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**FIBA Arbitral Tribunal (FAT)**

# ARBITRAL AWARD

**(0032/09 FAT)**

rendered by

# FIBA ARBITRAL TRIBUNAL (FAT)

**Mr. Raj Parker**

in the arbitration proceedings

**Mr. Nigel Dixon** c/o Larry Fox, 401E. 80th Street, Suite 17F, New York, NY 10075, USA

**- Claimant 1 -**

**Mr. Larry H. Fox**, 401E. 80th Street, Suite 17F, New York, NY 10075, USA

**- Claimant 2 -**

vs.

**Zhe Jian Guan Sha Basketball Club**, 169 Road Stadium, Zhejiang Province, 310004 Hangzhou, China

**- Respondent -**

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## 1. The Parties

### 1.1. The Claimants

1. The First Claimant is Mr. Nigel Dixon (hereinafter the “Player”, “Mr. Dixon” or “Claimant 1”), a citizen of the United States of America and a professional basketball player. He is domiciled at 401E. 80th Street, Suite 17F, New York, NY 10075, USA. Claimant 1 is represented in these proceedings by Mr. Larry H. Fox (hereinafter “Mr. Fox” or “Claimant 2”), a certified FIBA agent. Mr Fox is the Second Claimant in these proceedings.

### 1.2. The Respondent

2. Zhe Jiang Guang Sha (hereinafter the "Respondent") is a Chinese basketball club with its seat in Zhejiang Province, Hangzhou, China. It is domiciled at 169 Road Stadium, Zhejiang Province, 310004 Hangzhou, China. The Respondent is not represented by counsel but has made submissions on its own behalf.

## 2. The Arbitrator

3. On 24 February 2009, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Raj Parker as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").

4. By fax dated 24 February 2009, the Arbitrator accepted his appointment and signed a declaration of acceptance and independence provided by the FAT Secretariat. None of the parties has raised objections to the appointment of the Arbitrator or to the declaration of independence issued by him.

## 3. Facts and Proceedings

### 3.1. Background Facts

5. The Claimants have provided a contract signed on 23 August 2008, comprising two agreements (hereafter, "the Player Agreement" and the "Agent Agreement") and a later amendment to the contract signed on 28 October 2008 (hereafter, “the Amendment Agreement”, these three agreements being hereinafter collectively referred to as “Contract 1”). Most of the relevant clauses, for the purposes of this arbitration, are contained in the Amendment Agreement.

6. In relation to the salary of Claimant 1, Contract 1 provides in relevant part as follows:

> *"3. Guarantee of Salary*
>
> *Each and every one of the payments in Exhibit A shall be ABSOLUTELY GUARANTEED and non-payment of such shall constitute an immediate breach whereby CLUB SHALL BE LIABLE FOR SUCH DEBTS. PLAYER shall undeniably be entitled to receive each and every payment, as stated in Exhibits A and B regardless of how the Player or Club shall perform, even if CLUB releases PLAYER, CLUB is eliminated from competition or if PLAYER is unable to continue to perform his duties for CLUB due to injury or death or other circumstances.”*

7. The relevant part of Contract 1 in relation to payment of Claimant 2 reads as follows:

> *"EXCLUSIVE REPRESENTATION COMMISSION*
>
> *CLUB agrees to pay to Mr Larry Fox (the "REPRESENTATIVE") working in conjunction with Mr Tom Yang, an agent's fee of 10 percent in addition to the basic salary paid to Player. This shall be paid in the form of $22,667 USD wired to REPRESENTATIVE'S bank account. Wire fees on these transfers shall be paid by CLUB. Failure to timely make commission payment will be deemed a material breach of this Agreement and PLAYER will be relieved of all playing duties and PLAYER'S full salary and agent's full fee will immediately become due and payable.*"

8. Contract 1 provides for FAT Arbitration in the event of any dispute. This is discussed further below.

9. The Player Agreement (signed on 23 August 2008) provides:

> *"12. Entire Agreement*
>
> *This Agreement contains the entire agreement between CLUB and PLAYER and they cannot be altered or modified except by a written agreement signed by the PLAYER and CLUB. Similarly, any and all future agreements during the term of this Agreement or thereafter between CLUB (or any person or entity affiliated with, related to, or controlled by CLUB) and PLAYER cannot be executed without and (sic) agreement in writing signed by PLAYER, CLUB and REPRESENTATIVE. Any such agreement without the approval of all three parties shall be null and void."*

10. The Amendment Agreement (signed on 28 October 2008) provides, *in fine*:

> *"To the extend [sic] there is any conflict, the provisions of this Amendment shall take precedence over any and all other written agreements including the Agreement and the official contract (the "CBA Contract") filed with the Chinese Basketball Association and that all other provisions set forth in the Agreement that are not directly affected by the Amendment above shall remain in full force and effect. The terms of this Amendment shall be incorporated into the terms of the Agreement. The parties hereto agree that the Agreement and this Amendment will be filed as an Appendix to the CBA Contract that is filed with the CBA and that the terms of the Amendment [sic]."*

11. The Respondent has provided a different contract (the "CBA Contract") which is said to be "*made on 23 August 2008*", but which was signed on 22 October 2008 by the

Respondent and on 29 October 2008 by the Player. The opening section of the CBA Contract states that agreements dealing with additional matters not covered therein can be included as annexures to the CBA Contract. The signature page of the CBA Contract also makes reference to a "*9 page English Appendix Attached*". It appears that the 9 page English Appendix that was attached to the CBA Contract was, in fact, Contract 1.

12. In relation to disputes, the CBA Contract contains the following clause:

> *"9. DISPUTES*
>
> *In the event of any dispute arising between the Player and the Team concerning the performance or interpretation of this Contract, the Player or the Team may refer such dispute to the CBA for mediation. If the mediation fails, the Player or the Team may bring a suit to the People's Court.*"

13. Under clause 10A(3) of the CBA Contract, the Respondent could terminate the CBA Contract upon written notice if Claimant 1:

> *"at any time, fail, in the reasona[b]le opinion of the Team's management, to exhibit sufficient skill or physical ability he supposes to have … "*

14. Finally, the CBA Contract also contains the following clause:

> *"12. ENTIRE AGREEMENT*
>
> *(1) This Contract, includes Annex(s) any agency contract between the Player and/or the Team and the Agent, and Appendix, which has the same legal effect as this Contract per se.*
>
> *(2) This Contract contains the entire Agreement among the parties. There are no other agreements of any kind, oral or written, that has not been disclosed to the CBA among the parties."*

15. Thus, the key differences between Contract 1 and the CBA Contract, for the purposes

of these proceedings, are that:

(a) Contract 1 provides for FAT Arbitration, whereas the CBA Contract provides for mediation and, failing that, proceedings in the People's Court;

(b) The CBA Contract can be terminated by notice in writing by the Respondent should the Player's performance fall below particular standards.

### 3.2. The Proceedings before the FAT

16. On 4 February 2009 the Claimants filed a Request for Arbitration in accordance with the FAT Rules.

17. By fax dated 25 February 2009, the FAT Secretariat fixed a time limit until 18 March 2009 for the Respondent to file the Answer to the Request for Arbitration. By the same letter, and with a time limit for payment until 11 March 2009, the following amounts were fixed as the Advance on Costs:

| | |
|---|---|
| *"Claimant 1 (Mr Dixon):* | *EUR 3,500.00* |
| *Claimant 2 (Mr Fox):* | *EUR 1,500.00* |
| *Respondent (BC Zhe Jiang Guan Sha):* | *EUR 5,000.00"* |

18. On 13 and 30 March 2009 respectively, Claimant 1 and Claimant 2 paid their shares of the Advance on Costs.

19. On 1 April 2009, the FAT Secretariat informed the Claimants that the Respondent had failed to pay its share of the Advance on Costs. Therefore, the Claimants would have to pay the Respondent's share in the amount of EUR 5,000, which the Claimants did on

24 April 2009.

20. The Arbitrator issued several Procedural Orders requesting, among other things, additional submissions and documents from the parties.

21. Since none of the parties filed an express application for a hearing, the Arbitrator decided in accordance with Article 13.1 of the FAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions of the parties.

22. By Procedural Order dated 10 June 2009 the Arbitrator closed the proceedings subject to the parties submitting their accounts of costs.

23. On 17 June 2009, the Claimants submitted an account for legal costs of USD 6,558.75. These are costs that were invoiced by Claimant 2 to Claimant 1 in respect of the legal services provided by Claimant 2 to Claimant 1 in these arbitration proceedings.

24. The Respondent has not submitted any account of costs.

## 4. The Parties' Submissions

### 4.1. The Claimants' Submissions

25. The Claimants submit that the terms of Contract 1 apply and govern the relationships between the parties.

26. Claimant 1 has provided a sworn affidavit dated 21 May 2009 in which he states that he was told by the Respondent on 29 October 2009 that "*signing the Uniform Contract was a formality required for me to be able to play in the CBA but that the terms of [Contract 1] I had previously signed would dictate and govern the terms of our relationship and would be attached to the [CBA Contract] as an Appendix as described by its very terms"*. Claimant 1 does not, in his affidavit, state who from the Respondent told him this.

27. Consequently, the Claimants submit that Contract 1 is valid and binding on the Respondent and that the Respondent is late in its payment of the Player's salary and of Mr. Fox's agent fee. The Claimants therefore request:

    (i) That the Respondent pay Claimant 1 USD 86,667 plus interest;

    (ii) That the Respondent pay Claimant 2 USD 9,067 plus interest; and

    (iii) That the Respondent pay the Claimants for the costs associated with this arbitration, and the legal fees incurred as a result of it.

### 4.2. The Respondent's Submissions

28. The Respondent submits that Contract 1 is unofficial. Respondent contends that the CBA Contract is a "Uniform Contract" which all foreign players in the CBA are required to sign, in accordance with the CBA rules. Consequently, the Respondent submits that the CBA Contract has "*the ultimate legal effect*" and governs the relationship between the parties.

29. The Respondent also submits that the Player was not a "free agent" when he signed Contract 1 as he was still under contract with Atleticos de San German, a basketball club in Puerto Rico. The Respondent submits that Contract 1 is void for this additional reason.

30. The Respondent has provided a statement dated 12 January 2009 to the effect that it was terminating its contract with the Player because of his poor performance. It is not clear whether such notice was provided to Claimant 1 in January 2009.

31. The Respondent submits that it has paid all amounts due to the Claimants under the terms of the CBA Contract, as required by the CBA Contract and up until the time that the CBA Contract was terminated. The Respondent also submits that FAT Arbitration is not the correct procedure for resolving this dispute, as the CBA Rules require disputes to be referred to the CBA Arbitral Tribunal.

## 5. Jurisdiction

32. Pursuant to Article 2.1 of the FAT Rules, "[t]he seat of the FAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland". Hence, this FAT arbitration is governed by Chapter 12 of the Federal Statute on Private International Law (PILA).

33. The jurisdiction of the FAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

### 5.1. Arbitrability

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

### 5.2. Formal and substantive validity of the arbitration agreement

35. The existence of a valid arbitration agreement is to be examined in light of Article 178 PILA, which reads as follows:

> *"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.*
>
> *2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law."*

36. The jurisdiction of the FAT over the dispute between the Claimants and the Respondent would result, if the Arbitrator finds Contract 1 to be valid, from clause 11 of Contract 1 which reads as follows:

> *"In the event of any dispute in relation to this Agreement, the parties involved in such dispute agree to attempt to negotiate the dispute prior to taking any action. If any dispute may arise out of the content of this Agreement and the parties involved cannot amicably resolve such dispute, any unresolved dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be re-solved in accordance with the FAT Arbitration Rules by a single arbitrator ap-pointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The language of the*

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

> *arbitration shall be English. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

37. Contract 1 is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.

38. With respect to substantive validity, the Arbitrator considers that there is no indication which could cast doubt on the validity of the arbitration agreement under Swiss law (cf. Article 178(2) PILA). In particular, the wording "[a]ny dispute arising from or related to the present contract" clearly covers the present dispute.[2]

39. As is evident from the Respondent's submissions, it takes issue with Contract 1, including the validity of the arbitration clause therein.

40. Pursuant to Article 178(3) PILA, "[t]he arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen."

41. Hence, the Respondent's arguments regarding the validity of Contract 1 will be addressed when dealing with the merits of the case but do not constitute a sufficient ground to challenge the Arbitrator's jurisdiction.

42. Inasmuch as the Respondent's submission can be understood to mean that the dispute

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[2] *See* for instance BERGER/KELLERHALS, Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, No. 466, pp. 160-161.

resolution clause contained in the CBA Contract shall prevail over the arbitration clause contained in Contract 1, it is rejected for the following reasons:

### 5.3. Inconsistent Dispute Resolution Clauses

43. Contract 1 provides that in the event of a dispute which cannot be resolved by negotiation, the parties "s*hall*" submit that dispute to FAT Arbitration. The parties have contractually agreed to submit to FAT Arbitration. By contrast, the CBA Contract is permissive, in that it provides that the parties "*may*" refer any disputes to the CBA for mediation (followed by proceedings in the People's Court if the mediation fails). There is no necessary conflict arising from these clauses. By proceeding with a FAT Arbitration the Claimant does not appear to have breached the CBA Contract, which provides for the option (but not the obligation) of the parties to refer the dispute to CBA mediation.

44. In any case, the final clause of the Amendment Agreement in Contract 1, referred to above at paragraph 10, specifically contemplates that the terms of the Amendment Agreement are to take precedence over both the Player Agreement and the CBA Contract. This is also suggested by clause 12 of the CBA Contract itself, which refers to the existence of Contract 1 but does not suggest that its terms are to override the terms of Contract 1.

45. It is thus apparent that to the extent there are any inconsistencies between Contract 1 and the CBA Contract (in light of the varying dispute resolution clauses above), the terms of Contract 1 are to prevail.

46. Quite apart from the competing dispute-resolution clauses in the contracts, the

Respondent submits that any dispute arising between the Player and the Respondent must, under the CBA Rules, be referred to the CBA Arbitral Tribunal. The Arbitrator does not consider that there is sufficient evidence of this requirement before him to determine that such referral is required.

47. The Arbitrator therefore considers that the dispute resolution clause in Contract 1 applies, so that the Claimants are entitled to seek FAT Arbitration, as they have done.

## 6. Discussion

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

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

> *"the parties may authorize the arbitral tribunal to decide ex aequo et bono".*

49. Under the heading "Applicable Law", Article 15.1 of the FAT Rules reads as follows:

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

50. Indeed, as paragraph 36 above outlines, Contract 1 itself stipulates that the Arbitrator is to decide the dispute *ex aequo et bono*.

51. The concept of *équité* (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the *Concordat intercantonal sur l'arbitrage*[3] (Concordat),[4] under which Swiss courts have held that arbitration *en équité* is fundamentally different from arbitration *en droit* :

> *"When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[5]

52. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives "a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case".[6]

53. This is confirmed by Article 15.1 of the FAT Rules *in fine* according to which the arbitrator applies "general considerations of justice and fairness without reference to

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3 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA. Today, the Concordat governs exclusively domestic arbitration.

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

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

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

any particular national or international law".

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

### 6.2. Findings

55. The key issue in dispute is which contract governs the relationship between the parties.

#### 6.2.1 Which contract governs the relationship between Claimant 1 and Respondent?

56. The Player accepts that he signed the CBA Contract, but does not accept that the latter can be binding on him if it is different to Contract 1. By contrast, the Respondent submits that Contract 1 is not binding because it was superseded by the CBA Contract and because the Player was not a "free agent" at the time of signing Contract 1.

57. Putting to one side the circumstances surrounding the signing of the CBA Contract, on the face of the documents, the Arbitrator finds that the contracts should be read together. This is confirmed by clause 12 of the CBA Contract, referred to above in paragraph 14. That clause specifically refers to the "*Contract*" including the Appendix to the CBA Contract and states that the Appendix "*has the same legal effect as [the CBA] Contract per se*". In referring to the "*Contract [containing] the entire agreement among the parties*", the clause is referring to the entire CBA Contract, including its appendix. The Respondent also appears to accept that Contract 1 was the appendix to the CBA Contract.

58. A further indication that the parties intended the contracts to be read together is contained in Contract 1. The final clause of the Amendment Agreement in Contract 1

(quoted above at paragraph 10) specifically contemplates the CBA Contract, when it refers to "*[…] the official contract (the 'CBA Contract') filed with the Chinese Basketball Association […]*".

59. The question then is what obligations arise for the parties under Contract 1 and the CBA Contract.

### 6.2.2 Which contract governs the relationship between Claimant 2 and Respondent

60. Claimant 2 is not a party to the CBA Contract. The only agreement between Claimant 2 and the Respondent is therefore contained in Contract 1. There is no inconsistency between Contract 1 and the CBA Contract in this respect. If Contract 1 is valid and binding (which is dealt with further below), the obligations of the Respondent to Claimant 2 are set out in that contract.

### 6.2.3 Respondent's right to terminate the contracts with Claimant 1

61. The other inconsistency between Contract 1 and the CBA Contract relates to the ability of the Respondent to terminate Claimant 1's contract. Under Contract 1, payments by the Respondent to Claimant 1 are "*fully guaranteed*" including in circumstances where the Respondent releases Claimant 1. Under the CBA Contract, the contract may be terminated by the Respondent where the Player does not exhibit sufficient skill or does not perform to its satisfaction – see clause 10 of the CBA Contract, referred to above at paragraph 13.

62. For the reasons given above, Contract 1 prevails over the CBA Contract, to the extent of any inconsistency. The clause in the Player Agreement guaranteeing payments by the Respondent therefore applies, so that the purported termination of Contract 1 by

the Respondent does not remove the obligation of the Respondent to make payment to Claimant 1. A purported termination of the Player Agreement (between the Respondent and Claimant 1) also does not affect the Agent Agreement (between the Respondent and Claimant 2).

63. In any case, the Arbitrator does not consider that the Respondent has demonstrated that it was entitled to rely upon clause 10(3) of the CBA Contract. The Claimants have provided evidence (in the form of an affidavit of Claimant 1) that Claimant 1 "*averaged 26.3 points per game, 9.8 rebounds and had a field goal percentage of 69.3%*". Against this, the Respondent submits that Claimant 1 had a "*problem of fitting in with the team*" and had "*disadvantages on both defensively and offensively*".

64. Having considered this evidence, and deciding *ex aqueo et bono*, the Arbitrator is not satisfied that any opinion held by the Respondent that Claimant 1 did not exhibit sufficient skill or physical ability was reasonable. The Respondent has therefore not demonstrated that it was entitled to rely upon any termination right arising under clause 10(3) of the CBA Contract.

### 6.2.4 The "free agent" argument

65. The Arbitrator does not accept the submission of the Respondent to the effect that Claimant 1 was not a "free agent" when Contract 1 was signed. There are three reasons for this:

    (a) It is a feature of the FIBA Internal Regulations governing the international transfer of players that prior to any player being able to play for a new club in a different country, the national basketball federation of the new club must obtain a letter of clearance in relation to that player from the national basketball

federation of the previous club. There are significant penalties that apply to a national federation and a club that do not comply with these rules. Because there is no evidence to the contrary, the Arbitrator assumes that the Respondent complied with these rules and obtained through the Chinese basketball federation such a letter of clearance.

(b) In any case, any contractual obligations that Claimant 1 may have towards another club are not matters that can affect his contractual obligations vis-à-vis the Respondent. If, by playing for the Respondent, Claimant 1 breached contractual obligations to another club, that is a matter between Claimant 1 and that other club. These matters cannot affect the contractual position as between Claimant 1 and the Respondent.

(c) It is not disputed by the parties that Claimant 1 played matches for the Respondent. If the Respondent's contention is correct and assuming those matches were played, this would meant that, until the CBA Contract was signed, Claimant 1 was being paid by the Respondent without there being any contractual relationship between them. The Arbitrator does not consider that this could reasonably be said to have been the intention of the parties.

66. For all of these reasons, the Arbitrator finds that the Respondent's submission that Contract 1 is void based on the "free agency" argument cannot be upheld.

### 6.2.5 Conclusion

67. The Arbitrator finds that Contract 1 governs the relationship between the parties. The Respondent's "free agent" submission does not affect the validity of Contract 1, and the Respondent has not established that it was allowed to cease paying the amounts due

to the Claimants under Contract 1.

68. Under Contract 1 (and specifically, clause 1 of the Amendment Agreement), the Respondent was required to make the following payments to Claimant 1 on the dates shown:

| | |
|---|---|
| September 30, 2008 | $20,000 USD |
| October 25, 2008 | $20,000 USD |
| November 10, 2008 | $20,000 USD |
| November 25, 2008 | $20,000 USD |
| December 10, 2008 | $20,000 USD |
| December 25, 2008 | $20,000 USD |
| January 10, 2009 | $20,000 USD |
| January 25, 2009 | $20,000 USD |
| February 10, 2009 | $20,000 USD |
| February 25, 2009 | $20,000 USD |
| March 10, 2009 | $26,667 USD |

69. The first seven of these payments were made by the Respondent. The payments due on 25 January, 10 February, 25 February and 10 March 2009 have not been made by the Respondent and remain outstanding.

70. Under Contract 1 (and specifically, clause 2 of the Amendment Agreement), the Respondent was also required to make the following payments to Claimant 2 on the dates shown:

| | |
|---|---|
| November 1, 2008 | $6,800.00 USD |
| December 20, 2008 | $6,800.00 USD |
| January 1, 2009 | $4,533.50 USD |
| February 20, 2009 | $4,533.50 USD |

71. The first two of these payments were made by the Respondent. The payments due on 1 January and 20 February 2009 have not been made by the Respondent and remain outstanding.

72. The Arbitrator finds in favour of Claimant 1 and Claimant 2 in respect of the validity of Contract 1. The Arbitrator finds that the outstanding payments mentioned above are due and payable by the Respondent.

## 7. Costs

73. Article 19.2 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and may either be included in the award or communicated to the parties separately. Furthermore Article 19.3 of the FAT Rules provides that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

74. On 5 July 2009, considering that pursuant to Article 19.2 of the FAT Rules “the FAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of FAT and the fees and costs of the FAT President and the Arbitrator”, and that “the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the FAT President from time to time”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised, the FAT President determined the arbitration costs in the present matter at EUR 10,000.00.

75. In the present case, the costs shall be borne by the Respondent, as the Claimants

have been awarded their claim in its entirety and there is no indication that either the financial resources of the parties or any other circumstance compels otherwise.

76. The Arbitrator notes the Respondent's share of the Advance on Costs was paid by the Claimants. The Arbitrator therefore decides that the Respondent shall pay to the Claimants EUR 10,000.00.

77. The Arbitrator considers it is appropriate that the Claimants are entitled to the payment of a contribution towards their legal fees and expenses (Article 19.3 of the FAT Rules). The amount of USD 6,558.75 equates to approximately EUR 4,732.82. The Arbitrator considers it appropriate to take into account the non-reimbursable fee when assessing the expenses incurred by the Claimants in connection with these proceedings. Hence, and after having reviewed and assessed the submission by the Claimants, the Arbitrator fixes the contribution towards the Claimants' legal fees and expenses at EUR 4,500.00.

## 8. Interest

78. The Claimants also claim interest on the unpaid monies. Payment of interest is a customary and necessary compensation for late payment and there is no reason why the Claimants should not be awarded interest. The Arbitrator considers, in line with the jurisprudence of the FAT, that 5% per annum is a reasonable rate of interest that should be applied to the outstanding payments from the date that each such payment fell due under Contract 1.

## 9. AWARD

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

**I. Zhe Jian Guan Sha Basketball Club is ordered to pay to Nigel Dixon USD 86,667.00 together with:**

**(a) 5% interest p.a. on USD 20,000 from 25 January 2009;**

**(b) 5% interest p.a. on USD 20,000 from 10 February 2009;**

**(c) 5% interest p.a. on USD 20,000 from 25 February 2009;**

**(d) 5% interest p.a. on USD 26,667 from 10 March 2009.**

**II. Zhe Jian Guan Sha Basketball Club is ordered to pay to Larry H. Fox USD 9,067.00 together with:**

**(a) 5% interest p.a. on USD 4,533.50 from 1 January 2009;**

**(b) 5% interest p.a. on USD 4,533.50 from 20 February 2009;**

**III. Zhe Jian Guan Sha Basketball Club is ordered to pay to Nigel Dixon and Larry H. Fox EUR 10,000.00 as a reimbursement of the advance of FAT costs.**

**IV. Zhe Jian Guan Sha Basketball Club is ordered to pay to Nigel Dixon and Larry H. Fox EUR 4,500 as a contribution towards their legal fees and expenses.**

**V. Any other or further-reaching claims for relief are dismissed.**

Geneva, 28 July 2009

Raj Parker
(Arbitrator)

FIBA

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**FIBA Arbitral Tribunal (FAT)**

**Notice about Appeals Procedure**

cf. Article 17 of the FAT Rules
which reads as follows:

"**17. Appeal**

Awards of the FAT can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland and any such appeal must be lodged with CAS within 21 days from the communication of the award. The CAS shall decide the appeal *ex aequo et bono* and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure."