



FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0090/10 FAT)

rendered by

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Raj Parker

in the arbitration proceedings

Mr. Christopher Jeffries, _____, USA.

- Claimant 1 -

Mr. Claudio Pereira Garcia, _____, Uruguay.

- Claimant 2 -

vs.

**BC Gaiteros del Zulia, Mini Centro ROXI, Local 2, Calle 80 N3Y-57,
Nivel PB, Sector Bella Vista Zona Postal 4002, Venezuela.**

- Respondent -



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1. The Parties

1.1. The Claimants

1. Mr. Christopher Jeffries (hereinafter "Claimant 1" or the "Player") is a US citizen and a professional basketball player. He is represented in these proceedings by his agent Mr. Claudio Pereira Garcia.
2. Mr. Claudio Pereira Garcia (hereinafter "Claimant 2" or the "Agent") is a FIBA-certified basketball agent from Montevideo, Uruguay.

1.2. The Respondent

2. BC Gaiteros del Zulia (hereinafter the "Respondent" or the "Club") is a Venezuelan basketball club. The Respondent is not represented by legal counsel.

2. The Arbitrator

3. On 19 May 2010, 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").



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4. By email dated 24 May 2010, the Arbitrator accepted his appointment. 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. On 19 March 2009 the Player, the Agent and the Club signed an employment contract (hereinafter, the "First Contract"). The First Contract contains, among others, the following provisions:¹

"THIRD:

A. SALARY AND AWARDS

As a retribution to his services, the TEAM shall pay the PLAYER a net monthly amount of FIFTEEN thousand U.S. Dollars (US\$15,000.00) per month, payable in two equal parts every 15 days, starting 15 days after the PLAYER's arrival (MARCH 30th, 2009

[...]

Awards:

*US\$3,000.00 for reaching the LPB's Play offs.
US\$4,000.00 for reaching the LPB's Semifinals.
US\$6,000.00 for reaching the LPB's Finals.
US\$10,000.00 for winning the LPB's Championship.*

¹ Extracts of the First Contract are taken from the certified English translation of the First Contract provided by the Player to the FAT.



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*US\$200.00 per match won as Home Team.
US\$300.00 per match won as Visitor Team.*

[...]

B. AGENT

Both the TEAM and the PLAYER, acknowledge that this contract was entered into under the supervision and control of the AGENT. For that reason the TEAM agrees to pay to the AGENT upon the PLAYER's arrival at Maracaibo the amount of SIX thousand U.S. Dollars (US\$6,000) for expenses and commissions for the first 60 days of this contract. As from May 20th, 2009, the TEAM shall pay to the AGENT the amount of ONE thousand U.S. Dollars (US\$1,500) (sic) for each and every month until the end of season 2009.

[...]"

6. On 23 July 2009 the Player, the Agent and the Club signed a contract (the "Second Contract"), under which the Club acknowledged that it owed certain debts to the Player and the Agent arising out of the First Contract. The Second Contract contains, among others, the following provisions:²

"FIRST:

1. The TEAM hereby spontaneously acknowledges that owes to the PLAYER the net amount of Fifty Thousand Seven Hundred U.S. Dollars (US\$50,700) as unpaid salaries and awards owed to the PLAYER due to his participation in the TEAM during the season 2009 of LPB. Said participation had been agreed upon by the parties in the BASKETBALL PLAYER CONTRACT which was signed by the parties in Maracaibo, Venezuela on March 19th, 2009.

2. The TEAM hereby spontaneously acknowledges that owes to the AGENT the net amount of Eight Thousand Five Hundred U.S. Dollars (US\$8,500) as unpaid commissions for season 2008 and 2009 of the LPB.

3. Having reached a contract, the TEAM promises to pay the total amount owed before

² Extracts of the Second Contract are taken from the certified English translation of the Second Contract provided by the Player to the FAT.



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November 15th, 2009.”

3.2. The Proceedings before the FAT

7. On 18 March 2010 the Claimants filed an undated Request for Arbitration in accordance with the FAT Rules. On 7 May 2010 the FAT received the non-reimbursable handling fee of EUR 2,985.54 from the Claimants.
8. By letter dated 26 May 2010, the FAT Secretariat fixed a time limit until 16 June 2010 for the Respondent to file the Answer to the Request for Arbitration. By the same letter, and with a time limit for payment until 9 June 2010, the following amounts were fixed as the Advance on Costs:

<i>"Claimant 1 (Mr. Jeffries)</i>	<i>EUR 3,000</i>
<i>Claimant 2 (Mr. Pereira Garcia)</i>	<i>EUR 1,000</i>
<i>Respondent (BC Gaiteros del Zulia)</i>	<i>EUR 4,000"</i>

9. Claimant 1 paid his share of the Advance on Costs on 10 June 2010.
10. By email dated 3 June 2010, the FAT Secretariat informed the Claimants that it had attempted to deliver copies of the letter from the FAT dated 26 May 2010, the Request for Arbitration, the FAT Arbitration Rules and section L.2 of the FIBA Internal Regulations (hereinafter the "Documents") to the Respondent by courier. However, the courier had informed the FAT that it was unable to deliver the Documents because the Respondent had appeared to have moved offices. By the same email, the FAT Secretariat informed the Claimants that it had attempted to send the Documents to the



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Respondent by fax, however the fax transmission was unsuccessful.

11. On 26 May 2010 and 6 July 2010, the FAT Secretariat sent the Documents to various email addresses belonging to the Respondent, as well as to the Respondent's team delegate's email address and the President's email addresses. Read receipts were returned to the FAT Secretariat in relation to those emails.
12. On 6 July 2010, the FAT Secretariat sent the Documents by email and fax to the Federación Venezolana de Baloncesto ("FVB"), requesting that the FVB forward the Documents to the Respondent. The FAT Secretariat received a confirmation that the fax to the FVB had been transmitted successfully.
13. The Respondent failed to file an Answer.
14. By Procedural Order dated 11 August 2010, the Arbitrator informed the Parties that Claimant 2 and the Respondent had failed to pay their respective shares of the Advance on Costs and fixed a time limit until 23 August 2010 for these to be paid by the Claimants. On 24 August 2010, Claimant 2 paid the Respondent's share of the Advance on Costs.
15. In the same Procedural Order dated 11 August 2010, the Arbitrator reiterated to the Claimants that the Respondent had not replied to the FAT Secretariat's attempts to contact it, but that the Arbitrator considered that the proceedings would continue because the FAT Secretariat had received read receipts in relation to the emails sent to the Respondent on 26 May and 6 July 2010 and the fax transmission report indicated that the fax to the FVB had been transmitted successfully.
16. By Procedural Order dated 26 August 2010, the Arbitrator informed the Parties that



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Claimant 2 had failed to pay his share of the Advance on Costs and fixed a time limit until 6 September 2010 for it to be paid by the Claimants. On 27 August 2010, Claimant 1 paid Claimant 2's share of the Advance on Costs.

17. On 9 September 2010 the Arbitrator issued a Procedural Order, requesting from the Claimants certified English translations of the First Contract and Second Contract by no later than 24 September 2010. On 20 September 2010 the Claimants provided the requested translations.
18. 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.
19. By Procedural Order dated 30 September 2010 the Arbitrator declared the exchange of documents complete, and requested detailed accounts of their respective costs from the Parties.
20. By an email on 4 October 2010, Claimant 1 submitted the following account for costs:

*“3 wire transfers --- 125 USD total
Translator --- 264 Argentine pesos/70 USD”*
21. Claimant 2 and the Respondent did not submit an account for costs.



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4. The Parties' Submissions

4.1. The Claimants' Submissions

22. The Claimants submit that the Club breached the First Contract, by failing to pay certain salary and bonus payments to the Player and certain commissions to the Agent.
23. The Claimants submit that the Club has also breached the Second Contract, by failing to pay USD 50,700.00 to the Player and USD 8,500 to the Agent, by 15 November 2009.
24. The Claimants submit that they are entitled to interest on the amounts requested, to damages, to the costs relating to their legal representation and other costs in relation to the proceedings.
25. The Claimants' request for relief states:

"Club owes to the Player Christopher Jeffries the amount of: USD. 50.700=NET. per salaries and bonuses.

Club owes to the Agent Mr. Claudio Pereira the amount of: USD. 8.500=NET. per fee's compensation.

Interests defaults on payments, damages (law of torts), legal expenses, plus other charges, commissions and any other legal expense, incurred in order to carry on such arbitration, shall be added to aforementioned amounts."

4.2. The Respondent's Submissions

26. As mentioned above (see supra paras.10-13), despite several invitations, the



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Respondent failed to make any submissions within the time limits set by the Arbitrator in accordance with the FAT Rules.

5. Jurisdiction and other Procedural Issues

5.1. Review ex officio

27. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.³
28. 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 Swiss Act on Private International Law (PILA).

5.1.1 Arbitrability

29. The jurisdiction of the FAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
30. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and

³ ATF 120 II 155, 162.



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is thus arbitrable within the meaning of Article 177(1) PILA.⁴

5.1.2 Formal and substantive validity of the arbitration agreement

31. 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."

32. The fourth clause of the Second Contract states as follows:

"In the event of failing to comply with any of the clauses set forth in this ACKNOWLEDGEMENT OF DEBT, the TEAM shall be subject to LPB (Professional Basketball League) as well as FIBA's Arbitration Court (FAT) in Geneva, Switzerland and said conflict shall be definitely solved pursuant to the Regulations of FIBA's Arbitration Court (FAT). The judge shall decide upon the dispute ex aequo et bono. FAT's decisions could be appealed at the Court of Arbitration for Sports (CAS), Lausanne, Switzerland. Any Switzerland Law opposite to FAT's and CAS' decisions on the appeal shall be excluded."

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

34. With respect to substantive validity, the Arbitrator considers that there are no indications which could cast doubt on the validity of the arbitration agreement under Swiss law (cf. Article 178(2) PILA). Accordingly, the Arbitrator finds that the FAT has

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



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jurisdiction over the dispute.

5.2. Other Procedural Issues

35. Article 14.2 of the FAT Rules states that “*the Arbitrator may nevertheless proceed with the arbitration and deliver an award*” if “*the Respondent fails to submit an Answer*”. The Arbitrator’s authority to proceed with the arbitration in the case of default by one of the parties is in accordance with Swiss arbitration law⁵ and the practice of FAT⁶. However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
36. This requirement is met in the current case. The FAT Secretariat has used numerous methods to contact the Respondent including by courier, email, fax and through the FVB. Details of the attempts to contact the Respondent are set out at paragraphs 8 to 15 above. In light of the fact that the FAT Secretariat has received read receipts in relation to emails sent directly to the Respondent and fax transmission reports in relation to the fax sent to the FVB, the Arbitrator finds that the Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in line with the relevant rules. It was also given ample opportunity to respond to the Request for Arbitration. However, the Respondent chose not to respond at all. In light of these circumstances, the Arbitrator considers himself fit to proceed with the

⁵ Swiss Federal Tribunal SJ 1982, 613, 621; see also KAUFMANN-KOHLER/FIGOZZI, *Arbitrage international*, 2nd ed., Bern 2010, No. 483; LALIVE/POUDRET/REYMOND, *Le Droit de l’arbitrage interne et international en Suisse*, Lausanne, 1989, No 8 ad Art. 182 PILA; RIGOZZI, *L’Arbitrage international en matière de Sport*, Basie 2005, No. 898; SCHNEIDER, *Basler Kommentar*, No. 87 ad Art. 182 PILA.

⁶ See for instance FAT Decision 0001/07 (Ostojic, Raznatovic vs. PAOK) and FAT Decision 0018/08 (Nicevic vs. Besiktas JK).



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arbitration and deliver the award.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

37. 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”.

38. As set out in paragraph 32 above, the Second Contract stipulates that any disputes arising out of the Second Contract shall be resolved by the FAT “*pursuant to the Regulations of FIBA’s Arbitration Court (FAT)*”. 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.”

39. The fourth clause of the Second Contract stipulates that “*the judge shall decide upon the dispute ex aequo et bono.*” Consequently, the Arbitrator shall adjudicate the claims



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ex aequo et bono.

40. 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*⁷ (Concordat),⁸ 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.”*⁹

41. 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”.¹⁰
42. 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”.
43. In light of the foregoing matters, the Arbitrator makes the following findings:

⁷ That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA. Today, the Concordat governs exclusively domestic arbitration.

⁸ P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PILA.

⁹ JdT 1981 III, p. 93 (free translation).

¹⁰ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.



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6.2. Findings

6.2.1 Salary and bonus payments

44. Pursuant to article 3 of the first clause of the Second Contract, the Respondent agreed to pay USD 50,700.00 to the Player and USD 8,500.00 to the Agent by 15 November 2009. The Arbitrator finds that the Respondent failed to pay these amounts by 15 November 2009 and, as of the date of this Award, the payments are still outstanding. No valid reason for this failure to pay has been provided by the Respondent.
45. Accordingly, the Arbitrator finds that Claimant 1 is entitled to outstanding salary and bonus payments totalling USD 50,700.00 and that Claimant 2 is entitled to outstanding commission payments of USD 8,500.00.

6.2.2 Interest

46. The Claimants claim interest on the unpaid monies. Although the First and Second Contract do not specify an interest rate, 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. The Arbitrator considers that interest on the Player's unpaid salary of USD 50,700.00 should accrue from the date on which the payment was due under the Second Contract, namely, 15 November 2009.
47. The Arbitrator considers that interest on the Agent's unpaid commission of USD 8,500.00 should also accrue from the date on which the payment was due under the Second Contract, namely, 15 November 2009.



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6.2.3 Damages

48. The Claimants submit that they are entitled to “*damages (law of torts)*” in the Request for Relief. However, they do not provide any reasons as to why they are entitled to such damages, nor do they particularise any loss they may have suffered, which should be compensated by damages in tort. The Arbitrator thus considers that the Claimants are not entitled to any damages under the law of tort.

7. Costs

49. 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.

50. On 8 November 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 7,727.50.



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51. The Arbitrator notes that Claimant 1 paid both his own share of the Advances on Costs and that of Claimant 2, totaling EUR 3,992.39. The Arbitrator also notes that Claimant 2 paid the Respondent's share of the Advance on Costs. The Arbitrator notes that the Claimants were successful in establishing their claims in relation to the sums owing under the Second Contract, and the claims for interest thereon, but were not successful in their claim for damages in tort. The arbitration costs were fixed by the FAT President at EUR 7,727.50. Thus, the Arbitrator decides that in application of Article 19.3 of the FAT Rules:

- (i) FAT shall reimburse EUR 128.65 to Claimant 1, being the difference between the costs advanced by him and half of the arbitration costs fixed by the FAT President;
- (ii) FAT shall reimburse EUR 136.25 to Claimant 2, being the difference between the costs advanced by him and half of the arbitration costs fixed by the FAT President;
- (iii) The Respondent shall pay to the Claimants EUR 3,863.75 each ($7,727.50 / 2$), being the difference between the costs advanced by them and the amount they are going to receive in reimbursement from the FAT;
- (iv) The Club shall pay to Claimant 1 the amount of EUR 3,110.00 in respect of his legal fees and expenses.



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8. AWARD

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

- I. BC Gaiteros del Zulia is ordered to pay to Mr. Christopher Jeffries USD 50,700.00, together with 5% interest p.a. from 15 November 2009.**
- II. BC Gaiteros del Zulia is ordered to pay to Mr. Claudio Pereira Garcia USD 8,500, together with 5% interest p.a. from 15 November 2009.**
- III. BC Gaiteros del Zulia is ordered to pay to Mr. Christopher Jeffries EUR 3,863.75 as a reimbursement of the advance of FAT costs.**
- IV. BC Gaiteros del Zulia is ordered to pay to Mr. Claudio Pereira Garcia EUR 3,863.75 as a reimbursement of the advance of FAT costs.**
- V. BC Gaiteros del Zulia is ordered to pay to Mr. Christopher Jeffries EUR 3,110.00 as a contribution towards his legal fees and expenses.**
- V. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 10 November 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."