BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 2090/24)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Juan Diego Tello Palacios

- Claimant 1 -

U1st Sports Basket Espana
c/Uruguay 3 bis, 28016 Madrid, Spain

- Claimant 2 -

both represented by Messrs. Guillermo López Arana, Pablo Perez Fernandez and Antonio Garcia-Aranda Stai,

vs.

Guaros de Lara B.B.C
Avenida Lara, Torre Atrium, Piso 6, Oficinas 6A y 6B, 3001 Barquisimento, Lara State, Venezuela

- Respondent -

represented by Messrs. Jose Lasa Azpeitia and José Francisco Redondo Garrido, attorneys at law,

1. The Parties

1. Mr. Juan Diego Tello Palacios (hereinafter referred to as the “Player” or “Claimant 1”) is a Colombian professional basketball player.

2. U1st Sports Basket Espana (hereinafter referred to as the “Agency” or “Claimant 2”) is a sports management company based in Spain.

3. Basketball club “Guaros de Lara B.B.C” (hereinafter referred to as the “Club” or “Respondent”) is a professional basketball club participating in the Venezuelan Basketball Superleague (hereinafter referred to as the “SPB”).

2. The Arbitrator

4. On 31 January 2024, Prof. Ulrich Haas, the President of the Basketball Arbitral Tribunal (hereinafter referred to as the “BAT”), appointed Mr. Stephan Netzle as an arbitrator (hereinafter referred to as the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter referred to as the “BAT Rules”). Neither 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

5. On 8 April 2023, the Player and the Club signed an employment contract for the 2023 SPB-season, i.e., May to July 2023 (hereinafter referred to as the “Employment Contract”). According to the Employment Contract, the Club is obliged to pay the Player a monthly salary of USD 25,000.00 net on the last day of every month and thus USD 75,000.00 net in total. In addition, the Player is entitled to a bonus of USD 1,500.00

net of all taxes for reaching the conference final of the 2023 SPB-season (the “Conference Final”).

6. According to the Employment Contract, the Club is obliged to pay the agents __________ (__________) and __________ an agent fee for their services of “*10% OF THE MONEY PERCEIVED FOR THE PLAYER*” on or before 15 May 2023. __________ is a representative of the Agency. __________ is not a party of the present BAT proceedings.

7. The Club has paid neither the Player’s salary nor [the representative of the Agency]’s share of the agent fee.

8. On 23 August 2023, the Club informed the Venezuelan Basketball Federation (hereinafter referred to as the “FVB”) and the SPB that it would undergo an accounting audit to obtain a better understanding of the Club’s financial situation. In particular, the Club intended to find out whether [a former member of the management] used his influence to get the Club to sign employment contracts with players above market value to gain an undue advantage from the difference to what was eventually paid the players. The Club asserts that __________ (i.e., the second agent mentioned in the Employment Contract, who is not a party of the present BAT proceedings) was involved in the fraudulent practice of [the former member of the management].

9. On 10 November 2023, [the second agent mentioned in the Employment Contract] and the Player initiated a proceeding before the SPB’s Disciplinary and Dispute Resolution Tribunal. The subject matter of these proceedings is disputed between the Parties.

10. Later, the Club lodged a criminal complaint against [the former member of the management] and [the second agent mentioned in the Employment Contract]. Against this background, the FVB initiated an administrative procedure against [the second agent mentioned in the Employment Contract] in his capacity as an agent to determine whether he violated the FVB’s rules when he negotiated the Employment Contract.

11. In this BAT arbitration, the Player requests the outstanding salary of USD 75,000.00 and bonus of USD 1,500.00. The Agency claims half of the agent fee of USD 3,750.00 (corresponding to ½ of 10% of USD 75,000.00).

3.2 The Proceedings before the BAT

12. On 24 January 2024, the Player and the Agency filed a Request for Arbitration against the Club in accordance with the BAT Rules and paid the non-reimbursable handling fee of EUR 4,000.00 (received in the BAT bank account already on 22 January 2024).

13. On 1 February 2024, the BAT informed the Parties that Mr. Stephan Netzle had been appointed as the Arbitrator, invited the Respondent to file its Answer to the Request for Arbitration in accordance with Article 11.4 BAT Rules by no later than 22 February 2024 and fixed the Advance on Costs to be paid by the Parties by 12 February 2024 as follows:

“Claimant 1 (Mr. Juan Diego Tello Palacios)	*EUR 3,250.00*
Claimant 2 (U1st Sports Basket Espana)	*EUR 500.00*
Respondent (Guaros de Lara B.B.C.)	*EUR 3,750.00”*

14. On 5 and 8 February 2024, the BAT received the Claimants’ shares of the Advance on Costs.

15. On 16 February 2024, the BAT received the Respondent’s share of the Advance on Costs.

16. On 19 February 2024, the Respondent asked for an extension of the deadline to provide the Answer to the Request for Arbitration until 4 March 2024, which was granted by the BAT.

17. On 4 March 2024, the Respondent submitted the Answer to the Request for Arbitration, including a request to stay the present BAT proceedings.

18. On 7 March 2024, the BAT acknowledged receipt of the full amount of the Advance on Costs. It invited the Claimants to submit their comments on the Answer to the Request for Arbitration and the Respondent's request to stay the present proceedings by no later than 18 March 2024.

19. On 18 March 2024, the Claimants submitted their comments on the Answer to the Request for Arbitration (hereinafter referred to as the "Reply"), according to which they did not agree to stay the present BAT proceedings.

20. On 25 March 2024, the BAT invited the Claimants to provide "Evidence 0" of their Reply, which had not been submitted together with the Reply, by no later than 28 March 2024. In addition, the Respondent was granted a deadline until 4 April 2024 to submit its comments to the Claimants' Reply.

21. On the same day, the Claimants submitted the requested piece of evidence.

22. On 4 April 2024, the Respondent submitted its comments to the Claimants' Reply.

23. On 9 April 2024, the BAT informed the Parties that the Arbitrator had rejected the Respondent's request to stay the present BAT proceedings based on Article 186 paras. 1 and 1^{bis} of the Swiss Act on Private International Law (PILA). In addition, the BAT informed the Parties that the Arbitrator had declared the exchange of submissions complete and that the final award would be rendered as soon as possible. Finally, the BAT granted the Parties a deadline until 16 April 2024 to provide a detailed account of their legal costs.

24. On the same day, the Claimants submitted their cost statements.

25. On 16 April 2024, the Respondent provided a detailed account of its legal costs.

4. The Positions of the Parties

4.1 The Claimants' Position

a. On the merits of the claim

26. On 8 April 2023, the Player and the Club signed the Employment Contract for the 2023 SPB-season which lasted from May to July 2023. According to the Employment Contract, the Club must pay the Player a monthly salary of USD 25,000.00 net (i.e., total USD 75,000.00) and a bonus of USD 1,500.00 for reaching the Conference Final.

27. According to the Employment Contract, the Club must pay the Agency and [the second agent mentioned in the Employment Contract] an agent fee for their services of "*10% OF THE MONEY PERCEIVED FOR THE PLAYER*" by no later than 15 May 2023. As only one of these two agents, namely the Agency but not [the second agent mentioned in the Employment Contract], is a party of the present proceedings, only half of the total agent fee of USD 7,500.00 is up for discussion here, namely USD 3,750.00. [the second agent mentioned in the Employment Contract] is mentioned in the Employment Contract only because it is the common practice to include a local agent when doing business with basketball clubs abroad. However, [the second agent mentioned in the Employment Contract] is neither the Player's agent nor a partner of the Agency.

28. On 29 September 2023, [the representative of the Agency] sent a reminder to the Club requesting the payment of the full salary of USD 75,000.00 net and a bonus of USD 1,500.00 net for reaching the Conference Final.

29. Only on 4 November 2023, the Club replied that the Club was in a difficult situation and asked for a phone call to find a solution.

30. By e-mail of 4 December 2023, the Agency again demanded that the Club pay the outstanding amounts to the Player and the Agency. However, the Club did not pay and did not reply to this e-mail.

31. On 8 January 2024, the Claimants again requested payment of the salary of USD 75,000.00 net, the bonus of USD 1,500.00 net and the agent fee of USD 3,750.00, and set the Club a deadline of seven days.

32. Although the Player did not receive any salary during the entire 2023 SPB-season and would have had the option to early terminate the Employment Contract, he decided to finish the season and to fully comply with his obligations under the Employment Contract. There is no contractual or legal reason that would justify the Club's failure to pay the salary, the bonus and the agent fee. The Club's disregard of its payment obligation constitutes a clear breach of the fundamental legal principle of *pacta sunt servanda*.

33. The Club argues [the former member of the management] and [the second agent mentioned in the Employment Contract] were involved in fraudulent practices when they signed employment contracts that exceeded the market value of the players.

34. The Employment Contract subject to this procedure, however, reflects the true market value of the Player. After his employment with the Club, the Player signed an employment contract with the Korean basketball club "LG Sakers Pro Basketball Team", according to which he receives the same monthly salary of USD 25,000.00 net.

35. The Employment Contract was negotiated and agreed based on fair market evaluation in accordance with industry standards and the market value of the Player. In addition, the Claimants cannot be held responsible for the actions of the Club or its former management. The Club is now trying to avoid the consequences by referring to the investigation that it itself initiated. However, the Club has no legal or contractual argument that would allow it to escape its contractual responsibility. The Club does not dispute that it has not paid the claimed amounts, and it cannot rely on any reason (contractual or legal)

that would allow it to exempt itself from its contractual obligations under the Employment Contract.

36. The Claimants have given the Club ample opportunities and more than six months time to comply with its contractual obligations, however without success. Therefore, the Claimants have been forced to lodge the present Request for Arbitration.

b. On the Respondent's request to stay the present BAT proceedings

37. The ongoing administrative procedure before the FVB against [the second agent mentioned in the Employment Contract] has no influence on the present proceedings as [the second agent mentioned in the Employment Contract] is not a party thereof. In case the FVB would conclude that [the second agent mentioned in the Employment Contract] has violated some rules, this would not have any effect on the present BAT proceedings.

38. In addition, the BAT should not stay this arbitration proceedings as the procedures before the SPB's Disciplinary and Dispute Resolution Tribunal and before the FVB are about something else:

39. First, the procedure allegedly initiated on 10 November 2023 by [the second agent mentioned in the Employment Contract] and several players (*inter alia* the Player) before the SPB's Disciplinary and Dispute Resolution Tribunal is not a claim against the Club for payment of outstanding debts but part of an administrative procedure by which the Club must disclose unpaid amounts to players and agents to show its solvency in view of the admission procedure for the next season. Although the mentioned procedure is pending since several months, the Club has not provided any evidence that the SPB's Disciplinary and Dispute Resolution Tribunal had rendered a decision about whether the Player's salary/bonus or the Agency's agent fee are owed or not.

40. Second, the administrative procedure of the FVB is directed only against [the second agent mentioned in the Employment Contract] and not against the Claimants. That procedure deals with the question whether [the second agent mentioned in the Employment Contract] is a licensed agent and whether he has broken any rules.

41. There are no indications that the FVB or the SPB will rule on the question whether the Club owes USD 76,500.00 to the Player or USD 3,750.00 to the Agency. There is no information about composition of the SPB's Disciplinary and Dispute Resolution Tribunal, its dispute resolution method, its jurisdiction, the proceedings, and the applicable law.

42. Under the circumstances, it is not acceptable for the Claimants to be forced to stay the present BAT proceedings which was initiated in compliance with the contractual agreement of the Parties, and to await a decision of a body which was not agreed upon by the Parties and has no jurisdiction for the issue at stake in this arbitration. Such an interruption would violate the fundamental principles of *ex aequo et bono* and *pacta sunt servanda*,

43. By putting forward the argument of *lis pendens*, the Club simply intends to "buy time" and prolong its non-compliance with the contractual obligations. The application of *lis pendens* based on Article 9 PILA requires certain conditions: The action must involve the same parties and the same subject matter, and there must be a reasonable expectation that the decision of the foreign court would be recognized in Switzerland. Moreover, the PILA does not demand a stay of proceedings if a similar claim has been filed with a foreign tribunal, but the arbitral tribunal seated in Switzerland has discretion to do so under specific circumstances.

44. None of these conditions are met in the present case. The Claimants are not associated in any way with [the second agent mentioned in the Employment Contract] and/or [the former member of the management]. None of the Claimants is a party of the administrative proceeding in Venezuela, and these proceedings are not intended to establish whether the Club owes the claimed amounts to the Claimants.

45. In addition, based on Article 186 PILA, an arbitral tribunal is competent to decide on its jurisdiction without regard to any parallel actions pending before any state courts or other arbitral tribunals, except under extraordinary circumstances which may demand a stay in proceedings. In addition, based on the BAT Rules, the BAT can make provisional measures conditional upon the posting of a security. However, the Club did not provide any security (such as for example the deposit of the claimed amount in an escrow account). Furthermore, the Club tried the same legal trick in the proceedings before the FVB and the SPB by stating that the amounts owed to the Player are under "active legal proceedings".

46. There is no reason that the Claimants must wait even longer and to accept a stay of the present proceedings just to await the outcome of a procedure in which the Claimants are not even involved.

c. Request for Relief

47. In their Reply dated 18 March 2024, the Claimants requested the following relief:

> *"a) To award Claimant 1 with the amount of* ***SEVENTY SIX THOUSAND FIVE HUNDRED US DOLLARS NET (76,500 USD)*** *plus interest at the applicable Swiss statutory rate, starting from the date of July 31st, 2023.*
>
> *b) To award the Claimant 2 with the amount of* ***THREE THOUSAND SEVEN HUNDRED AND FIFTY US DOLLARS (3,750 USD)*** *plus interest at the applicable Swiss statutory rate, starting from the date of May 15th, 2023.*
>
> *c) To award both Claimants with the full covered the costs of this arbitration."*

4.2 The Respondent's Position

a. On the merits of the claim

48. In January 2023, [the former member of the management] joined the Club's management. During the next months, [the former member of the management] used his influence to get the Club to sign various contracts with players and agents to gain an undue advantage from the difference to what was eventually paid the players and the agents. The contract's values were significantly increased in relation to the players' market value and the profits were shared between [the former member of the management] and the players and agents. One of the agents collaborating with [the former member of the management] was [the second agent mentioned in the Employment Contract], who appears as one of the two Player's agents in the Employment Contract (together with [the representative of the Agency]). It was [the second agent mentioned in the Employment Contract] (and not [the representative of the Agency]), who negotiated the Employment Contract with the Club, and it was [the second agent mentioned in the Employment Contract], who announced that the Player signed the Employment Contract with the Club. The Claimants' intention to present [the second agent mentioned in the Employment Contract] as an irrelevant third party is not acceptable. The only reasons why [the second agent mentioned in the Employment Contract] is not a party of the present BAT proceedings is the fact that he is not a FIBA-licensed agent and that the agents try to claim the same amount before two different legal bodies.

49. The Player's market value is much lower than the salary due under the Employment Contract. This demonstrates the corrupted negotiation and conclusion of the Employment Contract. The fact that the Player receives the same salary under his new employment contract with the Korean basketball club "LG Sakers Pro Basketball Team" is irrelevant when considering the economic differences between the two countries and the different market salaries for basketball players. For example, Korea's GDP per capita is actually established by World Bank on USD 32,422.60 and Venezuela's GDP per capita

is actually established on USD 15,975.70. In addition, the Player's market value increased after he was employed by the Club.

50. On 23 August 2023, the Club informed the FVB and the SPB that it would undergo an accounting audit to obtain a better understanding of its financial situation.

51. On 10 November 2023, [the second agent mentioned in the Employment Contract] and the Player issued a claim against the Club before the SPB's Disciplinary and Dispute Resolution Tribunal requesting unpaid salaries in the amount of USD 69,833.00 and an unpaid agent fee of USD 6,833.30. The Club informed the FVB about the proceedings before the SPB's Disciplinary and Dispute Resolution Tribunal. The SPB's Disciplinary and Dispute Resolution Tribunal is the competent instance to deal with legal conflicts in Venezuelan basketball (based on Article 42 of the SPB's Statutes). The clubs under the SPB's jurisdiction are bound by the decisions of the SPB's Disciplinary and Dispute Resolution Tribunal and are sanctioned if they do not comply with (based on Article 11 of the SPB's Ethics Code).

52. As a result of the audit the Employment Contract was considered sufficient evidence to initiate criminal proceedings. This was communicated to the FVB on 9 February 2024. The Club's criminal complaint against [a former member of the management] has been transferred from the prosecutor's office in __________ to the national prosecutor's office and will soon be heard by the competent state court. As these proceedings are currently under seal, the Club is not able to provide a copy of the case file.

53. Against this background, the FVB initiated an administrative procedure against [the second agent mentioned in the Employment Contract] to determine whether he violated any rules by negotiating and signing the Employment Contract.

54. The Club has always fulfilled its obligations to all its employees and stakeholders. However, the Club would first like to clarify whether the Employment Contract was valid before making any contractual payments.

b. On the request to stay the present proceedings

55. The Club requests a stay of the present BAT proceedings because the administrative procedure before the FVB will undoubtedly affect the present claims. The FVB will examine whether the fraudulent collaboration among [a former member of the management] and [the second agent mentioned in the Employment Contract] (and the Player) had an influence on the validity of the Employment Contract.

56. In addition, the Player has already lodged a claim against the Club before the SPB's Disciplinary and Dispute Resolution Tribunal requesting unpaid salaries. Without a stay of the present BAT proceedings, there is a huge risk of contradictory judgements. Based on the principle of *lis pendens* and based on Articles 9, 181 and 186 PILA, the BAT shall not issue an award in the present case. It is obvious that the parties of the present BAT proceedings and the proceedings before the SPB's Disciplinary and Dispute Resolution Tribunal are essentially the same, bearing in mind that both claims are related to the same Employment Contract. As the Employment Contract involved three parties, i.e. the Club, the Player and the Player's agents, the parties and the subject matters of these proceedings (i.e. the amounts due under the Employment Contract) are identical. According to the Employment Contract, [the second agent mentioned in the Employment Contract] and the Agency form a single party that jointly represents the Player and refers to themselves in the contract as "the Agents".

57. Should the BAT not grant a stay of the present proceedings, the Club would be forced to present an incomplete legal defence in these proceedings, as it does not yet have the necessary information from the investigations conducted by the FVB and the criminal court. Should the conduct of [a former member of the management] and [the second agent mentioned in the Employment Contract] ultimately prove to be fraudulent, the BAT would risk to render an arbitral award sanctioning this behavior.

58. The principle of *prior tempore potior iure* shall be respected by the BAT. According to this principle, the claim raised first takes precedence over all later claims of the claimant.

The claim before the SPB's Disciplinary and Dispute Resolution Tribunal was issued by [the second agent mentioned in the Employment Contract] and the Player in November 2023 and the claim before the BAT was only filed on 24 January 2024. The prevailing competence of the SPB's Disciplinary and Dispute Resolution Tribunal (instead of the BAT) was tacitly accepted by the Club in its response to the complaint.

59. A stay of the present BAT proceedings would have no major impact on the Claimants, as the Player is currently working and receiving a salary, and the amount of the agent fee is not very high. The only impact for the Claimants would be a mere postponement of the consequences of this litigation, which is in any case covered by the interest of legal protection. For all these reasons, the BAT shall not issue an award at least until the administrative procedure before the FVB has been concluded.

c. Request for Relief

60. In its Answer dated 4 March 2024 and its second submission dated 4 April 2024, the Club requests the following relief:

> *"According with foregoing, Respondent respectfully requests the Arbitrator:*
>
> - *To declare the stay and suspension of this process until the termination of the ongoing FVB legal process and the subsequent termination of the legal process started by the Player and [the second agent mentioned in the Employment Contract] before SPB's Disciplinary and Dispute Resolution Tribunal."*

5. Jurisdiction of the BAT

61. Pursuant to Article 2.1 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 PILA.

62. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.

63. 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]

64. The Employment Contract contains the following arbitration clause:

> *"**6 JURISDICTION IN CASE OF DISPUTE:***
> *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 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 ARBITRATION SHALL BE GOVERNED BY CHAPTER 12 OF THE SWISS ACT ON PRIVATE INTERNATIONAL LAW, IRRESPECTIVE OF THE PARTIES DOMICILE. THE LANGUAGE OF THE ARBITRATION SHALL BE ENGLISH. THE ARBITRATOR SHALL DECIDE THE DISPUTE EX AEQUO ET BONO."*

65. The dispute resolution clause is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

66. With respect to the substantive validity, the Arbitrator considers that the jurisdiction of BAT over the Claimants' claims arises from the Employment Contract. The wording *"ANY DISPUTE ARISING FROM OR RELATED TO THE PRESENT CONTRACT"* clearly covers the Claimants' claims. The fact that Article 42 SPB's Statutes provides for the SPB's Disciplinary and Dispute Resolution Tribunal to be responsible for "*disciplinary and contractual disputes in the sports field, arising between Members, players, technicians and other employees, referees, table staff and any other actors in the sporting aspect of*

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

the 'SPB' products" does not change the fact that the parties to the Employment Contract have a clear will to submit the present case to the BAT. Nowhere in the Employment Contract does it refer to the competence of the SPB's Disciplinary and Dispute Resolution Tribunal.

67. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimants' claims.

6. Stay of the present BAT proceedings

68. The Respondent raises the defence of *lis pendens* because the Player's claims had already been submitted to the SPB's Disciplinary and Dispute Resolution Tribunal. The Respondent requests a stay of the present BAT proceedings until the termination of the proceedings before the SPB's Disciplinary and Dispute Resolution Tribunal.

69. Having carefully considered the Parties' respective submissions, the Arbitrator concluded in the Procedural Order dated 9 April 2024 that the present proceedings should not be stayed pending the decisions of the SPB's Disciplinary and Dispute Resolution Tribunal and the FVB's administrative procedure against [the second agent mentioned in the Employment Contract].

70. First, the Arbitrator notes that such obligation for a stay does not follow from the respective provisions of the Employment Contract since the SPB's Disciplinary and Dispute Resolution Tribunal is not even mentioned in this contract.

71. Second, Article 186 para. 1^{bis} PILA does not require an arbitral tribunal in Switzerland to stay its proceedings if a legal procedure has already been initiated before a tribunal abroad. This provision reads in its English translation as follows: "[The arbitral tribunal] *shall decide on its jurisdiction without regard to any action having the same subject matter that is already pending between the same parties before a state court or another arbitral tribunal, unless there are substantial grounds for a stay in proceedings."* It grants

the Arbitrator discretion to stay a proceeding. There is little guidance in the legislative materials what such "noteworthy grounds" might be, but in general, a stay of an arbitral proceeding initiated in Switzerland should be stayed only in exceptional circumstances, e.g. if a procedure before a foreign State court has already reached an advanced stage and if the decision is expected to be recognised in Switzerland.[2]

72. In the present case, the Arbitrator considers that no useful purpose would be served by staying the present BAT proceedings. It was [the second agent mentioned in the Employment Contract], who initiated a proceeding before the SPB's Disciplinary and Dispute Resolution Tribunal in November 2023. While he made the SPB's Disciplinary and Dispute Resolution Tribunal aware of the outstanding payments, including the open salary payments owed to the Player, there is no evidence on record that the Player is considered a party to these proceedings and that [the second agent mentioned in the Employment Contract] filed the complaint on his behalf, as the Club argues. In a letter of the SPB's Disciplinary and Dispute Resolution Tribunal to the Club dated 10 November 2023, one can read the following (English translation as provided by the Respondent; emphases as in the original):

> *"We, the Disciplinary and Dispute Resolution Tribunal, address you, on the opportunity to inform you of the details of the claim regarding pending payments, by the* ***[the second agent mentioned in the Employment Contract] (AGENT)****, of several players* __________***,*** __________***, TELLO PALACIOS,*** __________***,*** __________***,*** __________***,*** __________ *and* __________*, for professional fees, who held the position of Professional Basketball players, corresponding to the 2023 season, and whoever exhibits is owed the total amount of* ***TWO HUNDRED FIVE THOUSAND SIX HUNDRED AND FORTY-SIX AMERICAN DOLLARS ($205,646), and TWENTY NINE THOUSAND ONE HUNDRED AND FOURTEEN AND 30 CENTS OF AMERICAN DOLLARS ($29,114.30),*** *for commission of agent,* ***for a total NINETEEN THOUSAND SEVEN HUNDRED AND FORTY AMERICAN DOLLARS ($234,720.34).***
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> *For the above reasons, this Court requests, as provided for in the ART. 5, OF THE REGULATIONS FOR ISSUING SOLVENCIES OF THE SUPER PROFESSIONAL*

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2 See KELLERHALS / BERGER, International and Domestic arbitration in Switzerland, 4^{th} ed., N 1046 – 1050.

BASKETBALL LEAGUE (SPB), which states: ***'…Once the oppositions are received, a copy of them will be immediately passed to the applicant for the "TEAM SOLVENCY", and he will be required to issue his opinion about it. The lack of a timely response will consider the veracity of the facts on which the opposition is based. After hearing the oppositions and defenses of the applicant. The origin of any opposition will prevent the issuance of the corresponding solvency and consequently of the 'TEAM SOLVENCY'****."*

73. According to Article 26 of the SPB's Ethics Code, the SPB's Disciplinary and Dispute Resolution Tribunal is, *inter alia*, competent for the "*procedures aimed at granting the 'administrative solvency' necessary to register the team in an SPB competition*". Against this background, the Arbitrator considers it more likely that the proceedings before the SPB's Disciplinary and Dispute Resolution Tribunal is about the Club's admission to the new season and not about the enforcement of the Player's contractual claims against the Club, as the Arbitrator concludes from the last sentence of above letter ("The origin of any opposition will prevent the issuance of the corresponding solvency and consequently of the 'TEAM SOLVENCY'"). Whether such ruling on the Club's solvency assists [the second agent mentioned in the Employment Contract] and/or the Player in the enforcement of their claims can be left open. In any event, the administrative solvency proceeding does not prejudice or interfere with the present proceeding before the BAT.

74. The Arbitrator's conclusion is also supported by the Club's letter to the FVB dated 15 February 2024, according to which the Club itself lists the outstanding salaries and agent fees and writes under the debts to the Player "*to ACTIVE LEGAL PROCEDURE*". This wording can hardly refer to the proceedings before the SPB's Disciplinary and Dispute Resolution Tribunal but is to be understood as a reference to the present BAT proceedings. In addition, in this letter, the Club requests "*an extension of up to one week before the start of the 2024 season for the issuance of the 'TEAM SOLVENCY'*". This indicates that the Club is trying to convince the SPB's Disciplinary and Dispute Resolution Tribunal that the Player's salary claim is subject of a different procedure and that therefore the Player's salary claim should not be considered when determining whether the Club should be granted the "team solvency"-status and be admitted to the

next season. Hence, the BAT proceedings and the proceedings before the SPB's Disciplinary and Dispute Resolution Tribunal deal with different topics. In addition, the Agency is not a party to the proceedings before the SPB's Disciplinary and Dispute Resolution Tribunal. The Agency's legitimate interest in a timely resolution of its claim further supports the conclusion that the Club's request for a stay should be rejected.[3]

75. Finally, the fact that the FVB has initiated an administrative procedure against [the second agent mentioned in the Employment Contract] has no influence on the present BAT proceedings. The administrative procedure is about the actions of [the second agent mentioned in the Employment Contract], who is not a party of the present proceedings. There is no indication in the case file that either the Player or the Agency were involved in the alleged fraudulent activities of [a former member of the management] and/or [the second agent mentioned in the Employment Contract].

76. On the contrary, the Player's new contract with the Korean basketball club "LG Sakers Pro Basketball Team" indicates that the monthly salary of USD 25,000.00 net is indeed in line with the Player's value. The fact that the cost of living, and therefore salaries, are higher in Korea than in Venezuela, as the Club argues, does not change this. It seems more likely that a monthly salary of at least USD 25,000.00 net was a condition for the Player's employment with the Korean club.

77. In addition, [the second agent mentioned in the Employment Contract] and the Agency cannot be considered as one and the same party as the Club argues. The Club correctly states that both are mentioned as "agents" in the Employment Contract, but this alone does not mean that the actions of one can be attributed to the other without further evidence. Furthermore, the Arbitrator assumes that the Agency did the main work in the

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3 See also e.g. BAT 1377/19, para. 109.

negotiations, since it was also [the representative of the Agency], who signed the Employment Contract on behalf of the agents.

78. Finally, even if the investigation of the FVB or the criminal proceedings were to conclude that the Employment Contract was based on fraudulent practices of [a former member of the management] and/or [the second agent mentioned in the Employment Contract], this would have no influence on the debts owed by the Club to the Player and the Agency. It cannot be held against the Player and/or the Agency if a former manager of the Club or another agent acted with fraudulent intent. Rather, this would result in a claim for damages by the Club against [a former member of the management] and/or [the second agent mentioned in the Employment Contract].

79. Accordingly, the Arbitrator concludes that the arbitration proceedings shall proceed on the merits of the Claimants' claims.

7. Discussion

7.1 Applicable Law – *ex aequo et bono*

80. 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".*

81. Under the heading "Law Applicable to the Merits", Article 15 BAT Rules reads as follows:

> *"15.1 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.*
>
> *15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead."*

82. As seen above in para. 64, the Employment Contract stipulate that "*THE ARBITRATOR SHALL DECIDE THE DISPUTE EX AEQUO ET BONO*".

83. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

84. 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[4] (Concordat)[5], 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."*[6]

85. This is confirmed by Article 15.1 BAT Rules, according to which the Arbitrator applies "*general considerations of justice and fairness without reference to any particular national or international law*".

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4 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and the Swiss Code of Civil Procedure (governing domestic arbitration).
5 P.A. KARRER, Basler Kommentar, No. 289 ad Art. 187 PILA.
6 JdT 1981 III, p. 93 (free translation).

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

7.2 Findings

7.2.1 Standing to sue of the Agency

87. According to clause 5 of the Employment Contract, "*THE TEAM AGREES TO PAY [the second agent mentioned in the Employment Contract] and [the representative of the Agency] THE FEE FOR THEIR SERVICES (10% OF THE MONEY PERCEIVED FOR THE PLAYER), VIA BANK TRANSFER ON OR BEFORE MAY 15TH, 2023.* […]"

88. The question arises whether the Agency as Second Claimant (and not [the representative of the Agency] as individual) is entitled to request half of the agent fee, i.e. USD 3,750.00.

89. The Arbitrator affirms the Agency's standing to sue for the following reasons: First, the Employment Contract mentions not only [the representative of the Agency] but also the Agency *("[the second agent mentioned in the Employment Contract] (__________) FIBA AGENT __________ and [the representative of the Agency] (You First) FIBA Licensed Agent number: __________*"). Second, the payment requests were sent on 29 September 2023, 4 November 2023, and 8 January 2024 with an Agency email address (including the Agency's logo in some cases). Third, [the representative of the Agency] has been the European Director of the Agency for more than ten years and is, therefore, entitled to act as the legal representative of the Agency. Fourth, the Power of Attorney is signed by [the representative of the Agency] on behalf of the Agency as both are mentioned in this document.

7.2.2 Salary and bonus claims

90. Based on clause C of the Employment Contract, the Player is entitled to the following compensation (salary and bonus):

> *"**COMPENSATION:***
>
> *THE CLUB AGREES TO PAY PLAYER FOR RENDERING SERVICES TO THE CLUB A NET AMOUNT **OF TWENTY FIVE THOUSAND US DOLLARS NET (USD 25,000.00)** per month PAYABLE ON THE LAST DAY OF EVERY MONTH OF VALIDITY OF THIS AGREEMENT ALL PAYMENTS WILL BE DONE THROUGH WIRE TRANSFER TO THE PLAYER'S BANK ACCOUNT IN THE UNITED STATES OF AMERICA or CASH.*
>
> ***BONUS***
>
> *The team will pay for the championship 3.000$*
> *The team will pay for the final of the conference 1.500$*
>
> *All amounts mentioned in this agreement are to be considered net of all taxes. Prior Player's departure at end of the season, Club shall provide the Player with written verification of all taxes paid.*
>
> *All bonuses are cumulative and will be paid to the Player on the 1st day of the month following the consecution of the bonus.*
>
> *Regarding all salary monies 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 this contract at such times as the sums become due.*
>
> *If any scheduled payment is not received by the Player within 30 days of the due date, the Player's performance obligations shall cease, the Player shall have the option to terminate the present agreement by notifying the club in writing and shall be free to leave Venezuela with his FIBA letter of Clearance to play basketball anywhere in the world Player chooses, but the duties and liabilities of Club under this Agreement shall continue in full force and effect."*

91. As already explained in detail above (see paras. 68 et seq.), the ongoing criminal proceedings and administrative procedure before the FVB against [a former member of the management] and/or [the second agent mentioned in the Employment Contract] and the proceedings before the SPB's Disciplinary and Dispute Resolution Tribunal do not concern the Player's claim against the Club. Even if the FVB's investigation or the criminal proceedings were to conclude that the Employment Contract was based on

fraudulent practices of [a former member of the management] and/or [the second agent mentioned in the Employment Contract], this would not affect the Club's debts to the Player. The Player cannot be held liable if a former manager of the Club or another agent acted with fraudulent intent, but if so, that might be an issue between the Club and [a former member of the management] and/or [the second agent mentioned in the Employment Contract]. Furthermore, the Club itself confirmed in its submission that the "*player's performance in Guaros was outstanding*". It would not be fair and just if the Player did not receive a salary due to an alleged fraudulent practice by others.

92. As the Club does not provide any further reasons why it has not paid the Player a salary for three months or why the Player should only be entitled to a salary of USD 69,833.00, the Arbitrator concludes that the Player is entitled to a total net salary of USD 75,000.00.

93. In addition, based on publicly available sources, the Club has reached the Conference Final.[7] Therefore, the Club is also obliged to pay the Player a bonus of USD 1,500.00 net.

7.2.3 Agent fee claim

94. The Employment Contract mentions [the second agent mentioned in the Employment Contract] and [the representative of the Agency] as agents. In more detail, clause 5 of the Employment Contract provides the following regulation regarding the agent fee:

> *"THE TEAM AGREES TO PAY [the second agent mentioned in the Employment Contract] and [the representative of the Agency] THE FEE FOR THEIR SERVICES (10% OF THE MONEY PERCEIVED FOR THE PLAYER), VIA BANK TRANSFER ON OR BEFORE MAY 15TH, 2023. THE TERMINATION OR SUSPENSION OF THE CONTRACT BY THE CLUB BECAUSE OF PLAYER'S ILLNESS, INJURY, ON ACCOUNT OF PLAYER'S FAILURE TO EXHIBIT SUFFICIENT SKILL, OR ANY OTHER CAUSE, SHALL IN NO WAY AFFECT THE RIGHT OF THE AGENTS TO RECEIVE THE PROFESSIONAL FEES AGREED UPON IN THIS DOCUMENT ON THE DATE MENTIONED ABOVE."*

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7 https://www.latinbasket.com/Venezuela/basketball.aspx

95. As seen above (see paras. 87 et seq.), the Agency has standing to sue. However, the question arises as to whether it is entitled to half of the agent fee otherwise owed, i.e. 5% of the "*MONEY PERCEIVED FOR THE PLAYER*". As there is no rule as to how the agent fee is to be divided between the two agents, the Arbitrator assumes that both are entitled to 50% each.

96. Therefore, the Club is obliged to pay the Agency 5% of USD 75,000.00, i.e. USD 3,750.00.

7.2.4 Interest

97. The Player requests the BAT to order "*interest at the applicable Swiss statutory rate, starting from the date of July 31st, 2023"* regarding the salary and the bonus payments. The Agency requests the BAT to award "*interest at the applicable Swiss statutory rate, starting from the date of May 15th, 2023*".

98. The Employment Contract does not provide a regulation concerning interest. According to standing BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. This is a generally accepted principle, which is embodied in most legal systems. In correspondence with the standing BAT jurisprudence the default interest rate is of 5% per annum.

99. As to the date from which the interest for the outstanding amount starts to run, the Arbitrator notes that the due dates for the three salary instalments were on 31 May 2023, 30 June 2023, and 31 July 2023. To avoid an *ultra petita* decision, the Arbitrator awards interest as from 31 July 2023 for the first two salary instalments. However, interest regarding the third salary instalment starts to run only on 1 August 2023, i.e. one day after the due date. Regarding the bonus payment, the Employment Contract provides that "[a]*ll bonuses are cumulative and will be paid to the Player on the 1st day of the month following the consecution of the bonus*". The Conference Final of the 2023 SVB-season was played on 6 July 2023. Therefore, the due date for the bonus was on 1

August 2023 and the starting date for the interest on the bonus payment of USD 1,500.00 shall be 2 August 2023.

100. The starting date for the interest for the outstanding agent fee of USD 3,750.00 shall be 16 May 2023, i.e. one day after the due date.

8. Conclusion

101. Based on the foregoing, and after taking into due consideration all the evidence submitted and all arguments made by the Parties, the Arbitrator finds that the Respondent shall pay the Player outstanding salaries of USD 75,000.00 net as well as bonus in the amount of USD 1,500.00 net, both together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) until payment in full.

102. In addition, the Arbitrator finds that the Respondent shall pay the Agency the outstanding agent fee of USD 3,750.00, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) from 16 May 2023 until payment in full.

9. Costs

103. In respect of determining the arbitration costs, Article 17.2 BAT Rules provides as follows:

> *"At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4).* […]"

104. On 24 May 2024, the BAT President determined the arbitration costs in the present matter to be EUR 7,500.00.

105. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 BAT Rules provides as follows:

> *"The award shall determine which party shall bear the arbitration costs and in which proportion.* […] *When deciding on the arbitration costs* […]*, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties."*

106. Since the Claimants almost completely prevailed, the Arbitrator considers it as fair under the circumstances and in application of Article 17.3 BAT Rules that the costs of the arbitration be exclusively borne by the Club. Given that the Club has already paid its share of the advance on costs in the amount of EUR 3,750.00, the Club shall pay to the Claimants jointly and severally the amount of EUR 3,750.00.

107. In relation to the Parties' legal fees and expenses, Article 17.3 BAT Rules provides that:

> *"as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding* […] *on the amount of any contribution to the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties."*

108. The Claimants claim legal fees in the total amount of EUR 6,500.00. They also claim for the expense of the non-reimbursable handling fee in the amount of EUR 4,000.00. The Club requests a contribution to its legal fees of EUR 4,000.00.

109. Taking into account the factors required by Article 17.3 BAT Rules, the maximum awardable amounts prescribed under Article 17.4 BAT Rules, the work done by the counsels, the fact that the Agency is acting as legal counsel on Claimants' side and the specific circumstances of this case, the Arbitrator holds that it is fair and equitable that the Respondent shall pay a reduced contribution to the Claimants' legal fees of EUR 5,000.00. In addition, the Respondent shall pay the handling fee, i.e. EUR 4,000.00, to the Claimants.

10. AWARD

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

1. **Basketball club "Guaros de Lara B.B.C" shall pay Mr. Juan Diego Tello Palacios outstanding salaries of USD 75,000.00 net, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time)**

    a) **on the amount of USD 50,000.00 from 31 July 2023 until payment in full, and**

    b) **on the amount of USD 25,000.00 from 1 August 2023 until payment in full.**

2. **Basketball club "Guaros de Lara B.B.C" shall pay Mr. Juan Diego Tello Palacios outstanding bonus of USD 1,500.00 net, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 2 August 2023 until payment in full.**

3. **Basketball club "Guaros de Lara B.B.C" shall pay U1st Sports Basket Espana an agent fee of USD 3,750.00, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 16 May 2023 until payment in full.**

4. **Basketball club "Guaros de Lara B.B.C" shall pay Mr. Juan Diego Tello Palacios and U1st Sports Basket Espana jointly an amount of EUR 3,750.00 as reimbursement for their arbitration costs.**

5. **Basketball club "Guaros de Lara B.B.C" shall pay Mr. Juan Diego Tello Palacios and U1st Sports Basket Espana jointly an amount of EUR 9,000.00 as a contribution towards their legal fees and expenses.**

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

Geneva, seat of the arbitration, 29 May 2024

Stephan Netzle

(Arbitrator)