BASKETBALL
ARBITRAL TRIBUNAL

CORRECTED ARBITRAL AWARD

(BAT 1048/17)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Rhodri Thomas

in the arbitration proceedings between

Mr. Ivan Deniz O'Donnell

- Claimant 1 -

Mr. Marcos Cervero Simonet

- Claimant 2 -

Mr. Ronald Guillen

- Claimant 3 -

all represented by Mr. Jose Lasa Azpeitia and Mr. Marco Cusumano, attorneys at law, Calle de Serrano, 33, 2 A-B Madrid, Spain

vs.

Guaros de Lara B.B.C.
Avenida Lara, Torre Attrium, Piso 6, Oficinas, 6AY6B,
Barquisimeto, Lara State, 3001, Venezuela

- Respondent 1 -

Columbus Sport 99 C.A.
Avenida Lara, Torre Attrium, Piso 6, Oficinas, 6AY6B,
Barquisimeto, Lara State, 3001, Venezuela

- Respondent 2 -

both represented by Mr. Cédric Aguet, attorney at law,
8 Rue de Grand-Chene, CP 5463, 1002 Lausanne, Switzerland

1. The Parties

1.1 The Claimants

1. Mr. Ivan Deniz O'Donnell (hereinafter "Claimant 1"), Mr. Marcos Cevero Simonet (hereinafter "Claimant 2") and Mr Ronald Guillen (hereinafter "Claimant 3") are professional basketball coaches (together hereinafter the "Claimants").

1.2 The Respondents

2. Guaros de Lara B.B.C. (hereinafter "Respondent 1") and Columbus Sport 99 C.A. (hereinafter "Respondent 2") form a professional basketball club in Venezuela (together hereinafter the "Respondents").

2. The Arbitrator

3. On 11 August 2017, Prof. Richard H. McLaren, O.C., the President of the Basketball Arbitral Tribunal (hereinafter the "BAT") appointed Mr. Rhodri Thomas as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules").

4. None of the Parties has raised objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Background Facts

5. On 24 May 2016, Claimant 1 entered into an employment contract in relation to the 2016-2017 and 2017-2018 basketball seasons (hereinafter the "Claimant 1 Contract"). The Claimant 1 Contract states on its face that the parties to it are "*Guaros de Lara – Columbus Sport 99*" and Claimant 1. The Claimant 1 Contract contains, among others, the following provisions:

> "*3. MONETARY COMPENSATION TO COACH*
>
> *During the term of employment as foreseen in point 1, CLUB irrevocably guarantees payment to COACH of the following monetary (salary and bonuses) compensation …*
>
> *CURRENCY: AMERICAN DOLLARS*
>
> *IRREVOCABLY PAYMENT OF THREE HUNDRED FIFTY THOUSAND AMERICAN DOLLARS – USD 350.000=NET*
>
> *PAYABLE THROUGH WIRE TRANSFER AS FOLLOWS:*
>
> - *SEASON 2016-2017: ONE HUNDRED SEVENTY THOUSAND AMERICAN DOLLARS – USD 170,000=NET, IN EIGHT (8) MONTHLY, EQUAL AND CONSECUTIVE PAYMENTS OF USD 21,250=NET. THE FIRST PAYMENT SHALL BE DONE AT SEPTEMBER 30TH, 2016, AND LAST PAYMENT SHALL BE DONE AT APRIL 30TH, 2017, THE PRO-RATA TEMPORIS DAILY BASIS SHALL BE USD 708.33=NET.*
> - *SEASON 2017-2018: SEASON 2016-2017: ONE HUNDRED EIGHTY THOUSAND AMERICAN DOLLARS – USD 180.000=NET, IN EIGHT (8) MONTHLY, EQUAL AND CONSECUTIVE PAYMENTS OF USD 22.500=NET. THE FIRST PAYMENT SHALL BE DONE AT SEPTEMBER 30TH 2017, AND LAST PAYMENT SHALL BE DONE AT APRIL 30TH, 2018. THE PRO-RATA TEMPORIS DAILY BASIS SHALL BE USD.750=NET.*
> - *LATE PAYMENTS*
>
>   *IN THE EVENT CLUB IS LATE PAYING THE SALARY TO PLAYER AND/OR PAYING THE AGENT FEE TO THE AGENT, the following irrevocable and contract "late payments" rules shall apply.*

- *Starting from the FIFTH (5th) day of delay, CLUB must pay to PLAYER additional USD, 100=NET per day and additional USD, 100=NET, to the AGENT, as the late fee together with the monthly payment.*

- *After the TENTH (10th) day of delay COACH has additionally the right to cease rendering services until the CLUB re-establishes its commitment to the conditions herein. COACH and/or AGENT shall [sic] the right to declare the AGREEMENT NULL and VOID, while retaining their rights to compensation, and the CLUB shall grant to the COACH his Letter of Clearance to play anywhere in MEXICO or overseas without restriction of any sort.*

[…]

4. BONUSES MONETARY COMPENSATION TO COACH

In addition to the Net Monthly Salary to be paid to COACH as mentioned above, the CLUB shall pay to the COACH the following bonuses for each specific goal listed in this 4th clause that is achieved by the CLUB in each season

[…]

WINNING ANY OFFICIAL COMPETITION LEAGUE TITLE: ONE (1) MONTH OF SALARY.

All bonus, monetary compensation are ADDITIONAL TO PRORATED MONTHLY SALARY, CUMULATIVE AND SHALL BE PAYED IN THE NEXT 72 hours after achievement.

[…]

5. GUARANTEED CONTRACT UNDER THE FOLLOWING TERMS

CLUB fully guarantees this Agreement. In this regard, even if the COACH is removed or released from the CLUB or this agreement is terminated or suspended by the CLUB due to COACH's lack of or failure to exhibit sufficient coaching skills, COACH's death, illness, physical disability directly related with the accomplishment of this contract or his normal life activities regarding his presence in the country, Club shall nevertheless be required to pay to the COACH and the AGENT, on the dates set forth in this Agreement, the full amounts in the Agreement.

In case the COACH is released by the CLUB during this Agreement, he will be a complete free agent worldwide, and the present serves as a full release or Letter of Clearance.

In any case, if CLUB wants to release the COACH, they must send written notification to COACH's AGENT during the last five (5) days of the previous month, to confirm their decision..."

[…]

18. DISPUTES

Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be definitely resolved in accordance with the FAT Arbitration Rules, by a single arbitrator appointed by the FAT President. The seat of 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 the Chapter 12 of the Swiss Act on Private International Law (PIL) irrespective of the parties domicile. Awards of the FAT 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 FAT and against decision of the Court of Arbitration for Sport (CAS) upon appeal shall be excluded.

[…]

19. GOVERNING LAW

This contract shall be interpreted and enforced in accordance with the laws of VENEZUELA."

6. On 4 July 2016, Claimant 2 and Claimant 3 each also entered into separate employment contracts in respect of the 2016-2017 and 2017-2018 basketball seasons (respectively the "Claimant 2 Contract" and the "Claimant 3 Contract", together the "Claimant 2 and 3 Contracts") (Claimant 1 Contract, Claimant 2 Contract and Claimant 3 Contract together are hereinafter referred to as the "Claimant Contracts").

7. The Claimant 2 and 3 Contracts state on their face that the parties to them are "*Guaros de Lara – Columbus Sport 99*" and Claimants 2 and 3 respectively. The Claimant 2 and 3 Contracts, while different, both contain, among others, the following identical provisions:

"3. MONETARY COMPENSATION TO COACH

During the term of employment as foreseen in point 1, CLUB irrevocably guarantees payment to COACH of the following monetary (salary and bonuses) compensation […]

SALARY CURRENCY: USD.

IRREVOCABLY PAID AS FOLLOWS:

- SEASON 2016-2017: TWENTY FIVE THOUSAND AMERICAN DOLLARS – USD. 25,000=NET. PAYABLE IN TEN (10) MONTHLY, EQUAL AND CONSECUTIVE PAYMENTS OF USD 2,500=NET. THE DAILY "PRO-RATA TEMPORIS" SHALL BE USD 83,33=NET PER DAY. THE FIRST PAYMENT SHALL BE DONE AT SEPTEMBER 30TH, 2016, AND THE LAST PAYMENT SHALL BE DONE AT JUNE 30TH, 2017.

SEASON 2017-2018: THIRTY FIVE THOUSAND AMERICAN DOLLARS – USD. 35,000=NET. PAYABLE IN TEN (10) MONTHLY, EQUAL AND CONSECUTIVE PAYMENTS OF USD 3.500=NET. THE DAILY "PRO-RATA TEMPORIS" SHALL BE USD. 116,67=NET PER DAY. THE FIRST PAYMENT SHALL BE DONE AT SEPTEMBER 30TH, 2017, AND THE LAST PAYMENT SHALL BE DONE AT JUNE 30TH, 2018.

- <u>LATE PAYMENTS</u>

IN THE EVENT CLUB IS LATE PAYING THE SALARY TO THE PLAYER AND/OR PAYING THE AGENT FEE TO THE AGENT, the following irrecoverable and contract "late payment" rules shall apply:

- Starting from the FIFTH (5th) day of delay, CLUB must pay to PLAYER additional USD, 100=NET per day and additional USD, 100=NET, to the AGENT, as the late fee together with the monthly payment.

- After the TENTH (10th) day of delay COACH has additionally the right to cease rendering services until the CLUB re-establishes its commitment to the conditions herein. COACH and/or AGENT shall the [sic] right to declare the AGREEMENT NULL and VOID, while retaining their rights to monetary compensation, and the CLUB shall grant to the COACH his Letter of Clearance to work anywhere in VENEZUELA or overseas without restriction of any sort.

[…]

<u>5. GUARANTEED CONTRACT</u>

The CLUB guarantees the agreement to the coach, and all monies contracted as per Art 3 and Art 15 are hereby irrevocably guaranteed and shall be paid by the CLUB to the COACH and AGENT.

THE CLUB CANNOT RESCIND THIS AGREEMENT AND SUBSTITUTE THE COACH, FOR TECHNICAL REASONS OR POOR PERFORMANCES

[…]

18. DISPUTES

Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be definitely resolved in accordance with the FAT Arbitration Rules, by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English, and the arbitrator shall decide the dispute ex aequo et bono. The arbitration shall be governed by the Chapter 12 of the Swiss Act on Private International Law (PIL) irrespective of the parties' domicile. Awards of the FAT 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 FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal shall be excluded.

[…]

19. GOVERNING LAW

This contract shall be interpreted and enforced in accordance with the laws of VENEZUELA."

8. The Claimant Contracts were terminated on 6 November 2016.

3.2 The Proceedings before the BAT

9. On 10 July 2017, the BAT received the non-reimbursable handling fee of EUR 4,000 from the Claimants. On 18 July 2017, the Claimants filed a Request for Arbitration in accordance with the BAT Rules.

10. By letter dated 21 August 2017, the BAT Secretariat fixed a deadline of 13 September 2017 for Respondent 1 to file an Answer to the Request for Arbitration. By the same letter, and with a deadline of 1 September 2017 for payment, the following amounts were fixed as the Advance on Costs:

"Claimant 1 (Mr. Ivan Deniz O'Donell) *EUR 4,000.00*

Claimant 2 (Mr. Marcos Cervero Simonet)	*EUR 1,000.00*
Claimant 3 (Mr Ronald Guillen)	*EUR 1,000.00*
Respondent (Guaros de Lara B.B.C)	*EUR 6,000.00"*

11. The Claimants paid their share of the Advance on Costs in two instalments, the first on 2 October 2017 and the second on 4 October 2017. Respondent 1 paid its share of the Advance on Costs on 28 August 2017.

12. On 11 September 2017, Counsel for the Respondents requested an extension of time until 19 September 2017 to file the Answer. The Arbitrator granted this extension. On 19 September 2017, Respondent 2 made a submission to the Arbitrator.

13. By Procedural Order dated 19 October 2017, the Arbitrator requested that the Parties provide further information by 6 November 2017 (hereinafter the "First Procedural Order").

14. Respondent 2 responded to the First Procedural Order on 6 November 2017. The Claimants responded to the First Procedural Order on 7 November 2017.

15. On 15 November 2017, the Arbitrator wrote to the Parties, noting Respondent 2's submission in response to the First Procedural Order, which stated that *"Guaros de Lara BBC does not have any legal existence, contrary to the company Columbus Sport 99 C.A., which owns the club*" (hereinafter the "Second Procedural Order").

16. On 21 November 2017, the Claimants responded to the Second Procedural Order requesting that Columbus Sport 99 C.A. be added as an additional Respondent to their Request for Arbitration.

17. On 22 November 2017, the Second Respondent was joined to the proceedings. By Procedural Order of the same date, the Arbitrator invited both Respondents to make any submissions they deemed fit in relation to the Claimants' claim by 13 December 2017 (hereinafter the "Third Procedural Order").

18. The Respondents submitted their response to the Third Procedural Order on 27 November 2017, with which they provided eight sworn witness declarations from members of the Guaros de Lara B.B.C team. The Respondents submitted three further sworn witness declarations from other members of the Guaros de Lara B.B.C. team on 11 December 2017.

19. The Claimants submitted their response to the Third Procedural Order on 14 December 2017.

20. By Procedural Order dated 2 January 2018, the Arbitrator declared the exchange of documents complete, and requested that the Parties submit detailed accounts of their costs by 9 January 2018.

21. On 9 January 2018, the Respondents requested an extension of three days to the deadline for submitting detailed accounts of their costs. The Arbitrator granted the Respondents' request for an extension of time.

22. On 9 January 2018, the Claimants submitted the following account of costs:

> "*Respondent is ordered to pay expenses and reasonable legal fees on a net amount of FOURTEEN THOUSAND EUROS (14.000,00 €) concretely related to the execution of the request for arbitration and Respondent's refusal to submit the proper payment*.

Study of the Agreement with Respondent. *Draw up of notifications.* *Conversations with Claimants.* *Correspondence.*	*2,500 Euro*
Draw up of Request for Arbitration.	*5,500 Euro*
Claimant's reply to the questions presented by the arbitrators.	*3,250 Euro*

Claimant's reply to the Respondent's answer	*2,750 Euro*
Total fees	*14,000 Euro*

Respondent, ADITIONALLY, [SIC] is ordered to pay the advanced of costs effectively incurred in the amount of SIX THOUSAND (EUR 6.000) and it should be considered when assessing the Claimants' costs legal fees and expenses.

Respondent, ADITIONALLY, [SIC] is ordered to pay the legal costs effectively incurred to have access to BAT proceedings, i.e., the non-reimbursable handling fee of FOUR THOUSAND EURO (EUR 4.000) and it should be considered when assessing the Claimants' legal fees and expenses.

Claimant's share of Advance of Costs	6,000 Euro
Non-reimbursable handling fee	*4,000 Euro*

• In light of the above, the total sum to be disbursed to such effect would be the following:

Total Costs, Legal Fees and Expenses	*24,000 Euro*

"

23. On 12 January 2018, the Respondents submitted the following account of costs:

*"**Statement of fees and expenses N° 12877***
From 05.05.2017 to 29.09.2017

[…]

Fees	*12.70 h*	*CHF*	*6'350.00*
Expenses (telephones, copies, etc.)		*CHF*	*194.00*
Total		***CHF***	***6'544.00***

Statement of fees and expenses N° 12877
From 30.09.2017 to 11 January 2018

[…]

Fees	*0.40 h*	*CHF*	*200.00*

Expenses (telephones, copies, etc.)	*CHF*	*8.00*
Total	***CHF***	***208.00***

[…]

IBERIA AIR TOTAL USD 6275.94

HOTEL TIFFANY 4 NIGHTS TOTAL USD 662.96

INVOICE TOTAL USD 6938.90"

24. Since none of the Parties filed an application for a hearing, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the award on the basis of the written submissions of the Parties.

4. The Parties' Submissions

4.1 Claimant 1's Claims

25. Claimant 1 claims that he was verbally dismissed from the Club by its president, Jorge Hernandez (hereinafter the "President") on 6 November 2016 without notice, in breach of the Claimant 1 Contract and without just cause.

26. Claimant 1 alleges that, in light of the dismissal without just cause, he is entitled to receive his salary and bonuses for the full duration of the Claimant 1 Contract, together with late payment fees. In particular, Claimant 1 claims:

a) USD 148,750.00 in respect of outstanding salary payments due for the 2016-2017 season;

b) USD 180,000.00 in respect of outstanding salary payments due for the 2017-2018 season;

c) USD 21,250.00 as a bonus for winning the 2016 FIBA Intercontinental Cup (hereinafter the "Intercontinental Cup"); and

d) late payment penalties of USD 100.00 for each day that the Respondent has failed to pay the above outstanding sums.

27. In response to the First Procedural Order, Claimant 1 explained that, following his departure from the Respondent, he had sought new employment, eventually signing an employment contract with Bucaneros de la Guaira on 1 June 2017 (hereinafter the "Bucaneros Contract").

28. In the event, the Bucaneros Contract lasted for just 10 days (due to Bucaneros losing the West Conference semi-finals). Claimant 1 therefore earned a total of USD 2,500.00 pursuant to the Bucaneros Contract.

29. Following this, Claimant 1 returned to Mexico to coach Soles de Mexicali for the 2017-2018 season (hereinafter the "Soles de Mexicali Contract"). The Soles de Mexicali Contract commenced on 1 October 2017 and is scheduled to terminate following the last game of the 2017-2018 season. The Soles de Mexicali Contract provides that Claimant 1 will earn a total of USD 18,000.00 during the 2017-2018 season.

30. Claimant 1 originally submitted the following request for relief:

> *"**1.** Claimant 1 requests BAT to declare his entitlement to receive from Respondent the amount of **THREE HUNDRED FOURTY NINE THOUSAND SEVEN HUNDRED FIFTY U.S. Dollars ($349,750).***
>
> *"**2.** Respondent is ordered to pay **Claimant 1 late payments penalties** pursuant to Article 3 of the Agreement starting from the 6th November 2016 until the date of the submission of the present Request for Arbitration.*
>
> ***3.** Respondent is ordered to pay **Claimant 1 legal interest** on the sum of 5% per year from the date of the receipt of the Request for Arbitration until the day of actual payment by Respondent.*"

31. In response to the Second Procedural Order, however, Claimant 1 reduced the amount of his claim to take account of the amounts payable under the Bucaneros Contract and the Soles de Mexicali Contract thereby submitting that the Respondent owes him:

    a) USD 146,250.00 in respect of salary relating to the 2016-2017 season;

    b) USD 162,000.00 in respect of salary relating to the 2017-2018 season;

    c) USD 21,250.00 in respect of bonuses relating to the 2016-2017 season; and

    d) late penalty payments of USD 100.00 per day pursuant to Article 3 of Claimant 1 Contract.

4.2 Claimant 2 and Claimant 3's Claims

32. Claimants 2 and 3 also claim that they were verbally dismissed from the Respondent by its President on 6 November 2016, without notice in breach of the Claimant 2 and 3 Contracts and without just cause.

33. Claimants 2 and 3 allege that, in light of their dismissal without just cause, they are also entitled to receive their full salaries for the full duration of the Claimant 2 and 3 Contracts, together with late payment fees. In particular, Claimants 2 and 3 each claim:

    a) USD 22,500.00 in respect of outstanding salary payments due for the 2016-2017 season;

    b) USD 35,000.00 in respect of outstanding salary payments due for the 2017-2018 season; and

c) late payment penalties of USD 100.00 for each day that the Respondent has failed to pay the above outstanding sums.

34. Claimant 2 submitted that he was unable to find further employment for the 2016-2017 season but signed a contract with Soles de Mexicali for the 2017-2018 season (hereinafter the "Claimant 2 Soles de Mexicali Contract"). The Claimant 2 Soles de Mexicali Contract commenced on 15 September 2017 and is stated to terminate on the last game of the 2017-2018 season. The Claimant 2 Soles de Mexicali Contract provides that Claimant 2 will earn a total salary of USD 16,100.00.

35. Claimant 2 originally submitted the following request for relief:

> "***4. Claimant 2*** *requests BAT to declare his entitlement to receive from Respondent the amount of* ***FIFTY-SEVEN THOUSAND FIVE HUNDRED U.S. Dollars ($57,500)****.*
>
> ***5.*** *Respondent is ordered to pay Claimant 2* ***late payments penalties*** *pursuant to Article 3 of the Agreement, starting from the 6th of November 2016 until the date of the submission of the present Request for Arbitration.*
>
> ***6.*** *Respondent is ordered to pay* ***Claimant 2 legal interest*** *on the sum of 5% per year from the date of the receipt of the Request for Arbitration until day of actual payment by Respondent."*

36. In response to the Second Procedural Order, however, Claimant 2 reduced the amount of his claim to take account of the amounts payable under the Claimant 2 Soles de Mexicali Contract, thereby submitting that the Respondent owes:

a) USD 22,500.00 in respect of the 2016/2017 season (there being no applicable deduction for that season);

b) USD 18,900.00 in respect of the 2017/2018 season; and

c) late penalty payments of USD 100.00 per day pursuant to Article 3 of Claimant

2 Contract.

37. Claimant 3 submitted that he signed a contract with Marinos de Anzoategui in relation to the 2016-2017 season (hereinafter the "Marinos de Anzoategui Contract"). The Marinos de Anzoategui Contract commenced on 12 February 2017 and Claimant 3 received USD 6,133.44 in salary pursuant to the Marinos de Anzoategui Contract.

38. Following this, Claimant 3 signed a contract with Panteras de Aguascaliente A.C in relation to the 2017-2018 season (the "Panteras Contract"). The Panteras Contract was terminated after 24 days. Claimant 3 therefore received only USD 2,400.00 pursuant to the Panteras Contract.

39. Claimant 3 originally submitted the following request for relief:

> "***7. Claimant 3*** *requests BAT to declare his entitlement to receive from Respondent the amount of* ***FIFTY-SEVEN THOUSAND FIVE HUNDRED U.S. Dollars ($57,500)****.*
>
> ***8.*** *Respondent is ordered to pay Claimant 3* ***late payments penalties*** *pursuant to Article 3 of the Agreement, starting from the 6th of November 2016 until the date of the submission of the present Request for Arbitration.*
>
> ***9.*** *Respondent is ordered to pay* ***Claimant 3 legal interest*** *on the sum of 5% per year from the date of the receipt of the Request for Arbitration until day of actual payment by Respondent."*

40. In response to Procedural Order 2, however, Claimant 3 reduced the amount of his claim to take account of the amounts earnt under the employment contracts that he had entered into since his departure from the Respondent, thereby submitting that the Respondent owed him:

    a) USD 16,366.56 in respect of the 2016/2017 season;

    b) USD 32,600.00 in respect of the 2017/2018 season;

c) late penalty payments of USD 100.00 per day pursuant to Article 3 of Claimant 3 Contract.

4.3 The Respondents' Submissions

41. In response to the Claimants' Request for Arbitration, Columbus Sport 99 C.A. sent a letter to the BAT Secretariat stating that Guaros de Lara B.B.C. did not "*have any legal existence*" and instead the company Columbus Sport 99 C.A. owned "*the club*".

42. Columbus Sport 99 C.A. further submitted that the Request for Arbitration was filed against Guaros de Lara B.B.C. and argued that, since the Request for Arbitration was filed against a non-existing entity, it was inadmissible.

43. Notwithstanding this, Columbus Sport 99 C.A. went on to articulate its position in response to the Claimants' claims.

44. Columbus Sport 99 C.A. (which subsequently became joined to the proceedings as Respondent 2) submitted that the Claimants were not dismissed by the President but instead left of their own volition following poor match results.

45. Columbus Sport 99 C.A. argued that, in these circumstances, the Claimants were not entitled to salary payments due after the date on which they left the club.

46. Columbus Sport 99 C.A. argued that on the day of Claimant 1's resignation, he had "*warmly thanked Mr Hernandez, the president of the Club, for the opportunity which had been given to him to lead the team*." Columbus Sport 99 C.A. submitted a WhatsApp message sent on 6 November 2016 from Claimant 1 to the President. In the message, Claimant 1 explains that he has just received a call from the Claimants' agent, Claudio Pereira (hereinafter the "Claimants' Agent") and goes on to say:

> "*I just want to tell you Thanks for the opportunity you gave me to lead your team….. we learn from everything, Here I take the work, love and dedication that I gave your organization, also take two and half months of 24 hours' work with no break.*
>
> *[…]*
>
> *I know that Guaros is a winning team and the result in Argentina never was deserved but believe me with the time you will know that was not my fault.*
>
> *I left a project with two years of contract in mexicali winner, I leave a son that almost in three months I have not been able to tell him that I love him. In the stop I did not leave because I thought that I should be to focus on the work and I gave you the 100x100 of my focus , worked with the young as you asked me, I isolate myself from the threats, insults and continuous criticism without any defense of my team and so far I have the shirt well set and proud of Guaros as the leader of the club. I never steal money from my work and i think that my departure does not deserve to leave either through the back door or with conditions….. You are a gentleman and I only ask the life when we meet again.... A hand shake and a hug if you allow me.*
>
> *I understand that the morning meeting at 7 o'clock is not necessary…….*
>
> *My regards and greetings, here you will have me for what you need, I keep you with great respect to you and your family.*
>
> *A hug Ivan Denniz."*

47. In support of its position, Columbus Sport 99 C.A. also referred to a press article dated 7 November 2016 which states "*Deniz, who ceases to be the coach of the Larense team due to a series of negative results that have left him of the final instances of the South American League disputed in Argentina, was the one who had the initiative to resign to its position and to place it to the order of Jorge Hernandez Fernandez, president and owner of Guaros de Lara*."

48. Columbus Sport 99 C.A. submitted that Claimant 2 "*resigned*" and Claimant 3 "*simply left and never came back*".

49. Columbus Sport 99 C.A. also referred to further WhatsApp conversations that took place between the President and the Agent. In one of conversations that took place on 5 November 2016, the President informed the Claimants' Agent: "*Claudio, there in an internal war to the death. everything [sic] is very bad I have a lot of information I need 2 or 3 things to investigate and analyze*".

50. Columbus Sport 99 C.A. claimed that, in any event, the Claimants had not suffered any loss following their departure from Respondent 1 because Claimant 1 and Claimant 2 were re-hired by their previous employer, Soles de Mexicali, and Claimant 3 was subsequently hired as head-coach by Panteras de Aguascalientes.

51. Subsequently Respondent 2 was formally joined to the proceedings and both Respondent 1 and Respondent 2 were given the opportunity to make further submissions in response to the Claimants' submissions. Neither of the Respondents made any further legal submissions, however, they submitted eleven sworn witness declarations (hereinafter the "Declarations").

5. Jurisdiction

52. 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).

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

54. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.1

55. The existence of a valid arbitration agreement is to be examined in light of Article 178 PILA, which reads as follows:

> *"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.*
>
> *2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.*
>
> *3 The validity of an arbitration agreement may not be contested on the grounds that the principal contract is invalid or that the arbitration agreement concerns a dispute which has not yet arisen."*

56. Article 18 of each of the Claimant Contracts stipulates:

> *"18. DISPUTES*
>
> *Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be definitely resolved in accordance with the FAT Arbitration Rules by a single arbitrator appoiunted [SIC] by the FAT 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 the Chapter 12 of the Swiss Act on Private International Law (PIL) irrespective of the parties domicile Awards of the FAT 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 FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal shall be excluded."*

57. As noted at paragraph 42 above, Respondent 2 initially submitted that the Request for Arbitration was inadmissible because it was filed against (on the Respondent's case) a non-existing entity (Guaros de Lara B.B.C.). It is correct that Guaros de Lara B.B.C.

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

was initially named as the sole respondent by the Claimants. However, during the course of the proceedings, Columbus Sport 99 C.A. was added as Respondent 2.

58. The Arbitrator notes the following:

a) the Claimant 1 Contract:

I. states on its face that the parties to it are Claimant 1 and "*Guaros de Lara – Columbus Sport 99*";

II. contains a signature block bearing the stamps of both Guaros de Lara B.B.C. and Columbus Sport 99 C.A.; and

III. is signed on behalf of "*Guaros de Lara – Columbus Sport 99*" by the President;

b) the Claimant 2 Contract:

I. states on its face that the parties to it are Claimant 2 and "*Guaros de Lara – Columbus Sport 99*";

II. contains a signature block bearing the stamp of Guaros de Lara B.B.C.; and

III. is signed on behalf of "*Guaros de Lara – Columbus Sport 99*" by the President;

c) the Claimant 3 Contract:

I. states on its face that the parties to it are Claimant 3 and "*Guaros*

de Lara – Columbus Sport 99";

II. contains a signature block bearing the stamp of Guaros de Lara B.B.C.; and

III. is signed on behalf of "*Guaros de Lara – Columbus Sport 99*" by the President.

d) Respondent 2 submitted that the President is the "*owner*" and "*authorized representative*" of Columbus Sport 99 C.A.;

e) Respondent 2 also submitted that part of the activity of Columbus Sport 99 C.A. "*consists in exploiting Guaros de Lara BBC*"; and

f) Respondent 2 further submitted that Columbus Sport 99 C.A. assumes the benefits and legal obligations of Guaros de Lara B.B.C.

59. Although the Claimant Contracts refer to "*Guaros de Lara – Columbus Sport 99*" in places, the Arbitrator considers for the above reasons that Columbus Sport 99 C.A. (i.e. Respondent 2) is the relevant legal entity that is party to each of the Claimant Contracts and the arbitration clauses contained within them, and not Guaros de Lara BBC (i.e. Respondent 1). The Arbitrator considers that Respondent 1 is, instead, simply a brand or a team name given to Respondent 2's basketball team. In light of this, the Arbitrator finds that he does not have jurisdiction to determine the Claimants' claims as against Respondent 1.

60. The Claimant Contracts are each in written form and thus their respective arbitration clauses fulfil the formal requirements of Article 178(1) PILA. 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 respective arbitration agreements contained in the Claimant

Contracts under Swiss law (referred to by Article 178(2) of the PILA). In addition, Respondent 2 did not object to the jurisdiction of the BAT over it.

61. For these reasons, the Arbitrator has jurisdiction to adjudicate the Claimants' claims as against Respondent 2.

6. Discussion

6.1 Applicable Law – ex aequo et bono

62. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the Parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the Parties may authorize the arbitrators to decide "*en équité*", as opposed to a decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

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

63. 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."*

64. Article 18 of each of the Claimant Contracts states that *"[t]he arbitrator shall decide the dispute ex aequo et bono"*. However, Article 19 of each of the Claimant Contracts states "*This contract shall be interpreted and enforced in accordance with the laws of Venezuela*". It therefore falls to the Arbitrator to determine which law governs the dispute between the Parties.

65. The Arbitrator notes that Article 18 of each of the Claimant Contracts discusses the circumstances in which disputes are referred to the BAT for determination. Article 18 is clear that disputes referred to the BAT shall be decided *ex aequo et bono*. Furthermore, Article 18 states that any disputes submitted to the BAT shall be determined in accordance with the BAT Rules. The preamble to the BAT Rules states "*the parties recognise […] that the BAT arbitrators decide ex aequo et bono*" and BAT Rule 15.1 states "[*u]nless the parties have agreed otherwise, the Arbitrator shall decide the dispute ex aequo et bono*".

66. There might be circumstances in which Venezuelan law is relevant to the interpretation of the Claimant Contracts, however, given that the Claimant Contracts expressly provide that proceedings before the BAT shall be decided *ex aequo et bono*, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*. The Arbitrator notes for completeness that none of the Parties have sought to argue that Venezuelan law is relevant to these proceedings.

67. The concept of *équité* (or *ex aequo et bono*) used in 187(2) PILA originates from Article 31(3) of the *Concordat intercantonal sur l'arbitrage*[2] (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*

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

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

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]

69. 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*".

70. In light of the foregoing matters, the Arbitrator makes the following findings.

6.2 Findings

6.2.1 The Claimants' alleged resignation

71. The Arbitrator considers that this case essentially turns on whether the Claimants resigned or were dismissed by Respondent 2. If the Claimants resigned, they are not entitled to compensation for unpaid salaries or bonuses because there is nothing in the Claimant Contracts entitling them to such sums. Furthermore, the Claimants have not produced any evidence of Respondent 2 representing that such sums would be paid to them in the event that they resigned.

72. If, however, the Claimant Contracts were terminated by Respondent 2 without just cause, in principle the Claimants will be entitled to compensation for unpaid salary and bonuses. As it is the Claimants who are seeking to assert rights (i.e. right to unpaid salary and bonuses) after 7 November 2016, it is the Claimants who bear the burden of proof in this regard.

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

73. The Claimants allege that they were verbally dismissed from Respondent 2 in breach of the Claimant Contracts and without just cause on 6 November 2016. The Claimants argued that the President deliberately dismissed them verbally to avoid the need to dismiss them formally which would have required Respondent 2 to make all outstanding payments under the Claimant Contracts.

74. The Arbitrator notes that Article 9 of each of the Claimant Contracts sets out the procedure for termination:

> "*9. OFFICIAL TERMINATION OF CONTRACT AGREEMENT*
>
> *If COACH, CLUB and AGENT wish and agree to terminate this AGREEMENT, all parties will only and exclusively use, execute and sign the instrument 'Official Termination of Contract Agreement' provided by AGENT. No other form, in writing, oral or otherwise shall have any legal effect and is therefore null and void."*

75. This Article deals with the situation where the Claimant(s), Respondent 2 and the Agent all agree to a mutual termination. Neither the Claimants nor the Respondents submitted that they followed this procedure. On the basis of the evidence submitted by the Parties, the Arbitrator agrees that the termination of the Claimant Contracts was not mutual and so the above provision is not relevant for the purposes of determining this dispute.

76. To support its position that the Claimants resigned, Respondent 2 also relies on an article published on 7 November 2016 on the websites notiglobo.com and avdeportes.com which reports that Claimant 1 resigned (the "Article").

77. Respondent 2 also submitted the Declarations. The Declarations focus on the Claimants' management of the team and dissatisfaction among certain players with Claimant 1 in particular. Four of the Declarations refer to the Claimants having 'left' the Respondent(s). One of the Declarations (made by the Residence Manager of Respondent 1) states that the Claimants left their apartments without notice. .

78. In response, the Claimants submitted that the Declarations were "*clearly not relevant for the case at hand*" and noted that "*All the witness' statements convey complaining or critics, in a very excessive and untruthful manner, regarding the working methods and rules of conduct applied by the Claimants.*"

79. It is clear that the Claimant Contracts were terminated: all of the Parties agree this and the Claimant Contracts have not been performed by any of the Parties since 6 November 2016. It therefore falls to the Arbitrator to determine whether the termination arose as a result of the Claimants' resignation or their dismissal. The Claimants were unable to point to a contemporaneous document which states expressly that they were dismissed. Likewise, Respondent 2 was unable to submit a contemporaneous document proving that the Claimants resigned. However, based on the evidence presented during these proceedings, the Arbitrator is satisfied that the Claimants have discharged their burden of proving that the Respondent terminated the Claimant Contracts unilaterally and without just cause.

80. The Arbitrator finds *ex aequo et bono* that the Claimant Contracts were terminated without just cause by Respondent 2 and that the Claimants did not resign. The Arbitrator reaches this conclusion for the following reasons:

    a) the Claimants highlighted in their submissions that none of them had alternative clubs to join on leaving Respondent 2. The Respondents did not dispute this. Although not conclusive, the Arbitrator finds it persuasive that the Claimants would be unlikely to resign from their jobs without having alternative employment lined up, particularly at such an early stage of the season (when it would not have been easy to find new employment);

    b) the Article submitted by Respondent 2 is the only press article submitted in the proceedings which reports that the Claimants resigned. The

Claimants, however, provided multiple articles in which it is reported that they were dismissed;

c) the Arbitrator notes that the Declarations do not address in any detail the question of whether the Claimants were dismissed or resigned. Only four of the eleven Declarations actually mention any of the Claimants leaving the Respondent(s). Three of those four simply refer to the Claimants having 'left' and do not address whether they left as a result of a dismissal or a resignation. The one Declaration that does address the issue of dismissal contains very little detail, simply stating "*I make the reservation that the information that [Claimant 1] was fired was never published in the media. Neither was communicated the proper means of the organization Guaros de Lara*". However, as noted at paragraph 80(b) above, the Claimants submitted various media reports which state that Claimant 1 was fired. The Declaration made by Respondent 2's Residential Manager states that a duty guard had told the Residential Manager that the Claimants had left without notice at 10.50pm on 8 November. The Arbitrator notes that this is hearsay evidence and, in any event, the Residential Manager's statement could certainly be reconciled with the Claimants having been dismissed two days previously.

In response to the Declarations, the Claimants submitted, inter alia, that: (i) all the Declarations were made by employees of Respondent 2, which negates the Declarations' credibility; (ii) the Declarations are, in substance, irrelevant to the question of whether the Claimants resigned or were dismissed; and (iii) none of the individuals who signed the Declarations would have been acquainted with the terms of the Claimant Contracts, nor would they have participated in the discussions regarding the Claimants' dismissal. The Arbitrator considers that a witness statement might carry less weight if made by an individual who is an

employee of a Party (as compared to a more independent individual) however the employee-employer relationship does not necessarily undermine the credibility of the witness and their statement still has some evidentiary value. The Arbitrator does, however, consider it very unlikely that the persons giving the Declarations would have been privy to conversations between the Claimants and the Respondents regarding the Claimants' employment status. Moreover, the content of the Declarations does little to answer the question of whether the Claimants were dismissed or resigned;

d) as described at paragraph 46 above, Respondent 2 submitted a WhatsApp message from 6 November 2016 from Claimant 1 to the President, in which Claimant 1 thanked the President for the opportunity he was given. This would tend to support the assertion that the Claimants resigned; thanking an employer is something that an employee is more likely to do upon resignation, than they might be expected to do shortly after having been dismissed. However, it is not inconceivable that an employee might thank an employer for an opportunity, having just been dismissed. The Arbitrator finds that there is little else in the 6 November WhatsApp message to materially support the argument that the Claimants resigned. Indeed, Claimant 1's comment that "*the result in Argentina never was deserved but believe me with the time you will know that was not my fault*" could be viewed as something that someone who had just been dismissed would write, in the sense that the club's defeat was not Claimant 1's fault and that, in time, Respondent 2 would see the error of his ways. Likewise, Claimant 1's comment that "*my departure does not deserve to leave either through the back door or with conditions*" is a statement which tends support the assertion that Claimant 1 was dismissed, because someone who had been fired would probably be more likely to be concerned about their departure being managed by their

employer "through the back door" or with conditions attached to it, than someone who had resigned and would therefore expect to be able to simply walk away from the employment relationship. Given how ambivalent these comments are, the Arbitrator finds that the 6 November WhatsApp message is of limited support to Respondent 2's position;

e) other than the Article, the Declarations and the 6 November WhatsApp message (examined above), the Respondents submitted little further evidence to show that the Claimants resigned. While this, by itself, does not prove that the Claimants were dismissed, it does cast further doubt on Respondent 2's account of events; and

f) Respondent 2 submitted various WhatsApp conversations, including a conversation between the President and the Claimants' Agent on 10 November 2017 (i.e. 4 days after the termination of the Claimant Contracts). In that conversation the Agent states: "*talk to* [the Claimants] *about the terms of the rescission of your contract. Without going into details, they were very clear in that they intend to collect their contracts in full. Mention things that are real and indisputable, like all that they left aside (not only money) to join guaros, everything that lived and happened, and the irreparable damage to their reputation and image and personal*." In the same conversation the President states: "*I will not accept any arrangement because in that I do not remain with you that you are their agent. I will not pay anything more than the contract and that does not include what is guaranteed. You'll see what you're going to do. Set a precedent in the BAT/FIBA*." This conversation suggests that the Claimants did not resign. In particular, references made by the Claimants' Agent to "*the rescission of [the Claimant Contracts]*" and "*the irreparable damage to [the Claimants'] reputation and image and personal*" would make little sense in the context of a resignation but would make sense in

the context of the Claimants being dismissed. The Arbitrator finds that this evidence carries significant evidentiary weight to support the argument that the Claimants did not resign. It addresses the question of whether the Claimants resigned far more directly than the 6 November WhatsApp message relied upon by Respondent 2 and – unlike the Declarations – it was produced close to the time of the termination of the Claimant Contracts.

6.2.2 The salary payments under the Claimant Contracts

81. Given that the Claimant Contracts were terminated without just cause, the Claimants are prima facie entitled to all outstanding sums under the Claimant contracts. The Claimants are, however, under a duty to mitigate their losses.

82. Claimant 1 signed the Bucaneros Contract and the Soles de Mexicali Contract and mitigated his losses by USD 20,500.00. Claimant 2 signed the Claimant 2 Soles de Mexicali Contract and mitigated his losses by USD 16,100.00. Claimant 3 signed the Marinos de Anzoategui Contract and the Panteras Contract and mitigated his losses by USD 8,533.44.

83. The Arbitrator accepts that the Claimant Contracts were terminated during the course of the season at a point in time when it would have been difficult to obtain a new contract. Notwithstanding this, the Arbitrator considers that each of the Claimants failed to mitigate their losses sufficiently. The Arbitrator finds ex aequo et bono that the Claimants should have been able to mitigate at least 25% of the losses that they suffered in the 2016-2017 season. The reason for this comparatively low percentage is that (i) the Claimant Contacts were terminated relatively early in the season; and (ii) the Claimants were all coaches and the Arbitrator considers that it is generally harder for

coaches to find new clubs mid-season than it is for players (because, for example, players are far more likely to require replacing mid-season due to injury).[6] Therefore in relation to the 2016-2017 season:

a) Claimant 1 is entitled to USD 111,562.50;and

b) Claimant 2 is entitled to USD 16,875.00.

84. Claimant 3 received USD 6,133.44 in salary payments for the 2016-2017 season pursuant to the Marinos de Anzoategui Contract. This represents mitigation of slightly more than 25% of the losses he suffered in the 2016-2017 season. As such, the Arbitrator finds that Claimant 3 is entitled to the difference between the amount he was entitled to under the Claimant 3 Contract and the amount he actually earned the Marinos de Anzoategui Contract. Claimant 3 is therefore entitled to USD 16,366.56 (i.e. USD 22,500.00 less 6,133.44).

85. The Arbitrator considers that the Claimants were in a much better position to obtain new contracts for the 2017-2018 season, particularly given that the Claimant Contracts were terminated early in the 2016-2017 season. In light of this the Arbitrator finds ex aequo et bono that the Claimants should have been able to mitigate losses up to the amount of at least 75% of their salaries under the Claimant Contracts for the 2017-2018 season. Therefore in relation to the 2017-2018 season:

a) Claimant 1 is entitled to USD 45,000.00;

b) Claimant 2 is entitled to USD 8,750.00; and

[6] See BAT 0256/12, para. 170; BAT 0383/13, para. 109; BAT 0471/13, para. 69.

c) Claimant 3 is entitled to USD 8,750.00.

86. Accordingly, in relation to the total outstanding salary payments, Respondent 2 must pay:

a) USD 156,562.50 to Claimant 1;

b) USD 25,625.00 to Claimant 2; and

c) USD 25,116.56 to Claimant 3.

87. Claimant 1 also claims bonus payments amounting to USD 21,250.00 in respect of the Respondent's victory in the Intercontinental Cup in accordance with Article 4 of Claimant 1 Contract. Claimant 1 submitted evidence to show that this bonus was earned before Respondent 2 terminated the Claimant 1 Contract. This bonus is therefore due in full to Claimant 1 and accordingly the Arbitrator finds that the Respondent must pay to Claimant 1 USD 21,250.00 in respect of unpaid bonuses.

6.2.3 Late Payment fees

88. Late payment fees have been considered extensively in BAT jurisprudence (see, for example, FAT 0036/09 and BAT 0319/12). In general terms, parties may be entitled to receive late payment fees, provided that the fees are not excessive.

89. Each of the Claimants seeks late payment penalties at a rate of USD 100.00 per day, in accordance with the terms of the Claimant Contracts. For the period from 7 November 2016 (being the day following the termination of the contract) to 18 July 2017 (the date of the filing of the Request for Arbitration), this rate would amount to a combined total of USD 75,900.00, or approximately 28% of the total amount being awarded to the Claimants.

90. Even when capping the period of time for which late payment penalties run up until the date of the filing of the Request for Arbitration, the Arbitrator considers this sum to be excessive in the circumstances of the case and given the principal amounts being awarded to the Claimants.

91. However, there is no provision in the Claimant Contracts for default interest and the Arbitrator considers that the Parties should be able to contractually agree compensation for late payment of salary. In the circumstances of this case the Arbitrator considers, ex aequo et bono that a fair late payment fee for Claimant 1 would be USD 21,000.00; for Claimant 2 would be USD 2,600.00; and for Claimant 3 would be USD 2,800.00. In determining these amounts, the Arbitrator has paid regard to: (a) the total amount of principal compensation being awarded to the Claimants; (b) the length of time since those amounts fell due (i.e. since 7 November 2017); (c) the fact that the Parties did intend to agree a contractual incentive for the Respondents to avoid late payment by including a late payment fees clause in the Claimant Contracts; and (d) BAT jurisprudence regarding late payment fees.

6.2.4 Interest

92. The Claimants have claimed interest on the sums due to them from the Respondent at 5% per annum from the date of the Request for Arbitration. As noted above, the Claimant Contracts do not provide for default interest. Moreover, the Arbitrator considers that the award in respect of late payment fees detailed is more than adequate to compensate the Claimants for any losses suffered as a result of late payment of outstanding sums. The Arbitrator therefore rejects the Claimants' request for an additional 5% per annum on the sums awarded.

7. Costs

93. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the award or communicated to the Parties separately. Furthermore, Article 17.3 of the BAT Rules provides that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

94. On 21 February 2018, 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 at EUR 12,000.00.

95. Article 17.3 of the BAT Rules provides that the award shall determine which party shall bear the arbitration costs and in which proportion and that, as a general rule, the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings. In doing so, "*the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and financial resources of the parties.*"

96. The Claimants have been awarded approximately 45% of the total sum that they claimed from the Respondent (excluding the amounts claimed in respect of late payment fees). The Arbitrator considers that this percentage is the starting point for determining the proportion of the arbitration costs to be borne by the Respondent. However, given the specific circumstances of this case, including, in particular, the fact

that these proceedings would not have been necessary if Respondent 2 had not unilaterally terminated the Claimant Contracts without just cause, the Arbitrator considers it is fair in the circumstances of the case and in application of Article 17.3 of the BAT Rules, that 75% of the costs of the arbitration be borne by the Respondent 2 and 25% of the costs be borne by the Claimants.

97. The Claimants have claimed EUR 18,000.00 in legal fees and expenses (including the non-reimbursable handling fee). In light of the circumstances of this case, in particular the volume, number and complexity of submissions made by the Parties, the Arbitrator considers that a fair contribution towards the Claimants' legal fees (including the non-reimbursable handling fee) would be EUR 12,000.00.

98. Therefore, the Arbitrator decides:

(i) the Respondent shall pay to the Claimants EUR 9,000.00, as reimbursement of arbitration costs advanced by the Claimant; and

(ii) the Respondent shall pay to the Claimants EUR 14,000.00, as a contribution towards the Claimant's legal fees and expenses, including the non-reimbursable handling fee.

8. AWARD

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

1. **Columbus Sport 99 C.A. shall pay Mr. Ivan Deniz O'Donnell USD 177,812.50 as compensation for unpaid salary and bonuses.**

2. **Columbus Sport 99 C.A. shall pay Mr. Ivan Deniz O'Donnell USD 21,000.00 in late payment fees.**

3. **Columbus Sport 99 C.A. shall pay Mr. Marcos Cervero Simonet USD 25,625.00 as compensation for unpaid salary.**

4. **Columbus Sport 99 C.A. shall pay Mr. Marcos Cervero Simonet USD 2,600.00 in late payment fees.**

5. **Columbus Sport 99 C.A. shall pay Mr. Ronald Guillen USD 25,116.56 as compensation for unpaid salary.**

6. **Columbus Sport 99 C.A. shall pay Mr. Ronald Guillen USD 2,800.00 in late payment fees.**

7. **Columbus Sport 99 C.A. shall pay jointly to Mr. Ivan Deniz O'Donell, Mr Marcos Cevero Simonet and Mr Ronald Guillen the amount of EUR 9,000.00 as reimbursement of the advance on BAT costs.**

8. **Guaros de Lara BBC shall pay jointly to Mr Ivan Deniz O'Donnell, Mr Marcos Cevero Simonet and Mr Ronald Guillen the amount of EUR 12,000.00 as a contribution towards their legal fees and expenses.**

9. **Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 8 June 2018

BASKETBALL
ARBITRAL TRIBUNAL

Rhodri Thomas

(Arbitrator)