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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0112/10 FAT)

rendered by

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Stephan Netzle

in the arbitration proceedings between

U1st Sports Overseas Ltd.

31 Donnybroke Castle, Donnybroke, Dublin 4, Ireland

- Claimant -

represented by Mr. Regino López Olivares and Mr. Guillermo López Arana,
C/ Maestro Ripoll 9, 28006 Madrid, Spain

vs.

Club Baloncesto Valladolid SAD

Plaza México s/n, 47014 Valladolid, Spain

- Respondent -

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1. The Parties

1.1. The Claimant

1. U1st Sports Overseas (hereinafter "Claimant") is a player agency with its legal seat in Dublin, Ireland¹. Claimant is represented by Mr. Regino López Olivares and Mr. Guillermo López Arana. Claimant is doing business in various cities, including Madrid, at C/ Maestro Ripoll 9, 28016 Madrid, Spain, where the two officers representing Claimant are located.

1.2. The Respondent

2. Club Baloncesto Valladolid (hereinafter the "Respondent") is a professional basketball club with its seat in Valladolid, Spain. Respondent was initially represented by Mr. Eduardo Pascual Arcas, sports director, and Ms. Sara Villanueva Velasco, administrator, and later by Mr. Alberto Muro Lucas, attorney at law in Valladolid.

2. The Arbitrator

3. On 9 August 2010, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Dr. Stephan Netzle as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").

¹ Claimant is registered with the Irish Companies Registration Office under number 294534.



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4. Neither of the Parties has raised objections to the appointment of the Arbitrator or to the declaration of independence rendered by him.

3. Facts and Proceedings

3.1. Background Facts

5. On or before 9 July 2009, Respondent signed an employment agreement with Mr. Eulis Baez (hereinafter the "Player"), who was represented by Claimant. On 9 July 2009, Claimant and Respondent signed an agency agreement (hereinafter referred to as the "Agency Agreement") according to which Respondent was obliged to pay Claimant for the professional services rendered in relation to the Player, as follows:

"2009/10 season

- *23.000 Euros, plus the corresponding VAT to U1st Overseas Ltd., by an IOU that shall be paid on September 30th 2009 and that shall be issued to the beneficiary before July 30th 2009.*²

6. The Agency Agreement provides for the following penalties in case of late payment:

"The nonpayment (sic) of the aforementioned amounts in the form described above shall carry the following penalties as indemnity for damages and shall be the express penal clause:

- a) *0.10 % late fee for each day a payment is past due, and*
- b) *Double the amount owed if full amount due has not been paid by June 30th of*

² Second paragraph of the Clause titled "First" of the "Covenants" of the Agency Agreement (translation provided by Claimant).



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*each playing season.*³

7. To date, the Respondent has not paid any of the amounts stipulated in the Agency Agreement.

3.2. The Proceedings before the FAT

8. On 23 July 2010, Claimant filed a Request for Arbitration in accordance with the FAT Rules, which was received by the FAT on 2 August 2010.
9. By letter dated 13 August 2010, the FAT Secretariat confirmed receipt of the Request for Arbitration as well as the payment of the non-reimbursable handling fee of EUR 2,000.00 on 2 August 2010, and informed the Parties of the appointment of the Arbitrator. Furthermore, a time limit was fixed for Respondent to file its Answer to the Request for Arbitration, in accordance with Article 11.2 of the FAT Rules, by no later than 3 September 2010. The FAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs by no later than 27 August 2010:

<i>"Claimant (U1st Sports)</i>	<i>EUR 3,000</i>
<i>Respondent (BC Valladolid SAD)</i>	<i>EUR 3,000"</i>

10. By letter dated 9 September 2010, the FAT Secretariat noted that both Parties had failed to pay their shares of the Advance on Costs and that in accordance with Article 9.3 of the FAT Rules the arbitration would not proceed until the full amount of the Advance on Costs was received. Therefore, the Parties were requested to effect

³ Last paragraph of the Clause titled "First" of the "Covenants" of the Agency Agreement (translation provided by Claimant).



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payment of their shares of the Advance on Costs by no later than 20 September 2010. Furthermore, the FAT Secretariat informed that Respondent had failed to submit an Answer to the Request of Arbitration.

11. By email of 17 September 2010, Mr. Alberto Muro Lucas submitted a letter on behalf of the Respondent (Respondent's "Answer"), which, inter alia, reads as follows (sic):

"[...]

We should note that CB Valladolid, S.A.D., recognize and accept the claim filed by U1st Sports Overseas [...], as it has been notified to the claimants.

Nevertheless, nowadays the economic and financial situation of the club is certainly difficult, not being possible to face to the due payments.

Actually, CB Valladolid, S.A.D., has filed to Valladolid (Spain) Courts, an insolvency complaint, in order to get a settlement agreement with all the creditors to restructure the debt.

[...]"

12. By letter dated 28 September 2010, the FAT Secretariat acknowledged receipt of Claimant's share of the Advance on Costs. The Secretariat also informed the Parties that Respondent had submitted an Answer and that in accordance with Article 7.2 of the FAT Rules, and given that Respondent's recognition and acceptance of the claim was advantageous to the Claimant, the Arbitrator had accepted the late submission of the Answer. In the same letter the FAT Secretariat on behalf of the Arbitrator requested Claimant to inform FAT by no later than 11 October 2010 whether it nevertheless wished to continue the arbitration. Furthermore, he informed the Parties that in accordance with Article 9.3 of the FAT Rules the Advance on Costs was reduced to EUR 2,000.00 for each of the Parties. In accordance with Article 9.3 of the FAT Rules and due to the fact that Respondent had failed to pay its share of the Advance on Costs, a time limit until 11 October 2010 was set for Claimant to pay the balance of



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EUR 1,000.00 in order for the proceedings to continue.

13. By reply of 8 October 2010, Claimant informed the FAT that it had paid the balance of EUR 1,000.00 and that it wished to continue with the arbitration.
14. On 14 October 2010, the FAT Secretariat confirmed receipt of Claimant's reply and invited Respondent to comment on the issues addressed in the said reply by no later than 22 October 2010. Furthermore, the Respondent was requested, within the same time limit, to identify the person who signed the Answer.
15. By email of 22 October 2010, the FAT Secretariat received a letter of Respondent together with exhibits in the Spanish language. The relevant parts of this letter read as follows (sic):

"Ref.-112/10

Dear Sirs:

Regarding the FAT procedural order of October 14, CLUB BALONCESTO VALLADOLID, S.A.D., would like to point out the next facts:

First of all, we should insist, that CB Valladolid, S.A.D., acknowledges the claimant credit, and accepted de claim issued.

Nevertheless, actually, due to the difficult economic situation CB Valladolid, S.A.D., has filed to Valladolid (Spain) Courts, an insolvency complaint, in order to be declare in insolvency situation, and be object of the insolvency law rules. (Enclosed to this email you will find an insolvency application copy).

[...]

Kind Regards

Alberto Muro, on behalf of CB Valladolid, S.A.D.

(Enclosed, you will find the attorney proxy)."



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16. By letter dated 2 November 2010, the FAT Secretariat informed the Parties that the Arbitrator declared the exchange of documents complete. It invited the Parties to submit a detailed account of their costs until 8 November 2010.
17. On 5 November 2010, Claimant submitted a detailed account of its costs in a total amount of EUR 9,865.00, which was set out as follows:

<u>Concept:</u>	<u>Amount (€)</u>
- <i>Arbitral fees:</i>	
• <i>Handling fee:</i>	2,000.00 €
• <i>Advance on costs (Claimant)</i>	3,000.00 €
• <i>Advance on costs (Respondent)</i>	1,000.00 €
- <i>Legal Report</i>	3,200.00 €
- <i>Legal advising during the procedure</i>	500.00 €
- <i>Translation</i>	120.00 €
- <i>Copies of documents</i>	25.00 €
- <i>Other expenses</i>	20.00 €
TOTAL: 9,865.00 EUROS	

18. Respondent did not submit an account of costs.
19. Respondent was invited to submit its comments, if any, on Claimant's account of costs by no later than 15 November 2010. Respondent did not submit any comments.
20. The Parties have not requested the FAT to hold a hearing. The Arbitrator therefore 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.



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4. The Parties' Submissions

4.1. Summary of Claimant's Submissions

21. Claimant requests the payment of an amount of EUR 46,000.00 plus interest.
22. Claimant submits that according to the Agency Agreement, Respondent was obliged to pay an agent fee in an amount of EUR 23,000.00 for the 2009/10 season and that the said fee was to be paid on 30 September 2009. Due to the fact that Respondent failed to make any payment in this matter, an additional amount of EUR 23,000.00 became due as late payment penalty.
23. Claimant also submits that it was not aware of Respondent's insolvency application, which must be published in the Spanish Official Gazette (BOE) and communicated to the creditors, neither of which happened here. It disputes Respondent's opinion that the arbitral proceeding should be terminated. It also states that according to Spanish insolvency law, arbitral awards will be enforceable against Respondent and must be respected by the judge in charge of the insolvency proceedings.

4.2. Claimant's Request for Relief

24. Claimant submits the following requests for relief:

"a) To award the Claimant with amount of 46.000 Euros plus interest at the applicable Swiss statutory rate, starting from the 30th of September 2009.

Account name: _____

Bank Address: _____

Account number: _____



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Swift Code: _____

ABA o Routing: _____

b) To award the Claimant with the full covered the costs of this arbitration.” (sic)

4.3. Summary of Respondent’s Submissions

25. In its Answer, Respondent recognized and accepted the claim filed by Claimant. In its further letter received by the FAT Secretariat on 22 October 2010 and signed by Mr. Alberto Muro, Respondent explicitly acknowledges Claimant’s claim once again.
26. With respect to the alleged filing of an insolvency complaint to the courts in Valladolid, Respondent submits that once the insolvency court declares Respondent insolvent, all claims will become subject to the insolvency proceedings and any payments would be made according to the insolvency law rules. For these reasons and in order to avoid extra costs, Respondent recommended to Claimant to file a creditor notification to the insolvency court and to stop pursuing the FAT arbitration.

5. Jurisdiction

27. 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).
28. The jurisdiction of the FAT presupposes the arbitrability of the dispute as well as the existence of a valid arbitration agreement between the parties.



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5.1. Arbitrability

29. 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.⁴

5.2. Formal and substantive validity of the arbitration agreement

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

"1 The arbitration agreement must be concluded in writing, by telegram, telex, telefax or any other means of communication which allow proof of the agreement by text.

2 Furthermore, the arbitration agreement shall be valid if it conforms to the law chosen by the parties, to the law governing the dispute, in particular the principal contract, or to Swiss law."

31. The Arbitrator finds that the jurisdiction of the FAT over the dispute between Claimant and Respondent results from the third clause of the "Covenants" of the Agency Agreement which reads as follows:

*"**Third.**- 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 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 arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The language*

⁴ Decision of the Swiss Federal Tribunal 4P.230/2000 dated 7 February 2001, cons. 1, reported in ASA Bulletin 2001, p. 523 et seq., with reference to the decision of the Swiss Federal Tribunal dated 23 June 1992, BGE 118 II 353, 356, cons. 3b.



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of the 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 shall decide the dispute ex aequo et bono.”

32. The Agency Agreement is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.
33. With respect to substantive validity, the Arbitrator considers that there is no indication in the file 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 [...]” in the third article of the clause titled “Covenants” of the Agency Agreement clearly covers the present dispute.⁵
34. The jurisdiction of FAT has not been disputed by Respondent.
35. The Arbitrator thus finds that he has jurisdiction to decide the claims of Claimant.

6. Discussion

6.1. Applicable Law – ex aequo et bono

36. With respect to the law governing the merits of the dispute, Article 187(1) PILA

⁵ See for instance BERGER/ KELLERHALS: Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, N 466.



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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 rules 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”.

37. In their arbitration agreement, the Parties have explicitly directed and empowered the Arbitrator to decide the dispute *ex aequo et bono*. Consequently, the Arbitrator will decide the present matter *ex aequo et bono*.
38. 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*⁶ (Concordat),⁷ 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.”⁸

39. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

⁶ That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA. Today, the Concordat governs exclusively domestic arbitration.

⁷ KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 187 PILA N 289.

⁸ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).



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*“the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand”.*⁹

40. 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”.
41. In light of the foregoing developments, the Arbitrator makes the following findings:

6.2. Findings

6.2.1 Compensation and Penalty

42. In its Answer, Respondent explicitly acknowledges and accepts the claim filed by Claimant without any reservation. This acceptance includes both the compensation for the agent’s services and the late payment penalty. Respondent reiterates its acceptance of the claim in its further, undated letter which was received by the FAT Secretariat on 22 October 2010. The Arbitrator has no reason to question the validity of Respondent’s letters accepting Claimant’s claim or Claimant’s calculation of the claimed amounts. Therefore, the Arbitrator decides to award Claimant the claimed amount of EUR 46,000.00 (EUR 23,000.00 as compensation pursuant to the second paragraph of the clause titled “First” of the “Covenants” of the Agency Agreement and EUR 23,000.00 as late payment penalty in accordance with the last paragraph of the clause titled “First” of the “Covenants” of the Agency Agreement).

⁹ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.



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6.2.2 Interest

43. Claimant also requests interest at the *“applicable Swiss statutory rate, starting from the 30th of September 2009”*.
44. Interest is claimed on the total amount of EUR 46,000.00. Although Respondent’s letters accepting Claimant’s claim do not differentiate between the agent fee, the non-payment penalty and the interest, such acceptance may only refer to the amounts which are owed in good faith under the Agency Agreement. Interpreting the last paragraph of the clause titled “Covenants”, the Arbitrator finds that on 30 September 2009, an amount of EUR 23,000.00 became due. Since this payment was not made, interest on this amount became due from 1 October 2009 onwards.
45. Furthermore, since the payment of the agent fee of EUR 23,000.00 was still outstanding on 30 June 2010, the consequences described in the second subparagraph of the last paragraph of the clause titled “First” of the “Covenants” of the Agency Agreement (see para. 6 above) were triggered and the due agent fee was doubled, leading to an outstanding amount of EUR 46,000.00, upon which default interest became due as from 1 July 2010.
46. Thus, the Arbitrator holds that Respondent is obliged to pay to Claimant interest of 5% p.a. on the amount of EUR 23,000.00 from 1 October 2009 to 30 June 2010, and interest of 5 % p.a. on the amount of EUR 46,000.00 since 1 July 2010.



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7. Costs

47. Article 17.2 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 17.3 of the FAT Rules states that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
48. The Claimant's arbitration costs include the non-reimbursable handling fee of EUR 2,000.00 as well as the full amount of the Advance on Costs paid by Claimant alone (EUR 4,000.00). Such costs amount to EUR 6,000.00 in total.
49. On 8 December 2010, considering that pursuant to Article 17.2 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 4,000.00.
50. In its Answer, Respondent accepts "*the claim filed by U1st Sports Overseas*", whereas Claimant's request includes the claim to "*award the Claimant with the full covered the costs of this arbitration*". Therefore and in line with Article 17.3 of the FAT Rules, in the present case, the costs of the arbitration shall be borne by Respondent alone.
51. Given that Claimant paid the totality of the Advance on Costs of EUR 4,000.00, the



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Tribunal decides that:

- (i) Respondent shall pay to Claimant EUR 4,000.00 as reimbursement of the Advance on Costs.

- (ii) Furthermore, the Arbitrator considers it adequate that Claimant is entitled to the payment of a contribution towards its legal fees and other expenses (Article 17.3. of the FAT Rules). The Arbitrator holds it adequate to take into account the non-reimbursable fee when assessing the expenses incurred by Claimant in connection with these proceedings. Having reviewed and assessed all the circumstances of the case at hand, the Arbitrator fixes the contribution towards Claimant's legal fees and expenses at EUR 5,865.00.



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8. AWARD

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

- 1. Club Baloncesto Valladolid SAD is ordered to pay to U1st Sports Overseas Ltd. the amount of EUR 46,000.00, plus interest of 5% p.a. on the amount of EUR 23,000.00 from 1 October 2009 to 30 June 2010 and interest of 5 % p.a. on the amount of EUR 46,000.00 since 1 July 2010.**
- 2. Club Baloncesto Valladolid SAD is ordered to pay to U1st Sports Overseas Ltd. the amount of EUR 4,000.00 as reimbursement of the advance on arbitration costs.**
- 3. Club Baloncesto Valladolid SAD is ordered to pay to U1st Sports Overseas Ltd. the amount of EUR 5,865.00.00 as reimbursement of its legal fees and expenses.**
- 4. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 10 December 2010

Stephan Netzle
(Arbitrator)