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**FIBA Arbitral Tribunal (FAT)**

**ARBITRAL AWARD**

**(0114/10 FAT)**

rendered by

**FIBA ARBITRAL TRIBUNAL (FAT)**

**Mr. Stephan Netzle**

in the arbitration proceedings between

**U1st Sports Overseas Ltd.**

31 Donnybrook Castle, Donnybrook, Dublin, Ireland

**- Claimant 1 -**

and

**U1st Sports Atlanta LLC**

2571 Brookhaven Chase Lane, Atlanta, GA 30319, USA

**- Claimant 2 -**

both represented by 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 Claimants**

1. U1st Sports Overseas (hereinafter “U1st Overseas” or “Claimant 1”) is a player agency with its seat in Dublin, Ireland. Claimant 1 is represented by its associates Mr. Regino López Olivares and Mr. Guillermo López Arana.
2. U1st Sports Atlanta (hereinafter “U1st Atlanta” or “Claimant 2”) is a player agency with its seat in Atlanta, USA. Claimant 2 is represented by its director Mr. Andrew Vye and by Mr. Guillermo López Arana.

#### **1.2. The Respondent**

3. Club Baloncesto Valladolid (hereinafter the “Respondent”) is a professional basketball club with its seat in Valladolid, Spain. Respondent is not represented by counsel.

### **2. The Arbitrator**

4. On 23 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”).
5. None of the Parties has raised objections to the appointment of the Arbitrator or to the declaration of independence rendered by him.



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### 3. Facts and Proceedings

#### 3.1. Background Facts

6. On 27 July 2009, as a consequence of the engagement of the professional basketball player Mr. Lamont Barnes (hereinafter referred to as the “Player” or “Mr. Barnes”), Claimants and Respondent signed an agency agreement (hereinafter referred to as the “Agency Agreement”) according to which Respondent was obliged to pay Claimants for their professional services rendered in relation to the Player as follows:

***“2009/10 season***

- 15.500 USD, to U1st Sports Overseas Ltd., by an IOU that shall be paid on September 30<sup>th</sup>, 2009 and that shall be issued to the beneficiary before July 30<sup>th</sup>, 2009.*
- 15.500 USD, to U1st Sports Atlanta, by an IOU that shall be paid on September 30<sup>th</sup>, 2009 and that shall be issued to the beneficiary before July 30<sup>th</sup>, 2009.”<sup>1</sup>*

7. The Agency Agreement also provides for the following penalties in case of late payments:

*“The nonpayment 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 30<sup>th</sup> of each playing season.” (sic)<sup>2</sup>*

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<sup>1</sup> Second paragraph of the Clause titled “First” of the “Covenants” of the Agency Agreement (translation provided by Claimants).

<sup>2</sup> Last paragraph of the Clause titled “First” of the “Covenants” of the Agency Agreement (translation provided by Claimants).



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

#### 3.2. The Proceedings before the FAT

9. On 23 July 2010, Claimants filed a Request for Arbitration in accordance with the FAT Rules, which was received by the FAT on 5 August 2010.
10. By letter dated 7 September 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 5 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 27 September 2010 (hereinafter the "Answer"). The FAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs by no later than 20 September 2010:

<i>"Claimant 1 (U1st Overseas)</i>	<i>EUR 1,500</i>
<i>Claimant 2 (U1st Atlanta)</i>	<i>EUR 1,500</i>
<i>Respondent (CB Valladolid)</i>	<i>EUR 3,000"</i>

11. By letter dated 11 October 2010, the FAT Secretariat acknowledged receipt of Claimants' shares of the Advance on Costs received on 17 and 21 September 2010 and informed the Parties that Respondent had failed to submit an Answer but that the FAT had been informed in another matter between Claimant 1 and Respondent which was pending before the FAT that Respondent had filed an insolvency application before the Valladolid Court. Therefore, the Arbitrator requested Claimants to inform FAT by no later than 20 October 2010 whether they nevertheless wished to continue



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the arbitration. 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 25 October 2010 was set for Claimants to pay the balance of EUR 3,000.00 in order for the proceedings to continue.

12. By reply dated 18 October 2010, Claimants informed the FAT that they wished to continue the arbitration.
13. By letter dated 2 November 2010, the FAT Secretariat acknowledged receipt of Claimants' reply and Respondent's share of the Advance on Costs paid by Claimants and received on 20 October 2010. In the same letter, the FAT Secretariat on behalf of the Arbitrator invited Respondent to comment on the issues addressed in Claimants' reply by no later than 15 November 2010 and also requested Respondent to inform the FAT, within the same time limit, whether it accepted the claims raised by the Claimants. However, Respondent did not reply to the Arbitrator's questions.
14. On 18 November 2010, the FAT Secretariat informed the Parties that Respondent had not submitted any comments and that the Arbitrator declared the exchange of documents complete. It invited the Parties to submit a detailed account of their costs until 26 November 2010.
15. On 26 November 2010, Claimants submitted a detailed account of their costs in a total amount of EUR 11,865.00, which was set out as follows:

Concept:

Amount (€)

- *Arbitral fees:*

- *Handling fee: 2,000.00 €*
- *Advance on costs (Claimant)  
3,000.00 €*



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	•	<i>Advance on costs (Respondent)</i>	
			3,000.00 €
- Legal report			3,200.00 €
- Legal advising during the procedure			500.00 €
- Translation			120.00 €
- Copies of documents			25.00 €
- Other expenses			20.00 €
<b>TOTAL:</b>		<b>11,865.00 EUROS</b>	

16. Respondent did not submit an account of costs.
17. Respondent was invited to submit its comments, if any, on Claimants' account of costs by no later than 3 December 2010. Respondent did not submit any comments.
18. 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.

## 4. The Parties' Submissions

### 4.1. Summary of Claimants' Submissions

19. Claimants request the payment of an amount of USD 62,000.00 plus interest.
20. Claimants submit that according to the Agency Agreement, Respondent was obliged to pay agent fees for the 2009/10 season in the amount of USD 15,500.00 to Claimant 1 and in the amount of USD 15,500.00 to Claimant 2, both amounts being payable on 30



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September 2009. Due to the fact that Respondent failed to make any payment in this matter an additional amount of USD 31,000.00 became due as late payment penalty.

21. Claimants also submit that they have tried several times to get a response from Respondent, without success. Furthermore, they were 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 in this case. They also state that according to Spanish insolvency law arbitral awards will be enforceable against Respondent and must be recognized by the judge in charge of the insolvency proceedings.

### 4.2. Claimants' Request for Relief

22. Claimants submit the following requests for relief:

*"a) To award the Claimants with amount of 62.000 US Dollars plus interest at the applicable Swiss statutory rate, starting from the 30<sup>th</sup> of September 2009.*

*Account name: [...]*

*b) To award the Claimants with the full covered the costs of this arbitration."  
(sic)*

### 4.3. Summary of Respondent's Submissions

23. Despite several invitations by the FAT, Respondent has neither submitted an Answer, nor comments to Claimants' reply nor any other submissions related to this procedure. Respondent's information about the fact that it had filed an insolvency application before the Valladolid Court became known in the context of another arbitration



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proceeding involving Claimant 1 and Respondent as parties.

### 5. Jurisdiction

24. 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.<sup>3</sup>
25. 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).
26. The jurisdiction of the FAT presupposes the arbitrability of the dispute as well as the existence of a valid arbitration agreement between the parties.

#### 5.1. Arbitrability

27. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and

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<sup>3</sup> Decision of the Swiss Federal Tribunal of 19 April 1994, reported in ATF 120 II 155, 162.



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is thus arbitrable within the meaning of Article 177(1) PILA.<sup>4</sup>

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

28. 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."*

29. The Arbitrator finds that the jurisdiction of the FAT over the dispute between Claimants and Respondent results from the third article of the clause titled "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 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*

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<sup>4</sup> Decision of the Swiss Federal Tribunal, 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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*Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.”*

30. The Agency Agreement is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.
31. 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.<sup>5</sup>
32. The Arbitrator thus finds that he has jurisdiction to decide the Claimants' claims.

### 6. Other Procedural Issues

33. Article 14.2 of the FAT Rules specifies 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 case of default of one of the parties is in accordance with Swiss arbitration law<sup>6</sup> and the practice of the FAT<sup>7</sup>.

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

<sup>6</sup> Decision of the Swiss Federal Tribunal dated 26 November 1980, in: Semaine Judiciaire (SJ) 1982, p. 613 et seq., p. 621; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international - Droit et pratique à la lumière de la LDIP, Bern 2010, N 483; LALIVE/POUDRET/REYMOND: Le droit de l'arbitrage interne et international en Suisse, Lausanne 1989, Art. 182 PILA N 8; RIGOZZI: L'Arbitrage international en matière de sport, Basel 2005, N 898; SCHNEIDER, in: Basel commentary to the PILA, 2<sup>nd</sup> ed., Basel 2007, Art. 182 PILA N 87; VISCHER, in: Zurich Commentary to the PILA, 2<sup>nd</sup> ed., Zurich/Basel/Geneva 2004, Art. 182 PILA N 29.



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However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

34. This requirement is met in the current case. 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 the opportunity to respond to Claimants' Request for Arbitration and their reply of 11 October 2010. Still, Respondent has chosen not to respond within the time limits set by the Arbitrator according to the FAT Rules.

## 7. Discussion

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

35. 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 rules of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

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<sup>7</sup> See for instance 0001/07 FAT, Ostojic, Raznatovic vs. PAOK KAE; 0018/08 FAT, Nicevic vs. Beşiktaş; 0020/08 FAT, Dimitropoulos vs. Athlitiki Enosis Konstantinoupoleos; 0030/09 FAT, Vujanic vs. Enterprise Men's Basketball Club "Dynamo" Moscow; 0031/09 FAT, Misanovic, Ristanovic vs. Enterprise Men's Basketball Club "Dynamo" Moscow; 0010/08 FAT, Grgurevic vs. AEP Olympias Patras; 0043/09 FAT, Gomis vs. Women's Basketball Club Fenerbahçe; 0093/10 FAT, A.S.D. Pallacanestro Femminile Schio vs. Braxton.



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*“the parties may authorize the arbitral tribunal to decide ex aequo et bono”.*

36. 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*.
37. 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*<sup>8</sup> (Concordat),<sup>9</sup> 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.”<sup>10</sup>*

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

*“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”.<sup>11</sup>*

39. 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”.

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<sup>8</sup> That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA. Today, the Concordat governs exclusively domestic arbitration.

<sup>9</sup> KARRER, in: Basel commentary to the PILA, 2<sup>nd</sup> ed., Basel 2007, Art. 187 PILA N 289.

<sup>10</sup> JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

<sup>11</sup> POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.



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

### **7.2. Findings**

41. The Arbitrator must decide the following issues:

- a. Is Respondent obliged to pay agent fees in the total amount of USD 31,000.00 to Claimants?
- b. Is Respondent obliged to pay an additional amount of USD 31,000.00 to Claimants as late payment penalty?
- c. Is Respondent obliged to pay interest on the amount of USD 62,000.00 and if yes, at which rate and since when?

#### **7.2.1 Agent fees**

42. Claimants claim outstanding agent fees in the total amount of USD 31,000.00, consisting of USD 15,500.00 as Claimant 1's fee and further USD 15,500.00 as Claimant 2's fees. The claimed amounts relate to the engagement of Mr. Barnes, particularly Claimants' professional services of intermediation in negotiating and contracting when Mr. Barnes was engaged by Respondent.
43. According to the first article of the clause titled "Covenants" of the Agency Agreement Respondent is obliged to pay agent fees of USD 15,500.00 to each of the Claimants for the 2009/10 season. Pursuant to Claimants' submission these amounts are not yet paid. Due to Respondent's failure to participate in the proceedings this submission



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remains undisputed. In addition, the Arbitrator considers that there is no indication in the file which could cast doubt on Claimants' respective allegation. Therefore, the Arbitrator finds that Respondent is obliged to pay to each of the Claimants the amount of USD 15,500.00 as agent fees.

44. The Arbitrator has reached this conclusion based on the record and not on the mere fact that the Respondent has defaulted. Under these circumstances, the Arbitrator does not deem it necessary to call for further evidence.

### **7.2.2 Late payment penalty**

45. Claimants request a further amount of USD 31,000.00 as penalty due to the late payment of the agent fees.

46. According to the first article of the clause titled "Covenants" of the Agency Agreement, non-payment of the agent fees *"shall carry the following penalties as indemnity for damages and shall be the express penal clause"*. The penalties are stipulated as follows:

*"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 30<sup>th</sup> of each playing season."*

47. The agent fees for the 2009/2010 season were not paid on the due date of 30 June 2010. The Agency Agreement provides for a penalty of double the principal amount, which became due on 1 July 2010.
48. In most jurisdictions and as a consequence of the freedom of contract the parties are



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entitled to stipulate such contractual penalties. However, such penalties are subject to judicial review and can be adjusted if they are excessive. Whether a contractual penalty is excessive is usually left to the discretion of the judge and depends on the individual circumstances. As a general rule, a contractual penalty is considered to be excessive if it is disproportionate to the basic obligation of the debtor.<sup>12</sup>

49. In the present matter, the penalty is capped at 100% of the principal obligation of the debtor and there are no other circumstances which would require the Arbitrator to adjust the penalty *ex officio*. Therefore, the Arbitrator deciding *ex aequo et bono*, accepts the penalty clause in the Agency Agreement and acknowledges the claimed amount of USD 31,000.00 as late payment penalty. The Arbitrator finds therefore that Respondent is obliged to pay also the late payment penalty of USD 31,000.00 to Claimants.

### 7.3. Interest

50. Claimants request interest at the “*applicable Swiss statutory rate, starting from the 30<sup>th</sup> of September 2009*”. The interest is claimed on the total amount of USD 62,000.00.
51. The last paragraph of the clause titled “Covenants” indicates that the open amount shall be doubled if the full amount has not been paid by 30 June of each playing season. When interpreting this clause, the Arbitrator finds that on 30 September 2009, an amount of USD 31,000.00 became due. Since this payment was not made on time,

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<sup>12</sup> See for instance 0036/09 FAT, Tigran Petrosean, TP Sports vs. WBC “Spartak” St. Petersburg; 0086/10 FAT, Queenan vs. Basketball Club Pecsí Noi Kosariabda Kft; 0092/10 FAT, Ronci, Coelho vs. WBC Mizo Pecs 2010.



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interest on this amount became due from 1 October 2009 onwards.

52. Furthermore, since the payment of the agent fee of USD 31,000.00 was still outstanding on 30 June 2010, the consequences described in the second subparagraph of the last article of the Agency Agreement titled “Covenants” were triggered and the due agent fee was doubled leading to an outstanding amount of USD 62,000.00, upon which additional default interest became due as from 1 July 2010.
53. Thus, the Arbitrator holds that Respondent is obliged to pay to Claimants interest of 5% p.a. on the amount of USD 31,000.00 from 1 October 2009 to 30 June 2010 and interest of 5 % p.a. on the amount of USD 62,000.00 since 1 July 2010.

### **8. Costs**

54. 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.
55. The Claimants’ 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 Claimants alone (EUR 6,000.00). Such costs amount to EUR 8,000.00 in total.
56. On 17 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



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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 4,600.00.

57. In line with Article 17.3 of the FAT Rules and considering the Claimants prevailed in their main claims, the Arbitrator finds it fair that the fees and costs of the arbitration be borne by Respondent alone.
58. Given that Claimants paid the totality of the Advance on Costs of EUR 6,000.00, the Tribunal decides that:
  - (i) The FAT shall reimburse EUR 1,400.00 to Claimants.
  - (ii) Respondent shall pay the difference between the costs advanced by Claimants and the amount which is going to be reimbursed to them by the FAT, i.e. EUR 4,600.00.
  - (iii) Furthermore, the Arbitrator considers it adequate that Claimants are entitled to the payment of a contribution towards their 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 Claimants in connection with these proceedings. After having reviewed and assessed all the circumstances of the case at hand, the Arbitrator fixes the contribution towards the Claimants’ legal fees



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and expenses at EUR 5,865.00.



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### 9. AWARD

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

1. **Club Baloncesto Valladolid SAD is ordered to pay jointly to U1st Sports Overseas Ltd. and U1st Sports Atlanta LLC the amount of USD 62,000.00 plus interest of 5% p.a. on the amount of USD 31,000.00 from 1 October 2009 to 30 June 2010 and interest of 5% p.a. on the amount of USD 62,000.00 since 1 July 2010.**
2. **Club Baloncesto Valladolid SAD is ordered to pay jointly to U1st Sports Overseas Ltd. and U1st Sports Atlanta LLC the amount of EUR 4,600.00 as reimbursement of the advance on arbitration costs.**
3. **Club Baloncesto Valladolid SAD is ordered to pay jointly to U1st Sports Overseas Ltd. and U1st Sports Atlanta LLC the amount of EUR 5,865.00 as a contribution towards their legal fees and expenses.**
4. **Any other or further claims for relief are dismissed.**

Geneva, seat of the arbitration, 22 December 2010

Stephan Netzle  
(Arbitrator)