

ARBITRAL AWARD

(BAT 1184/18)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Auxilium Pallacanestro Torino S.p.A.
Corso Siracusa n. 10, 10136 Turin, Italy

- Claimant and Counterrespondent -

represented by Mr. Florenzo Storelli, attorney at law,
Viale Cadorna n. 50, 55100 Lucca, Italy

vs.

Mr. Lamar Patterson

- Respondent and Counterclaimant 1 -

Pensack Sports
41 W Lemon St. Apt 502, Lancaster, PA 17603, USA

- Counterclaimant 2 -

both represented by Mr. Benjamin Pensack, attorney at law,
1000 Shelter Bay Ave. Ste. 1109 Mill Valley, CA 94941, USA

1. The Parties

1.1 The Claimant and Counterrespondent

1. Auxilium Pallacanestro Torino S.p.A. (hereinafter the “Club”) is a professional basketball club located in Italy. The Club plays in the LBA, the first division of Italian basketball.

1.2 The Respondent and Counterclaimant 1

2. Mr. Lamar Patterson (hereinafter the “Player”) is a professional basketball player of American nationality. He played with the Club in the 2017-2018 season.

1.3 The Counterclaimant 2

3. Pensack Sports (hereinafter the “Agency”) is a basketball agency located in the USA. It represented the Player during the contractual relationship between the Player and the Club.

2. The Arbitrator

4. On 3 May 2018, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren OC appointed Dr. Stephan Netzle 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

5. On 26 July 2017, the Player, the Agency represented by Messrs. Adam and Ben Pensack and the Club signed a contract whereby the Club engaged the Player for the 2017/2018 basketball season (hereinafter the “Player Contract”). On 30 July 2017, the Club and Mr. Ben Pensack (on behalf of the Agency) signed an agreement which regulated the services and the compensation of the Agency relating to the Player (hereinafter the “Patterson Agency Agreement”). A similar agreement relating to another player (Trevor Mbakwe) had been signed on 26 July 2017 (hereinafter the “Mbakwe Agency Agreement”). On 14 August 2017, the Player and the Club entered into a License Agreement (hereinafter the “License Agreement”) by which the Club obtained the worldwide rights to use the Player’s name, his picture (image) and the rights to the Player’s personal services for marketing and promotion purposes. On 29 September 2017, the Club and the Player signed a form contract confirming the engagement of the Player by the Club (hereinafter the “League Contract”).
6. According to the Player Contract, the Player was entitled to a total compensation for his services as a basketball player and for his image rights in the total amount of USD 365,000.00 payable in 21 instalments, a compensation for passing the medical examination at the beginning of the season and certain bonus payments depending on the Club’s sporting results. The compensation for the image rights as addressed by the License Agreement was included in the Player Contract.
7. On 13 March 2018, the Player, through the Agency, terminated the Player Contract with immediate effect because the Club had been late with salary payments by more than 30 days, and demanded payment of all monies due under the Player Contract,

including all salaries and bonuses, within 72 hours. The Agency also requested the immediate payment of the past due agency fees related to the Player.

8. The Player played with the Club from the beginning of the 2017/2018 season until 2 February 2018. On 24 May 2018, the Player contracted with the Chinese club, Lhasa Jingtu and played his first game for his new club on 13 June 2018.
9. The Club disputes the legitimacy of the termination of the Player Contract. It asserts that the Player was in breach of that agreement since he had not complied with his professional duties as a member of the Club's team and publicly expressed his intention to leave the Club early.
10. The Club is now claiming damages of USD 100,000 consisting of the replacement costs to fill the Player's position in the team and a compensation for the image and reputational damage. By way of a counterclaim, the Player demands the payment of all outstanding salary and bonus payments. In addition, the Agency claims the unpaid Agency Fee relating to the Player and unpaid agency fees relating to Trevor Mbakwe.

3.2 The Proceedings before the BAT

11. On 20 April 2018, the Club filed a Request for Arbitration, which was received by the BAT Secretariat on the same date. The non-reimbursable handling fee of EUR 3,000.00 was received in the BAT bank account on 24 April 2018.
12. On 30 April 2018, a Request for Arbitration was filed by the Player and the Agent and received by the BAT Secretariat on the same date. The non-reimbursable handling fee in the amount of EUR 2,985.06 was received in the BAT bank account on 7 May 2018

13. On 22 May 2018, the BAT Secretariat confirmed receipt of both Requests for Arbitration and of the handling fees. The Arbitrator decided to treat the Player's and the Agency's Request for Arbitration as a counterclaim. A time limit was fixed for both Parties to file their Answers to the Request for Arbitration respectively the counterclaim in accordance with Article 11.2 of the BAT by no later than 12 June 2018. The BAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs by no later than 1 June 2018:

<i>"Claimant (Auxilium Pallacanestro Torino S.p.A)</i>	<i>EUR 5,000</i>
<i>Respondent and Counterclaimant 1 (Mr. Lamar Patterson)</i>	<i>EUR 2,500</i>
<i>Counterclaimant 2 (Pensack Sports)</i>	<i>EUR 2,500"</i>

14. The Parties filed their respective Answers within the given time limits.
15. By letter of 16 July 2018, the BAT Secretariat acknowledged receipt of both Parties' shares of the Advance on Costs in a total amount of EUR 9,957,78.00. It also requested the Player to indicate any alternative sources of income he was entitled to after the termination of the Player Contract, by no later than 23 July 2018. Moreover it declared that upon expiry of this time limit, the exchange of documents would be complete and invited the Parties to file an account of their costs.
16. The Player replied to the Arbitrator's request and filed an account of costs on 18 July 2018. The Club filed its account on costs on 23 July 2018 and also referred to the fact that the Player had signed a new contract with Lhasa Jingtū.
17. On 28 August 2018, the Arbitrator re-opened the written proceedings and requested the Player to submit his contract with Lhasa Jingtū. On the same day, the Player's Agency replied to the BAT and explained why it did not find it necessary to provide the Arbitrator with the Lhasa Jingtū contract. The Club commented on the Player's submission on 10 September 2018.

4. The Positions of the Parties

4.1 The Claimant's Position

18. The Club always fulfilled its contractual obligations. However, in November 2017, the Player started to behave in an undisciplined way: On 26 November 2017, he arrived late and drunk at the scheduled training. On 25/26 January 2018, he spent the night before an official league match at a hotel with his girlfriend without the Club's authorization.
19. When the Club faced the Player with these charges, the Player expressed his willingness to an amicable termination of the Player Contract and to leave the Club.
20. The serious conduct of the Player continued, and in early February 2018 the Player and his Agency started to look out for a new Club, which was also reported by the media. Then, on 14/15 February 2018, the Player left the team hotel again and spent the night before the official match against Florence (quarter finals of the Italian Cup) with his girlfriend without the Club's authorization. As if this was not enough and despite pending settlement negotiations, the Player's Agency sent a termination letter to the Club on 13 March 2018. Thereafter, the Player left Turin.
21. The Player's termination notice was invalid: It was not signed by the Player and the Player was himself in breach of the Player Contract, because he had started to look out for a new club and violated the disciplinary rules and orders of the Club. This prevented him from exercising his contractual termination right.
22. The Club disputes the Player's allegation in his counterclaim that the Club wanted to get rid of the Player because the new coach, who had joined the Club on 15 January 2018, had different plans and did not want to rely on the Player any longer. It is true

that the Club hired another American player (Vander Blue) but it was planned that Vander Blue should not replace the Player, but both should play together in the same team.

23. Because of the serious misconduct of the Player, it is the Club which is entitled to terminate the Player Contract retroactively as per 26 July 2017 (i.e. the date of the Player Contract) and to claim damages for all damages suffered as a consequence of the Player's breach of his contractual obligations.
24. In its submissions of 23 July 2018 and 10 September 2018, the Club referred to the fact that the Player had signed a contract with the Chinese basketball club Lhasa Jingtuo without disclosing this circumstance in arbitration, which should be taken into account when assessing the Player's attitude towards the Club.
25. The Club admits that there was a delay in paying the balance of the Patterson and Mbakwe Agency Fees, which amounts to a total of USD 13,541.34 and not USD 13,627.00 as claimed by the Agency. The Club withheld these payments until a global settlement agreement including an agreement on the damages claimed by the Club would have been reached.

4.2 The Claimant's Request for Relief

26. In its Request for Arbitration dated 20 April 2018, the Club requested the following relief:

"Claimant(s) request(s)

- *declaration of termination of the agreement of July 26th 2017 due to serious breach made by the Player;*
- *Eur 50.000 (or other sum that the Arbitrator will find equitable), as compensation for damages deriving from the necessity to unexpectedly replace the Player who*

has a major investment in scheduling the roster for the season 2017/2018, with a consequent loss of results;

- *Eur 50,000, (or other sum that the Arbitrator will find equitable), as compensation for image and reputation damages;*
- *Legal fee and BAT costs.”*

4.3 The Position of the Respondents

27. The Player never breached the Player Contract but always met his contractual duties. The Club was late in paying the agreed salary instalments by more than 30 days when the Player exercised his contractual right to terminate the Player Contract.
28. The Player contests that he never engaged in behaviour which could be qualified as a serious breach of contract. The Club never warned the Player of bad behaviour. Prior to the termination of the Player Contract on 13 March 2018, the Club did not even address the alleged “serious conduct” of the Player.
29. The reality was that on 2 February 2018, the Club signed the American player Vander Blue who was actually playing on the same position as the Player. The addition of Vander Blue to the Club’s team roster gave the Club’s team one too many American players than are allowed in the Italian league and cup games. This meant that one American player on the Club’s team would have been benched at each game.
30. After the Italian Cup, which took place between 15 and 18 February 2018, it became clear that the Club no longer wanted the Player to play for its team and suggested to him to find another team. The Club also failed to make timely payments to the Player. By 10 February 2018, a payment of USD 14,600 became due to the Club but was not timely made to the Player. When the payment was still open on 13 March 2018 (i.e. after more than 30 days upon the due date), the Player, through his Agency, terminated the Player Contract in application of Article IV of the Player Contract.

31. After receiving the termination letter, the Club made the overdue USD 14,600 payment, and, on 10 April 2018, paid the amounts due on 10 March 2018, namely USD 14,600 and USD 21,900. However, these payments were made late and did not reverse the termination of the Player Contract. Consequently, the Club must fully compensate the Player according to the Player Contract by paying the remainder of the agreed salary and all bonus payments according to the sporting results of the Club's team.
32. The income that the Player earned from his new club Lhasa Jintu is irrelevant for this arbitration and must not be deducted from the compensation to be paid by the Club. The Club played the last game on 9 May 2018 and even if the Player Contract had not been terminated early, the Player would have been entitled to leave the Club on 12 May 2018.

4.4 Respondents' Request for Relief

33. In their Request for Arbitration of 30 April 2018, the Player and the Agency requested the following relief:

"Claimants request the following:

- 1. For the BAT to hold that Respondent must immediately pay \$154,900 USD Net to Claimant #1 plus lawful interest.*
- 2. For the BAT to hold that that Respondent must immediately pay \$13,627 USD Net to Claimant #2 plus interest of 1% per month, whereas a part of the month is regarded as a whole month.*
- 3. For the BAT to hold that Respondent shall reimburse Claimants and bear the cost of the 3,000 EUR handling fee to bring this arbitration.*
- 4. For the BAT to hold that respondent shall reimburse Claimants and bear the cost of the 3,000 EUR handling fee to bring this arbitration.*
- 5. For the BAT to hold that Respondent shall bear all further costs of this arbitration.*
- 6. For the BAT to hold that Respondent shall pay Claimants' costs of attorney fees for this case.*

7. For such other and further relief that the BAT may deem appropriate.”

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 at hand is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.¹
37. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Art. X of the Player Contract, which reads as follows:

“In the event of a dispute in relation to this Agreement, Club agrees to contact Player’s Foreign Representative in an attempt to negotiate the dispute prior to any action. 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 (PIL), irrespective of the parties’ domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.”

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

¹ Decision of the Swiss Federal Tribunal 4P.230/2000 dated 7 February 2001, cons. 1, reported in ASA Bulletin 2001, p. 523 et seq., with reference to the decision of the Swiss Federal Tribunal dated 23 June 1992, BGE 118 II 353, 356, cons. 3b.

39. Similar arbitration clauses are also contained in the Patterson Agency Agreement (para. 5) and the Mbakwe Agency Agreement (para. 5).
40. 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). In particular, the wording “[a]ny dispute arising from or related to the present contract” in Art. X of the Player Contract and Art. 5 of both the Lamar and the MBakwe Agency Agreements clearly covers the present dispute.²
41. There is no arbitration clause in the License Agreement and in the League Contract. However, the claim and the counterclaim are entirely based on the Player Contract and not on the License Agreement or the League Contract. The Player Contract addresses all financial terms agreed between the Player and the Club, the mutual rights and obligations of the Club and the Player and also the conditions under which the Player Contract could be terminated. The License Agreement merely stipulates which of the payments addressed in the Player Contract were considered as license fees. None of the Parties referred to the License Agreement or the League Contract, and none of the Parties disputed the jurisdiction of the BAT to adjudicate the Club’s claim and the Player’s counterclaim.
42. The Agency’s claims regarding the Agency Fees relating to the Player and Mr. Mbakwe are actually not counterclaims but separate, albeit related, claims since the Agency is not a respondent to the Club’s claim. However, also the Agency’s claims are directed against the Club, i.e. the same respondent as in the counterclaim, and they are based on contracts which both contain a BAT arbitration clause.

² See for instance BERGER/ KELLERHALS: International and domestic Arbitration in Switzerland, Berne 2010, N 466.

43. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Club's claim, the Player's counterclaim and the Agency's separate claim for agency fees.

6. Applicable Law – *ex aequo et bono*

44. 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".

45. 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."

46. In their arbitration agreement in Art. X of the Player Contract and Art. 5 of the Patterson and the Mbakwe Agency Agreement, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono*. Consequently, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.

47. 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 of 1969³ (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

48. 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”.

7. Consolidation of the Proceedings

49. By procedural order of 22 May 2018, the Arbitrator decided to consolidate the Club’s claim and the Player’s Counterclaim into one single proceeding. Both claims affect the same parties, and they are based on the same Player Contract and the same arbitration agreement.

50. For the reasons addressed before at para. 42, the Arbitrator also finds that, as a matter of procedural efficiency, it is appropriate to include the claims based on the Agency Agreements in the consolidated proceedings.

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 KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Article 187 PILA N 289.

⁵ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

8. Reasoned Award

51. According to art. 16.2 BAT Rules, the Arbitrator shall issue an award without reasons if the value in dispute does not exceed EUR 100,000. The Club's claims amount to USD 100,000 which was below EUR 100,000 based on the currency exchange rate on the date of the Request for Arbitration. The Player has raised a counterclaim of USD 154,900, and the Agency's claims amount to USD 13,627.00. For the purpose of Art. 16 BAT Rules and given the consolidation of the proceedings, the value of all claims shall be added together. The combined value in dispute clearly exceeds the threshold of EUR 100,000, both at the date of the respective Requests for Arbitration and the date of the Award. Therefore, the Arbitrator issues a reasoned Award.

9. Findings

9.1 Termination of the Player Contract

52. The core question to adjudicate the Club's claim and the Player's counterclaim is whether or not the termination of the Player Agreement was justified.

53. The Club disputes that the letter of 13 March 2018 (i.e. the "Termination Letter") was a valid termination notice because it was signed by Mr. Ben Pensack without a special power of attorney and not by the Player himself. The Termination Letter on the letterhead of Pensack Sport was signed by Mr. Ben Pensack as the CEO of Pensack Sport. It was known and accepted by the Club from the beginning that Pensack Sport was representing the Player: Pensack Sport represented by Mr. Ben Pensack was a signatory of the Player Contract and also of the separate Agency Agreement with the Club. The power of Pensack Sport to represent the Player was not restricted in any way. In particular, there was no specific requirement that the

Player had to personally sign a termination notice. Also Clause IV.3 of the Player Agreement cannot be interpreted that way. There cannot have been any doubts that the Agency was generally empowered to represent the Player towards the Club. That is also confirmed by the text messages between the Club's representatives and Adam Pensack of Pensack Sports. Finally, the Player did not revoke the Termination Letter but rather signed a power of attorney for this arbitration in favour of Pensack Sport by which he implicitly confirmed any prior acts of his representative. The Arbitrator therefore finds that the Termination Letter was a valid expression of the Player's will to terminate the Player Contract as of 13 March 2018.

54. According to clause IV.3, *"Club agrees that Player may void this contract in the event that (A) any payment mandated by this Contract is past due for 30 (thirty) days, or (B) any non-economical clause is not performed by Club for 30 (thirty) days or longer. In such case, as soon as he makes such request in writing to any Club official, Player will be granted an unconditional release and free agency 72 (seventy two) hours after notice has been given, all monies due to Player during the entire term of this Contract shall become immediately due and payable."*
55. On the date of the Termination Notice (13 March 2018), the payment of USD 14,600 due by 10 February 2018 was unpaid since more than 30 days. The Club submits that this was not a salary payment but a compensation for the Player's image rights and therefore not a payment which could trigger the termination rights under Clause IV.3.
56. Clause IV.3 does not make a difference when it comes to the purpose of the payment which had remained unpaid. As a matter of fact, the Player Contract simply refers to the annual salary of USD 365,000 and the monthly instalments without mentioning the reason why the monthly instalments were split into payments of USD 14,600 and USD 21,900. All payments listed in Clause IV.3 are "mandated by this Contract", irrespectively of the fact that the image rights payments were also addressed by the License Agreement. Hence, the termination right can be invoked if any of the

contractual payments are overdue, whether these are salary payments or compensations for image rights.

57. The Club then submits that the Player applied the termination right of Clause IV.3 in bad faith since the Club paid the outstanding amount only one day after the Termination Letter. Indeed, the Club made payments on the following day. However, this does not change the fact that on the date of the Termination Letter, an amount of at least USD 14,600 was outstanding since more than 30 days and the Player was entitled to exercise the termination right. The payment by the Club on the following day did not invalidate the termination but may be considered as a circumstance which must be taken into account when determining the financial consequences of the termination.
58. The Club then argues that the Player was not entitled to exercise the termination right because he was himself in material breach of the Player Contract. Already on 2 February 2018, the media reported about the Player's endeavours to find a new club. He also repeatedly disregarded the disciplinary rules of the Club: On 26 November 2017, he arrived drunk at the team's training. Before the league match against Sassari on 26 January 2018 and again before the quarter-final match of the Italian Cup match against Florence on 16 January 2018, he spent the night with his girlfriend "without any authorization and contravening the specific directives of the Club." Finally, he left the Club on 14 March 2018 without any notice and whereabouts.
59. The Player's alleged disregard of the Club's directives to spend the night before a match in the team hotel may have constituted disorderly behaviour which the Club did not have to tolerate. While there is no evidence on record that the Club pursued the incident of 26 November 2017 and the overnighter outside of the team hotel on 24/25 January 2018, the Player was benched as a disciplinary sanction for his repeated refusal to spend the night in the team hotel on 14 and 15 January 2018. Justice was

done and the Club was barred from producing the same misbehaviour two months later to deny the Player's right to terminate the Player Contract.

60. The Player's attempts to find a new employer in the middle of the season constitutes a more serious issue since it may have raised legitimate doubts on the Player's loyalty and his motivation to devote himself to the Club's success. On the other hand, the evidence on record indicates that the Player's (and his Agency's) search for job offers had been triggered by the plans of the Club's new head coach and the Club's vice president who expected an improvement of the team's performance with another former NBA player, namely Vander Blue. Although the Club submits that it was its plan to have the Player and Vander Blue joining forces, the Arbitrator understands that the hiring of Vander Blue who plays on the same position as the Player, created the impression with the Player that he was no longer wanted. That impression was further fuelled by the facts that the coach no longer relied on the Player but favoured Vander Blue in the starting five, that Club representatives suggested to Mr. Adam Pensack that the Player should agree to an early termination of the Player Agreement and that the Club became late with the contractual payments to the Player.
61. The Arbitrator nevertheless finds that the Player's search for new job offers indeed constituted a breach of his duty of loyalty to the Club. However, the breach was not substantial under the circumstances since it was the Club which created the uncertainty about the Player's role in the team when it hired Vander Blue and it did nothing to restore the Player's confidence – to the contrary, as the text messages of the Club's vice president demonstrate. Under the circumstances, the Arbitrator does not consider the Player's breach so serious as to bar him from exercising his contractual termination right when the Club was late with the agreed payments.
62. *A fortiori*, the three incidents listed by the Club (the Player's search for a new club and his two overnights outside the team hotel before matches) did not invalidate the Player Contract from the beginning. The Club has no factual or legal justification to

retroactively terminate the Player Contract. The Arbitrator therefore concludes that the Player Contract was validly terminated by the Termination Letter of 13 March 2018.

9.2 The financial consequences of the termination of the Player Contract

63. Both Parties raise financial claims against each other, either in the Club's Request for Arbitration or by way of a counterclaim.
64. The Club claims a payment of EUR 50,000 as a compensation of its costs of replace the Player and a payment of EUR 50,000 as a compensation for immaterial and reputational damages. Since the Arbitrator found that the Player's termination of the Player Contract was justified by the Club's failure to pay the agreed salary instalments in time, the Club has no cause of action to claim damages. For the sake of completeness, the Arbitrator also finds that the Club has not demonstrated any loss as a consequence of the Player's departure: the Club had already hired a new player before the Player terminated the employment relationship and there is no evidence on record that the Player's publicly expressed discontent about the hiring of Vander Blue and his later departure actually caused a financial loss to the Club. The Club's compensation claims are therefore dismissed.
65. The Player claims a compensation for the loss of the contractual payments which amounts to USD 154,900 net. The Club disputes the Player's claim in its entirety but it does not contest the Player's calculation of the open amount. Indeed, upon justified termination of the Player Contract, the Player is entitled to the entire agreed amount until expiration of the contract (including bonus payments due as of termination date) from which the already paid instalments must be deducted. The compensation due to the Player therefore amounts to USD 154,900 net.

66. According to standing BAT jurisprudence, there are mainly two reasons why the Arbitrator should adjust the open amount, namely (1) the deduction of any alternative income which the Player earned during the remaining term of the Player Contract, and (2) a compensation for the Player's contributory fault, if his acts and omissions added to the circumstances which eventually led to the termination.

(a) Alternative income

67. Undisputedly, the Player signed an agreement with the Chinese club, Lhasa Jingtu on 24 May 2018 and played his first game with the new team on 13 June 2018. The Player did not comply with the Arbitrator's request to submit the new contract to verify the information from public sources.

68. The Player validly terminated the Player Contract with the Club by his Termination Letter of 13 March 2018. Thereafter, he was free to join a new club. Any alternative salary earned during the agreed term of the Player Contract must however be deducted from the compensation for the lost income. The Player contests that he must accept any such deduction because according to Clause II of the Player Contract, he was "free to leave the Club three days after the last Regular Season or Play-Off game, and after informing the Club." The Club did not qualify for the Play-Offs and played its last game on 9 May 2018. Without the early termination, the Player Contract would have been free to leave the Club three days later, namely on 12 May 2018, and he was entitled to sign a new contract on 24 May 2018. Therefore, there was no overlap of the two contracts.

69. Clause II of the Player Contract seems to conflict with the payment schedule in Clause IV.2 which stipulates unconditional monthly payments until 10 July 2018, irrespectively of whether the Club qualified for the Play-Offs and when it played its

last game in the 2017/2018 season. The Club therefore argues that the Player Contract did not end before 10 July 2018.

70. It is true that Clause II does not explicitly determine the final date of the Player Contract. It only allows the Player to leave the Club three days after the last game, whenever that was. According to Clause IV.1, the Player is entitled to a guaranteed salary for the 2017/2018 season of USD 365,000, irrespectively of the effective duration of the playing season. Clause IV.2 only determines the payment schedule but not the term of the contract. It is therefore irrelevant whether the payment schedule provided for the payment of instalments after the last game. The Player did not have to sit on his hands until 10 July 2018 until he obtained the last instalment of his total salary but was allowed to leave the Club without any further obligation which also means that he was free to join another club without compromising his right to the full guaranteed salary. It is not unusual that agreed payments remain due also after the expiration of the contract if the parties so agreed or if there is a payment delay. In the case at hand, the question became moot anyway when the Player validly terminated the Player Contract. Upon such termination, all contractual payments became immediately due, irrespective of any payment schedule. The Arbitrator therefore finds that the initial term of the Player Contract ended on 12 May 2018 irrespectively of the salary payment schedule. Payments which the Player received from his new club after 12 May 2018 but before the payment date of the last salary instalment due by the Club (10 July 2018) are not subject to any mitigation duty and do not have to be deducted from the compensation for lost salaries.

(b) Contributory fault

71. The Club complains about the Player's disorderly behaviour which led to the deterioration of their relationship. The Arbitrator has already addressed these allegations before and found that the two overnights outside the team hotel before

important games did not qualify as severe incidents which would trigger the serious consequences requested by the Club. However, he also found that the Player's blunt search for a new club already in February 2018, while the Player Contract was still in full force was a considerable act of disloyalty which must also have affected the Player's motivation to play to the best of his abilities. Furthermore, the Player did not do anything to repair the compromised relationship with the Club. The fact that a new American player was hired was no sufficient excuse but should have motivated the Player to defend his position in the team. In addition, the Player was not ready to re-think his position despite the Club's substantial payments immediately after the Termination Letter. Whether the Player's quick departure had anything to do with his new engagement with Llasa Jingtu remains speculation since the Player was not ready to submit the new player contract.

72. The Arbitrator finds that the Player's disloyal behaviour was a factor which eventually contributed to his separation from the Club. This must be taken into consideration when determining the financial consequences of the early termination of the Player Contract. The Arbitrator, deciding *ex aequo et bono*, finds that the Player must accept a deduction of 20 % from his otherwise due compensation. This amounts to USD 123,920.00.

9.3 The Agency Fee

73. The Agency claims due Agency Fees for its services related to the Player and to Trevor Mbawke in the total amount of USD 13,627. The total Agency Fee related to both players amounted to USD 40,625, payable on 30 December 2017. The Club made payments of USD 19,965 on 3 January 2018, and of USD 13,507 and USD 6,745 both on 7 February 2018. According to the Claimants, the balance amounts to USD 13,627.00, which the Arbitrator cannot follow at all. The Club however admits that it was late with the payment of the Agency Fees and stopped the payment

because of the incidents which led to the termination of the Player Contract. It acknowledges an open amount of USD 13,541.34.

74. According to the “invoice #4015” (Player’s exhibit 18), the balance amounted to USD 40,625 on 30 December 2017. The Player acknowledges receipt of USD 6,745 on or before 8 January 2017 which corresponds to the Club’s payment of EUR 5,673.88 on 29 December 2017. The Club alleges having made two further payments on 5 February 2018, namely EUR 5,473.52 corresponding to USD 6,815.53, and EUR 10,937.03 corresponding to EUR 13,618.60. This results in unpaid Agency Fees in the amount of USD 13,445.87. The difference to the Parties’ calculations may have been caused by different EUR/USD conversion rates. Since the Club acknowledges a debt of USD 13,541.34, this is the amount which it must pay to the Agency.

9.4 Interest

75. The Player requests “lawful interest” on the compensation without determining a starting date. The Player Contract does not stipulate an obligation to pay interest on overdue amounts to either Party. Nevertheless, 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. However, it is generally accepted that the obligee must request payment of interest from the obligor if not agreed in the underlying agreement in advance or where the contract makes it clear that the parties intended that performance take place at or before a precise point in time.
76. The Player has requested payment of interest in the Request for Arbitration, on an amount which was determined by this award. The BAT is applying a default interest rate of 5% p.a. The starting date is the day following the due date of the February 2018 payment for the amount of USD 14,600.00 (11 February 2018) the due date for

the March 2018 payment for the amount of USD 36,500.00 (11 March 2018) and the day following the termination date for the remaining amount of USD 80,565.00 (14 March 2018).

77. The second instalments of the Agency Fees became due on 30 December 2018. Interest of 5% p.a. on USD 13,541.34 is therefore due since 31 December 2018.

9.5 Summary

78. The Player Contract was validly terminated by the Termination Note of 13 March 2018. The Club owes the Player a compensation of USD 154,900.00 which is reduced by 20% because of the Player's contributory fault. This results in a due amount of USD 123,920.00 plus interest of 5% on USD 14,600.00 since 11 February 2018, on USD 36,500.00 since 11 March 2018 and on 72,820.00 since 14 March 2018.
79. The Agency shall be entitled to the unpaid part of the Agency Fees related to the Player and to Trevor Mbawke in the total amount of USD 13,541.34 plus interest of 5% since 31 December 2017.

10. Costs

80. 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 rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

81. On 16 October 2018 - 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 9,957.78.
82. Considering the outcome of the case, the Arbitrator finds it fair that the fees and costs of the arbitration consisting of the Club’s claim, the Player’s counterclaim and the Agency’s claim for Agency Fees shall be borne 85% by the Club and 15% jointly by the Player and the Agency.
83. The Club claims legal costs of EUR 11,000.00 and the Player and the Agency claim legal costs of EUR 10,000.00. According to Art. 17.4 BAT Rules, the maximum contribution to a party’s reasonable legal fees and other expenses (excluding the non-reimbursable handling fee) shall be EUR 10,000.00. In case of multiple Claimants and/or Respondents, the maximum contribution is determined separately for each party.
84. In consideration of the outcome of the arbitration, but also in view of the Player’s refusal to comply with the Arbitrator’s request for the player contract with Lhasa Jingtū, the Arbitrator finds that the Player shall be entitled to a contribution to his legal fees of EUR 8,000.00 (including his share of the non-reimbursable handling fee), the Agency shall be entitled to EUR 1,000 (including its share of the non-reimbursable handling fee) while the Club shall bear its own legal costs.

11. AWARD

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

- 1. Auxilium Pallacanestro Torino S.p.A. is ordered to pay to Mr. Lamar Patterson the amount of USD 123,920.00 (net), plus interest of 5% p.a. on USD 14,600.00 since 11 February 2018, on USD 36,500.00 since 11 March 2018 and on USD 72'820.00 since 14 March 2018.**
- 2. Auxilium Pallacanestro Torino S.p.A. is ordered to pay to Pensack Sports the amount of USD 13,541.34 (net) plus interest of 5% p.a. since 31 December 2017.**
- 3. Auxilium Pallacanestro Torino S.p.A. is ordered to pay jointly to Mr. Lamar Patterson and Pensack Sports the amount of EUR 3,464.11 as a reimbursement of their advance on arbitration costs.**
- 4. Auxilium Pallacanestro Torino S.p.A. is ordered to pay to Mr. Lamar Patterson the amount of EUR 8,000.00 as a reimbursement of his legal costs and expenses.**
- 5. Auxilium Pallacanestro Torino S.p.A. is ordered to pay to Pensack Sports the amount of EUR 1,000.00 as a reimbursement of its legal costs and expenses**
- 6. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 23 October 2018



BASKETBALL
ARBITRAL TRIBUNAL

Stephan Netze
(Arbitrator)