BASKETBALL
ARBITRAL TRIBUNAL

# ARBITRAL AWARD

**(BAT 0130/10)**

by the

# BASKETBALL ARBITRAL TRIBUNAL (BAT)

**Mr. Quentin Byrne-Sutton**

in the arbitration proceedings between

**Mr. Chris Thomas**, 6616 Greenridge Drive, Indianapolis, IN 46278, USA

**- Claimant 1 -**

**U1st Sports Overseas Ltd.**, 31 Donnybrook Castle, Donnybrook,
Dublin 4, Ireland

**- Claimant 2 -**

**U1st Sports New York LLC**, 150 County Road Suite 1,
Tenafly, NJ 07670, USA

**- Claimant 3 -**

Jointly represented by Mr. Guillermo López Arana and Mr. Mikel Abete Vecino,
U1st Sports, C/ Maestro Ripoll 9, 28006 Madrid, Spain

vs.

**Baloncesto Fuenlabrada SAD**, Pabellón Fernando Martín,
C/ Grecia s.n., 28943 Fuenlabrada, Madrid, Spain

**- Respondent -**

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## 1. The Parties

### 1.1. The Claimants

1. Mr. Chris Thomas (hereinafter referred to as “the Player”) is a professional basketball player of US nationality, who during the 2009-2010 season was playing for Baloncesto Fuenlabrada SAD.

2. U1st Sports Overseas Ltd. and U1st Sports New York LLC are the Player’s agents (hereinafter referred to collectively as “the Agents”).

3. The Player and the Agents shall hereinafter also be collectively referred to as "the Claimants".

### 1.2. The Respondent

4. Baloncesto Fuenlabrada SAD (hereinafter referred to as “the Club” or "the Respondent") is a professional basketball club in Madrid, Spain.

## 2. The Arbitrator

5. On 10 November 2010, the President of the Basketball Arbitral Tribunal (hereinafter "BAT") appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the "BAT Rules"). None of the parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

## 3. Facts and Proceedings

### 3.1. Summary of the Dispute

#### 3.1.1 The Player's Contract and its Termination

6. On 26 May 2009, the Player and the Club entered into an employment contract (hereinafter the "Contract") whereby the latter engaged the Player for the following three seasons: 2009-2010, 2010-2011 and 2011-2012.

7. According to Clause 1 of the Contract:

> *"…The contract shall begin on [the] day after its signing, and shall conclude 10 days after the last game of the official competition of the 2011-2012 season, that the Club takes part in. Nevertheless, the Player shall be entitled to leave the city 10 days after the last official game of each season".*

8. Clause 7 of the Contract provides that it is a "no-cut" agreement, in the following terms:

> *"In regards to all salary amounts payable to the Player, the termination or suspension of this contract by the Club on account of an injury, illness, or disability suffered or sustained by the Player, or on account of the Player's failure to exhibit sufficient skill shall in no way affect the Player's right to receive the sums payable under the contract at such times as the sums become due".*

9. Clause 3 of the Contract provides that the Club shall pay the following total amounts of base salary to the Player for the foregoing seasons: USD 325,000 (2009-2010 season), USD 375,000 (2010-2011 season) and USD 425,000 (2011-2012 season).

10. According to the schedule of salary installments for the 2009-2010 season, the first payment was due in September 2009 and the last in June 2010.

11. Clause 4 of the Contract stipulates that the Club shall provide the Player with an allowance of USD 10,000 per season for travel expenses and with lodging free of charge, as follows:

> *"The Club will provide the Player, at the beginning of each season, with 10,000 USD for his expenses. The Club will also provide the Player with housing in good conditions, whilst the contract is in force. The apartment shall be fully furnished and equipped with all the necessary conveniences (color TV, DVD, washer, dryer, satellite dish and ADSL, internet connection). Club guarantees that the living accommodations will be adequate. The apartment will have a telephone installed…".*

12. With respect to his lodging during the 2009-2010 season, on 1 October 2009, the Player entered directly into a lease contract with a landlord, relating to a flat in Fuenlabrada, Madrid (the "Lease Agreement"). According to article 3 of the Lease Agreement, the lease ran for a first period from 1 October 2009 to 31 May 2010, with the right to extend it for a further 12 months and to pay only 50% of the rental during the months of June-July 2010 if the lodging was not used.

13. In connection with the lodging, the Player submits that he stayed in the flat in Madrid until 23 September 2010, when he returned to the USA, and contends as follows that he and the Club entered into an oral agreement which was not honoured by the latter, with the consequence that he must be indemnified:

> "*There was a verbal agreement between the Club and the Player by which instead of the Club providing the lodging, as it is set on the labor contract, the Club shall pay the player an additional amount of 11,000 EUR to the ones set in his contract, so that the Player was helped to pay the rent of the housing he had previously found himself. That is the reason why the leasing contract is subscribed by the Player. Nevertheless, the Club only paid the Player the amount of 7,000 EUR. Therefore the Club still owes the Player the amount of 4,000 EUR in this concept (sic).*
>
> *The rent was paid until the month of May 2010 by Mr. Chris Thomas with the help of the 7,000 EUR paid by the Club. […]*
>
> *The Club never paid the rent. It was the Player who paid the rent with the help of the 7,000 EUR paid by the Club.*
>
> *The rent corresponding to the period June-August 2010 remains unpaid. Mr. Chris Thomas has not been able to pay the rent corresponding to such months due to the unpaid 4,000 EUR and due to his unpaid salary. Therefore, the landlord is claiming such amounts to Mr. Chris Thomas as the signatory of the lease agreement.*"

14. The Club denies any such oral agreement was passed with respect to the lodging, and submits among others that under the Contract "… *the Club has only undertaken to provide lodging for the Player, and it was the Player himself who unilaterally refused*

*the one offered by the Club. Thereby the Club remained free from any further obligation in this respect […] The sole obligation of the Club consisted in finding suitable lodging for the Player, which obligation was duly fulfilled. The lease agreement that now serves as a basis for the claim has only been signed due to the fact that the Player has unilaterally refused the lodging offered by the Club*"

15. With regard to matters of training, attitude and discipline, Clause 2 of the Contract provides the following:

> "*SECOND- To the effects of what is foreseen in the first section, the Player will have to:*
>
> *a) Train in the frame of the technical structure of the Club and take care of his good physical condition in order to obtain the best possible performance in his activity.*
>
> *b) Use the clothing and sporting material, shoes including, that was provided by the Club.*
>
> *c) Observe the regulations and internal rules of the Club. Rules will be given to the Player in English upon Player's arrival in the city of Fuenlabrada. If those internal rules are not given to the Player for their signing they shall not be enforceable against him.*"

16. The internal rules of the Club referred to in Clause 2, subsection c) of the Contract are named the "*Internal Rules and Regulations of Fuenlabrada Basketball S.A.D. for Player*" (hereinafter the "Disciplinary Rules").

17. With regard to their scope of application, the Disciplinary Rules provide as follows that during the season they apply to a Player's conduct within and outside the Club, among others for the purpose of preserving the Club's image:

> *"ARTICLE 1.- FUENLABRADA BASKETBALL, S.A.D., in accordance with what is put down in article 6° of the Royal Decree 642/1.984, of the 28th of march, exercises disciplinary authority over the players and in consequence the present Regulation of Internal Rules, which governs all the Fuenlabrada Baskelball team players.*
>
> *ARTICLE 2. - The norms for the Regulation of Internal Rules, have as their objective the achievement of the best image for Fuenlabrada Basketball and obtain the best relations for cooperation between the players and the rest of the classes of Fuenlabrada Basketball.*
>
> *ARTICLE 3. - The Players as sports representatives of FUENLABRADA BASKETBALL, S.A.D., will observe the norms of this Regulation of Internal Rules, as much as in their*

*sports activity, as in the way their lives may be conducted outside the Club".*

18. In their Chapter II, entitled "*Rights and Obligations of the Players*", the Disciplinary Rules define different requirements concerning the Players' conduct in connection with training and competitions.

19. Chapter III sets out a system of sanctions in case of misconduct, in which a distinction is made between "*slight faults*", "*serious faults*" and "*very serious faults*", the first two categories of fault giving rise to escalating fines and the third category to higher fines, to the possibility of the Player being "*suspended from job and salary for two months*" as well as to the possibility of a "*Cancellation of contract and expulsion from Fuenlabrada Basketball*" (article 15).

20. Among the acts qualified as "*serious faults*" are: "*Disobedience to the instructions of the Coach and Staff*" (article 11.d) and "*Comments, declarations and attitudes that harm the image, prestige and respect of Fuenlabrada Basketball, the Club's partners, directors, players, staff, employees and sponsor*" (article 11.g).

21. Acts qualified as "*very serious faults*" include: "*The repetition of serious faults*" (article 12.a) and "*Alcohol and drug abuse will adversely affect a player's performance and it will also affect the image of Fuenlabrada Basketball*" (article 12.b).

22. With respect to the sanctions for misconduct, article 18 of the Disciplinary Rules stipulates that:

> "*All fines for serious or very serious faults must be preceded by a letter of charges, it will be given to the interested party, to whom three days will be given for him to make his allegations. The directive board will impose a fine in his case after hearing the player without detriment to the appeals which are established against the fines, in the sports legislation and in ordinary jurisdiction*."

23. Concerning a Player's exclusion from the Club for reasons of discipline, article 16 of the Disciplinary Rules stipulates that:

> *"Without detriment to the regulation of faults and sanctions in the above articles, the extinction of a contract by disciplinary sack of the player, will be ruled by what is in the*

*Royal Decree 1.006/85 of the 26th of June, through which the special labor relation of professional athletes and sports players is regulated".*

24. Chapter V, entitled "*Social Behaviour*", adds the following rules of conduct:

*"ARTICLE 25.- The players must at all times, observe a conduct in accordance with their condition as sportsmen and members of Fuenlabrada Basketball.*

*ARTICLE 26.- The players must not smoke during the whole period they are engaged in, or directly connected with an activity of Fuenlabrada Basketball, (training, matches, travelling, concentrations, etc.) without the express permission of the coach.*

*ARTICLE 27.- Not must (sic) the players consume alcoholic drinks under the same circumstances as stated in the previous article, except under the conditions mentioned above."*

25. The Player played the entire 2009-2010 season for the Club.

26. However, at the end of the 2009-2010 season, a total amount of USD 93,250 in salary payments was outstanding, corresponding to monthly installments (or parts thereof) which under Clause 3 of the Contract were due for payment between February-June 2010. It is uncontested that the payment of the foregoing amount of salary remains outstanding today.

27. On 30 August 2010, the Player informed the Club that he was in Madrid at the Club's disposal to start practice for the forthcoming season (2010-2011), as follows:

"*I am contacting you to inform you that I am in Madrid, and fully available for the squad of Baloncesto Fuenlabrada SAD in order to start pre-season training.*

*I likewise inform you that I have had to meet the costs of the return airplane ticket from my place of residence, Indianapolis, the United States, to Madrid, and so I would ask you to repay said amount to me in full in the shortest possible time, by virtue of the terms set out in clause four of my contract of employment with the Club. As can be seen in the copy of the tickets that are attached, the cost mentioned totals the sum of 1,807 Euros.*

*With no further ado, and repeating my complete availability to start the training with the Club's first team squad, I await your instructions.* [Translation by Claimants of the original letter in Spanish]".

28. On 17 September 2010, the Club notified the Player that it was terminating his Contract for the following reasons:

"[…] *The Management of the Club Baloncesto Fuenlabrada has gained knowledge of serious breaches of your obligations deriving from the contract, which are referred to below:*

*a/ During the final competition rounds of the 2009/2010 season, carried on both in Fuenlabrada and those which involved the team travelling away, it was understood that you systematically visited hostelry establishments, specifically different discotheques of Madrid, where you stayed until the small hours of the morning where you were seen to consume alcohol and smoke tobacco. This has serious and negative effects on your performance as a player, likewise affecting the club's image, as you are someone who is well-known in the sports world, and notably in that related to basketball, as well as your association with our club.*

*b/ Likewise, the Club Management has been informed by the technical team, through the person in charge Mr. Maldonado, the first team trainer of Club Baloncesto Fuenlabrada, about your repeated behaviour involving a lack of commitment to the team, your lack of interest in the same making progress during the competition and, lastly, during the final rounds of the season, with a lack of respect and consideration for the technical team and the trainer who leads it. These acts were repeated, as you sought to provoke the cancellation of your employment relationship as a sportsperson of our Club. In this respect, you had already been told by the trainer at that time that such a situation could not be prolonged. This behaviour has not only not been corrected, as you have boasted to several of your team colleagues that you were not going to carry on it as that was what you had decided, but also at this time you have lost all of the confidence of the trainer who leads the team.*

*Given this situation, the need to cancel your contract causes the Club and (sic) economic loss, which must be compensated for by mean[s] of the corresponding indemnity. As this sum was not set out in the employment contract signed, the Club sets this at the amount of four monthly salary payments, that is to say $ 90,000. This amount is reasonable and proportionate, taking account of the provision of your services and the term of the contract that was initially envisaged, as well as the planning of the Club first team, whose preparation is seriously affected by your employment breaches and the cancelling of your contract which these have led to.*

*All of the amounts of your salary payments which are outstanding at today's date will be settled shortly and these will not be withheld or used in compensation, in spite of the fact that the cancellation of your contract leads to the obligation to repair the damage that this causes to the Club. This is because such an indemnity is of a different nature to the payment for your services. This is stated without prejudice to the aforesaid indemnity remaining unpaid and being claimed by the Club by means of the competent Jurisdiction.* [Translation by Claimants of the original letter in Spanish]"

### 3.1.2 The Dispute Regarding the Validity and Consequences of the Termination

29. As indicated in the termination letter of 17 September 2010 quoted above, the Club is

arguing that it had good cause to terminate the Contract because the Player allegedly committed various acts of misconduct. In support of its contention that the Player was responsible for misconduct the Club has filed affidavits by employees of the Club and by the managers of two nightclubs in Madrid.

30. The Club also contends that the Player's alleged misconduct that led the Club to terminate his Contract prematurely has affected the Club's image and caused it to suffer damages in an estimated amount of EUR 64,687.

31. The Player is disputing the validity of the termination and is seeking compensation for unpaid salary payments due between February – June 2010 and salaries accruing for the 2010-2011 and 2011-2012 seasons, for three months of rent (corresponding to lodging for the months of June – August 2010) and for travel expenses (representing airfare in 2010).

32. With respect to travel expenses, the Player is claiming reimbursement of EUR 1,807 for the cost of airfare for tickets from Madrid to Indianapolis (in May 2010) and return (in August 2010), which the Club is refusing to pay on the allegation (contested by the Player) that the Player and his entourage had indicated he would not continue playing for the Club beyond the end of the 2009-2010 season.

33. As a result of these disagreements, the Player began by filing a request for conciliation on 5 October 2010 with the Service for Conciliation, Arbitration and Mediation of Madrid ("*Servicio de conciliación, arbitraje y mediación de Madrid*") (hereinafter the "Service for Conciliation of Madrid").

34. In his request for conciliation, the Player indicated as follows that he had also initiated an arbitration in front of the (then) FAT (in fact the arbitration had not yet been initiated since the request for arbitration was filed with the (then) FAT on 19 October 2010):

> *"QUINTO.- Sin perjuicio del sometimiento de esta parte a la jurisdicción laboral ordinaria propia de la relación contractual descrita, se ha iniciado igualmente un arbitraje ante un organismo internacional deportivo: la FIBA, el denominado FAT, a los solos efectos de*

*intentar evitar el presente litigio laboral, y con la voluntad de pacto amistoso previsto en el art.15.1 del RD 1006/1985, de 26 junio, que regula la relación laboral especial de los deportistas profesionales"*

*"Without prejudice by my part to the ordinary laboral jurisdiction appropriate for the described agreement, an arbitrary process has been equally initiated before the international sports organization: The FIBA, and the called FAT, for the only effects to avoid the following contractual dispute, and with the intention of a friendly agreement as provided by art. 15.1 from the Real Decreto 1006/1985, of June 26th, that regulates the special job relationship of the professional athletes* [Translation by the Respondent]*".*

35. As shall be examined in more detail below, on 15 October 2010 the Player entered into an employment contract with a new Club for the 2010-2011 and 2011-2012 seasons, the Polish Club "*Anwil Wloclawek*".

36. On 19 October 2010, the Player filed his request for arbitration with the BAT.

37. On 22 October 2010, the Service for Conciliation of Madrid held a conciliation hearing between the parties that was unsuccessful.

38. On 25 November 2010, the Player filed a claim for unjust termination before the labour courts of Madrid (hereinafter the "Madrid labour courts").

39. Consequently, the two proceedings – the lawsuit in front of the Madrid labour courts and this BAT arbitration proceeding – were, at a certain point in time, advancing in parallel, creating a situation of *lis pendens*.

40. On 30 November 2010, in its Answer in this arbitration, the Club argued that "*The own claimant party, Mr. Thomas has renounced to submit his lawsuit to the arbitration procedure of the BAT, by submitting it to the Spanish labour authorities*" because the Player had stated in his request in front of the ordinary courts that the BAT arbitration was only aimed at seeking an amicable settlement without prejudice to the jurisdiction of the ordinary courts.

41. In keeping with its foregoing interpretation of the procedural situation, the Club submitted in its Answer a settlement proposal to the Player but offered scheduled payments stating that: "*The deferred payments is (sic) due to the economical situation*

*and the general recession of the economy suffered in Spain nowadays, which have direct consequences on the economic situation of Club Baloncesto Fuenlabrada*".

42. The Club added that: "*With the aim of reaching a friendly agreement Baloncesto Fuenlabrada SAD, will renounce of the indemnity that Mr Thomas has claimed to the Spanish labour authorities of 64,687 € in the conciliation act done on October 22nd, 2010 in front of the mediation, arbitration and conciliation service of Madrid's county government (General Direction of Labour of the Employment, Women and immigration regional ministry – competent Spanish labour authority)*".

43. On 14 December 2010, after having been invited by the BAT to pronounce himself on the settlement proposal of the Club, the Player indicated that "*After revising the terms of such proposal, with regards to the claim of Claimant 1 (Mr. Chris Thomas), his position is to reject the proposal made by Baloncesto Fuenlabrada and respectfully asks the Arbitrator to continue with the procedure*".

44. On 22 December 2010, the Madrid labour courts served a procedural order on the Parties, whereby the court called them to a trial hearing fixed for 2 February 2011.

45. On 29 December 2010, in their reply brief in this arbitration, the Claimants argued that the Player had only begun the lawsuit in the ordinary courts of Madrid in order to preserve his rights under the rules of mandatory law governing labour disputes, while intending the jurisdiction of the BAT to be preferential, as follows:

> *"In respect of the labour claim lodged through the Spanish Courts of Justice, [t]he Claimants wish to state that the actions taken by Mr. Chris Thomas are the ones that are prescribed and they are compulsory in cases of labour disputes under Spanish Law. These Laws make it compulsory for the worker to comply, within an established period, with the prior requirements that have been carried out (copies of which were furnished by the Respondent in its Answer) so that the worker does not lose the option of claiming, in the future, the indemnity he is entitled to by the Court. But, as [t]he Respondent admits in its reply, Mr. Chris Thomas has communicated to the Spanish jurisdictional bodies that the issue under dispute has been reported to the FIBA Arbitral Tribunal (FAT), as a pre-eminent and preferential issue, insofar as both parties expressly and voluntarily submitted to this arbitral tribunal with the intention of settling any disputes relating to the contract that was signed because it is an authorised body that acts knowledgeably within the scope of basketball and its problems."*

46. In the same submission, the Claimants went on to conclude as follows that the Player wished for this arbitration proceeding in front of the BAT to take precedence over the lawsuit in the ordinary courts and that if necessary he would withdraw that lawsuit:

> *"The Parties have therefore submitted any disputes arising from the above-mentioned contract to the judgment of the FAT, and [t]he Claimants want the FAT to solve the dispute. If it is necessary to expressly and formally waive the actions lodged with the Spanish Courts, The Claimants undertake to send a notice of waiver of domestic action, because it is our intention that the FAT solve the dispute in the understanding that it has the full authority to do so.*
>
> *In light of the foregoing, the Claimants reject [t[he Respondent's argument stating that Mr. Chris Thomas has waived the possibility of the FAT reviewing the claim at issue. Quite the contrary, what Mr. Chris Thomas has done is attach to the jurisdiction of the FAT the pre-eminent nature commented above.(sic)"*

47. Upon the BAT's request, the Player also filed with his reply a copy of the employment contract he had entered into on 15 October 2010 with the Polish club Anwil Wloclawek.

48. In its rejoinder of 21 January 2011, the Club withdrew its above-mentioned settlement offer and confirmed its objection to the jurisdiction of the BAT on the basis that it had now become apparent that "… *the existence of the contract with the Polish club Anwil Wloclawek … was hidden at the beginning of the proceeding, when it had already been signed, which expresses the fraudulent spirit of the claimants with their request*". In that respect, the Club summed up its position as follows:

> *"In any event the club has manifested its goodwill by making a series of offers to reach a friendly solution of the case, despite the fact that there was no obligation for payment involved pursuant to the Law. That offer has been made even within the framework of the proceeding before the FAT (even improving any previous offers), but surprisingly the claimants have refused them.*
>
> *Hereby the club withdraws any economic offerings, as the procedural behavior (even the behavior enacted by the player: it is possible to suspect that he willfully looked for the termination of the contract) of Mr. THOMAS has made evident that his only motive had been his unfair enrichment through the demand of payment of all the amounts".*

49. On 27 January 2011, the Player sent a non-solicited submission to the BAT indicating that he had withdrawn his claim in front of the Madrid labour courts, and filed a copy of the corresponding formal application for withdrawal.

50. On 20 March 2011, in answer to questions put to the Parties by the Arbitrator, the Claimants re-confirmed they did not wish to enter settlement discussions and filed a copy of the decision whereby the Madrid labour courts acknowledged the Player's withdrawal of his claim and struck the case from the courts' record.

51. On 21 March 2011, in answer to questions put to the Parties by the Arbitrator, the Respondent indicated that if the Player was unwilling to engage in settlement discussions its counterclaim for damages remained applicable.

52. In its final rebuttal submission filed in this proceeding, the Respondent argued as follows that despite the withdrawal of the Player's claim in front of the Madrid labour courts, his right to claim outstanding contractual salaries (standing to sue) remained alive and could be re-introduced before those courts:

> *"It should be taken into account that the Claimant's action, although principally directed against his dismissal, also comprises a claim regarding the outstanding contractual salary instalments. Such claim is generally subject to a one-year prescription period, counted as of the day on which the suit may have been filed. The aforementioned one-year period is considered interrupted in case a claim is filed to demand the payment of the outstanding salary instalments, just as the one currently discussed within the auspices of the FAT.*
>
> *In accordance with the said regulations, and taking into account that the withdrawal of the Claimant's request pending in front of the Spanish Labour Court may not be considered as a renouncement of his rights, it may be concluded that the amounts claimed by the Player may still be demanded in Spanish Courts."*

53. However, given the Player's withdrawal of his claim in front of the Madrid labour courts, the only claims that currently remain between the Parties with respect to the termination of the Contract are those made in this arbitration proceeding, as summarized below in Section 4 of this award.

### 3.1.3 The Player's Contract with a New Club for the 2010-2011 and 2011-2012 Seasons

54. The Player submits on the basis of an affidavit signed by a representative of U1st Sports New York LLC that: "*The first contacts made by Mr. Andy Miller, Player's Agent, regarding the possibility of signing Player with another Club, once Baloncesto*

*Fuenlabrada terminated his contract, were with the Polish club Anwil Wloclawek at the beginning of October 2010*".

55. On 15 October 2010, the Player entered into an employment contract with a new Club for the 2010-2011 and 2011-2012 seasons, the Polish Club "*Anwil Wloclawek*" (hereinafter the "new employment contract") and in doing so was represented by one of the same agents, i.e. Mr. Andy Miller of U1st Sports New York LLC.

56. According to Clause 3 of the new employment contract, the Player is to receive USD 70,000 as a total base salary for the 2010-2011 season and USD 130,000 for the 2011-2012 season.

57. In this proceeding, the Player filed two affidavits, one signed by his agent Andy Miller and the other by the General Manager of the Polish Club "*Anwil Wloclawek*" stating that the foregoing salaries are the only consideration (aside possible bonuses) being received by the Player from the Club for his services. The latter declares "*That in the agreement of 15 October 2010 … are contained all the considerations in favor of Mr. Chris Thomas for the rendering of his services in favor of our Club, not existing any other contractual agreement or any form by which the Player shall receive any other consideration, remuneration or benefit (in concept of e.g. image rights or any other concept) in addition to those figuring in the mentioned labor contract of 15 October 2010*".

58. Clause 18 provides the Player with an option to terminate the contract after the first season (2010-2011) under certain conditions.

59. Clause 24 of the new employment contract stipulates that: "*Club will utilize its best efforts to assist the Player with obtaining Polish Citizenship. In the event the Player, during the 2010-11 season, obtains Polish Citizenship and has received his Polish Passport in his possession, AND Player elects to terminate this Agreement due to Eighteenth Clause as described in the manner above, CLUB will be entitled to a payment by the Player of $20,000 USD as long as the Club has not breached any of its*

*obligations in this Agreement*". In that connection, the Claimants submit that "*Because the Player is married to a Polish and he is applying to the Polish citizenship. The process is underway*".

### 3.1.4 The Agents' Contract and the Non Payment of Their Fees

60. Article 13 of the Contract specified as follows that the Club would be responsible for the Agents' fees: "*The Club agrees to pay the Agent's fee to U1st Sports Basket España Overseas Ltd. and U1st Sports Nueva York for their services as the Player's representative, in the terms and conditions stipulated in the attached commission page which is included as an annex to this document. This commission is considered part of the Player's Contract*".

61. In accordance with the foregoing provision, on the same date as the Contract was signed (26 May 2009), the Club and the Agents entered into an agreement (the "Agents' Agreement"), whereby the Club undertook to pay fees to each agent as follows: USD 16,250 during the 2009-2010 season, USD 18,750 at the end of the 2010-2011 season and USD 21,250 at the end of the 2011-2012 season.

62. Clause 1 of the Agents' Agreement stipulates as a penalty for late payment that:

> *"The non payment of the aforementioned amounts in the form described above shall carry the following penalties as indemnity for damages and shall be 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 each playing season."*

63. Clause 2 of the Agents' Agreement provides that:

> *"The termination of the contract by the Club because of illness, injury or on account of Player's failure to exhibit sufficient skill shall in no way affect the right of the Agents to receive the professional fees agreed upon in this document on the dates mentioned above."*

64. It is uncontested that the Club has not paid the Agents any of their fees for any of the three seasons.

65. Given that the Agents' Agreement contains an arbitration clause (Clause 3) in favour of the BAT (then FAT) which is identical to the arbitration clause contained in the Contract, the Agents are claiming the payment of their agency fees in this proceeding; and in that respect are relying on the foregoing clauses of the Agents' Agreement to argue that they are entitled to the penalty (double the amount) for the 2009-2010 season and complete payment of the fees for the 2010-2011 and 2011-2012 seasons.

66. The Club is disputing any duty to pay the amount as being claimed, and in that respect is invoking as grounds that the Agents never submitted any invoices for their fees relating to the 2009-2010 season, that the penalty clause is abusive and therefore void in any event and that no fees can be owed for subsequent seasons because the Contract was terminated and in addition the Agents would be unjustly enriched due to having received a fee for the negotiation of the Player's agreement with his new club.

67. Nevertheless, the Club "… *acknowledges the debt relative to the season that was effectively fulfilled, that is 16,250 of each one of the commercial companies*".

68. The Claimants contest the Club's allegation regarding the lack of invoicing.

### 3.2. The Proceedings before the BAT

69. On 19 October 2010, the Claimants filed a Request for Arbitration in accordance with the BAT Rules and subsequently duly paid the non-reimbursable handling fee of EUR 5,000.

70. On 10 November 2010, the BAT informed the parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter.

71. On 24 November 2010, the Claimants (jointly) and the Respondent each paid to the

BAT an advance on arbitration costs in an amount of EUR 6,000.

72. On 30 November 2010, the Club filed its Answer to the Request for Arbitration, which also contained a settlement proposal.

73. On 9 December 2010, the Claimants were invited to pronounce themselves upon the Club's settlement proposal.

74. On 14 December 2010, the Claimants declared they were not accepting the settlement proposal.

75. On 16 December 2010, the Claimants were invited to file a Reply to the Club's Answer.

76. On 29 December 2010, the Claimants filed their Reply to the Respondent's Answer.

77. On 11 January 2011, the Club was invited to respond to the Claimants' Reply.

78. On 21 January 2011, the Club filed a rejoinder in response to the Claimants' Reply.

79. On 27 January 2011, the Claimants filed a non-solicited submission with the BAT indicating that, in light of the Club's objections to the jurisdiction of the Arbitrator, the Player had decided to withdraw his claim in front of the Madrid labour courts. A copy of the request for withdrawal was filed therewith.

80. By Procedural Order of 7 March 2011, the parties were invited to indicate whether they had any interest in attempting to settle their dispute during a hearing in front of the Arbitrator under procedural conditions which would need to be agreed. The Parties were also asked to answer specific questions put by the Arbitrator and to file any documentary evidence in support of their answers.

81. On 20 and 21 March 2011, the Parties submitted their answers to the Arbitrator's questions and the Claimants indicated they did not wish to discuss a settlement.

82. On 24 March 2011, the Parties were given leave to comment on each other's answer.

83. On 29 March and 1 April 2011, the Parties submitted their comments and the Respondent filed new unsolicited affidavits.

84. The Parties were informed, by a letter from the BAT Secretariat dated 4 April 2011, that the FIBA Arbitral Tribunal (FAT) had been renamed into Basketball Arbitral Tribunal (BAT) and that, absent any objections from the Parties on or before 11 April 2011, the new name would be applied also to the present proceedings. Neither of the Parties raised any objections within the said time limit.

85. On 5 April 2011, the Claimants were given leave to comment on the new affidavits.

86. On 8 April 2011, the Claimants provided their comments together with their statement of costs.

87. On 11 April 2011, the Respondent filed its statement of costs.

88. By procedural order of 12 April 2011, the Arbitrator invited the Parties to comment on the opposite party's costs until 15 April 2011 and informed them that the exchange of documents was completed. No comments were received by any party within the deadline set by the Arbitrator.

89. By procedural order of 27 April 2011, the Arbitrator decided to readjust the advance on arbitration costs to EUR 18,000 in total, given the complexity of the matter at hand and the number of submissions made by the parties. Taking into account that an amount of EUR 12,000 had already been paid, the parties were invited to pay until 6 May 2011 the following additional Advance on Costs:

| | |
|---|---|
| *"Claimant 1 (Mr. Chris Thomas)* | *EUR 2,000* |
| *Claimant 2 (U1st Sports Overseas)* | *EUR 500* |
| *Claimant 3 (U1st Sports New York)* | *EUR 500* |
| *Respondent (Baloncesto Fuenlabrada)* | *EUR 3,000"* |

90. By letter dated 11 May 2011 the BAT Secretariat acknowledged receipt of the Parties'

additional Advance on Costs.

## 4. The Positions of the Parties

### 4.1. The Claimants' Position

91. The Claimants submit the following in substance:

- The Arbitrator has jurisdiction over the Player's and the Agents' claims.

- By filing suit with the Madrid labour courts the Player did not intend to waive the jurisdiction of the BAT – and indicated this in his claim in front of those courts – but simply wished to preserve its rights under Spanish law while maintaining the BAT as the privileged forum within which to resolve the dispute.

- The Player has now confirmed the foregoing position by formally withdrawing the claim initially made in front of the Madrid labour courts.

- The Contract termination by the Club is unjustified and invalid because the Club's allegations regarding the Player's behaviour are baseless and because the Contract is a "no cut contract".

- Even if the Player were responsible for any breach of disciplinary rule, he was never put on formal notice thereof as required by the Contract and the Disciplinary Rules. That being said, if anything, fines rather than termination were the only measures the Club would have been entitled to take as a starting point in sanctioning any established lack of discipline.

- Furthermore, whereas the season ended in May 2010, i.e. over three months before the notice of termination of 17 September 2010 was sent to the Player, he received no notice of any breach in the meantime, i.e. the termination came "out

of the blue".

- Given the invalidity of the termination, under the terms of the Contract the Club is obliged to pay all outstanding salaries and other benefits owed to the Player under the Contract for the 2009-2010, 2010-2011 and 2011-2012 seasons.

- Under the terms of the Agents' Agreement, all the fees are owed irrespective of the reasons for which the Club terminated the Contract, and the conditions for applying the contractual penalty clause for late payment of the fees are fulfilled with respect to the 2009-2010 season.

- The Club's counterclaim for damages allegedly caused by the Player's behaviour must be rejected since the Club has not established any valid grounds for termination of the Contract and in any event no damage has been proven.

92. In their Request for arbitration, the Claimants requested the following relief:

"*1. To award Claimant 1 with:*

*a) Immediate payment by the Respondent of 93,250 USD net plus interest at the applicable Swiss statutory rate, starting from the 5th of February 2010, corresponding to the unpaid salary amounts of the 2009-2010 season.*

*b) Immediate payment by the Respondent of 3,900 EUROS, corresponding to the unpaid flat rental.*

*c) Immediate payment by the Respondent of 1,807 EUROS, corresponding to the reimbursement of the plane tickets already paid by Claimant 1.*

*d) Immediate payment by the Respondent of 375,000 USD net, corresponding to Player's salary for the 2010-2011 season.*

*e) Immediate payment by the Respondent of 425,000 USD net, corresponding to Player's salary for the 2011-2012 season.*

*2. To award Claimant 2 and Claimant 3 with:*

*a) Immediate payment by the Respondent of the following amounts:*

*32,500 USD to U1st Sports Overseas Ltd.*

*32,500 USD to U1st Sports New York LLC*

*3. Payment of the following amounts on the following dates:*

*18,750 USD to U1st Sports Overseas Ltd. on November 5th 2010.*

*18,750 USD to U1st Sports New York LLC on March 5th 2011.*

*21,250 USD to U1st Sports Overseas Ltd. on November 5th 2011.*

*21,250 USD to U1st Sports New York LLC on March 5th 2012.*

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

### 4.2. Respondent's Position

93. The Club submits the following in substance:

- During the 2009-2010 season, the Player committed very serious breaches of discipline by going out late to nightclubs where he was seen drinking and smoking.

- This not only affected his performance as a Player on the court but also had a negative effect on the Club's image since it plays in first division and the Player was known to the public.

- The Player was put on notice by the coach and the head of the team to reform his behaviour but never did and instead became antagonistic, acting in a pretentious and non-constructive manner both with the coach and his teammates.

- The Player was offered a perfectly acceptable lodging in conformity with the Contract, but he chose to reject it and enter into a lease of his own, which the Club was not responsible for.

- The Club did not terminate the Contract immediately at the end of the 2009-2010 season because the Player and his entourage indicated on several occasions that he was looking for another club in any event, i.e. that he would not be continuing to play for the Club for the next two seasons. The Club was therefore surprised to receive his letter of 30 August 2010 indicating he intended to start training for the new season, and it sent him the notice of termination which otherwise would have been sent earlier.

- By behaving in the manner he did, the Player breached the disciplinary rules of the Club; and underlying mandatory rules of Spanish labour law entitle the Club to terminate his contract for cause without any prior written notice in case of a serious breach of discipline. Consequently, the termination is valid.

- Furthermore, because by continuously behaving in the inappropriate manner he did, the Player undermined team spirit and the team's results, thus wasting the Club's resources, the Club is entitled to a fair amount in compensation for damages, which it deems to represent EUR 64,687, corresponding to the equivalent of four months of the Player's salary.

- Because the applicable Spanish rules are mandatory law and under Spanish law labour disputes are not arbitrable, any dispute relating to the validity of termination of the Contract must be submitted to the competent labour courts in Madrid, meaning that the BAT (then FAT) arbitration clause in the Contract is not effective, i.e. the exclusive jurisdiction of the Madrid labour courts cannot be avoided and the Arbitrator lacks jurisdiction.

- By himself first filing a claim in front of the Madrid labour courts to challenge the validity of the Club's termination of the Contract, the Player has confirmed the mandatory nature of the Madrid labour courts' jurisdiction and has accepted it, thereby also waiving any right to file an arbitration request with BAT.

- Also, because the claim concerns the validity of the Contract termination, it cannot be deemed an arbitrable claim of financial nature under the terms of article 177 (1) of the PILA.

- Even if the Arbitrator were deemed to have jurisdiction, the Player's claim for compensation should be rejected as abusive under the Contract but also under the applicable mandatory rules of Spanish labour law, since according to the latter if the Player is at fault (i.e. if termination is for cause) he cannot claim compensation; and even if termination is without cause he cannot claim such large amounts of compensation for loss of salary.

- In addition, the Player had been planning to leave the Club and as early as 15 October 2010 did take up a new employment with a Polish club, although initially hiding that fact in this arbitration; meaning that in any event he cannot claim any compensation relating to the 2010-2011 or 2011-2012 seasons; it also being probable that the Player has not revealed the true extent of his remuneration by the new Club since the employment contract he has submitted is not even signed by it.

- The Club had initially made a settlement offer to the Player to pay him a lump sum as a compromise, despite his misconduct, as well as renouncing any claim of its own. However, given the Player's inadmissible attitude in this arbitration, during which he did not even spontaneously indicate he is currently employed and paid by a new club, the Respondent is withdrawing that offer.

- Concerning the Agents' fees relating to the 2009-2010 season, they cannot be claimed today in this arbitration because the Agents never invoiced them. Furthermore, the contractual penalty clause being invoked by the Agents is abusive and is therefore invalid by law. As regards the claimed fees for the 2010-2011 and 2011-2012 seasons, they are not owed because the Contract was

validly terminated and because the Agents would be unjustly enriched due to the Player signing a new contract with the Polish club generating additional fees for the Agents.

94. The Respondent submitted the following prayer for relief:

> *"I REQUEST to the Court that, having conducted all corresponding proceedings, issues a resolution with the following settlements:*
>
> *- The proceedings to be filed due to it having an object that is not subject to arbitration and being already subject to the Spanish Courts of Law.*
>
> *And also:*
>
> *- The request of compensation by Mr. THOMAS to be dismissed.*
>
> *- The request of 16,250 USD for each one of the claimant commercial companies shall be paid upon the presentation of the corresponding invoice, and the rest is dismissed.*
>
> *To award the respondent with the full covered the costs of this arbitration. (sic)"*

95. With respect to its counterclaim the Club submits:

> *"The termination of the contract due to disciplinary dismissal causes to the Baloncesto Fuenlabrada SAD a economic damage, which must be compensated by Mr. Thomas by the adequate indemnity, that the club, as it has not been provided by the contract signed, estimates the figure in four monthly salaries of retribution, that is to say 64.687 €, a very reasonable and measured figure, taking into account the amount of time and services provided (season 2009/2010) and the length of the contract, initially for three years, as the planning of the first team, whose preparation was severely affected by the contract breaches and the termination of the contract to which these have led to".*

## 5. The jurisdiction of the BAT

### 5.1. The Arbitration Clauses

96. The Contract (Clause 8) and the Agent's Agreement (Clause 3) contain identical arbitration clauses, which read as follows:

> *"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 Sports (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 upon appeal shall decide the dispute ex aequo et bono."*

### 5.2. The Arbitrability of the Dispute and the Validity of the Arbitration Agreements

97. In accordance with the foregoing arbitration clause and pursuant to Article 2.1 of the BAT Rules, whereby "[t]*he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland*", this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA) (Articles 176-199 of the PILA) insomuch as the Chapter 12 of the PILA applies to all arbitrations in which the seat of the arbitration is in Switzerland and at least one of the Parties is not domiciled in Switzerland (article 176 PILA).

98. Under the provisions of Chapter 12 of the PILA, the jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

99. In this proceeding the Club is challenging the arbitrability of the Player's claim on the ground that it is not financial in nature due to its object being the validity of the termination and also on the ground that under mandatory rules of Spanish labour law claims of this nature are not arbitrable.

100. Consequently, the Arbitrator shall begin by examining the question of the arbitrability of the claims.

101. In that relation, the Arbitrator finds that since the arbitrability of the dispute is governed

by Article 177(1) PILA[1] and according to that provision it is sufficient for the dispute to be of financial nature for it to be deemed arbitrable, it is irrelevant, for the purposes of this arbitration, whether or not labour disputes are deemed arbitrable under Spanish law.

102. Furthermore, the Arbitrator finds that the Player's claim is clearly financial in nature, since although he is contesting the validity of the Club's termination of the Contract, he is above all requesting financial compensation for such termination. Similarly, the Agents' claim is incontestably financial in nature since they are requesting the payment of their contractual fees.

103. Accordingly, the Arbitrator considers that all the claims submitted to him in this arbitration are arbitrable within the meaning of Article 177 (1) PILA.

104. As to their validity, the agreements to arbitrate are in written form and thus fulfill the formal requirements of Article 178(1) PILA, while at the same time the Arbitrator finds that there are no allegations and/or evidence on record that could cast doubt on the substantive validity of the arbitration agreements under Swiss law (referred to by Article 178(2) PILA). In particular, the wording "[a]ny dispute arising from or related to the present contract" clearly encompasses the present disputes.

105. Consequently, the arbitration agreements binding the Club to the Player and to the Agents must be deemed valid as to their form and content.

### 5.3. The Issue of *Lis Pendens* and Alleged Renouncement to Arbitrate

106. With respect to the Agents' right to make their claims in this proceeding on the basis of the arbitration clause contained in the Agency Agreement, there are no grounds upon which to consider they may have waived that right in any manner, nor any issue of *lis pendens,* since they have not filed a lawsuit in any other forum.

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

107. Concerning the Player, the situation is different since he began by making a request for conciliation with the Service for Conciliation of Madrid before filing his request for arbitration with the BAT, and then – the conciliation having failed – he submitted a claim to the Madrid labour courts despite having filed the request with the BAT.

108. The Club is arguing in substance that by acting in this manner the Player must be deemed to have submitted to the jurisdiction of the Madrid labour courts and thereby renounced any right to arbitrate in front of the BAT, whereas the Player contends that he was careful to reserve at the same time in his submissions to the labour courts his intention to also file an arbitration request with the BAT and that, in any event, he has now withdrawn the lawsuit he had brought before the Madrid labour courts.

109. The Arbitrator considers that the withdrawal of the claim before the Madrid labour courts has resolved *de facto* the issue of *lis pendens*, since it no longer exists, but that in the circumstances the following related question nevertheless needs to be examined:

- Did the manner in which the Player proceeded in front of the Services for Conciliation of Madrid and then the Madrid labour courts amount to a renouncement/waiver of his right to arbitrate under Clause 8 of the Contract?

110. With regard to this question, there is no applicable provision of law or rule that explicitly regulates the consequences on the jurisdiction of an arbitral tribunal of a claimant filing the same or partly overlapping claims both in front of an ordinary court and in front of an arbitral tribunal.

111. Article 7 of the PILA deals with the partly inverse situation of a defendant not objecting at the outset to the jurisdiction of an ordinary court – and thereby being deemed to have implicitly renounced an arbitration agreement – while article 186 (2) PILA addresses a different but partially related scenario by providing in substance that the fact of proceeding in front of an arbitral tribunal without objecting to its jurisdiction at the outset may be deemed an implicit recognition of that tribunal's jurisdiction despite the

absence of a prior agreement to arbitrate.

112. Although the foregoing provisions address different situations from the one at hand, their logic and the case law relating to them are useful to bear in mind by analogy in this case, insomuch as they deal with the conditions under which a party may be deemed to have implicitly renounced or accepted to arbitrate as a result of its behaviour, respectively in front of a State court or in front of an arbitral tribunal.

113. Indeed, in keeping with the fundamental principle that arbitration is consensual, both those provisions of the PILA are based on the idea that a renouncement or an acceptance to arbitrate may be deduced from a party's behaviour and declarations at the outset of a proceeding, such behaviour and declarations to be assessed and interpreted in light of principles of good faith.

114. Accordingly, the question in this case is whether, factually speaking, the Player acted in a manner and made declarations that demonstrated an intention to renounce arbitration under the auspices of the BAT, or at least which led the Club to consider in good faith that a renouncement had occurred.

115. Given the Parties' submissions and the evidence adduced in this case, the Arbitrator finds for the following reasons that, overall, the Player's behaviour and declarations in front of the courts in Madrid cannot be deemed to have represented a definitive renouncement by him to arbitrate his current claim before the BAT on the basis of the arbitration clause quoted above:

- Rightly or wrongly the Player believed that if he did not submit his claim to the Service for Conciliation of Madrid within a given deadline he would lose any option of pursuing a case in front of the labour courts.

- At the outset of the procedure in front of the Madrid courts, i.e. in his request for conciliation of 5 October 2010, the Player made a written submission which made it clear that he (i) did not intend to renounce arbitration and (ii) believed that a BAT

arbitration represented a means to resolve the dispute and perhaps reach a friendly settlement with the Club in a manner which would prevent having to go through a full-fledged court proceeding in Madrid.

- Accordingly, the Player filed his Request for arbitration with the BAT on 19 October 2010, before the conciliation hearing took place in Madrid on 22 October.

- As soon as the Player learnt on the basis of the Club's Answer of 30 November 2010 in this arbitration that the latter deemed the existence of his claim in front of the Madrid courts to constitute a renouncement to arbitrate in front of the BAT, he confirmed on the first date possible (i.e. in his reply brief of 29 December 2010) that such was not his intention and that, on the contrary, if a choice had to be made his intention was to withdraw the claim lodged in the Madrid courts and to continue proceeding only in front of the BAT.

- The Player then effectively withdrew his claim in front of the Madrid labour courts and informed the BAT thereof on 27 January 2011.

116. Given the foregoing sequence of events and the content of the Player's comment on jurisdiction in his first written submission in front of the Madrid labour courts, it is clear that the Player's intention was not to renounce the right to arbitrate in front of the BAT, but rather to preserve that right and to make arbitration a priority over litigation in front of the Madrid labour courts even if the claim was filed first in those courts within a process which the Player initially believed was mandatory.

117. Furthermore, the formulation of the Player's written submission in front of the Madrid courts gives the impression that he was somewhat confused about the exact formal relationship between the two proceedings, i.e. between the claim in front of the Madrid labour court on the one hand and a BAT arbitration on the other hand, but that he believed they could exist in parallel for some period.

118. Nevertheless, as soon as the Player realized that the simultaneous claims could be

deemed contradictory, he withdrew the claim in front of the Madrid courts.

119. The Arbitrator finds that in such circumstances, the Club cannot have believed in good faith that at any time between 5 October 2010 (when the request for conciliation was filed in Madrid) and January 2011 (when the Player withdrew his claim lodged in the Madrid courts) the Player had renounced his right to arbitrate in front of the BAT.

120. Thus, the BAT arbitration clause contained in Clause 8 of the Contract remained in force between the parties and the Arbitrator has jurisdiction to hear the Player's claims.

## 6. Discussion

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

121. 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*" instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

> *"the parties may authorize the arbitral tribunal to decide ex aequo et bono".*

122. Under the heading "Applicable Law", Article 15.1 of the BAT 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."*

123. The Contract itself does not include any choice-of-law clause providing for the application of a national law, while its Clause 8 (and Clause 3 of the Agents' Contract) stipulates that "*The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono*".

124. However, Clause 2, subsection c) of the Contract refers to the Disciplinary Rules which in turn contain two references to Spanish statutory law.

125. Article 1 of the Disciplinary Rules states that *"… in accordance with what is put down in article 6° of the Royal Decree 642/1.984, of the 28th of March*" the Club exercises disciplinary authority over the players and in applying its Disciplinary Rules.

126. Article 16 stipulates that: "*Without detriment to the regulation of faults and sanctions in the above articles, the extinction of a contract by disciplinary sack of the player, will be ruled by what is in the Royal Decree 1.006/85 of the 26th of june, through which the special labor relation of professional athletes and sports players is regulated*" (sic).

127. The Club submits that the foregoing decrees form part of mandatory Spanish labour law and must therefore be applied to the issue of termination.

128. It is a matter of interpretation of the Contract to determine how deciding the case *ex aequo et bono* fits with the references contained in the Disciplinary Rules to certain Spanish Statutes.

129. Concerning the reference in Article 1 of the Disciplinary Rules to the Royal Decree 642/1984, the question of the application of such Statute can be left open because it is only mentioned in confirmation of the Club's authority to apply disciplinary rules, which is not contested in this case in any event.

130. With respect to the reference to the Royal Decree 1006/85 contained in article 16 of the Disciplinary Rules it is significant that the latter provision reserves the application of the Disciplinary Rules themselves, i.e. gives them precedence, by stipulating "**Without detriment to the regulation of faults and sanctions in the above articles**, the extinction of a contract by *disciplinary sack of the player, will be ruled by what is in the Royal Decree 1.006/85 of the 26th of june …* (emphasis added).

131. In light of the foregoing elements, the Arbitrator finds that the Parties' common intention was for any disputes relating to disciplinary faults and sanctions to be governed in

priority by the Disciplinary Rules and resolved *ex aequo et bono*, including the question of whether any such faults can lead to a termination of a player's contract. The foregoing is confirmed by the content of article 15, subsection c) of the Disciplinary Rules since such provision provides that in case of "*very serious faults*" one of the possible sanctions is "*Cancellation of contract and expulsion from Fuenlabrada Basketball*".

132. The Arbitrator shall therefore decide *ex aequo et bono* whether the Club properly applied its own Disciplinary Rules when terminating the Contract for disciplinary reasons or whether the termination was unjustified.

133. However, with respect to any compensation that might be owed in case of an unjustified termination by the Club, the Arbitrator shall also account for article 15.1 of the Royal Decree 1006/1985 invoked by the Club, which provides that "*In the event of an unfair dismissal, without readmission, the professional sportsman shall have the right to a compensation, which if not previously agreed, shall be established by the Court, of at least two monthly payments of his periodic retribution, plus the proportional part corresponding to the supplement for quality and quantity of work perceived during the previous year, for year of service. For its establishment the circumstances that concur must be considered, particularly those referring to the remuneration that was not received by the sportsman due to the anticipated termination*".

134. As far as the Agents' claims are concerned, they shall be decided *ex aequo et bono* in keeping with Clause 3 of their Agreement.

135. 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[2] (Concordat)[3], under

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[2] That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration), and, most recently, of the Swiss Code of Civil Procedure (governing domestic arbitration).

[3] P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

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."*[4]

136. This is confirmed by Article 15.1 of the BAT Rules *in fine,* according to which the Arbitrator applies

> *"general considerations of justice and fairness without reference to any particular national or international law".*

137. In light of the foregoing considerations, the Arbitrator makes the findings below.

## 6.2. Findings

### 6.2.1 The Player's Claims

#### *a) Relating to the 2009-2010 Season*

138. The Player's main claim relating to the 2009-2010 season is for payment of his outstanding contractual salaries, based on the argument that the Club's termination of his Contract was unjustified.

139. Consequently, the preliminary issue that needs to be determined is whether or not the termination was unjustified.

140. It is uncontested that the cause the Club is invoking to justify its termination of the Contract on 17 September 2010 is the Player's alleged misconduct during the first season.

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[4] JdT 1981 III, p. 93 (free translation).

141. At the same time the Club has admitted that at no point during the 2009-2010 season did it ever put the Player on formal notice that he was deemed responsible for any form of misconduct, i.e. warn him in writing, or formally reprimand, fine or sanction him in any manner on the basis of its Disciplinary Rules. The Club submits that oral warnings occurred: "… *the Player had been warned of his behaviour of disrespect and indiscipline by the coach responsible of the first team; which wasn't amended or corrected despite being requested to*".

142. In that respect, the Club has submitted, among others, that: "*It is not the Club's policy to resolve disciplinary matters by fining its players. An effort has always been made to resolve disciplinary problems that arise with players in a positive manner through dialogue … In addition, Mr. THOMAS's case was particularly delicate because he was one of the team's most important players (the best paid) and his observed behaviour seemed surprising. In addition, we were fearful of this reaction taking into account the player's background in similar circumstances and as such it was considered that the most appropriate action to take was to try and tackle the situation in a conciliatory matter … It must be remembered that the CLUB signed a contract of three years so to initiate a disciplinary proceeding for matters of such a nature in the fifth month of the contract would have been suicide*".

143. The Arbitrator finds that both the content of the Club's own Disciplinary Rules as well as general considerations of fairness and equity prevent the Club from relying on alleged acts of misconduct to terminate the Contract if those acts occurred at a prior point in time and never gave rise to any written warnings or disciplinary sanctions as admitted by the Club in its foregoing submission.

144. Indeed, not only do articles 9-18 of the Disciplinary Rules contain a whole gradation of disciplinary faults – including "slight faults", "serious faults" and "very serious faults" – to which corresponding disciplinary sanctions of progressive severity apply, but article 18 of the Disciplinary Rules also expressly states that: "*All fines for serious or very serious faults must be preceded by a letter of charges, it will be given to the interested party, to*

*whom three days will be given for him to make his allegations …*".

145. Furthermore it is a general principle of law – based on fairness – that alleged contractual breaches must normally be preceded by a formal notice of breach, which gives the other party a chance to conform its acts/behaviour and/or explain its position, before termination for cause can be resorted to; and it is a general principle in disciplinary matters that for reasons of fairness sanctions need to be foreseeable, progressive and proportional.

146. In addition, in this case the Club terminated the contract on 17 September 2010 while invoking acts of misconduct that allegedly occurred between January and May 2010, i.e. four or more months earlier, making it even more difficult to justify the absence of any written warnings or lesser sanctions prior to termination.

147. For the above reasons, the Club's termination must be deemed unjustified and invalid, whether or not the Player breached the Disciplinary Rules in the manner alleged by the Club.

148. Having decided that the termination of the Contract was invalid, the next question concerns the amount of compensation the Player is entitled to for the 2009-2010 season. In that relation, it is uncontested that on the date of termination the amount of outstanding salary was USD 93,250 (USD 13,625 outstanding from the instalment due on 5 February 2010; USD 40,625 for the instalment due on 5 March 2010; USD 19,500 for the instalment due on 5 May 2010; and USD 19,500 for the instalment due on 5 June 2010).

149. Since the Player performed for the Club throughout that whole season and the termination occurred after the end of it (and in addition was unjustified for the reasons indicated above) there is no contractual or legal reason for the Player not to be fully compensated for his season's services as a player, while considerations of justice and fairness require such payment.

150. Also, contrary to what the Club appears to be arguing, article 15.1 of the Royal Decree 1006/1985 does not detract from the foregoing, since with respect to compensation such provision expressly reserves what is "*previously agreed*" and stipulates that compensation must correspond to "*at least*" two monthly salaries. In other words, the provision does not set a cap on the amount of compensation and reserves the parties' prior agreement, which in this case exists since the Contract is a "no cut" contract, which under Clause 7 stipulates that the entire salary is due in case of termination.

151. Consequently, the Club owes and will be ordered to pay the entire amount of outstanding salary for the 2009-2010 season, being USD 93,250.

152. Remains the question of whether the Player is entitled to claim interest at 5% on this amount, it being noted that the Claimants have only claimed interest on this amount, i.e. not on any of the other sums being claimed by the Player and the Agents.

153. Although the Contract does not regulate interest for late payments, it is a generally recognized principle embodied in most legal systems, which is underpinned by motives of equity, that late payments give rise to interest – in order that the creditor be placed in the financial position she/he would have been in had payments been made on time.

154. Therefore and despite the Contract not specifying an interest rate, it is normal and fair that interest is due on the late payments. Since the interest rate of 5% per annum being requested by the Player is fair and reasonable in the circumstances of this case, interest will be awarded at that rate.

155. The Claimants have requested interest on the Player's outstanding salaries for the 2009-2010 season as from 5 February 2010. It is an established principle that interest runs from the day after the date on which the principal amounts are due. Consequently, the Arbitrator finds that interest at 5% is to be applied from the day after the due date of each outstanding amount, in accordance with the schedule of payments for the Player's base salary provided in Clause 3 of the Contract and described in para. 148 above.

156. In connection with the 2009-2010 season, the Player is also requesting payment of an amount of EUR 3,900 for unpaid housing rental and of EUR 1,807 for the reimbursements of plane tickets.

157. With respect to the amount being claimed as rent (EUR 3,900), the Arbitrator considers that the Player has not established that the Club owes such amount.

158. It is uncontested that the Player decided to live in a different lodging from the one offered by the Club and that he signed a lease agreement for the housing in question. However, the Club contests it owes the Player any monies to cover the rent of that housing, and the Player has not brought convincing proof of the alleged oral agreement he passed with the Club, whereby the latter would have undertaken to pay him an extra allowance of EUR 11,000 to cover the housing expenses.

159. Furthermore, the Player has not brought proof of the fact that he has or will have to pay to the landlord the amount of EUR 3,900 he is currently claiming from the Club, while exhibit n°1 filed by the latter with its answers of 21 March 2011 tends to demonstrate the contrary, i.e. that no such amount has been paid by the Player and that a higher amount is being claimed directly from the Club by the landlord.

160. Also the amounts being claimed by the Player for payment of rental covering the months of June-July 2010 (EUR 1,300 per month) do not fit with the fact that according to clause 3 of the lease agreement filed by the Player himself, the monthly rental would be reduced by 50% during those months; while at the same time the total amount of EUR 3,900 being claimed is inconsistent with the amount of EUR 6,009.49 the Player apparently recognized was owed to the landlord, according to a declaration of 7 October 2010 they co-signed, which has been filed by the Club as exhibit n° 1 with its answers of 21 March 2011.

161. For the above reasons, the Player's request for payment of EUR 3,900 shall be dismissed for lack of proof that the Club owes such amount or that the Player has actually incurred an equivalent amount of cost for rental during the months of June-

August 2010.

162. Concerning the reimbursement of EUR 1,807 corresponding to airfare for a ticket from Madrid to Indianapolis (19 May 2010) and return (29 August 2010), the Club is not contesting that the expense was incurred or that it would not normally have been covered by the Club on the basis of the Contract.

163. Instead, the Club is invoking an alleged prior decision of the Player to leave the Club and it submits in that connection that: "*Having accepted the commitment to leave the Club, it did not seem appropriate to pay for the plane ticket that included the trip to Madrid. It must be noted that Mr. Thomas intended to be paid for the ticket back to the USA in May 2011*".

164. The Player contests he ever indicated any final intent to leave the Club after the 2009-2010 season or committed to do so, and in light of the contradictory evidence submitted by the Club and the Player in that regard as well as the fact that the Player returned to Madrid on 29 August 2010 and immediately informed the Club by letter of 30 August that he was at its disposal to begin training for the new season, the Arbitrator finds that it is not established that the Player either unilaterally reneged the Contract or led the Club to believe that he would certainly not start a second season (in 2010-2011) with the Club.

165. Accordingly and because it has already been found that the Contract was invalidly terminated by the Club, the Arbitrator finds that considerations of fairness and justice require that the travel expenses in question be covered by the Club in keeping with the Contract.

166. Consequently, the Club shall be ordered to reimburse the Player an amount of EUR 1,807.

*b) Relating to the 2010-2011 and 2011-2012 Seasons*

167. Bearing in mind that the termination of the Contract is deemed unjustified and invalid

for the reasons explained above, considerations of fairness and justice require that with respect to remuneration for the seasons following such termination a balance be found between, on the one hand, the fact that contractually the Player could legitimately expect to benefit from a lucrative contract for another two seasons, and on the other hand, the fact that the Player found a new contract with a Polish club for the seasons in question.

168. Indeed, while it would be unfair and unjust for the Player to financially suffer as a result of an unjustified termination, it would also be inequitable if the Player ended up being unjustly enriched.

169. The question is therefore how to weigh the various benefits obtained by the Player in signing a contract with the Polish club in comparison with the disadvantages and unfulfilled expectations arising for the Player from the Club's sudden termination on 17 September 2010 of the three-year "no cut" Contract he was supposed to continuing enjoying.

170. In the particular circumstances of this case, the Arbitrator finds that it is fair and just that the Player be remunerated for the difference between the salary he was owed by the Club for the 2010-2011 season and the salary he is entitled to for that same season under his contract with the Polish club, i.e. an amount of USD 305,000 (= USD 375,000 – USD 70,000) and that no compensation be given for the 2011-2012 season.

171. The reasons for which the Arbitrator finds that considerations of fairness and justice dictate the foregoing solution are the following:

- The Contract was unduly terminated without forewarning on 17 September 2010, i.e. at a moment in time which made it very difficult for the Player to find and negotiate a new contract under good conditions for the 2010-2011 season.

- *De facto*, the contract for the 2010-2011 season with the Polish club was for a much lower salary.

- On the other hand, the Player was able to obtain an important benefit in kind from signing with the Polish club, since it gave him the opportunity to apply for Polish nationality and the Polish club contractually undertook to assist the Player with obtaining Polish citizenship (see clause 24), such assistance being part of the consideration he received.

- The Player was not in a similarly delicate situation for the 2011-2012 season, since he could begin looking for a possible future transfer from the Polish club to a more lucrative contract elsewhere a year in advance of that season, and furthermore he obviously envisaged that possibility since he managed to negotiate a favourable "Termination option" under clause 18 of his contract with the Polish Club, allowing him to announce until the end of June 2011 if he intended to terminate the contract after the first season, while at the same time he would only be obliged to pay an amount of USD 20,000 for any such early termination without cause (see clause 24 of the contract).

172. Accordingly, the Club shall be ordered to pay the Player a total amount of USD 305,000 as fair and just compensation for the remuneration he lost due to the unjustified termination of his Contract by the Club at the end of the first season.

**6.2.2 The Agents' Claims**

173. With respect to the Agents' fees being claimed for the 2009-2010 season, the Club has acknowledged the amount as follows: "*BALONCESTO FUENLABRADA solely acknowledges the debt relative to the season that was effectively fulfilled, that is 16,250 for each one of the co[m]mercial companies*".

174. Furthermore, contrary to the Club's allegations that those amounts were never invoiced, the Agents have convincingly established that they were claimed and invoiced.

175. Consequently, the Club shall be ordered to pay the principal amount of USD 16,250 to

both U1st Sports Overseas Ltd. and U1st Sports New York as fees relating to the 2009-2010 season.

176. The Agents are also each invoking the contractual penalty under Clause 1 of their Agreement, which provides that the fees payable will be doubled if the entire principal amounts are not paid by 30 June of the relevant season – meaning they are claiming an additional USD 16,250 each for the 2009-2010 season – and requesting payment of the fees that accrue to them under the Agreement for the two subsequent seasons (2010-2011 and 2011-2012).

177. Concerning the contractual penalty, Clause 1 of the Agreement is very clear in providing that: "*The non payment of the aforementioned amounts in the form described above shall carry the following penalties as indemnity for damages and shall be the express penalty 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 each playing season*".

178. Given the fact that the Agents' fees for 2009-2010 are now overdue for more than a year and bearing in mind the clarity of the penalty clause, the Arbitrator deems that considerations of fairness and justice as well as the principle *pacta sunt servanda* require the penalty clause to be applied without reduction.

179. Accordingly, the Club will be ordered to pay each agent an additional USD 16,250 representing the contractual penalty for late payment of their fees for the season 2009-2010.

180. With regard to the Agency fees corresponding to the two further seasons, Clause 2 of the Agents' Agreement is also very clear in that it implies that the Agents' fees cannot be eliminated or reduced if the Contract is terminated without cause (under the meaning of a "no cut" contract), by providing that: "*The termination or suspension of the contract by the Club because of illness, injury or on account of Player's failure to exhibit sufficient skill shall in no way affect the right of the Agents to receive the professional*

*fees agreed upon in this document on the dates mentioned above*".

181. Absent any other relevant factor, considerations of fairness and justice as well as the principle *pacta sunt servanda* would therefore normally require that the fees also be fully honoured in the amounts stipulated for the seasons subsequent to the termination.

182. However, in the circumstances of this case, the Arbitrator finds that considerations of fairness and justice require one particular factor to be taken into consideration when determining how much of such fees the Agents should be entitled to.

183. The factor in question is that under the contract with the Polish club one of the Player's same agents (U1st Sports NY) is indicated as having negotiated it, and is guaranteed the following consideration (see in particular Clause 1 of its Annex 1): a fee of USD 3,500 for the 2010-2011 season and a fee of USD 7,000 for the 2011-2012 season.

184. Consequently, whereas the Club will be ordered to pay U1st Sports Overseas Ltd its complete agency fees pertaining to the 2010-2011 and 2011-2012 seasons – i.e. respectively the sums of USD 18,750 and USD 21,250 – amounts of USD 3,500 and USD 7,000 shall be deducted from the equivalent fees accruing to U1st Sports New York LLC for those seasons, meaning that the Club shall be ordered to pay the latter USD 15,250 for the 2010-2011 season and USD 14,250 for the 2011-2012 season.

**6.2.3 The Club's Counterclaim**

185. The Club is counterclaiming EUR 64,687 on the basis that the termination was for cause and that the disciplinary breaches by the Player, representing the grounds for termination, i.e. the Player's allegedly very serious misconduct in public places, caused economic damage to the Club as a result of its image being tarnished.

186. The Arbitrator finds the Club has not established that the Player's alleged misconduct in several nightclubs was sufficiently visible to the general public or known to that public and/or any partners or sponsors of the Club to have caused a loss of image; and

furthermore the Club has not established any form of causality link between the alleged acts and the economic prejudice invoked, nor, for that matter, proven the existence of such prejudice.

187. Consequently, the Club's counterclaim cannot be admitted either on the basis of the rules of Spanish law invoked by the Club (article 15.2 of the Royal Decree 1006/1985) or for reasons of fairness and justice; and it shall be dismissed.

## 7. Costs

188. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings.

189. On 30 May 2010 - considering that pursuant to Article 17.2 of the BAT Rules "*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT 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 BAT 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 BAT President determined the arbitration costs in the present matter to be EUR 18,000.00.

190. Considering the Claimants prevailed to a large degree in their main claims, it is fair that the fees and costs of the arbitration be borne by the Club and that the latter be required to cover the Claimants' legal fees and other expenses.

191. Given that the Claimants together and the Respondent each paid an advance on costs of EUR 9,000.00 and the Claimants paid the non-reimbursable handling fee of EUR 5,000.00 – which will be taken into account when deciding on the Claimants' total legal

fees and expenses – the Arbitrator decides that in application of article 17.3 of the BAT Rules:

(i) The Respondent shall pay EUR 9,000.00 to the Claimants as reimbursement for the advance on arbitration costs paid by them;

(ii) The Respondent shall pay to the Claimants EUR 13,657 representing the amount of their legal fees and other expenses, those having been submitted (EUR 8,657 + 5,000), being reasonable in amount.

## 8. AWARD

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

1. **Baloncesto Fuenlabrada SAD shall pay Mr. Chris Thomas the following amounts (totalling USD 93,250.00) pertaining to their Contract of 26 May 2009:**

   - **USD 13,625.00, corresponding to amounts outstanding for the February 2010 instalment, plus interest at 5% per annum on such amount from 6 February 2010 onwards.**

   - **USD 40,625.00, corresponding to the March 2010 instalment, plus interest at 5% per annum on such amount from 6 March 2010 onwards.**

   - **USD 19,500.00, corresponding to the May 2010 instalment, plus interest at 5% per annum on such amount from 6 May 2010 onwards.**

   - **USD 19,500.00 corresponding to the June 2010 instalment, plus interest at 5% per annum on such amount from 6 June 2010 onwards.**

2. **Baloncesto Fuenlabrada SAD shall pay Mr. Chris Thomas USD 305,000.00, as compensation for salaries pertaining to the 2010-2011 season.**

3. **Baloncesto Fuenlabrada SAD shall pay Mr. Chris Thomas EUR 1,807.00, as reimbursement for the cost of airfare.**

4. **Baloncesto Fuenlabrada SAD shall pay U1st Sports Overseas Ltd. the following amounts:**

   - **USD 16,250, as compensation for fees for the 2009-2010 season.**

   - **USD 16,250, as a penalty for late payment of fees relating to the 2009-2010 season.**

   - **USD 18,750, as compensation for fees for the 2010-2011 season.**

- **USD 21,250, on 5 November 2011, as compensation for fees for the 2011-2012 season.**

5. **Baloncesto Fuenlabrada SAD shall pay U1st Sports New York LLC the following amounts:**

   - **USD 16,250, as compensation for fees for the 2009-2010 season.**

   - **USD 16,250, as a penalty for late payment of fees relating to the 2009-2010 season.**

   - **USD 15,250, as compensation for fees for the 2010-2011 season.**

   - **USD 14,250, on 5 March 2012, as compensation for fees for the 2011-2012 season.**

6. **Baloncesto Fuenlabrada SAD shall pay to the Claimants an amount of EUR 9,000.00 as reimbursement for the advance on arbitration costs paid by them.**

7. **Baloncesto Fuenlabrada SAD shall pay to the Claimants an amount of EUR 13,657.00 as reimbursement for their legal fees and expenses.**

8. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 8 June 2011

Quentin Byrne-Sutton

(Arbitrator)