

## **ARBITRAL AWARD**

**(BAT 1664/21)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Ms. Annett Rombach**

in the arbitration proceedings between

**Mr. Marcquise Reed**

**- Claimant -**

represented by Mr. Benjamin J. Pensack, attorney at law

vs.

**Sports Club Prometey**

Ave. Anoshkina, 109, 51909 Kamianske, Dnipropetrovsk Region, Ukraine

**- Respondent -**

represented by Mr. Vassil Dimitrov, attorney at law

### **1. The Parties**

### 1.1 The Claimant

1. Mr. Marcquise Reed (the **"Player"** or the **"Claimant"**) is a professional basketball player of U.S. nationality.

### 1.2 The Respondent

2. Sports Club Prometey (hereinafter the **"Club"** or the **"Respondent"**) is a Ukrainian professional basketball club competing in the Ukrainian Basketball SuperLeague.

## 2. The Arbitrator

3. On 4 March 2021, Prof. Ulrich Haas, the President of the Basketball Arbitral Tribunal (the **"BAT"**), appointed Ms. Annett Rombach as arbitrator (the **"Arbitrator"**) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal as of 1 December 2019 (the **"BAT Rules"**). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

## 3. Facts and Proceedings

### 3.1 Summary of the Dispute

4. On 17 July 2020, the Player and the Club entered into an employment contract pursuant to which the Club engaged the Player as a professional basketball player for the 2020-21 basketball season (the **"Player Contract"**).
5. The Player's remuneration was agreed between the Parties in Clause IV of the Player Contract as follows:

*"The Club agrees to pay the Player a fully guaranteed net salary for the **2020-2021 season** in amount of 180000 USD (one hundred*

*and eighty thousand US dollars) net of all Ukrainian taxes.*

*The payment-schedule will be as follows:*

*5000 USD within 4 days of arrival to the Club  
13000 USD (thirteen thousand) on September 7, 2020  
18000 USD (eighteen thousand) on October 7, 2020  
18000 USD (eighteen thousand) on November 7, 2020  
18000 USD (eighteen thousand) on December 7, 2020  
18000 USD (eighteen thousand) on January 7, 2021  
18000 USD (eighteen thousand) on February 7, 2021  
18000 USD (eighteen thousand) on March 7, 2021  
18000 USD (eighteen thousand) on April 7, 2021  
18000 USD (eighteen thousand) on May 7, 2021  
18000 USD (eighteen thousand) on June 7, 2021”*

6. Pursuant to Clause VII of the Player Contract, all payments to the Player under Clause IV were to be made *“net and free of all Ukrainian progressive (income) taxes.”*
7. Among the duties which the Player undertook as the Club’s employee were the following:

**“I: EMPLOYMENT AND DUTIES**

*“[...] The Player agrees to report to the Club in good physical conditions and training, to participate in Club’s practice sessions, and to play in Club’s exhibition, regular season and Play off/out of Ukrainian Superleague and FIBA Europe Cup games under the direction of the Club. The Player further agrees to comply with all reasonable rules established by the Club regarding disciplinary conduct of players (Club’s rules annexed to this agreement - «Office regulations about the responsibility for breach of training process, game and everyday discipline by players, trainers and administration of SC Prometey.)”*

**“IX: PLAYER’S DUTIES**

*a. [...]*

*b. The Player will be presented in good condition and will participate in all scheduled practices and games to which he will be appointed.*

*[...]*

*g. The Player must follow the internal rules of the Club, which are given to all players, and the Club agrees to provide a written copy*

*of such rules and fines, which is the integral part of the present contract. They must be signed immediately after the medical examination of the player.*

[...]"

8. On 8 August 2020, the Player arrived at the Club. On 11 August 2020, the Player successfully underwent a medical examination.
9. On 2 October 2020, at the Club's offices, the Player was requested to sign a document titled *"REGULATIONS on bonuses and cancellation of bonuses of players of basketball teams of "SPORTS CLUB "PROMETHEY" LTD"* (the **"Club Regulation"**). Clause 1.1. of the Club Regulation sets out the following:

*"1.1. This Regulation determines the sources, conditions, indicators and terms for bonus awarding of the Club's players, as well as the grounds and procedure for cancellation of bonuses (application of sanctions) in case of violation of the Club's player's responsibilities as defined in the Club's Statute, the internal regulations of the Club, the Sportsman's contract, orders and instructions of the Club's management."*

10. Clause 5.3. of the Club Regulation provided for a list of grounds permitting the reduction of the Player's bonus and the imposition of disciplinary fines. This list included, amongst others, the following:

<b>"Type of violation"</b>	<b>"The amount of cancellation of bonuses from player salary"</b>
<i>"2.2. obviously rude unethical behavior [sic] in relation to anyone of the coaching staff, demonstrative failure to follow the coaching instructions or directions during training or games (matches)"</i>	<i>"25 %"</i>
<i>"3.4 non-fulfillment [sic] of the training plan for more than two months"</i>	<i>"50% with the possibility of"</i>

	<i>termination of the contract</i>
<i>"3.7. non-keeping up the competition form at the proper level, non-fulfillment [sic] of the standards of physical and technical training for more than one month."</i>	<i>"50% with the possibility of termination of the contract"</i>
<i>"3.14. displayed more than twice poor quality game in official matches (with a significant number of technical, tactical or other errors, with meaningless decisions as a professional player, gaming actions that have caused the team's defeat)"</i>	<i>"30% with the possibility of termination of the contract"</i>

11. On 7 October 2020, the Club lost its first game of the season against Zaporozhye.
12. On 15, 16 and 26 October 2020, the Club's official Instagram account ("*prometey\_sc*") promoted the Player as the best player of the games that had respectively taken place on these dates.
13. On 1 November 2020, the Club lost a game against Kiev.
14. On 6 November 2020, the Club lost a match against Dnipro. After this match, the Club imposed a fine in the amount of USD 4,500.00 on the Player.
15. On 7 November 2020, the Club paid an amount of USD 13,500.00 to the Player, with the fine (USD 4,500.00) being deducted from the full monthly instalment of USD 18,000.00.
16. On 17 November 2020, the Player's counsel (being also one of his agents) received a call from the Ukrainian agent Mr. Yegor Chemyakin informing him about the Club's intention to terminate the Player Contract with the Player.
17. On 19 November 2020, the Club's legal counsel sent a letter to the Player and his

agents terminating the Player Contract with immediate effect, due to alleged disciplinary violations (the “**Termination Letter**”). The Termination Letter read as follows:

*“Dear Mr. Marcquise Deandre Reed,*

*I am writing to you on behalf of my client Sports Club Prometey (see **Encl. Power of attorney**).*

***You have failed to adhere to your obligations under the employment contract with Sports Club Prometey, which was signed by you on 17 July 2020.***

***You also failed to obey to the internal disciplinary regulations of the club which are an integral part of your employment contract.***

*Pursuant to Art. I of the employment contract: “The Player further agrees to comply with all reasonable rules established by the Club regarding disciplinary conduct of the players”.*

*Moreover, you had the obligation at all times to present yourself “in good condition” and to “participate in all scheduled practices and games” (Art. IX, letter “b”, Employment contract).*

***However during your time with the club, you have violated the following provisions of the internal disciplinary rules:***

*You committed “failure to follow the coaching instructions or directions during training and games” (**Art. 2.2 Internal rules**);*

*You did not fulfil “the training plan for more than two months” (**Art. 3.4 Internal rules**).*

*Furthermore, you failed to keep up “the competition form at the proper level” and you failed to comply with “the standards of physical and technical training for more than one month” (**Art. 3.7 Internal rules**).*

*In addition to the above-mentioned violations you “displayed more than twice poor quality game in official matches”. You made “a significant number of technical, tactical and other errors”, which are uncharacteristic for a professional basketball player and which have caused defeat to the team (**Art. 3.14 Internal rules**).*

*Each of the individual violations under **Art. 3.4, 3.7 and 3.14** of the internal rules merits immediate termination of the employment contract on its own.*

***Because of your multiple disciplinary violations, Sports Club Prometey hereby terminates your employment contract with immediate effect.***



***You will receive your prorated salary - for the 19 days you have already spent with the club for the month November 2020 in due course.***

***As of today 19 November 2020, you are no longer an employee of Sports Club Prometey.***

[...]"

18. On the same day, the Player's counsel sent a letter to the Club rejecting the reduction of the November 2020 salary as well as the termination declared in the Termination Letter.
19. On 20 November 2020, the Club published the following press release:

***"BC "Prometheus" terminated the contract with American defender Marquis [sic] Reed, said the president of IC "Prometheus" Vladimir Dubinsky :***

***Dear Prometheus fans, yesterday our club terminated the contract with the Marquis [sic] Reed, unfortunately the Marquis [sic] did not show the game that the coaching staff and all the fans expected from him and was not professional in the training process and his form of play. team [sic] success in the future. Only Prometheus! Only Victory !!!"***

20. On 23 December 2020, the Player and the French basketball club Nanterre 92 entered into an employment agreement pursuant to which Nanterre 92 engaged the Player as a professional basketball player for the remainder of the 2020-21 season (the "**Nanterre Contract**"). The Player was promised a gross monthly salary of EUR 5,556.00, beginning on 1 January 2021 and ending on 30 June 2021. Under the attachment to the Nanterre Contract, "*Explanation of Profit*", the respective net salary was EUR 30,000.00, which equals approx. USD 35,364 net.<sup>1</sup>

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<sup>1</sup> Exchange rate EUR-USD of 22 February 2021 (date of receipt of the RfA), see [https://www.finanzen.net/waehrungsrechner/euro\\_us-dollar](https://www.finanzen.net/waehrungsrechner/euro_us-dollar).

### 3.2 The Proceedings before the BAT

21. On 22 February 2021, the BAT received a Request for Arbitration together with several exhibits filed by the Claimant in accordance with the BAT rules. A non-reimbursable handling fee of EUR 2,978.27 was received in the BAT bank account on the same day.
22. On 10 March 2021, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited the Respondent to file its Answer in accordance with Article 11.4 of the BAT Rules by no later than 31 March 2021 (the “**Answer**”), and fixed the amount of the Advance on Costs to be paid by the Parties (including an outstanding amount of EUR 21.73 for the applicable handling fee to be paid by the Claimant) by 22 March 2021 as follows:

<i>“Claimant (Mr. Marcquise Reed)</i>	<i>EUR 4,021.73</i>
<i>Respondent (Sports Club Prometey)</i>	<i>EUR 4,000.00”</i>

23. On 24 March 2021, the Respondent requested an extension of its time limit to file the Answer until 14 April 2021. On 25 March 2021, the Arbitrator extended the time limit for the Respondent’s Answer until 9 April 2021.
24. On 6 April 2021, the Respondent submitted its Answer together with several exhibits. The Respondent further requested that the Arbitrator order the Claimant to disclose his bank account statements and/or his current employment contract with Nanterre 92 as evidence for the receipt of payments from Nanterre 92 (the “**Disclosure Request**”).
25. On 12 April 2021, the BAT acknowledged receipt of the Claimant’s share of the Advance on Costs and the remainder of the non-reimbursable handling fee and noted the Respondent’s failure to pay its share. In accordance with Article 9.3 of the BAT Rules, the Claimant was invited to substitute for the Respondent’s (yet unpaid) share by no later than 22 April 2021 in order to ensure that the arbitration could proceed.



26. On 19 April 2021, the BAT acknowledged receipt of the full amount of the Advance on Costs (EUR 8,028.82), paid by the Claimant. The Arbitrator further requested the Claimant to submit explanations and evidence why it was not possible to find a financially more favourable employment for the remainder of the 2020-21 season, and to explain his claim for “legal interest”, by no later than 26 April 2021.
27. On 26 April 2021, the Claimant replied to the Arbitrator’s requests (the “**Reply**”) and submitted further evidence, *inter alia*, the employment contract with Nanterre 92.
28. On the same date, the BAT acknowledge receipt of the Claimant’s Reply and invited the Respondent to comment on the Reply by no later than 10 May 2021 (the “**Rejoinder**”). In the same procedural order the Arbitrator declared that upon expiry of the above mentioned time-limit and in accordance with Article 12.1 of the BAT Arbitration Rules the exchange of documents will be completed and requested the Parties to submit their detailed cost accounts by 12 May 2021.
29. On 27 April 2021, the Respondent submitted its Rejoinder and cost account. The Respondent further reiterated its Disclosure Request.
30. On 12 May 2021, the Claimant submitted his cost account.
31. On 14 May 2021, the Respondent requested the BAT to communicate the Arbitrator’s position on its Disclosure Request.
32. By email of 17 May 2021, the BAT informed the Parties that the Respondent’s Disclosure Request is dismissed, and that the reasons for the decision will be communicated in the final award.
33. On 18 and 20 May 2021, the Claimant voluntarily submitted further evidence in respect of the payments received by him from Nanterre 92 between January and April 2021.

34. On 7 June 2021, the BAT acknowledged receipt of the Claimant's additional submissions and forwarded copies to the Respondent. The Arbitrator noted that the exchange of submission remained completed and that the final award would be rendered as soon as possible.

35. As neither of the Parties requested to hold a hearing, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to render the award based on the written record before her.

#### **4. The Position of the Parties**

##### **4.1 The Claimant's Position and Request for Relief**

36. The Claimant submits the following in substance:

- To date, the Respondent has failed to pay outstanding salaries in the amount of USD 119,100.00 to the Claimant;
- The Respondent has wrongfully terminated the Player Contract before its designated expiry. The reasons given by the Respondent in support of the premature termination of the Player Contract are false. The Claimant did not do any of the things mentioned by the Respondent in the Termination Letter. There are no references in the Termination Letter to the specific conduct of the Claimant that constitutes the alleged violations;
- The Claimant was performing very well on the court during the first half of the 2020-21 season. He was one of the best players of the team. That was also recognized by the Respondent according to its several posts on social media and website praising the Claimant's performance;
- It is false that the Claimant was not playing up to the coach's expectations. The Respondent only claimed that the Claimant broke team rules to find a reason to

release him;

- The real explanation why the Respondent attempted to release the Claimant without paying his salary is that the Respondent wanted to save money because the Claimant was one of the highest paid players on the team. Therefore, the Respondent used the Claimant's alleged misconduct as a pretext to terminate the Player Contract. The Respondent made up false accusations of contract and rule violations and published these false accusations in its press release;
- The "Internal Rules" (the Club Regulation) are not valid and are not binding on the Claimant. Contrary to Clause 1 of the Player Contract, there were in fact no such rules annexed to the Player Contract or disclosed to the Claimant or his representatives. By not providing the written copy of the rules immediately after the medical examination, the Respondent breached Clause IV para. g. of the Player Contract and forfeited its right to include any such rules as an integral part of the Player Contract;
- The Claimant never signed a document titled "Internal Rules". The Claimant was not given any document to sign until almost two months after his arrival, when (on 2 October 2021) an employee in the Respondent's office handed over to the Claimant a document named *"REGULATIONS on bonuses and cancellation of bonuses of players of basketball teams of Sports Club "Prometey" LTD"*. The Respondent's employee asked the Claimant to sign it immediately. The document was never sent to the Claimant's agents. The Claimant believed that the document, as the title suggests, was only related to the regulations on bonuses;
- The document *"REGULATIONS on bonuses and cancellation of bonuses of players of basketball teams of Sports Club "Prometey"* was never approved by the Claimant's representatives, which Clause XIII of the Player Contract would have required for an amendment. Therefore, it does not equate to a valid amendment to the Player Contract;

- The combination of the misleading document title, the rushing of the Respondent to sign the document (which was 10 pages in length), the undue delay in not providing the document until two months after it was supposed to be produced, and the failure of the Respondent to send the document to the Claimant's representatives and seek their approval, all amounted to a clear display of extreme bad faith on the part of the Respondent. By getting the Claimant to sign the misleading document, the Respondent was clearly making a deceitful attempt at altering the terms of the Claimant's employment contract without the knowledge or approval of the Claimant's trusted U.S. based agents;
- The Claimant never broke any "Internal Rules" (the Club Regulation). The allegations in the Termination Letter are false and not based on any facts that could substantiate the attempted contract termination. In particular:
  - It is not true that the Claimant did not follow the instructions or directions of the coach during training and games. The Respondent provides no proof or reference to substantiate this claim;
  - The Claimant fully complied with all of his training duties. Furthermore, the Respondent's own social media posts as well as the Claimant's overall statistics while with the club, clearly show that the Respondent's claims of the Claimant's poor performance are completely without merit. From an objective standpoint, the Claimant's performance on the court was very well;
  - The Claimant was in very good condition and was playing excellent basketball. The Claimant participated in all scheduled practices and games. The only practices missed by the Claimant occurred when in fact he was infected with COVID-19;
  - The pretext for his release from the Respondent is evidenced by the fact that there was never any warning given by the Respondent for such conduct prior to the Respondent's Termination Letter.

- The Respondent acted again in bad faith when it wrongfully levied a fine on all players including the Claimant after the defeat against Dnipro by deducting the salary respectively;
- The Claimant fulfilled his damage mitigations duties. At the time of the termination of the Player Contract, it was very difficult to find a comparable contract because of the COVID-19 pandemic. However, the Claimant's agents did everything possible to obtain a similar employment. With its press release dated 20 November 2020, the Respondent reduced the Claimant's market value by publishing negative (and false) information about him. After a lot of effort, the Claimant finally signed an employment contract with Nanterre 92, with a total salary of approx. USD 36,000.00 net (EUR 30,000.00 net) for the remainder of the 2020-2021 season.

37. With the Request for Arbitration dated 22 February 2021, the Claimant initially requested the following relief:

*"1. For the BAT to hold that Respondent must immediately pay \$83,100 USD net to Claimant plus legal interest. Should the BAT find that any amounts are not immediately due, then Claimant asks the BAT for a declaratory judgment that any amounts not immediately due be paid by Respondent to Claimant according to the payment schedule outlined in Paragraph IV of the employment contract between the parties.*

*2. For the BAT to hold that Respondent shall reimburse Claimant and bear the cost of the 3,000 EUR handling fee to bring this arbitration.*

*3. For the BAT to hold that Respondent shall bear all further costs of this arbitration.*

*4. For the BAT to hold that Respondent shall pay Claimant's cost of attorney fees for this arbitration.*

*5. For such other and further relief that the BAT may deem appropriate."*

38. In his Reply, the Claimant amended the requested relief with respect to his claim for "legal interest" as follows:

*"[...] Thus, given that the Claimant was in fact paid \$60,900 by the Respondent, Claimant*



*asks for 5% interest on the amounts and from the due dates as follows:*

*11,100 USD from December 7, 2020  
18,000 USD less 5,000 EUR (or USD equivalent) from January 7, 2021  
18,000 USD less 5,000 EUR (or USD equivalent) from February 7, 2021  
18,000 USD less 5,000 EUR (or USD equivalent) from March 7, 2021  
18,000 USD less 5,000 EUR (or USD equivalent) from April 7, 2021  
18,000 USD less 5,000 EUR (or USD equivalent) from May 7, 2021  
18,000 USD less 5,000 EUR (or USD equivalent) from June 7, 2021*

*This schedule give the Respondent credit for the 30,000 EUR scheduled to be paid to Claimant by Nanterre 92 and spreads the 30,000 EUR over the course of the original payment schedule between Claimant and Respondent."*

#### **4.2 The Respondent's Position and Request for Relief**

39. The Respondent submits the following in substance:

- The Club Regulation needs to be considered as the "Internal Rules" of the Respondent. The title of a document does not define its nature, but its content does. The Claimant, who signed every page of the "Internal Rules", was fully aware that in case he violates these rules, regardless of their title, his contract could be terminated with just cause. Such stance is clearly supported by the principle of freedom of contract, which enables the Parties to include additional provisions to their contract by means of annexes, internal rules, etc.;
- There is no violation of the Claimant's rights, because he was presented with the "Internal Rules" (the Club Regulation) right before the first official match of the season, which took place on 7 October 2020;
- The Claimant breached the following contractual rules which led to the just termination and voided the guarantee of the salary:
  - The Claimant failed to follow the coach's directions during training and official matches. Furthermore, despite persistent warnings from the staff, the Claimant failed to fulfil the training plan ordered by the coaching staff (Clause 5.3, No. 3.4 of the Club Regulation);



- The Claimant failed to keep his competition form as well as the standards of physical and technical training imposed by the staff (Clause 5.3, No. 3.7 of the Club Regulation);
- The Claimant showed poor quality of play in more than two official matches. He committed a significant number of technical, tactical and other errors, which led to defeats of his team (Clause 5.3, No. 3.14 of the Club Regulation);
- The Claimant did not fulfil his duty to mitigate the alleged damage. If the Claimant refuses to provide full bank statements plus all employment and image rights contracts with Nanterre 92, the salary of the Claimant in France from December 2020 until May 2021 shall be regarded as the same as with the Respondent (USD 18,000.00 per month). Furthermore, the Claimant already played in France before joining the Respondent. In his first stint in France, his salary was allegedly USD 12,000.00 per month. This shall be the floor for determining his market value in France.

40. The Respondent requests the following relief:

*"1. BAT shall dismiss the claims of the Claimant due to the fact that the termination was performed by the club with just cause and the Claimant failed to overcome the burden of proof in all of his requests;*

***Alternatively,***

***Only in case the Respondent is found to have performed the termination without sufficient grounds:***

*2. To reduce the claim of the Claimant by 6 monthly salaries of 18,000 USD each (108,000 USD total), or to reduce it by the value of the 6 monthly salaries the Claimant is due from Nanterre 92, if he presents detailed evidence of the actual amounts by means of bank statements and contracts (both employment and image rights).*

***In any event:***

*3. To order the Claimant to bear all arbitration costs and handling fee related to the case;*

4. *To order the Claimant to pay 5,000 EUR as a contribution to the legal expenses incurred by the Respondent for attorney fees – detailed account of cost will be presented at the end of the case.”*

**5. The Jurisdiction of the BAT**

41. 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”).
42. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
43. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.
44. The Player Contract (Clause XI) contains the following dispute resolution clause in favour of BAT:

*“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, irrespective of the parties’ domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono”*

45. The arbitration agreement is in written form and thus fulfils the formal requirements of Article 178(1) PILA.
46. With respect to substantive validity, the Arbitrator considers that there is no indication

in the file which could cast any doubt on the validity of the arbitration agreement in the present matter under Swiss law (cf. Article 178(2) PILA). The Respondent did also not dispute BAT's jurisdiction.

47. Hence, the Arbitrator has jurisdiction to decide the present dispute.

## 6. Other Procedural Issues

48. In its Disclosure Request dated 6 April 2021, repeated on 27 April 2021 (see above at paras 24 and 29), the Respondent requested the following:

***“(1.) BAT shall order the Claimant to reveal all his bank account statements from accounts where his new French club Nanterre 92 or third parties are paying salary and/or image rights remuneration.”***

*In addition to revealing all the bank account statements of the Claimant from the moment of signing the contract with Nanterre 92, the Respondent requests from BAT to send a letter to the French Federation of Basketball (FFBB) and the Ligue Nationale de Basket (LNB) and obtain confirmation whether the contract attached by the Claimant as Exhibit I is the one actually registered by the French basketball authorities or there are discrepancy between the contract registered and the contract shown before BAT.*

*[...]”*

49. The Arbitrator dismisses the Disclosure Request, for the following reasons:

- The Claimant has provided his duly signed contract with Nanterre 92, which includes the salary amounts the Claimant has subtracted from his claim in view of BAT's governing mitigation principles. Under constant BAT jurisprudence, players are principally not obligated to submit any evidence beyond the relevant employment contract in order to demonstrate the salary they earned under subsequent contracts that are relevant for the required damages mitigation.
- If the Respondent suspects that the Claimant may have received different

(greater) amounts than those proclaimed in the produced contract, it is for the Respondent to demonstrate why it holds such view. In particular, the Respondent is required, under such circumstances, to provide the Arbitrator with evidence, or at least indications, corroborating its suspicion that the Claimant may have declared wrong salary amounts as part of the required damages mitigation. If the Respondent fails to provide the Arbitrator with any indications in support of its view, the disclosure request constitutes an inappropriate fishing expedition.

- The Respondent's Disclosure Request is such an inappropriate fishing expedition. The Respondent has not provided any comprehensive information why it believes that the Claimant received different amounts from Nanterre 92 than those agreed in the produced contract. The Respondent's allegation that the Claimant has been hiding the truth about the financials of the Nanterre Contract is mere speculation and not corroborated by any evidence. The mere fact that the Claimant had earned more money with another French club in the past is not sufficient in this respect. Hence, the Arbitrator dismissed the Disclosure Request.

## **7. Applicable Law – *ex aequo et bono***

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

*“the parties may authorize the arbitral tribunal to decide ex aequo et bono”.*

51. 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.”*

52. In the arbitration agreement quoted above at para. 44, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law.
53. Consequently, the Arbitrator will decide the issues submitted to her in this proceeding *ex aequo et bono*.
54. 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<sup>2</sup> (Concordat)<sup>3</sup>, 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*

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<sup>2</sup> 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). .

<sup>3</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.



*those rules.*<sup>4</sup>

55. 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”.

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

## **8. Findings**

57. The Player seeks salary compensation due to the Club’s allegedly illegal termination of the Player Contract (below at 8.1), together with default interest (below at 8.2).

### **8.1 Salary Compensation**

58. The Player and the Club entered into the Player Contract on 17 July 2020, which provides for a total annual net salary of USD 180,000.00, payable in monthly instalments. There are no indications on the record which would cast doubt on the validity of the Player Contract or the payment obligations undertaken by the Club thereunder. The Player’s salary was expressly characterized as “*fully guaranteed*” (Clause IV of the Player Contract).

59. The guarantee of a salary is, however, not absolute but subject to certain explicit or implied exceptions: No salary can, e.g., be claimed in case of a justified termination of the Player Contract by the Club. The Club declared the immediate termination of the Player Contract in its Termination Letter dated 19 November 2020. The central question to be addressed by the Arbitrator is whether the Club’s termination was justified, i.e.

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<sup>4</sup> JdT 1981 III, p. 93 (free translation).



whether the Club had “just cause” to terminate the Player Contract prematurely and with immediate effect, thereby revoking the payment guarantee provided for in Clause IV of the Player Contract.

#### **8.1.1 Was the Club’s Contract Termination Justified?**

60. In its Termination Letter, the Club purports that the Player “*failed to adhere to [his] obligations under the employment contract*”, and that he “*also failed to obey to the internal disciplinary regulations of the club*”, which it considers were an “*integral part*” of the Player Contract. In particular, the Club alleges that the Player:

- failed to follow the coaching instructions or directions during training and games;
- did not fulfil the training plan for more than two months;
- failed to keep up the competition form at the proper level and failed to comply with the standards of physical and technical training for more than one month;
- displayed more than twice poor quality game in official matches and made a significant number of technical, tactical and other errors, which are uncharacteristic for a professional basketball player and which have caused defeat to the team.

61. The Claimant has been disputing these allegations.

62. The Arbitrator finds that based on the record before her, the Termination Letter, in view of the Club’s further submissions before and during this arbitration, does not justify the purported termination, and that the Club has failed to demonstrate “just cause” for the dismissal of the Player, both for factual and for legal reasons. The evidence provided by the Respondent cannot constitute the basis for the unilateral termination of the Player Contract.

63. First, the Club has failed to sufficiently substantiate the Player's alleged misconduct. The Respondent neither specified exact dates nor any other details regarding the Player's alleged violations of the Player Contract and the Club's disciplinary rules. Rather, the Termination Letter only reiterates what the internal rules say without, however, explaining which specific conduct by the Player violated which of the internal rules. For example, there is no detail whatsoever on when and how the Player failed to follow the coaching instructions, or when and how he did not fulfil the training plan. The Player's alleged lack of skill on court cannot, as a matter of principle, justify a termination either, because it is the very essence of the contractual guarantee agreed by the Club that its dissatisfaction with the Player's performance falls within its own risk sphere. Furthermore, the Arbitrator is also not convinced on a factual level that the Club was as dissatisfied with the Player as it proclaims in the Termination Letter; the Club's praise for the Player on its social media channels on more than one occasion shortly before the termination suggest that the Club's alleged unhappiness with the Player's performance was used as a pretext to justify the termination. The Player's personal statistics from three games, which the Club submitted as proof for the alleged bad performance, do not constitute suitable evidence to demonstrate lack of skill. They do not show in themselves a *"significant number of technical, tactical or other errors"*. Every player has games for the better and for worse. It is undisputed and clearly demonstrated by the Club's social media channels that the Player had some very good games as well. In addition, the Arbitrator is not convinced by the witness statements submitted by the Respondent, which are rather generic and hardly make reference to any specific details.
64. Second, the Arbitrator finds that the Club Regulation, which seem to include the *"internal rules"* relied upon by the Club in its Termination Letter, and on which the termination is primarily based, have not become part of the Player Contract, and were, therefore, not binding on the Player. In this respect, it is undisputed between the Parties that the Player was not provided with any "Internal Rules" after the medical examination on 11 August 2020, as it was required by the Player Contract (Clause IX para. g.). The

circumstances of the Club's subsequent attempt to make its internal rules binding upon the Player almost two months after the signing of the Player Contract are rather dubious. The title of the document presented to the Player in the Club's offices on 2 October 2020 (*"REGULATIONS on bonuses and cancellation of bonuses of players of basketball teams of "SPORTS CLUB "PROMETHEY" LTD"*) was entirely misleading, and so was the introductory paragraph (Clause 1.1, cited above at para. 9). Nothing suggested that this document was supposed to be the Club's internal rules, which the Club itself identifies as the *"Office regulations about the responsibility for breach of training process, game and everyday discipline by players, trainers and administration of SC Prometey"* (Clause I. of the Player Contract). Upon his own submission, which remained uncontested in this proceeding, the Player had to sign the document immediately in the office, without any chance to show it to his agents, or to take it home for a more thorough reading. Therefore, the circumstances of the signing of the Club Regulation suggest that the Club tried to take advantage of the Player's inexperience with legal documents to obtain his signature under a document that should have been signed two months earlier during the execution of the Player Contract. These circumstances constitute bad faith, with the result that the Player cannot be considered to be bound by such document. Furthermore, pursuant to Clause XIII. of the Player Contract, subsequent alterations or modifications of the Player Contract must be approved by the Player's representatives. Such approval has not been given in the present case. As a result, the Club was not entitled to base its termination on the Club Regulation.

65. Third, the termination is invalid because the Club failed to provide the Player or his representatives with a proper warning before the termination. A "just cause" termination usually requires a forewarning, which adequately informs the employee about the perceived misbehaviour, and announces potential consequences in case the misbehaviour continues after the warning. In case the employee disregards the warning, the employer might be entitled to terminate the employment for just cause, usually after having given another warning mentioning the possibility of an immediate

termination. Only in very exceptional circumstances, e.g. when the employee commits a very serious or irreversible breach, the employer might be entitled to immediately terminate the employment without a prior warning (constant BAT jurisprudence, see e.g. BAT 0785/15, para. 90 et seq.). The Club has not forewarned the Player of the possibility of termination. The Club has also failed to demonstrate exceptional circumstances which would have justified an immediate termination without a forewarning.

66. As a result, deciding *ex aequo et bono*, the Arbitrator concludes that the unilateral termination of the Player Contract by the Club was without cause and, therefore, invalid. Consequently, the Club owes to the Player his outstanding salaries for the 2020-21 season, subject to the required mitigation under BAT's established mitigation principles.

#### **8.1.2 What is the Quantum of the Player's Compensation?**

67. It has been consistent jurisprudence by the BAT based on generally accepted principles of the law of damages and also labour law that after an unjustified termination of the player contract by a club, a player has an obligation to take reasonable efforts to find a new club and that his alternative earnings shall be deducted from the compensation otherwise due by the club.<sup>5</sup> Any advantages which a player as the injured party may have gained as a consequence of the breach (e.g. salaries otherwise earned) must be taken into account when calculating the compensation due.
68. The Arbitrator finds that the Player has duly satisfied his duty to mitigate damages by entering into a new contract with basketball club Nanterre 92 for the remainder of the 2020-21 season on 23 December 2020, despite the fact that he earned significantly

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<sup>5</sup> See, ex multis, FAT 0005/08, p. 19; FAT 0014/08, para. 68; FAT 0024/08, paras. 48-50; BAT 0237/11, paras. 56-59; BAT 0289/12, para. 44; BAT 0535/14, paras. 47-53.

less money under the Nanterre Contract compared to his contract with the Respondent. According to the Nanterre Contract, the Player was entitled to a gross monthly salary of EUR 5,556.00, beginning on 1 January 2021 and ending on 30 June 2021. Under the attachment to the Nanterre Contract, *"Explanation of Profit"*, the respective net salary was EUR 30,000.00, which equals USD 35,364 net (see above at para. 20).

69. The Club alleges that, considering that the amount the Player earned under the Nanterre Contract is three times lower than the amount he would have earned under the remainder of the Player Contract, the Player failed to fulfil his duty to mitigate. For the purposes of calculating the Player's damages, a monthly amount of at least USD 12,000.00 net (which equals the salary the Player earned under a previous contract in France) should be offset against the compensation. The Arbitrator disagrees with the Club. Under the specific circumstances at hand, the Arbitrator accepts the explanations provided by the Player why it was not possible to find a financially better employment. The COVID-19 pandemic resulted in poor basketball market conditions. The market was difficult for players already prior to the start of the 2020-21 season (i.e. in the months of June, July and August 2020 when most contracts for the season are signed), but got worse as time went on. By November 2020, the basketball seasons in Europe and elsewhere had already begun and teams generally had their rosters set. Thus, when the Club released the Player without cause in the latter part of November 2020, the Player was put in a difficult position as far as finding alternative employment. Furthermore, the contract that the Player had signed with the Club was for a rather high amount given the pandemic and the overall market conditions for the 2020-21 season. The Player also demonstrated the efforts his representatives had undertaken to find him a new employment in the middle of the season.
70. Hence, an amount of USD 36,000.00 net shall be deducted from the outstanding compensation of USD 119,100.00 net that the Club would have been obligated to pay



to the Player for the unjust termination.<sup>6</sup> Thus, the compensation the Player is entitled to is USD 83,100.00 “*net and free of all Ukrainian progressive (income) taxes*” pursuant to Clause VII of the Player Contract.

## 8.2 Interest

71. The Claimant requests interest on the claimed compensation of USD 83,100.00 at the rate of 5% per annum on the following schedule:

“[...]”

*11,100 USD from December 7, 2020  
18,000 USD less 5,000 EUR (or USD equivalent) from January 7, 2021  
18,000 USD less 5,000 EUR (or USD equivalent) from February 7, 2021  
18,000 USD less 5,000 EUR (or USD equivalent) from March 7, 2021  
18,000 USD less 5,000 EUR (or USD equivalent) from April 7, 2021  
18,000 USD less 5,000 EUR (or USD equivalent) from May 7, 2021  
18,000 USD less 5,000 EUR (or USD equivalent) from June 7, 2021*

*This schedule give the Respondent credit for the 30,000 EUR scheduled to be paid to Claimant by Nanterre 92 and spreads the 30,000 EUR over the course of the original payment schedule between Claimant and Respondent.”*

72. The Player Contract does not provide for any provision concerning interest. According to constant BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. As requested by the Claimant, and in line with BAT’s jurisprudence, the interest rate shall be 5% per annum.
73. With respect to the starting date requested by the Claimant (the respective due dates

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<sup>6</sup> According to the applicable exchange rate on the date of the filing of the RfA, the USD amount equivalent to EUR 30,000 (the Player’s salary under the Nanterre Contract) was USD 35,364.00. However, the Claimant himself subtracted the amount of USD 36,000 from the salary compensation. The Arbitrator is barred from awarding the Claimant more than he requests (no *ultra petita*), which is why she relies on the slightly higher mitigation amount suggested by the Claimant.



for the agreed salary), the Arbitrator notes that interest principally begins running as of the day after the principal debt falls due. Hence, the Arbitrator finds that the Claimant's claims for interest start running as of the day after the respective due date of the instalment pursuant to Clauses IV of the Player Contract, i.e. as of the 8th day of the respective month. The proposed USD equivalent of the subtracted salary earned under the Nanterre Contract is USD 6,000.00 per month (see above at para 70).

### **8.3 Summary**

74. The Player is entitled to receive USD 83,100.00 net and free of all Ukrainian progressive (income) taxes in outstanding salary compensation together with interest of 5% per annum until complete payment

- from 8 December 2020 on the amount of USD 11,100.00;
- from 8 January 2021 on the amount of USD 12,000.00;
- from 8 February 2021 on the amount of USD 12,000.00;
- from 8 March 2021 on the amount of USD 12,000.00;
- from 8 April 2021 on the amount of USD 12,000.00;
- from 8 May 2021 on the amount of USD 12,000.00;
- from 8 June 2021 on the amount of USD 12,000.00.

### **9. Costs**

75. In respect of determining the arbitration costs, 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). [...]”*

76. On 27 August 2021, the BAT President determined the arbitration costs in the present matter to be EUR 8,028.82.

77. 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.”*

78. Considering that it was the Claimant who prevailed in this arbitration, it is consistent with the provisions of the BAT Rules that 100% of the fees and costs of the arbitration, as well as 100% of the Claimant’s reasonable costs and expenses, be borne by the Respondent.

79. 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.”*

80. 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. The maximum contribution for an amount in dispute between EUR 30,001.00 and EUR 100,000.00 (excluding the handling fee) according to Article 17.4 of the BAT Rules is EUR 7,500.00. The amount in dispute in this case is approx. EUR 70,700.00

(USD 83,100.00).<sup>7</sup>

81. The Parties claim the following reimbursement for their lawyer's fees:
- EUR 6,468.75 (legal fees and expenses for the Claimant)
  - EUR 5,100.00 (legal fees and expenses for the Respondent)
82. Considering the outcome of the proceedings, the Claimant shall be entitled to a contribution to his legal fees and expenses. The claimed contribution of EUR 6,486.75 is within the limits defined by Article 17.4 of the BAT Rules. The Claimant provided a detailed breakdown of his counsel's hours (28.75) and hourly rates (EUR 225.00/hour). The Arbitrator finds these fees reasonable, in particular in light of the Respondent's conduct in this arbitration, which required the Claimant to spend time and effort to make and defend his case.
83. Furthermore, Claimant is entitled to a reimbursement of the non-reimbursable handling fee in the amount of EUR 3,000.00.
84. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:
- (i) The Club shall pay EUR 8,028.82 to the Claimant; and
  - (ii) The Club shall pay EUR 9,468.75 (EUR 3,000.00 for the non-reimbursable fee plus EUR 6,468.75 for legal fees) to the Claimant, representing the amount of his reasonable legal fees and other expenses.

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<sup>7</sup> [https://www.finanzen.net/waehrungsrechner/us-dollar\\_euro](https://www.finanzen.net/waehrungsrechner/us-dollar_euro) (27 August 2021).

## **10. Award**

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

- 1. Sports Club Prometey shall pay Mr. Marcquise Reed the amount of USD 83,100.00, net and free of all Ukrainian progressive (income) taxes, for outstanding salaries, plus 5% interest per annum until complete payment**
  - from 8 December 2020 on the amount of USD 11,100.00;
  - from 8 January 2021 on the amount of USD 12,000.00;
  - from 8 February 2021 on the amount of USD 12,000.00;
  - from 8 March 2021 on the amount of USD 12,000.00;
  - from 8 April 2021 on the amount of USD 12,000.00;
  - from 8 May 2021 on the amount of USD 12,000.00; and
  - from 8 June 2021 on the amount of USD 12,000.00.
- 2. Sports Club Prometey shall pay Mr. Marcquise Reed the amount of EUR 8,028.82 as reimbursement for arbitration costs.**
- 3. Sports Club Prometey shall pay Mr. Marcquise Reed the amount of EUR 9,468.75 as a contribution towards his legal fees and expenses.**
- 4. Any other or further reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 30 August 2021

Annett Rombach

(Arbitrator)