conflicts with other business matters. This holds true even more for witnesses who need to join the hearing only during their testimony, the timing of which could take into account any other commitments that they might have on the date of the hearing."*

18. On 6 August 2016, Respondent filed, with the President of the BAT, a challenge to the

Arbitrator.

19. On 8 August 2016, the President of the BAT issued procedural directions in connection with the challenge made by the Respondent to the Arbitrator. The same day, Player made written observations in opposition to the challenge. Further, on the same day, the Arbitrator reaffirmed his statement of independence and impartiality.

20. On 9 August 2016, the President of the BAT issued his ruling dismissing the challenge to the Arbitrator.

21. On 10 August 2016, Respondent made written observations by email on Player's application of 1 August 2016 concerning further photographic evidence, and also sought production of certain documentation.

22. On 11 August 2016, Player made written observations on Respondent's email of 10 August 2016.

23. By Procedural Order dated 16 August 2016, the Arbitrator ruled on the matter of further photographic evidence, and also issued directions for the hearing taking place in Munich on 26 August 2016.

24. On 19 August 2016, Respondent submitted further photographic evidence. That same day the Parties submitted their lists of witnesses.

25. On 26 August 2016, the hearing took place in Munich. Copies of the attendance sheets are attached as Addenda A and B to this Award. Player and Respondent, respectively, made opening statements. Oral evidence[1] was tendered by Player, Dr. David Schmidt

[1] Under direct examination, cross-examination, re-direct examination, and re-cross-examination (in the case of Mr. Pan). Translation into Mandarin was made available as necessary.

(Doctor, San Antonio, Texas, USA, by videolink), Mr. Frankel (Agent of Player), Dr. Feifei Yan (Doctor with Respondent), Mr. Jie Pan (General Manager of Respondent), Mr. Jiang Pan (Coach with Respondent), and Mr. Chao Duan (Interpreter with Respondent). At the conclusion of the oral evidence, the Arbitrator asked the Parties to address, in their post-hearing briefs, certain specific questions, and also to have regard to the Award in BAT 0756 (para. 59) when making submissions as to the interpretation of the Agreement. These questions were later confirmed in writing on 29 August 2016 by the BAT. Also, at the end of the hearing the Arbitrator asked the Parties if there was anything they wished to place on the record, to which the answers were that there was not.

26. On 19 September 2016, a written transcript of the audio recording of the hearing was sent to the BAT and to the Arbitrator.

27. On 23 September 2016, the Parties filed their post-hearing submissions.

28. On 26 September 2016, the BAT informed the Parties that additional advances on costs in the amount of EUR 7,500.00 each were requested to be paid. These were paid on 30 September 2016 as follows: EUR 7,500.00 by Player; and EUR 7,485.00 by Respondent.

29. On 10 October 2016, the Parties filed their rebuttal post-hearing submissions.

30. On 11 October 2016, the Parties were invited to submit their statements of costs by 18 October 2016 and were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.

31. The Parties filed their respective statements of costs by the deadline of 18 October 2016. The Parties were each given an opportunity to comment on the statements of costs of the other. The Parties did not make any such comment.

4. The Positions of the Parties

32. Player's position is as sought in his claim for relief in the Request for Arbitration (in summary):

    (a) USD 900,000.00 for unpaid compensation and all Chinese taxes owed as a result of that payment;

    (b) USD 100.00 per day late payment fee from 5 November 2015 until payment of the damages sought by Player;

    (c) All unpaid Chinese taxes owed, or taxes for which proof of payment cannot be produced, as a result of the payment of USD 300,000.00 to Player by Respondent.

    (d) USD 341,500.00 in potential bonuses that Player was precluded from receiving as a result from Respondent's termination of the Agreement; and

    (e) Legal fees, costs, expenses, and interest.

33. Respondent's position in the Answer is that Player's claims for relief be denied, and that costs be awarded to it. Respondent did provide an exhibit (R1) with the Answer certifying that the applicable taxes were paid in respect of the USD 300,000.00 paid to Player.

5. The Jurisdiction of the BAT

34. 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).

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

36. 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.[2]

37. The jurisdiction of the BAT over Player's claims is stated to result from Article 11 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. Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile, shall govern the arbitration. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

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

39. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration clauses under Swiss law (referred to by Article 178(2) PILA).

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

40. The language of the arbitration clause is quite clear, namely, the Parties have opted for BAT arbitration. The Parties have participated fully, asserting their respective claims, and without reservation as to jurisdiction.

41. For the above reasons the Arbitrator has jurisdiction to adjudicate the claims of the Parties.

6. Discussion

6.1 Applicable Law – ex aequo et bono

42. 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".*

43. 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."*

44. As noted in paragraph 37 above, the arbitration clause in the Agreement expressly provides that the Arbitrator shall decide any dispute *ex aequo et bono*.

45. The concept of "équité" (or *ex aequo et bono*) used in Article 187(2) PILA originates

from Article 31(3) of the Concordat intercantonal sur l'arbitrage[3] (Concordat)[4], 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."*[5]

46. 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."*[6]

47. 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*."

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

6.2 Findings

49. The doctrine of *pacta sunt servanda* (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the principle by which the Arbitrator will examine the merits of the claims.

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3 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).

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

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

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

50. The first task of the Arbitrator is the interpretation of the Agreement. As a matter of common sense, the ascertainment of what the Parties have agreed as being their contract and the terms thereof, precedes an examination of what they assert was or was not done, and whether rights, allegations, or claims have foundation, or otherwise.

51. As described in BAT 0756, it is abundantly clear that an arbitrator, sitting in Switzerland and mandated to rule *ex aequo et bono*, is not bound by any particular set of national legal rules. However, it is also the case that such an arbitrator is not free to do whatever it is they want and, for example, completely disregard the words used by parties in their contractual documentation. The sort of principles which might inform the exercise of interpretation in the context of a BAT arbitration include:

- looking at all of the contractual language chosen by parties through the eyes of a reasonable reader to see what is the ordinary and natural meaning of the words used;

- the overall background context of professional basketball and general common understanding amongst such users together inform the ordinary and natural meaning of the words used;

- when it comes to considering the centrally relevant words to be interpreted in a particular case, the less clear they are, or, to put it another way, the worse their drafting, the more ready an arbitrator might be to depart from the ordinary and natural meaning. That is simply the obverse of the sensible proposition that the clearer the ordinary and natural meaning the more difficult it is to justify departing from it;

- the description or label given by parties to something in a contract is not inflexibly determinative of its true nature;

- the mere fact that a contractual arrangement, if interpreted according to its ordinary and natural language as described above, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from that language; and

- in general, it is not the function of an arbitrator when interpreting an agreement to relieve a party from the consequences of his or her imprudence or poor advice. Accordingly, when interpreting a contract, *ex aequo et bono*, an arbitrator avoids re-writing it in an attempt to assist an unwise party or to penalise an astute party. Also, parties should not seize on a literal translation of the phrase *ex aequo et bono* and consider that "justice" and "equity" provide them with a route to unprincipled and unmoored indulgence for poor contractual choices.

52. The Arbitrator will now, in light of the foregoing, record and interpret the pertinent provisions of the Agreement which are particularly relevant to heart of this dispute, namely, whether or not Respondent was justified when it sought to terminate the Agreement.

53. Article 1 sets out the term of the Agreement, namely, from the date of signature to the day after the last official game of the season "unless terminated earlier under the terms of this contract". The quoted language shows, clearly, that in principle, termination of the Agreement needed to be undertaken pursuant to such terms as there were in the document which provided for bringing the contract to an end. The Agreement, in the Arbitrator's interpretation of this language, thereby excluded purported termination save by means of the prescribed mechanism in that contract. Put another way, the language strongly suggests that unless termination was made in accordance with the terms of the Agreement, the latter would run its course to the last official game of the season.

54. Article 2 sets out the obligations of Player. These obligations include a provision for attending at team practices, and a process for medical opinions in that regard:

> *"PLAYER will respect and obey all internal rules of CLUB and also the League rules such as attending and fully participating in all team practices. If PLAYER cannot take part in practices or games, he should apply to the CLUB, and should provide the injury evaluation report from the doctor appointed by the CLUB. In the event that the PLAYER disagrees with the outcome of a medical opinion administered by the CLUB's doctor, the PLAYER shall have the right, at the PLAYER's expense, to a second medical opinion administered by an independent Chinese physician. If the doctor rendering the second opinion disagrees with the opinion rendered by the CLUB's doctor, a doctor mutually agreed upon by the CLUB and the PLAYER will obtain a third opinion. The opinion of the third doctor shall control and the CLUB shall pay for any costs associated with carrying out the directives of such third doctor's opinion."*

55. The first sentence quoted just above is straightforward, and unremarkable in the context of professional basketball contracts. The language provides for the simple and basic proposition that Player has to observe the rules, and attend practices. What follows, however, is more complex and describes a detailed mechanism for medical examinations in the event that Player cannot take part in practices or games.

56. It appears to the Arbitrator that the procedure agreed between the Parties is as follows:

- If Player is injured or otherwise considers himself physically unable to participate in a game or practice session, he notifies Respondent[7]. Respondent then arranges for a doctor to examine Player. That doctor provides a report to Player, which the Agreement labels as an "injury evaluation report". Upon the assumption that the "injury evaluation report" shows that Player is injured, Player then provides that report to Respondent. Player is then, presumably, excused

[7] Such notification is described elsewhere in the Agreement as an obligation on the part of Player "to timely report any possible injury which could affect PLAYER's participation for practices and games".

from practice and games for such time as comports with the "injury evaluation report".

- If, however, Player disagrees with the contents of the "injury evaluation report" which he receives, then he has the right to obtain a second opinion from a different doctor. The limitation which the Agreement puts on that right to obtain a second opinion is that the doctor must be an independent Chinese physician. No time limits are prescribed by the Agreement for either the exercise of Player's right to say to Respondent that he wished to get a second opinion, or for the actual obtaining of such a second opinion. The Arbitrator considers that in either case, a reasonable time limit can be inferred. What time is reasonable, though, for the first element, namely a notification to Respondent from Player that he disagrees with the "injury evaluation report" is different from the time needed for the second element, namely the obtaining of a second opinion. A reasonable time limit for the first element is likely to be much shorter than a reasonable time limit to obtain a second opinion. It does not place much of a burden upon Player to promptly indicate that he disagrees with an "injury evaluation report", and also it is important for a professional basketball club to know where it stands on a matter as important as an injured player. On the other hand, the actual securing of a second opinion does involve a number of facets which cannot be expected to be rushed. These include finding a suitable doctor of the relevant expertise, who is an independent Chinese physician; making an appointment; attending that doctor with all the necessary information (which would include the "injury evaluation report"); and then receiving that doctor's opinion in writing. These are matters which cannot be either rushed, or dealt with on a say-so of one party or the other. However, as injuries can heal, even in a short space of time, it is important that there is no delay in making arrangements.
- The written opinion of the second doctor, along with the "injury evaluation report" have an importance, which is addressed just below.
- In the event that the second medical opinion is different to that of the "injury evaluation report", the Agreement sets up a tie-break process whereby a third

doctor, mutually agreed upon by the Parties, decides the matter. It stands to reason that such doctor would both want and need to see the reports from the first two doctors (and also examine Player), in order to come to a conclusion. That conclusion is the one which the Agreement says, ultimately, binds the Parties.

57. The Arbitrator now turns to Article 6 of the Agreement, which is headed "Rules and Regulations". This Article contains the agreed mechanisms for termination in the event of certain specified circumstances arising.

58. Within Article 6 there are two provisions which are of particular interest to the Arbitrator as regards the circumstances of this dispute:

> *"If PLAYER misses practice and/or game twice without team permission, this AGREEMENT may be terminated."*
> *[…]*
> *"CLUB has the unilateral right to terminate the contract with the PLAYER if the PLAYER violates any rules of CLUB and/or any rules of the CBA league set by Chinese Basketball Association after PLAYER is warned by CLUB two times, with the third such violation shall give rise to CLUB's termination right of the PLAYER's AGREEMENT. Warnings must be made in a writing presented to PLAYER and AGENTS."*

59. Termination of a professional basketball contract is a matter of considerable importance and seriousness to all concerned. The Parties have taken the trouble to include the language just set out above in the Agreement, and in the case of the latter quotation, have made it clear that warnings must be made in writing. This is unsurprising as it would not be fair to a player if he or she did not know that they were in potential default, and therefore were unaware of the impending consequences. Save in the case of extreme circumstances (and none are applicable in this case), being made aware, in a timely fashion, of culpable transgressions is important for the

potential wrongdoer as it gives them an opportunity to correct their behaviour. This is the approach the Parties have taken in the Agreement.

60. It appears from the language just quoted, that the Agreement contemplates that two transgressions, suitably and properly warned in writing, give rise to the right on the part of Respondent to terminate. It is not entirely clear from the language why the Parties have provided for a third warning giving rise to a termination right, when two warnings give rise to a unilateral right on the part of Respondent. The only distinction between the two circumstances is the use of the word "shall" which may mean that three warnings has an enhanced status in terms of the right of termination. In any event, once two warnings have been duly issued (and the word duly is used by the Arbitrator as warnings cannot simply be issued without foundation), the Parties have agreed that Respondent has the unilateral right to terminate. It does not mean that termination automatically follows, but from the moment of the second warning onwards, Respondent has in its hands the right to terminate the Agreement.

61. Having examined the relevant contractual language, the Arbitrator now turns to the warnings issued by Respondent.

62. The Arbitrator will first examine the warnings connected with Player's missing of training practice. There is an immediate question as to how many such warnings were issued by Respondent. In this arbitration, in particular in its post hearing submission, Respondent asserts that there were four warnings in total (one of which was connected with Player's use of a mobile telephone). The warnings dated 14 and 15 October 2015 (which are recorded at paragraph 7 above in relevant part) are each unambiguously stated to be "WARNING LETTER". However, the document dated 19 October 2015 does not have the heading "WARNING LETTER", but rather has the more anodyne label of "NOTICE". Of course a label is not determinative of the contents, and the Arbitrator examines these now:

> "*According to the doctor's diagnosis and the team doctor confirmed that the ____ injury you said does not affect the normal training. Now the club to inform you that: On the basis of the contract, you can make the second medical diagnosis which is on your own expense. Please be sure that you have to submit your second diagnostic results to the club by tomorrow (October 20th, 2015) before 18:00. Otherwise, you will be held responsible for all the serious consequences. In the second medical diagnosis, our club shall provide convenient conditions to the player such as vehicles, etc. And our staffs including Duan Chao who is the team translator will also cooperate."*

63. This language is not, and cannot even be inferred to be a warning insofar as potentially wrongful or culpable conduct on the part of Player is concerned. It is something quite different, namely, a notification on the part of Respondent to Player that he could seek a second medical diagnosis, and sets a deadline for him to do so. This is plainly a reference to the contractual language in Article 2 which was examined in paragraph 56 above, and the mechanism for the obtaining of a second medical opinion. This, in the Arbitrator's view, has nothing to do with a warning letter in connection with a transgression or violation on the part of Player. The Arbitrator holds that the document dated 19 October 2015 is not a warning letter, either in form or in substance. Thus, there are only two warning letters (apart from the mobile telephone matter) to be examined, namely, 14 and 15 October 2015. Each will be examined in turn.

64. The core text of the warning letter of 14 October 2015 is recorded again:

> "*On 14th October 2015, the player made a request to Duan Chao who is the team translator that he could not attend the morning training because he had pain in his ____ ____. The club placed high attention immediately and made arrangement without delay. In order not to delay the player' condition, the team doctor had checked in the first place and proposed to go to the hospital for further examination diagnosis. Then the club arranged vehicles and entourage to take Jeffrey Ayres to Shanxi Academy of Medical Sciences Shanxi Da Yi Hospital but the diagnosis showed no abnormalities. Jeffrey Ayres reported false sick and did not participate in team training which violated the Article 7 of*

the first chapter the training management in Shanxi Fenjiu Professional basketball Club administrative regulations. According to the Article 6 in the contract signed by the two sides, a WARNING is given to the player."

65. This warning letter was issued on the same day as the circumstances stated to be its foundation, namely, Player reporting that he was in pain in his ____, being brought to hospital for an examination, that examination revealing no abnormalities, and, therefore he was guilty of having "reported false sick". Player did miss a practice, in the morning, because he was being examined in hospital at that time. Thus, as a matter of substance, Respondent took the view that he falsely reported being in pain and that this was not a valid excuse to miss the morning practice.

66. The Arbitrator is concerned at the rapidity at which this warning letter was issued by Respondent, as immediately upon hearing the diagnosis from the hospital, decided that a warning was justified. This approach, namely an immediate warning, effectively sought to cut out and bypass completely the agreed mechanism of providing Player with the "injury evaluation report" (discussed at paragraph 56 above), an opportunity for him to obtain a second opinion, and in the event of differing medical views, the Parties could obtain a "tie-break" third medical opinion. By issuing a warning letter in the immediate aftermath of the hospital visit Respondent gave Player no meaningful opportunity whatsoever to invoke his contractual right to obtain a second opinion. The fact that the opportunity to obtain a second medical opinion was extended by Respondent on 19 October 2015 was too late as the warning had already been issued by then.

67. The Arbitrator, therefore, holds that as a matter of procedural form, Respondent did not follow the Agreement's mechanisms when issuing the warning letter of 14 October 2015. The same consequence attaches to the warning letter of 15 October 2015 as that letter reposes upon almost identical circumstances to the letter of 14 October 2015 save that it references the fact that Player missed the afternoon practice. As before, by

immediately issuing a warning letter, Respondent gave Player no meaningful opportunity whatsoever to invoke his contractual right to obtain a second medical opinion.

68. While the Arbitrator has found that both warning letters (dated 14 and 15 October 2015) did not follow the contractual path, he will also look at the underlying substantive issue, namely whether Player was in pain or injured.

69. As regards the injury, or otherwise, of Player on 14 October 2015, the Parties debated and disputed this issue at length in the written submissions and during the course of the oral hearing. Player says that he was injured or in pain, and Respondent says that he was not. The Arbitrator has the benefit of live oral evidence from two medical doctors, Dr Yan and Dr Schmidt, and also from Player.

70. Dr Yan stated, unequivocally, in oral testimony before the Arbitrator that in his professional medical opinion, the supposed injury sustained by Player did not preclude him from participating in the required normal training sessions of Respondent. He was examined, at length, as to the timing of his examination of Player, and also as to the presence or otherwise of _____.

71. Dr Schmidt, testifying by way of video link at the hearing, answered the following question posed by the Arbitrator, and the opportunity to ask further questions was offered to both Counsel thereafter (each declining to do so):

> *"ARBITRATOR REICHERT: -- you mentioned under cross-examination a -- that the view or the -- that the athlete would know best. Now, in professional basketball in your experience with the Spurs over a 24-year period, could you tell me a little bit more about the importance that is attached to a player's view when they come to your – a professional player's view when they come to you and they say, I'm -- I feel injured in*

whatever way, how -- what weight or importance do you attach to that as part of your professional opinion?

THE WITNESS: It's huge. That's what I teach all of our young physicians in training, listen to the athlete, because they know their body better than anybody. I can use the examples of several of our players who, you know, if they say, you know, my plantar fascia is bothering me a little bit, you know, we listen to them. Or, you know, I'm starting together get a little tendonitis in my knee, we listen to them, because they know.

ARBITRATOR REICHERT: Okay. Thank you, Dr. Schmidt. I'm going to invite for completeness counsel if they wish to ask any question arising out of my question.

MR. GINSBERG: No. Thank you, Dr. Schmidt.

THE WITNESS: You're welcome.

MR. VICKERS: We have no further questions."

72. The foregoing testimony from Dr Schmidt very fairly concedes or yields particular importance to the opinion of a professional player as to their sense of their own bodies. In the context of an injury or pain which might be difficult to observe in an objective fashion (in contrast to a dislocation or broken bone), professional player's sense that all is not right does have a particular importance, as Dr Schmidt opines. The Arbitrator does not understand Respondent to gainsay or put forward a different position to that of Dr Schmidt in this regard.

73. The Arbitrator also appreciates that it is entirely reasonable for different medical professionals to come to different opinions as to the fitness or otherwise of a player. Examinations and opinions can differ, and absolute certainty does not attach to any of them. Merely because there is a difference of opinion amongst medical professionals does not make one absolutely right and the other absolutely wrong, particularly in the context of an injury where causes and symptoms (such as _____ pain) are more elusive to identify objectively by the examining doctor.

74. Player testified in person at the hearing and this afforded the Arbitrator an opportunity to assess, from an evidential point of view, his approach and demeanour as regards his

professional playing commitments. Player came across most clearly as a consummate professional, dedicated to his sport. This is particularly important as there is a credibility question as concerns Player, given that he has been accused of falsely reporting an injury. The Arbitrator cannot reconcile such an allegation of false reporting of an injury with the approach and demeanour of the witness (Player) who testified before him. The Arbitrator does not consider that Player would knowingly concoct an injury story in order to avoid practice.

75. Taking into account the testimony of Dr Schmidt set out above (and after which both sides had an opportunity to question him further) which placed considerable importance on a professional player's own sense of their body, and also taking into account the credibility, objective professionalism, and demeanour of Player during the course of the hearing, the Arbitrator does not find that he falsely reported an injury on 14 October 2015. This finding in no way detracts from Dr Yan's testimony, which the Arbitrator does not disregard. However, the primary element for consideration is Player's own sense of his body. He did not feel right on 14 October 2015, and that sense of his own body is, taking into account Dr Schmidt's testimony, determinative of Player's condition that day. This means that it is not necessary, evidentially, for the Arbitrator to assess the minutiae of what was or was not the precise condition of Player. The Arbitrator is content to follow the unambiguous, professional, and unchallenged, evidence of Dr Schmidt whereby a measure of appropriate deference is given to the sense of a player as to their own body condition.

76. The Arbitrator is further fortified in the foregoing finding by reason of his impression of Player as a professional basketball player, namely, that it is most unlikely that he would contrive an injury in order to avoid practice, with the resultant risk that a USD 1,200,000.00 contract would be put in peril. The Arbitrator considers Player to be someone of clear professionalism, with a clear eye to his obligations based on long experience at the very highest level of success with the San Antonio Spurs. He struck

the Arbitrator as someone clearly possessed of the astuteness to know when a ruse to avoid a couple of training sessions might have profound consequences.

77. Thus, as a matter of substance, the warning letters of both 14 and 15 October 2015, are not supported by the evidence before the Arbitrator.

78. For completeness, the Arbitrator also notes that Respondent argues (part 4.c of its post hearing submissions) that there was a total of 13 unexcused absences, and further opines that even if one accepts Dr Schmidt's suggestion of 2 to 3 days of non-impact activities, Player still had no reason not to attend training on 6 occasions between 19 and 21 October 2015. This argument is unavailing as it is one which asserted retrospectively, and is not supported by reference to validly issued warning letters.

79. In summary, the warning letters of both 14 and 15 October 2015 are not supported either in form (as to the procedure leading to their issuance) or in substance. Given that the document dated 19 October 2015 has already been found not to be a warning letter, and the two warning letters of 14 and 15 October 2015 have not stood up to examination, only one warning letter is left standing. That warning letter concerned use of a mobile telephone by Player. However, since termination requires at least two warnings, and only one remains to be examined, it is readily apparent that Respondent cannot support a case for termination. The logically anterior point has already been dealt with (namely that three of the four alleged warning letters have not stood up to scrutiny), and therefore the warning letter concerning mobile telephone use is moot. The Arbitrator need not, and does not express any view on whether this warning letter was validly issued, or not.

80. The consequence of the Arbitrator's findings is that Respondent's termination of the Agreement on 21 October 2015 was not supported by the facts, and was therefore wrongful.

81. The next issue for the Arbitrator to decide is what relief is to be awarded to Player arising from the wrongful termination of the Agreement by Respondent on 21 October 2015.

82. Recording again the relief sought by Player:

(a) USD 900,000.00 for unpaid compensation and all Chinese taxes owed as a result of that payment;

(b) USD 100.00 per day late payment fee from 5 November 2015 until payment of the damages sought by Player;

(c) All unpaid Chinese taxes owed, or taxes for which proof of payment cannot be produced, as a result of the payment of USD 300,000.00 to Player by Respondent.

(d) USD 341,500.00 in potential bonuses that Player was precluded from receiving as a result from Respondent's termination of the Agreement; and

(e) Legal fees, costs, expenses, and interest.

83. The Arbitrator has already noted that Respondent has provided evidence of Chinese taxes paid to date (relief (c)) so therefore that prayer for relief no longer arises. The Arbitrator is content to accept the word of a professional basketball club, affiliated to the CBA, that it has duly paid Chinese taxes in respect of the monies already paid to Player.

84. There is no dispute between the Parties that as of the date of wrongful termination, USD 900,000.00 was the remaining amount of net salary to be paid to Player in the event that the Agreement ran to its full term. The Agreement contains unremarkable

and standard provisions as to its guaranteed nature ("*This contract is fully guaranteed against skill, injury, illness, and death, and in the event of death, all remaining salary payments and earned bonuses for the full term of the contract shall be payable to PLAYER's estate or beneficiaries"*).

85. The only issue as between the Parties is whether or not mitigation of the amount of USD 900,000.00 should be applied by the Arbitrator in light of amounts earned subsequently after termination.

86. Respondent argues that the testimony of Mr. Frankel, Player's agent, during the hearing is of importance in this regard when he stated that something under USD 500,000.00, gross, was earned. Player counters with the argument that the Agreement would have only run to the end of the CBA season, and whatever Player earned pursuant to a contract with the LA Clippers dated 16 March 2016 was at a later point in time and outside the scope of mitigation.

87. The Arbitrator notes from the evidence put before him that Player did sign an agreement dated 23 January 2016 with the LA Clippers for a 10-day period in return for USD 64,741.00 (exhibit C39). He signed a further 10-day agreement with the same team on 2 February 2016 for USD 64,741.00 (exhibit C40). As also already noted just above, Player signed a contract with the LA Clippers on 16 March 2016 for the remainder of the NBA season for a compensation of USD 187,750.00.

88. While recognising that there is a duty to mitigate, Player argues against any benefit which might accrue to Respondent given the circumstances of the case. He argues that general considerations of justice and fairness should militate against giving Respondent any windfall in light of the circumstances of the case. Player goes to the extent of saying that there was "*such bad faith that reducing the damages […] would essentially amount to an unfair windfall*".

89. The Arbitrator is not prepared to depart from the general duty to mitigate in this case. Relieving the obligation to mitigate in circumstances of a diffuse nature, such as an allegation of bad faith, would reduce certainty, and also promote the very opposite of the sort of result which, for example, BAT 0756 explicitly stated needs to be avoided:

> *"Also, parties should not seize on a literal translation of the phrase ex aequo et bono and consider that "justice" and "equity" provide them with a route to unprincipled and unmoored indulgence for poor contractual choices."*

90. The Arbitrator is prepared to apply both 10 days contracts with the LA Clippers in mitigation against Player's claim for unpaid salary compensation. Those two contracts have a total salary compensation of USD 129,482.00. However, it does appear to the Arbitrator that those two contracts are not expressed to be net of tax. It would be unfair to Player to apply a gross amount by way of mitigation against a net-of-tax compensation due to him from Respondent. The Arbitrator considers that an approximate net figure of USD 85,000.00 fairly represents an estimate by him of the appropriate amount by which to mitigate Player's unpaid salary compensation claim from Respondent.

91. Finally, as regards mitigation, the Arbitrator must examine whether any deduction should be made arising from the contract signed on 16 March 2016 with the LA Clippers. Consistent with the approach taken in the foregoing paragraph, in principle the answer is yes. The question is how much. In that regard, the Arbitrator notes that the last milestone for salary payment from Respondent was 30 March 2016. Therefore, there is an apparent overlap of some two weeks between the commencement of that LA Clippers contract, and the end of the Agreement (had it been performed through to the end of its life). That LA Clippers contract continued on to the end of the NBA season (which would have been of a longer duration than the agreed lifetime of the Agreement, had it been performed through to its conclusion). Would Player have found a contract for the remaining part of the NBA season had the Agreement been

performed through to the end of its agreed life? Perhaps yes, perhaps no. These are all highly fact-sensitive matters which can vary from case to case, and precise calculations in such circumstances are likely to be difficult. However, difficulty of calculation in of itself is not a bar to the Arbitrator arriving at a reasonable estimate for mitigation when he has found that the circumstances for mitigation arise in principle. Taking into account the factors present in this case, and drawing from them to make a reasonable estimate thereof, a deduction of USD 45,000.00, net of taxes, appears to the Arbitrator to be appropriate.

92. In total, therefore, the Arbitrator will reduce, by way of mitigation, Player's claim for unpaid salary compensation to a net figure of USD 770,000.00. The Arbitrator awards Player that amount, net of Chinese taxes, by way of unpaid salary compensation. It is for Respondent to ensure that it is compliant with the Chinese tax authorities in respect of this payment.

93. Player claims USD 100.00 per day from 5 November 2015 by way of a fine (pursuant to Article 3 of the Agreement). While Player claims that daily fine until ultimate payment by Respondent, the Arbitrator considers that this is a step too far, and rather is content to apply the daily fine formula from 5 November 2015 until 26 March 2016, being the date upon which the Request for Arbitration was filed. That is a period of 142 days, which results in a late payment penalty of USD 14,200.00. This figure does not impose a detriment on the contract-breaker (Respondent) out of all proportion to any legitimate interest of the innocent party (Player), in light of the amount of unpaid salary compensation found to be due (USD 800,000.00).

94. Player seeks compensation for potential bonuses which he says he was precluded from earning. The Arbitrator does not award Player such bonuses as at the time of termination, the season had barely begun and no certainty could attach to the performance of Respondent for its remainder, or whether the sort of on-court successes necessary for the bonuses to be triggered would actually occur.

95. In the post hearing submission of Player, he seeks a number of items which were not initially included in the Request for Arbitration, namely USD 4,500.00 for travel expenses (Player's return airline ticket to the United States after termination), USD 31,500.00 for the value of remaining unfurnished airline tickets which would have been due to him if the Agreement ran its course, and USD 5,000.00 for hotel expenses which Player paid himself. In its Rebuttal submission, Respondent did not take issue with these additional prayers for relief. The Arbitrator is content to award Player USD 4,500.00 for an actually-incurred airline ticket, and USD 5,000.00 for hotel expenses. The prospective value of USD 31,500.00 for unfurnished airline tickets does not arise as the Agreement had ended prior to those tickets being duly triggered for payment. Thus, the Arbitrator awards Player USD 9,500.00 in total by way of reimbursement of expenses.

96. Finally, as regards interest, the rate which is long-established in BAT awards is 5% per annum. The Arbitrator awards Player interest, at 5% per annum from 27 March 2016 (being the day following the date of the filing of the Request for Arbitration) until payment in full of USD 800,000.00 (the salary compensation amount) and USD 9,500.00 (the expenses amount). Up to 26 March 2016, Player has had the benefit of the daily fine of USD 100.00. The Arbitrator does not consider it appropriate to award concurrent daily fines and interest.

7. Costs

97. 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.

98. On 11 February 2017 – 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 32,970.34.

99. Considering that Player was the prevailing party in this arbitration, it is consistent with the provisions of the BAT Rules that the fees and costs of the arbitration, as well as his reasonable costs and expenses, be borne by Respondent.

100. Player seeks USD 66,397.50 for professional services, hotels (USD 1,294.02), taxis (210.62), flights (USD 1,381.26) and supplies, printing and shipping (USD 365.35). Player also seeks the non-reimbursable handling fee of EUR 7,000.00. Player's Counsel makes a reduction of USD 5,000.00 for professional courtesy.

101. Taking into account the factors required by Article 17.3 of the BAT Rules, the maximum amount prescribed under Article 17.4 of the BAT Rules, and the specific circumstances of this case, the Arbitrator holds that EUR 40,000.00 represents a fair and equitable contribution by Respondent to Player's legal fees and expenses, including the non-reimbursable handling fee. The figure of EUR 40,000.00 is the maximum contribution which the Arbitrator can award in this case. This is well short of Player's overall outlay for this case, and the Arbitrator considers that it would not be fair to make any further reduction by reducing the figure of EUR 40,000.00.

102. The Arbitrator decides that in application of Article 17.3 of the BAT Rules:

(i) Respondent shall pay EUR 16,500.34 to Player, being the costs advanced by him;

(ii) Respondent shall pay EUR 40,000.00 to Player, representing a contribution by it to his legal fees and expenses.

8. AWARD

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

1. **Shanxi Fenjiu Basketball Club shall pay Mr. Jeffrey Ayres USD 770,000.00, net, by way of compensation for unpaid salary, together with interest at 5% per annum from 27 March 2016 until payment.**

2. **Shanxi Fenjiu Basketball Club shall pay Mr. Jeffrey Ayres USD 9,500.00 by way of compensation for incurred expenses, together with interest at 5% per annum from 27 March 2016 until payment.**

3. **Shanxi Fenjiu Basketball Club shall pay Mr. Jeffrey Ayres USD 14,200.00 by way of late payment penalties.**

4. **Shanxi Fenjiu Basketball Club shall pay Mr. Jeffrey Ayres EUR 16,500.34 as reimbursement for his arbitration costs.**

5. **Shanxi Fenjiu Basketball Club shall pay Mr. Jeffrey Ayres EUR 40,000.00 as a contribution to his legal fees and expenses.**

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

Geneva, seat of the arbitration, 21 February 2017

Klaus Reichert

(Arbitrator)