



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0396/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Anthony Joseph Gaffney

- Claimant 1 -

Mr. Carlos Ayesa

- Claimant 2 -

Both represented by Mr. Carlos Ayesa

vs.

Club Joventut Badalona S.A.D.

Ponent, 143-161,
08912 Badalona, Spain

- Respondent -

represented by Mr. Josep Via Marcó,
attorney at law, Spain

1. The Parties

1.1 The Claimants

1. Mr. Anthony Joseph Gaffney is a professional basketball player (hereinafter referred to as “the Player” or “Claimant 1”).
2. Mr. Carlos Ayesa is a basketball agent (hereinafter “the Agent” or “Claimant 2”) and is representing the Player.
3. Claimants 1 and 2 are referred to jointly as “the Claimants”.

1.2 The Respondent

4. Club Joventut Badalona S.A.D. (hereinafter also referred to as “the Club” or “the Respondent”) is a professional basketball club in Spain.

2. The Arbitrator

5. On 13 May 2013, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter 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

6. On 31 July 2012, the Player signed an employment contract with the Club, whereby the Player was engaged for the 2012/2013 season (the “Contract”).

7. The Contract is in bilingual format (Spanish and English).
8. Article 5 of the Contract provides that:

*“During the contract period, all compensation and bonuses are considered guaranteed to the Player by the Club. In the event the Player cannot perform as a professional player due to diminished skills, sickness, injury, or death should in no way affect his right to receive all amounts and compensation detailed in the third paragraph or the bonuses indicated below. [...] If any of the amounts specified in this contract, **agent fee included** [emphasis added], exceeded more than 30 days of the date specified, the player shall have the right to sit and not perform in any practice, game or event for the Club until the payment is due and still maintain all the rights and payments under this agreement. If after 40 days any amount specified in this contract is still due, **agent fee included** [emphasis added], the Player shall be free to sign for any club in the world with no further compensation to the Club.”*

9. Article 11 of the Contract stipulates that:

“If the Club proceeds to unilaterally rescind this agreement without justification, the Player and his agent Carlos Ayesa has the right to claim the totality of the monetary amounts agreed upon in this Agreement. This clause will work even with illness, damage or player’s death during the season.”

10. On the same date, the Club and the Agent signed an Agreement covering the latter’s agency fees (the “Agent’s Agreement”), according to which the Agent would be paid a total amount of USD 18,500 in two installments of USD 9,250, on 1 October 2012 and 1 February 2013 respectively.
11. Between December 2012 and February 2013, the Agent sent the Club a number of written notices and reminders by email regarding the fact that the Player was unhappy because his salaries were being paid late.
12. On 31 January 2013, the Agent sent the Club an invoice in an amount of USD 9,250 for the second half of his fee, and thereafter he sent the Club reminders in emails of 11, 12 and 20 February 2013.
13. By email of 27 February 2013, the Club replied:

“Hola Carlos,

He tardado unos días en contestarte porque tenía esperanzas que se solucionara un tema importante de cobros y poder decirte que, con retraso, la comisión se había pagado.

A día de hoy no he podido ordenar ninguna de las comisiones comprometidas para este mes de febrero y lamentablemente no puedo definir en que fecha las podré atender.

Espero en breves días poder decirte algo concreto.

Gracias. Saludos,

Rosalía Pinet Gerente”

Translation into English by the Claimants:

“Hello Carlos, I spent several days to reply because I had hopes that an important income pending was going to be resolved and should tell you that, with delay, the fee had been paid [...] As of today I couldn’t pay any of the fees promised for this month of February and sadly I cannot define which date I will be able to attend them. I hope in a few days I can tell you something more concrete [...] Thanks, regards, Rosalia Pinet Manager”.

14. On 3 March 2013, the Agent put the Club on notice again, this time invoking article 5 of the Player’s Contract (which was quoted in the email). He stated that, in keeping with article 5, the Player was entitled to cease performing on 4 March 2013 and that if the Agent’s outstanding fee remained unpaid on 8 March the Player would not play in the game in Murcia on Sunday, 10 March.
15. On 6 March 2013, the Agent copied his email of 3 March 2013 to the Club a second time stating that he was doing so because the latter had failed to reply.
16. On 7 March 2013, the Agent forwarded to the Club a notice letter from his partner agent representing the Player in the United States, Mr. Sam Porter.
17. In this letter, Sam Porter again quoted article 5 of the Player’s Contract and repeated that failing payment of the outstanding part of the agent’s fee the Player would cease performing in practices and in games from 8 March onwards. He added, among others:

“Moreover, if on March 14th, 2013 payment has still not been made, Mr. Gaffney will have the right under the Agreement to leave your Club, and we will be forced to go to FIBA BAT in order to collect all of Mr. Gaffney’s outstanding salary for the season, as well as the remaining portion of the agent fee”.

18. On 8 March 2013, the Club's manager sent an email to the Agent proposing that they talk by telephone about the matter and the Agent replied he was available any time.
19. On 13 March 2013 the Agent sent the Club's manager an email stating that he was attaching a letter whereby the 40-day delay in payment by the Club was being invoked in accordance with the Player's Contract, as the Agent had already informed him earlier that day by telephone would be the case.
20. The attached letter, signed by the Agent, repeated in essence what had been stated in the letter of 7 March with regard to the Club's delay in payment and the reasons for which the Player had ceased performing as of 8 March. It added (English translation by the Claimants):

"[...] Seeing that this decision has not been enough to make the Club meet such payment, we announce that if that amount is not fulfilled today, tomorrow March 14th 2013, 41 days after the payment date mentioned, in addition to maintaining the rights and amounts specified in that clause, we will execute the option of being free to sign for any club in the world with no further compensation to the Club, as reads the above mentioned clause [...] If any conflict arises we will submit to the Arbitral Tribunal of basketball of FIBA (BAT), as the contract specifies in its twelfth clause ...".

21. On 14 March 2013, the Club's manager sent the Agent an email attaching a letter of reply to the latter's letter of 13 March. In his reply, the Manager stated (English translation of Claimants):

"Dear Carlos,

We have received today your e-mail in which you refer to non-payment of US\$ 9,250, and wherein you state that if such payment is not made in full by March 13, as of the 14th you would exercise the player's option to be free to sign for any club, without any form of compensation to us. Almost simultaneously we also found that the player, on his Twitter account, said his contract was terminated, stating that he is no longer a club player ("I regret to say that I am no longer an employee of Joventut Badalona") [...] In light of such unilateral termination, we would submit the following: [...] The Club, as you know, has just come out of reorganization proceeding, in which it has had to restructure its debt payments, which required a reorganization of our finances, and for this reason the Club has delayed the payment of commission to Gafney's agent [...] We are doing everything possible to pay the agent the US\$ 9,250 as soon as possible, to solve this issue, so it was with surprise this morning when I got the email you sent yesterday March 13, at 11:04 P.M. (when no one was in the club) in which you state your intention to terminate

the contract on the 14th of March (that is 56 minutes later) in case the debt is not satisfied on that day, that is, a period of 56 minutes; and almost simultaneously, the player published in his twitter account the termination of his contract. In light of this, it is only logic to deduct that your intention is not to collect the USA agent commission, but rather, terminate the contract, thus seeking the appearance of legality. Notwithstanding, as you claim you will seek resolution of the dispute before the FIBA's BAT, I have to remind you that rights are to be exercised in good faith; and the Arbitration Court will issue an award based on equity arbitration (ex aequo et bono); and your actions will be taken into account [...] Apparently you consider that clause 5 of the contract of July 31, 2012 in an arbitrary fashion, to your sole benefit, as the clause provides two options for the player, the first, within 30 days after late payment of any amount, the (player) can cease his activities, although continuing his affiliation with the Club, and keeping all economic rights; and second, exclusive of the first, that if after 40 days the amount outstanding is not paid, the Player has the option to terminate his contract, a termination inherently entails extinction of the Club's financial obligations, and for this reason, it has been specified in this case the player should not pay any amount to the Club as compensation for the unilateral early termination by the player, on the understanding that the early termination itself would be sufficient compensation by the player. So you cannot expect to have, at the same time, the option to be free to sign for any team and also to collect the contract's full amount, as the player's economic rights end on the same day of rescission; for this reason, and unless otherwise determined, we understand the player compensation will be satisfied until today".

22. On 14 March 2013, the Agent responded by email to the Club's letter of the same day. In his email the Agent stated (English translation by the Claimants):

"I don't understand your surprise about the execution of this clause when during the conversation we had yesterday March 13th 2013 at 2pm, my time, 7 pm time in Spain, I already announced you directly, the president Jordi Villacampa that was on the phone too and the Sports director, Jordi Cairo, during a following telephone conversation, that we were going to execute this option the following day, it means, today, if you didn't face the debt, and I told you that once back in my office I was going to draft the document and was going to send it to you [...] And this is exactly what I did, sending the document by fax before 6pm my time, time in which I am usually still at work in my office. I remind you that there was no reason to advise you of anything yesterday March 13th as it is today 14th when officially following the letter of the contract, we execute the way out. But I sent it to you yesterday so today the 14th, first time in the morning your time, we could all have notification of it [...] Don't look for bad intentions here because there are not. You well know I've been more than a month asking you to fulfill the payment, on the phone, by email, by fax without success, there are enough written proofs. If we would have wanted to leave the logical step would have been not demanding anything and execute the way out without previous notice. But we have notified you several times, even the player has executed the first part of the clause allowing him to stop practicing and playing games after 30 days so you would realize that you have to fulfill the contract, but you still didn't. All this deeply appeared on the media, the Club's president himself declared to the media that Gaffney would never play anymore for the Club, so it is not credible that him leaving was a surprise for you [...] It would have been simple to pay 9,250 dollars pending since a month and a half to keep the player as part of the Club and this clause wouldn't have

been executed, but you have to understand that if you were unable to put together this amount during all this time, hardly you would be able to fulfill all the payments pending, were one monthly salary and one image rights amount of the player due dated already without being paid ...”.

23. Thereafter, the Player left the Club and the Claimants deemed the Club to owe them all the outstanding amounts stipulated under the Player's Contract and the Agent's Agreement in relation to the 2012/2013 season.
24. The Club took the position that the Player's departure was abusive in the circumstances and that, in any event, it only contractually owed the amounts of salary and agency fees that had become due before his departure from the Club.
25. Between March and May 2013, the Club therefore paid to the Claimants all the contractual amounts that had become contractually due until 1 March 2013 included, and in these proceedings submitted that the only outstanding amount due today was USD 7,173.83, representing 13/30 parts of the Player's March 2013 salary, since he had left the Club on 13 March 2013.
26. Because the outstanding part of the Agent's fee which had become contractually due before the Player's departure from the Club (USD 9,250) was paid by it in an amount of USD 9,205 during these proceedings, the Agent has reduced his claim to a principal amount of USD 45 and interest for the period during which the payment was delayed.
27. Furthermore, the contractually-owned amounts which have been paid by the Club to the Player during these proceedings are uncontested.
28. Consequently, the Player has reduced his claim to the sum of the salary installments that remain outstanding in relation to the total salary contractually stipulated for the 2012/2013 season.

3.2 The Proceedings before the BAT

29. On 22 March 2013, the BAT received the Claimants' Request for Arbitration dated 15 March 2013, filed in accordance with the BAT Rules, and on 26 March 2013 received the non-reimbursable handling fee in an amount of EUR 1,976.

30. On 21 May 2013, the BAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

<i>"Claimant 1 (Mr. Anthony Joseph Gaffney)</i>	<i>EUR 3,000</i>
<i>Claimant 2 (Mr. Carlos Ayesa)</i>	<i>EUR 1,500</i>
<i>Respondent (Club Joventut Badalona S.A.D.)</i>	<i>EUR 4,500"</i>

31. On 31 May and 6 June 2013, the Claimants and the Respondent paid their respective shares of the advance on costs.

32. On 14 June 2013, the Respondent filed its Answer dated 13 June 2013.

33. By Procedural Order of 20 June 2013, a second round of submissions was fixed.

34. On 28 June 2013, the Claimants filed their Reply.

35. By procedural instructions of 1 July 2013, the Claimants were required to clarify what contractual payments they acknowledged to have received.

36. On 5 July 2013, the Claimants submitted their position on the status of the contractual payments received.

37. On 8 July 2013, the Respondent filed its observations dated 4 July 2013 on the Claimants' Reply.

38. By Procedural Order of 10 July 2013, the Parties were invited to indicate whether any

compromise might be reached towards a settlement. Alternatively, the Parties were invited to file their statements of costs and the Claimants to update/modify their prayers for relief in accordance with the content of their submission of 5 July 2013.

39. On 17 July 2013 both Parties filed their statements of costs and the Claimants submitted their updated prayers for relief. Responding to a question from the Arbitrator, the Claimants added that:

“Upon request of the Tribunal about Mr. Gaffney’s activity after returning home, He [sic] didn’t play for any Club for the rest of the season, furthermore he had no income since then. My agency tried to seek a new club but no contact made generated an offer. Please note that several markets in Europe closed the signing period on February 28th 2013 and that the ACB League allowed transfers of players within the ACB only until the last game of the first round of the Regular Season, this year on January 13th 2013, which made Mr. Gaffney ineligible for the ACB”.

40. On 22 July 2013, the proceedings were closed and the Parties invited to file any observations they might have on the other party(ies)’ statement of costs.
41. On 26 July 2013, the Parties filed their comments on the other party(ies)’ statement of costs.

4. The Positions of the Parties

4.1 The Claimants’ Position

42. In a nutshell and in substance, the Claimants contend that:
- The Club had been late in paying the Player’s salaries and was more than 40 days late in paying the second half of the fee owed to his Agent.
 - Consequently, under the terms of the Player’s fully-guaranteed Contract and in particular article 5 thereof, he had been entitled to cease performing when the Club was more than 30 days late in paying his Agent’s outstanding fees and to leave the Club when the delay exceeded 40 days, without losing the right to his entire

contractually-stipulated salary for the 2012/2013 season.

- When the termination was given, the Club had received more than a fair warning, since it had been put on written notice on several occasions and the Player had effectively suspended his performance before the termination occurred (as he was contractually entitled to do due to the delay in payment exceeding 30 days), thereby demonstrating that the notices had been made in earnest and would lead to termination.
- Moreover, the Club was given a final clear ultimatum by telephone on 13 March that if it failed to pay the outstanding part of the Agent's fee the next day (14 March) the Contract would be deemed terminated and the outstanding remuneration claimed.
- In addition, the Club cannot feign surprise since, when the Player suspended his performance, it announced to the media that the Player would not be playing for the Club any longer.
- The amount of unpaid contractually-stipulated remuneration relating to the 2012/2013 season is uncontested.
- Although the major part of the outstanding amount due to the Agent was finally paid on 3 April 2013, the payment was only made during this proceeding well after the Contract was terminated and USD 45 remains missing. Consequently, the Agent is entitled to be paid the outstanding principal amount of USD 45 and interest on the late payment between the contractually due date and 3 April 2013.

43. In their submission of 17 July 2013, the Claimants updated/modified their prayers for relief and requested payment as follows:

For the Player:

"USD 62,152 for pending salary and image specified in the guaranteed contract"

USD 4,511 for 5% interest of the amount originally owed and paid late or still pending (5% of USD 90,220)

TOTAL OF USD 66,663”

For the Agent:

“USD 2677,60 for BAT Handling Fee paid in the name of the Claimant 1 and 2

USD 6057.17 for Advance in Costs paid in the name of the Claimant 1 and 2

USD 5,000 for legal assistance with the Attorney in Law Mr. Andrew Baker

USD 266 for official document translations

USD 45 for pending fee (9,205 received from the 9,250 stipulated)

USD 462,50 for 5% interest in the delay of the payment of the fee due on February 1st 2013 and paid on April 3rd 2013

TOTAL OF USD 14,508.27”

4.2 Respondent's Position

44. In a nutshell and in substance, the Respondent contends that:

- The Club did not breach the Contract or any of its duties because according to the terms of article 5 of the Contract it has no duty to pay any further salaries to the Player if he decided to leave the Club of his own accord due to late payments.
- This is clear from the wording of article 5 itself, which does not mention any duty to pay future salaries if the Player's regains his freedom to play elsewhere, but also by contrast with the explicit wording guaranteeing future salary payments that the Club accepted in other players' employment contracts, which demonstrate that in this case the intentions were different.
- Furthermore, the Player acted unfairly and in bad faith because it was the Agent's fees that were more than 40 days late, not the Player's own salary, when he

decided to leave the Club, and he knew the Club was in financial difficulties but was still planning to meet its obligations as all the other players understood who stayed with the Club and honoured their contracts by continuing to perform in spite of the difficulties; those players having since been entirely paid. Also the Player was not in any financial need given the amount of salary he had already been paid by March 2013 as well as the considerable fringe benefits that he was enjoying under the Contract.

- The articles in the media about the alleged problems between the Club and the Player are not reliable, whereas his tweets demonstrate that he was not intending to remain with the Club.
- The Club therefore has no contractual liability; and principles of justice and fairness should in any event prevent the Player from claiming any compensation beyond the USD \$7,173.83 the Club is offering as compensation for the outstanding part of his March 2013 salary (13 days) which remained unpaid prior to his departure.

45. In its Answer of 13 June 2013, the Club's prayer for relief stated:

"We request that the claim presented by the Player Anthony Joseph Gaffney and the Agent Carlos Ayesa be rejected, having established that no outstanding sum is owed to the Agent, and that the Player is only owed the sum of \$7,173.83 (US Dollars); that the plaintiff's pay compensation for all costs and expenses of the Basketball Arbitration Tribunal, and legal costs".

5. The Jurisdiction of the BAT

46. Pursuant to Article 2.1 of the BAT Rules, "[t]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland". Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).
47. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

48. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.¹
49. The jurisdiction of the BAT over the dispute results from the arbitration clauses contained under article 12 of the Contract and article 8 of the Agent's Agreement, which read respectively as follows:

"Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be definitively resolved in accordance with the BAT Arbitration Rules, by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English, and the arbitrator shall decide the dispute ex aequo et bono. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties domicile. Awards of the BAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. To the extent legally possible under Swiss Law recourse to the Swiss Federal Tribunal against awards of the BAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal shall be excluded"

"Any dispute arising from, or in relation to, the present contract shall be submitted to the FIBA Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved definitively in accordance with the BAT Rules by a single arbitrator appointed by the BAT 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. The arbitrator shall decide the dispute ex aequo et bono."

50. The foregoing arbitration agreements are in written form and thus fulfil the formal requirements of Article 178(1) PILA.
51. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreements under Swiss law (referred to by Article 178(2) PILA).
52. The arbitration agreements cover all aspects of the dispute being raised in this proceeding and all the Parties to this proceeding are bound by them.

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

53. In addition, none of the Parties challenged the jurisdiction of the BAT in their submissions.

54. For the above reasons, the Arbitrator has jurisdiction to adjudicate the claims submitted by the Player and the Agent against the Club.

6. Discussion

6.1 Applicable Law – ex aequo et bono

55. 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”.

56. 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.”

57. Article 12 of the Contract and article 8 of the Agent’s Agreement provide that if and when any dispute between the Parties hereto is submitted to the BAT the “... *arbitrator shall decide the dispute ex aequo et bono*”.

58. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Claimants against the Club in this arbitration in front of the BAT.

59. 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'arbitrage² (Concordat)³, 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.”⁴

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

“a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case.”⁵

61. 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*”.

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

6.2 Findings

63. The two main issues which need deciding are whether the Player was entitled to terminate his Contract and leave the Club when he did, and, if so, with what financial consequences for himself and the Club.

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

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

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

⁵ Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717. pp.625-626.

64. In that connection and as a preliminary matter, the Arbitrator notes that – based on the wording of the various notices and of the termination letter sent by the Agent to the Club and given the Player’s actions, notably his decision to interrupt his performance due to the late payments invoked – it is clear that the notices and the termination letter were issued on behalf of the Agent and the Player.
65. Although the Agent has given up most of his claim after receiving a payment during the course of this proceeding, he is still claiming a principal amount of USD 45 and interest for late payment. That remaining part of his claim will therefore also be addressed.
66. With respect to the Player’s right to terminate, the situation is somewhat unusual to the extent his termination of the Contract and departure from the Club were essentially motivated – contractually speaking – by the late payment of the Agent’s second instalment of the commission rather than by the late payment of his own salary, i.e. it was the late payment of the Agent’s fees which was invoked by the Claimants in their notices and termination letter to the Club.
67. Since article 5 of the Contract clearly stipulates that one of the possible grounds for the Player to suspend his performance and to subsequently terminate the Contract is the late payment of the Agent’s fees, the Arbitrator finds that, in principle, termination on such basis was admissible.
68. Bearing in mind the general principle “*pacta sunt servanda*”, the Claimants were entitled to invoke this contractual ground for termination and there is no evidence that the term was negotiated in an unfair fashion, i.e. that the Club’s consent to it was defective in any manner.
69. The Club contends that, factually speaking, the Claimants invoked and applied the term (article 5) in an unfair manner, the Player’s goal having been to obtain a windfall allowing him to receive a guaranteed salary without pursuing his performance, thanks only to the delayed payment of half of the Agent’s commission.

70. In that relation, the Club invokes, among others, the fact that the termination letter – which was to take effect on 14 March 2013 – was received by the Club late on 13 March 2013, thereby effectively leaving the Club less than one hour and at night to make the requested payment, i.e. that the process was abusive and indicative of the unworthy goal being sought. In that connection, it points to the fact that the Player sent out a Tweet already during the day of 14 March indicating that he had left the Club.
71. The Club also implies that the termination came as a surprise given the content of a telephone call that had taken place on 13 March 2013 between a representative of the Agent and a representative of the Club.
72. Furthermore, the Club invokes the financial difficulty it was in at the time, the fact that the Claimants were aware of this and the fact that other players on the team accepted delays in payment and were finally paid in full.
73. In light of the emails and letters exchanged between the parties in February and March 2013, the Arbitrator finds that the evidence on record does not uphold the Club's foregoing contentions.
74. Those written communications in February-March 2013 establish that although the Claimants were systematic and rigorous in invoking and applying this particular term of article 5 of the Contract, they did so in a fair manner by making it clear from the outset that they intended to invoke it and by putting the Club on formal notice on three occasions in an explicit fashion (quoting the clause in question).
75. Moreover by first putting the Club on notice that the Player would suspend his performance upon the delay in payment of the Agent's fee reaching 30 days and by actually enforcing that term (the Player stopped playing) before enforcing the right to terminate, the Claimants made it obvious that they were serious and that termination would follow if the payment was not received. Thus, in good faith the Club could and should have felt warned.

76. There is no evidence that during the telephone conversation of 13 March 2013 the Agent promised anything that was contradicted by him sending the termination letter at the end of the same day with a final ultimatum requiring the Club to pay the amount owed by the next day (14 March).
77. Contrary to what was stated in the Club's reply at the time on 14 March, the Agent's letter of 13 March did not imply that the Club had to pay within the next hour but rather within the next day, while there is no evidence that the club attempted to make the payment that day.
78. Furthermore, given the prior notices that had been sent by the Claimants to the Club, the Arbitrator finds that giving a final ultimatum to the Club to pay within the next day cannot be deemed unfair, especially since the Player had already demonstrated by his actions that the terms of article 5 of the Contract would be strictly applied. In addition, although the Player does seem to have sent out a Tweet to his fans at some point during the day of 14 March, it is unclear from the evidence at what time this occurred and in any event he may have felt pretty sure that the Club would not be paying, as actually turned out to be the case.
79. Therefore, the Arbitrator does not find that the Tweet is, in itself, a sign of bad faith or of a contradictory attitude of the Player, bearing in mind also that although articles in the media are not necessarily reliable and cannot therefore easily be accepted as proof of a fact, there were several articles in the Spanish newspapers as early as 9 March 2013 allegedly quoting the Club stating that it would not be maintaining the Player on its team due to him having refused to play a game. Even if the newspapers were misquoting the Club, the articles were unfortunately there for the public and the Player to see.
80. Finally, the fact that other players may have been willing to be more patient with the Club is not, in itself, a sufficient reason to consider that the Claimants acted unfairly. Indeed, how much patience a creditor is willing to have, particularly if a debtor's

financial difficulties are of no secret, is a personal question and depends on the circumstances. Players may feel different degrees of loyalty towards their clubs and/or have different needs, opportunities, plans and so forth.

81. For the above reasons, the Arbitrator finds that – despite article 5 being somewhat unusual in content (as far as it allowed the Player to terminate the Contract for non-payment of the Agent’s fees alone) and although the Claimants were strict and quite tough in their application of the contractual terms – the Claimants were in their right and did not act unfairly.
82. Situations could arise in which a clause of this type could be applied in an unfair manner for the Player and/or for the Club, e.g. if a conflict of interest arose between the Agent and the Player. However, the Arbitrator finds that this did not occur in this case. The Arbitrator is also aware of Article 3-158.u of the FIBA Internal Regulations governing Players’ Agents which provides that a FIBA-licensed agent has a duty “*never to terminate, encourage or be involved in the termination of a player’s contract on the basis of non-payment of the agent fee.*” The Arbitrator notes that the Parties chose to include different terms in the Contract and shall now abide by the bargain they struck with respect to their contractual rights and obligations, bearing in mind the factual circumstances of this case. On the other hand, the duties of a FIBA-licensed agent are linked to possible disciplinary sanctions, which fall within the exclusive jurisdiction of FIBA and may not be implemented by the BAT.
83. Having determined that the Player was entitled to terminate the Contract when and in the manner he did, the question remains whether he was also entitled to claim the full outstanding part of his contractual compensation for the 2012/2013 season.
84. The Club argues that such was not the case because the wording of article 5 of the Contract only stipulates that if the Player becomes free to leave the Club due to late payments, he is entitled to leave without paying any compensation to the Club but does not provide that the Player is entitled, in addition, to his entire outstanding contractual

salary.

85. In support of its interpretation of article 5, the Club has invoked the content of the equivalent provision in its contracts with certain other players, wherein the departing player's right to also claim the outstanding part of his salary for the season is expressly stipulated. According to the Club, those provisions in other contracts demonstrate that if in this case the parties' intention had been to allow the Player to terminate his Contract and claim outstanding salaries, this would have been expressly stipulated.
86. Overall, the Arbitrator finds that the Club's interpretation of article 5 of the Contract is not sustainable for several reasons.
87. First, the terms of the Contract (notably articles 5§1 and 11) correspond to those of a so called fully-guaranteed contract, which normally implies that if the club terminates without cause or the player terminates for good cause, the outstanding fixed contractual remuneration remains due. Accordingly, under article 11 of the Contract, the Player is entitled to his full outstanding salary if the Club terminates the Contract without cause.
88. The Arbitrator finds therefore that if the Parties intended there to be an exception where the Player terminated for good cause (due to late payments by the Club), this exception could and should have been explicitly stated, which is not the case in article 5. Otherwise, the Player could in good faith believe that a full guarantee applied.
89. Second, the fact that the Club incorporated different language in contracts with other players is irrelevant in this case – both contractually and in relation to principles of good faith – because there is no evidence that the Player was aware of those other contracts and he could not therefore in good faith be expected to interpret the Club's intentions on such basis when his Contract was negotiated/signed.
90. Finally, the Arbitrator notes that the final sentence of article 5 of the Contract (in both the English and Spanish versions) is not very logical or comprehensible in any event

because it is difficult to understand why the Player would owe the Club any compensation if he were terminating the Contract for good cause due to late payments.

91. For the above reasons, the Arbitrator finds that the Player having terminated the Contract for a valid cause under article 5, he was entitled to claim all the outstanding amounts due to him under the Contract for the 2012/2013 season.
92. Concerning the Player's outstanding remuneration (corresponding to salaries and image rights), the Parties agree that all the payments contractually due up until 28 February 2013 (included) were ultimately paid. However, the Claimants allege that the two last payments were made late and that there was a minor shortfall in the amount received.
93. Given the manner in which the Claimants have formulated their final prayers for relief, it is difficult for the Arbitrator to determine exactly what minor shortfall in the two payments the Player is invoking, whereas the bank statements adduced by the Club tend to prove it ultimately paid the entire contractual amounts due until 28 February 2013, minus USD 379 in various sundry costs it had covered on the Player's behalf, such as mobile phone expenses.
94. Furthermore, when requesting the payment of a lump sum of USD 4,511 for late interest, the Player's calculation does not distinguish between the various delays invoked on different principal sums (the Player is requesting the foregoing sum of interest "... *on the amount originally owed and paid late or still pending*"), while at the same time any principal amounts which remain outstanding today are still bearing interest, meaning that such interest should not be capitalized.
95. For the above reasons, the Arbitrator finds that Player has not established what shortfall there might be to claim on the principal amounts paid by the Club to cover the contractual instalments owed up until 28 February 2013, nor what amount of interest might have accrued on such sums. Those claims are therefore rejected, except that, as indicated below, running interest will be awarded on any other principal amounts

awarded for payments that were due by the Club after 28 February 2013 and which are still outstanding.

96. In light of the evidence, the total amount of the Player's contractually-stipulated remuneration which the Arbitrator considers to remain due, represents **USD 61,665**, corresponding to the sum of the instalment of 30 March 2013 (USD 16,555), of the two instalments of 30 April (USD 12,000 for image rights and USD 16,555 of salary) and of the instalment of 30 May (USD 16,555); subject however to the Player having respected his duty to mitigate damages by diligently seeking another employment for the remainder of the season.
97. With respect to the duty to mitigate, the Arbitrator notes that the termination came relatively late in the season (14 March 2013) and that it was therefore not an easy task to find a new club within the season for a similar salary.
98. That said, it is also true that the Player and his Agent could have begun anticipating the possible outcome at an earlier date, during the month of February 2013, since the Club had regularly paid the Player late and the Agent's relatively small fee remained unpaid, while at the same time it was not unknown that the Club was in financial difficulty. Furthermore, although the Claimants have indicated that certain markets were closed and that the Player did make some attempts to find a new club, no evidence of those efforts was adduced.
99. In view of the foregoing circumstances and the evidence on record, the Arbitrator finds that the Player has not established that it was impossible for him to find another club – even if that required accepting a lower salary – or that he made the utmost efforts to diligently anticipate the eventuality of having to seek a new Club given the possibility that he would be terminating the Contract.
100. As a result the Arbitrator finds it fair in the circumstances to reduce, *ex aequo et bono*, the Player's compensation by an amount of **USD 16,555**, equivalent to the amount of the Player's final salary instalment which was due on 30 May 2013 under article 3 of

the Contract.

101. Hence, the Player shall be awarded a principal amount of **USD 45,110** (USD 61,665 - USD 16,555), corresponding to the sum of the instalments due on 30 March and 30 April 2013.
102. With respect to interest on the amount being awarded to the Player, the Arbitrator finds it fair that, in keeping with the BAT jurisprudence, interest on the three late payments be awarded at a rate of 5% per annum from the day after the respective contractual due dates (the due dates being 30 March 2013 for one of the instalments and 30 April for the two others).
103. With respect to the Agent's outstanding claim for a principal sum of USD 45 (due to having allegedly finally received USD 9,205 instead of USD 9,250), the Arbitrator finds that according to the bank statements filed it would appear that the Club ordered its bank to pay the full amount and that the minor difference is therefore due to banking costs which may have been deducted by the Agent's bank. Consequently, it is unclear that it would be fair to award such amount to the Agent and this claim is rejected.
104. On the other hand, it is clear that the second half of the Agent's commission was only received on 3 April 2013, whereas it was due on 1 February 2013. Consequently, the Agent shall be awarded interest from the day after the second commission was owed (2 February) until the day when it was received (3 April 2013), i.e. for a period of 60 days, which, capitalized and rounded off, represents an amount of USD 76 (USD 9,250 x 5% : 365 x 60).

7. Costs

105. 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 reasonable legal fees and expenses incurred in connection with the proceedings.

106. On 10 October 2013 – 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 8,988.18.
107. Considering the Claimants prevailed in a large part of their claims, it is fair that the fees and costs of the arbitration be borne by the Respondent and that it be required to cover its own legal fees and expenses. However, because the Claimants have not adduced any evidence regarding a lawyer’s invoice of fees and their submissions in these proceedings do not evidence the involvement of a lawyer, the Respondent’s contribution to the Claimants’ costs shall be limited to its invoked translation expenses of USD 266 and compensation for the sum of the non-reimbursement fee paid to the BAT by the Claimants.
108. Given that the Claimants paid an advance on costs in an amount of EUR 4,500 as well as a non-reimbursable handling fee of EUR 1,976 (which form part of the Claimants’ expenses), whereas the Club paid its advance on costs in an amount of EUR 4,500, the Arbitrator decides that in application of article 17.3 of the BAT Rules:
- (i) The Club shall pay EUR 4,500 to the Claimants, being the amount of the costs advanced by the Claimants.
 - (ii) The Club shall pay to the Claimants EUR 1,976 for the non-reimbursable fee, plus USD 266 for translation expenses. This amount does not exceed the maximum



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amount stipulated in Article 17.4 of the BAT Rules.

8. AWARD

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

- 1. Club Joventut Badalona S.A.D. shall pay Mr. Anthony Joseph Gaffney the following amounts as compensation for unpaid salaries:**
 - **USD 16,555.00, plus interest at 5% per annum from 31 March 2013 onwards.**
 - **USD 12,000.00, plus interest at 5% per annum from 1 May 2013 onwards.**
 - **USD 16,555.00, plus interest at 5 % per annum from 1 May 2013 onwards.**
- 2. Club Joventut Badalona S.A.D. shall pay Mr. Carlos Ayesa an amount of USD 76.00 as the capitalized interest due on the late payment of the second instalment of his agent commission.**
- 4. Club Joventut Badalona S.A.D. shall pay Mr. Anthony Joseph Gaffney and Mr. Carlos Ayesa an amount of EUR 4,500.00 as reimbursement of their arbitration costs.**
- 5. Club Joventut Badalona S.A.D. shall pay Mr. Anthony Joseph Gaffney and Mr. Carlos Ayesa an amount of EUR 1,976.00 and an amount of USD 266.00 as a contribution to their expenses.**
- 6. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 16 October 2013

Quentin Byrne-Sutton
(Arbitrator)