ARBITRAL AWARD

(BAT 0756/15)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Paul Stoll

- Claimant 1 -

Mr. Eric Fleisher
1 Ridge Drive, Chappaqua, NY, 10514, USA.

- Claimant 2 -

represented by Mr. Juan de Dios Crespo Pérez and Mr. Agustin Amoros Martinez, attorneys at law, Avda. Reino de Valencia 19, 4a, 46005 Valencia, Spain

vs.

Halcones Rojos de Veracruz
Auditorio Benito Juarez, Av. Salvador Díaz Mirón #1500, Col. Centro 91700 Veracruz, Mexico

- Respondent -
1. The Parties

1.1 The Claimants

1. Mr. Paul Stoll ("Player") is an American professional basketball player. Mr. Eric Fleisher ("Agent") is an American basketball agent.

1.2 The Respondent

2. Halcones Rojos de Veracruz ("Respondent") is a professional basketball club in Veracruz, Mexico.

2. The Arbitrator

3. On 20 October 2015, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert SC as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter 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

4. On 21 December 2014, Player, Agent, and Respondent entered into an agreement ("the Agreement") whereby Respondent engaged Player to play basketball for the 2014-2015 season, the 2015-2016 season, and the 2016-2017 season. The salary of Player was agreed at a guaranteed sum of USD 100,000.00 net of tax for the 2014-2015 season, together with further payments of USD 834.00 per day for any additional days starting on 25 March 2015 until the day after club's final day of that season; a
guaranteed sum of USD 201,250.00 net of tax for the 2015-2016 season, together with further payments of USD 958.00 per day for any additional days starting on 1 April 2016 until the day after the club’s final day of that season; and a guaranteed sum of USD 210,000.00 net of tax for the 2016-2017 season, together with further payments of USD 958.00 per day for any additional days starting on 31 March 2017 until the club’s final game of that season. Further, Player was to be paid bonuses by reference to certain defined on-court successes.

5. The Agreement provided that Agent was to be paid agency fees by Respondent in the amounts of USD 10,000.00 (for the 2014-2015 season), USD 23,000.00 (for the 2015-2016 season), and USD 24,000.00 (for the 2016-2017 season).

6. Player says that from February 2015 onwards Respondent did not pay him his salary. This led, ultimately, to his terminating the Agreement in August 2015. Agent says that he has not been paid any of the agency fees provided for in the Agreement.

7. Respondent has not participated in this case.

3.2 The Proceedings before the BAT

8. On 14 October 2015, Player and Agent filed a Request for Arbitration of the same date in accordance with the BAT Rules.

9. The non-reimbursable handling fee in the amount of EUR 4,000.00 was paid on 14 October 2015.

10. On 26 October 2015, 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:
The foregoing sums were paid as follows (all on behalf of Claimants, by Assist Sports Management, Inc.): 9 November 2015, EUR 1,000.00; 9 November 2015, EUR 4,500.00; and 9 December 2015, EUR 6,500.00.

11. Respondent did not participate in the arbitration and did not file an Answer, despite several invitations by the BAT to do so.

12. By Procedural Order dated 14 December 2015, Claimants were invited to inform the Arbitrator as to:

   (a) where the Player is playing this season and what his salary is; and
   
   (b) whether his present contract runs to next season, and what his salary will be.

13. On 29 December 2015, Claimants provided answers to the two questions raised by the Procedural Order dated 14 December 2015. On 30 December 2015, Respondent was afforded an opportunity to comment on these answers, and to do so by no later than 13 January 2016. Respondent did not take up this opportunity.

14. On 18 January 2016, the Parties were invited to submit their statements of costs by 25 January 2016 and were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.

1 When the non-reimbursable handling fee was paid to the BAT, there was an additional amount of EUR 1,000.00 included. This additional amount was credited by the BAT against the advance on costs.

16. On 26 January 2016, Respondent was invited to comment on the claim for costs of Claimants, and to do so by 1 February 2016. Respondent did not do so.

4. The Positions of the Parties

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

   (a) USD 53,172.00 net for unpaid salary;

   (b) USD 411,250.00 for compensation arising from the early termination of the Agreement; and

   (c) A contractual penalty of USD 100.00 per day from 21 February 2015 until payment by Respondent of amounts due to Player.

18. Agent’s position is as sought in his claim for relief in the Request for Arbitration (in summary):

   (a) USD 10,000.00 net for unpaid agency fees;

   (b) USD 47,000.00 for compensation arising from the early termination of the Agreement; and

   (c) A contractual penalty of USD 100.00 per day from 16 December 2014 until payment by Respondent of amounts due to Agent.
19. Claimants also seek an award of costs and fees.

20. As already noted, despite several invitations by the BAT, Respondent did not participate in this arbitration.

5. The Jurisdiction of the BAT

21. As a preliminary matter, the Arbitrator wishes to emphasize that, since Respondent did not participate in this arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.

22. 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).

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

24. 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

25. The jurisdiction of the BAT over Claimants’ claims is stated to result from the arbitration clause in clause 12 of the Agreement, which reads as follows:

   “Any dispute arising from or related to the present Contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall

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be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."

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

27. 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).

28. The language of the arbitration clause is quite clear, namely, the Parties have opted for BAT arbitration. The Arbitrator also notes that the apparent stamp (also known as a seal, or a chop) of Respondent is clearly placed on every page of the Agreement.

29. For the above reasons, the Arbitrator has jurisdiction to adjudicate Claimants’ claims.

6. Other Procedural Issues

30. Article 14.2 of the BAT Rules specifies that “the Arbitrator may [...] proceed with the arbitration and deliver an award” if “the Respondent fails to submit an Answer.” The Arbitrator’s authority to proceed with the arbitration in case of default by one of the parties is in accordance with Swiss arbitration law and the practice of the BAT. See ex multis BAT 0001/07; BAT 0018/08; BAT 0093/09; BAT 0170/11.

31. This requirement is met in the present case. Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules. It was also given sufficient opportunity to respond to Claimants’ Request
for Arbitration, to comment on the further information supplied by Player, and to comment on their Account on Costs. Respondent, however, chose not to participate in this arbitration.

7. Discussion

7.1 Applicable Law – ex aequo et bono

32. 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”.

33. 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.”

34. As noted in paragraph 26 above, the arbitration clause in the Agreement expressly provides that the Arbitrator shall decide any dispute ex aequo et bono. The Arbitrator finds that the parties have made an express choice with regards to disputes decided by the BAT (and upon appeal, by the CAS), namely that “[t]he Arbitrator shall decide the dispute ex aequo et bono.”

35. 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\(^4\) (Concordat)\(^5\), 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.”\(^6\)

36. 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.”\(^7\)

37. 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.”

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

### 7.2 Findings

39. 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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\(^4\) 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).

\(^5\) P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.


40. First, the Arbitrator will examine Claimants’ claim for unpaid salary and agency fee for the 2014-2015 season.

41. It appears from the documentation on record that the Agreement did come into effect, and the Arbitrator notes the provision thereof which says:

“The Guaranteed salary payments above are vested in and owing to the player upon the completion of the execution of this Agreement and are contingent upon Player passing the medical examination provided for […]”

42. In light of the evidence (such as media reports) put before the Arbitrator, Player commenced playing with Respondent, and it stands to reason that he would only have done so having successfully passed the medical examination at the outset.

43. Player says that Respondent stopped paying him his salary in February 2015.

44. In light of the fact that Respondent has not participated in this arbitration, it is of some importance to the Arbitrator that amongst the exhibits to the Request for Arbitration is an apparent email dated 5 July 2015 from the Respondent which says the following:

[private/confidential information]

45. This suggests that Respondent admits that it owes money, and this gives evidential comfort to the Arbitrator in assessing the position of Claimants that Respondent did not pay from February 2015 onwards.

46. The next factual matter of importance is the letter dated 4 August 2015 sent by Player to Respondent. This is described as an “Official Notice of Termination” and recites the following matters:
(a) the fact of unsuccessful attempts to get paid;
(b) a detailed calculation of the sums owed to Player arising from the 2014-2015 season including a series of bonuses arising from certain on-court successes, and additional days with the club following the end of that season;
(c) invoking the Agreement’s provisions as regards default, and the right to terminate (including an acceleration clause of all monies to be paid); and
(d) demand for a Letter of Clearance.

47. Was Player justified to terminate the Agreement on 4 August 2015? The answer is yes. The Agreement expressly provides that if payments are more than 30 days late, then Player has the right to terminate. Undoubtedly, the circumstances which would allow Player to invoke such a right were present when he sent this letter. Quite apart from the apparent lack of payment since February 2015, on 5 July 2015, Agent, on Player’s behalf, had been promised by Respondent news by the following week as to possible payment. Additionally, there was also a concession, explicitly, of the fact that monies were owed. Notwithstanding the contents of the email dated 5 July 2015, no such news, seemingly, materialised, and no payment emanated from Respondent.

48. In summary, Player was entitled to, and did properly terminate the Agreement on 5 August 2015.

49. The consequence of the foregoing discussion and findings is that Player was entitled to the money which he had earned for the 2014-2015 season. The Arbitrator accepts the calculation of this amount which Player has made in the Request for Arbitration at paragraph 24, namely:

(a) USD 12,500.00 scheduled for payment on 20 February 2015;
(b) USD 25,000.00 scheduled for payment on 20 March 2015;
(c) USD 6,672.00 for eight additional days (at USD 834.00 per day) at the end of the season; and
(d) USD 9,000.00 for bonuses.


51. The Arbitrator will return later in this Award to a further claim of Player with its origins in the 2014-2015 season, namely, a USD 100.00 per day contractual penalty fee.

52. Turning to Agent’s claim for the 2014-2015 season, the Agreement provides that he was to be paid USD 10,000.00 on or before 15 December 2014. He was not paid this money, and it is, therefore, clear to the Arbitrator that Respondent owes Agent this sum of money.

53. The Arbitrator will return later in this Award to a further claim of Agent with its origins in the 2014-2015 season, namely, a USD 100.00 per day contractual penalty fee.

54. The Arbitrator will now examine the claims of Player for the 2015-2016 and 2016-2017 seasons.

55. Player claims compensation in the amount of USD 411,250.00, being the sum of the agreed annual salary for these two seasons as provided for in the Agreement (USD 201,250.00 plus USD 210,000.00). Player invokes the provision of the Agreement which says that, in the event of termination, all payments owed to him for the entire term shall be “accelerated and become immediately due and payable”.

56. The Arbitrator also notes that the Agreement expressly provides that from the moment Player passes the medical examination (and the Agreement entering into force) all the contractual sums, which are stated to be guaranteed, become “vested in and owing to player”.
57. Taking into account words in the Agreement such as “vested” (which is indicative of a property right) and “accelerated”, the question for the Arbitrator is whether, and by how much, the claims of Player for the two seasons (2015-2016 and 2016-2017) should be reduced in line with the practice established in BAT awards heretofore invoking the general principle of mitigation.

58. This question has a number of aspects. First, the proper interpretation of an agreement is of foremost importance, as the contents of the “pacta” must be known thoroughly before one can say, with confidence, what must be performed (the “sunt servanda”). Secondly, in what circumstances might the strict terms of the agreement, once properly construed, be attenuated or moderated?

59. Taking the first aspect, namely, proper interpretation of an agreement, 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.

60. As regards the second aspect of the question, namely, when ruling *ex aequo et bono*, under what circumstances might the effect of contractual terms (once properly interpreted) be attenuated or moderated. Again, as already noted, under *ex aequo et bono*, in principle, an arbitrator gives effect to all contractual terms used by parties once properly interpreted.

61. The starting point is that parties enter into contracts with the presumed intent that they will abide by their terms, and see them out to a conclusion. Alteration or moderation of a contract’s terms would not usually arise in such circumstances, save by the parties’ own subsequent agreement.

62. One comes to a point of departure from the usual contractual performance (i.e. in full according to agreed terms) when there has been a breach and an arbitrator is looking
at the remedies sought by the innocent party seeking compensation. There are a number of particular factors which inform such an exercise:

- a claimant may often look for compensation for the loss of the benefit of the contract which they have lost, or, putting it another way, what would they have earned had the contract been performed in the usual and agreed manner to the end of its life;
- in the professional basketball context, there are specific circumstances which colour the foregoing factor in an important manner, namely, a player, or a coach, can only be at one club at a time during a season, and they cannot have multiple parallel contracts (as might be the case for a commercial company undertaking multiple deals and lines of business). Thus, for example, if a player agrees to a two year contract at a particular salary, it is known from the outset exactly the extent (save for items like bonuses, which are tied to sporting success) of the monetary compensation for that agreement’s lifetime, and also for those two years of that player’s professional playing time;
- in the context of a breach of contract, or termination for cause, the innocent party should not be put into a better position than they would have been had all gone according to plan with full and complete performance of the obligations;
- contractual clauses which apply in the context of a breach, or termination for cause, such as penalties, or liquidated damages (this is not a closed list), are subject to careful scrutiny when ruling *ex aequo et bono*. In particular, such a clause which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party, may be refused enforcement, or moderated in its application;
- the innocent party is normally expected to mitigate their position by, for example, seeking alternative employment if possible; and
- there is a time-value to money payable now, rather than at a point in the future, and such time-value normally attracts a discount factor.
63. Turning to the case at hand, what is the ordinary and natural meaning of the words used in the Agreement (in light of all the factors set out in paragraph 59 above) as might impact upon Player’s claim for compensation for the 2015-2016 and 2016-2017 seasons?

64. Clause 2 of the Agreement has three initial narrative parts describing the salary structure for each season that Player was to be with Respondent. Player’s salary for each season was stated to be payable in monthly instalments. These provisions are clear and do not cause any particular difficulty in how they are to be read by a reasonable reader with a knowledge of commercial arrangements prevalent in professional basketball.

65. Clause 2 then continues with a specific provision and states that once Player has passed the medical examination (the importance of such initial medical examinations is prevalent in professional basketball contracts), the “[G]uaranteed salary payments above are vested in and owing to the player” (emphasis added). Vesting something or a right in someone does suggest that a proprietorial right is being created at that moment. However, reading this clause in line with the principles articulated above, it does sit somewhat uneasily with a detailed salary structure by which monthly instalments are the agreed method of payment across three seasons. The Arbitrator, therefore, considers that the proper interpretation of “vested in and owing to the player” is a similar formulation to the “guaranteed contract” term regularly seen in professional basketball agreements, and does not create an immediate, property-style, right to all sums payable there and then to Player once he passed the initial medical examination.

66. Player specifically refers to a further provision in clause 2 of the Agreement which says that in the event of termination for cause, “all payments under this contract shall be accelerated and become immediately due and payable”. The Arbitrator interprets these words in light of the Agreement as a whole, and also in the context of the background of professional basketball contracts, to say that no particular distinct importance can be
ascribed to the word “accelerated” or the words “immediately due and payable”. These words construed together with the guaranteed nature of the Agreement (as is usual in professional basketball contracts) simply give contractual force at the moment in time of termination of what would have been the case had the contract been performed according to its terms to its natural end.

67. Clause 10 of the Agreement is also invoked, but its terms are to a similar intent, and the Arbitrator interprets them in a similar manner as clause 2 as described in the foregoing paragraph.

68. Based upon the foregoing analysis, it appears to the Arbitrator that as of 5 August 2015 and immediately upon the termination by Player of the Agreement, the amount of USD 411,250.00 had crystallised as the precise amount he would have earned had that contract been performed according to its terms. This crystallisation of the value of the future performance (which, of course, due to the termination, was not going to take place) assists greatly in ease of proof of what Player has been deprived. The question then arises as to how one, properly, characterises this sum of USD 411,250.00. While the Agreement says that such sum is accelerated and due, thereby giving it the indicia of a salary, for example, that is actually misleading as to its true and proper characterisation. As Player was no longer going to be playing for Respondent after termination, to describe the future, total value of the Agreement as a due salary would be a mischaracterisation. One earns a salary by doing something in return, and in Player’s case, this would be by playing professional basketball for Respondent to the end of the 2016-2017 season. Rather, the proper characterisation of the obligation owed to Player by Respondent at the moment of termination was that of a liquidated and precise claim for compensation. This is exactly the characterisation of the claim made by Player in the Request for Arbitration and demonstrates the perceptive and appropriate approach taken in the formulation of the claims for relief.
69. Having placed Player’s claim for compensation for the 2015-2016 and 2016-2017 season into its proper context, namely, a claim for compensation liquidated in the amount of USD 411,250.00, the Arbitrator then moves on to examining any factors which might impact upon the sum claimed.

70. The Arbitrator has been informed by Player that he is playing for the 2015-2016 season with a professional basketball club in Saratov in Russia. He states that he is likely to receive USD 92,800.00 from that club for that season. The Arbitrator finds, therefore, that Player has taken steps to mitigate his position, at least for the purposes of the 2015-2016 season.

71. Taking into account the general principles described in paragraph 62 of this Award and concomitant with the obligation to mitigate, which Player has reasonably met given that he had to find a new team quite late in the off-season, the Arbitrator considers that it is appropriate to reduce Player’s claim for compensation for the 2015-2016 season by an amount of USD 92,800.00. By making this reduction in compensation, Player will be in no worse position than he would have been had the Agreement been performed according to its terms for that season with Respondent. Also, it means that Player does not get a windfall, which is not practically available to a professional basketball player given that they cannot play for more than one club at a time, through a non-reduction in compensation.

72. Turning to Player’s claim for compensation for the 2016-2017 season, in the amount of USD 210,000.00, the Arbitrator is told that the Player is under contract to the end of the 2015-2016 season in Saratov. The Arbitrator takes from that information that Player has not yet secured employment for 2016-2017. However, the Arbitrator does consider that it is demonstrated to him that Player has taken his obligation to mitigate seriously by finding a club in a relatively short period of time after the termination of the Agreement (a period from August to November 2015), and is obviously cognizant of the desirability to play each professional season. The life of a professional basketball
player is not infinite. As of the time of the making of this Award, Player is aged thirty, and therefore is more likely than not to wish to secure employment rather than to sit out a season.

73. The Arbitrator considers that it is likely that Player will, at least, secure employment for the 2016-2017 season to the same salary level as he presently has in Saratov, and therefore it is appropriate to reduce his claim for compensation by that amount. In addition, as this compensation claim is for a season yet to start, and well into the future in 2016, the Arbitrator considers it appropriate to make a further reduction in Player’s claim for the value to him of getting money now rather than spread across the 2016-2017 season. The overall reduction which the Arbitrator will make to Player’s claim for compensation for that season is USD 100,000.00.

74. In summary, the Arbitrator reduces the claim of Player for compensation by USD 192,800.00, and this results in a net claim amounting to USD 218,450.00. The Arbitrator, therefore, awards Player this amount.

75. Turning to Agent’s claims, these are divided into two parts, namely, his fees accruing prior to termination of the Agreement (USD 10,000.00) for the 2014-2015 season, and compensation (USD 47,000.00) for the 2015-2016 and 2016-2017 seasons.

76. In light of the analysis set out already in this Award, Agent’s claim for compensation for the 2015-2016 and 2016-2017 seasons did crystallise in the amount of USD 47,000.00 on the moment of termination by Player. The right to terminate, according to the Agreement, only reposed in Player not in Agent, but this is an academic point as termination took place on 5 August 2015.

77. Agent’s claim as against Respondent as of 5 August 2015 is properly characterised as compensation as against a contract-breaker. Agent is looking for the amounts he would have earned had the Agreement been performed in accordance with its terms. The fact
that this Claimant is an Agent does not in of itself dis-apply the general principles described in paragraph 62 of this Award. Therefore, the question arises as to whether any reduction is appropriate to Agent’s claim for compensation?

78. While an agent does have the opportunity to arrange many contracts simultaneously for a season depending on the number of clients they have, it is also a necessary fact of professional basketball that in the normal course of events, an agent can only earn an agency fee for a player once in a season (though such agency fee may be structured into instalments). A player is normally only at one club at a time per season. Thus, in the specific case at hand, Agent would have earned USD 47,000.00 had the Agreement been performed according to its terms to its natural conclusion. Also, that amount would have been the maximum amount of agency fees which Agent would have earned arising from his representative work for Player for those two seasons of 2015-2016 and 2016-2017.

79. It is therefore appropriate, and consistent with the approach taken to Player’s claim, for the Arbitrator to reduce Agent’s claim for compensation in the amount of USD 4,665.00 (being the amount of agency fees he is to receive pursuant to Player’s contract in Saratov) for the 2015-2016 season.

80. For the purposes of the 2016-2017 season, the Arbitrator sees no reason why Agent will not also secure a contract for Player, and will also be paid agency fees. In addition, there is a value to having money now, and therefore the Arbitrator will reduce the compensation claim for that season in the amount of USD 5,000.00.

81. In summary, the Arbitrator reduces Agent’s claim for compensation by the amount of USD 9,665.00. This results in an award against Respondent of USD 40,335.00 for compensation to Agent for the 2015-2016 and 2016-2017.
82. Finally, the Arbitrator addresses Claimants’ claims each for late payment penalty fees of USD 100.00 per day. The Agreement expressly provides for such a late payment penalty fee in the event of a ten day default by Respondent. Player claims as and from 21 February 2015. Agent claims as and from 16 December 2014.

83. Do these late payment penalty fees impose a detriment on the contract-breaker (Respondent) out of all proportion to any legitimate interest of the innocent party (Claimants)? As of the date of filing of the Request for Arbitration, 14 October 2015, the amounts attributable to these late payment penalty fees are USD 30,300.00 (for Agent), and USD 23,600.00 (for Player). Comparing those figures to the sums already awarded to Claimants:

- Player’s awarded claim/penalty fee up to date of Request: USD 271,622.00/USD 23,600.00. This late payment penalty fee amount is in or around 9% of the awarded claim.

- Agent’s awarded claim/penalty fee up to date of Request: USD 50,335.00/USD 30,300.00. This late payment penalty fee amount is in or around 60% of the awarded claim.

84. The Arbitrator considers that Player’s claim for late payment penalty fees, if calculated up to the date of the Request for Arbitration, would not be out of all proportion to his legitimate interest. Such an amount, representing 9% of his awarded claim, is proportionate to the wrong which such a clause seeks to address. The Arbitrator awards USD 23,600.00 to Player by way of late payment penalty fees. Any further award of such fees beyond the date of the Request for Arbitration would, in the Arbitrator’s view, stray into a disproportionate penalty.

85. The Arbitrator considers that Agent’s claim for late payment penalty fees, if calculated up to the date of the Request for Arbitration, would be out of all proportion to his
legitimate interest. Such an amount, representing 60% of his awarded claim, is disproportionate to the wrong which such a clause seeks to address. The Arbitrator, exercising his power *ex aequo et bono* awards USD 5,000.00 to Agent by way of late payment penalty fees.

8. **Costs**

87. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

88. On 11 April 2016 – considering that pursuant to Article 17.2 of the BAT Rules “the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator”, and that “the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 11,900.00.

89. Considering that Claimants prevailed on the main question in this arbitration, i.e. the termination of the Agreement by Player for just cause, and also in view of the fact that the Claimant’s claim for compensation was significantly reduced for the reasons mentioned in this award, it is consistent with the provisions of the BAT Rules that 60% the fees and costs of the arbitration, as well as 60% of Claimants’ reasonable costs and expenses, be borne by Respondent. Of specific relevance in this regard is an aspect of Article 17.3 of the BAT Rules (“[W]hen deciding on the arbitration costs and
on 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”). Additionally, the Arbitrator notes the provisions of Article 17.4 of the BAT Rules as follows:

“The maximum contribution to a party’s reasonable legal fees and other expenses (including the non-reimbursable handling fee) shall be as follows:

<table>
<thead>
<tr>
<th>Sum in Dispute (in Euros)</th>
<th>Maximum contribution (in Euros)</th>
</tr>
</thead>
<tbody>
<tr>
<td>up to 30,000</td>
<td>5,000</td>
</tr>
<tr>
<td>from 30,001 to 100,000</td>
<td>7,500</td>
</tr>
<tr>
<td>from 100,001 to 200,000</td>
<td>10,000</td>
</tr>
<tr>
<td>from 200,001 to 500,000</td>
<td>15,000</td>
</tr>
<tr>
<td>from 500,001 to 1,000,000</td>
<td>20,000</td>
</tr>
<tr>
<td>over 1,000,000</td>
<td>40,000</td>
</tr>
</tbody>
</table>

In case of multiple Claimants and/or Respondents, the maximum contribution is determined separately for each party according to the foregoing table on the basis of the relief sought by/against this party.”

90. Given that the sum in dispute in this case fell in the range of EUR 200,001 to 500,000, the maximum possible amount which could be awarded by the Arbitrator to two Claimants as a contribution to reasonable legal fees and other expenses is EUR 30,000.00.

91. Turning to Claimants’ actual claim for legal fees and expenses, this comprises: (a) EUR 4,000.00, namely the non-reimbursable handling fee; and (b) EUR 30,180.00 for
legal fees (calculated by reference to Valencian Bar Association). These figures added together exceed the maximum amount which can be awarded in a claim of this size, and Claimants limit the relief in this regard to an amount of EUR 15,000.00.

92. Turning to the case in hand, the Arbitrator notes that only one substantive submission was made in this case by Claimants with the preparation of the Request for Arbitration. There was also a short submission on Player’s subsequent contract in Russia.

93. It is also noteworthy that the claims made were straightforward. In seeking EUR 15,000.00, Claimants are effectively putting this case on a par with a fully-fought BAT arbitration with a value up to EUR 500,000.00.

94. The fact of a local Bar rule setting a particular level of legal fees is a matter as between Claimants and their lawyer, and does not influence the amount to be awarded by a BAT arbitrator.

95. 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 10,000.00 represents a fair and equitable contribution by Respondent to Claimants’ legal costs and expenses, including the non-reimbursable handling fee.

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

(i) BAT shall reimburse EUR 1,100.00 to Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the BAT President;

(ii) Respondent shall pay EUR 7,140.00 to Claimants, being 60% of the arbitration costs fixed by the BAT President;

(iii) Respondent shall pay EUR 10,000.00 to Claimants, representing a contribution
by it to their legal fees and expenses.
9. AWARD

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

1. **Halcones Rojos de Veracruz shall pay Mr. Paul Stoll:**
   a. USD 53,172.00, net, in respect of unpaid salary and bonuses;
   b. USD 218,450.00, net, in respect of compensation; and
   c. USD 23,600.00 in respect of late payment penalty fees.

2. **Halcones Rojos de Veracruz shall pay Mr. Eric Fleisher:**
   a. USD 10,000.00, net, in respect of unpaid agency fees;
   b. USD 40,335.00, net, in respect of compensation; and
   c. USD 5,000.00 in respect of late payment penalty fees.

3. **Halcones Rojos de Veracruz shall pay jointly to Mr. Paul Stoll and Mr. Eric Fleisher EUR 7,140.00 as reimbursement for their arbitration costs.**

4. **Halcones Rojos de Veracruz shall pay jointly to Mr. Paul Stoll and Mr. Eric Fleisher EUR 10,000.00 as a contribution to their legal fees and expenses.**

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

Geneva, seat of the arbitration, 15 April 2016

Klaus Reichert
(Arbitrator)