Arbitration CAS 2018/A/5711 Columbus Sport 99 C.A. v. Ivan Deniz O'Donnell, Marcos Cervero Simonet & Ronald Gillen, award of 1 April 2019

Panel: Mr Ivaylo Dermendjiev (Bulgaria), President; Mr Olivier Carrard (Switzerland); Mr José Juan Pintó (Spain)

Basketball
Termination of contract without just cause
Right to be heard (non-hearing of a party's witnesses)
Standard(s) of proof
Notice of termination of contract
Scope of coaches' discretion in selecting methods to achieve a club's goal(s)

1. **Arbitrators are granted vast procedural discretion in the conduct of arbitral proceedings. This discretion encompasses their right to choose based on the evidence on file whether to conduct a hearing and, in the affirmative, whether to call a witness to the stand. Where witnesses statements in support of a party's position and filed prior to a hearing have been duly considered by an arbitrator, the latter's decision not to hear said witnesses' during the hearing does not violate said party's right to be heard.**

2. **Under Swiss law, absolute certainty is not required in employment disputes. Instead, "full proof" is usually prescribed, which entails that a court is convinced that a fact is correct based on objective evidence. When there is no objective evidence of an alleged fact, namely in a one-word-against-another situation, the party having the burden of proof should provide further evidence supporting its argument, for instance by submitting a written confirmation. Witness statements issued by individuals close to or employed by one of the parties involved in the proceedings carry less evidentiary weight than the testimony of the parties or objective evidence.**

3. **Although the need to send notices of termination is not mandatory in all cases and is established on a case by case basis, notices are regarded as a vital step which can possibly play a role in bringing an end to an unexplained breach or series of breaches, particularly where the breach(es) in question has/have not yet reached a fundamentally unacceptable level and/or unduly prejudiced the non-breaching party to the extent that the latter cannot be reasonably expected to continue the contract.**

4. **In the professional world, coaches are generally granted broad discretion in selecting the methods used in order to achieve a club's goal(s). Such methods shall however not result in a clear violation of a player's or a club's rights.**

I. PARTIES

1. Columbus Sport 99 C.A. ("Columbus" or the "Appellant") is a Venezuelan company active in the sports industry, having its seat in Barquisimeto, Venezuela. The Appellant operates a professional basketball club named Guaros de Lara BBC (the "Club"), member of the Venezuelan Basket Federation, which in turn is member of the Fédération Internationale de Basketball ("FIBA"). The Club has no legal personality and therefore Columbus commenced the present proceedings in its name.

2. Mr Ivan Deniz O'Donnell ("Ivan Deniz" or "First Respondent") is a professional basketball coach with Spanish nationality.

3. Mr Marcos Cervero Simonet ("Marcos Cervero Simonet" or "Second Respondent") is a professional basketball coach with Spanish nationality.

4. Mr Ronald Gillen ("Ronald Gillen" or "Third Respondent") is a professional basketball coach with Venezuelan nationality.

5. The Respondents will be individually and jointly referred to respectively as "Coach" and "Coaches".

6. The Appellant and the Respondents will be jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

7. This appeal was filed by Columbus against the award of the Arbitrator of the FIBA's Basketball Arbitral Tribunal ("BAT") passed on 12 April 2018 (the "BAT Award").

8. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its award (the "Award") only to the submissions and evidence it considers necessary to explain its reasoning.

9. The present contractual dispute is related to the right of the three Respondents to receive compensation and their unpaid salaries and bonuses after the Appellant allegedly unilaterally terminated their employment contracts without notice or just cause.

10. On 24 May 2016, the First Respondent entered into an employment contract with Columbus for the 2016-2017 and 2017-2018 basketball seasons. Said contract contains, among others, the following provisions:

"3. MONETARY COMPENSATION TO COACH:

During the term of employment as foreseen in point 1, CLUB irrevocably guarantees payment to COACH of the following monetary (salary and bonuses) compensation (…).

CURRENCY: AMERICAN DOLLARS

IRREVOCABLY PAYMENT OF THREE HUNDRED FIFTY THOUSAND AMERICAN DOLLARS – USD 350.000=NET

PAYABLE THROUGH WIRE TRANSFER AS FOLLOWS:

- *SEASON 2016-2017: ONE HUNDRED SEVENTY THOUSAND AMERICAN DOLLARS – USD 170,000=NET, IN EIGHT (8) MONTHLY, EQUAL AND CONSECUTIVE PAYMENTS OF USD 21,250=NET. THE FIRST PAYMENT SHALL BE DONE AT SEPTEMBER 30TH, 2016, AND LAST PAYMENT SHALL BE DONE AT APRIL 30TH, 2017, THE PRORATA TEMPORIS DAILY BASIS SHALL BE USD 708.33=NET.*

- *SEASON 2017-2018: SEASON 2016-2017: ONE HUNDRED EIGHTY THOUSAND AMERICAN DOLLARS – USD 180.000=NET, IN EIGHT (8) MONTHLY, EQUAL AND CONSECUTIVE PAYMENTS OF USD 22.500=NET. THE FIRST PAYMENT SHALL BE DONE AT SEPTEMBER 30TH 2017, AND LAST PAYMENT SHALL BE DONE AT APRIL 30TH, 2018. THE PRO-RATA TEMPORIS DAILY BASIS SHALL BE USD.750=NET.*

- *LATE PAYMENTS*

  IN THE EVENT CLUB IS LATE PAYING THE SALARY TO PLAYER AND/OR PAYING THE AGENT FEE TO THE AGENT, the following irrevocable and contract "late payments" rules shall apply.

  - Starting from the FIFTH (5th) day of delay, CLUB must pay to PLAYER additional USD, 100=NET per day and additional USD, 100=NET, to the AGENT, as the late fee together with the monthly payment.

  - After the TENTH (10th) day of delay COACH has additionally the right to cease rendering services until the CLUB re-establishes its commitment to the conditions herein. COACH and/or AGENT shall [sic] *the right to declare the AGREEMENT NULL and VOID, while retaining their rights to compensation, and the CLUB shall grant to the COACH his Letter of Clearance to play anywhere in MEXICO or overseas without restriction of any sort (…).*

4. BONUSES MONETARY COMPENSATION TO COACH:

In addition to the Net Monthly Salary to be paid to COACH as mentioned above, the CLUB shall pay to the COACH the following bonuses for each specific goal listed in this 4th clause that is achieved by the CLUB in each season: (…).

WINNING ANY OFFICIAL COMPETITION LEAGUE TITLE: ONE (1) MONTH OF SALARY.

All bonus, monetary compensation are ADDITIONAL TO PRORATED MONTHLY SALARY, CUMULATIVE AND SHALL BE PAYED IN THE NEXT 72 hours after achievement (…).

5. GUARANTEED CONTRACT UNDER THE FOLLOWING TERMS:

CLUB fully guarantees this Agreement. In this regard, even if the COACH is removed or released from the CLUB or this agreement is terminated or suspended by the CLUB due to COACH's lack of or failure to exhibit sufficient coaching skills, COACH's death, illness, physical disability directly related with the accomplishment of this contract or his normal life activities regarding his presence in the country, Club shall nevertheless be required to pay to the COACH and the AGENT, on the dates set forth in this Agreement, the full amounts in the Agreement.

In case the COACH is released by the CLUB during this Agreement, he will be a complete free agent worldwide, and the present serves as a full release or Letter of Clearance.

In any case, if CLUB wants to release the COACH, they must send written notification to COACH's AGENT during the last five (5) days of the previous month, to confirm their decision (…).

18. DISPUTES:

Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be definitely resolved in accordance with the FAT Arbitration Rules, by a single arbitrator appointed by the FAT President. The seat of arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English, and the arbitrator shall decide the dispute ex aequo et bono. The arbitration shall be governed by the Chapter 12 of the Swiss Act on Private International Law (PIL) irrespective of the parties domicile. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. To the extent legally possible under Swiss Law recourse to the Swiss Federal Tribunal against awards of the FAT and against decision of the Court of Arbitration for Sport (CAS) upon appeal shall be excluded.

19. GOVERNING LAW:

This contract shall be interpreted and enforced in accordance with the laws of VENEZUELA".

11. On 4 July 2016, the Second and Third Respondents also entered into separate employment contracts with Columbus for the 2016-2017 and 2017-2018 basketball seasons. Their contracts, while slightly different, contain the following identical provisions:

> *"3. MONETARY COMPENSATION TO COACH:*
>
> *During the term of employment as foreseen in point 1, CLUB irrevocably guarantees payment to COACH of the following monetary (salary and bonuses) compensation (…).*
>
> *SALARY CURRENCY: USD.*
>
> *IRREVOCABLY PAID AS FOLLOWS:*
>
> *- SEASON 2016-2017: TWENTY FIVE THOUSAND AMERICAN DOLLARS – USD. 25,000=NET. PAYABLE IN TEN (10) MONTHLY, EQUAL AND CONSECUTIVE PAYMENTS OF USD 2,500=NET. THE DAILY "PRO-RATA TEMPORIS" SHALL BE USD 83,33=NET PER DAY. THE FIRST PAYMENT SHALL BE DONE AT SEPTEMBER 30TH, 2016, AND THE LAST PAYMENT SHALL BE DONE AT JUNE 30TH, 2017.*
>
> *- SEASON 2017-2018: THIRTY FIVE THOUSAND AMERICAN DOLLARS – USD. 35,000=NET. PAYABLE IN TEN (10) MONTHLY, EQUAL AND CONSECUTIVE PAYMENTS OF USD 3.500=NET. THE DAILY "PRO-RATA TEMPORIS" SHALL BE USD. 116,67=NET PER DAY. THE FIRST PAYMENT SHALL BE DONE AT SEPTEMBER 30TH, 2017, AND THE LAST PAYMENT SHALL BE DONE AT JUNE 30TH, 2018.*
>
> *- LATE PAYMENTS*
>
> *IN THE EVENT CLUB IS LATE PAYING THE SALARY TO THE PLAYER AND/OR PAYING THE AGENT FEE TO THE AGENT, the following irrecoverable and contract "late payment" rules shall apply:*
>
> *- Starting from the FIFTH (5th) day of delay, CLUB must pay to PLAYER additional USD, 100=NET per day and additional USD, 100=NET, to the AGENT, as the late fee together with the monthly payment.*
>
> *- After the TENTH (10th) day of delay COACH has additionally the right to cease rendering services until the CLUB re-establishes its commitment to the conditions herein. COACH and/or AGENT shall the* [sic] *right to declare the AGREEMENT NULL and VOID, while retaining their rights to monetary compensation, and the CLUB shall grant to the COACH his Letter of Clearance to work anywhere in VENEZUELA or overseas without restriction of any sort (…).*

5. GUARANTEED CONTRACT:

The CLUB guarantees the agreement to the coach, and all monies contracted as per Art 3 and Art 15 are hereby irrevocably guaranteed and shall be paid by the CLUB to the COACH and AGENT.

THE CLUB CANNOT RESCIND THIS AGREEMENT AND SUBSTITUTE THE COACH, FOR TECHNICAL REASONS OR POOR PERFORMANCES (…).

18. DISPUTES:

Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be definitely resolved in accordance with the FAT Arbitration Rules, by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English, and the arbitrator shall decide the dispute ex aequo et bono. The arbitration shall be governed by the Chapter 12 of the Swiss Act on Private International Law (PIL) irrespective of the parties' domicile. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. To the extent legally possible under Swiss Law recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal shall be excluded (…).

19. GOVERNING LAW:

This contract shall be interpreted and enforced in accordance with the laws of VENEZUELA".

12. On 6 November 2018, all three contracts were terminated.

III. THE BAT PROCEEDINGS

13. On 18 July2017, the Coaches filed a Request for Arbitration against Columbus before the BAT alleging that the Appellant had breached their employment contracts by unilaterally terminating said contracts without notice and without just cause, seeking the payment of unpaid salaries, bonuses and compensation in accordance with said contracts.

14. The First Respondent claimed from the Appellant payment of USD 146,250 in respect of outstanding salary payments due for the 2016-2017 season; USD 162,000 in respect of outstanding salary payments due for the 2017-2018 season; USD 21,250 as a bonus for winning the 2016 FIBA Intercontinental Cup, and late payment penalties of USD 100 for each day that the Appellant has failed to pay the above outstanding sums.

15. The Second Respondent in turn claimed from the Appellant payment of USD 22,500 for the 2016-2017 season, USD 18,900 for the 2017-2018 season and late penalty payments of USD 100 per day for each day of failure to pay the above-requested sums.

16. The Third Respondent claimed from the Appellant payment of USD 16,366.56 for the 2016-2017 season, USD 32,600 for the 2017-2018 season and late penalty payments of USD 100 per day in case of failure to pay.

17. In its reply, the Appellant submitted that the Respondents were not entitled to salary payments due after the date on which they left the Club as they were never dismissed by the President of the Club but instead left of their own volition following poor match results. The Appellant relied on communications between the First Respondent and the President of the Club on the day the Respondents' contracts were terminated, on press articles following said termination, as well as on conversations between the President of the Club and the First Respondent's agent (the "Agent") on the day preceding the termination. *In fine*, the Appellant stated that, in any event, the Respondents did not suffer any loss as all of them subsequently found substitute employment.

18. On 12 April 2018, the BAT issued an Award (the "BAT Award"), which was later on corrected, on 8 June 2018, upholding Respondents' claims. The operative part of the BAT Award reads as follows:

> *"1. Columbus Sport 99 C.A. shall pay Mr. Ivan Deniz O'Donnell USD 177,812.50 as compensation for unpaid salary and bonuses.*
>
> *2. Columbus Sport 99 C.A. shall pay Mr. Ivan Deniz O'Donnell USD 21,000.00 in late payment fees.*
>
> *3. Columbus Sport 99 C.A. shall pay Mr. Marcos Cervero Simonet USD 25,625.00 as compensation for unpaid salary.*
>
> *4. Columbus Sport 99 C.A. shall pay Mr. Marcos Cervero Simonet USD 2,600.00 in late payment fees.*
>
> *5. Columbus Sport 99 C.A. shall pay Mr. Ronald Guillen USD 25,116.56 as compensation for unpaid salary.*
>
> *6. Columbus Sport 99 C.A. shall pay Mr. Ronald Guillen USD 2,800.00 in late payment fees.*
>
> *7. Columbus Sport 99 C.A. shall pay jointly to Mr. Ivan Deniz O'Donnell, Mr Marcos Cervero Simonet and Mr Ronald Guillen the amount of EUR 9,000.00 as reimbursement of the advance on BAT costs.*
>
> *8. Guaros de Lara BBC shall pay jointly to Mr Ivan Deniz O'Donnell, Mr Marcos Cervero Simonet and Mr Ronald Guillen the amount of EUR 12,000.00 as contribution towards their legal fees and expenses.*
>
> *9. Any other or further-reaching requests for relief are dismissed".*

19. The grounds of the BAT Award were as follows:

- As it is the Respondents who are seeking to assert their right to unpaid salaries and bonuses, the same bear the burden of proof in this regard.

- Neither the Respondents nor the Appellant were able to submit relevant and reliable evidence proving that the termination resulted from either the Respondents' resignation or their dismissal by the Appellant. However, based on the submitted evidence, the BAT Arbitrator was satisfied that the Respondents discharged their burden of proof.

- In finding *ex aequo et bono* that the Appellant dismissed the Respondents without just cause, the BAT Arbitrator found persuasive the following facts: 1) upon leaving the Club, none of the Respondents had alternative clubs to join; 2) while some articles invoked a resignation, multiple other press articles pointed to a dismissal; 3) the declarations submitted by the Club carry less weight because made by the latter's employees, did not contain any relevant information as to whether the Respondents resigned or were dismissed, and were partially based on hearsay evidence as none of the declarants have been privy to conversations between the Parties; 4) the WhatsApp conversations between the President of the Club and the First Respondent, submitted as leading evidence by the Appellant, are ambivalent and therefore of limited support to the latter's position; 5) the WhatsApp conversation between the President and the First Respondent's Agent following the termination of the contracts carries the most evidentiary weight because of the unambiguous statements it contains going to proving that the Respondents were dismissed.

- While entitled to compensation for their dismissal without just cause, the Respondents were under a duty to mitigate their losses. Consequently, upon finding that the Respondents did not mitigate their losses sufficiently, the BAT Arbitrator decreased the awarded compensation.

- With regard to late payment fees, the BAT Arbitrator observed that they are not uncommon in BAT jurisprudence but finds that those requested by the Respondents are excessive and determined *ex aequo et bono* fair late payment fees.

- The BAT Arbitrator, considering that the so awarded late payment fees more than adequately compensate the Respondents, rejected their claim for interest.

20. The BAT Award with grounds was notified to the Parties on 13 April 2018.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. On 1 May 2018, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Respondents challenging the BAT Award, pursuant to Article R48 of the Code of Sports-related Arbitration (the "CAS Code").

22. On 18 May 2018, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.

23. On 8 June 2018, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division and in accordance with Articles R33, R52, R53 and R54 of the CAS Code, informed the Parties that the Panel appointed to decide the case was constituted as follows:

> President: Mr Ivaylo Dermendjiev, Attorney-at-law in Sofia, Bulgaria.
>
> Arbitrators: Mr Olivier Carrard, Attorney-at-law in Geneva, Switzerland (appointed by the Appellant) and Mr José Juan Pintó, Attorney-at-law in Barcelona, Spain (jointly appointed by the Respondents).

24. On 11 June 2018, the Respondents filed their Answer, in accordance with Article R55 of the CAS Code.

25. On 13 June 2018, the CAS Court Office invited the Parties to inform the CAS whether they preferred a hearing to be held or for the Panel to issue an award based solely on the Parties' written submissions.

26. By letter dated 15 June 2018, the Respondents stated that no hearing was necessary and agreed for the Panel to issue an award based solely on the Parties' written submissions.

27. By letter dated 15 June 2018, the CAS Court Office invited the Respondents to comment on the Appellant's request for the production of documents (para. 58 of the Appeal Brief).

28. By email dated 20 June 2018, the Appellant requested that a hearing be held in this matter in order for its witnesses to be heard, and filed legal advice on Venezuelan employment law ("Legal Advice").

29. On the same day, the CAS Court Office invited the Respondents to comment on the Legal Advice filed by the Appellant.

30. On 25 June 2018, the Respondents filed their comment on the Appellant's request for production of documents.

31. On 2 July 2018, the Respondents submitted their observations on the Legal Advice.

32. On 5 July 2018, the CAS Court Office, on behalf of the Panel, informed the Parties that the hearing will take place in Lausanne on 14 September 2018.

33. On 10 July 2018, the Parties signed the Order of Procedure.

34. On 12 July 2018, the Appellant requested that the First Respondent files bank statements and cash receipts proving the amounts received under his contract with the Venezuelan club Bucaneros de la Guaira ("Bucaneros").

35. On 13 July 2018, the CAS Court Office, on behalf of the Panel, granted a deadline of 10 days to the First Respondent to declare whether the documents sought exist and are in its possession and whether it is willing to provide such documents for consideration.

36. By letter dated 31 July 2018, the CAS Court Office informed the Parties that the First Respondent did not provide any documents in response to the Appellant's document production request, and invited, on behalf of the Panel, the Appellant to file any comments or further requests in that respect.

37. On 2 August 2018, the Respondents submitted a statement of Bucaneros as proof of the salary received by the First Respondent during his short employment relationship with Bucaneros.

38. By letter dated 12 September 2018, the Appellant objected to admitting the statement filed by the Respondents because of its relevance and evidentiary weight and commented on the Respondents' procedural behaviour.

39. In accordance with Article R57 of the CAS Code, a hearing was convened and held on 14 September 2018 in Lausanne, Switzerland. The Panel was assisted at the hearing by Mr Antonio de Quesada, Counsel to the CAS. The following persons attended the hearing:

    a. For the Appellant: Mr Cedric Aguet, Counsel; Mrs Marina Likoska, Counsel; Mr Jorge Hernández, witness; Mr José David Hernández, witness; Mr Freddy Urdaneta Vale, witness; Mr José Martínez, witness and Dr Evies Vásquez, expert.

    b. For the Respondents: Mrs María Teresa Nadal, Counsel and Mr Tomás Damià, Counsel.

40. The Parties were given the opportunity to present their case, to make pleadings and arguments, to examine the witnesses and to answer questions posed by the Panel. Upon closing of the hearing, the Parties expressly stated that they had no objections in relation to their right to be heard. The Panel had carefully taken into account all the evidence and the arguments presented by the Parties, in their written submissions and at the hearing, even if they have not been summarised in the present Award.

41. By letters dated 14 and 24 September 2018, the CAS Court Office requested that the Parties file their respective submissions on costs.

42. On 24 September 2018, the Appellant filed its submission on costs.

43. On 1 October 2018, the Respondents filed their submission on costs.

V. SUBMISSIONS OF THE PARTIES

A. The Appellant

44. As to the facts, the Appellant's submissions, in essence, may be summarized as follows:

- On 24 May 2016 and 4 July 2016, the Appellant hired one coach and two assistant coaches for the team for the fixed duration of two seasons (2016-2017 and 2017-2018), starting on 1 September 2016.

- Before its arrival at the Club, the First Respondent was unfamiliar with the way the team functioned. Upon his arrival in August 2016, the First Respondent imposed rules of conduct and of communication that were shocking to the other members of the staff and to the players. For example, he imposed that no player nor coach besides the other two Respondents could ever talk to him directly, never had lunch with the players, prohibited that music be played in the arena where the team trains and plays or while travelling by bus, never spoke to members of the management of the team.

- Upon multiple complains by members of the staff, players and fans, the Club's management suggested the First Respondent change his behaviour, which he did not do. Furthermore, he made questionable strategic choices leaving on the bench some of the most valuable players of the team.

- At the end of October - early November 2016, the First Respondent had a major dispute with the team captain criticizing the former's methods in leading the team.

- Upon arrival of the team in Barquisimeto on 3 November 2016 for participation in the second part of the South-American League, fans openly threatened the First Respondent and he became afraid for his own safety.

- On 6 November 2016, the First Respondent and the President of the Club had a discussion regarding the former's dispute with the captain and fear for his safety. No decision was taken during that discussion and another meeting was scheduled for the following morning, on 7 November 2016.

- After the first meeting but before the second one, the President called the Agent in order to discuss about the First Respondent's difficulties in the Club. Again, no decision was taken during that call even though solutions were discussed, and the upcoming second meeting was confirmed.

- Following the Agent's discussion with the President, the former spoke to the First Respondent, who then sent a message to the President thanking him for their collaboration and stating that the upcoming second meeting was unnecessary.

- The other two Respondents did not have any communication with any representative of the Appellant.

- All three Respondents left their houses and the country early in the morning of 7 November 2016, not attending the second meeting scheduled with the President.

- The Agent invoiced the Club on 11 July 2017. The Appellant refused to make any payment in favour of the Respondents. The Agent did nothing further to obtain the claimed payment.

- The Respondents filed a claim before the BAT against the Appellant on 18 July 2017.

45. With regard to the merits, the Appellant submits that its right to be heard during the BAT proceedings was breached as the BAT Arbitrator in charge of such proceedings did not hear its witnesses.

46. The Appellant further submits that though it did not have the burden of proving that the Respondents resigned, it had provided sufficient evidence to proving that fact. Based on that evidence, the Club concludes that it would have made no sense to orally terminate the contracts during its meeting with the First Respondent on 6 November 2016 before scheduling a second meeting for the following morning. The Appellant also states that the First Respondent must have taken its decision to leave the Club after his discussion with the President as it felt the need to later send him a message thanking him for their collaboration and annulling their second meeting. The fact that the Respondents' Agent claimed a payment from the Club only after many months have passed further illustrates the fact that Respondents unlawfully terminated their contracts.

47. Alternatively, the Appellant submits that even in case the Panel found that the Appellant had terminated Respondents' contracts, it had just cause to do so because of the Coaches' arrogant and inappropriate behaviour towards members of the team and the management.

48. In the Appeal Brief, the Appellant requested the following relief:

"1. To admit that the appeal has been filed in due course and meets the formal requirements imposed by the Code of Sports-related arbitration, thus that it is admissible.

2. On the merits, to admit the appeal and to annul the award rendered by the Basketball Arbitral Tribunal (BAT) in the case BAT 1048/17, Columbus Sport 99 C.A. vs Ivan Deniz O'Donnel, Marcos Cervero Simonet and Roland Guillen.

3. To order that the respondents Ivan Deniz O'Donnel, Marcos Cervero Simonet and Roland Guillen bear all costs of the proceedings and to condemn them jointly and severally to pay all expenses incurred by Columbus Sport 99 C.A., including its lawyers' fees as of the date the respondents seized the Basketball

Arbitral Tribunal (BAT) on 18 July 2017, the costs it paid to the Basketball Arbitral Tribunal (BAT) and the costs it paid and shall pay to the CAS".

B. The Respondents

49. As to the facts, the Respondents' submissions, in essence, may be summarized as follows:

- Notwithstanding his successful employment with a Mexican club, on 24 May 2016, Ivan Deniz signed an employment agreement with the Club for the duration of two consecutive basketball seasons.

- On 4 July 2016, the Second and Third Respondents, coming from the same Mexican club as the First Respondent, also signed separate employments contracts with the Appellant hiring them as assistant coaches. As such, their job was to assist the First Respondent in performing his duties.

- All three agreements the Respondents and the Appellant signed are guaranteed contracts providing for compensation to the Coaches in case of dismissal by the Club. Just a few days after the start of the new season in September 2016, under the guidance of the Respondents, the Club won the 2016 FIBA Intercontinental Cup, which represents the most important and prestigious title the Appellant's Club has ever won.

- In October 2016, the Club won the first two games of the National League but lost a game in Argentina. Said defeat was not well received by the President of the Club and changed the entire working atmosphere within the Club.

- On 6 November 2016, the President of the Club verbally communicated to the First Respondent and the Agent his decision to dismiss all three of the Respondents. On the same day, the Agent sent a WhatsApp message to the President requesting that they discuss his decision.

- Also on 6 November 2016, the Agent sent a WhatsApp message to the President requesting that they discuss his decision. On the same day, the First Respondent 1 sent a polite message to the President as well accepting his decision, thanking him for their collaboration and asking him to recognize what was due to the former.

- On 7 November 2016, the Respondents left Venezuela.

- On 10 November 2016, the Agent sent a message to the President requesting payment of the Respondents' compensation for the dismissal but the latter expressly refused payment thereof.

- Consequently, on 3 March 2017, the Respondents jointly conveyed to the Appellant a formal notice inviting the latter to remedy its contractual violations in order to avoid

arbitration. Since no response was ever communicated by the Appellant, the Respondents initiated the BAT proceedings.

50. With regard to the merits of the case, the Respondents first question the Appellant's motivation behind this appeal as they claim the BAT Award was quite favourable to the latter because it substantially reduced the amounts initially claimed by the Respondents (by around 45%) taking into account their duty to mitigate losses from the termination of their employment with the Club. Furthermore, Respondents find that said mitigation found no grounds whatsoever as they could not be forced to attain a concrete salary especially when no wrongdoing was evidenced on Respondents' side.

51. With regard to Appellant's claim that its right to be heard had been violated during the BAT proceedings since none of its witnesses who submitted their written witness statements were heard, the Respondents first note that said declarations were untimely as submitted at a very late stage, right before the BAT Arbitrator's final deliberations. Moreover, all declarations were submitted by employees of the Appellant which further discredits their credibility. With regard to their content, the witness statements did not introduce any new or relevant information as to whether the Respondents were dismissed or resigned. Lastly, the BAT Arbitrator clearly took said witness statements in consideration and discussed their relevance and credibility in the BAT Award.

52. Concerning the Appellant's argument that the burden of proof and the degree of proof had been misstated and misapplied in the BAT Award, the Respondents recall that the BAT Arbitrator, after careful consideration of the evidence on record and an observation of the little relevant evidence submitted by the Appellant, concluded that the Respondents have the burden of proof and have satisfied it by proving that the Appellant unilaterally terminated their contracts without just cause.

53. In that sense, the Respondents point out to the evidence they have already submitted before the BAT and its relevance to proving the Appellant's unilateral termination: 1) WhatsApp conversations between the First Respondent, his Agent and the President of the Club on 6 and 7 November 2016, 2) further communication between the Agent and the President whereby the former requests payment of just compensation for the termination which the latter refuses to do, 3) the President's behaviour with regard to the start of a potential arbitration, 4) the Appellant's own public statement following the termination and its previous statements after similar dismissals illustrating a pattern in the Appellant's way to end its relationship with a coach, and 5) the Second Respondent's communication with third parties following the termination whereby the former confirmed that the coaching team had been "fired" and having difficulty finding a job mid-season.

54. By contrast, the Respondents underline that the only evidence that the Appellant submitted were the above-mentioned witness statements and a press article which has been contradicted by multiple other press articles qualifying the underlying situation as a dismissal and that the Respondents are citing to in their written submissions.

55. The Appellant's alternative contention is that even if the Panel were to find that the Club terminated the Respondents' contracts, it did so with just cause, that being the Club's dissatisfaction with Respondents' coaching strategy and their bad relationship with the players and the management of the Club. It is the Respondents' position that such allegations are untruthful and exaggerated but even assuming they were true, they could not justify a termination without cause and notice. Such conclusion is, according to the Respondents, consistent with the findings of the BAT Arbitrator, the leading practice in the professional sport industry, CAS case law, and a provision in Respondents' contracts guaranteeing compensation even in the event of the *"COACH's lack of or failure to exhibit sufficient skills"*.

56. The Respondents affirm that by hiring the First Respondent, the Appellant empowered him to apply his methods in order to achieve the best results possible for the Club. Indeed, the Respondents' position is that implementing that professional discretion could not constitute just cause for terminating the First Respondent's contract.

57. The Respondents explain that the evidence submitted before both the BAT Arbitrator and this Panel clearly discredits the hypothesis of the Respondents' potential resignation. They point out to the particular circumstances of the case suggesting that no coach could reasonably resign when having a prestigious, secure and well-paid job, with a two-year guaranteed contract and without any alternative during the basketball season. The Respondents also contend that they only left the country after being dismissed because of their expectation to be compensated under their guaranteed contracts.

58. In their Answer, the Respondents requested the following relief:

> *"1. To reject the Appeal submitted against the BAT award 1048.*
>
> *2. To establish that Appellant terminated the Respondent's* [sic] *employments contracts without just cause.*
>
> *3. To confirm in full the BAT award 1048 and the legal economic entitlements of the Respondents.*
>
> *4. To order Columbus Sport 99 to bear all the costs and legal expenses of both parties of the present proceeding".*

VI. JURISDICTION

59. Article R47 of the CAS Code provides as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".*

60. The Appellant relies on the arbitration clause of its three contracts with the Respondents dated 24 May and 4 July 2016, providing the following:

> *"18. DISPUTES:*
>
> *Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be definitely resolved in accordance with the FAT Arbitration Rules, by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English, and the arbitrator shall decide the dispute ex aequo et bono. The arbitration shall be governed by the Chapter 12 of the Swiss Act on Private International Law (PIL) irrespective of the parties' domicile. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. To the extent legally possible under Swiss Law recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal shall be excluded".*

61. Further to this clause, the jurisdiction of the CAS has not been contested by the Respondents and has been confirmed by the Parties by signing the Order of Procedure.

62. It follows that the CAS has jurisdiction to decide this dispute.

VII. ADMISSIBILITY

63. Article R49 of the CAS Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".*

64. The grounds of the BAT Award were notified to the Parties on 13 April 2018 and the Statement of Appeal filed on 1 May 2018, within the required twenty-one days set in Article R49 of the CAS Code.

65. Furthermore, no objection in that respect has been raised by the Respondents. It follows that the appeal is admissible.

VIII. APPLICABLE LAW

66. Article R58 of the CAS Code provides as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law,*

the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

67. The matter at stake relates to an appeal against a BAT award, and reference must hence be made to Article 15 of the BAT Arbitration Rules which states that:

"15. Law Applicable to the Merits

15.1 Unless the parties have agreed otherwise, the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.

15.2 If according to the parties' agreement 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".

68. Article 19 of the underlying contracts entered into between the Parties provides as follows:

"19. GOVERNING LAW:

This contract shall be interpreted and enforced in accordance with the laws of VENEZUELA".

69. Under Article 18 of the contracts, disputes between the Parties should be resolved in the following manner:

"18. DISPUTES:

Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be definitely resolved in accordance with the FAT Arbitration Rules, by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English, and the arbitrator shall decide the dispute ex aequo et bono. The arbitration shall be governed by the Chapter 12 of the Swiss Act on Private International Law (PIL) irrespective of the parties' domicile. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. To the extent legally possible under Swiss Law recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal shall be excluded".

70. In its written submissions, the Appellant refers to both Articles 18 and 19 of the contracts and designates the FIBA Rules and subsidiarily, Venezuelan law, as law applicable to the merits of the dispute.

71. By contrast, in their Answer, the Respondents call for the application of the FIBA Rules and Swiss law pursuant to the Disputes clause of the underlying contracts.

72. In light of the above, and taking into account the fact that the provisions of the contracts may be perceived as ambiguous as to the issue of applicable law, the Panel considers the will of the Parties as expressed in their written submissions and in both Articles 18 and 19 of the underlying contracts. The Panel is therefore of the view that the law applicable to the present appeal shall be primarily the FIBA regulations, and subsidiarily Venezuelan law to the extent that it does not contradict Swiss public Order.

IX. MERITS

73. The core principle that CAS applies when rendering an award is the *de novo* principle resulting from Article R57 of the CAS Code. According to Article R57, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the challenged decision or may alternatively annul the decision and refer the case back to the previous instance.

74. Based on the Parties' submissions and oral arguments, the issues for determination are the following:

A. Was there a violation of the Appellant's right to be heard and if so, was it remedied during the appeal proceedings?

B. Did the Respondents resign or were they dismissed by the Appellant?

C. Depending on the answer to (B) above, what are the legal consequences of the termination of the Respondents' contracts?

A. Was there a violation of the Appellant's right to be heard and if so, was it remedied during the appeal proceedings?

75. The Appellant argued in its written submissions that the BAT proceedings violated its right to be heard since none of the witnesses it presented were heard by the BAT Arbitrator.

76. The Respondents underline that the Appellant had neither substantiated nor presented any legal merit to support the alleged breach. The former further point out to the late timing of filing of said witness statements as well as to their irrelevance and unreliability with regard to both their content and source, the witnesses being employees of the Club.

77. The BAT Arbitrator, upon examination of said witness statements, concluded that they were not directly relevant to the main issue whether the Club or the Coaches terminated the contracts, but also that they might carry less evidentiary weight as they are made by individuals who are employed by the Club.

78. Based on all of the above, the Panel does not consider that the BAT Arbitrator had breached the Appellant's right to be heard. With regard to the conduct of the arbitral proceedings,

arbitrators are granted vast procedural discretion which encompasses their right to choose based on the evidence on file whether to conduct a hearing at all and also whether to call a witness to the stand. The Appellant had filed 11 witness statements prior to the hearing, which had been duly considered by the BAT Arbitrator. The decision of the BAT arbitrator not to hear them does therefore not constitute a violation of the Appellant's right to be heard.

79. Moreover, as the Appellant rightfully presumed in its written submissions that, even assuming such breach indeed existed, it had been sufficiently cured during the course of the current proceedings. The Panel accepts the Respondents' assertion that the *de novo* review contemplated by Article R57 of the CAS Code, must be understood to cure any eventual violation of Appellant's right to be heard at the previous instance.

80. The jurisprudence of CAS in this regard is abundant and consistent. For instance, in the award CAS 2008/A/1574, the CAS Panel established that the effect of the *de novo* hearing is:

> *"a completely fresh hearing of the dispute between the parties* [and thus]*, any allegation of denial of natural justice or any defect or procedural error even in violation of the principle of due process which may have occurred at first instance (…) will be cured by the arbitration proceedings before the appeal panel and the appeal panel is therefore not required to consider any such allegations".*

81. To similar effect, MAVROMATI/REEB (the Code of the Court Arbitration for Sport, Cases and Materials, Edition 2015) observe that CAS panels regularly reject arguments as to procedural deficiencies in the previous instance on the basis of this curative effect, noting the well-established CAS jurisprudence according to which *"the virtue of an appeal system is that issues relating to fairness of the proceedings before the authority of first instance fade to the periphery"*.

82. The Panel concurs with the Panel in CAS 2015/A/4346 that the full power to review the facts and the law, granted under the provisions of Article R57 of the CAS Code, has a dual meaning: not only that procedural flaws of the proceedings of the previous instance can be cured in the proceedings before the CAS, but also that the Panel is authorized to admit new prayers for relief and new evidence and hear new legal arguments (see MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Edition 2015, comment under Article R57, para. 12, p. 508) with some limited restrictions which are not applicable in the present case.

83. On this basis, the Panel considers that any eventual violation of Appellant's right to be heard at the previous instance has been cured by these CAS proceedings. Furthermore, the Appellant has been able to present its witnesses who have been heard by the Panel during the CAS hearing. Whether or not their testimony will be given full evidentiary weight is examined in Subsection B below.

B. Did the Respondents resign or were they dismissed by the Appellant?

84. The pivotal question in these proceedings revolves around determining whether the Appellant unilaterally dismissed the Respondents, and if so – whether it terminated their contracts with just cause (Sub-Section C below), or whether the latter left their jobs without any notice.

85. The Panel shall first examine the relevant burden and standard of proof (1), as well as the applicable tests for the alleged violations (2) before applying them to the specific factual situations of the First Respondent (3), on the one hand, and Second and Third Respondents (4), on the other hand.

a. Burden and standard of proof

86. The Panel considers that determining what the standard of proof for any of those allegations is and whether it has been satisfied by the Parties is paramount to evaluating the evidence on record and reaching a conclusion on the main issue.

87. The BAT Award clearly states that the burden of proving a termination by the Club was on the Respondents (then Claimants), and that they had successfully discharged their burden of proof.

88. The Appellant argues that while it did not have the burden of proving that it was the Respondents who left the Club, it had provided the Panel with enough evidence to substantiate its position. The Appellant further alleges that the BAT Arbitrator misapplied the burden of proof by admitting unproven facts into evidence, and reduced the standard of proof to a mere probability. The Legal Advice provided by the Appellant suggests that, under Venezuelan employment law, the burden of proof is on the party alleging an event took place, and the standard of proof with respect to employment disputes is *"certainty"*. That being said, the Appellant does not comment on whether it had satisfied the burden of proving its subsidiary defence that there was just cause for dismissing the Respondents.

89. The Respondents do not oppose having the burden to prove that they were dismissed by the Club and confirm they have provided sufficient evidence to discharge their burden of proof.

90. The Panel observes that, as a general rule, the burden of proving the existence of an alleged fact rests on the party who is alleging such fact. This is consistent with both Venezuelan and Swiss law. Therefore, it belongs to the Respondents to prove that they were unilaterally dismissed by the Club, which is the basis of their original claim against the Appellant. However, the burden of proving that the Coaches resigned or were alternatively dismissed with just cause rests on the party relying on those arguments, which is the Appellant.

91. As to the applicable standards of proof to the main claim and to the answer to such claim, the Legal Advice provided by the Appellant suggests that *"certainty"* is the applicable standard of proof under Venezuelan law. The Expert, however, did not refer to any specific provision on this issue under Venezuelan law. Under Swiss law, for instance, absolute certainty is not required

in employment disputes, instead *"full proof"* is usually prescribed which entails that the court is convinced that a fact is correct based on objective evidence. This Panel notes that there is no generally applied standard of proof by CAS panels. CAS panels however often apply standards ranging from the lower balance of probabilities test to the higher comfortable satisfaction standard. This being said, CAS panels do not generally consider that in civil/employment law contexts, allegations need to be proved beyond absolute certainty. This Panel would therefore require that it be satisfied or convinced that an event occurred based on objective evidence. Pursuant to CAS case law, when there is no objective evidence of the alleged fact, that is to say in a one-word-against-another situation, *"the party having the burden of proof should provide further evidence supporting its argument"*, which can for example take the form of a written confirmation. (CAS 2013/A/3126).

b. Applicable tests for resignation and dismissal

92. In establishing the applicable tests for both the dismissal and the resignation, the Panel has to look to the law applicable to the merits of the dispute, such as determined in Section VIII above, limiting itself to what has been argued by the Parties in their written and oral submissions.

93. The Respondents' contracts all contain a provision on termination dealing with the situation where the Appellant, the respective Respondent and the Agent might agree to a mutual termination. However, the underlying facts clearly do not fall within the scope of said provision because of the very disagreement giving rise to the present dispute. Additionally, the Respondents bring up the fact that their contracts are guaranteed. Article 5 of the Respondents' contracts provides that even if the Coaches are released by the Club due to poor performance, they will be paid their salaries until the end of their fixed-term contracts. In such a case, the Club must send written notifications to the Agent within the last 5 days of the previous month. The contracts do not address the termination by the Coaches or the termination by any of the Parties for any other reason than poor performance.

94. The FIBA regulations do not expressly address the termination of an employment contract between a coach and a club. The Panel will therefore focus its analysis on the applicable law interpreted in light of persuasive CAS case law.

95. The Appellant filed as part of its pleadings a Legal Advice on Venezuelan employment law. The Legal Advice envisages both the resignation and dismissal scenarios. It results from the Legal Advice that if an employee wishes to resign from her/his functions, she/he must notify her/his resignation to the employer, the absence of proper notification being considered a just cause for dismissing the employee abandoning her/his position. Also, the employee can only lawfully resign for the reasons enumerated in a state statute, including for any act of the employer constituting indirect dismissal. A situation which would constitute indirect dismissal would be the employer somehow altering the existing work conditions of the employee. Therefore, if the employee resigned from her/his position with just cause and duly notified the employer of such resignation - the latter owes the former due compensation in the amount of the remaining salaries if the contract has a fixed term, as in the case at hand. However, if the employee

terminates the employment contract without just cause, Venezuelan law does not prescribe any sanctions for the employee, with the exception of losing the opportunity to get any compensation under her/his contract. This unjustified termination by the employee, on the other hand, gives the employer the right, but not an obligation, to file a *"Justified Dismissal of Abandonment of Work"*. When not filing such a report, the employer remains exposed to claims similar to those underlying the present proceedings. This being said, it cannot be automatically inferred from such conscious choice or omission that the employer dismissed the employee.

96. Regarding dismissal, the Legal Advice submitted by the Appellant distinguishes between dismissal with just cause and unjustified dismissal. Under Venezuelan law, an employer can lawfully dismiss its employee if it has just cause. According to the Legal Advice, this situation however entails that, within 5 days of the dismissal, the employer initiates legal proceedings and participates in a procedure before the Judge of Mediation and Execution to explain which or what were the justified reasons for the dismissal. The Legal Advice expressly notes that *"*[i]*f the employer does not act in such a way, the dismissal will be considered as unjustified"*. Facts constituting a just cause for dismissal are the employee's abandonment of work, which, according to the Legal Advice, encompasses untimely and unjustified departure without permission, refusal to perform assigned tasks, *etc*., the serious breach of obligations imposed by the employment relationship, or labour harassment. In case the employee that is being dismissed does not agree with the cause of dismissal, she/he shall apply to the competent courts for reinstatement or due compensation within 10 days following the dismissal. Based on the above, it appears that under Venezuelan law, if the employee terminates the employment relationship without just cause or notice, it loses its right to compensation under the contract.

97. The Panel notes that the Legal Advice was prepared by a person that the Panel discovered is employed by the Appellant which necessarily affects its credibility and diminishes its probative value. The Panel will therefore only take it into consideration as moderately persuasive authority.

98. On the issue of just cause, the Panel notes that pursuant to CAS jurisprudence, *"just cause to terminate a contract is generally said to exist where the breach has reached such serious levels that the injured party cannot in good faith be expected to continue the contractual relationship"* (CAS 2015/A/4161). In the above-mentioned case, a coach was dismissed after failing to attend and oversee three training sessions. The panel in that case found that the alleged violation did not qualify as just cause and the club should have first initiated some internal disciplinary proceedings. Additionally, another panel, relying on the applicable provisions of Swiss law, which are similar to the ones applicable to Venezuelan law, held that *"only a breach which is of a certain severity justifies termination of a contract without prior warning"* and that *"the breach is considered to be of a certain severity when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties such as serious breach of confidence"* (CAS 2006/A/1180).

99. With regard to notice of termination, the panel in another CAS case found that *"although the need to send notices is not mandatory in all cases and is established on a case by case basis, CAS panels have regarded notices as a vital step which could possibly have played a role in bringing an end to an unexplained breach or*

series of breaches, particularly where the breach or breaches in question has not yet reached a fundamentally unacceptable level and/or unduly prejudiced the non-breaching party to the extent that the latter cannot be reasonably expected to continue the contract" (CAS 2014/A/3460).

100. Under Venezuelan Law to lawfully terminate an employment contract either by the employer or the employee, there has to be just cause and a prior notice or remedial effort from the terminating party. However, as rightfully noted by another CAS tribunal, whether the unilateral termination is valid depends on the overall circumstances of the case (CAS 2006/A/1180).

101. The Panel considers that the legal analysis of the termination with regard to the First Respondent, on the one hand, and the Second and Third Respondents, on the other hand, has to be made separately based on the differences in their factual situations.

c. First Respondent

102. The First Respondent alleges that it was dismissed by the Club and files what it qualifies as objective evidence of such dismissal. Undisputable objective evidence would be, in this situation, a written notice of dismissal or some other kind of written confirmation of the employer's decision, or alternatively the employee's preferably written request for reinstatement or explanations with regard to the dismissal.

103. Such written proof has however not been made available to this Panel. The First Respondent provides the Panel with only circumstantial evidence of said termination in the form of WhatsApp messages, open to different interpretations. The BAT Arbitrator found that the WhatsApp messages exchanged between the President of the Club, the First Respondent and the Agent satisfy the Respondents' burden of proving the dismissal and that such dismissal took place. The Panel disagrees that such messages provide reliable and sufficient proof of a potential dismissal as they are, in the Panel's view, clearly ambiguous. For instance, the Respondents rely on an exchange between the Agent and the President of the Club dated 10 November 2016 to prove that point. However, a plausible reading of the same communications could be that the Respondents allegedly left the Club upon what they thought was a just cause (deterioration of the relationship with the Club, external and internal threats, criticism, *etc.*), while the President confirms the resignation but disapproves the reasons, thereby refusing to make any additional payment than what has already been due prior to 6 November 2016. Furthermore, the messages exchanged between the President, the First Respondent and the Agent on 6 and 7 November 2016 could very well be read in a similar way. It stems from the Agent's message to the President of the Club that there is a common expectation to continue the conversation on the following day *"with tranquillity about all this matter"*. One could argue that if the President had already dismissed the First Respondent on 6 November 2016, it would be unnecessary to further discuss the situation at a second meeting scheduled for the following morning. Moreover, the First Respondent's message to the President dated 6 November 2016, read as a whole, demonstrates that his departure was dictated by the *"threats, insults and continuous criticism"* during his time at Columbus.

104. The First Respondent also relied on various press articles qualifying the events as a dismissal as well as on the press release published by the Club after the departure of the Respondents. The Respondents argue in that regard that the press release is fully consistent with such statements previously published by the Club upon the dismissal of a coach. The Panel notes that it is common practice in the sports world that such messages are left intentionally ambiguous so as not to harm any of the concerned parties' reputation. Also, as previously noted with regard to the press articles submitted by the Appellant, such publications cannot be relied on for the truth of the asserted matter because of the existence of contradictory articles, and the low probative value of such evidence.

105. Neither the First Respondent, nor his Agent filed witness statements attesting to the veracity of the above-mentioned WhatsApp communications or the statements asserted in the so submitted press articles or releases. Neither of them was present at the CAS hearing, nor did their counsel offer their testimony going to proving the First Respondent's allegations. In addition, Respondents' counsel did not take the opportunity to cross-examine the Appellant's witnesses in order to set the record straight and relied instead exclusively on the findings of the BAT Arbitrator, thereby demonstrating a general misunderstanding as to the *de novo* standard of review applied by CAS tribunals. The Panel was hence unable to reconstruct the full story of what happened on 6-7 November 2016.

106. The Panel also notes that the Respondents, while being convinced of their right to compensation under the employment contracts, only claimed such amounts around 8 months after the 6-7 November 2016 events took place. The same goes for the Appellant, who neither requested from the Respondents any written explanation of the termination, nor sent them any notification of dismissal. The Panel observes that the Parties to this arbitration are sophisticated professionals who could not have omitted the fact that a fixed-term employment contract does not simply dissolve after only partial performance thereof, without any written notice of termination or efforts to repair the relationship emanating from either of the Parties. The lack of such effort only attests ignorance or even negligence of the Parties.

107. As to the evidence submitted by the Appellant, the Panel agrees with the finding of the BAT Arbitrator that the Club submitted little further evidence to show that the Respondents resigned. However, the Panel also understands that such proof might simply not exist. The Appellant relies in its submissions on one press article as well as on the witness testimony of players and different members of the staff and management of the Club. Nonetheless, none of the witnesses offered direct evidence of either an act of dismissal or of resignation. At most, the underlying statements could provide elements as to why the relationship between the Club and the First Respondent deteriorated. Also, the Panel agrees with the BAT Arbitrator that such testimony emanating from individuals who are in different ways employed or closely related to the Appellant carries less evidentiary weight than the testimony of the Parties or objective evidence which has been scarce. The Panel is also unwilling to rely on press articles which are usually considered hearsay not admissible into the evidence on file.

108. The Appellant had the burden to prove that the First Respondent resigned by offering objective or all available evidence to convince the Panel that a resignation did in fact take place. Although the Appellant has, in the Panel's view, satisfied its burden of proof as it seems, based on the totality of circumstances, that no objective evidence of the termination events exists, it has failed to meet the required evidentiary standard. That is to say that the evidence procured by the Appellant is insufficient to conclude that the First Respondent unilaterally terminated its contract without just cause.

109. It can be inferred from the above that the requirement of a prior notification, preferably written, or any remedial efforts has not been satisfied. This would make both a resignation and a dismissal under Venezuelan law, imposing on the employer the commencement of mandatory proceedings right after the dismissal or on the employee a proper notification, invalid. Swiss law, as interpreted and applied by CAS tribunals, gives the parties to an employment relationship the option of exiting such relationship overnight and without notice only upon just cause which as mentioned above had been restrictively interpreted to only include violations of a significant severity.

110. The Appellant submitted that in the event this Panel was to consider that it did in fact dismiss the Respondents, it did so with just cause. Therefore, the Appellant claimed that it would be justified in terminating the Coaches' contracts because the latter behaved in an unbearable and unreasonable manner with the players and with the staff and management of the Club which allegedly deteriorated the Club's objective performance and subjective perception by the fans. The Appellant describes the First Respondent's behaviour in detail both in its written and oral submissions, which have been summarized above. The Panel notes that the described behaviour does by no means exceed the common boundaries of a coach's discretion in selecting the methods it uses in order to achieve the Club's goals. In the professional world, coaches are generally granted broad discretion in training teams as far as it does not result in a clear violation of a player's or club's rights. A dismissal by the Appellant would therefore not have been justified.

111. The Appellant's main claim is that the Respondents unilaterally terminated their employment relationship with the Club overnight. This being said, the Appellant makes the argument that if the First Respondent left, it was because of its deteriorating relations with the Club and because of the negativity and serious threats to his safety made by fans. The question is whether these facts constituted just cause for the First Respondent to resign without notice.

112. Based on the totality of the circumstances and to different extents on the evidence on file, this Panel is satisfied that the First Respondent was not dismissed but rather resigned from his position and his relations with the Club and fans triggered his decision to leave. The Panel finds that the communications of 6-7 November 2016 could very well be read as the President of the Club simply expressing his dissatisfaction with the First Respondent's performance which let the latter to leave the Club upon an unjustified belief that it could easily request payment of its salaries until the end of the fixed-term contract based on the guarantee clause contained therein. For the guarantee clause to be triggered, however, the Club has to have dismissed the Coach,

while the evidence does not favour that approach. On 10 November 2016, the Agent contacted the Club asking for the above-mentioned compensation. The Panel reads the exchange as indicating that the Club clearly did not consent nor initiate the Respondents' departure and did not believe it owed them any contractual compensation for that reason. The Respondents then waited for more than 8 months before initiating the BAT proceedings. Furthermore, they did not bother to provide all available evidence of the litigious events, nor to testify to the events of 6-7 November 2016. Based on the evidence on file, the Panel is satisfied that the First Respondent unilaterally terminated its contract with the Appellant.

113. Based on the provisions of Venezuelan law, the First Respondent would still be entitled to compensation if he proved that he left the Club with just cause. While serious threats to one's integrity and security may constitute just cause, such facts have not been proved before this Panel. In addition, such circumstances would have constituted a just cause to the extent that the Club had prompted or contributed to the threats extended to the First Respondent, if any. Such conduct on the part of the Club was not proved or even argued. Neither the First Respondent, nor his Agent testified as to the First Respondent's situation and state of mind as of 6-7 November 2016. Consequently, the Panel finds that the First Respondent terminated the contract without just cause.

d. Second and Third Respondents

114. The Second and Third Respondents claim they have been dismissed by the Appellant without notification or just cause and request payment of compensation in the amount of their unpaid salaries under the 2-year fixed-term contract.

115. The Appellant argued that the Second and Third Respondents never claimed nor proved that any representative of the Club had any discussion with them prior to their departure.

116. The Panel finds that the Second and Third Respondents have not satisfied their burden of proving that they were dismissed by the Appellant. No factual or legal submissions have been made with regard to either of them. The only evidence remotely relating to their situation is the Second Respondent's communications with players of the Club about the recent termination of the Respondents' employment contracts. However, such communications do not bring any clarity to the reason and manner of their departure, let alone whether they resigned or were dismissed by the Appellant.

117. *In fine*, neither of them were present at the hearing or available to testify to the events that took place on 6-7 November 2016.

118. For the above reasons, the Panel is satisfied that the Second and Third Respondents simply resigned from their positions without just cause without any prior notification or subsequent effort to repair the relationship.

C. Depending on the answer to (B) above, what are the legal consequences of the termination of the Respondents' contracts?

119. All three Respondents unilaterally left the Club without just cause and are therefore not entitled to compensation.

120. The Respondents' employment relationship with the Appellant took place from 1 September 2016 to 6 November 2016. Therefore, in accordance with their contracts, the Appellant has to pay the Respondents the salaries for the time they performed their contractual duties as coaches of the Appellant.

121. However, the Respondents claimed in their written submissions that the Appellant only paid them for one month concerning September 2016. This claim has not been objected by the Appellant neither in its subsequent written communications, nor at the hearing.

122. In light of the foregoing, the Respondents are entitled to receive salaries for the period between 1 October 2016 and 6 November 2016. For the First Respondent would be a total of USD 25,499.98, and for the Second and Third Respondents would be USD 2,999.98.

123. Also, pursuant to the First Respondent's contract, the Appellant has to pay the former a bonus for winning *"any official competition league title (…) PAYED IN THE NEXT 72 hours after achievement"*. It is undisputed between the Parties that on 18 September 2016, under the Respondents' training, the Club won the 2016 FIBA Intercontinental Cup. A bonus in connection with that victory is therefore owed and has not been paid to the First Respondent. The Appellant has to pay the First Respondent the amount of USD 21,250.

124. Furthermore, the BAT Arbitrator, while noticing that the Respondents' contracts do not contain a *"late payment"* or default interest provision with regard to delay in paying the Coaches' salaries, awarded them *ex aequo et bono* a late payment fee in the approximate amount of one of each of the Respondents' respective monthly salaries. At the same time, the BAT Arbitrator refused to award the Respondents an additional 5% *per annum* interest considering that the above-mentioned late payment fee would be *"more than adequate to compensate"* them. The Panel notes that the Parties failed to inform the Panel on how Venezuelan law deals with the issue of default interest.

125. As a result, since the Panel is unable to determine the applicable provisions of Venezuelan law with regard to default interest, the Panel finds that in accordance with Article 16 of the Swiss PILA, which applies by analogy in arbitration proceedings in Switzerland[1], Swiss law shall apply instead of the applicable specific national law. In this respect, Article 16 of the Swiss PILA stipulates the following:

---

1 See to that regard KARRER P., in: HONSELL ET AL., IPRG Kommentar, 3rd edition, Article 187, p. 1943. See also *ad hoc* MAVROMATI/REEB, The Code of the Court of Arbitration for Sport. Commentary, Cases and Materials, Kluwer Law 2015, p. 546, 547 with further references to relevant CAS case-law: cases CAS 2011/A/2321, CAS 2009/A/1958, CAS 2008/A/1477 & 1567.

"Article 16. Establishing foreign law.

1. The contents of the foreign law shall be established by the authority on its own motion. For this purpose, the cooperation of the parties may be requested. In matters involving an economic interest, the task of establishing foreign law may be assigned to the parties.

2. Swiss law applies if the contents of the foreign law cannot be established".

126. In light of the above, the Panel shall apply Swiss law in order to establish the default interest to the Respondents' unpaid salaries. In accordance with the Swiss Code of Obligations, a default interest of 5% *per annum* shall apply to the due amounts.

127. In general, under Swiss law, where the parties have agreed on a specific date of payment or performance, the debtor will automatically be in default as of this date. Therefore, the default interest will become due as of the date of default on the contractual obligations. Under the Respondents' contracts, monthly salaries must be paid on the last day of each month. On 30 September 2016, the Appellant paid the Respondents their first salaries. However, on 31 October 2016, when payment of their salary for the month of October became due, no payment ensued.

128. Thus, the Appellant owes the Respondents interest on the sums awarded for the month of October at 5% *per annum* from the date the performance of the payment obligation became due, that is to say from 31 October 2016. With regard to the period between 1 November 2016 and 6 November 2016, payment became due on the day of the contract termination. Consequently, for this period, the Appellant owes the Respondents default interest at 5% *per annum* starting from 6 November 2016. Regarding the First Respondent's bonus, it should have been paid *72 hours after achievement* (*i.e.* 21 September 2016).

129. In conclusion:

- Columbus Sport 99 C.A. shall pay to Mr Ivan Deniz O'Donnell the total amount USD 46,749.98, plus interest as follows:

  - USD 21,250 corresponding to the month of October 2016, plus an interest of 5% *p.a.* calculated as from 1 November 2016 until the date of effective payment.

  - USD 4,249.98 corresponding to the month of November 2016, plus an interest of 5% *p.a.* calculated as from 7 November 2016 until the date of effective payment.

  - USD 21, 250 corresponding to the bonus for achieving the 2016 FIBA Intercontinental Cup, plus an interest of 5% *p.a.* calculated as from 21 September 2016 until the date of effective payment.

- Columbus Sport 99 C.A. shall pay to Mr Marcos Cervero Simonet the total amount of USD 2,999.98 plus interest as follows:

    - USD 2,500 corresponding to the month of October 2016, plus an interest of 5% *p.a.* calculated as from 1 November 2016 until the date of effective payment.

    - USD 499.98 corresponding to the month of November 2016, plus an interest of 5% *p.a.* calculated as from 7 November 2016 until the date of effective payment.

- Columbus Sport 99 C.A. shall pay to Mr Ronald Gillen the total amount of USD 2,999.98 plus interest as follows:

    - USD 2,500 corresponding to the month of October 2016, plus an interest of 5% *p.a.* calculated as from 1 November 2016 until the date of effective payment.

    - USD 499.98 corresponding to the month of November 2016, plus an interest of 5% *p.a.* calculated as from 7 November 2016 until the date of effective payment.

130. The Panel therefore partially upholds the appeal, setting aside the BAT Award, which is replaced by this CAS Award.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Columbus Sport 99 C.A. on 1 May 2018 against the award rendered by the Basket Arbitral Tribunal dated 12 April 2018 is partially upheld.

2. The award rendered by the Basket Arbitral Tribunal dated 12 April 2018 is set aside and replaced as follows:

    a. Columbus Sport 99 C.A. shall pay to Mr Ivan Deniz O'Donnell the total amount USD 46,749.98, plus interest as follows:

        i. USD 21,250 corresponding to the month of October 2016, plus an interest of 5% *p.a.* calculated as from 1 November 2016 until the date of effective payment.

        ii. USD 4,249.98 corresponding to the month of November 2016, plus an interest of 5% *p.a.* calculated as from 7 November 2016 until the date of effective payment.

iii. USD 21,250 corresponding to the bonus for achieving the 2016 FIBA Intercontinental Cup, plus an interest of 5% *p.a.* calculated as from 21 September 2016 until the date of effective payment.

b. Columbus Sport 99 C.A. shall pay to Mr Marcos Cervero Simonet the total amount of USD 2,999.98 plus interest as follows:

i. USD 2,500 corresponding to the month of October 2016, plus an interest of 5% *p.a.* calculated as from 1 November 2016 until the date of effective payment.

ii. USD 499.98 corresponding to the month of November 2016, plus an interest of 5% *p.a.* calculated as from 7 November 2016 until the date of effective payment.

c. Columbus Sport 99 C.A. shall pay to Mr Ronald Gillen the total amount of USD 2,999.98 plus interest as follows:

i. USD 2,500 corresponding to the month of October 2016, plus an interest of 5% *p.a.* calculated as from 1 November 2016 until the date of effective payment.

ii. USD 499.98 corresponding to the month of November 2016, plus an interest of 5% *p.a.* calculated as from 7 November 2016 until the date of effective payment.

3. (…).

4. (…).

5. All other motions or prayers for relief are dismissed.