ARBITRAL AWARD

(BAT 1682/21)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Rhodri Thomas

in the arbitration proceedings between

Mr. Bryce Taylor

- Claimant -

represented by Mr. Sébastien Ledure and Mr. Wouter Janssens,

vs.

Bamberger Basketball GmbH
Kornstr. 20, 96050 Bamberg, Germany

- Respondent -

represented by Mr. Sven Piel, attorney at law,

BASKETBALL
ARBITRAL TRIBUNAL

1. The Parties

1.1 The Claimants

1. Mr. Bryce Taylor (hereinafter "the Claimant") is a naturalised German professional basketball player who is originally from the USA.

1.2 The Respondent

2. Bamberger Basketball GmbH (hereinafter the "Respondent") is a professional basketball club in Bamberg, Germany, that competes in the German Basketball Bundesliga.

2. The Arbitrator

3. On 21 April 2021, Mr. Raj Parker, Vice-President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), appointed Mr. Rhodri Thomas as arbitrator (hereinafter the "Arbitrator") pursuant to Articles 0.4 and 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 (hereinafter the "BAT Rules").

4. Neither the Claimant or the Respondent (hereinafter the "Parties") has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. The relevant facts and allegations presented in the Parties' written submissions and evidence are summarised below. Additional facts and allegations are set out, where relevant, in connection with the legal discussion that follows.

6. Although the Arbitrator has considered all the facts, allegations and evidence submitted by the Parties in the present proceedings, he refers in this Award only to those necessary to explain its reasoning.

3.1.1 The Contract

7. On 9 June 2017, the Claimant and the Respondent entered into a player contract for the 2017-2018, 2018-2019 and 2019-2020 seasons (hereinafter the "Contract"). The Contract contains, among others, the following provisions:

> "***§ 5***
> ***Renumeration***
>
> *1. For the season 2017/2018 (01.07.2017 – 30.06.2018), for season 2018/2019 (01.07.2018 – 30.06.2019) and for season 2019/2020 (01.07.2019 – 30.06.2020) the Player shall receive a monthly salary of 48.850,00 Euro gross.*
>
> […]
>
> ***§ 9***
> ***Commencement and Ending of the Contract***
>
> […]
>
> *4. All claims arising from the employment relationship are to be asserted in written form by the Parties within three months after the due date. In case of rejection of the claim by the opposite side the Party has to assert its claim within three months by taking legal action.*
>
> […]
>
> ***§ 10***
> ***Final Provisions***
>
> […]
>
> *4. This contract is subject to German law.*
>
> […]
>
> *6. Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile.*"
>
> (Emphasis as in the original.)

8. On 9 June 2017, the Claimant and the Respondent entered into an addendum to the Contract (hereinafter the "First Addendum"). The First Addendum contains the following provision:

"*The parties consider,* [*sic*] *that the player will obtain the German citizenship. In that case the player will receive an increase to his contractual salaries of 60.000 Euro net per season, starting proportionately with the month entering into German citizenship.*"

(Emphasis as in the original.)

9. On 5 January 2018, the Claimant and the Respondent entered into a further addendum to the Contract (hereinafter the "Second Addendum"). The Second Addendum contains, among others, the following provisions:

"*This is the Addendum to the employment contract signed on 09.06.2017.* [*sic*] *between the Parties. With this Addendum, the Parties agree to add the following, under the condition, that the player has received the german* [*sic*] *passport:*

1. The employment contract is extended for the basketball season 2020/21 for the total monthly salary of 46.500,00 Euro gross (12 months, 01/07/2020. – 30.06.2021. [*sic*]*), under the condition that the Player successfully passes Club's* [*sic*] *regular medical test, within 15 days after the Club's last official game in the basketball season 2019/20. In the case that the Player should not pass the medical exam, the Club shall communicate the medical test result in written* [*sic*] *to the Player within 72 hours after it's* [*sic*] *done. The Player shall have the right on* [*sic*] *the second opinion by the neutral sports doctor and if the second opinion is different than the opinion of the Club's doctor, Parties* [*sic*] *shall agree on* [*sic*] *neutral third sports doctor whose opinion shall be final, valid and accepted by the Parties. In case that the Player does not pass the medical exam successfully, the Club has an option to unilaterally terminate the contract for season* [*sic*] *2020/21. If examination* [*sic*] *is not completed for a reason that is the responsibility of the club* [*sic*]*, within 15 days after the Club's last official game in the basketball season 20219/20, it is understood that Club* [*sic*] *declines right* [*sic*] *to complete such medical exam and the Club* [*sic*] *obligations for season* [*sic*] *2020/21 shall continue and employment contract* [*sic*]*, with all its addendums, shall be in full force and effect. If the player cannot join the medical test in time, it is understood that the Club has an option unilaterally to terminate the contract for season* [*sic*] *2020/21 without any further obligation.*

[…]

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

All terms or parts of the employment contract terms signed on 09.06.2017. [*sic*] *between the Parties, including all previous addendums, which are not changed/added in this present Addendum, remain the same, unchanged and in full force and effect.*"

3.1.2 Factual background to the dispute

10. Following the execution of the Second Addendum, the Claimant obtained German citizenship on 23 April 2018.

11. On 24 February 2020, the Claimant underwent an ____ surgery and did not play any further games for the Respondent during the 2019/2020 season.

12. On 18 June 2020, the Respondent notified the agent of the Claimant by e-mail that "*we will conduct the medical test with Bryce according to* [the Second Addendum]*, as soon as the last game of this season is played. As this might happen already on Saturday, we subsequently would start the process on Monday 22 June 2020*". The Respondent informed the Claimant that the medical examination would be performed by Dr. med. Dirk Rothaupt (hereinafter "Dr. Rothaupt"). The Respondent also requested the Claimant to provide his written consent that Dr. Rothaupt could release the results of the medical examination to the Respondent.

13. On 19 June 2020, the Claimant wrote to the Respondent noting that the terms of the Second Addendum required the medical examination to be performed "*by the club's doctor*". The Claimant requested that the examination should therefore be performed by Dr. med. Andreas Först (hereinafter "Dr. Först"), who had conducted previous examinations of the Claimant for the Respondent. The Claimant noted that he would "*reserve all rights with respect to the outcome*" if the examination were to be conducted by Dr. Rothaupt. The Claimant further explained that "*I am still in rehab after my surgery, even though close to completing it*" and he expressed his disappointment that the Respondent was "*pushing me to take the test*" as soon as the season had ended.

14. On 20 June 2020, the Respondent played its last game of the 2019/2020 season.

15. Over the following two days, the Respondent provided the Claimant with further details regarding the date and location of the medical examination. The Respondent did not address the Claimant's request that the examination should be performed by Dr. Först.

16. On 22 June 2020, the Claimant reiterated his request that the medical examination be performed by Dr. Först.

17. The Respondent replied on the same day that Dr. Rothaupt was the "*club doctor of our choice*" within the meaning of the Second Addendum.

18. On the following day, 23 June 2020, the Respondent provided the Claimant with a document "*with which we have released Dr. Dr. Först from his obligation as the club's doctor regarding the conduction* [*sic*] *of your medical test and have instead appointed Dr. med. Dirk Rothaupt*". The document was dated 19 June 2020 and signed by the Respondent and Dr. Först.

19. Between 23 June 2020 and 30 June 2020, the Claimant attended the medical examination with Dr. Rothaupt. At the end of the examination, Dr. Rothaupt asked the Claimant to release him from his confidentiality obligations towards the Claimant so that he could provide the results of the examination to the Respondent.

20. On 1 July 2020, the Claimant wrote to Dr. Rothaupt noting that he had "*never received such request before, as all of my medical tests in the past have been conducted by the doctors of my respective clubs*". The Claimant therefore requested Dr. Rothaupt to first provide him with "*a copy of the results as well as your interpretation thereof*".

21. Dr. Rothaupt did not respond to the Claimant, and the Claimant does not appear to have chased Dr. Rothaupt for the results of the examination.

22. The 15-day deadline for the completion of the Claimant's medical examination pursuant to the Second Addendum expired on 5 July 2020.

23. Three days later, on 8 July 2020, the Respondent notified the Claimant that his refusal to release the results of the medical examination meant that he had not passed his examination by the 15-day deadline pursuant to the Second Addendum. The Respondent was therefore not going to extend the Contract to the 2020/2021 season.

24. The Respondent further notified the Claimant that his refusal to release the results meant that he had failed to "*participate*" in the examination within the meaning of the Second Addendum. The Respondent was therefore exercising its option to terminate the Contract unilaterally, thereby discharging the Respondent of certain obligations it had to the Claimant in the event that he did not pass his examination. The Respondent noted in this regard that "[*p*]*articipation in the examination without relieving the examining doctor of his obligation to professional secrecy does not qualify as participation in the sense of the contract, since the club cannot find out the results of the examination or the interpretation thereof*".

25. On 15 July 2020, the Respondent invoiced the Claimant EUR 336.07 in relation to the medical examination with Dr. Rothaupt.

26. On 31 July 2020, another team in the Basketball Bundesliga, Hamburg Towers, informed the agent of the Claimant that it would be willing to offer the Claimant a contract for the 2020/2021 season for an annual salary of EUR 30,000.00. The agent also contacted a number of other teams but did not receive any offers.

27. On 3 August 2020, counsel for the Claimant sent a detailed letter of claim to the Respondent (hereinafter the "Pre-Action Letter") noting that (i) the Contract had been extended to the 2020/2021 season pursuant to the Second Addendum, and (ii) the purported termination of the Contract by the Respondent was therefore unlawful.

28. The letter explained that the Claimant had been justified to refuse the release of the results of his medical examination because (i) "*the Player has never been requested by the Club to consent to the lifting of the professional secrecy of any doctor* [which] *raises questions regarding the effective capacity of Dr. Rothaupt as alleged 'doctor of the Club"*", (ii) the Claimant was under no contractual obligation to release the results, and (iii) "*it is reasonable and understandable that the Player requested Dr. Rothaupt to be informed of such data in view of consenting to their disclosure*".

29. Accordingly, "*it is obvious that it is the sole and exclusive responsibility of the Club* that *the medical examination could not be timely completed*", and the Contract had therefore been automatically extended to cover the 2020/2021 season pursuant to the terms of the Second Addendum.

30. The letter further stated that (i) "*the Club did not subject the Player to its 'regular medical test', since the medical examination was not done by the Club's regular doctor Dr. Först*", (ii) "*the Player did effectively undergo the first medical examination*", and (iii) "*the consequence of the Player not passing the medical examination, quod non, is: the Player being allowed to undergo a second and, potentially, a third medical examination*". The Respondent was therefore not entitled "*to immediately and unilaterally terminating* [*sic*] *any contractual relationship with the Player*".

31. As a consequence, the Respondent was requested to (i) pay to the Claimant a "*termination indemnity*" of EUR 558,000.00 gross under the Second Addendum and EUR 60,000.00 net under the First Addendum, respectively, and (ii) settle the outstanding invoice for the medical examination with Dr. Rothaupt in the amount of EUR 336.07.

32. The letter further noted that absent prompt payment "*we have been instructed to immediately initiate proceedings with the BAT per the penultimate paragraph of the* [*Second Addendum*]", in which case "*the Player's claim is most likely to be enhanced with another* ***forty-five thousand Euro (€45.000)***" (emphasis as in the original).

33. On 7 August 2020, the former counsel for the Respondent sent a letter to the counsel for the Claimant rejecting the claim set out in the Pre-Action Letter on the basis that (i) the dispute was governed by German law, (ii) German employment law required the dispute to be asserted within three weeks "*by filing a declaratory action before the competent labour court (in this case Bamberg*), failing which "*the notice of termination shall be deemed legally effective*", (iii) German employment law provides that employment disputes may not be submitted to arbitration, and (iv) since the termination

of the Contract "*is to be regarded as legally effective, there are no claims for damages against Bamberger Basketball GmbH*".

34. On 10 August 2020, the Claimant signed a new contract with Hamburg Towers for the 2020-2021 season with a gross base salary of EUR 30,000.00. According to the Claimant, he signed the contract "*after duly passing the medical examination conducted by Hamburg's doctor*".

35. The Parties did not engage in any further written correspondence in relation to the Pre-Action Letter over the next few months. However, the Claimant alleges that his counsel tried to contact the former counsel for the Respondent via telephone on several occasions.

36. On 27 January 2021, counsel for the Claimant sent an e-mail to the former counsel for the Respondent in response to the Pre-Action Letter. The e-mail noted that (i) "*the club's position as elaborated in your* [*letter dated 7 August 2020*] *is formally rejected*", and (ii) "*our client intends to start arbitration proceedings against the club with* [*the BAT*]. Attached to the e-mail was a draft Request for Arbitration.

37. The Claimant and the Respondent subsequently engaged in settlement discussions.

38. On 17 March 2021, counsel for the Claimant informed the Claimant that "[*w*]*e had a final call with the German lawyer about 10 days ago regarding a possible settlement. He (and the team) keep denying jurisdiction of the BAT. It is clear that Bamberg will never make any settlement offer/payment unless forced to do so by the BAT and FIBA*".

39. The Claimant appears to have discontinued the settlement negotiations at this point.

3.2 The Proceedings before the BAT

40. On 14 April 2021, the Claimant filed a Request for Arbitration with the BAT in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 7,000.00 was received by the BAT on 12 April 2021.

41. On 26 April 2021, the BAT fixed a deadline of 17 May 2021 to file an Answer to the Request for Arbitration (hereinafter the "Answer"). The BAT also fixed the following amounts as the Advance on Costs with a deadline of 6 May 2021 for payment:

"*Claimant (Mr Bryce Taylor)*	*EUR 6,000.00*
Respondent (Bamberger Basketball GmbH)	*EUR 6,000.00*"

42. On 30 April 2021, the Claimant paid its share of the Advance on Costs. On 5 May 2021, the Respondent paid its share of the Advance on Costs.

43. On 14 May 2021, the Respondent requested an extension of the deadline to file the Answer until 31 May 2021. On 17 May 2021, the Arbitrator granted the extension as requested. On 31 May 2021, the Respondent filed its Answer.

44. By Procedural Order dated 28 June 2021 (hereinafter "Procedural Order 1"), the Arbitrator requested the Parties to provide further information by 12 July 2021.

45. On 29 June 2021, the Claimant requested an extension of the deadline until 31 July 2021. The Arbitrator subsequently extended the deadline until 26 July 2021. The Parties responded to Procedural Order 1 on 26 July 2021.

46. On 28 July 2021, the Arbitrator requested the Respondent to provide a document that appeared to have been inadvertently omitted from its response to Procedural Order 1. The Respondent provided the document on the same day.

47. By Procedural Order dated 2 August 2021, the Arbitrator declared the exchange of submissions complete, and requested that the Parties submit detailed accounts of their costs by 9 August 2021 (hereinafter "Procedural Order 2").

48. On 4 August 2021, the Claimant informed the BAT that he had incurred legal costs of EUR 37,200.00 (excluding his share of the advance on costs and the non-reimbursable handling fee). The Claimant therefore requested a contribution to his legal costs of EUR 20,000.00 plus reimbursement of the handling fee of EUR 7,000.00.

49. The Respondent did not submit its accounts of costs by the deadline set by the Arbitrator.

50. On 11 August 2021, the BAT acknowledged receipt of the Claimant's account of costs while noting that the Respondent "*failed to submit its account of costs*".

51. On the same day, the Respondent provided the BAT with its account of costs and explained that it had not received Procedural Order 2 as the cover e-mail from the BAT "*apparently did not pass our firewall and arrived late*". The Respondent explained that it had incurred legal costs of EUR 22,750.00 (excluding its share of the advance on costs), and therefore requested a contribution towards its legal fees and other expenses of EUR 20,000.00.

52. The Arbitrator subsequently decided to admit the Respondents' account of costs to the case file late given that (i) the Respondent had provided a reasonable explanation for the delay, (ii) the Respondent had acted promptly to provide its account of costs once notified of the delay, and (iii) admitting the Respondent's account of costs two days late did not cause any serious prejudice to the Claimant.

53. In its Answer, the Respondent requested that two of its current and former employees be given the opportunity to testify at an oral hearing. After reviewing the written submissions of the Parties, the Arbitrator decided that he did not require any oral evidence from the proposed witnesses in order to determine the dispute. In accordance with Article 13.1 of the BAT Rules, the Arbitrator therefore decided not to hold a hearing and to deliver the award on the basis of the written submissions of the Parties.

4. The Position of the Parties

4.1 The Claimant

54. The Claimant's position is essentially the same as set out in its Pre-Action Letter (summarised above), namely, that the Respondent was not entitled to terminate the

Contract pursuant to the Second Addendum on the basis that the Claimant had not passed and/or not participated in the medical examination within the 15-day deadline mandated by the Second Addendum. According to the Claimant, the Respondent had waived its rights to conduct the medical examination because the failure to complete the examination within the 15-day deadline was "*the responsibility of the Respondent*".

55. The Claimant notes in this regard that (i) the medical examination should have been performed by Dr. Först ("*the internal doctor that normally conducts medical examinations on behalf of the Respondent*") and not Dr. Rothaupt, (ii) the Claimant nonetheless "*effectively joined the medical examination*" with Dr. Rothaupt, (iii) the request by Dr. Rothaupt for the Claimant's permission to release the results was "*both surprising and suspicious, as Claimant in the past had never been requested to consent to the lifting of the professional secrecy of any of the Respondent's doctors*", (iv) the Claimant was under no contractual obligation to provide his consent for the disclosure of the results, (v) given the "*strictly personal and sensitive*" nature of the results, "*it is reasonable and understandable that Claimant requested Dr. Rothaupt on the beforehand* [*sic*] *to be personally informed of such data*", and (vi) absent prior disclosure of the results to the Claimant, "*Respondent prevented Claimant from being in a position where he could duly decide on his consent to the disclosure of the data*".

56. The Claimant contends in the alternative that the Respondent was not entitled to refuse to extend the Contract on the basis that the Claimant had not passed the medical examination because (i) "*no negative result whatsoever was communicated to the Claimant*", and (ii) "*no right to a second medical examination was given to Claimant*".

57. The Claimant further suggests that the Respondent had sought to terminate the Contract on 8 July 2020 to mitigate the impact of the COVID-19 pandemic on its financial position and "*cut its budget for the 2020/2021 season*". According to the Claimant, it is "*crystal clear that the appointment of Dr. Rothaupt solely took place 'pour les besoins de la cause' in view of terminating Respondent's relationship with Claimant*".

58. The Claimant finally submits that his claim is neither time barred by Article 9(4) of the Contract or certain statutory provisions of German employment law. The Claimant notes in this regard that (i) the Arbitrator has to decide the dispute *ex aequo et bono*, consistent with the express governing law clause of the Second Addendum, (ii) whether or not a claim is time barred therefore needs to be "*addressed by the doctrine of Verwirkung*" as developed by BAT jurisprudence, and (iii) the present claim is not time barred because (a) "[*n*]*o substantial period of time has elapsed since the claim fell due*" given that the Request for Arbitration was filed eight months after the Pre-Action Letter, and (b) "*Respondent cannot reasonably have assumed that Claimant would no longer file a claim*" as the Claimant repeatedly intimated his intention to commence proceedings with the BAT during the intervening period.

59. The Claimant submits that he is therefore entitled, in principle, to his gross annual salary for the 2020/2021 season under the Second Addendum (EUR 558,000.00) and his annual net salary under the First Addendum (EUR 60,000.00). The Claimant acknowledges, however, that this sum needs to be reduced by his annual gross salary under his new contract with Hamburg Towers (EUR 30,000.00).

60. The Claimant has submitted a statement from his agent confirming that the contract with Hamburg Towers was "*the best possible one on the market for him*". The agent has given a number of reasons why the Claimant was forced to sign a "*low money deal*", including (i) his poor performance during the 2019/2020 season, (ii) his age (34 years), (iii) the timing of the unlawful termination of the Contract (8 July 2020, which was "*way too late for the German player and lots of jobs were already taken by then*"), and (iv) the impact of the COVID-19 pandemic, "*with teams lowering their budget*". The Claimant submits that, in these circumstances, "*it is indisputable that Claimant and his representative agent have undertaken all reasonably expectable efforts in finding the best possible deal* […] *so that no further mitigation of the termination indemnity by the BAT would be justified*".

61. As a consequence, Claimant is claiming (i) EUR 558,000.00 gross, comprising his annual gross salary under the Second Addendum (EUR 558,000.00) minus his annual gross salary under the Hamburg Towers contract (EUR 30,000.00), and (ii) EUR 60,000.00 net, comprising his annual net salary under the First Addendum, plus interest at a rate of 5% per annum from 9 July 2018, i.e. the day after the Respondent purported to terminate the Contract, until payment.

62. The Claimant is also seeking a contribution to its legal fees and expenses plus reimbursement of the BAT handling fee of EUR 7,000.00.

63. The Claimant accordingly submitted the following request for relief:

> "*Claimant requests an award to be rendered, per which Respondent shall:*
>
> - *pay Claimant:*
>
> - *an amount of five hundred twenty-eight thousand Euro (€ 528.000) gross plus sixty thousand Euro (€ 60.000) net as termination indemnity; and*
>
> - *late payment interest at a rate of five percent (5%) per annum on the principal amount of five hundred twenty-eight thousand Euro (€ 528.000) gross plus sixty thousand Euro (€ 60.000) net, as from July 9, 2020, until the date of full payment, at the date of filing present Request for Arbitration determined at an amount of twenty-two thousand five hundred fifty-three Euro and forty-two cents (€ 22.553,42).*
>
> - *Reimburse Claimant all BAT expenses and procedural costs, including:*
>
> - *reimbursement of the BAT Handling Fee ex article 17.1 of the BAT Rules in the amount of seven thousand Euro (€ 7.000), to be paid supplementary on top of the contribution towards Claimant's legal fees and expenses;*
>
> - *reimbursement of Claimant's share of the advance on costs; and*
>
> - *in case Claimant would have to substitute for (part of) Respondent's share on the advance of costs, the reimbursement hereof.*
>
> - *Indemnify Claimant for all incurred legal and advisory expenses up to an amount to be determined during the BAT proceedings, at present estimated at twenty thousand Euro (€ 20.000).*

> *Total amount in dispute:* […] *five hundred twenty-eight thousand Euro (€528.000) gross plus eighty-two thousand five hundred fifty-three Euro and forty-two cents (€82.553,42) net*."
>
> (Emphasis as in the original.)

4.2 The Respondent

64. The Respondent (who is represented by a new counsel in these proceedings) submits that (i) it was entitled to terminate the Contract pursuant to the Second Addendum on the basis that the Claimant did not participate in and/or pass the medical examination by the 15-day deadline pursuant to the Second Addendum, and (ii) the claim is in any event time-barred.

65. As a preliminary matter, the Respondent contends that the Contract is governed by German law in light of (i) the express reference to German law in Article 10(4) of the Contract, and (ii) the omission of an express reference to the principle of *ex aequo et bono* from the BAT jurisdiction clause in Article 10(6) of the Contract (which, save for this omission, replicates the model BAT jurisdiction clause). The Respondent submits that the subsequent inclusion of such an express reference in the BAT jurisdiction clause in the fourth paragraph of the Second Addendum "*must be evaluated as an editorial mistake*". That being said, "*even if the BAT were to conclude that it does not apply German law but decides the case ex aequo et bono, this does not affect the outcome of the dispute*".

66. The Respondent then provides six reasons why the claim must fail, namely, (i) "*the Claimant itself* [*sic*] *was responsible for the fact that the condition for the extension of the contract did not occur*" as it was "*within his sphere of responsibility to ensure that the results of the medical test were made available to the Respondent*", (ii) "*the Claimant is not entitled to any claims arising from the Employment Agreement because he himself has not fulfilled his obligations under the alleged Employment Agreement*" in relation to the 2020/2021 season, such as "*actual appearance at training sessions and games of the Respondent*", (iii) the claim was commenced outside the three-month

contractual limitation period pursuant to Article 9(4) of the Contract, (iv) the claim was commenced outside the three-week statutory limitation period pursuant to German employment law, (v) the claim was forfeited because the Claimant "*did not claim any payment against Respondent for almost one year*", and (vi) the claim must fail by reference to "*general considerations of justice*", including the need for "*legal certainty*" in employment relationships, as evident from the "*particularly short time limits in employment law for the judicial review of the effectiveness of a dismissal or the assertion of claims*".

67. In response to the various claims made by the Claimant in relation to the appointment of Dr. Rothaupt, the Respondent provided a written statement from Dr. Först which confirmed that (i) he was unavailable to conduct any medical examinations for the Respondent during the relevant period "*due to personal reasons*", and (ii) "*results of a medical check were never transmitted to the club without the consent of the patient/player*", contrary to the allegation made by the Claimant. The Respondent also explained that Dr. Rothaupt not only conducted the medical examination of the Claimant but also of eleven other players during the summer of 2020. The Respondent submits in this regard that it is in any event "*completely irrelevant which doctor as the Club's Doctor performs the first medical test*" as the Second Addendum entitled the Claimant to "*further testing with other doctors*".

68. Regarding the quantum of the claim, the Respondent contends that the Claimant is not entitled to any salary under the First Addendum in relation to the 2020/2021 season (EUR 60,000.00 net) because "*the condition to obtain German citizenship was priced into the consideration agreed on*" for the Second Addendum.

69. The Respondent accordingly submitted the following request for relief:

> "*The Respondent requests:*
>
> 1. ***All Requests for Relief as laid out in Section 2 on page 30 of the Request of the Arbitration by the Claimant are dismissed.***
> 2. ***The Claimant shall bear all arbitration costs (art.17.1, 17.2, 17.3 sentence 1 BAT-AR).***

> ***3. The Claimant shall pay a contribution to the Respondent's reasonable legal fees and other expenses (Art. 17.3 sentence 2 BAT-AR) in the amount of 100 per cent of the latter, limited to 20,000 Euros, but not less than 12,024.95 Euros.***"
>
> (Emphasis as in the original.)

5. The Jurisdiction of the BAT

70. 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).

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

72. 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]

73. Article 10(6) of the Contract states:

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

74. The fourth paragraph of the Second Addendum similarly states:

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

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

of parties' domicile. The language of arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."

75. Both the Contract and the Second Addendum are in written form and thus the arbitration clauses fulfil the formal requirements of Article 178(1) PILA. With respect to their substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreements contained in the Contract and the Second Addendum under Swiss law (referred to by Article 178(2) of the PILA).

76. In addition, while the former counsel of the Respondent disputed the jurisdiction of the BAT in the pre-action correspondence between the Parties, the Respondent accepted in its Answer (correctly) that the BAT had jurisdiction to adjudicate the dispute.

77. For these reasons, the Arbitrator has jurisdiction to adjudicate the claim against the Respondent.

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

78. 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 authorise 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:

"[*T*]*he parties may authorise the arbitral tribunal to decide ex aequo et bono.*"

79. Under the heading "*Law Applicable to the Merits*", Article 15 of the BAT Rules reads as follows:

"*15.1 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.*
>
> *15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead.*"

80. Article 10(4) of the Contract provides that the Contract "*is subject to German law*". While the Respondent is correct to point out that the Contract (in its original version) makes no express reference to the principle of *ex aequo et bono*, the Arbitrator notes that Article 10(6) of the Contract provides that any disputes submitted to the BAT shall be determined in accordance with the BAT Rules. The preamble to the BAT Rules states that "*the parties recognise* […] *that the BAT arbitrators decide ex aequo et bono*" and Article 15.2 of the BAT Rules provides that the Arbitrator shall decide the dispute *ex aequo et bono* unless the parties have expressly and specifically agreed that he is not authorised to do so.

81. The position is in any event put beyond doubt by the Second Addendum. The final sentence of the fourth paragraph provides expressly that the Arbitrator "*shall decide the dispute ex aequo et bono*". In addition, the Arbitrator considers that the effect of the fifth paragraph of the Second Addendum is that the terms of the Second Addendum shall take precedence over any conflicting terms of the Original Contract:

> "*All terms or parts of the employment contract terms signed on 09.06.2017.* [sic] *between the Parties, including all previous addendums, which are not changed/added in this present Addendum, remain the same, unchanged and in full force and effect.*"

82. While the Respondent alleges that the express reference in the Second Addendum to the principle of *ex aequo et bono* was an "*editorial mistake*", it has provided no evidence that would justify a claim for rectification. Indeed, the Arbitrator notes that there is no indication in the pre-contractual correspondence between the Parties that the Contract (as amended by the Second Addendum) was intended to be governed by German law.

83. In light of the above, the Arbitrator considers that the governing law for this dispute is *ex aequo et bono* and the Arbitrator will decide the issues submitted to him in these proceedings *ex aequo et bono*.

84. 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]

85. 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*".

6.2 BAT Covid-19 Guidelines

86. The BAT Covid-19 Guidelines (hereinafter the "Covid Guidelines") are aimed at addressing "*the consequences of the COVID-19 crisis on contracts in basketball, in particular those consequences arising out of domestic championships being suspended or terminated early as a result of the pandemic*".[5] The Respondent is not suggesting that it would have been unable to comply with its contractual obligations under the Contract if the Claimant had passed his medical examination nor does the Respondent refer to the Covid Guidelines in its submissions. In light of this, and the

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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 BAT Covid-19 Guidelines, p.1.

findings made below, the Arbitrator considers that it would not be appropriate to draw on the principles in the Covid Guidelines for the purposes of determining the present case.

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

6.3 Findings

88. The Arbitrator considers it most appropriate to start with the question whether the claim is time barred pursuant to Article 9(4) of the Contract.

89. Article 9(4) states as follows:

> "*All claims arising from the employment relationship are to be asserted in written form by the Parties within three months after the due date. In case of rejection of the claim by the opposite side the Party has to assert its claim within three months by taking legal action.*"

90. Neither the First Addendum nor the Second Addendum contain any amendments to Article 9(4) of the Contract. The provisions of Article 9(4) therefore "*remain the same, unchanged and in full force and effect*" for the purposes of determining the present dispute, in accordance with the fifth paragraph of the Second Addendum.

91. The Arbitrator notes that the meaning of Article 9(4) is clear and unambiguous: once a Party has asserted a claim in relation to the Contract, and that claim has been rejected by the other Party in writing, the claimant Party has to commence legal proceedings within three months; otherwise its claim is time barred. The Arbitrator further notes that this provision reflects a legitimate commercial objective of the Parties to achieve legal certainty regarding their contractual relationship. While the contractual limitation period under Article 9(4) is relatively short, it nonetheless provides for a reasonable enough amount of time to prepare and bring a claim. Indeed, the Arbitrator notes that the contractual limitation period under Article 9(4) (three months) is significantly longer than the statutory limitation period for employment claims under German law (three weeks).

92. Applying Article 9(4) to the facts of this case, it is clear that the Claimant has failed to comply with the contractual limitation period. The Respondent purported to terminate the Contract on 8 July 2020. The Claimant subsequently asserted its claim "*in written form*" in the Pre-Action Letter on 3 August 2020. The Respondent rejected the claim on 7 August 2020. The Claimant then had three months to assert its claim "*by taking legal action*" which meant, in this context, filing a Request for Arbitration with the BAT. However, the Claimant did not file a Request for Arbitration until 14 April 2021, over eight months after the Respondent had rejected his claim and over five months after the expiry of the contractual limitation period under Article 9(4) of the Contract.

93. The Claimant submits that the issue as to whether the claim is time barred has to be determined by reference to the principle of *Verwirkung* as developed by BAT jurisprudence. However, the Arbitrator finds that the principle of *Verwirkung* is of much less (if any) relevance in circumstances where the Parties have agreed to include an express limitation period in their contract. The Arbitrator notes that the BAT decisions relied on by the Claimant concern contracts that do not contain an express limitation period and can therefore be distinguished from the present case.

94. The Arbitrator further considers that there is nothing unconscionable *per se* about the inclusion and/or terms of the contractual limitation period in Article 9(4). As noted above, three months is a reasonable period to prepare and commence a BAT arbitration.

95. The Arbitrator also finds that there is nothing unconscionable in the circumstances of this particular case that would justify a different conclusion. To the contrary, and as noted above, the Claimant had particularised its claim in detail as early as 3 August 2020. That is obvious not only from the Pre-Action Letter but also from the fact that the Claimant had apparently instructed his counsel "*to immediately initiate proceedings with the BAT*" if the Respondent did not make the requested payments by 11 August 2020.

96. The Respondent, of course, did not make any payments in response to the Pre-Action Letter. Instead, the Respondent rejected the Claimant's claim in no uncertain terms by letter dated 7 August 2020, thereby triggering the three-month limitation period under Article 9(4) of the Contract.

97. However, rather than pursuing his claim, the Claimant appeared to have backed off and he did not engage in any further written correspondence with the Respondent until 27 January 2021. While the Claimant alleges that its counsel sought to contact the former counsel for the Respondent "*via telephone*" in the meantime, there is no evidence in these proceedings that the Claimant received any indication or encouragement during this period that the Respondent would be willing to engage in settlement discussions. Furthermore, the Claimant did not pursue his efforts to settle the dispute with requisite urgency and seriousness, particularly in light of the contractual limitation period under Article 9(4).

98. The Arbitrator notes that the Respondent appears to have engaged in settlement discussions at some point between the end of January 2021 and mid-March 2021. However, the Arbitrator finds that the Respondent's participation in settlement discussions during this period does not preclude the Respondent from subsequently invoking the contractual limitation period under Article 9(4) in these proceedings.

99. In light of the above, the Arbitrator finds *ex aequo et bono* that the Claimant's claim for unpaid salary payments in relation to the 2020/2021 season, including his claim for interest, is time barred pursuant to Article 9(4) of the Contract and, therefore, must be dismissed.

100. As a consequence, it is not necessary to consider whether the Respondent was justified in terminating the Contract on the basis that the Claimant did not pass and/or participate in his medical examination within the meaning of the Second Addendum.

7. Costs

101. Article 17.2 of the BAT Rules provides as follows:

> *"At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4).* […]*"*

102. On 21 September 2021, the BAT President determined the arbitration costs in the present matter to be EUR 10,900.00.

103. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 of the BAT Rules provides as follows:

> *"The award shall determine which party shall bear the arbitration costs and in which proportion.* […] *When deciding on the arbitration costs* […]*, 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."*

104. The Claimant's claim was held to be without merit.

105. The Arbitrator considers it is fair in these circumstances, and consistent with Article 17.3 of the BAT Rules, that 100% of the costs of the arbitration be borne by the Claimant. The Arbitrator notes in this context that there is nothing in the conduct of the Respondent in this arbitration that would support a different allocation.

106. In relation to the Parties' legal fees and expenses, Article 17.3 of the BAT Rules provides that

> *"as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding* […] *on the amount of any contribution to 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."

107. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses (maximum contribution of EUR 20,000.00 to a party's legal fees for cases of this size with the sum in dispute being between EUR 500,001.00 and EUR 1,000,000.00).

108. Given that the Claimant's claim was held to be without merit, the Arbitrator makes no order regarding the legal fees and other expenses of the Claimant.

109. The Arbitrator notes that the Respondent is seeking the maximum permissible contribution towards its legal fees and other expenses under Article 17.4 of the BAT Rules of EUR 20,000.00 on the basis that it incurred legal fees of EUR 22,750.00. Counsel for the Respondent did not provide a breakdown of its fees and hours per fee-earner. However, counsel for the Respondent explained that its office spent 65 hours working on the case, including in relation to settlement negotiations between the Parties, which implies an average hourly rate per fee-earner of EUR 350.00.

110. The Arbitrator notes that the claim brought by the Claimant was for a substantial sum (EUR 528,000.00 gross and EUR 60,000.00 net, plus interest at 5% from 9 July 2020) and the Respondent was entitled to defend itself appropriately. The Arbitrator further notes that the written submissions and evidence produced by the Respondent were relatively concise and focused. On the other hand, the Arbitrator considers that the legal costs incurred in relation to pre-action settlement negotiations are generally not recoverable in BAT arbitrations. The Arbitrator also considers that 65 hours at an average hourly rate per fee-earner of EUR 350.00 is excessive given the factual and legal issues at stake. The Arbitrator therefore finds that it would be fair and reasonable for the Claimant to pay the Respondent EUR 14,000.00 as a contribution towards its legal fees and expenses.

111. Therefore, the Arbitrator decides:

a) the Claimant shall pay to the Respondent EUR 6,000.00 as reimbursement for its contribution to the Advance on Costs;

b) The remaining balance of the Advance on Costs, in the amount of EUR 1,100.00, will be reimbursed to the Claimant by the BAT; and

c) the Claimant shall pay to the Respondent EUR 14,000.00, as a contribution towards its legal fees and expenses.

8. AWARD

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

1. **The claim by Mr. Bryce Taylor against Bamberger Basketball GmbH for unpaid salary payments in relation to the 2020/2021 season is time barred and, therefore, dismissed.**

2. **Mr. Bryce Taylor shall pay Bamberger Basketball GmbH the amount of EUR 6,000.00, as reimbursement for arbitration costs.**

3. **Mr. Bryce Taylor shall pay Bamberger Basketball GmbH the amount of EUR 14,000.00, as a contribution towards its legal fees and expenses.**

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

Geneva, seat of the arbitration, 5 October 2021

Rhodri Thomas
(Arbitrator)