



**FIBA**

We Are Basketball

**FIBA Arbitral Tribunal (FAT)**

## **ARBITRAL AWARD**

**(0117/10 FAT)**

rendered by

**FIBA ARBITRAL TRIBUNAL (FAT)**

**Mr. Stephan Netzle**

in the arbitration proceedings between

**Mr. Demonico Lamont Barnes**

**- Claimant -**

represented by Mr. Guillermo López Arana,  
U1st Sports, C/ Maestro Ripoll 9, 28006 Madrid, Spain

vs.

**Club Baloncesto Valladolid SAD**

Plaza México s/n, 47014 Valladolid, Spain

**- Respondent**

Av. Louis Casai 53  
P.O. Box 110  
1216 Cointrin / Geneva  
Switzerland

Tel: (+41-22) 545 0000  
Fax: (+41-22) 545 0099  
info@fiba.com  
www.fiba.com



We Are Basketball

## **FIBA Arbitral Tribunal (FAT)**

### **1. The Parties**

#### **1.1. The Claimant**

1. Mr. Demonico Lamont Barnes (hereinafter "Player" or "Claimant") is a professional basketball player of US nationality. Claimant is represented by Mr. Guillermo López Arana of the agency U1st Sports.

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



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

### 3. Facts and Proceedings

#### 3.1. Background Facts

5. In summer 2009, Claimant and Respondent signed a labor contract (hereinafter referred to as the “Player Contract”) according to which Claimant was employed by Respondent as a basketball player for the seasons 2009-2010 and 2010-2011. The Player Contract is dated 27 July 2009 and was signed on 31 July 2009 and on 1 August 2009 respectively. Pursuant to the fifth article of the clause titled “Covenants” of the Player Contract, Respondent undertook to pay to Claimant for the 2009-2010 season a total net salary of USD 310,000.00, payable in monthly installments as follows:

*“**FIFTH-** The salary to be received for the player’s services will be the gross amount, from which the corresponding percentage for Personal Income Tax withholding is deducted, results:*

***-2009-10 Season: 310,000 USD NET, payable as follows:***

*-24,000 USD net upon Player arrival to Spain  
-24,000 USD net between the 1<sup>st</sup> and 5<sup>th</sup> of September 2009  
-24,000 USD net between the 1<sup>st</sup> and 5<sup>th</sup> of October 2009  
-24,000 USD net between the 1<sup>st</sup> and 5<sup>th</sup> of November 2009  
-35,000 USD net between the 1<sup>st</sup> and 5<sup>th</sup> of November 2009 (Image)  
-24,000 USD net between the 1<sup>st</sup> and 5<sup>th</sup> of December 2009  
-24,000 USD net between the 1<sup>st</sup> and 5<sup>th</sup> of January 2010  
-24,000 USD net between the 1<sup>st</sup> and 5<sup>th</sup> of February 2010  
-35,000 USD net between the 1<sup>st</sup> and 5<sup>th</sup> of February 2010 (Image)  
-24,000 USD net between the 1<sup>st</sup> and 5<sup>th</sup> of March 2010  
-24,000 USD net between the 1<sup>st</sup> and 5<sup>th</sup> of April 2010  
-24,000 USD net between the 1<sup>st</sup> and 5<sup>th</sup> of May 2010*

*[...]”*

6. It is undisputed that to date, Respondent has only paid the amount of USD 181,781.00 net to Claimant. Several reminders by Claimant remained unanswered by Respondent.



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

### 3.2. The Proceedings before the FAT

1. On 16 August 2010, Claimant filed a Request for Arbitration in accordance with the FAT Rules, which was received by the FAT on the same day.
2. By letter dated 26 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 3,000.00 on 18 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 17 September 2010. The FAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs by no later than 10 September 2010:

<i>"Claimant (Mr. Barnes)</i>	<i>EUR 3,500</i>
<i>Respondent (BC Valladolid SAD)</i>	<i>EUR 3,500"</i>

3. By email of 17 September 2010, Mr. Alberto Muro Lucas submitted a letter on behalf of the Respondent (Respondent's "Answer"), the relevant parts of which read as follows (sic):

*"[...]*

*We should note that CB Valladolid, S.A.D., recognize and accept the claim filed [...], by Mr. Demonic Lamont Barnes, 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.*

*[...]"*



We Are Basketball

### **FIBA Arbitral Tribunal (FAT)**

4. On 21 September 2010, the FAT Secretariat noted that Respondent had submitted an Answer, 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 payment of their shares of the Advance on Costs by no later than 1 October 2010.
5. By letter dated 11 October 2010, the FAT Secretariat acknowledged receipt of Claimant's payment of 24 September 2010 in the amount of EUR 7,000.00. Since Respondent had failed to pay its share of the Advance on Costs and given that Claimant's representative had informed FAT that due to a misunderstanding Claimant had paid the full amount of the Advance, but agreed that FAT keep the excess payment so as to substitute for Respondent in case the latter failed to pay its share, the FAT Secretariat acknowledged receipt of the full amount of the Advance on Costs. In the same letter, the FAT Secretariat drew Claimant's attention to Respondent's submission that it had filed an insolvency application before the Valladolid Court. In view of this fact, the Arbitrator requested Claimant to inform FAT by no later than 18 October 2010 whether he wished to continue with the arbitration.
6. By email of the same date, Claimant submitted a statement regarding Respondent's Answer. Claimant stated that he wished to continue with the arbitration (the "Reply").
7. On 14 October 2010, the FAT Secretariat confirmed receipt of Claimant's Reply and informed Respondent about its right to comment on the Reply by no later than 22 October 2010. Respondent's comments were to be strictly limited to the issues addressed in the Reply. Furthermore, Respondent was requested, within the same time limit, to identify the person who signed Respondent's Answer.



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

8. By email of 22 October 2010, the FAT Secretariat received a letter from Respondent together with exhibits in the Spanish language. The relevant parts of this letter read as follows (sic):

*"Ref.-117/10*

*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)."*

9. By letter of 2 November 2010, the FAT Secretariat informed the Parties that the Arbitrator declared the exchange of documents complete. He invited the Parties to submit a detailed account of their costs until 8 November 2010.
10. By email dated 5 November 2010, Claimant submitted a detailed account of his legal and other costs, including his attorney fees (Gonzales de Mendoza Abogados) in a total amount of EUR 13,865.00, which was set out as follows:



**FIBA**

We Are Basketball

## FIBA Arbitral Tribunal (FAT)

<u>"Concept"</u>	<u>Amount (€)</u>
- <i>Arbitral fees:</i>	
• <i>Handling fee:</i>	3,000.00 €
• <i>Advance on costs (Claimant)</i>	3,500.00 €
• <i>Advance on costs (Respondent)</i>	3,500.00 €
- <i>Legal report</i>	3,200.00 €
- <i>Legal advising during the procedure</i>	500.00 €
- <i>Translations</i>	120.00 €
- <i>Copies of documents</i>	25.00 €
- <i>Other expenses</i>	20.00 €

**TOTAL: 13,865.00 EUROS"**

11. Respondent did not submit an account of costs.
12. 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.
13. 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 Claimant's Submissions**

14. Claimant requests the payment of outstanding salary in the amount of USD 128,219.00



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

plus interest.

15. Claimant submits that according to the Player Contract, Respondent was obliged to pay for the 2009-2010 season a salary in the total amount of USD 310,000.00 net. Due to the fact that Respondent has only paid USD 181,781.00, an amount of USD 128,219.00 is still owed to Claimant.
16. In his Reply, Claimant states that he was not aware of Respondent's insolvency application, which must be made public, i.e. published in the Spanish Official Gazette (BOE) and communicated to the creditors, neither of which has happened. He also states that according to Spanish insolvency law arbitral awards will be enforceable against Respondent and taken into account by the judge in charge of the insolvency proceedings.

### 4.2. Claimant's Request for Relief

17. Claimant submits the following requests for relief:

*"a) To award the Claimant with amount of 128,219 USD net plus interest at the applicable Swiss statutory rate, starting from the 5th of May 2010.*

*Account name: [...]*

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

### 4.3. Summary of Respondent's Submissions

18. 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



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

Mr Alberto Muro, Respondent acknowledged Claimant's credit and accepted the claim once again.

19. 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

20. 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).
21. 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

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



**FIBA**

We Are Basketball

## FIBA Arbitral Tribunal (FAT)

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

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

23. 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."*

24. The Arbitrator finds that the jurisdiction of the FAT over the dispute between Claimant and Respondent results from article 13 of the clause titled "Covenants" of the Player Contract which reads as follows:

***"THIRTEENTH.***- *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*

---

<sup>1</sup> 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.



**FIBA**

We Are Basketball

## **FIBA Arbitral Tribunal (FAT)**

*Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS shall decide the dispute ex aequo et bono.”*

25. The Player Contract is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.
26. 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 thirteenth article of the clause titled “Covenants” of the Agency Agreement clearly covers the present dispute.<sup>2</sup>
27. The jurisdiction of FAT has not been disputed by Respondent.
28. The Arbitrator thus finds that he has jurisdiction to decide the claims of Claimant.

## **6. Discussion**

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

29. 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

---

<sup>2</sup> See for instance BERGER/ KELLERHALS: Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, N 466.



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

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”.*

30. 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*.
31. 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>3</sup> (Concordat),<sup>4</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>5</sup>*

32. 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*

---

<sup>3</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>4</sup> KARRER, in: Basel commentary to the PILA, 2<sup>nd</sup> ed., Basel 2007, Art. 187 PILA N 289.

<sup>5</sup> JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

*circumstances of the case at hand*".<sup>6</sup>

33. 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".
34. In light of the foregoing developments, the Arbitrator makes the following findings:

### 6.2. Findings

#### 6.2.1 Compensation

35. In the Answer, Respondent explicitly recognizes and accepts the claim filed by Claimant. Respondent reiterates its acceptance of the claim in its further letter, received by the FAT Secretariat on 22 October 2010 and signed by Mr. Alberto Muro, on behalf of the Respondent. There is no indication in the file, which could cast doubt on the validity of Respondent's letters accepting Claimant's claim. Therefore, the Arbitrator decides to award Claimant the claimed amount of USD 128,219.00 plus interest.

#### 6.2.2 Interest

36. Claimant requests interest at the "*applicable Swiss statutory rate, starting from the 5th of May 2010*". Respondent's letters accepting Claimant's claim do not contain specific submissions as to interest. However, Respondent's acceptance may only refer to the amounts it owes to Claimant. According to article 5 of the clause titled "Covenants" of

---

<sup>6</sup> POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

the Player Contract, the last installment of the salary was payable between 1 and 5 May 2010. Therefore, the starting date of the interest relating to the last installment of the salary is 6 May 2010, the day after this amount became due. Deciding *ex aequo et bono*, the Arbitrator finds that the starting date for the claimed interest is 6 May 2010 instead of 5 May 2010.

37. The current Swiss statutory rate is 5% p.a.. Such interest rate is in line with FAT jurisprudence and the Arbitrator, deciding *ex aequo et bono*, considers it to be fair and equitable in the present case.
38. Thus, the Arbitrator decides that Respondent has to pay to Claimant the amount of USD 128,219.00 plus interest of 5% p.a. since 6 May 2010.

### 7. Costs

39. 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.
40. The Claimant's arbitration costs include the non-reimbursable handling fee of EUR 3,000.00 as well as the full amount of the Advance on Costs paid by Claimant alone (EUR 7,000.00). Such costs amount to EUR 10,000.00 in total.
41. On 8 December 2010, considering that pursuant to Article 17.2 of the FAT Rules "the



We Are Basketball

## FIBA Arbitral Tribunal (FAT)

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 4,350.00.

42. In its Answer, Respondent accepts “*the claim filed by [...] Mr. Demonic Lamont Barnes*”, whereas Claimant’s request for relief claims “*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.
43. Given that Claimant paid the totality of the Advance on Costs of EUR 7,000.00, the Tribunal decides that:
  - (i) The FAT shall reimburse EUR 2,650.00 to Claimant.
  - (ii) Respondent shall pay EUR 4,350.00, being the difference between the costs advanced by Claimant and the amount which is going to be reimbursed to him by the FAT.
  - (iii) 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. After having reviewed and assessed all the



**FIBA**

We Are Basketball

## **FIBA Arbitral Tribunal (FAT)**

circumstances of the case at hand, the Arbitrator fixes the contribution towards the Claimant's legal fees and expenses at EUR 6,865.00.



**FIBA**

We Are Basketball

## **FIBA Arbitral Tribunal (FAT)**

### **8. AWARD**

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

- 1. Club Baloncesto Valladolid SAD is ordered to pay to Mr. Demonico Lamont Barnes the amount of USD 128,219.00 plus interest of 5% p.a. since 6 May 2010.**
- 2. Club Baloncesto Valladolid SAD is ordered to pay to Mr. Demonico Lamont Barnes the amount of EUR 4,350.00 as reimbursement of the advance on arbitration costs.**
- 3. Club Baloncesto Valladolid SAD is ordered to pay to Mr. Demonico Lamont Barnes the amount of EUR 6,865.00 as reimbursement of his 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)