BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0764/15)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Raj Parker

in the arbitration proceedings between

Mr. Bernard King

- Claimant -

represented by Mr. Juan de Dios Crespo Perez, attorney at law,
Avda. Reino de Valencia 19, 46005 Valencia, Spain

vs.

Basketball Club Krasny Oktyabr Volgograd
Lenin Avenue 110, 1.2 Office,
400007 Volgograd, Russia

- Respondent -

represented by Ms. Marina Makarova

BASKETBALL
ARBITRAL TRIBUNAL

1. The Parties

1.1 The Claimant

1. The Claimant is a professional basketball player of American nationality.

1.2 The Respondent

2. The Respondent is a professional basketball club based in Russia.

2. The Arbitrator

3. On 12 November 2015, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the "BAT") appointed Mr. Raj Parker 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 objections to the Arbitrator's appointment or to his declaration of independence.

3. Facts and Proceedings

3.1 Background Facts

4. On 14 August 2014, the Claimant entered into a contract with the Respondent under which he was engaged as a skilled basketball player from 14 August 2014 until three days after the end of the 2014/15 season (the "Contract").

5. The Contract contains, among others, the following provisions:

(i) the Contract is a "guaranteed no-cut contract", which may only be terminated on the following terms:

> *"…neither the Club nor any assignee thereof can terminate this contract should any injury, illness or death befall the Player and this shall include any injury, illness or death during or outside of basketball-related activity with any national team with the exception of cases specified under this Contract. This Contract may be terminated by the Club under terms and conditions of the Internal Club Regulations only if Player is in breach of the obligations set forth herein, which breach is proven beyond a reasonable doubt*"

(Art. III);

(ii) the Claimant's salary was stated to be no more than USD 225,000.00 net for the 2014/15 season payable in nine installments of USD 22,500.00 from August 2014 to April 2015 and, should the season continue after 1 May 2015, USD 750 per day (Art. IV), plus performance bonuses (Art. V);

(iii) the following provisions in relation to non-payment:

> *"In case of scheduled payments not being made by the Club within 30 (thirty) days of the scheduled payment to the Player or the Agent, the Player and Agent shall be entitled to all moneys in accordance with the Contract, but the Player shall not have to perform in practice session or games until all scheduled payments have been made plus appropriate penalties and such non-performance will not be considered breach of contract. In the event that payments are not made by Club within 45 (forty five) days of the scheduled payment date, player shall immediately be entitled to the entire salary and shall have no further obligations to the Club. Upon receipt of a request from the National Federation to issue the Player's Letter of Clearance, the Club must authorise the Federation to do so unconditionally within 24 (twenty four) hours without charging a transfer fee.*"

(Art. IV)

(iv) the following provision in relation to employment and duties:

> *"The Player agrees to report to the Club in good physical condition to participate in the Club's practice sessions, and to play in Club's exhibition, regular season, play-off games, and Russian Cup under the direction of the Club. The Player further agrees to comply with all rules established by the Club regarding disciplinary conduct of the players, and to follow the Internal Club Regulations…*"

(Art. I);

(v) a dispute resolution clause:

> "*Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration should be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domiciles. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

(Art. IX)

(viii) a governing law clause:

> "*This contract shall be interpreted and enforced in accordance with the laws of the Russian Federation. Mutual relations, arising from this Contract, are being regulated by the Civil Code of the Russian Federation."*

(Art. X)

6. The Internal Club Regulations form part of the Contract. They include the following provisions:

(i) players who are ill or injured must present at all practice sessions and games, unless they are hospitalised or are following instructions of the Club doctor or Head Coach (Regulations 2.3 and 3.3);

(ii) only the Head Coach can "*free a player*" from participating in a practice session or game (Regulations 2.4 and 3.4);

(iii) players must obtain the permission of the team doctor, Head Coach or Club Director before receiving medical treatment outside of the Club (Regulation 7.3);

(iv) if a player misses a practice session "*more than 3 times during the season*" without a "*respectable reason*", the Club may terminate the contract (Sanctions Table appended to Regulations); and

(v) if a player misses more than one game without a "*respectable reason*", the Club may terminate the contract (Sanctions Table).

7. On 17 December 2014, the Respondent terminated the Contract by written notice on the basis that the Claimant had breached the Contract by "*missing multiple practices with no respectable reason, missing game with no respectable reason and leaving Club disposal*". The termination notice was stated to be effective as of 8 December 2014.

3.2 The Proceedings before the BAT

8. The Claimant filed the Request for Arbitration on 19 June 2015 and paid the non-reimbursable handling fee of EUR 3,000.00 on 4 November 2015. The Arbitrator was appointed on 12 November 2015.

9. On 23 November 2015, the Advance on Costs was fixed at EUR 12,000.00 payable by the Claimant (EUR 6,000.00) and the Respondent (EUR 6,000.00). The Advance on Costs was payable by 3 December 2015.

10. The Respondent paid its share of the Advance on Costs on 7 December 2015 and filed its Answer on 16 December 2015. On 16 December 2015, BAT extended the deadline for the Claimant to pay his share of the Advance on Costs to 28 December 2015.

11. On 6 January 2016, the Claimant requested that the Arbitrator use his discretion to exempt the Claimant from paying his share of the Advance on Costs, either by re-allocating the Claimant's share to the Respondent, or reducing the total Advance on Costs to the amount already paid by the Respondent. The Claimant gave the following reasons for the request:

    (i) the Claimant is in a "*delicate economic situation*" as a result of breaches of contract by the two previous clubs for whom he played. Both breaches were the subject of BAT arbitrations;

    (ii) the Claimant has been unable to enforce one of the awards he obtained against one of his previous clubs for EUR 38,000.00. The respondent club in that arbitration appears to have assigned its rights to another club and gone into liquidation; and

    (iii) as such, the Claimant is unable to pay the Advance on Costs in this Arbitration.

12. On 25 January 2016, the Arbitrator adjusted the Advance on Costs in accordance with Article 9.3.1 of the BAT Rules to EUR 8,000.00 payable by the Claimant (EUR 2,000.00) and the Respondent (EUR 6,000.00 – already received) on the basis of the exceptional circumstances identified by the Claimant in his submission. The Claimant's share was to be received by 8 February 2016.

13. On 8 February 2016, the Claimant requested a 10-day extension to the deadline for paying its Advance on Costs. The Arbitrator agreed to grant a final extension to 19 February 2016. BAT received the Claimant's share on 22 February 2016.

14. On 7 March 2016, BAT wrote to the Parties with questions from the Arbitrator (the "First Procedural Order"). The Parties provided answers on 21 March 2016 (being the deadline set by BAT).

15. On 30 March 2016, BAT wrote to the Parties with further questions from the Arbitrator (the "Second Procedural Order"). The Respondent provided answers on 13 April 2016, being the deadline. On 13 April, the Claimant requested an extension of at least seven days, which the Arbitrator granted. The Claimant provided his response on 20 April 2016.

16. On 2 May 2016, BAT wrote to the Parties with further questions from the Arbitrator (the "Third Procedural Order") requesting answers by 17 May 2016. The Respondent provided answers on 17 May 2016 and the Claimant provided answers on 18 May 2016.

17. On 23 May 2016, BAT wrote to the Parties informing them that the exchange of documents was complete and requesting detailed accounts of costs by 30 May 2016.

18. On 30 May 2016, the Claimant submitted the following account of costs:

> *"Non-reimbursable handling fee: EUR 3,000.00.*
>
> *Adjustment of the Advance on Costs as set out in BAT's letter dated 25 January 2016: EUR 2,000.00.*
>
> *Legal fees: EUR 12,605.00 (calculated according to the Criteria for Lawyers' professional fees of the Valencian Bar Association)".*

19. The Claimant noted that his legal fees and expenses exceeded the maximum contribution provided for in the BAT Arbitration Rules and so claimed EUR 10,000.00 (being the maximum for a dispute of this value) instead.

20. On 30 May 2016, the Respondent made an unsolicited submission. As it was submitted after the parties had been informed that the exchange of documents was complete, the Arbitrator decided not to consider the submission. BAT notified the Respondent of this on 2 June 2016 and requested that it provide an account of costs by 6 June 2016.

21. On 6 June 2016, the Respondent made another unsolicited submission disputing the Arbitrator's decision not to take the unsolicited submission of 30 May 2016 into account. The Arbitrator reminded the Respondent on 7 June 2016 (with reference to the BAT Arbitration Rules) that it is for the Arbitrator, in his sole discretion, to decide whether further submissions and/or evidence is required to enable him to decide the case *ex aequo et bono*, and he is entitled to not take unsolicited submissions into account.

22. The Respondent failed to provide an account of costs by the extended deadline of 6 June 2016. On 7 June 2016, BAT invited the Respondent to comment on the Claimant's account of costs by 14 June 2016.

23. On 14 June 2016, the Respondent commented on the Claimant's account of costs. The Respondent submitted that the Claimant should not be entitled to recover the costs claimed and/or should not be awarded the full amount claimed because: (i) it exceeds the maximum provided for in the BAT Rules for a case of this value; and (ii) it would create financial hardship for the Respondent which is currently experiencing financial difficulties. The Respondent submitted its own account of costs of EUR 6,000.00 for the advance on costs.

24. Since none of the Parties filed an application for a hearing, the Arbitrator 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 of the Parties.

4. The Positions of the Parties

4.1 The Claimant's Position

25. The Claimant submits in essence that:

(i) the Respondent terminated the Contract in bad faith and without just cause by falsely alleging that the Claimant had breached his obligations under the Contract by missing practices and games;

(ii) after sustaining an injury to his [body part] on 4 December 2014, the Claimant requested permission from the Respondent's General Manager to travel to Houston, USA to receive treatment. The General Manager granted permission (via text on 8 December 2014) for the Claimant to travel from 8 December to 19 December 2014. The Claimant provided an image of the text message;

(iii) the Claimant's agent informed the Respondent's General Manager on 16 December 2014 that the Claimant would return from Houston on 19 December 2014 as agreed. However, the Respondent sent the Claimant a letter on 17 December 2014 stating that the Contract was terminated with effect from 8 December 2014 on the basis of the Claimant's absence from the Respondent Club;

(iv) the Claimant's agent rejected the termination notice but on 18 December 2014, the Respondent sent a further letter stating that it was not necessary for the Claimant to return to the Respondent Club;

(v) in terminating the Contract, the Respondent breached Article III of the Contract, which expressly prohibits termination on the grounds of injury. The Respondent did so in an attempt to shirk its financial responsibilities to the Claimant; and

(vi) to date, the Claimant has received USD 90,000.00 under the Contract. USD 135,000.00 in salary payments remains outstanding.

26. In his request for relief, the Claimant asks that the Arbitrator order the Respondent to pay to the Claimant:

(i) USD 135,000.00 in outstanding salary payments with interest at 5% from 8 December 2014;

(ii) the costs of the arbitration; and

(iii) EUR 10,000.00 as a contribution toward the Claimant's legal expenses.

4.2 The Respondent's Position

27. The Respondent submits that:

(i) the Arbitrator should decide the case with reference to the laws of the Russian Federation, as per Article X of the Contract;

(ii) the limitation period for the Claimant to bring a claim under the Contract has expired. The Labor Code of the Russian Federation provides that employees must refer disputes to a court within three months from the date that he became aware, or should have become aware, of the violation;

(iii) under the Civil Procedure Code of the Russian Federation, a judge should dismiss a claim without further investigation if the Claimant has failed to bring the dispute before the court within the limitation period without valid reasons;

(iv) for these reasons, the Arbitrator should dismiss the Claimant's claim.

28. The Respondent also attached to its Answer the following correspondence:

(i) a notice dated 13 December 2014 signed by the Respondent's General Manager informing the Claimant's agent that the Claimant had committed disciplinary violations by missing practices on 8, 12 and 13 December;

(ii) a notice dated 15 December 2014 signed by the Respondent's General Manager informing the Claimant's agent and the Claimant that the Claimant had committed further disciplinary violations by missing a game on 13 December without any reason. The notice states that the Respondent will consider the violations in accordance with the Internal Club Regulations; and

(iii) a notice dated 17 December 2014 signed by the Respondent's General Manager informing the Claimant's agent and the Claimant that the Respondent had decided to terminate the Contract on the grounds of the violations.

4.3 The Parties' Further Submissions

4.3.1 The First Procedural Order

29. In the First Procedural Order, the Arbitrator asked the Claimant to provide comments on the Respondent's submissions regarding applicable law, including the submission that the Arbitrator should decide the dispute with reference to the law of the Russian

Federation. The Claimant submitted that:

(i) Article IX of the Contract makes clear that the Arbitrator should decide disputes *ex aequo et bono*;

(ii) under Article 15 of the BAT Arbitral Rules, *ex aequo et bono* means that the Arbitrator will apply general considerations of justice and fairness without reference to any particular national or international law;

(iii) Article X of the Contract states that "*mutual relations, arising from this Contract, are being regulated by the Civil Code of the Russian Federation*". It does not refer to the Russian Labor Code on which the Respondent relies; and

(iv) in any event, by failing to make submissions on the Claimant's substantive claim within the deadline set by BAT, the Respondent waived its right to raise any grounds of opposition beyond those set out in its Answer.

30. In the First Procedural Order, the Arbitrator acknowledged the submission made by the Respondent in its Answer that the claim should be dismissed but asked the Respondent to provide submissions on the Claimant's substantive claim for the Arbitrator to consider in the event that he decides that the claim should not be dismissed. The Respondent submitted that:

(i) the Respondent was entitled to terminate the Contract on the basis that the Claimant had breached the Internal Club Regulations;

(ii) the Internal Club Regulations state that a player must obtain permission for absences from the Head Coach, and failure to attend team practice without a respectable reason warrants contract termination;

(iii) the Claimant did not obtain permission from the General Manager to return to the USA (and miss team practices and games) between 8 and 19 December 2014. The Respondent has provided a witness statement from the General Manager confirming that he did not receive a request from the Claimant for permission to be absent during this period, and did not approve any absence;

(iv) the evidence (namely the image of the text message) provided by the Claimant in support of his submission that the General Manager gave him permission to return to the USA is false. This is supported by the witness statement of the General Manager, which confirms that he does not own or use the number from which the Claimant alleges the text message granting permission was sent;

(v) the Claimant purchased a plane ticket before receipt of the alleged text granting permission for him to return to the USA. In addition, pursuant to the Contract, the Claimant is entitled to free return travel to the USA. The Respondent submits that these facts further suggest that the Claimant did not have permission to travel;

(vi) the Claimant arranged for the Club's driver to take him to the airport in his personal capacity. The Respondent has provided a witness statement from the Club driver which confirms that he did not receive any instructions from the Respondent regarding the Claimant's travel and that he did not use the Club car to take the Claimant to the airport (rather he used his personal car);

(vii) the Respondent notified the Claimant's agent of the grounds for termination;

(viii) accordingly, the Claimant is not entitled to receive salary payable under the Contract after the 8 December 2016; and

(ix) after termination of the Contract, the Claimant played for a club in France from

17 December 2014 until 19 June 2015, during which he did not take any action against the Respondent to challenge termination of the Contract.

4.3.2 The Second Procedural Order

31. In the Second Procedural Order, the Arbitrator asked the Claimant to:

(i) confirm whether he obtained permission to travel to the USA from the Head Coach as per the Internal Club Regulations;

(ii) provide comments on the witness statements submitted by the Respondent;

(iii) provide any further evidence to show permission was obtained to travel to the USA;

(iv) confirm which telephone number the Claimant usually used to contact the Club General Manager;

(v) provide a working link to, or a transcript of, the recording of the Claimant's conversation with the Club President referred to in the Request for Arbitration;

(vi) confirm whether the Claimant responded to the notices sent by the Respondent on 13 and 15 December 2014, and provide details;

(vii) explain the reason for the lapse of time between termination of the Contract and filing of the Request for Arbitration; and

(viii) explain what steps the Claimant took to mitigate his losses since termination of the Contract, and confirm whether he entered into a contract with another club.

32. The Claimant submitted that:

(i) the Head Coach was aware of the Claimant's injury and agreed that he should go to the USA for treatment. No evidence was provided in support of this statement;

(ii) the Claimant also requested consent from the Club President and General Manager as he had to book flights (the cost of which would be covered by the Respondent under the Contract);

(iii) the recording of a conversation via Skype with the President on 6 December 2014 shows that the President was aware of the Claimant's injury and his intention to return to the USA for treatment. The connection was lost before dates for the trip could be discussed and agreed but the Claimant followed up by text to inform him of the dates;

(iv) the President did not object to the proposed dates, and nor did anyone else from the Respondent;

(v) the Claimant visited a treatment centre for his injury on 9 December, as soon as he arrived in USA;

(vi) for these reasons, the Claimant had a "respectable reason" for missing the two training sessions and one game in the period 8 – 19 December;

(vii) under the Internal Club Regulations, the Respondent can only terminate the Contract if the Claimant misses more than three training sessions, or more than one game. For anything less than that, the Respondent can only impose a fine;

(viii) the Respondent sent the first notice (dated 13 December) to the Claimant's

agent by email on 15 December. The Claimant's agent responded immediately;

(ix) after termination of the Contract, the Claimant's agent engaged in settlement discussions with the Respondent to no avail. Due to the fact that the Claimant was still trying to enforce awards in relation to other recent disputes before BAT, the Claimant was reluctant to initiate another claim; and

(x) the Claimant signed a new contract with Chorale Roanne, a club in France, on 3 April 2015 for the period 5 April to 17 June 2015 ("New Contract"). He received USD14,400 in salary for that period.

33. In the Second Procedural Order, the Arbitrator asked the Respondent to:

(i) explain the meaning of "respectable reason" in the context of the Internal Club Regulations (which provide that a player must not miss a practice or game without a "respectable reason"); and

(ii) confirm whether the Club President was aware of, or approved, the Claimant's trip to the USA before he left on 8 December 2014.

34. The Respondent submitted that:

(i) the meaning of "respectable reason" should be determined by the Respondent with reference to "*current judicial practices*". On that basis, such reasons would include illness, child care, accidents, arrest and natural disasters;

(ii) reasons should be justified and documented; and

(iii) neither the Head Coach nor the Club President gave the Claimant permission to travel to the USA on 8 December 2014.

4.3.3 The Third Procedural Order

35. In the Third Procedural Order, the Arbitrator asked the Claimant to:

(i) provide details and/or evidence of settlement negotiations between the Claimant's agent and the Respondent;

(ii) confirm the amount he received under the New Contract;

(iii) confirm the date of the Skype call (as per the recording on the link provided by the Claimant) between the Claimant and the Club President; and

(iv) confirm whether the medical advice relayed to the Club President on the Skype call was from the Club doctor or the doctor in the USA.

36. The Claimant submitted that:

(i) Mr Stanislav Rizhov, a Russian agent, conducted settlement discussions on behalf of the Claimant in late February 2015. No further details or evidence in support of this statement are provided;

(ii) the Claimant received USD 15,500 under the New Contract, as per Article 7 of the New Contract. The submission made in response to the Second Procedural Order that the Claimant received USD 14,400 was an error;

(iii) the date of the Skype call on the recording is Wednesday 3 December 2014; and

(iv) the medical advice discussed on that call was advice received from the Claimant's American doctor, rather than the Club Doctor.

37. The Claimant also provided a letter from Mr. Dirk Bauermann, the Head Coach at the Respondent for the 2014/15 season, confirming that he gave the Claimant permission to travel to the USA for treatment. There is no reference to the time period for which the permission was granted.

38. In the Third Procedural Order, the Arbitrator asked the Respondent to provide evidence to show that the Claimant missed three practice sessions (rather than two as the Claimant submits). The Respondent provided the practice and game schedule for December 2014 and explained that the Claimant missed practices on 8, 12 and 13 December 2014 in contravention of regulations 2 and 3 of the Internal Club Regulations.

5. Jurisdiction

39. 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 PILA.

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

5.1 Arbitrability

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

---

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

5.2 Formal and substantive validity of the arbitration agreement

42. Article IX of the Contracts is an arbitration clause in favour of the BAT. It reads as follows:

> *"Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration should be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domiciles. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

43. The Contract is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreements under Swiss law (referred to by Article 178(2) of the PILA). In particular, the wording "*any dispute arising from or related to the present contract*" in Article IX clearly covers the present dispute.

44. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimant's claim.

6. Discussion

6.1 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",* as opposed to a decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

> *"the parties may authorise 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. Article IX of the Contract states "*the arbitrator shall decide the dispute ex aequo et bono*". However, the Respondent submits that, pursuant to the BAT Rules, the Arbitrator should decide the dispute with reference to the Laws of the Russian Federation. The Respondent makes this submission on the basis that Article X of the Contract provides for the governing law of the Contract to be the laws of the Russian Federation.

48. The Arbitrator notes that the reference to the laws of the Russian Federation in Article X of the Contract is made only in connection with the interpretation and enforcement of the Contract, and not to the overall determination of disputes before BAT. In these circumstances, the Arbitrator finds that the Parties intended that any dispute which fell to be determined in accordance with Article IX would be determined in the usual way for an arbitration under the BAT Rules, i.e. *ex aequo et bono*.

49. Moreover, in its submission, the Respondent relies on Russian law only for the purposes of claiming rights additional to the rights provided in the Contract, rather than in relation to construction of the Contract.

50. In light of the above, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.

51. 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*[2] (Concordat),[3] under which Swiss courts have held that arbitration *en équité* is fundamentally different from arbitration *en droit* :

> *"When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[4]

52. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives "*a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case*".[5]

53. This is confirmed by Article 15.1 of the BAT Rules *in fine* according to which the arbitrator applies "*general considerations of justice and fairness without reference to any particular national or international law*".

54. In light of the foregoing matters, the Arbitrator makes the following findings.

6.2 Findings

55. It is not necessary, in order to determine this dispute, for the Arbitrator to refer to and make findings on all of the various matters on which the Parties have made

---

2 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).

3 P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PILA.

4 JdT 1981 III, p. 93 (free translation).

5 POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

submissions. Accordingly, in this section the Arbitrator sets out his analysis in relation only to those matters on which it has been necessary for him to make findings in order to determine this dispute. The above notwithstanding, the Arbitrator notes that he has reviewed all the evidence and arguments submitted by the Parties, whether expressly referred to in this section or not.

6.2.1 Was the Respondent entitled to terminate the Contract?

56. The Contract is a no-cut contract (Article III). It can only be terminated by the Respondent:

    (i) upon breach by the Claimant of his obligations under the Contract; and

    (ii) in accordance with the Internal Club Regulations.

57. The Internal Club Regulations set out the sanctions that apply in the event of breach by the Claimant of specific obligations under the Contract ("Sanctions Table"). According to these Regulations, the Respondent can terminate the Contract where the Claimant misses "*more than 3* [practices] *during the season*" without a "*respectable reason*" or misses more than one game during the season without a "*respectable reason*".

58. The Respondent has submitted (and provided evidence purporting to prove) that the Claimant missed three practices and one game during the period 8 – 19 December 2014 without a respectable reason. The Claimant has submitted that he missed two practices and one game during this period, and had a respectable reason in each case.

59. For the purpose of deciding whether the Respondent was entitled to terminate in these circumstances, it is not necessary for the Arbitrator to resolve the discrepancy between the Parties, or to determine whether the Claimant had a "respectable reason" for missing practices and a game. This is because, on either submission, the threshold for

termination set out in the Regulations – *more than three practices or more than one game* – has not been met.

60. Given that the Contract is a no-cut contract, and the Internal Club Regulations clearly specify the sanctions that apply where a player misses a specific number of practices or games, the Arbitrator considers that the Respondent is not entitled to impose alternative sanctions.

61. For these reasons, the Arbitrator finds that the Respondent was not entitled to terminate the Contract by notice dated 17 December 2014.

6.2.2 Did the Claimant breach his obligations under the Contract?

62. Although the Arbitrator has found that the Respondent was not entitled to terminate the Contract, the Arbitrator considers that it is still necessary to consider and determine whether the Claimant has breached his obligations under the Contract. This will be relevant to the relief that he should be awarded in this Arbitration.

63. Under regulations 2.4 and 3.4 of the Internal Club Regulations, which form part of the Contract, the Claimant was required to obtain permission from the Head Coach to miss a practice or a game. There is some dispute between the Parties as to whether the Claimant sought and obtained the necessary permission from the Head Coach.

64. The Claimant has submitted that he informed the Head Coach that he had sustained an injury (on 4 December 2014) and that the Head Coach agreed that he should travel to the USA for treatment. The Respondent has submitted that the Head Coach did not give the Claimant permission to return to the USA for the period 8 – 19 December 2014.

65. The Arbitrator has been disappointed by the quality of the submissions and evidence in

support provided by both Parties. However, the burden of proof is on the Claimant to show that he did have permission to return to the USA for the period 8 – 19 December, and miss practices and games during that period.

66. The Claimant has provided a letter from the Head Coach confirming that he gave the Claimant permission to return to the USA for treatment. However, the Claimant has provided no evidence to show that the permission related to the period 8 – 19 December 2014. The Claimant has also provided no details of when or where the alleged meeting with the Head Coach (at which they discussed his injury) took place, despite being invited to provide further evidence in support.

67. For these reasons, the Arbitrator considers that the Claimant has failed to discharge his burden of proof and, therefore, has technically breached regulations 2.4 and 3.4 of the Internal Club Regulations.

6.2.3 Did the Claimant have a "respectable reason" for missing the practices and game?

68. According to the Sanctions Table, sanctions can only be imposed for a breach of regulations 2.4 or 3.4 where the player misses a practice or game without a "respectable reason".

69. The Respondent has submitted that "respectable reason" in the context of the Sanctions Table means circumstances that are not provided for in the Internal Club Regulations (i.e. unforeseen), such as where the player is involved in an accident or has to provide emergency care to a child, which results in the player being unable to obtain the necessary permission to miss a practice or game.

70. The Arbitrator agrees with the Respondent's submissions for the following reasons:

(i) the Internal Club Regulations make clear when and what consents are required for absences from practices and games, including where a player is ill or injured;

(ii) the consents specified in the Internal Club Regulations are not unreasonable or unduly onerous; and

(iii) it follows that the circumstances where failure to obtain the necessary consents will not constitute a breach will be limited to circumstances which cannot be foreseen or are otherwise outside the player's control.

71. The Claimant has submitted that he had a "respectable reason", namely:

(i) he needed to travel to the USA for a second opinion/treatment on his injured [body part]; and

(ii) he informed the Club President and the General Manager that he intended to return to the USA for treatment during the period 8 to 19 December 2014. The President did not object to this and the General Manager approved it by text.

72. The Parties agree that the Claimant has suffered an injury for which he required medical treatment. However, the Internal Club Regulations explicitly require certain consents to be obtained to be absent from a practice or game through injury or medical treatment. As explained above, the Claimant has failed to prove that he did obtain the necessary consents for the relevant period. In these circumstances, the Arbitrator finds *ex aequo et bono* that the Claimant is not entitled to rely on the "reasonable excuse" exemption.

73. The Claimant has provided evidence in support of his submissions at (ii) above but the Arbitrator does not consider the evidence to be compelling, for the following reasons:

(i) the Claimant has provided an image of a text exchange on 6 December 2014 in which he informed the Club President of his proposed dates of travel. The exchange shows that the President received the message but it does not contain any approval or permission from the President;

(ii) the Claimant has provided a recording of a Skype call with the Club President in which he gave him an update on his injury and asked whether the President was happy with his return date. However, the connection on the call was lost before the Claimant could discuss with the President his proposed dates of travel;

(iii) the Claimant has submitted that the text exchange (referred to at (i) above) occurred shortly after the Skype call (referred to at (ii) above). However, it appears from the evidence that the text exchange preceded the call:

a) the text exchange occurred between 13.44 and 13.54 on Saturday 6 December 2014;

b) the call occurred at 14.47 on a Wednesday. The Claimant has submitted that this was Wednesday 3 December 2014 but it appears that, in fact, it was Wednesday 10 December 2014;

c) on the recording of the Skype call, the Claimant states that he "*went to the doctor here*" and refers to medical advice he had received. The Claimant has confirmed that this was a reference to his American doctor;

d) as he met with the doctor in the USA on Tuesday 9 December 2014, the call must have occurred on (or after) Wednesday 10 December 2014; and

e) this implies that this Claimant's dates of absence had not been agreed, at least with the Club President, before he left for the USA.

(iv) the Claimant has provided an image of a text message received on 8 December 2014 at 01.48 in which – the Claimant submits – the Club General Manager gave him permission to return to the USA ("*you can fly home*"). The Claimant submits that the General Manager's phone had run out of battery, so the permission was sent from another person's phone. The Respondent has provided a witness statement from the General Manager confirming that he did not send the alleged text message, and does not own the phone number shown in the image provided by the Claimant; and

(v) the Respondent has provided phone records for the General Manager's usual number which shows activity on the phone at 01.00 and 02.00. This suggests that, contrary to the Claimant's submission, the General Manager's phone may not have been out of battery at the time that the text message referred to at (iv) was sent.

74. For these reasons, the Arbitrator considers that the Claimant has not successfully rebutted the Respondent's submission that neither the General Manager nor the President provided permission for the Respondent to return to the USA during the relevant period.

75. However, the Arbitrator notes that none of the President, General Manager or Head Coach raised any objection to, or otherwise contacted the Claimant about, his trip to the USA before the first disciplinary notice was issued and sent on 15 December 2014 – being nine days after the Claimant first informed the President on 6 December 2014, and seven days after the first missed practice. The Arbitrator also notes that the Claimant's agent responded promptly to the first disciplinary notice to say that the

Claimant believed that he had permission to travel to the USA for the period 8 – 19 December 2014.

76. This is not sufficient to satisfy the Arbitrator that the Claimant had a reasonable excuse for breaching regulations 2.4 and 3.4. of the Internal Club Regulations. However, the Arbitrator considers that it should be taken into account when deciding what fine should be imposed on the Claimant for the breach.

77. For the above reasons, the Arbitrator finds that the Claimant technically breached regulations 2.4 and 3.4 of the Internal Club Regulations without a "respectable reason".

6.2.4 Conclusion and quantum

78. Accordingly, the Arbitrator finds *ex aequo et bono* that the Respondent was not entitled to terminate the Contract.

79. There is no provision in the Contract governing compensation for wrongful termination. In the absence of such a provision, the Arbitrator considers that Article IV should apply by analogy. This article provides that, where the Respondent fails to make payment for amounts owed under the Contract within 45 days of them becoming due, the Claimant shall be entitled immediately to all remaining salary instalments.

80. The Claimant has claimed that the salary outstanding is USD 135,000, which includes an instalment of USD 22,500.00 for May 2015. However, under Article IV of the Contract, salary is only payable in May on a per-day basis if the basketball season continues beyond 1 May 2015. As the Respondent club had no games in May (http://www.bcredoctober.com/en/games/schedule/?season=1259), no amount is due for that month. Therefore, the salary instalments remaining under the Contract are for December 2014 to April 2015 totalling USD 112,500.

81. However, the Arbitrator also finds *ex aequo et bono* that the Claimant has breached regulations 2.4 and 3.4 of the Internal Club Regulations. Under the Contract, the Respondent would have been entitled to impose the following fines on the Claimant in accordance with the Internal Club Regulations:

    (i) up to 50% of the Claimant's monthly salary for missing three training sessions without reasonable excuse; and

    (ii) up to 100% of the Claimant's monthly salary for missing one game without reasonable excuse.

82. As such, the Arbitrator considers that the applicable fine should be deducted from the remaining salaries due under the Contract.

83. In calculating the fine, the Arbitrator considers that regard should be had to the fact that the Claimant acted in good faith in notifying the Club President of the dates of his intended trip and travelled to the USA on the assumption that the Respondent had granted permission and/or not objected to his trip to receive medical treatment. For these reasons, the Arbitrator considers that an appropriate fine would be:

    (i) USD 9,000.00 for missing the three training sessions (being 40% of the monthly salary); and

    (ii) USD 11,250 for missing a game (being 50% of the monthly salary).

84. In addition, to ensure that the Claimant is not unjustly enriched, the amount received under the New Contract must be deducted from the remaining salaries payable under the Contract, being USD 15,500.

85. Finally, the Arbitrator must consider whether the Claimant properly mitigated his losses

following termination and, if not, whether appropriate reductions must be made to account for this.

86. The Arbitrator notes that the Claimant secured the New Contract with a different club within three and a half months of termination of the Contract (which period included the Christmas break). The Arbitrator also notes that, in circumstances where the Claimant was having difficulty enforcing an award from another arbitration, he was entitled to consider over a period of six months following termination whether to bring proceedings against the Respondent. However, the Arbitrator would have expected the Claimant or his agent to engage in settlement discussions with the Respondent during this period. The Claimant submitted that he did but has provided no details or evidence in support.

87. For this reason, the Arbitrator considers it appropriate to reduce the award by 10% to reflect the fact that further mitigation steps could have been taken.

88. The total amount due to the Claimant, therefore, is USD 69,075.00.

6.2.5 Interest

89. The Claimant has requested interest on the claimed amount "*at a rate of 5% p.a*". Although the Contract does not provide for the payment of default interest, this is a generally accepted principle which is embodied in most legal systems. Indeed, payment of interest is a customary and necessary compensation, and the Arbitrator considers that there is no reason why the Claimant should not be awarded interest in this case. Also, according to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. The Arbitrator further considers, in line with the jurisprudence of the BAT, that 5% per annum is a reasonable rate of interest and that such rate should be applied in this case.

90. The Claimant has requested that interest be paid from 8 December 2014, being the date of breach of the Contract by the Respondent. The Arbitrator finds that the correct date from which interest is payable is the day after the receipt of the termination notice, being 18 December 2014.

7. Costs

91. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration (which include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator) shall be determined by the BAT President and may either be included in the award or communicated to the Parties separately. It also provides 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*".

92. On 25 July 2016, pursuant to Article 17.2, 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 at EUR 8,000.00.

93. Article 17.3 of the BAT Rules provides that, as a general rule, the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings. In doing so, "*the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and financial resources of the parties.*"

94. Considering that the Claimant was awarded approximately 50% of the sums he claimed, the Arbitrator considers it is fair that the each party bear 50% of the costs of the arbitration. As the Respondent has paid an advance on the arbitration costs of EUR 6,000.00 while the Claimant has paid only EUR 2,000.00, the Claimant shall thus

reimburse an amount of EUR 2,000.00 to the Respondent.

95. The Claimant has submitted an account of costs of EUR 13,000.00 (including the non-reimbursable fee of EUR 3,000.00) in legal fees and expenses but is claiming EUR 10,000.00 on the basis that this is the maximum permitted under the BAT Arbitration Rules for a case of this value. Considering that the Claimant was awarded approximately 50% of the sums he claimed, the Arbitrator considers it is fair in the first instance that 50% of his legal fees and expenses (up to the maximum) be borne by the Respondent.

96. However, the Arbitrator considers that the Claimant has contributed to this Arbitration taking longer, and being more complicated, than it needed to be. In particular, the Claimant:

a. failed to pay his share of the Advance on Costs by the initial deadline of 3 December 2015, and by the extended deadline of 28 December 2015;

b. requested that the Arbitrator re-allocate the Parties' shares of the Advance on Costs more than a month after the initial deadline for payment had passed;

c. even after the Arbitrator had re-allocated the Advance on Costs so that the Claimant's share was reduced to EUR 2,000.00, the Claimant failed to meet the new payment deadline of 8 February 2016 and instead, on that date, requested an extension;

d. failed to make payment by the extended deadline of 19th February (finally making payment on 22 February);

e. requested an extension to the deadline for responding to the Second

Procedural Order on the day that responses were due;

f. did not provide key evidence requested in the Second Procedural Order (of 30 March) until 18 May as part of his response to the Third Procedural Order; and

g. made submissions that were inconsistent with evidence that he submitted.

97. For these reasons, the Arbitrator considers that the contribution to legal fees and expenses should be reduced by a further 20%.

98. Therefore, the Arbitrator decides that the Respondent shall pay to the Claimant EUR 4,000.00 as a contribution towards the Claimant's legal fees and expenses.

8. AWARD

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

1. **Basketball Club Krasny Oktyabr Volograd is ordered to pay to Mr. Bernard King USD 69,075.00 net plus interest of 5% per annum from 18 December 2014.**

2. **Mr. Bernard King is ordered to pay EUR 2,000.00 to Basketball Club Krasny Oktyabr Volograd as reimbursement of the advance on arbitration costs.**

5. **Basketball Club Krasny Oktyabr Volograd is ordered to pay Mr. Bernard King EUR 4,000 as a contribution towards his legal fees and expenses.**

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

Geneva, seat of the arbitration, 10 August 2016

Raj Parker
(Arbitrator)