BASKETBALL
ARBITRAL TRIBUNAL

CORRECTED ARBITRAL AWARD

(BAT 0779/15)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Annett Rombach

in the arbitration proceedings between

Mr. Nikoloz Tskitishvili

- Claimant 1 -

EPM Sports Consultants Limited
14 Via degli Aceri, 47892 Gualdicciolo, San Marino

- Claimant 2 -

Mr. Aydin Dianat

- Claimant 3 -

all represented by Mr. Eran Shimony, attorney at law,
20 Lincoln Street, Tel Aviv, Israel

vs.

Fujian SBS Basketball Club Co., Ltd.
Fujian SBS Sports Center, 362200 Jinjiang City, Fujian Province, China

- Respondent -

represented by Messrs. Juan de Dios Crespo Pérez and Augustín Amorós Martínez, attorneys at law, Avda. Reino de Valencia 19, 4, 46005 Valencia, Spain

1. The Parties

1.1 The Claimants

1. Mr. Nikoloz Tskitishvili (the “Player” or “Claimant 1”) is a professional basketball player of Georgian nationality.

2. EPM Sports Consultants Limited (the “First Agent” or “Claimant 2”) and Mr. Aydin Dianat (the “Second Agent” or “Claimant 3” and together with Claimant 1 and Claimant 2 the “Claimants”) are basketball agents who represented the Player leading to his retainer by the Respondent.

1.2 The Respondent

3. Fujian SBS Basketball Club Co., Ltd. (the “Club” or “Respondent” and together with Claimants the “Parties”) is a professional basketball club located in Jinjian City, China.

2. The Arbitrator

4. On 18 December 2015, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Ms. Annett Rombach as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the "BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. On 9 October 2015, the Player and the Club entered into a contract (the "Player Contract"), pursuant to which the Club engaged the Player as a professional basketball player for the 2015-16 season. Clause 1 of the Player Contract provided the following:

> *"Player must Report* [sic] *to Club before Oct 12th 2015 and have two days tryout after landing in the Club's city. Player will be an employee of Club from the date player report to team, to the last official game of the 2015-16 season."*

6. The Player was to receive a base salary of USD 500,000.00 (net), payable in six instalments starting from 22 October 2015 (Clause 3). The salary payments were "*fully-guaranteed*" against injury, illness or any other inability to perform (Clause 1). Furthermore, he was promised certain success-related bonuses.

7. Three days earlier, on 6 October 2015, the Player's agents – Claimants 2 and 3, and Mr. Feng Kai-Li – had executed a contract with the Club (the "Agents Agreement"), pursuant to which the Club agreed to pay the agents a fee in consideration for their promise "*to secure*" the Player for the Club. The agents were to be paid the following net commission fees (Clause 3)a) Agents Agreement):

- Claimant 2: USD 34,000.00
- Claimant 3: USD 6,000.00
- Mr. Kai-Li: USD 10,000.00

8. The commission fees became payable "before" 30 November 2015, Clause 3) a).

9. The Player landed in China on 10 October 2015 (evening) and reported to the Club soon after his arrival.

10. On 11 October 2015, at the request of the Club, the Player participated in a game against the Chinese team Shandong Flaming Bulls. He scored 14 points and collected 3 rebounds.

11. On 12 October 2015, again at the Club's request, the Player participated in a morning practice session with the team, which lasted about three hours.

12. On 13 October 2015, the Player participated in another game against Shandong Flaming Bulls. He played 15 minutes.

13. On 13 or 14 October 2015 – the exact date is in dispute between the Parties – the Club's director manager, Ms. Wu Bolan, tried to deliver a termination letter to the Player's agents – Claimant 3 and Mr. Kai-Li (the "Termination Letter") – during a meeting in the Player's hotel. The agents refused to sign the Termination Letter.

14. On 15 October 2015, a representative of the Player sent an e-mail to the Club's director manager, stating the following (in relevant part):

> *"Our Iranian associate Mr Aydin Dianat and our Chinese associate in the Nikoloz Tskitischvili agreement informed us of your final decision to terminate unilaterally the contract with our client and 6 years NBA player Nikoloz Tskitischvili after the try out expired. […] I urge you to speak to your owner and have him come to reason before it is too late. I am aware you have booked a flight for Nikoloz to go back home on the 17th so you have till tomorrow to change this decision."*

15. Claimants did not receive any response to this e-mail. On 17 October 2015, the Player left China on a plane ticket booked by the Club.

16. On 23 October 2015, the Player signed an employment agreement with Link Sports Entertainment Inc., which runs the Japanese club LINK Tochigi BREX (the "LSE Contract"). Pursuant to the LSE Contract, the Player was engaged as a basketball player by the club for the 2015-16 season, and was to earn a total base salary of

USD 126,000.00 (net). Claimant 2 was to receive a commission fee of 10% of the Player's net salary (USD 12,600).

17. On 21 December 2015, the Player signed an "agreement on cancellation" of the LSE Contract (the "LSE Termination Agreement"). Pursuant to the Termination Agreement, the Player and LSE agreed "*to cancel the contract*" with both parties being released from any further obligations under the LSE Contract. No reason for the termination of the LSE Contract is mentioned in the LSE Termination Agreement.

18. One day earlier, on 20 December 2015, the Player had signed an employment contract with the Lebanese club Champville for the remainder of the 2015-16 season. He was to earn a net base salary of USD 90,000 for his services thereunder.

19. Around 3 April 2016, the Player signed an employment contract with the Iranian Club Chemidor Iran for the remainder of the 2015-16 season. He was promised a base salary of USD 25,000 (net).

20. Pursuant to a declaration submitted by the Player in this arbitration, he received the following salary amounts for the 2015-16 season after his departure from China:

    - USD 30,000 under the LSE Contract
    - USD 65,500 under the employment contract subsequently concluded with the Lebanese club Champville
    - USD 25,000 under the employment contract subsequently concluded with the Iranian club Chemidor Tehran
    - Total: USD 120,500.00.

3.2 The Proceedings before the BAT

21. On 7 December 2015, the Claimants (together with a fourth claimant, Mr. Feng Kai-Li, who later withdrew from these proceedings (see below at para. 36)), filed a Request for Arbitration together with several exhibits in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 4,000 was received in the BAT bank account on the same day.

22. On 12 January 2016, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited the Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 2 February 2016 (the "Answer"), and fixed the amount of the Advance on Costs to be paid by the Parties as follows:

"Claimant 1 (Mr. Nikoloz Tskitishvili)	*EUR 5,000.00*
Claimant 2 (EPM Sport Consultants)	*EUR 500.00*
Claimant 3 (Mr. Aydin Dianat)	*EUR 500.00*
Claimant 4 (Mr. Feng Kai-Li)	*EUR 500.00*
Respondent (Fujian SBA Basketball Club)	*EUR 6,500.00"*

23. On 2 February 2016, Respondent filed its Answer, including several exhibits and witness statements. Respondent also requested the holding of a hearing for the examination of the witnesses offered by it.

24. On 3 February 2016, BAT acknowledged receipt of Claimant 1-3's shares of the Advance on Costs and the Answer. Furthermore, BAT noted that Claimant 4, Mr. Feng Kai-Li, and Respondent had failed to pay their respective shares. Claimants were invited to substitute for the missing shares to ensure that the arbitration could proceed.

25. On the same day, Claimants requested an extension of the time limit for the payment of Mr. Kai-Li's and Respondent's share of the Advance on Costs. The Arbitrator granted the request on 8 February 2016. In addition, the Arbitrator forwarded Respondent's

Answer to Claimants and invited them to comment thereon by 1 March 2016 (the "Reply"). The time limit for Claimants' Reply was extended until 10 March 2016 upon Claimants' request dated 24 February 2016.

26. On 8 March 2016, Claimants filed their Reply, including further evidence and witness statements.

27. On 29 March 2016, the BAT Secretariat acknowledged receipt of the full Advance on Costs (with Claimants having substituted for Mr. Kai-Li's and Respondent's shares). Respondent was invited to comment on Claimants' Reply and to address certain specific issues identified by the Arbitrator (the "Rejoinder"). Claimant was invited to comment on Respondent's hearing request. Furthermore, the Arbitrator addressed the Parties as follows:

> *"*[T]*he Arbitrator takes note of the fact that both Parties have submitted witness statements in support of their factual allegations. The Arbitrator herewith requests both Parties to submit from each witness who has presented a witness statement in this case a sworn affidavit, in which the respective witness declares, before a local notary (or an equivalent, as applicable), under oath that the information provided in the witness statement is (to the best of the witnesses' knowledge) true, correct and complete."*

28. On 10 April 2016, Claimants commented on Respondent's hearing request and requested an extension of the time limit for filing the sworn affidavits of their witnesses. The Arbitrator granted the request.

29. On 17 April 2016, Claimants filed sworn affidavits of Claimant 1 and Claimant 3.

30. On 19 April 2016, within the (extended) time limit, Respondent filed its Rejoinder together with sworn affidavits of its witnesses. Respondent reserved the right to submit further witness statements.

31. On 21 April 2016, Respondent submitted a witness statement of Mr. Kai-Li.

32. On 2 May 2016, the Arbitrator issued a Procedural Order in which she exceptionally admitted the belated witness statement of Mr. Kai-Li, but also reminded the Parties to adhere to the time limits set by BAT. The Arbitrator further requested that Claimants submit a Power of Attorney for Mr. Kai-Li (who had been named as a claimant), and informed them that Mr. Kai-Li would be officially taken off the case without proof of a proper Power of Attorney signed by him. Furthermore, with respect to Respondent's hearing request, the Arbitrator – exercising her discretion under Article 13 BAT Rules – suggested to conduct a hearing by videoconference. The Parties were invited to confer with respect to the logistics of the hearing.

33. On 3 May 2016, Claimants informed BAT that they agreed to the removal of claimant Mr. Kai-Li from the case and requested a reimbursement of Mr. Kai-Li's share of the Advance on Costs, which had been advanced by them.

34. On 4 May 2016, Respondent filed a sworn affidavit by Mr. Kai-Li.

35. On 11, 12 and 13 May 2016, the Parties filed comments with respect to the proposed hearing.

36. On 23 May 2016, the Arbitrator issued a Procedural Order confirming the removal of Mr. Kai-Li as a party of the case. Furthermore, with respect to the envisaged hearing, the Arbitrator informed the Parties that a one day hearing shall take place, to be conducted by videoconference. Respondent, as the party requesting the hearing, was requested to pay an additional Advance on Costs (EUR 3,000) to cover the expected additional expenses.

37. On 26 May 2016, Respondent withdrew its request for the holding of a hearing. Claimants were invited to comment thereon.

38. On 7 June 2016, Claimants commented on Respondent's withdrawal of its hearing request.

39. On 13 June 2016, the Arbitrator issued the following Procedural Order:

> *"After careful consideration of the Parties' statements, the Arbitrator informs the Parties that she upholds her decision of 23 May 2016 that a hearing shall be held. The case contains disputed factual issues for which both Parties have offered witness testimony which directly contradicts each other. The Arbitrator believes that these contradictions may best be addressed during a hearing and an oral examination of the relevant witnesses. Pursuant to Article 13.1 BAT Rules, the Arbitrator may decide to hold a hearing after the consultation of the Parties. This includes the possibility to hold a hearing without that the parties have requested it."*

40. The Arbitrator further addressed certain logistical items (date, time, witnesses to be examined) and again requested Respondent, which had not paid any portion of the Advance on Costs thus far, to pay the additional advance for the hearing in the amount of EUR 3,000.

41. By Procedural Order dated 29 June 2016, and in consideration of further comments and suggestions by the Parties on the hearing logistics, the Arbitrator confirmed receipt of the additional Advance on Costs, paid by Respondent (EUR 2,985.00), and proposed alternative hearing dates.

42. On 19 July 2016, after the Parties had filed additional comments, the Arbitrator determined that the hearing shall take place on 27 July 2016, 9 a.m. (CET). She further provided information with respect to the agenda, logistics, and technical requirements for the hearing. Respondent was invited to provide information on its translators (English – Chinese / Chinese – English).

43. On 25 July 2016, upon request by Respondent and with Claimants' consent, the hearing was postponed to 28 July 2016, 9 a.m. (CET). The Parties were provided with the necessary log-in information for the videoconferencing system.

44. On 27 July 2016, Respondent provided information about the translator it intended to bring to the hearing.

45. On 28 July 2016, a hearing took place by video conference. The following people were present at the hearing:

- Mr. Nikoloz Tskitishvili, Claimant 1
- Mr. Aydin Dianat, Claimant 3
- Mr. Eran Shimony, counsel for Claimants
- Mr. Feng Kai-Li, witness for Respondent
- Mr. Zhu Shilong, witness for Respondent
- Ms. Wu Bolan, Respondent's director manager
- Mr. Augustín Amorós Martínez, counsel for Respondent
- Mr. Chen Xinwei, translator for Respondent
- Ms. Annett Rombach, BAT Arbitrator
- Dr. Heiner Kahlert, BAT Secretariat
- Ms. Carmen Paulsen, BAT Secretariat
- Mr. Blake Hamm, BAT Secretariat (intern)
- Mr. Mathieu Laplante-Goulet, BAT Secretariat (intern)

46. The Arbitrator opened the hearing by giving a brief introduction on the merits and by discussing certain organizational and procedural issues, followed by opening statements given by the Parties' counsel. After the opening statements, the following parties and witnesses were examined (first by the Arbitrator, followed by questions from the party representatives):

- Mr. Nikoloz Tskitishvili (Claimant 1)
- Mr. Aydin Dianat (Claimant 3)
- Mr. Feng Kai-Li (the Player's Chinese Agent, offered by Respondent)
- Mr. Zhu Shilong (the Club's assistant coach, offered by Respondent)
- Ms. Wu Bolan (Respondent's director manager)

47. The party and witness examinations were followed by closing statements by the Parties' counsels. The Parties agreed to waive the opportunity of submitting Post Hearing Briefs. The Arbitrator concluded the hearing by informing the Parties that further written submissions would follow solely with respect to the quantum of any potential claims by Claimants.

48. By Procedural Order dated 1 August 2016, the Arbitrator invited Claimants to submit comments and evidence on the steps taken to find new employment for the Player after he had left China.

49. On 8 August 2016, Claimants submitted their comments with respect to the Player's damages mitigation efforts. Respondent was invited to comment on Claimants' submission.

50. On 17 August 2016, Respondent submitted its comments on the damages mitigation issue.

51. By Procedural Order of 18 August 2016, the Arbitrator closed the proceedings and invited the Parties to submit their detailed cost accounts.

52. On 20 August 2016, Respondent submitted its cost account and requested the re-opening of the proceedings in order to clarify the circumstances of the Player's mutual termination of his employment with the Japanese club which he had joined after leaving China.

53. On 21 August 2016, Claimants submitted their cost account.

54. On 25 August 2016, the Arbitrator granted Respondent's request for a re-opening of the proceedings and addressed the Parties as follows:

> *"The Arbitrator notes that for the purpose of calculating the quantum of any damages the Player might have sustained (in case there is a finding of liability on the part of the Club), disclosure of all evidence showing the Player's earnings in the 2014/15 season is essential. The Player is required to produce any such evidence.*
>
> *Accordingly, because experience dictates that an early termination of a fully-guaranteed employment in the middle of the season often comes with a settlement agreement (and the payment of a settlement amount), the Claimants are herewith requested to produce any such settlement agreement with the Japanese Club, or to explain why no such settlement agreement exists.*
>
> *Additionally, the Player is herewith requested to submit a signed declaration confirming the total amounts earned in the 2014/15 season. For the sake of good order, the Arbitrator notes that she might initiate own investigations if deemed necessary."*

55. On 29 August 2016, Respondent submitted comments on Claimants' cost account.

56. On 7 September 2016, Claimants submitted their comments on the Arbitrator's Procedural Order of 25 August 2016, and comments on Respondent's cost account. Respondent was invited to comment on Claimants' submission.

57. On 26 September 2016, Respondent submitted its comments.

58. On 11 October 2016, the Arbitrator declared the exchange of documents to be completed and closed the proceedings definitely.

4. The Positions of the Parties

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

4.1 Claimants' Position

60. Claimants submit the following in substance:

- The Club had no right to terminate the Player Contract based on the try-out provision. The try-out provision does not mention a corresponding right to terminate the Player Contract in case of the Player's failure to pass the try-out. Because the Club dictated the language of the Player Contract, it would have been required to expressly link its alleged termination right to the try-out.
- Even if the Club had a right to terminate the Player Contract upon the Player's not passing the try-out (*quod non*), it has not validly exercised this right in a timely manner.
- The try-out period started with the Player's landing in China on 10 October 2015 and ended two days later, on 12 October 2015.
- Between 10 and 12 October 2015, it was never communicated to the Player or his agents that the Club was dissatisfied with the Player's performance, or that the Player failed the try-out. The agents never asked the Club for a "second chance". The Player participated in the games and practices upon the Club's requests.

- Everyone understood that the game on 13 October 2015 was not any more part of the try-out, which the Player had already passed.
- Claimant 3, in his function as the Player's agent, was first approached by the Club about the termination of the Player Contract on 14 October 2015, two days after the expiry of the try-out period. Claimant 3 refused to accept a letter the Club intended to deliver to him in respect of the termination.
- Respondent failed to submit any written evidence proving its allegation that the decision to waive the Player was duly communicated before 14 October 2015. The testimony of Respondent's witnesses contains substantial discrepancies and is, therefore, not credible.
- The Player's agents made every possible effort to find the Player a new club as quickly as possible after his unjustified release.
- BAT has jurisdiction over Claimant 3's claim. Claimant 3 was involved in the negotiation and execution of the Player Contract, and the Club addressed him as the Player's agent. The assertion that he was not a party to the Agents Agreement is, therefore, baseless.

61. Claimants request the following relief:

> *"44.1. To order the Club to pay the Player a sum of USD 374,000, which reflects the difference between the Player's net salary under the Player Contract (USD 500,000) and his net salary under the New Contract (USD 126,000).*
>
> *44.2. In addition and pursuant to Article 3 of the Player Contract - to order the Club to pay the Player a net fee of USD 200, for each day of delay in payment of the Player's salary, commencing on October 22, 2015 and until full payment of the amount mentioned in Article 39.1 above.*
>
> *44.3. To order the Club to pay the Agents a sum of USD 37,400, which reflects the difference between the total payment due to the Agents from the Club under the Agents Contract (10% of the Player's net salary in the Player Contract - USD 50,000) and the payment due to the Agents under the New*

Contract (10% of the net salary of the Player under the New Contract - USD 12,600). Pursuant to section 3(c) of the Agents Contract,
this amount shall accrue 5% annual interest as of November 30, 2015.

44.4. To order the club to reimburse the Claimants for all expenses incurred by them, including all costs related to the arbitration proceedings, as well as attorney's fees."

4.2 Respondent's Position

62. Respondent submits the following in substance:

- BAT does not have jurisdiction to decide the present case with respect to Claimant 3, because Claimant 3 did not sign the Agents Agreement.
- It is clear that the legal consequence of the Player's failure to pass the try-out was the termination of the Player Contract. There was no need to mention such legal consequence expressly in the contract, because try-out clauses are widespread and commonly used in the world of basketball. It is common knowledge that such clauses are intended to give a club the right to waive a player which the try-out proves is not satisfactory for the club. The Player himself is familiar with such clauses, and had in fact failed another try-out with NBA team L.A. Clippers just before he joined Respondent.
- The Club validly waived the Player during the try-out period. The Player was duly informed about the Club's decision on 13 October 2015 by the latest, at which time the try-out period had not yet expired.
- The try-out period started upon the Player's first appearance at the first game – in the evening of 11 October 2015 – and expired on 13 October 2015.
- The technical staff of the Club did not like the Player's performance in the first game on 11 October. The Coach and the Club's manager told Mr. Kai-Li after the first game that the Player failed to pass the try-out. However, upon the

agents' request, the Player received a second chance and was allowed to play another game on 13 October. Because the coaches were not convinced of the Player also in the second match, they decided to waive him and explained the situation to him and his agents immediately after the match.

- Still on the same day, the Club's director manager tried to deliver a notice of termination to Claimant 3 and Mr. Kai-Li. The agents refused to accept the letter.
- The Club was fully convinced that the try-out period was still running on 13 October 2015, and this was also the understanding of the Player and his agents.
- Nothing prevented the Club from communicating the Player's failure to pass the try-out after the expiration of the try-out period. The Player Contract provided that the period for the try-out (i.e. the time the Player was expected to be available for the Club to test his shape) was two days, but did not require that the Club's decision about the passing of the try-out had to be communicated within this time frame.
- The Player finally accepted the termination of the employment by leaving China on 17 October 2015.
- The Player's failure to pass the try-out period also affects the Agents Agreement, the validity of which is directly linked to the validity of the Player Contract. The agents are not entitled to any fee in the event of a failure of the try-out period. Furthermore, their commission fee was conditioned upon a successful passing of the medical exam. No such medical exam was ever conducted.

63. Respondent requests the following relief:

> *"(i) To declare the lack of jurisdiction of this Arbitral Tribunal in connection with the claims filed in this proceeding by Mr. Aydin Dianat and Mr. Feng Kai-li"*

(ii) To fully dismiss the Request for Arbitration filed by the rest of the Claimants.

(iii) To condemn the Claimants to pay the whole arbitration costs and arbitrator fees.

(iv) To condemn the Claimants to pay legal fees and expenses incurred by the Respondent in connection with the proceeding, in a range of a minimum of EUR 20.000."

5. The Jurisdiction of the BAT

64. Pursuant to Art. 2.1 of the BAT Rules, *"[t]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland".* Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law ("PILA").

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

66. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Art. 177(1) PILA.

67. The Player Contract (Clause 5) contains the following dispute resolution clause in favor of BAT:

> *"In the event of any dispute in relation to this Agreement, Club agrees to contact Player's Representative in an attempt to negotiate the dispute prior to any action.*
> *Any dispute arising from or relating 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."*

68. The Agents Agreement provides for the following dispute resolution clause (3 e):

> *"Any dispute arising from or relating 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"."*

69. Both arbitration agreements are in written form and thus fulfill the formal requirements of Article 178(1) PILA. For the formal validity of these (written) agreements, it is not necessary that they have been signed by the Parties.[1]

70. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity of the arbitration agreements in the present matter under Swiss law (cf. Article 178(2) PILA).

71. However, Respondent has challenged BAT's jurisdiction with respect to Claimant 3, because Claimant 3 has not signed the Agents Agreement. On the level of substantive validity, this argument could only be successful if Respondent were able to show that Claimant 3 did not submit to the arbitration agreement, i.e. had no intent to be bound by it. Respondent has not made any such showing. In fact, based on the record before her, the Arbitrator is convinced that Claimant 3, although he failed to sign the contract, validly concluded the Agents Agreement. The Club communicated with him on a frequent basis, and he was one of the representatives travelling to China with the Player. Additionally, the Club tried to deliver the Termination Letter to him, which evidences that the Club considered Claimant 3 to be one of the Player's agents.

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[1] SFT 128 III, 50, 53; SFT 4P124/2001, para 2c, 20 (published at ASA Bulletin 2002, 88, 91).

Accordingly, the Arbitrator finds that a valid arbitration agreement exists between Claimant 3 and Respondent.[2]

72. Therefore, the Arbitrator decides that she has jurisdiction to decide the present case.

6. Applicable Law – *ex aequo et bono*

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

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

74. 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."*

75. In Clause 5 of the Player Contract and Clause 3) e) of the Agents Agreement, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to her in this proceeding *ex aequo et bono*.

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

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[2] With respect to the formal validity of a written, yet not signed, arbitration agreement under Swiss law see above at para. 69.

7. Findings

77. Claimants request salary compensation for the Player in the amount of USD 374,000.00, plus late payment penalties (below at 7.1.), and agent fees for the agents in the amount of USD 37,400.00, plus interest (below at 7.2.).

7.1 The Player's claim for salary compensation and late payment penalties

78. Two main aspects need to be addressed in respect of the Player's compensation claim: First, whether the Player Contract survived the try-out period, or whether it was terminated as a result of the Club's alleged notice to the Player that he did not pass the try-out (below at 7.1.1.) and second, if applicable, the quantum of any potential compensation claim, specifically in respect of BAT's applicable damages mitigation principles (below at 7.1.2.). Lastly, the Arbitrator will analyze late payment penalties and interest (below at 7.1.3.).

7.1.1 The validity of the Player Contract

79. The central issue which the Arbitrator needs to resolve in deciding whether the Player has a justified claim for salary compensation for the 2015-16 season is whether the Player Contract was terminated in October 2015 as a result of the Club's alleged exercise of the try-out option contained in Clause 1 of the Player Contract (quoted above at para. 5).

80. Claimants maintain that the Player Contract was fully guaranteed, that the try-out provision had no legal significance, and that in any event the Club failed to exercise any try-out option in a timely manner. Respondent, on the other hand, argues that the Player did not pass the try-out, that the Club properly communicated his failure to pass the try-out in due time, and that the Player Contract immediately ended as a result, depriving the Player of any salary claims thereunder.

81. The Arbitrator's review in respect of the try-out is three-fold (below at (i.) to (iii.)): (1) What is the legal significance of the try-out provision? Does it – in principle – allow the Club to release the Player if it is unhappy with his performance during the try-out? (2) When did the try-out period end? (3) Did the Club properly exercise the try-out option?

(i) What is the legal significance of the try-out provision?

82. Pursuant to Clause 1 of the Player Contract, the Player was to "*have two days of tryout after landing in the Club's city*." In the Claimants' view, because the Player Contract is silent with respect the consequences of a failed try-out, the Club had no right to withdraw from the contract, even if as a result of the try-out, it was no longer interested in the Player's services. Had the Parties intended to condition the existence of the Player Contract on the successful passing of the try-out, they would have – and they should have – expressly mentioned that consequence.

83. The Arbitrator finds that the significance of the try-out clause was to provide the Club with a temporal right to release the Player and to terminate the Player Contract within the stipulated two day time period. Try-out clauses are widely established and used in the world of sports, and – more specifically – in the world of basketball. Clubs have a legitimate interest in testing a player's sportive skills and physical fitness before committing to a fully guaranteed contract with almost no opportunity to release that player during the designated term when the club is not satisfied with his performance. It is common sense and common understanding within the basketball community that try-out periods have the purpose of allowing a club to walk away from a contract during a specified (usually very short) time-window at the very beginning of the contractual term, and to avoid thereby that it "buys the pig in the poke".

84. Additionally, Claimants' interpretation would render the try-out clause entirely meaningless. There is no apparent reason why the Parties would have provided for a

clause that does not trigger any legal consequence. A try-out without a corresponding right to release the Player would not make any sense.

85. Accordingly, the Arbitrator is of the view that the try-out provision principally allowed the Club to withdraw from the Player Contract, if properly exercised within the designated time period.

(ii) What was the time limit for the exercise of the try-out provision?

86. Next, the Arbitrator needs to determine for which period of time the Club was allowed to exercise the try-out option. The Parties take different positions in this respect. Claimant maintains that the try-out clause needs to be interpreted narrowly and strictly, and that according to the clear language of the contract ("*two days of tryout after landing in the Club's city*"), the try-out period began on 10 October and expired on 12 October at midnight. Respondent, on the other hand, maintains that the try-out period started to run only when the Player met the team for the first time before the first test game, which happened in the evening of 11 October, and that it expired two days later, on 13 October (midnight) at the earliest. Respondent further argues that even if one interpreted the contract in Claimants' sense, the try-out period did not expire before the end of the day on 13 October, because the Parties had a mutual understanding to treat the clause flexibly, and the Club had agreed to extend the try-out at the Player's request after the first game. Both Claimants and Respondent submitted witness testimony in support of their respective positions.

87. Starting with the contractual language, the Arbitrator finds that Clause 1 of the Player Contract is rather clear and unambiguous. The Player was to have "*two days of tryout after landing in the Club's city*". It is undisputed that the Player landed in Jinjang City in the evening of 10 October. Finding that "*after landing*" means on the next day after the Player arrived in the Club's city, the try-out period started at 0:00 a.m. on 11 October and ended 48 hours (2 days) later, on 12 October at midnight. Respondent's

proposition that the clause would only make sense if the try-out period were to start when the Player first met the team, because the Player could otherwise "*pass the trial period in the hotel room, irrespective of whether he plays or not*", finds no basis in the contractual language.

88. In the Arbitrator's view, under the present circumstances and contrary to what Respondent suggests, there is no room for a broad interpretation of the try-out provision beyond the precise wording of Clause 1. Respondent does not dispute that the provision was included in the contract at its request. In fact, the Club is the sole beneficiary of this clause, because the Player does not have any interest in having the validity of his employment conditioned upon the successful passing of a probation period (no matter how short). Because the Club dictated the terms and wording of the try-out clause – a clause that serves solely its own interest – it must adhere to the language suggested by it and cannot request subsequently a broader interpretation that is disadvantaging the Player. Furthermore, the principle of contractual stability warrants that clauses which touch upon the existence of the parties' legal relationship be predictable and interpreted accordingly.

89. The Arbitrator concedes that this interpretation may – in an extreme case – result in the Player "*passing the trial period in the hotel room*", or at least in limited opportunities for the Club to really test the Player. However, contrary to what Respondent argues, such consequence would not be absurd, because it is by nature the Club's risk to make an efficient use of the try-out, and to make sure that it can see as much as possible of the Player during the stipulated try-out period. Try-out provisions deviate from the contractual "default position" of an employment relationship becoming effective unconditionally upon the execution of the agreement. They exceptionally provide the employer with a right to walk away from a contract which would otherwise be binding *ab initio* for a longer period of time. Whether the opportunity to test a player is used efficiently is the employer's choice and, ultimately, risk. Unless expressly stipulated otherwise in the contract, the employer cannot shift that risk to the employee.

90. To avoid the consequence of the Player "*passing the trial period in the hotel room*", the Club could have tried to negotiate a longer try-out period,[3] or to introduce a different reference point for the beginning of the period (e.g. the Player's first meeting the team, his first practice or first game). The Club cannot later cure a clause it now deems imperfect, simply because the agreed period turned out to be too short for its purposes.

91. As a result, the Arbitrator accepts the Claimants' position and finds that the try-out period ended two days after the Player's landing in China, on 12 October 2015 at midnight.

92. The question remains whether the Parties (expressly or tacitly) agreed to extend the try-out period beyond 12 October 2015. It is undisputed that no written agreement exists to that extent. Respondent maintains that the Club, which was allegedly ready to waive the Player already after the first game on 11 October 2015, agreed to extend the probation period to the second game upon the express requests of the agents. Respondent offered witness testimony by its coaches, the director manager, and Mr. Kai-Li in support of this allegation. Claimant 1 and Claimant 3 contradicted the version of Respondent's witnesses both in writing and orally (during the hearing).

93. It can be left undecided here whether or not the Club really agreed to extend the probation period at the agents' request. Such an oral understanding would in any event be insufficient under the terms of the Player Contract. Clause 7 provided that "[t]*his Agreement can be amended only in writing*" (sub-paragraph 1), and that "[a]*ny amendments and supplements should be in writing*" (sub-paragraph 3). Accordingly, any extension of the try-out period stipulated in Clause 1 of the Player Contract ("*two days tryout after landing in the Club's city*") would have to be perpetuated in writing to

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[3] As testified by Claimant 3, Mr. Dianat, during the hearing, try-out periods in Basketball often take 7 or 10 days, but the Club, in this case, was content with a two day period and the opportunity to see the Player in one game and one practice.

be binding upon the Parties. An oral agreement is insufficient and inappropriate to amend the Parties' written agreement.

94. Additionally, as will be addressed in more detail now, the Arbitrator is not convinced of the portrayal of facts offered by Respondent's witnesses in respect of the communications which happened between the Parties between 11 October and 13 October. This includes the communications after the first game, when the Player and his agents were allegedly informed for the first time that the Player did not pass the try-out. This issue will be discussed now.

(iii) Did the Club properly exercise the try-out option?

95. Respondent alleges that its head coach and director manager informed the Player and his agents already after the first game that he has not passed the try-out. It was – according to Respondent – only due to the agents' insistence that the Club agreed to give the Player "a second chance" to prove that he fits into the team. Claimants, on the other side, contend that the Club informed them of the Player's failure to pass the try-out for the first time on 14 October 2015 (after the expiry of the try-out period), when the Club's director manager tried to deliver the Termination Letter to the Player's agents.

96. The issue of the Club's alleged exercise of the right to terminate the Player Contract during the try-out period was at the heart of the oral hearing and the examination of the witnesses offered by the Parties. Based on the written witness statements and the oral testimony given by the witnesses during the hearing, the Arbitrator is not convinced that Respondent communicated the Player's failure to pass the try-out period properly to Claimants on 11 or 12 October 2015 (during the try-out period). Rather, the Arbitrator believes that the first time the Player was duly notified of the termination was through the Termination Letter, which was delivered to the Player's agents either on 13 October

or on 14 October, but in any event after the expiry of the try-out period on 12 October 2015.

97. As a general matter, doubts in the credibility of Respondent's witness testimony are raised by the fact that the written statements of Respondent's witnesses are not only literally identical in large parts,[4] but are also very generic and hardly make reference to specific details (time, place, attendees) of the conversations and meetings addressed therein. When examined during the oral hearing, Respondent's witnesses repeatedly contradicted either their own written statements and/or the testimony of other of Respondent's witnesses, or they had trouble to remember exact details. This became particularly apparent with respect to Mr. Kai-Li, who was the key intermediate between the Club's representatives (who speak very little or no English) and the Player and his representatives (who – except for Mr. Kai-Li – do not speak Chinese) during the relevant time period.

98. During his oral examination, Mr. Kai-Li testified that he received two separate phone calls on 11 October 2015 after the first game, one from the head coach and one from the manager, who – he alleges – informed him of the Player's failure to pass the try-out. However, his written statement does not mention this very important aspect, but only states that the head coach did not like the Player's shape and commented this assessment to him and Claimant 3. Claimant 3, however, had no direct dealings with the head coach, also as a result of the language barrier, as confirmed later by Mr. Kai-Li himself and also by the manager Ms. Bolan. Ms. Bolan also does not refer to any phone call she supposedly gave to Mr. Kai-Li after the first match in her written statement. When questioned orally about the communications she had with Claimants, she initially said that she only delivered the Termination Letter, and that apart from that there was no other communication with either the Player or any of his representatives.

[4] Compare, e.g., paras 3-7 of the witness statements of Mr. Kareem Hodge (Assistant Coach), Mr. Zhu Shi Long (Assistant Coach), and Ms. Wu Bolan (manager).

Only when Respondent's counsel expressly asked her about the alleged conversation with Mr. Kai-Li after the first match, she remembered such conversation and Mr. Kai-Li's alleged request for a second chance. However, Ms. Bolan at no point confirmed that she initiated a telephone call to Mr. Kai-Li informing him of the Player's failure to pass the try-out in the evening of 11 October.

99. Similarly, the head coach's written witness statement does not mention any phone call he allegedly gave to Mr. Kai-Li on 11 October. It is limited to the brief remark that he did not like the Player's performance. A fact as important as a phone call to Mr. Kai-Li about the Player's failure to pass the try-out would have surely been mentioned by the head coach, who hardly could have forgotten about such call.

100. On the other hand, Respondent's assistant coach, Mr. Shi Long, testified during the hearing that he gave Mr. Kai-Li a phone call after the first game – something that Mr. Kai-Li never mentioned or confirmed.

101. Furthermore, Mr. Kai-Li's testimony revealed other contradictions and inconsistencies, e.g.:

- In his written statement, Mr. Kai-Li states that the Termination Letter was delivered to "*the Player and his Agents*" by the "*Head Coach and his Assistant*". During the hearing, all witnesses, including Mr. Kai-Li himself, confirmed that the Termination Letter was delivered by the Club's manager, Ms. Bolan (not by any of the coaches) to Mr. Kai-Li and Claimant 3. The Player was not present when the letter was delivered.
- In his written statement, Mr. Kai-Li states that the Player "*refused to sign*" the Termination Letter. However, the other witnesses testified – and Mr. Kai-Li later admitted – that the Player never saw any letter, and that the letter was given only to his agents.

- In his written statement, Mr. Kai-Li states that he did not sign the Agents Agreement for as long as it was contingent upon the successful passing of the try-out. During the hearing, Mr. Kai-Li, for the first time, alleged that he indeed signed the Agents Agreement. He did not remember his previously stated refusal to sign it because of the try-out.

102. Apart from these obvious contradictions in his testimony, Mr. Kai-Li – during the oral hearing – proved to have difficulties in remembering some of the facts he was questioned about. The Arbitrator is, therefore, not convinced of Mr. Kai-Li's credibility as a witness, and of the correctness of his witness testimony.

103. After all, in the Arbitrator's view, the oral hearing did not confirm Respondent's version of the facts. Respondent's witnesses did not testify coherently with respect to the alleged (oral) notice of the Player's failure to pass the try-out after the first match. They contradicted each other on the exact details of such (oral) notification. To avoid the apparent problems in proving proper and timely notice of the Player's failure to pass the try-out, Respondent could have simply informed the Player or his representatives in writing, by e-mail or letter. In fact, given that the decision to not let a Player pass the try-out has an immense legal significance – it cancels a contract that would otherwise become binding for the whole season – it would be expected as reasonable and diligent on the part of the Respondent to have made sure that reliable (written) evidence exists to prove its case. Respondent did not produce any such evidence.

104. The only written evidence apparently existent (although not submitted in this arbitration), is the Termination Letter delivered to Claimants on 13 October 2015 at the earliest. However, on 13 October 2015, the try-out period had already expired. It was not in Respondent's discretion to communicate the decision to waive the Player at any time. Rather, Respondent was required to notify the Player before the end of the try-out period, which it failed to do.

105. As a result, the Arbitrator finds that Respondent did not exercise its termination right in due time, and that the Player Contract became binding on the Parties upon expiry of the try-out period on 12 October 2015 (midnight).

106. Following the try-out period, the Club refused to honor the validity of the Player Contract and insisted that there was no longer any employment relationship. This is evidenced by the Club's purchase of a return ticket for the Player. The Club's conduct amounted to a *de facto* termination of the employment, under which the Player could not reasonably be expected to stay in China. Rather, it was in the Player's best interest to leave China – as requested by the Club – and to pursue other job opportunities.

107. The Player is, therefore, principally entitled to receive compensation for the salary the Club promised to pay, subject to the reductions discussed below.

7.1.2 Quantum of the Player's salary compensation claim

108. Because the Club failed to properly terminate the Player Contract during the try-out period, the Player is entitled to compensation for the agreed 2015-16 salary. According to Clause 3 of the Player Contract, the total salary agreed by the Player and the Club was USD 500,000.00 (net).

109. However, in accordance with generally accepted principles of the law of damages and also of labor law, any amounts which the Player earned or might earn by exercising reasonable care during the remaining term of the Player Contract must be deducted.[5]

110. The Player took up a position with the Japanese club LINK Tochigi BREX immediately after he left China. Pursuant to the LSE Contract, the Player was to receive

[5] These principles are also reflected in the BAT jurisprudence, see, *ex multis*, the following BAT awards: 0237/11; 0441/13.

USD 126,000.00 from the club for the remainder of the 2015-16 season. The LSE Contract was, however, terminated on 21 December 2015 by mutual agreement between the Player and the Club. Claimants submit that the termination was the result of an injury suffered by the Player. While this explanation appears to be somewhat dubious in the first place (given that the Player had signed a new contract with a Lebanese Club already on 20 December 2015), it is in any event irrelevant for the damages mitigation discussion and may, therefore, not be taken into account. The LSE Contract was fully guaranteed against injury, and the Player would not have legally been obligated to leave the team as a result of the alleged injury. His decision to voluntarily give-up a guaranteed contract without any compensation cannot go to Respondent's detriment.

111. Therefore, the guaranteed salary amounts under the LSE Contract (USD 126,000.00) have to be deducted from the Player's compensation claim in their entirety.[6]

112. Additionally, the Arbitrator finds that a further deduction has to be made under the applicable damages mitigation principles. The Player signed the LSE Contract only 6 days after he left China. It is noteworthy that the salary agreed under the LSE Contract was much less (only around 25%) than under the Player Contract. The Player submits that the Club's termination was late in the 2015-16 (pre-) season, which limited his options for negotiations with other clubs. Similarly, he submits that the Club's wrongful behavior, which forced the Player to leave China after only 5 days, allegedly evoked a huge question mark over the Player's health and physical condition in public, further limiting his opportunities to find a new club.

113. The Player's duty to mitigate provides for the serious attempt to reduce the damage. Six days seem very short to get into negotiations with different clubs and to find the

[6] The amounts subsequently earned by the Player with the Lebanese and Iranian clubs were lower than what the Player would have received from LINK Tochigi BREX, and are – therefore – irrelevant.

best offer.[7] This is true even when considering that the Player was under time pressure because the season had already started. In fact, the time pressure the Player had when he looked for a new club in late October was not much different from the time restraints he already faced when he managed to secure the lucrative deal with Respondent two weeks earlier, on 9 October 2015 (after having been waived by the L.A. Clippers).

114. The little information provided by Claimants about only a few preliminary contacts with other clubs (essentially limited to two e-mails sent by the agents, in which the Player was only one among many players offered to clubs with a fairly general description) is, in the Arbitrator's view, not sufficient to show that the required efforts for mitigating damages have been undergone.

115. Furthermore, the e-mail correspondence with the Latvian club BK Ventspils shows that the Player – even in a small market as Latvia – was offered for a monthly salary of USD 25,000 per month (corresponding to a one season total salary of approximately USD 200,000). The LSE Contract was for a significantly lower amount. The Arbitrator finds that the amount of remuneration for which the Player was offered to the Latvian club after he left China should, in principle, serve as the benchmark for the Player when negotiating a new contract.

116. Finally, it cannot be ignored and has been emphasized many times by the Claimants in the written correspondence and during the hearing that the Player has a rather strong track record as a former no. 5 pick in the first round of the NBA draft, and is equipped with NBA experience and extensive experience at various European top clubs.

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[7] On this aspect see also BAT award 0502/14, in which the Arbitrator found that a Player who had concluded a new contract only four days after the termination of his old employment for a value of only 20% of the old contract had to accept a further deduction on the requested salary compensation.

117. Taking into account all of the above, the Arbitrator – deciding *ex aequo et bono* – finds that the Player's compensation claim must be further reduced by USD 74,000.00 (bringing the total amount of mitigation up to USD 200,000). As a result, the Player is entitled to compensation in the amount of USD 300,000.00 net (USD 500,000 minus USD 200,000).

7.1.3 Late payment penalties and interest

118. Clause 3 of the Player Contract provides for a "late fee" of USD 200 net for each day a contractual payment is late. This constitutes a contractual penalty. BAT arbitrators have frequently dealt with this kind of penalty clauses. BAT jurisprudence on penalty clauses shows that these clauses and the time window for which they can be applied should generally be interpreted narrowly in order to prevent excessive results. In this respect, BAT arbitrators have decided that absent any indication to the contrary, penalty should principally accrue only between the due date for the debt and the termination of the contract.[8]

119. In application of these principles, the Arbitrator finds that the Player is not entitled to any late payment penalty in the present case. When the Player Contract was terminated through a breach of contract by Respondent (on 13 October 2015), no salary payments had yet fallen due. The first salary instalment was to be paid on 22 October 2015, several days after the (unlawful) contract termination. The original claim of the Player for monthly remuneration turned into a claim for damages which became due on the date the Player Contract was (unlawfully) terminated on 13 October 2015. The duty to pay late payment fees only applies, however, to contractual remuneration claims, not to damages claims.

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[8] E.g. BAT awards 100/10; 418/13.

120. However, the Arbitrator finds that Claimants' request for late payment penalties does – implicitly – contain a request for the payment of default interest (which is a "minus" compared to the more severe penalty of late payment fees). Although the Player Contract does not provide for any obligation by the club to pay interest in case of a non-payment, it is a generally accepted principle embodied in most legal systems and reflected in the BAT jurisprudence,[9] that default interest can be awarded even if the underlying agreement does not explicitly provide for a respective obligation. The Arbitrator, deciding *ex aequo et bono* and in accordance with constant BAT jurisprudence, considers an interest rate of 5% per annum to be fair and just to avoid that the Club derives any profit from the non-fulfillment of its obligations.

121. With respect to the starting date, it is appropriate to have interest run as of the day after the outstanding compensation claim became due, i.e. as of 14 October 2015.

7.1.4 Summary

122. According to the above-stated reasons, the Player is entitled to salary compensation in the amount of USD 300,000.00 (net), plus interest of 5% p.a. from 14 October 2015.

7.2 The Agents' claim for agent fees and interest

123. Pursuant to Clause 3) a) of the Agents Agreement, Claimant 2 was to be paid a net commission of USD 34,000, payable "*at the Player's arrival and upon passing of physical examination*". The payment was to be made "before" 30 November 2015, i.e. by 29 November 2015 the latest. Claimant 3 was to receive a commission of USD 6,000, for which the same payment modalities applied.

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[9] See*, ex multis*, the following BAT awards: 0092/10, Ronci, Coelho vs. WBC Mizo Pecs 2010; 0069/09,Ivezic, Draskicevic vs. Basketball Club Pecsi Noi Kosariabda Kft; 0056/09, Branzova vs. Basketball Club Nadezhda); 0237/11, Ivanovic, GPK Sports Management Limited vs. Kolossos Rhodes Basketball Club.

124. Respondent argues that the agents are not entitled to any fee, because – in accordance with the above-quoted language of Clause 3) a) – such fee was conditioned upon the Player's passing of the medical examination, which the Player failed to do. This argument is without merit. In light of the fact that it was Respondent who had unlawfully terminated the Player Contract before a medical examination could even take place, the Player was fully deprived of any opportunity to fulfill the condition. It would be unfair to burden Claimants with the consequences of the non-fulfillment of a contractually stipulated condition when the other party unlawfully prevented the condition to be met. Therefore, the agents are entitled to receive a commission in accordance with the Agents Agreement.

125. Whether BAT's damages mitigation principles result in a reduction of the agent fees in case of an early termination of the brokered employment depends on the specific circumstances of each case, in particular on the contractual agreement between the parties. Usually, when the parties wish to avoid any connection between the fate of the player's employment and the agent fee, they provide for specific language in the contract which makes clear that the full agent fee shall be payable even in case of an early termination of the employment, and irrespective of the validity of the player's contract.[10] No such language is contained in the Player Contract or Agents Agreement. Rather, the agents' commission seems to be closely linked to the fate of the Player's employment, as evidenced, e.g. by Clause 3) b) of the Agents Agreement (stating that the Player may terminate the Player Contract if the agents' fees remain unpaid, and that in case of a termination, the payments to be made to the Player and the agents shall be accelerated in the same manner).

126. Accordingly, it is fair and equitable to mitigate the agents' fee claims in accordance with the mitigation principles applicable to the Player's compensation claim. In fact, this is

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[10] See e.g. BAT awards 0826/16; 0791/16.

the exact understanding of Claimants themselves, who applied the mitigation amounts used for the Player's claims *pro rata* to the commission fee claims in their prayers for relief.

127. In reliance on these principles, the Arbitrator finds that all amounts the Agents earned or could have earned after the termination of the Player Contract for placing the Player at a club for the 2015-16 season should be deducted. In making the necessary calculations, the Arbitrator needs to consider Claimant 2 and Claimant 3 separately, because they were to earn different commission fees under the Player Contract independently from each other.

128. Claimant 2 was promised a commission fee of USD 34,000. After the Player had left China, he was promised the following agent fees for placing the Player in Japan, Lebanon and Iran:

- USD 12,600 under the LSE Contract;
- USD 6,000 under the contract with the Lebanese club Champville;
- USD 1,625 under the contract with the Iranian club Chemidor Tehran.

129. These successful placements all related to the 2015-16 season so that the corresponding earnings are fully deductible. Accordingly, Claimant 2 is entitled to a (mitigated) agent fee in the amount of USD 13,775.00.

130. Claimant 3 was promised a commission fee of USD 6,000 under the Player Contract. After the Player had left China, he earned a further fee of USD 875 for placing the Player at the Iranian club. Accordingly, Claimant 3 is entitled to a (mitigated) agent fee in the amount of USD 5,125.00.

131. Interest of 5% p.a. from 30 November 2015 accrues on the agents' fees, Clause 3) c) of the Agents Agreement.

7.3 Summary

132. In accordance with all of the above,

- the Player is entitled to salary compensation in the amount of USD 300,000.00 (net), plus interest of 5% p.a. from 14 October 2015;
- Claimant 2 is entitled to a commission fee in the amount of USD 13,775.00 (net), plus interest of 5% p.a. from 30 November 2015;
- Claimant 3 is entitled to a commission fee in the amount of USD 5,125.00 (net), plus interest of 5% p.a. from 30 November 2015.

8. Costs

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

134. On 4 April 2017 – considering that pursuant to Article 17.2 of the BAT Rules "the BAT President shall determine the final amount of the costs of the arbitration, which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator"; that "the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time", and taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 15,200.00.

135. Considering that Claimants prevailed on the main question in this arbitration, i.e. the unlawfulness of the Club's purported termination of the Player Contract, it is consistent with the provisions of the BAT Rules that 100% of the fees and costs of the arbitration, as well as 100% 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:*

Sum in Dispute *(in Euros)*	Maximum contribution *(in Euros)*
up to 30,000	5,000
from 30,001 to 100,000	7,500
from 100,001 to 200,000	10,000
from 200,001 to 500,000	15,000
from 500,001 to 1,000,000	20,000
over 1,000,000	40,000

> *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."*

136. Given that the sum in dispute relating to Claimant 1's claims fell in the range of EUR 200,001 to 500,000, and the sum in dispute relating to Claimant 2 and Claimant 3 is within the range of up to EUR 30,000 for each of them, the maximum possible

amount which could be awarded by the Arbitrator to the Claimants as a contribution to reasonable legal fees and other expenses is EUR 15,000.00 (for Claimant 1) and EUR 5,000.00 (for each Claimant 2 and Claimant 3), i.e. EUR 25,000 (including the handling fee).

137. Turning to Claimants' actual claim for legal fees and expenses, this comprises: (a) EUR 4,000.00 (the non-reimbursable handling fee); and (b) 10% of any amounts awarded to Claimants in these proceedings (in total USD 318,900.00), which adds up to USD 31,890.00.

138. These figures added together exceed the maximum amounts which can be awarded in claims of this size. They must, therefore, be reduced. Given that this arbitration was particularly complex with several rounds of submissions and a one day hearing involving the examination of five witnesses, the Arbitrator finds that it is justified to award the maximum possible contribution to Claimants. Accordingly, Respondent shall reimburse Claimants legal fees and other expenses (including the handling fee) in the amount of EUR 25,000.

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

- The BAT will reimburse to the Claimants EUR 785.00, being the difference between the Advance on Costs paid by the Parties (EUR 15,985.00) and the costs of the arbitration (EUR 15,200.00);

- Respondent shall pay EUR 12,225.00 to Claimants, being the difference between the Advance on Costs paid by the Claimants (EUR 13,000.00) and the reimbursement that the Claimants will receive from the BAT (EUR 785.00);

- Respondent shall pay EUR 25,000.00 to Claimants, representing a contribution by it to their legal fees and expenses;

- Respondent shall bear its own legal fees and expenses.

9. AWARD

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

1. **Fujian SBS Basketball Club Co., Ltd. is ordered to pay Mr. Nikoloz Tskitishvili USD 300,000.00 net as salary compensation, plus interest of 5% p.a. from 14 October 2015.**

2. **Fujian SBS Basketball Club Co., Ltd. is ordered to pay EPM Sports Consultants Limited USD 13,775.00 net as commission fee, plus interest of 5% p.a. from 30 November 2015.**

3. **Fujian SBS Basketball Club Co., Ltd. is ordered to pay Mr. Aydin Dianat USD 5,125.00 net as commission fee, plus interest of 5% p.a. from 30 November 2015.**

4. **Fujian SBS Basketball Club Co., Ltd.is ordered to pay Mr. Nikoloz Tskitishvili, EPM Sports Consultants Limited, and Mr. Aydin Dianat, jointly and severally, EUR 12,225.00 as a reimbursement of the arbitration costs.**

5. **Fujian SBS Basketball Club Co., Ltd.is ordered to pay Mr. Nikoloz Tskitishvili, EPM Sports Consultants Limited, and Mr. Aydin Dianat, jointly and severally, EUR 25,000.00 as a contribution towards their legal fees and expenses. Fujian SBS Basketball Club Co., Ltd.shall bear its own legal fees and expenses.**

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

Geneva, seat of the arbitration, 10 April 2017

Annett Rombach

(Arbitrator)