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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0064/09 FAT)

rendered by

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Raj Parker

in the arbitration proceedings

Saski Baskonia S.A.D., c/o Mr. Juanjo Seoane Osa, Carretera Zurbano s/n Torre 12 –
Pabellon Fernando Buesa Arena – C.P. 01013 – Vitoria (Alava), Spain.

- Claimant 1 -

vs.

William Dubois McDonald, c/o Mr. Jorge Luis González de Mendoza de Nova, González de
Mendoza Abogados, C/ Ferraz, 55, 28008, Madrid.

- Respondent -

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1. The Parties

1.1. The Claimant

1. Saski Baskonia SAD, (hereinafter the "Claimant" or the "Club") is a Spanish basketball club. It is domiciled at Carretera Zurbano s/n Torre 12 – Pabellon Fernando Buesa Arena – C.P. 01013 – Vitoria (Alava), Spain. The Claimant is represented by Mr. Juanjo Seoane Osa.

1.2. The Respondent

2. The Respondent is Mr. William Dubois McDonald (hereinafter the "Player" or the "Claimant"), a citizen of the United States of America and a professional basketball player. He is represented in these proceedings by Mr. Jorge Luis González de Mendoza de Nova of González de Mendoza Abogados.

2. The Arbitrator

3. On 4 November 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 letter of the same day, 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



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declaration of independence issued by him.

3. Facts and Proceedings

3.1. Background Facts

5. The Player and the Club signed an employment contract dated 11 June 2007 (hereafter, the "Playing Contract"). The Playing Contract states in relevant part as follows:

***"THIRD** – The Club will pay the Player for his services the amount of 750,000€ (hereinafter Euros) net for the 2007-2008 season; 800,000€ for the 2008-2009 season and 800,000€ net for the 2009-2010 season as follows:..."*

6. The Playing Contract goes on to set out a monthly payment schedule of the Player's salary, in each case stating that the amount due is "net". The Playing Contract also sets out the bonuses available to the Player. The bonuses are stated to be "net of taxes".
7. The parties subsequently wanted to terminate the Playing Contract and so signed a second contract (hereafter, the "Termination Contract") dated 10 July 2009, which terminated the Playing Contract. The Termination Contract provides that the Player shall pay the Club EUR 180,000.00 as compensation for the early termination. In addition, the Termination Contract states in relevant part:

"The payment of these amounts shall be made 24 hours before the Player takes part in any match with any other team contemplated in the aforementioned cases, allowing Saski-Baskonia S.A.D. to submit a request for his suspension to the FIBA provided the



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aforsaid amounts have not been settled.”

8. The Termination Contract also states:

“[...]

FOURTH: *William McDonald states he owes the amount of 59,000 euros as payment regarding several expenses, upon presentation of the corresponding invoices in reference to said amount by the Club. The Player authorizes the deduction from the amounts which the Club recognizes it owes the player established in the sixth agreement.*

FIFTH: *Likewise, [William] McDonald states he owes the amount which the Club estimates following the valuation of the damages carried out by the Player in the flat, and to which both parties agree upon. The Club shall provide the corresponding invoices of said damages. The Player authorizes the deduction from the amounts which the Club recognizes it owes the player established in the sixth agreement.*

SIXTH: *Saski-Baskonia S.A.D recognizes it owes William MacDonald the amount of 103,750 euros in order to settle the payments for the 2008-09 season, as well as an additional 14,800 euros as bonuses. These amounts are held by the Club as a payment on account regarding the amounts owed in the previous agreement.*

[...]”

9. The Player has left the Club with the intention of joining the Club Baloncesto Gran Canaria Claret S.A.D. (hereinafter the “New Club”). At the time of writing this Award, no payments have been made under the Termination Contract.
10. The Player has submitted a contract between the Player and the New Club, dated 11 August 2009 (hereinafter the “New Club Contract”). The New Club Contract states in relevant part:

FIRST: *Mr William McDonald engages himself to fulfill his activities as a basketball Player in the official competitions and friendly tournaments in which the Club may take part during the 2009-2010, 2010-2011 and 2011-2012 seasons, as well as in the happenings and matches of “All-Stars” for which he may be selected. The contract shall begin on the day following its signing, and shall conclude 4 days after the last official game of the ACB league in which the Club participates during the 2011-2012 season.”*



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the Arbitrator fixed the following further Advance on Costs:

"Claimant (Saski Baskonia SAD) EUR 1,500

Respondent (Mr. McDonald) EUR 1,500"

16. On 11 February 2010 and 17 February 2010 respectively, the Claimant and the Respondent paid their shares of the further Advance on Costs.
17. 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.
18. By Procedural Order dated 1 March 2010 the Arbitrator closed the proceedings subject to the parties submitting their accounts of costs.
19. On 5 March 2010, the Claimant submitted an account for legal costs of EUR 19,639.68 (inclusive of the non-reimbursable fee and its share of the advance on costs).
20. On 10 March 2010, the Respondent submitted an account for legal costs of EUR 36,250.00.

4. The Parties' Submissions

4.1. The Claimant's Submissions

21. The Claimant claims that the Player has started playing for the New Club and so the



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compensation payment of EUR 180,000.00 is payable by the Player to the Claimant. The Claimant submits this payment is payable net of tax.

22. The Claimant claims that the Player owes the Claimant EUR 13,497.84 in relation to damages caused to the flat in which the Player resided while playing for the Club.
23. The Claimant claims that the Player owes the Claimant EUR 51,728.91 in expenses.
24. The Claimant recognizes that it owes the Player EUR 103,750.00 in unpaid salary and EUR 14,800.00 in unpaid bonuses (EUR 118,550.00 in total). The Claimant states that it is entitled to set off payment of this sum against the amounts owed to the Claimant by the Player.
25. The Claimant has made a request that the FAT suspend the Player's registration with FIBA.

4.2. The Respondent's Submissions

26. The Respondent claims that he is entitled to receive his unpaid salary and bonuses gross, and not net, of tax. Accordingly, the Respondent claims that the amount that should be set off against any monies owed to the Claimant is EUR 197,583.32 and not EUR 118,550.00.
27. In his Answer, the Respondent stated that he had not been provided with copies of the invoices relating to the expenses claimed by the Club and that the Termination Contract provides that such expenses are only payable on presentation of the invoices to the Player.



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28. In his Answer, the Respondent stated that he had not been provided with copies of the invoices relating to the damages caused to the flat and that the Termination Contract provides that such damages are only payable on presentation of the invoices to the Player and where “*both parties agree upon*” the amount of such damages. The Respondent submitted that the parties had not come to any agreement on the amount of damages payable.
29. In his response to the second Procedural Order, the Respondent acknowledged that EUR 8,196.26 worth of damages were caused to the flat.
30. The Respondent submits that the amounts which the Claimant claims to be owed by the Respondent would, in any event, be payable by the New Club and not by the Respondent. The Respondent cites the Payment Schedule as support for this.

5. Jurisdiction

5.1. The jurisdiction of the FAT

31. 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).
32. The Respondent did not challenge the jurisdiction of FAT. Hence the Arbitrator asserts jurisdiction over the present dispute (Art. 186(2) PILA). For the sake of completeness, the Arbitrator will nevertheless examine the validity of the arbitration agreement



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contained in the Termination Contract (see 5.1.2 below).

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

5.1.1 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) PILA².

5.1.2 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 Claimant and the Respondent would in any event result from the tenth clause of the Termination Contract which states:

"TENTH: *Any dispute arising out of or relating to this Agreement shall be referred to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved according to its arbitration rules by the arbitrator which the president of said organisation appoints.*

² Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.



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Arbitration shall be conducted in Geneva, Switzerland and shall be governed by Chapter 12 of the Swiss Act on Private International Law, independently of the parties' venues. Arbitration shall be conducted in English. The decision reached by the FAT can be appealed before the Tribunal of Arbitration for Sport (TAS) with headquarters in Lausanne, Switzerland. The parties expressly waive the right to appeal the decisions reached by both the FAT and the TAS before The Swiss Federal Court, as established in Article 192 of the Swiss Act on Private International Law. Both the arbitrator and the TAS shall act with justice and equity in the event of an appeal."

37. The Termination Contract 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 out of or relating to this Agreement" clearly covers the present dispute.³

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

39. 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

³ See for instance BERGER/KELLERHALS, *Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz*, Bern 2006, No. 466, pp. 160-161.



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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”.

40. As set out in paragraph 36 above, the Termination Contract stipulates that any disputes arising out of the Termination Contract shall be resolved by the FAT “*according to its arbitration rules*”. 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.”

41. In the present case, the parties have not agreed otherwise, whilst explicitly providing for the arbitrator “*to act with justice and equity*” in the tenth clause of the Termination Contract (*in fine*). Consequently, the Arbitrator shall adjudicate the claims *ex aequo et bono*.
42. 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*⁴ (Concordat),⁵ 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

⁴ That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA. Today, the Concordat governs exclusively domestic arbitration.

⁵ P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PILA.



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*not inspired by the rules of law which are in force and which might even be contrary to those rules.*⁶

43. 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”⁷.
44. 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 any particular national or international law”.
45. In light of the foregoing matters, the Arbitrator makes the following findings:

6.2. Findings

6.2.1 The New Club

46. Neither party has disputed that the Player has agreed to play for the New Club. It can be gathered from publicly available information that the Player has played for the New Club in the 2009/2010 season⁸. The second clause of the Termination Contract states that, following the Player’s release from the Playing Contract:

⁶ JdT 1981 III, p. 93 (free translation).

⁷ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

⁸ See for example, the Euroleague website, at: <http://www.euroleague.net/uleb/domestic-leagues/domestic-leagues-2009-2010/spain/i/58835/3929/spanish-league-game-1-october-9-10-2009?lang=en&itemid=58835&mid=3929&tabid=1067&itemname=Spanish%20League,%20Game%201:%20October%209-10,%202009>.



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“[a]s compensation, the Player shall indemnify the Club Saski-Baskonia S.A.D. with the amount of 180,000 euros”

47. The Arbitrator finds that this provision has been triggered and the sum of EUR 180,000.00 is therefore payable by the Player to the Club.

6.2.2 The tax issue

48. The Claimant made submissions which quote and comment on Spanish tax law. The Respondent cited tax regulations for the region of Alava. The Arbitrator finds that he does not have to determine which party's interpretation of the Spanish tax laws and regulations is correct because the issue is provided for in the Playing Contract. As noted at paragraphs 5 and 6 above, the Playing Contract provides that all salary and bonus payments are to be made by the Claimant net of tax. The Arbitrator accordingly finds that the Claimant owes the Player EUR 118,550.00, being the unpaid salary and bonuses net of tax.

6.2.3 The expenses

49. The fourth clause of the Termination contract states:

“William McDonald states he owes the amount of 59,000 euros as payment regarding several expenses, upon presentation of the corresponding invoices in reference to said amount by the Club. The Player authorizes the deduction from the amounts which the Club recognizes it owes the player established in the sixth agreement”

50. The Arbitrator finds that the effect of this provision is that for any amount to be owed by the Player to the Club in relation to expenses, the Club must have first presented invoices relating to the expenses to the Player. The Player will only owe the Club sums which can be evidenced by invoices that are presented to the Player.



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51. In his Answer, the Player stated that the Club had not provided any such invoices to him. The Claimant subsequently exhibited to its response to the first Procedural Order a schedule of expenses totaling EUR 51,728.91 and copies of invoices relating to expenses listed in the schedule. However, there were 27 invoices missing and in the case of 14 of the invoices produced, the amount shown on the invoice did not match the amount shown in the schedule.
52. In its response to the second Procedural Order, the Claimant exhibited copies of 24 of the 27 invoices that were previously missing. The total value of the three invoices that are still missing (invoices number 155, 177, and 197) is EUR 477.89.
53. In relation to the 14 invoices where there is an inconsistency between the amount shown on the invoice and the amount shown in the schedule, the Claimant provided an explanation for the inconsistency in relation to invoices number 190, 200, 214, 215 and 228 in its response to the second Procedural Order. The explanation is as follows. The Club agreed to pay the first EUR 450.00 of the cost of the Player's monthly car hire. The remaining cost was also paid by the Club and so is now recoverable as an expense. The amount being claimed by the Club as an expense is therefore EUR 450.00 less than the amount shown on invoices number 190, 200, 214, 215 and 228. The Arbitrator accepts this explanation.
54. In relation to the other 9 invoices where there is an inconsistency between the amount shown on the invoice and the amount shown in the schedule, the Arbitrator finds that the Claimant has not provided a valid explanation for the inconsistency. As such, the Arbitrator finds that the amount that the Player owes to the Club in relation to these expenses is the amount stated on the invoice to be attributable to the Player. These amounts are as follows:



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Invoice Number	Amount attributable to Player (EUR)
158 - 159	595.00
186	322.00
196	0 ⁹
203	287.00
212	773.00
219	87.00
240	87.00
227	295.00

55. In light of the above, the Arbitrator finds that the Claimant has presented valid invoices to the Player in relation to the expenses to the value of EUR 50,425.22. Accordingly, the Arbitrator finds that the Player owes the Claimant EUR 50,425.22 in relation to the expenses.

6.2.4 The damages to the flat

56. The fifth clause of the Termination contract states:

"[William] McDonald states that he owes the amount which the Club estimates following the valuation of the damages carried out by the Player in the flat, and to which both parties agree upon. The Club shall provide the corresponding invoices of said damages"

⁹ The Arbitrator cannot see any amount which is attributable to the Player on this invoice



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57. The Arbitrator finds that the effect of this provision is that for any amount to be owed by the Player to the Club in relation to the damages to the flat, the Club must: (i) provide invoices for work to be carried out to repair the damages and (ii) agree the amount owed with the Player.
58. In his Answer, the Player stated that the Club had not provided such invoices to him. The Claimant subsequently exhibited to its response to the first Procedural Order copies of invoices relating to EUR 13,497.84 worth of damage to the flat. The Player, in his response to the second Procedural Order, did not agree that all of the invoices were payable. Instead, the Player agreed that EUR 8,196.26 worth of damages caused to the flat was payable. The Arbitrator finds that there was agreement between the parties that EUR 8,196.26 is payable in relation to the said damages and so finds that the Player owes this sum to the Club.

6.2.5 Responsibility for making the payments

59. The Player has argued that certain sums owed by him to the Club are payable by the New Club and not by the Player himself.
60. The Arbitrator acknowledges that the Payment Schedule makes provision for the New Club, and not the Player, to make payments to the Club in respect of the EUR 180,000.00 compensation payment and the expenses. However, the Payment Schedule is unsigned by the Player and, as such, does not constitute a valid and binding agreement between the parties. Indeed, in his response to the first Procedural Order the Respondent stated that the Payment Schedule “*was never signed or acknowledged by Mr. William McDonald. And so such contract should be considered void due that it was never fully executed between the parties in it involved*”. The Arbitrator has seen no binding contract between the Player, the Club and the New Club under which it is agreed that the New Club will pay any sums that may be due from the



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Player to the Club.

61. The Termination Contract states specifically that “*the Player shall indemnify the Club*” and states that it is the Player who owes the Club sums in relation to the expenses and the damage caused to the flat. Accordingly, the Arbitrator finds that the sums awarded to the Club under this Award are payable by the Player.

6.2.6 The Respondent’s player registration

62. With respect to Claimant’s request that the FAT suspend the Player’s registration with FIBA, the Arbitrator notes that, as stated in the Procedural Order dated 21 December 2009, the FAT does not have jurisdiction to order the suspension of players. Requests relating to players’ suspensions should be made to FIBA in accordance with the FIBA Internal Regulations¹⁰.

6.2.7 Conclusion

63. The Arbitrator finds that the Player owes the Club EUR 180,000.00 as compensation for early termination of the Playing Contract; EUR 50,425.22 for the expenses; and EUR 8,196.26 for the damages to the flat, making a total of EUR 238,621.48. The Arbitrator also finds that the Club is entitled to set off the sum of EUR 118,550.00 in unpaid wages and salary against the figure of EUR 238,621.48. Accordingly, the sum of EUR 120,071.48 is due from the Player to the Club.

¹⁰ See also FAT Award 0017/08 of 3 June 2009 (Lugtenburg, Kukic v. Sekularac), para. 38.



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7. Costs

64. 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.
65. On 7 April 2010, 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 12,000.00.
66. The Arbitrator notes that the Respondent paid his share of both Advances on Costs and complied with both of the Procedural Orders. The Arbitrator notes that the Claimant was successful in establishing its claim in relation to the compensation payment of EUR 180,000.00 net of tax, but only partially successful in establishing its claims in relation to the expenses and the damage to the flat. The Arbitrator therefore decides that the Respondent shall pay to the Claimant EUR 3,000.00.
67. The Arbitrator considers it appropriate that the Claimant is entitled to the payment of a contribution towards its reasonable legal fees and expenses (Article 19.3 of the FAT Rules). The Arbitrator considers it appropriate to take into account the non-reimbursable fee when assessing the expenses incurred by the Claimant in connection with these proceedings. Hence, and after having reviewed and assessed the



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submission by the Claimant, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at EUR 8,319.84.

8. AWARD

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

- I. William Dubois McDonald is ordered to pay to Saski Baskonia S.A.D. EUR 120,071.48.**
- II. William Dubois McDonald is ordered to pay to Saski Baskonia S.A.D. EUR 3,000 as a reimbursement of the advance of FAT costs.**
- III. William Dubois McDonald is ordered to pay to Saski Baskonia S.A.D. EUR 8,319.84 as a contribution towards its legal fees and expenses.**
- IV. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 13 April 2010

Raj Parker
(Arbitrator)



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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."