ARBITRAL AWARD

(BAT 1592/20)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Trevor Dawon Releford

- Claimant 1 -

Starvision Enterprise Ltd.
6, Kolokotroni Street, Nicosia, Cyprus

- Claimant 2 -

both represented by Mr. Alexandros Vagiatas, attorney at law,

vs.

Basketball Löwen Braunschweig GmbH
Hasenwinkel 1a, 38114 Braunschweig, Germany

- Respondent -

represented by Mr. Filip Piljanović, attorney at law,

1. The Parties

1.1 The Claimants

1. Mr. Trevor Dawon Releford ("Player" or "Claimant 1") is a US professional basketball player, who signed an employment contract with Basketball Löwen Braunschweig GmbH for the 2019/2020 and 2020/2021 seasons.

2. Starvision Enterprise Ltd. ("Agency" or "Claimant 2") is a players' agency with its seat in Cyprus. The Agency mediated the conclusion of the employment contract between Claimant 1 and Basketball Löwen Braunschweig GmbH.

1.2 The Respondent

3. Basketball Löwen Braunschweig GmbH ("Club" or "Respondent") is a German professional basketball club competing in the *Basketball Bundesliga*.

2. The Arbitrator

4. On 28 September 2020, Prof. Ulrich Haas, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Stephan Netzle as arbitrator (the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 (the "BAT Rules"). None of the parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. On 16 September 2019, the Player and the Club entered into an employment agreement whereby the latter engaged the Player for the 2019/2020 and 2020/2021 seasons (the "Employment Contract"). According to § 5 para. 2 of the Employment Contract, the Player is entitled to a salary of EUR 50,000.00 net for the 2019/2020 season and EUR 120,000.00 net for the 2020/2021 season.

6. On 17 September 2019, the Club signed an agent agreement with the Agency, in which it agreed to pay the Agency a fee of EUR 5,000.00 for the 2019/2020 season and EUR 12,000.00 for the 2020/2021 season for its services in mediating the transfer of the Player to the Club ("Agent/Club Agreement").

7. On 17 March 2020, the Player and the Club reached an agreement as to the consequences of the Covid-19 pandemic on the Employment Contract as regards the 2019/2020 season ("2019/2020 Termination Agreement"). The 2019/2020 Termination Agreement explicitly states that *"the second contract year (Season 2020/2021) remains unaffected".*

8. On 2 July 2020, the Club's General Manager, Mr. Oliver Braun, informed the Agency's associate, Mr. Enea Trapani, that the Club was willing to let the Player leave the Club if he got a better offer from another club. Mr. Trapani advised Mr. Braun that the Player had a valid contract and that it would be difficult to find adequate alternative employment.

9. On 22 July 2020, Mr. Braun sent an e-mail to Mr. Trapani, according to which the Player had tested positive for THC in a doping test on 23 September 2019. In addition, Mr. Braun proposed terminating the Employment Contract by mutual consent. To this end, he submitted a draft of a termination agreement, according to which no

compensation was owed to the Player. The Agency was given a deadline until 24 July 2020 to comment on the proposal.

10. Mr. Braun also attached to this e-mail a report that included a picture of a plastic cup, which allegedly contained a sample of the Player's urine taken on 23 September 2019, and a testing device, which appears to be showing a positive finding for THC. According to the report, a meeting took place between the Player, the Club's former General Manager, Mr. Sebastian Schmidt, and the team coach, Mr. Pete Strobl, at which occasion the Player was informed about the positive doping test.

11. Until the end of July 2020, Mr. Nick Lotsos, acting on behalf of the Claimants, and representatives of the Club had several phone conversations in which they tried to reach a settlement. However, these attempts were unsuccessful.

12. On 30 July 2020, Mr. Lotsos sent the following e-mail to Mr. Braun:

> *"As we both know, you on behalf of the club informed our associate* [Mr. Enea Trapani] *approximately three weeks ago that club does not intent to bring our client Trevor Releford back for the 2nd season of a two year contract that he signed with your club on September 2019.*
>
> *A little later than that we start receiving questionable and disturbing materials together with a termination letter from you requesting player's signature on that.*
>
> *Right after me and you had our first conversation where I clearly explained to you that not only we denied the acquisitions that you had elect to use in order to make us accept to brake the contract with no further conversation but I also clearly told you that if you continue following this strategy, we will have to protect our client legally against the club and / or any individual who elects to do so.*
>
> […]

Last Friday I received a call from you letting me know that from that point and then Filip Piljanovic would be handling these conversations on behalf of the club. […] *he told me that club will not be opposed to the player staying and playing for the club for the upcoming season but in order for this to be happen the player would have to accept a season salary of approximately 40.000 to 50.000 euros instead of the 120.000 euros, which is his contract currently. I explained to him that for sure this cannot be accepted and I told him that it seems to me that the only solution is to try to find a settlement amount that it would be accepted by both sides* […].

At the same time, I will be making efforts to find another club for the player, in order to facilitate our negotiations. In that case the player should remain home waiting for the outcome of this situation.

If you change your mind and wish that the player gets back in order to fulfill the already signed agreement, please inform us, within a reasonable timeframe in order for the player to be prepared for travel, issue a ticket on his behalf, as per contract, and he will be there to perform his duties."

13. At the beginning of August 2020, the Club's counsel offered a settlement, according to which the Club would pay to the Claimants a total amount of EUR 30,000.00 for early termination of the Employment Contract.

14. On 10 August 2020, Mr. Lotsos sent an e-mail to the Club's counsel (Cc. to Mr. Braun) rejecting the settlement offer because the contractual obligations towards the Claimants were EUR 132,000.00 in total. In addition, he informed the Club that *"unless you have a significantly bigger offer of 50.000 euros net of all German taxes plus the total value of our fee you will have to consider two options: A. To give up on trying to break the contract and make travel arrangements for player to join the team in order for all sides to fulfil their responsibilities according to the existing agreement; or*
B. To grant aim [sic] *in writing in definite paid permission for player to stay home in the US until we hopefully find another job which as I said on my previous email will hopefully help to settle our contract with you."*

15. On 11 August 2020, the Club's counsel sent the following e-mail to Mr. Nick Lotsos:

> *"*[…] *I will send the evidences we have to the German Nada [Germany's National Anti-Doping Organization] the 13th August 2020 at 01:00 pm.*
>
> *It's up to them how to decide in that special case. Trevor declared in the presence of witnesses the abuse of thc. I think I don't need to explain what it means for Mr. Releford if the German Nada and the BBL* [Basketball Bundesliga] *suspend him.*
>
> *The contract of Mr. Releford contains a subsequent condition under § 1 Ziff. 5. That means he is in need of the right to participate by the BBL. Without the right to participate the contract is invalid. If Mr. Releford doesn't receive the right to participate, we will charge him your agency fees as compensation of damage. I think you said it is an amount of 12.000,00 € net of taxes.* […]*"*

16. On the same day, i.e. 11 August 2020, the Club sent a warning letter to the Player for not showing up for a training session on 1 August 2020. In addition, the Club requested the Player to participate in a training session on 17 August 2020.

17. By e-mail of 17 August 2020, the Claimants' counsel sent a letter titled "TERMINATION OF EMPLOYMENT CONTRACT FOR JUST CAUSE" and stated as follows:

> *"*[..] *As (a) Mr. Releford had no positive doping control results ever and certainly (b) no notification by the Club when the pre-season would start, we find your actions, tactics and strategy untolerable and psychologically unbearable to continue working for an Employer who is struggling to find a way to terminate Mr. Releford's contract blaming him without any really existing reason, in order to avoid paying any compensation, using illegal and unethical methods such as psychological force and blackmail, and has even reached to the point to threat the Players' career based on 'invented' and fraudulent positive doping control results.*

We therefore consider all the aforementioned actions, unethical methods and your threats a breach of your contractual obligation to behave properly as an Employer and a just cause to terminate our contract entirely on your absolute Club's blame, as you have proved that your strategy was to force the Player to accept a termination of contract without receiving any compensation.

Hence, as we consider your Club the only responsible for your actions and unconventional behaviour towards the Player, we hereby notify you of our intentions to claim the total amount of Mr. Relefords' salary for the season 2020/2021 from FIBA BAT […]*".*

18. By e-mail of 19 August 2020, the Club sent a second warning dated 17 August 2020 to the Player for not showing up for training on that date. In addition, the Club invited the Player to start training with the Club on 20 August 2020 and warned that "[i]*f such an incident should occur again in the future, you do not show up/come to work on the 20th of August 2020, we will proceed in the right to issue a conduct-related termination of the employment relationship*".

19. On 28 August 2020, by fax, the Club's counsel sent a letter titled "Extraordinary Termination" concerning the Employment Contract to the Claimants' counsel because the Player did not show up for training despite two warning letters.

3.2 The Proceedings before the BAT

20. On 21 August 2020, the BAT received a Request for Arbitration filed by the Claimants in accordance with the BAT Rules. On the same date, the non-reimbursable handling fee of EUR 3,000.00 was received in the BAT bank account.

21. By letter dated 28 September 2020, the BAT Secretariat (a) notified the parties of the Arbitrator's appointment; (b) invited the Respondent, on behalf of the Arbitrator, to file an Answer to the Request for Arbitration in accordance with Article 11.4 of the BAT

Rules by no later than 19 October 2020; and (c) fixed the amount of the Advance on Costs to be paid by the parties by 8 October 2020 as follows:

"Claimant 1 (Mr. Trevos [sic] *Releford)*	*EUR 4,000.00*
Claimant 2 (Starvision Enterprise Ltd.)	*EUR 1,000.00*
Respondent (Löwen Braunschweig)	*EUR 5,000.00"*

22. On 19 October 2020, the Respondent submitted its Answer to the Request for Arbitration, which included a counterclaim.

23. On 21 October 2020, the BAT Secretariat acknowledged receipt of the Answer to the Request for Arbitration as well as the full Advance on Costs. In addition, it invited the Claimants to comment on the main arguments of the Respondent by no later than 4 November 2020.

24. On 29 October 2020, the BAT Secretariat requested the Respondent to pay a non-reimbursable handling fee in the amount of EUR 1,500.00 for the counterclaim by no later than 9 November 2020.

25. On 4 November 2020, the Claimants provided the BAT Secretariat with their second submission.

26. On 9 November 2020, the BAT Secretariat acknowledged receipt of the handling fee for the counterclaim and of the Claimants' second submission. In the same Procedural Order, the BAT Secretariat invited the Respondent to provide its comments on the Claimants' second submission together with any further evidence by no later than 23 November 2020.

27. On 23 November 2020, the Respondent requested an extension of the deadline until 30 November 2020.

28. By e-mail dated 23 November 2020, the BAT Secretariat acknowledged receipt of the Respondent's extension request and informed the parties that according to Article 7.2 BAT Rules, a request for extension of time should have been submitted at least one day before the expiry of the original deadline. However, in the exercise of the discretion afforded to him by the BAT Rules, the Arbitrator nevertheless granted the extension.

29. On 30 November 2020, the Respondent submitted its comments on the Claimants' second submission.

30. By letter dated 2 December 2020, the BAT Secretariat acknowledged receipt of the Respondent's comments. Furthermore, the BAT Secretariat informed the parties that the Arbitrator had declared the exchange of submissions complete and that the final award would be rendered as soon as possible. Finally, the BAT Secretariat granted the parties a deadline until 9 December 2020 to provide a detailed account of their costs.

31. On 8 and 9 December 2020, respectively, the Claimants and the Respondent submitted their accounts of costs.

4. The Positions of the Parties

4.1 The Claimants' Position

32. The Claimants submit the following in substance:

33. According to § 10 para. 5 of the Employment Contract, the Club agreed on a BAT arbitration clause, which provides that any dispute arising from the contract shall be submitted to the BAT and that the arbitrator shall decide the case *ex aequo et bono*. In addition, the Agent/Club Agreement contains the same arbitration clause without any reference to German law. Therefore, contrary to the Respondent’s argument, German law is not applicable to the present case.

34. According to § 5 para. 2 of the Employment Contract, the Player is entitled to a salary of EUR 50,000.00 net for the 2019/2020 season and EUR 120,000.00 net for the 2020/2021 season. According to the Agent/Club Agreement, the Agency is entitled to an agent fee of EUR 5,000.00 for the 2019/2020 season and EUR 12,000.00 for the 2020/2021 season. While the parties agreed on the 2019/2020 Termination Agreement, the provisions of the Employment Contract and the Agent/Club Agreement concerning the 2020/2021 season remained unaffected.

35. In summer 2020, the Club made all possible efforts to terminate the Employment Contract for the 2020/2021 season.

36. The Club invented a positive doping test of the Player which allegedly took place on 23 September 2019. There was, in fact, no such positive doping test. This doping test was made up by the Respondent's officials to justify an early termination of the Employment Contract without paying any compensation. If the allegation of a positive doping test were true, the Club should have informed the Player immediately after the test, instead of waiting for 10 months, and should have terminated the Employment Contract for just cause. It does not make sense for a club to be aware that one of its players tested positive in a doping test and not to inform the Player, the German NADA and the league immediately. It is telling that the Respondent did not submit the official laboratory results as evidence. The only explanation for this is that no laboratory was involved and there was no positive test result at all. If an official doping test is positive, the laboratory informs the German NADA and the basketball league, and the club cannot interfere with this process. Finally, although it threatened to do so, the Club never passed the alleged positive doping test on to the German NADA. The only possible explanation for this is that there was no positive doping test.

37. The Claimants asked the Respondent for the exact date on which the Player had to appear for the pre-season training in summer 2020; however, the Player never received any official answer or notification. Therefore, the warning letters were merely sent by the Respondent in an attempt to find a reason to terminate the Employment Contract.

38. According to the Respondent's official homepage, it started the preparation for the 2020/2021 season only on 1 September 2020. There was no reason for the Player to be in Germany on 1 August 2020.

39. The Player felt threatened and blackmailed by the Club's actions, which were unethical, unacceptable, intolerable and psychologically unbearable. That is why he decided not to continue working for this employer, who put him under psychological pressure and invented facts to terminate the Employment Contract without compensation. The Player considered the behaviour of the Club a serious breach of the Employment Contract and, on 17 August 2020, terminated the Employment Contract for just cause. The witness statements of Mr. Enea Trapani and Mr. Nick Lotsos have also confirmed the intolerable strategy by the Club.

40. Finally, the counterclaim of the Club, by which it claims that in the event of a finding that the Club is obliged to pay an amount of EUR 12,000.00 to the Agency, the Player should be liable for paying the same, does not make any sense. The Club does not even explain why the Player should pay the agent fee. It is obvious that it is the Club that has to pay the agent fee.

41. In their Request for Arbitration dated 21 August 2020, the Claimants request the following relief:

> *"Request for Relief*
>
> ***1.16*** *As the Respondent is the sole responsible and liable for the breach of the contract due to the threats and psychological pressure to Claimants to terminate the Employment Contract dated 16.9.2019 so that Claimant 1 is not paid any compensation and Claimant 2 is paid no commission to Claimant 2 in relation to their Agreement dated 17.09.2019, the Claimants request to be paid as compensation the full amount that the Respondent was obliged to pay them for season 2020/2021.*
>
> ***1.17*** *Claimant 1 requests to be paid the amount of one hundred twenty thousand (120,000) EUR net of taxes, for compensation of termination of the Contract on Respondent's blame, as per the salary that he was supposed to be paid according to their employment contract dated 16/09/2019.*
>
> *Claimant 2 requests to be paid the amount of twelve thousand (12,000) EUR for*

compensation of termination of the Players' Contract on the Respondents' blame, as per the commission that he was supposed to be paid according to their Agreement dated 17/09/2019.

Claimants also seek for the contribution of the Respondent to their expenses: a). Handling fee of 3000 EUR […] *and b). Legal Fees of 4076 EUR [3600 EUR and 476 EUR respectively* […]*] as well as the Advance on Cost and legal interest of 5% from the date of filing the present Request for Arbitration until full payment.*

Claimant(s) request(s):

Claimant 1 requests: 120,000 EUR net of taxes for compensation due to termination.

Claimant 2 requests: 12,000 EUR for compensation due to termination.

Total amount in dispute: 132.000 EUR"

42. In their second submission dated 4 November 2020, the Claimants additionally request the following relief:

"Respondent´s counter-claim should be rejected as it has no legal grounds."

4.2 Respondent's Position

43. The Respondent submits the following in substance:

44. According to Section 1031 para. 5 of the German Code of Civil Procedure, a valid arbitration clause requires that the original signatures are on the same page. As there is no document in the present arbitration proceedings that fulfils this requirement, the BAT is not competent to decide this case. In addition, the Arbitrator is not authorized to decide the case *ex aequo et bono* as the Employment Contract is subject to German law pursuant to § 10 para. 4 of the Employment Contract.

45. According to § 5 para. 1 of the Employment Contract, the 2020/2021 season started on 1 August 2020. Therefore, the Player had to physically offer his services to the Club as of 1 August 2020.

46. Contrary to the submissions of the Claimants, the Respondent was not seeking to find a way to terminate the Employment Contract.

47. Mr. Oliver Braun is in charge as General Manager only since 1 July 2020. After assuming his position, Mr. Braun found out that, on 23 September 2019, the Player tested positive for THC, which constitutes a breach of the Employment Contract. The former General Manager, Mr. Sebastian Schmidt, refused to terminate the Employment Contract for just cause on that basis. Instead, on 24 September 2019, Mr. Schmidt, the head coach Mr. Pete Strobl and the Player had a meeting during which the Player admitted the use of THC, as confirmed in Mr. Strobl's witness statement. The test was carried out with the "*Cleartest Multidrug from GLP Medical*". Neither a laboratory nor the German NADA were involved in the testing procedure.

48. It was clear from the beginning that the Club would send the test result to the German NADA in case the parties did not agree on a termination agreement. As the Player purported to terminate the Employment Contract for just cause on 17 August 2020, there was no need to inform the German NADA about the positive doping test.

49. At no time did the Club concede that the Player did not have to appear at his work place. To the contrary, the Club demanded the Player to participate in training sessions twice and sent two warning letters to the Player after he had failed to attend these training sessions. The official date for the beginning of training was 1 September 2020, but the players who had already been on the roster for the 2019/2020 season participated in official training sessions already in August 2020. It would have been the obligation of the Player to participate in these training sessions.

50. According to § 5 para. 5 of the Employment Contract, the Club is obliged to pay the Player two return tickets (USA-GER). However, it was the Player's duty to inform the Club which flight he wished to take to appear at his work place. The Club had no contractual obligation to make travel arrangements for the Player.

51. According to German law, only the actual appearance at the workplace shall be deemed to be an offer of work. An oral offer is not enough. As the Player was in delay, the Club sent two warning letters to the Player and lawfully terminated the Employment Contract on 28 August 2020.

52. The Club behaved honestly and proportionately and did not apply unethical, unacceptable, intolerable and psychologically unbearable methods. The Club has never made any illegal threats and it did not blackmail or threaten the Player.

53. The Club assumes that the Player terminated the Employment Contract to avoid a decision by the German NADA or the *Basketball Bundesliga*.

54. In its Answer to the Request for Arbitration dated 19 October 2020, the Respondent requests the following relief:

> *"I do respond on behalf and in full authority of the Respondent and request to dismiss the claims of the Claimants and assign the costs to the Claimants.*
>
> […] *Alternatively, the Respondent requests to be paid by the Claimant 1 the amount of twelve thousand (12.000,00) EUR for compensation, if the request of the Claimant 2 is not dismissed."*

5. The jurisdiction of the BAT

55. 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 (the "PILA"), not by the German Code of Civil Procedure, as argued by the Respondent. This is also confirmed by the express reference to the PILA in the Parties' arbitration clauses (see para. 58 below).

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

57. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.[1.]

58. The jurisdiction of the BAT results from the identical arbitration clauses in § 10 para. 5 of the Employment Contract (in relation to the claims of Claimant 1) and in Article 7 of the Agent/Club Agreement (in relation to the claims of Claimant 2), both of which read 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."*

59. The Employment Contract and the Agent/Club Agreement are in written form and thus the arbitration clauses fulfil the formal requirements of Article 178(1) PILA. Given the applicability of the PILA (see para. 55 above), the Arbitrator does not need to make a finding on whether the arbitration agreements fail to meet the formal requirements of Section 1031 para. 5 of the German Code of Civil Procedure, as asserted by the Respondent.

60. 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 agreements under Swiss law (referred to by Article 178(2) PILA).

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

61. The jurisdiction of BAT over the Claimants' claims arises from the Employment Contract and the Agent/Club Agreement. The wording *"*[a]*ny dispute arising from or related to the present contract* […]*"* clearly covers the present dispute.

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

63. The Arbitrator further notes that, in any case, the Respondent's objection to the Arbitrator's jurisdiction was made only in its second submission and, thus, too late in accordance with Article 186 para. 2 PILA and Article 11.4 of the BAT Rules. For this reason alone, the Arbitrator has jurisdiction based on the principle of *Einlassung* (appearance).

6. Discussion

6.1 Other Procedural Issues

64. In the Request for Arbitration, the Claimants requested that Mr. Lotsos and Mr. Trapani be heard as witnesses. In its Response, the Club proposed to hear Mr. Schmid, Mr. Strobl, Mr. Piljanovic and Mr. Braun as witnesses. In its "Comments (…) to Respondents' Answer & Evidence" dated 4 November 2020, the Claimants submitted witness statements of Mr. Lotos and Mr. Trapani. In its Statement of 30 November 2020, the Club provided witness statements of Mr. Strobl and Mr. Braun.

65. According to Article 13.1 of the BAT Rules, "[n]*o hearings are held in arbitration proceedings under these Rules unless the Arbitrator decides to hold a hearing after consultation with the parties".* In the present case, the Arbitrator felt sufficiently informed by the submissions of the parties and the written statements of Mr. Lotsos, Mr. Trapani, Mr. Strobl and Mr. Braun, and decided not to carry out a hearing and/or to hear witnesses, who are in any case closely related to the parties who called them.

6.2 Applicable Law – ex aequo et bono

66. 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".*

67. Under the heading "Law Applicable to the Merits", Article 15 of the BAT Rules reads as follows:

> *"15.1 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.*
>
> *15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead."*

68. According to its § 10 para. 4, the Employment Contract is subject to German law. However, at the same time, § 10 para. 5 of the Employment Contract and Article 7 of the Agent/Club Agreement explicitly provide that the Arbitrator shall decide the dispute *ex aequo et bono*.

69. Pursuant to the jurisprudence of the BAT, the parties' agreement to submit any dispute to the BAT according to the BAT Rules includes the mandate to the arbitrator to apply the *ex aequo et bono* principle. A fortiori, if the Parties have explicitly agreed on the application of the *ex aequo et bono* principle for any BAT arbitration, this specific agreement prevails over the reference to any particular national law elsewhere in the

Employment Contract, according to the maxim that *lex specialis derogat legi generali*.[2] The Arbitrator notes that this does not necessarily deprive § 10 para. 4 of the Employment Contract of any meaning. In particular, it may well be that German law applies in respect of, e.g., rules on workplace safety, or in case a forum other than the BAT is called upon to interpret the Employment Contract, e.g. in relation to provisional measures.

70. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

71. The concept of "équité" (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) 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]

72. 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".

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

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2 See e.g. BAT 0563/14; BAT 0683/15; BAT 0769/15.

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).

6.3 Findings

6.3.1 Termination of the Employment Contract?

74. First, the question arises whether the Employment Contract was validly terminated. The Claimants submit that the Player was entitled to terminate the Employment Contract early on 17 August 2020 because of the Club's undue pressure to sign a termination agreement without compensation. The Club argues that it was its termination of 28 August 2020 that brought the Employment Contract to an end, because the Player did not appear in the training sessions despite two warning letters.

75. The Player argues that continuing the employment relationship with the Club was no longer acceptable to him as the Club used illegal and unethical methods such as psychological force and blackmail, and threatened his career with an invented and fraudulent doping allegation. For this reason, the Player argues that he was entitled to terminate the Employment Contract on 17 August 2020.

76. § 9 para. 3 of the Employment Contract regulates the issue of early termination and reads as follows:

> *"The mutual right to terminate the Contract for good cause shall remain unaffected. The breaches of duty listed below constitute serious impairments of the employment relationship:*
>
> - *any breach of the doping provisions,*
> - *consumption of illegal drugs,*
> - *unauthorised betting, match-fixing agreements or acceptance of advantages."*

77. The Arbitrator concludes that this list of grounds for early termination of the Employment Contract is not exhaustive. In other words, there may be other grounds for early termination of the Employment Contract for cause if the terminating party can no longer be reasonably expected to continue the employment relationship.

78. This leads to the question of whether the threat of the Club to inform the German NADA about the alleged positive doping test if the Claimants did not sign an unfavourable termination agreement constitutes a valid ground for early termination by the Player.

79. While the Club argues that it had informed the Player about the positive doping test at the time and submitted corresponding witness statements, the Claimants dispute that there had been a positive doping test of a sample collected on 23 September 2019 or on any other date.

80. The Arbitrator finds that irrespective of if and when the Cub notified the player of the alleged positive doping test, it could not derive any legal consequences therefrom under the Employment Contract, for several reasons: The Club has not presented sufficient evidence of a positive finding. The statement of Mr. Strobl that the Player had admitted the use of THC has been disputed and was not substantiated or corroborated by other evidence. But in any event, it would have been up to the Club to take legal action against the Player within three months from the notice, "otherwise the claims shall become null and void" (§ 9 para. 4 of the Employment Contract).

81. The Arbitrator therefore concludes that the Club's threat to disclose the results of an allegedly positive doping test to the German NADA was nothing but an attempt to put the Player and his agent under pressure to accept an unfavourable termination agreement. While the e-mail of the Club's counsel dated 11 August 2020 does not expressly say that the Club would refrain from forwarding the information to the German NADA if the Claimants agreed to the proposed settlement, the Club itself submitted in its Answer that this was the case ("*It was clear, from the beginning of the negotiations, that the Respondent would sent the positive THC-Test to the German NADA, in case that there is no mutual agreement* […]", emphasis added).

82. It seems obvious to the Arbitrator that in the summer of 2020, the Club pulled the alleged doping test of a year earlier out of its hat to get rid of its obligation to continue to employ the Player in the 2020/2021 season.

83. The repeated attempts of the Club to get rid of the Player after it had signed the 2019/2020 Termination Agreement, which explicitly confirmed the validity of the Employment Contract for the next season, has definitely destroyed the confidence of the Player in his employer and made the continuation of the employment no longer acceptable to the Player. The Arbitrator therefore finds that the Club's aforementioned actions justified the Player's early termination of the Employment Contract.

84. As a consequence of the lawful termination of the Employment Contract on 17 August 2020, the Player was no longer obliged to offer his services to the Club. It is therefore moot to review whether the Player had valid reasons not to attend the training sessions in August 2020 and whether the Club's communication about when the Player was expected to report back at the Club was sufficiently clear and explicit.

6.3.2 Financial consequences of the termination of the Employment Contract

85. According to § 5 para. 2 of the Employment Contract, the Player would have been entitled to a net salary of EUR 120,000.00 for the 2020/2021 season.

86. Since the Employment Contract was validly terminated by the Player's termination notice of 17 August 2020, the Player is entitled to the full salary for the remaining contractual term. The Player is therefore entitled to a compensation of EUR 120,000.00. The Arbitrator notes that the Club did not claim that the Player found employment elsewhere for the remainder of the term, and it seems from publicly available sources that the Player did not in fact play for any other team after he left the Respondent. In light thereof, and given that the Covid-19 pandemic made it more difficult for basketball players to find new employment, the Arbitrator finds that taking into account the particular circumstances of this case, no deduction shall be made on the basis of mitigation in this case.

87. Pursuant to Article 2 of the Agent/Cub Agreement, the Club would have been obliged to pay the Agency an agent fee of total EUR 12,000.00 net of taxes for the 2020/2021

season (EUR 6,000.00 payable no later than 30 September 2020 and EUR 6,000.00 payable no later than 28 February 2021).

88. According to Article 2 of the Agent/Club Agreement, "*Club will not be responsible to pay for fees of season 2020/2021 in the event that the Player executes its option out according to article 9.1 of the Contract*".

89. In the present case, the Player did not use the buy-out option stipulated in the Agent/Club Agreement, but the terminated the Employment Contract for cause on 17 August 2020. Accordingly, as the agent fee corresponds to 10% of the Player's net yearly salary, the Arbitrator finds it fair and adequate that the Agency shall be entitled to an agent fee of EUR 12,000.00, i.e. 10% of the amount to which the Player is entitled as a compensation for the salary for the 2020/2021 season.

6.3.3 Counterclaim

90. The Respondent failed to demonstrate why the Player should be obliged to pay the agent fee instead of the Club. According to the clear wording of the Agent/Club Agreement, the Club (not the Player) has to pay the agent fee. This was not changed by the fact that the Club and the Player mutually terminated the Employment Contract. Therefore, the Arbitrator dismisses the Respondent´s counterclaim.

6.4 Interest

91. The Claimants request the BAT to order "*interest of 5% from the date of filing the present Request for Arbitration until full payment*".

92. Neither the Employment Contract nor the Agent/Club Agreement provide for interest. However, according to standing BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. This is a generally accepted principle, which is embodied in most legal

systems. As requested by the Claimants and in correspondence with the standing BAT jurisprudence, the default interest rate is 5% per annum.

93. Upon termination of the Employment Contract on 17 August 2020, all obligations arising therefrom became due, in particular the compensation payable to the Player. Due to the close connection between the Employment Contract and the Agent/Club Agreement and the fact that the Agency has already provided its services for which a compensation is owed, the Arbitrator concludes that also the agent fee became due on 17 August 2020. Interest of 5% on the Player's compensation and the agent fee is due from the day following the termination date, i.e. since 18 August 2020. However, the Claimants seek interest only since the filing of the Request for Arbitration, i.e. 21 August 2020. As the Arbitrator cannot grant more than is requested by the Claimants (*ne ultra petita*), the Arbitrator grants interest as of 21 August 202[0].

7. Conclusion

94. Based on the foregoing, and after taking into due consideration all the evidence submitted and all arguments made by the parties, the Arbitrator finds that the Respondent is obliged to make the following payments:

- EUR 120,000.00 net (compensation due to the termination of the Employment Contract), plus interest of 5% per annum from 18 August 2020 until payment, to the Player; and

- EUR 12,000.00 net (outstanding agent fee), plus interest of 5% per annum from 18 August 2020 until payment, to the Agent.

8. Costs

95. In respect of determining the arbitration costs, Article 17.2 of the BAT Rules provides as follows:

> *"At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4).* […]*"*

96. On 15 January 2021, the BAT President determined the arbitration costs in the present matter to be EUR 8,600.00.

97. As regards the allocation of the arbitration costs as between the parties, Article 17.3 of the BAT Rules provides as follows:

> *"The award shall determine which party shall bear the arbitration costs and in which proportion.* […] *When deciding on the arbitration costs* […]*, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties."*

98. Considering the outcome of the proceedings, the Arbitrator finds it fair and adequate that the Respondent shall bear the full arbitration costs. Thus, the Respondent shall reimburse EUR 3,600.00 as arbitration costs to the Claimants. The difference between the advance on costs and the costs of these proceedings in the amount of EUR 1,400 shall be reimbursed to the Claimants by the BAT.

99. In relation to the parties' legal fees and expenses, Article 17.3 of the BAT Rules provides that

> *"as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding* […] *on the amount of any contribution to the parties' reasonable legal fees and expenses, the*

Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties."

100. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses. The maximum contribution for an amount in dispute between EUR 100,001.00 and EUR 200,000.00 excluding handling fee according to Article 17.4 of the BAT Rules is EUR 10,000.00. The amount in dispute in this case is EUR 132,000.00 plus 5% interest.

101. The Claimant 1 requests a contribution to his legal fees of EUR 3,600.00 and the Claimant 2 requests a compensation in the amount of EUR 476.00. This does not include the non-reimbursable handling fee of EUR 3,000.00.

102. The Respondent requests a contribution to its legal fees of EUR 6,726.09. This does not include the non-reimbursable handling fee of EUR 1,500.00 for the counterclaim.

103. Considering the outcome of the proceedings, the Claimants shall be entitled to a contribution to their legal fees. The claimed contribution of EUR 4,076.00 is within the limits defined by Article 17.4 of the BAT Rules. In addition, the Respondent shall cover the non-reimbursable handling fee of EUR 3,000.00 paid by the Claimants and bear its own non-reimbursable handling fee for the counterclaim.

9. AWARD

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

1. **Basketball Löwen Braunschweig GmbH shall pay Mr. Trevor Dawon Releford a compensation in the amount of EUR 120,000.00 net, plus interest of 5% per annum from 21 August 2020 until payment.**

2. **Basketball Löwen Braunschweig GmbH shall pay Starvision Enterprise Ltd. an agent fee of EUR 12,000.00, plus interest of 5% per annum from 21 August 2020 until payment.**

3. **Basketball Löwen Braunschweig GmbH shall pay Mr. Trevor Dawon Releford and Starvision Enterprise Ltd. jointly an amount of EUR 3,600.00 as reimbursement for their advance on the arbitration costs.**

4. **Basketball Löwen Braunschweig GmbH shall pay Mr. Trevor Dawon Releford and Starvision Enterprise Ltd. jointly an amount of EUR 7,076.00 as reimbursement for their legal fees and expenses.**

5. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 11 February 2021

Stephan Netzle
(Arbitrator)