

ARBITRAL AWARD

(BAT 0392/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Eric Dawson

- Claimant -

represented by Mr. Jeremiah Haylett, attorney at law,
Haylett Sports and Entertainment Law, 3900 Vitruvian Way Suite 451,
Addison, Texas, USA

vs.

Foshan Long Lions Basketball Club
Office area of Lingnan Pearl Gym Gate 3, Jihua Wu Road,
Chancheng District, Foshan 528000, China

- Respondent -

represented by Mr. Voiron Chor, Club Director

1. The Parties

1.1. The Claimant

1. Mr. Eric Dawson (hereinafter the "Player") is a professional basketball player of US nationality. He is represented by Mr. Jeremiah Haylett, a FIBA-licensed agent and attorney at law in Texas, USA.

1.2. The Respondent

2. Foshan Long Lions Basketball Club (hereinafter the "Club") is a professional basketball club located in Foshan, China. The Club is represented by the Club Director, Mr. Voiron Chor.

2. The Arbitrator

3. On 6 May 2013, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), Prof. Richard H. McLaren, appointed Dr. Stephan Netzle as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Arbitration Rules of the BAT (hereinafter the "BAT Rules"). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

4. On 27 July 2012, the Player and the Club entered into an employment agreement commencing on 20 August 2012 and continuing until the Club's last official game in the CBA (Chinese Basketball Association) 2012-2013 season (hereinafter the "Player

Contract“). According to Article 4 of the Player Contract, the Club agreed to pay to the Player a total salary of USD 320,000 net in 8 instalments as scheduled in Article 4.

5. Article 2 of the Player Contract, inter alia, states as follows:

“The Player agrees that he shall undergo a medical check since the Club will evaluate and confirm that the Player is healthy without injuries. If the Player does pass the said medical check, both the Club and the Player agree that this agreement is a monthly guaranteed agreement which means if the Club has to terminate this Contract for the Player’s lack of skill on the court, the Club has to pay the Player for the salary and bonus owed to him for that month. In the event Player is injured playing basketball while under Contract and the Club terminates the Player’s contract while the Player is injured, the Club expressly agrees to pay Player all of the compensation set forth in Article 4.”

6. On 24 August 2012, the Player underwent a medical examination arranged by the Club. The Player then started training and playing with the Club’s team.
7. According to the Player, he suffered a [injury] while exercising in the Club’s gym on 27 August 2012. Thereafter he was [treatment] as advised by the Club. It is undisputed that the Player continued training with the Club’s team until 25 October 2012, i.e. the end of a training camp.
8. On 18 October 2012, the Player’s counsel sent an email to the email address “lukaspeng@gmail.com” informing that he was the new agent of the Player.
9. On 27 October 2012, the Player’s [medical detail] was x-rayed and a MRI was made on 30 October 2012.
10. On 4 November 2012, the Player’s counsel sent an email to the Club Director and introduced himself again as the new agent of the Player. The Player’s counsel also referred to Player’s injury (“concerns with his injury”) and asked for [treatment]. The Player was treated by the Club with [treatment] on 5 and 10 November 2012.
11. On 9 and 11 November 2012, the Player participated in two pre-season games.

12. On 15 November 2012, the Club wired USD 42,000 to the Player's bank account. This was the last payment made by the Club to the Player. All prior instalments stipulated in Article 4 of the Player Contract had been made by the Club on time.
13. By email of 21 November 2012, the Club Director informed the Player's counsel about the termination of the Player Contract. The email reads as follows:

*"Hi Jeremiah,
I am currently on business trip. I have been informed that the coach team decided not to register Eric for this CBA season due to poor health condition. Upon receiving confirmation signed off by the head coach, Eric will be free to leave the Club in the next few days. The club will arrange air ticket for him.
Thanks, Voiron"*
14. On the same date, the Player's counsel sent an email to the Club Director requesting the amount of USD 174,000 for the Player before leaving the Club and, inter alia, stating as follows:

"[...] As he passed the medical exam of the team and was deemed healthy and later on was injured and is still currently injured ([medical details] from a month ago and the hand from yesterdays practice) Article 2 of the contract takes effect that the team is obligated to pay him the full amount listed in Article 4. [...]"
15. The Player left the Club in the beginning of December 2012 and never returned to China.
16. On 15 December 2012, the Player entered into a new employment contract with the Philippine club Meralco Bolts (hereinafter the "Meralco Contract"). According to Clause II of the Meralco Contract, the term should be "*deemed to have commenced from the date of your [the Player's] arrival*". According to Clause III of the Meralco Contract, a salary of USD 40,000 net was agreed. The Player played for Meralco Bolts from 9 February to 24 April 2013.
17. On 17 February 2013, the Club's last official game of the 2012/2013 CBA season was played.

18. On 4 May 2013, the Player signed an employment contract with the Iranian club Petrochimi Bandar. On 26 July 2013, the Player was contracted by the club Metros de Santiago from the Dominican Republic.

3.2. The Proceedings before the BAT

19. On 18 March 2013, the BAT Secretariat received the Player's Request for Arbitration of the same date. The non-reimbursable handling fee of EUR 2,990.00 was received in the BAT bank account on 20 March 2013.
20. By letter of 13 May 2013, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties of the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Club to file its answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 29 May 2013. The BAT Secretariat also requested the Parties pay the following amount as an Advance on Costs by no later than 24 May 2013:

<i>"Claimant (Mr. Eric Dawson)</i>	<i>EUR 6,000</i>
<i>Respondent (Foshan Long Lions)</i>	<i>EUR 6,000"</i>

21. On 25 June 2013, due to the delays relating to the delivery of the Request for Arbitration to the Respondent, the Arbitrator set a new time limit for Respondent to submit its Answer and to pay its share of the Advance on costs by 8 July 2013.
22. By letter of 19 July 2013, the BAT Secretariat confirmed receipt of the Advance on Costs and the Club's Answer. Furthermore, the BAT Secretariat informed the Parties that the Arbitrator understands the Club's request for relief also as a counterclaim in the amount of USD 162,000.00. Because of this counterclaim, and in accordance with Article 9.3 of the BAT Rules, the advance on costs was re-adjusted to EUR 15,000.00 and the BAT Secretariat requested the Club pay the additional share of EUR 3,000.00

by 29 July 2013. By the same time limit, the BAT Secretariat requested the Player submit further documents.

23. On 19 July 2013, the Player's counsel informed the BAT that the Player did not consider himself obliged to submit the requested documents. On 31 July 2013, the Arbitrator replied and insisted on the requested documents but extended the time limit for submission by 7 August 2013. By email of 31 July 2013, the Player's counsel eventually complied with the Arbitrator's request of disclosure.
24. By letter of 31 July 2013, the BAT Secretariat informed the Parties about the Club's failure to pay the additional Advance on Costs and granted the Club a final chance to pay the amount of EUR 3,000.00 by 6 August 2013 otherwise the counterclaim would be deemed withdrawn in accordance with Article 17.3 of the BAT Rules.
25. By letter of 14 August 2013, the BAT Secretariat informed the Parties that the Club failed to pay the additional Advance on Costs and that the Club's counterclaim is deemed withdrawn in accordance with Article 17.3 of the BAT Rules. Furthermore, the BAT Secretariat forwarded the Club's Answer to the Player and invited him to reply by 23 August 2013.
26. By letter of 20 August 2013, the BAT Secretariat confirmed receipt of the Player's reply dated 14 August 2013 (hereinafter the "Reply") and forwarded it to the Club which was invited to file a rejoinder by 2 September 2013.
27. By letter of 26 September 2013, the BAT Secretariat confirmed receipt of the Club's rejoinder received on 2 September 2013 (hereinafter the "Rejoinder"). Moreover, the Parties were informed that the Arbitrator had decided to declare the exchange of documents complete. The Parties were therefore invited to submit a detailed account of their costs by 4 October 2013.

28. By email of 1 October 2013, the Player's counsel submitted an invoice for his legal services. This invoice contained a detailed account of costs and listed 66.5 hours spent on the case corresponding to legal fees of USD 25,195.19. The Player's counsel also added:

"Plus - 3000 euros (\$3912.30) FIBA Arbitration handling fee"

29. By letter of 8 October 2013, the BAT Secretariat acknowledged receipt of the Player's account of costs and informed the Parties that the Club had failed to submit an account of costs. Furthermore, the Club was invited to submit its comments, if any, on the Player's account of costs by no later than 16 October 2013. The Club did not file any comments.

30. The Parties did not request the BAT hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the award on the basis of the written submissions available.

4. The Positions of the Parties

4.1. The Claimant's Position

31. The Player submits the following in substance:

- The Club released the Player while being injured. Thus, according to Article 2 of the Player Contract, the Club is obliged to pay the Player all compensation set forth in Article 4 of the Player Contract. The Club has failed to pay the last four instalments amounting to USD 174,000.00.
- The Player suffered a [injury] in the Club's gym during a mandatory team practice under the supervision of the Club's trainer on 27 August 2012. This practise was a "basketball related event" and falls under the injury clause in Article 2 of the Player

Contract.

- The Player immediately informed the Club about his injury. On 2 September 2012 he was advised to undergo [treatment]. The Player and his counsel asked several times for [treatment] but the Club refused and advised the Player to continue with [treatment]. Only after return from the training camp at the end of October 2012, the Club agreed to [treatment] after the Player had refused to continue training and playing because of the pains. The MRI confirmed [medical condition]. Immediately after the MRI, the Player and his counsel requested [treatment] but the Club prompted such treatment only on 5 November 2012. If appropriate treatment of the 27 August 2012 injury had started earlier, the Player's [medical condition] would not have transformed, over a period of two months, into a [medical condition].
- The Player has not concealed any injuries suffered prior to his engagement with the Club. The Player passed the Club's medical check on 24 August 2012, which was confirmed by the Club's payment of USD 20,000.00 to the Player and by three further physical examinations which the Player passed without any reservation. The last examination took place on 13 July 2013.
- The Player participated in the two pre-season games because the Club had threatened to release him if he did not play although the Club was well aware of the Player's [medical condition].
- The Club's payment of 15 November 2012 covers only the time period until that date. Thus, the Player is still entitled to salary for the period from 16 to 30 November 2012 and the time thereafter.
- The Player Contract would end on 17 February 2013, i.e. the Club's last game of the 2012/2013 season. Consequently, the Player's duty to mitigate the damage

lasted only until that date. The first game with Meralco was on 9 February 2013 and therefore the salary agreed in the Meralco Contract can be considered only partially, namely from 9 to 17 February 2013. The Player's two further employment contracts with Petrochimi Bandar and Metros de Santiago concerned the time after the Club's last game only and can therefore not be considered for any mitigation.

4.2. The Claimant's Request for Relief

32. In his Request for Arbitration, the Player requested the following relief:

- *\$174,000 in remaining salary to be paid*
- *3000 Euros (\$3912.30) FIBA Arbitration handling fee*
- *Advance on Cost Arbitration reimbursement*
- *\$17,522.97 in attorney fees*
- *\$598 Reimbursement of medical care Eric needed to receive in US.*
- *\$2,520 Reimbursement of physical therapy and rehabilitation costs*
- *\$8,600 late payment fees (as per the contract Article 4 (A) (calculated at \$100 per day from last scheduled payment on Dec. 15 plus 7 days Dec. 22, 2012.- March 18, 2013)*
- *Plus 5% interest*

Total: \$207,153.27 (159939.31 EUROS)(Plus: 5% interest, added late fees, and Advance on Cost reimbursement)

4.3. The Respondent's Position

33. The Club submits the following in substance:

- The Club released the Player for lack of skill. After a period of three months of practice and team formation and two pre-season games in November 2012, the Club's coaches decided not to register the Player for the CBA season.
- There is no injury case reported or recorded during either the Player's practice or the pre-season games. Strength training in the gym is under controlled conditions and it is the Player's obligation to avoid injury scenarios. Only "injury on the basketball court while playing for the Club" will trigger the conditional guarantee as

stated in Article 2 of the Player Contract.

- The Player must have been injured before he joined the Club in August 2012. According to Article 9 lit m of the Player Contract, the Player was obliged to inform the Club about any prior injuries which may prevent him to play for the Club. The Club's coaching team provided several reports which indicated that the Player could not manage to play for five minutes on the court during practice sessions and therefore the Club sent the Player for X-Ray and MRI. This examination resulted in the confirmation that the Player's previous injuries led to the development of [medical condition] which both the Player and his agent tried to conceal.
- The Club has made all payments to which the Player was entitled. The amount of USD 42,000.00 wired to the Player on 15 November 2012 was his full November salary. According to Article 4 of the Player Contract, the Parties agreed to pay the monthly salary instalments on the 15th of each month.
- The Player's counsel led the Player into a new contract to earn agent fees. In addition, the Player's counsel billed USD 17,522.97 as attorney fees for services rendered as Player's agent and in the present arbitration he claims reimbursement for services beginning only 7 days after the Player arrived at the Club.

4.4. The Respondent's Request for Relief

34. The Club did not submit a formal request for relief but in its Answer the Club submits, inter alia, as follows:

"The Club exercised its right set forth in the contract to terminate the contract and paid the Player accordingly. The Club did not owe the Player anything at the point of contract termination. [...]"

The Club therefore would like to demand the return of USD162,000 payment paid to the Player and his Agent.

5. The Jurisdiction of the BAT

35. 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).
36. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
37. The Arbitrator finds that the dispute is of a financial nature and arbitrable within the meaning of Article 177(1) PILA.
38. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Article 12 of the Player Contract, which reads as follows:
- “Any dispute arising from or related to the present contract shall be submitted to the FIBA 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 in 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.”*
39. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA. The Arbitrator also considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement 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 Article 12 of the Player Contract covers the present dispute.
40. The Club did not object to the BAT jurisdiction.

41. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Player's claims.

6. Other Procedural Issues

42. In the Answer, the Club stated as follows:

"The Club therefore would like to demand the return of USD 162,000 payment paid to the Player and his agent."

43. The Arbitrator understands this request as a counterclaim in the amount of USD 162,000.00. Consequently, the advance on costs was re-adjusted in accordance with Article 9.3 of the BAT Rules and the BAT Secretariat requested the Club pay the additional share of EUR 3,000.00. Moreover, the Club was repeatedly informed about the consequences of not paying the additional share of the Advance on Costs, namely that the counterclaim would be deemed withdrawn. Still, the Club failed to pay this amount.
44. In accordance with Article 17.3 of the BAT Rules applied *mutatis mutandis*, the counterclaim is therefore deemed withdrawn. Consequently, the Arbitrator will not rule on the Club's request for payment of USD 162,000.00.

7. Applicable Law – ex aequo et bono

45. 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".

46. 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."

47. In the arbitration agreement in Article 12 of the Player Contract, 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 him *ex aequo et bono*.

48. 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 1969¹ (Concordat),² under which Swiss courts have held that "arbitrage en *équité*" is fundamentally different from "arbitrage 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."³

49. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

"the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand".⁴

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

¹ 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).

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

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

⁴ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

8. Findings

51. The Player claims outstanding compensation for the 2012/2013 season, reimbursement of medical costs, late payment fees and interest.

8.1. Is the Player entitled to outstanding compensation for the 2012/2013 season in the amount of USD 174,000.00?

52. According to Article 2 of the Player Contract, the Player is entitled to the full outstanding compensation for the remaining 2012/2013 season if the Player Contract was terminated by the Club "*while the Player (was) injured playing basketball while under Contract.*" If the Player Contract was, however, terminated by the Club because of the "*Player's lack of skill on the court*", the Club had to pay only "*the salary and bonus owed to him for that month*" (which is understood as the month during which the Club terminated the Player Contract).

53. It is undisputed that the Player Contract was terminated by the Club's notice sent by email to the Player's agent on 21 November 2012. On this date, the "passing the medical bonus [sic]" of USD 20,000.00 and the salary payments for September, October and November 2012 (of USD 42,000.00 each) totaling USD 146,000.00 had been paid by the Club and received by the Player. If the Player Contract had not been terminated prematurely, the Player would have earned another USD 174,000.00 during the remaining term of the Player Contract.

54. Whether or not that amount of USD 174,000.00 was payable depends on the reason of the termination, namely whether the Player Contract was terminated because the Player was injured "while playing basketball" or because of his "lack of skill on the court".

55. The termination notice of 21 November 2012 states that the Player was not registered for the upcoming CBA season “due to poor health condition.” The Club then explains in its Answer that because of his injuries, the Player could not manage to play for five minutes on the court during practice sessions. This has not been disputed by the Player.
56. In its broadest sense, a player lacking skill may be understood as a player who is not able or not willing to perform at the playing level which is expected from a player competing in a certain league. Such lack of skill may be caused by physical or mental circumstances.
57. Article 2 of the Player Contract draws a distinction between “lack of skill on the court” and “injured playing basketball while under Contract”. While lack of skill must be understood as a *general* assessment of the Player’s playing abilities which can be determined by comparison with other players or statistical observations, an injury which the Player suffered while playing with the Club is a *specific* cause of lacking skill which leads to different consequences, namely full compensation of the Player for the remaining term of the Player Contract. In other words: If the Player is not able to perform at the expected level (and is therefore lacking skill) because of an injury suffered while playing with the Club, the specific consequence of full payment applies. If the lack of skill is caused by other circumstances, the Player is entitled only to the monthly salary for the month during which the Player Contract was terminated.
58. The key issue is therefore whether the Player got injured while “playing basketball” during the term of the Player Contract. The Parties concur that the Player participated in the training camp which ended on 25 October 2012, and that he complained about a [medical condition] which prevented him from continuing training and playing. An MRI was applied which revealed a [medical condition]. Treatment was initiated only on 5 November 2012. This medical condition was obviously not the result of an acute injury but must have developed over time. While the Player traces the [medical condition]

back to an injury allegedly suffered on 27 August 2012 while exercising in the gym under a Club coach's supervision, the Club concludes that there must have been an injury which happened before the Player joined the Club and which was not discovered, or even concealed, by the Player at the medical examination of 24 August 2012.

59. According to Article 2 of the Player Contract, *“(t)he Player agrees that he shall undergo a medical check since the Club will evaluate and confirm that the Player is healthy and without injuries.”* That medical check was executed without reservation of further examinations. The Club also paid to the Player the amount of USD 20,000.00 provided by Article 2 of the Player Contract which the Arbitrator understands as a confirmation that he passed the medical check. The Arbitrator does not accept the Club's submission that *“this initial medical check by no means is an exhaustive one (since neither) X-ray and MRI were not carry out”* [sic]. The unconditional passing of the medical exam rather leads to the (rebuttable) assumption that the Player was healthy and did not suffer from any pre-existing injury. This conclusion is supported by prior BAT jurisprudence⁵ explaining the efforts which are expected by each party at the medical checks. It is also supported by the fact that the Player was contracted by another club in December 2012 and was able to play again in February 2013.
60. The Club argues that the Player, by not disclosing his [medical condition] when he signed the Player Contract or at the medical exam, violated Article 9 (m) of the Player Contract which required him to *“unconditionally declare that [he] has no previous injuries and/or illness which may prevent him to play for the Club at any time during the term of this Contract.”* That is a circular argument since a violation of Article 9 (m) of the Player Contract presupposes the evidence of a prior injury or illness which is upon the Club to demonstrate. The Club refers to the X-Ray of 27 October 2012 followed by

⁵ See the following BAT awards: 0318/12, Hunter, Priority Sports vs. Polisportiva Dinamo SRL; 0263/12, Jujka vs. Miejski Miedzyszkolny Klub Torun; 0213/11, Mr. Player vs. Club.

an MRI on 30 October 2012 which revealed a pre-existing medical condition. However, that is not evidence that this medical condition existed already before the medical exam of 24 August 2012. The Arbitrator therefore concludes that the Player Contract was terminated while the Player was suffering from an injury which occurred between the medical exam and the end of the training camp, i.e. during the term of the Player Contract. The date on which the injury occurred is therefore irrelevant.

61. The final question is therefore whether the injury happened while the Player was “playing basketball” as required by Article 2 of the Player Contract. The Player refers to an incident at the gym. The Club replies that even if that were true, the Player was not injured while “playing basketball.” Deciding *ex aequo et bono*, the Arbitrator finds that “playing basketball” cannot be understood in a narrow sense but must include any Club-related sporting activity exercised by the Player during the Player Contract with the goal to maintain and improve his playing skills. This also concerns practicing in the Club’s gym under the supervision of a Club coach.
62. The kind of injury identified by X-Ray and MRI at the end of October 2012 (i.e. a [medical condition]) points to a sporting injury. The Club has not provided any evidence to the contrary. The Arbitrator already held that the incident must have happened during the term of the Player Contract. He therefore concludes that the injury which led to the termination of the Player Contract was an injury in the meaning of Article 2 of the Player Contract which happened while the Player provided his contractual services as a basketball player and which entitled him to “all of the compensation set forth in Article 4” of the Player Contract.

8.2. The duty to mitigate the damage

63. It is common jurisprudence of the BAT that a party who is entitled to compensation because of early termination of the Player Contract has a duty to mitigate such compensation. In particular, such party must accept that any amounts otherwise

earned during the remaining term of the Player Contract are deducted from the compensation.

64. The Player Contract would have ended after the Club's last official game in the Chinese Basketball League 2012/2013 season. That season ended on 17 February 2013. The Player signed the Meralco Contract on 15 December 2012 but played his first game only on 9 February 2013. According to Article II of the Meralco Contract, the Player was entitled to USD 40,000.00 per month, payable every 15th and 30th of each fiscal month. The term of the Meralco Contract began upon the date of the Player's arrival in the Philippines, which date is however not known. The first month's payment of USD 40,000.00 was guaranteed and payable upon passing the medical exam and drug testing (USD 20,000.00) and on 30 January 2013 (USD 20,000.00). After the first guaranteed month, the salary was to be calculated on the basis of USD 1,334.00 per day.
65. The Arbitrator refers to the Meralco Contract to calculate the earnings to which the Player was eligible during the remaining term of the Player Contract. The fact that the Player started to play with the Meralco team on 9 February 2013 indicates that he must have passed the medical exam which entitled him to the first half of the guaranteed payment. On 30 January 2013, the second half of the guaranteed payment became due. Because of the explicit reference to 30 January 2013 as the payment date for the first guaranteed monthly payment, the Arbitrator concludes that the guaranteed salary constituted the salary for January 2013 of USD 40,000.00. To that amount, the salary to which the Player was entitled until 17 February 2013 (i.e. the initial term of the Player Contract) must be added. Based on the daily rate of USD 1,334.00, this amounts to USD 22,678.00.
66. The Arbitrator concludes that until 17 February 2013, the Player was entitled to a salary from Meralco of USD 62,678.00 in total which must be deducted as alternative income

from the overall compensation of USD 174,000.00 leading to a remaining amount of USD 115,322.00.

8.3. Is the Player entitled to reimbursement of medical costs in the total amount of USD 3,118.00?

67. The Player claims the reimbursement of the costs for ultrasound treatment in the amount of USD 598.00 and for physical therapy in the amount of USD 2,520.00. The Club does not address this part of the Player's claim at all.

68. According to Article 7 lit. b of the Player Contract, the Club shall cover "all costs relating to injury for basketball injuries." The Player's costs claimed under that title consist of the following:

69. [Treatment] in the amount of USD 598.00: The Player submitted a document dated 11 December 2012 and titled "Employment/School Excuse". This document states the Player's name and that he was treated at the "University Health Center – Downtown" with ultrasound. In addition it states "Amt. Due \$598.00". The Arbitrator understands that the respective treatment took place on 11 December 2012 which is a date after the termination of the Player Contract on 21 November 2012. The Arbitrator finds that the Player is not entitled to reimbursements for costs incurred after the termination of the Player Contract. This part of the claim is therefore rejected.

70. [Treatment] in the amount of USD 2,520.00: The Player submitted a document titled "Receipt for Services". According to that document, the therapies have been executed in November and December 2012 by a practice in San Pedro, California. However, that document does not indicate the name of the patient or the specific dates of the treatments. Since it refers to treatments which took place in California in November 2012 when the Player was still in China, the Arbitrator has substantial doubts whether these treatments concern the Player. In addition, Article 7 lit b of the Player Contract provides that "*(s)pecialists chosen by the Club shall carry out the medical care in such*

cases”, but there is no evidence on record that the Club chose or recommended [treatment] in the United States. The Arbitrator therefore rejects the Player’s claim for reimbursement of the costs for [treatment].

8.4. Is the Player entitled to late payment fees in the amount of USD 8,600.00?

71. Article 4 lit A of the Player Contract provides for a “late penalty fee”: *„In case of scheduled payments for every month not being made by the Club within seven (7) days as of the scheduled date, the Club shall pay a late penalty fee of USD100.00 per day of the delay.”*

72. The penalty fee is due on delayed monthly salary payments. The monthly payments due until the termination of the Player Contract were paid in a timely manner. The Player now requests late payment penalties on all further monthly payments after termination. However, upon termination, the Club was no longer obliged to monthly payments but to a one-time compensation which became due on the termination date.

73. The BAT has consistently held that late payment penalty clauses are generally lawful but subject to review by the Arbitrator. In accordance with BAT-jurisprudence, the Arbitrator holds that the purpose of the penalty clauses in the Player Contract was a *“dissuasive measure to prevent late payments”* and that, once the employment relationship was terminated, *“penalty payments ceased to accrue”*.⁶ This has to be applied no matter which party terminated the relationship.

74. Since the Player Contract was terminated on 21 November 2012 the Player’s request for late payment penalties starting from 22 December 2012 has to be rejected.

⁶ See the following BAT awards: 0154/11, Gloger, Bill A. Duffy International vs. CB Atapuerca; 0109/10, Plaisted vs. Basketball Club Zadar (KK Zadar); 0100/10, Taylor vs. KK Crvena Zvezda Beograd.

8.5. Is the Player entitled to interest in the rate of 5% p.a.?

75. In addition, the Player requests interest in the rate of 5% p.a., however, without stating on which amount and from which date.
76. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest.⁷ Although the Player Contract does not provide for the payment of default interest, this is a generally accepted principle which is embodied in most legal systems.
77. The Arbitrator agrees that an interest rate of 5% p.a. is acceptable and in line with the interest rate usually awarded by default if no other interest rate has been agreed by the parties. Concerning the commencement date, the Arbitrator takes into consideration that the contractually agreed salary entitlement was converted into the right to claim a one-time compensation when the Player Contract was terminated. Such compensation for the entire unpaid salary became due at the date of the termination, i.e. 21 November 2012. Therefore, the Arbitrator holds *ex aequo et bono* that the Player is entitled to default interest from the day following the date of the termination and thus the calculation of the default interest at 5% p.a. starts on 22 November 2012.

8.6. Summary

78. The Player is entitled to a total amount of USD 115,322.00 plus interest on that amount since 22 November 2012. Any other or further-reaching claims are dismissed.

⁷ See, *ex multis*, the following BAT awards: 0092/10, Ronci, Coelho vs. WBC Mizo Pecs 2010; 0069/09, Ivezic, Draskicevic vs. Basketball Club Pecs Noi Kosariabda Kft; 0056/09, Branzova vs. Basketball Club Nadezhda.

9. Costs

79. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
80. On 5 December 2013 – considering that pursuant to Article 17.2 of the BAT Rules “the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator”, and that “the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 11,975.31.
81. Considering the circumstances of the present case (Article 17.3. of the BAT Rules), in particular the reliefs granted compared to the reliefs sought, the Arbitrator deems it appropriate that 1/3 of the arbitration costs shall be borne by the Player (EUR 3,991.77) and 2/3 by the Club (EUR 7,983.54).
82. Given that all Parties contributed to the Advance on Costs of EUR 11,975.31 (EUR 5,990.31 paid by the Player and EUR 5,985.00 paid by the Club), in application of Article 17.3 of the BAT Rules the Arbitrator decides that the Club shall pay EUR 1,998.54 to the Player, being the difference between the amount advanced by it and the amount it is ordered to pay.

83. Furthermore, the Arbitrator takes note that the Player requests reimbursement of the amounts of EUR 3,000.00 (non-reimbursable handling fee) and USD 17,522.97 (further legal costs) while the Club does not request reimbursement of any legal costs. The Arbitrator also takes note that the Club has not provided any comments on the Player's account of costs of 1 October 2013, but has submitted its objection to services provided by the Player's counsel in the amount of USD 17,522.97 (the Player's exhibit 5) already in the Answer.
84. According to Article 17.4 of the BAT Rules, in view of the amount in dispute the maximum contribution to a party's legal fees and other expenses amounts to EUR 10,000.00 (including the non-reimbursable handling fee) which seems also reasonable under the circumstances. Considering those circumstances, the Player is entitled to the amount of EUR 6,666.67 as contribution to his legal costs.

10. AWARD

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

- 1. Foshan Long Lions Basketball Club is ordered to pay to Mr. Eric Dawson the amount of USD 115,322.00 plus interest of 5% p.a. on this amount since 22 November 2012.**
- 2. Foshan Long Lions Basketball Club is ordered to pay to Mr. Eric Dawson the amount of EUR 1,998.54 as a reimbursement of his advance on arbitration costs.**
- 3. Foshan Long Lions Basketball Club is ordered to pay to Mr. Eric Dawson the amount of EUR 6,666.67 as a contribution towards his legal fees and expenses. Foshan Long Lions Basketball Club shall bear its own legal fees and expenses.**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration 16 December 2013

Stephan Netzle
(Arbitrator)