



**BASKETBALL**  
ARBITRAL TRIBUNAL

## **ARBITRAL AWARD**

**(BAT 1380/19)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Rhodri Thomas**

in the arbitration proceedings between

**Mr. Mathias Calfani Percincula**

represented by Mr. Claudio Pereira Garcia,  
c/o Prosports Basket Management, Bvar Espana 2813/302,  
Montevideo, Uruguay

**- Claimant 1 -**

**Mr. Claudio Pereira Garcia**

**- Claimant 2 -**

vs.

**Club Atletico San Lorenzo de Almagro – I.D.S. Sports**  
Av. La Plata 1794, CP 11300 C.A. Buenos Aires, Argentina

**- Respondent -**

represented by Mr. Diego M. Lennon

## **1. The Parties**

### **1.1 The Claimants**

1. Mr. Mathias Calfani Percincula (hereinafter “Claimant 1”) is a professional basketball player. Mr. Claudio Pereira Garcia (hereinafter “Claimant 2”) is the agent of Claimant 1 (together hereinafter the “Claimants”).

### **1.2 The Respondent**

2. Club Atletico San Lorenzo de Almagro – I.D.S. Sports (hereinafter “Respondent”) is a professional basketball club in Argentina.

## **2. The Arbitrator**

3. On 30 May 2019, Prof. Richard H. McLaren, O.C., the then 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 Summary of the Dispute

5. On 1 June 2016, the Parties entered into an employment contract in relation to the 2016-2017, 2017-2018 and 2018-2019 basketball seasons (hereinafter the “Contract”), pursuant to which Claimant 1 was engaged as a basketball player and Claimant 2 as an agent. The Contract contains, among others, the following provisions:

“3. MONETARY COMPENSATION TO PLAYER:

*During the term of employment as foreseen in point 1, CLUB irrevocably guarantees payment to PLAYER of the following monetary (salary and bonuses) compensation within the payment terms as follows hereunder. All payments showed in this AGREEMENT are intended net of all and any social expenses and net of all income taxes which are paid for by CLUB and not to be deducted from PLAYER’s monetary compensation at no time. [...]*

**SALARY CURRENCY: AMERICAN DOLLARS – USD**

**METHOD: BANK WIRE**

**IRREVOCABLY PAID AS FOLLOWS:**

1. 2016-2017 SEASON: TEN (10) MONTHLY, EQUAL AND CONSECUTIVE PAYMENTS OF TWELVE THOUSAND AMERICAN DOLLARS – USD 12,000=NET, FIRST PAYMENT SHALL BE DONE ON SEPTEMBER 30th, 2016. DAILY “PRO-RATA TEMPORIS” RATE SHALL BE USD. 400=NET.
2. 2017-2018 SEASON: TEN (10) MONTHLY, EQUAL AND CONSECUTIVE PAYMENTS OF THIRTEEN THOUSAND AMERICAN DOLLARS – USD 13,000=NET, FIRST PAYMENT SHALL BE DONE ON SEPTEMBER 30th, 2017. DAILY “PRO-RATA TEMPORIS” RATE SHALL BE USD. 433.33=NET.
3. \*\*2018-2019 SEASON: TEN (10) MONTHLY, EQUAL AND CONSECUTIVE PAYMENTS OF FIFTEEN THOUSAND AMERICAN DOLLARS – USD 15,000=NET, FIRST PAYMENT SHALL BE DONE ON SEPTEMBER 30th, 2018. DAILY “PRO-RATA TEMPORIS” RATE SHALL BE USD. 500=NET.

**\*\* ONLY VALID IF THE CLUB EXTENDS THE AGREEMENT AS IS STATED IN ART. 1.**

--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 tenth (10th) 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 such term, the PLAYER has additionally the right to cease rendering services until the CLUB re-establishes its commitment to the conditions herein. PLAYER 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 PLAYER his Letter of Clearance to play anywhere in ARGENTINA or overseas without restriction of any sort.

[...]

**4. BONUSES MONETARY COMPENSATION TO PLAYER:**

The CLUB hereby guarantees payment to PLAYER of the following bonus monetary compensation, during each and every season of the AGREEMENT, is foreseen as listed hereunder:

WINNING SUPER 4 TOURNAMENT: 2 WEEKS OF SALARY NET.

REACHING LNB and/or LSB and/or LDA SEMIFINALS (TOP 4): 2 WEEKS OF SALARY NET, EACH.

REACHING LNB and/or LSB and/or LDA FINALS (TOP 2): 2 WEEKS OF SALARY NET, EACH.

WINNING LNB and/or LSB and/or LDA CHAMPION TITLE: 1 MONTH OF SALARY = NET, EACH.

All bonus monetary compensation is additional to prorated monthly salary, cumulative, and shall be paid in the next 72 hours after achievement.

[...]

La compensacion monetaria por bonos, es adicional al salario y sera abonada antes de la 72 horas de alcanzado.

**5. GUARANTEED CONTRACT UNDER THE FOLLOWING TERMS:**

CLUB fully guarantees this Agreement. In this regard, even if the PLAYER is removed or released from the CLUB or this Agreement is terminated or suspended by the CLUB due to Player's lack of or failure to exhibit sufficient skills, Player's death, illness, physical disability (whether incurred on or off the court) 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 Player and the Agent, on the dates set forth in the Agreement, the full amounts in the Agreement.

In case the PLAYER is released by the CLUB during the AGREEMENT, while retaining their rights to receive all the monetary compensation established in the 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 PLAYER, they must send written notification to PLAYER's Agent during the last five (5) days to confirm their decision."

[...]

**10. MATERIAL BREACH OF CONTRACT "AGREEMENT":**



## BASKETBALL ARBITRAL TRIBUNAL

*CLUB, PLAYER and AGENT materially breach the AGREEMENT by not complying with the conditions, terms and provisions of this AGREEMENT. In such circumstances all parties are entitled to seek enforcement of the conditions, terms and provisions of all AGREEMENTS, by giving to the other Party written notice sent by registered mail, within a term of TEN (10) working days.*

[...]

### 15. AGENT SERVICES AND FEES:

*Starting on the date of the AGREEMENT, the AGENT agrees to represent the PLAYER in conducting individual compensation negotiations for the performance of the PLAYER'S services as a basketball player for pay [sic] anywhere in the world.*

*After a contract with the PLAYER'S club is executed, the AGENT agrees to continue to assist, advise and counsel the PLAYER in the enforcing of his rights under the contract. PLAYER agrees that the AGENT shall be his exclusive representative during the term of this AGREEMENT, throughout the world.*

*For services rendered by AGENT prior and during this AGREEMENT and in regards to PLAYER's employment in this AGREEMENT, CLUB hereby irrevocably guarantees payment to AGENT of:*

*Season 2016-2017: TWELVE THOUSAND AMERICAN DOLLARS – USD. 12,000=NET, on December 1st, 2016.*

*Season 2017-2018: THIRTEEN THOUSAND FIVE HUNDRED AMERICAN DOLLARS – USD. 13,000=NET, on December 1st, 2017.*

*Season 2018-2019: FIFTEEN THOUSAND AMERICAN DOLLARS – USD. 15,000=NET, on December 1st, 2018.*

*In case CLUB and PLAYER agree terms for an extension or a new contract in view of the following season, one or more, the AGENT's approval is requested and AGENT's exclusive rights in invoicing services, maintained.*

[...]

### 18. DISPUTES

*Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be definitely resolved in accordance with the BAT Arbitration Rules, by a single arbitrator appointed by the BAT 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 [sic] governed by the Chapter 12 of the Swiss Act on Private International Law (PIL) irrespective of the parties domicile. Awards of the BAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. To the extent legally possible under Swiss Law recourse to the Swiss Federal Tribunal against awards of the BAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal shall be excluded.*

[...]

### 19. GOVERNING LAW

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

### **3.2 The Proceedings before the BAT**

6. On 20 March 2019, the Claimants filed a Request for Arbitration in accordance with the BAT Rules. On 25 April 2019, the BAT received EUR 2,977.10 of the non-reimbursable handling fee of EUR 3,000.00 from the Claimants.

7. By letter dated 3 June 2019, the BAT Secretariat fixed a deadline of 24 June 2019 for Respondent to file an Answer to the Request for Arbitration. By the same letter, and with a deadline of 14 June 2019 for payment, the following amounts were fixed as the Advance on Costs, which included the outstanding EUR 22.90 for the handling fee:

<i>“Claimant 1 (Mr. Mathias Calfani Percincola)</i>	<i>EUR 2,522.90 (cf. p. 1 above)</i>
<i>Claimant 2 (Mr. Claudio Pereira Garcia)</i>	<i>EUR 2,500.00</i>
<i>Respondent (Club Atletico San Lorenzo)</i>	<i>EUR 5,000.00”</i>

8. Respondent failed to submit an Answer within the initial deadline of 24 June 2019 and within the additional deadline of 5 July 2019 that was granted to it by the Arbitrator on 25 June 2019.

9. Claimant 2 paid the Advance on Costs (including the outstanding EUR 22.90 for the handling fee) on behalf of the Claimants on 7 June 2019. Claimant 2 paid the Respondent’s share of the Advance on Costs on 5 July 2019.

10. By Procedural Order dated 16 July 2019, the Arbitrator requested that the Claimants provide further information and requested that the Respondent make any submissions it deemed appropriate in relation to the Claimants’ claim by 30 July 2019 (hereinafter the “First Procedural Order”).

11. The Claimants responded to the First Procedural Order on 30 July 2019, and at the same time the Claimants made an additional request for relief. The Respondent did not respond to the First Procedural Order.

12. By Procedural Order dated 6 August 2019, the Arbitrator requested that the Parties provide further information by 14 August 2019 (hereinafter the “Second Procedural Order”).
13. The Claimants responded to the Second Procedural Order on 14 August 2019. The Respondent did not respond to the Second Procedural Order.
14. By Procedural Order dated 19 August 2019, the Arbitrator granted the Respondent an extension to the time-limit for the Respondent to reply to the Second Procedural Order until 26 August 2019 (hereinafter the “Third Procedural Order”).
15. On 23 August 2019, the Respondent responded to the Second and Third Procedural Orders.
16. On 5 September 2019, the Claimants sent a letter to the Arbitrator, which updated their request for relief.
17. By Procedural Order dated 11 September 2019, the Arbitrator requested that the Claimants make any submissions they deemed appropriate in relation to the Respondent’s submission of 5 September 2019 and that the Respondent make any submissions it deemed appropriate in relation to the Claimants’ submission dated 23 August 2019 by 25 September 2019 (hereinafter the “Fourth Procedural Order”).
18. On 25 September 2019, both the Claimants and the Respondent responded to the Fourth Procedural Order.
19. By Procedural Order dated 8 October 2019, the Arbitrator requested that the Parties provide further information by 22 October 2019 (hereinafter the “Fifth Procedural Order”).

20. On 22 October 2019, the Claimant responded to the Fifth Procedural Order. The Respondent did not respond to the Fifth Procedural Order.
21. By Procedural Order dated 5 November 2019, the Arbitrator declared the exchange of documents complete, and requested that the Parties submit detailed accounts of their costs by 12 November 2019. None of the Parties submitted an account of costs.
22. Since none of the Parties filed an application for a hearing, and the Arbitrator did not deem a hearing necessary, 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 Positions of the Parties**

##### **4.1 The Claimant 1's Position**

23. In the Request for Arbitration, Claimant 1 initially claimed from the Respondent:
  - a) USD 26,000.00 net as unpaid bonus payments for winning the 2018 FIBA League of Americas (hereinafter the "2018 LDA Champion Title");
  - b) USD 26,000.00 net as unpaid bonus payments for winning the 2018 Argentina LNB (hereinafter the "2018 LNB Champion Title"); and
  - c) USD 25,500.00 net as late payment penalties for 255 days that the Respondent has failed to pay the above outstanding sums.



24. Claimants submitted evidence that Claimant 2 requested from the Respondent payment of unpaid amounts due to Claimant 1, including by emails on 14 December 2018 and 11 March 2019.
25. In the Request for Arbitration, the Claimants also claimed EUR 6,000.00 for expenses and reasonable legal fees *“related to the execution of the present Request for Arbitration and Respondent’s lack of fulfilment of his obligations pursuant to the Player and Agent Agreement”*.
26. Clause 4 of the Contract provides for bonuses for reaching the semi-finals and the finals of the 2018 FIBA League of Americas, and for winning the 2018 LDA Champion Title. Clause 4 of the Contract also provides for bonuses for reaching the semi-finals and the finals of the 2018 Argentina LNB, and for winning the 2018 LNB Champion Title. In response to the First Procedural Order, the Claimants submitted that in each case, these bonuses are “cumulative”. Therefore, for winning each of the 2018 LDA Champion Title and 2018 LNB Champion Title, the Claimants claim that the total bonus payable comprises two weeks of salary (for reaching the semi-final) plus two weeks of salary (for reaching the final) plus 1 month of salary (for winning the tournament).
27. In his response to the First Procedural Order on 30 July 2019, Claimant 1 claimed additional unpaid bonuses and late payment penalties as follows:
- a) USD 30,000.00 net as unpaid bonus payments for winning the 2019 FIBA League of Americas (hereinafter the “2019 LDA Champion Title”);
  - b) USD 30,000.00 net as unpaid bonus payments for winning the 2019 Argentina LNB (hereinafter the “2019 LNB Champion Title”);
  - c) USD 11,800.00 net as late payment penalties for 118 days that the Respondent failed to pay the outstanding sums regarding the 2019 LDA Champion Title; and

- d) USD 2,300.00 net as late payment penalties for 23 days that the Respondent failed to pay the outstanding sums regarding the 2019 LNB Champion Title.
28. By letter dated 5 September 2019, Claimant 1 claimed additional unpaid salaries and late payment penalties as follows:
- a) a total of USD 30,000.00 net in unpaid salaries for May and June 2019; and
  - b) USD 8,500.00 net as late penalty payments for 85 days that the Respondent failed to pay the unpaid salaries of May and June 2019.
29. In the Fourth Procedural Order, the Arbitrator requested, inter alia, that the Parties provide details of the total amount paid by the Respondent to Claimant 1 in bonuses in relation to the 2016-2017 season. This was so that the Arbitrator could discern how Clause 4 of the Contract had been interpreted by the Parties in that season (given that the interpretation of this clause was in dispute between the Parties in relation to the 2017-2018 and 2018-2019 seasons). In response, the Claimants stated that Claimant 1 received USD 30,000.00. The Claimants explained that for winning:
- a) each of the Liga Nacional Super 4 Circus Tournament, Claimant 1 received USD 6,000.00, being 2 weeks of salary; and
  - b) the LNB Championship, Claimant 1 received USD 24,000.00, which comprised 2 weeks of salary, plus 2 weeks of salary, plus 1 month of salary.
30. The Claimants asserted that this break-down is consistent with their interpretation of Clause 4 of the Contract (i.e. that bonus payments are cumulative).

31. The Claimants submit that their interpretation of Clause 4 is also supported by negotiations that took place between the Claimants and the Respondent during the 2018-2019 season. In particular, the Claimants submitted an email sent by the Respondent to Claimant 2 on 24 July 2019 (hereinafter the “24 July 2019 email”), which sets out a payment proposal including in relation to unpaid bonuses.

#### **4.2 The Claimant 2’s Position**

32. Claimant 2 claims that the Respondent did not pay him any of the agent fees due under the Contract in relation to the 2017-2018 and 2018-2019 seasons. Claimant 2 therefore claims:

- a) USD 13,000.00 net in respect of outstanding agent fee payments due for the 2017-2018 season;
- b) USD 15,000.00 net in respect of outstanding agent fee payments due for the 2018-2019 season; and
- c) USD 45,200.00 net as late payment penalties for 452 days that the Respondent has failed to pay the above outstanding sums.

33. Claimant 2 claims that he requested payment of the overdue agent fees on numerous occasions, including by emails sent on 6 November 2018 and 14 December 2018.

#### **4.3 The Claimants’ Requests for Relief**

34. The Claimants’ initial Request for Relief, as contained in their Request for Arbitration, stated:

**“1. Claimant**, requests BAT to declare his entitlement to receive from Respondent the amount of **FIFTY TWO THOUSAND AMERICAN DOLLARS - USD. 52.000=NET.;** **PLUS TWENTY FIVE THOUSAND FIVE HUNDRED AMERICAN DOLLARS - USD. 25.500=NET.**

**2. Claimant 2**, requests BAT to declare his entitlement to receive from Respondent the total amount of **TWENTY EIGHT THOUSAND AMERICAN DOLLARS - USD. 28.000=NET.;** **PLUS FOURTY FIVE THOUSAND TWO HUNDRED AMERICAN DOLLARS - USD. 45.200=NET.**

**3.** Respondent is ordered to pay to the **Claimants, legal interest** on the sum of 5% per year from the date of the receipt of the Request of Arbitration until the day of actual payment by the Respondent.

**4.** Respondent, additionally, is ordered to pay the legal costs effectively incurred to have access to BAT proceedings, i.e., the non-reimbursable handling fee, which should be considered when assessing the Claimants’ legal fees and expenses.

**5.** Respondent is ordered to pay expenses and reasonable legal fees on a net amount of **SIX THOUSAND Euros (€ 6,000.00)** concretely related to the execution of the present Request for Arbitration and Respondent’s lack of fulfilment of his obligations to which he committed in the Agreement.

**6.** Respondent is, as well, ordered to disburse the advanced of costs eventually determined by BAT.”

35. Subsequently, Claimant 1 amended his Requests for Relief by requesting an additional USD 90,000.00 net in salaries and bonuses and USD 22,600.00 net in late payment penalties (see paras. 27 and 28 above) as follows:

a) By letter dated 30 July 2019:

**“On addition to the Claimants [sic] Request for Relief filled in the original Request for Arbitration, Claimant 1 also seek [sic] relief whereby BAT would rule ex aequo et bono as follows:**

**1. Claimant 1 also requests BAT to declare his entitlement to receive from Respondent the amount of SIXTY THOUSAND AMERICAN DOLLARS - USD. 60.000=NET.;** **PLUS FOURTEEN THOUSAND ONE HUNDRED AMERICAN DOLLARS - USD. 14.100=NET.**

b) By letter dated 5 September 2019:

**“On addition to the Claimants [sic] Request for Relief filled in the original Request for Arbitration, Claimant 1 also seek [sic] relief whereby BAT would rule ex aequo et**

***bono as follows:***

***1. Claimant 1 also requests BAT to declare his entitlement to receive from Respondent the amount of THIRTY THOUSAND AMERICAN DOLLARS - USD. 30.000=NET.; PLUS EIGHT THOUSAND FIVE HUNDRED AMERICAN DOLLARS - USD. 8.500=NET.“***

#### **4.4 The Respondent’s Submissions**

36. The Respondent did not provide an Answer to the Claimants’ Request for Arbitration.
37. The Respondent did, however, respond to the Second and Third Procedural Orders. In its responses, the Respondent submitted that the negotiations that took place with the Claimants during the 2018-2019 season (including the 24 July 2019 email) were simply an attempt to preserve the Parties’ relationship and did not cover “*payment of the Bonus in the terms claimed*” by the Claimants.
38. The Respondent also disputed the Claimants’ interpretation of Clause 4 of the Contract. In particular, the Respondent submitted that the Spanish version of the Contract does not contain the word “cumulative” in clause 4 and so the bonus payments listed in Clause 4 are not cumulative.
39. In response to the Fourth Procedural Order, the Respondent submitted that the total amount paid by the Respondent to Claimant 1 in relation to the 2016-2017 season was USD 23,322.00 “*in accordance to article 4 (Spanish Version) of the Contract between the Claimant and Respondent*” (emphasis in original). However, the Respondent was unable to provide evidence of this because the relevant “*documentation was not digitized*”.
40. Further, the Respondent rejected the additional requests for relief made by the Claimants in their submission of 5 September 2019, on the basis that those requests

were not included in the original Request for Arbitration and that they related to new facts.

## **5. The jurisdiction of the BAT**

41. 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).

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

43. 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.<sup>1</sup>

44. 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."*

45. Clause 18 of the Contract stipulates:

---

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

**“18. DISPUTES:**

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

46. The Contract is in written form and thus its arbitration clause fulfils 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 Contract under Swiss law (referred to by Article 178(2) of the PILA). In addition, the Respondent did not object to the jurisdiction of the BAT over it.
47. For these reasons, the Arbitrator has jurisdiction to adjudicate the Claimants’ claims against the Respondent.

## **6. Discussion**

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

48. 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 équit *”, 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”.*

49. Under the heading “Law Applicable to the Merits”, 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.”*

50. Clause 18 of the Contract states that “[t]he arbitrator shall decide the dispute ex aequo et bono”. However, Clause 19 of the Contract states “[t]his contract shall be interpreted and enforced in accordance with the laws of ARGENTINA”. It therefore falls to the Arbitrator to determine which law governs the dispute between the Parties.
51. The Arbitrator notes that Clause 18 of the Contract discusses the circumstances in which disputes are referred to the BAT for determination. Clause 18 is clear that disputes referred to the BAT shall be decided *ex aequo et bono*. Furthermore, Clause 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”*.
52. There might be circumstances in which Argentinian law is relevant to the interpretation of the Contract, however, given that the Contract expressly provides 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 Argentinian law is relevant to these proceedings.



53. 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*<sup>2</sup> (Concordat),<sup>3</sup> under which Swiss courts have held that arbitration *en équité* is fundamentally different from arbitration *en droit* :

*“When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.”*<sup>4</sup>

54. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives “a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case”.<sup>5</sup>

55. 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”.

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

## 6.2 Findings

### 6.2.1 Additional requests for relief

57. The Claimants made two additional requests to those originally set out in the Request for Arbitration: in response to the First Procedural Order on 30 July 2019, a request for unpaid bonus payments and associated late penalty payments, and by letter of 5

<sup>2</sup> 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).

<sup>3</sup> P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PILA.

<sup>4</sup> JdT 1981 III, p. 93 (free translation).

<sup>5</sup> POUURET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

September 2019, a request for payment of unpaid wages for May and June 2019 and associated late penalty payments.

58. In its response to the Fourth Procedural Order, the Respondent objected to new claims made in the Claimants' submission of 5 September 2019 "*because the Claimant is not entitled to include, at this stage, new facts or demands not included in the original Request for Arbitration, as for example a demand for unpaid salaries*". The Respondent did not expressly object to the additional claims made in the Claimants' response to the First Procedural Order on 30 July 2019, despite having been given the opportunity to do so.
59. The Arbitrator considers that each additional claim is of materially the same subject matter as the claims in the Request for Arbitration: each is for unpaid wages or bonuses under the same provisions of the Contract plus corresponding late payment penalties. Indeed, the evidence presented to the Arbitrator demonstrates that the claim for unpaid salaries was discussed by the Parties as part of the more general discussions regarding the Claimants' dispute with the Respondent over unpaid sums. The 24 July 2019 email states that the Respondent is "offering" USD 15,000.00 for "Installment 9" and USD 15,000.00 for "Installment 10", i.e. the salary payments for each of May and June 2019. In a WhatsApp message sent by the Respondent to Claimant 2 on 23 July 2019, Respondent 2 stated that Claimant 2 will receive an email "*reviewing the debt*".
60. Moreover, the Claimants could not have been aware of the additional claims at the time of filing the Request for Arbitration. The Respondent won the 2019 LDA Champion Title on 31 March 2019 and the 2019 LNB Champion Title on 4 July 2019 (both occurring after the Request for Arbitration was filed on 20 March 2019). The claim for unpaid wages for May and June 2019 also arose after the Request for Arbitration was filed.
61. In these circumstances, the Arbitrator considers that it would not be procedurally efficient to require the Claimants to commence separate proceedings in respect of the

additional claims. In addition, no procedural prejudice is done to the Respondent, if these new claims (that are all linked to the same factual context) are admitted in these proceedings. Accordingly, the Arbitrator admits each of the additional claims made by the Claimants. The Arbitrator notes that the Respondent was given the opportunity to respond to the additional claims.

### 6.2.2 Claimant 1's bonus payments

62. There is no dispute between the Parties as to whether or not payment is due from the Respondent to Claimant 1 for winning the 2018 LDA Champion Title, the 2018 LNB Champion Title, the 2019 LDA Champion Title or the 2019 LNB Champion Title.<sup>6</sup> The dispute is as to what amount is due.

63. Claimant 1 submits that bonus payments are “cumulative” pursuant to Clause 4 (English version) of the Contract. Clause 4 states that:

*“All bonus monetary compensation is additional to prorated monthly salary, cumulative, and shall be paid in the next 72 hours after achievement” (emphasis added)*

64. For the bonus payments relating to each of the 2017-2018 and 2018-2019 seasons, Claimant 1 has therefore claimed 8 weeks of salary, being 2 weeks for reaching the semi-finals, 2 weeks for reaching the finals and 4 weeks for winning the relevant title.

65. In its response to the Second Procedural Order, the Respondent argued that the payments are not cumulative and Claimant 1 is only entitled to receive 1 month's salary, being the bonus paid for winning the relevant title. The Respondent argued that the

---

<sup>6</sup> This is also confirmed in publicly available sources, for example: <https://www.latinbasket.com/Argentina/games-schedule.asp?League=1&LName=Argentina&Year=2017-2018>; <http://www.fiba.basketball/ligamericas/2018/news/san-lorenzo-are-the-directv-liga-de-las-americas-2018-champions>; <http://www.laliganacional.com.ar/laliga/page/noticias/id/26101/title/San-Lorenzo-se-consagr%C3%B3-tetracampe%C3%B3n-de-La-Liga>; <http://www.fiba.basketball/ligamericas/2019/news/san-lorenzo-de-almagro-is-two-time-champion-of-the-americas>

Claimants' interpretation of Clause 4 is wrong, because the word "cumulative" is not mentioned in the Spanish version:

*"La compensacion monetaria por bonos, es adicional al salario y sera abonada antes de la 72 horas de alcanzado."*

#### 6.2.2.1 Historic course of dealings

66. In light of the conflicting interpretations of Clause 4 of the Contract, the Arbitrator requested in the Fourth Procedural Order that the Parties provide details of the bonuses that Claimant 1 received in the 2016-2017 season, when the Respondent won the LNB Champion Title. The Claimants responded by submitting that Claimant 1 had received USD 24,000.00 (being 8 weeks of salary) pursuant to Clause 4. The Respondent stated that it paid Claimant 1 USD 23,322.00 in accordance with the Spanish version of Clause 4. As the Claimants noted in their response to the Fifth Procedural Order, the Respondent's position is inconsistent with its own interpretation of Clause 4 because that interpretation would suggest that Claimant 1 should only have received 1 month's salary, being USD 12,000.00, for winning the 2017 LNB Champion Title. The Parties' submissions in this regard would suggest that they previously treated the bonus provisions in the Contract as cumulative.
67. The Arbitrator also requested documentary evidence of what Claimant 1 was in fact paid for winning the 2017 LNB Champion Title. The Claimants presented a number of payslips detailing amounts paid by the Respondent to Claimant 1. However, the payslips do not assist the Arbitrator because they refer to various amounts, some of which do not reflect the figures in the Contract, and they do not appear to have been paid on a particular day each month (pursuant to the Contract). As such, no consistent pattern can be gleaned from the payslips.
68. In its response to Procedural Order 4, the Respondent requested additional time to present supporting evidence of the 2016-2017 payments. The Arbitrator provided

additional time, but the Respondent then did not produce any evidence. Therefore, the Arbitrator does not find the payslip evidence conclusive of a course or dealing one way or another.

6.2.2.2 The 24 July 2019 email

69. The Claimants rely on the 24 July 2019 email in support of their interpretation of Clause 4 of the Contract. The 24 July 2019 email, which was sent from the Respondent to Claimant 2 states in its English translation:

*“Hello Claudio.*

*Fabian and Myself had a meeting.*

*Here I send you the proposed prepared in order to pay and re-sign Mathias.*

*PAYMENT PROPOSAL*

*MATHIAS (146,000)*

*INSTALLMENT 9.....15,000 (Cash)*

*INSTALLMENT 10.....15,000 (5TH AUGUST)*

*ON ACCOUNT OF BONUSES.....30,000 (15TH AUGUST)*

*We can sign the renewal (SEASON 2019/20) from August 1st, and we can put it in an annex of 10 equal and consecutive payments of 8,600 each, the first on September 1st, 2019.*

*CLAUDIO (69,000)*

*7 PAYMENTS OF 10,000 (the 1st on August 1 with the signing of the 2019/20 season).*

*Agent Commission 19/20 50% on December 15th, 2019 and 50% on March 15th, 2020.*

*Looking forward for your answer. Greetings”*

70. The Claimants submitted that the 24 July 2019 email is evidence of the Respondent acknowledging its historic debt to the Claimants. In particular, the Claimants argued that the sums in the email of 24 July 2019 *“includes in full the amounts we claim for Bonuses and Salaries, for a total of AMERICAN DOLLARS ONE HUNDRED FIFTY FOUR THOUSAND – Usd. 154.000 = net – to the Player, and for a total of AMERICAN DOLLARS SIXTY NINE THOUSAND – Usd. 69.000=net – to the Agent.”*

71. The Claimants further submitted that the Respondent acknowledged that these amounts were debts owed to the Claimants in a WhatsApp message sent by the Respondent to Claimant 2 on 23 July 2019 which states “*Pablo D’Angelo will send you an email reviewing the debt. Also I attach the payment proposal for Calfani and yourself*”.
72. It is not clear how the Claimants have calculated USD 154,000.00 from the figures in the 24 July 2019 email, nor why USD 154,000.00 represents the amounts that the Claimants are claiming. At the time of the Request for Arbitration, the Claimants’ total claimed amount was USD 150,700.00 plus EUR 6,000.00.
73. The Respondent denies that the 24 July 2019 email was an acknowledgement of any debt due to the Claimants, but argues instead that it was a proposal of terms under which Claimant 1 would continue to play for the Respondent in the 2019-2020 season.
74. The Arbitrator does not agree with the Claimants that the contents of the 24 July 2019 email evidences an acknowledgment that the Respondent owes the Claimants the full amounts that they have claimed in these proceedings. The Arbitrator finds that the 24 July 2019 email at most represents two things: (a) an acknowledgment by the Respondent that there were two salary payments due (i.e. May and June 2019) and a bonus payment due of USD 30,000.00; and (b) a separate proposal for the 2018-2019 season. Such interpretation corresponds with the WhatsApp message of 23 July 2019. Accordingly, the Arbitrator considers that the 24 July 2019 email does not meaningfully assist the Arbitrator in construing Clause 4 of the Contract, or determining the Parties’ understanding of that clause.

#### 6.2.2.3 Interpretation of Clause 4

75. The key difference between the English and Spanish version of Clause 4 is that the word “cumulative” is not included in the Spanish version.
76. There is no provision in the Contract stating which version takes precedence in the event of an inconsistency between the English and Spanish versions. However, the Arbitrator notes that Clause 18 (Disputes) of the Contract states that the “*language of the arbitration shall be English*” (consistent in both the English and Spanish versions).
77. *Ex aequo et bono*, the Arbitrator considers that the bonus payments payable under Clause 4 are cumulative. This is principally because both the English and the Spanish versions of the Contract can be read this way. The Spanish version does not state that the bonuses are not cumulative; it simply does not include the word “cumulative”. However, it is not possible to interpret the English version of the Contract as meaning not cumulative; such a result would require the Arbitrator to disregard a word in the Contract or to re-write part of it.
78. This interpretation by the Arbitrator is also consistent with the amounts that all of the Parties submit were paid to Claimant 1 for winning the 2016-2017 LNB Champion Title.
79. Therefore, given the historic course of dealing between the Parties and the Arbitrator’s interpretation of Clause 4, the Arbitrator finds *ex aequo et bono* that the Respondent has failed to pay Claimant 1:
- a) USD 26,000.00 net in bonus payments for winning the 2018 LDA Champion Title;
  - b) USD 26,000.00 net in bonus payments for winning the 2018 LNB Champion Title;

- c) USD 30,000.00 net in bonus payments for winning the 2019 LDA Champion Title; and
- d) USD 30,000.00 net in bonus payments for winning the 2019 LNB Champion Title.

80. When looking at the wording to Claimant 1's request, it is not clear whether he filed a request for declaratory relief or performance. However, interpreting the requests filed by Claimant 1 in light of the Request for Arbitration, the Arbitrator indeed finds that Claimant 1 seeks payment and therefore performance by the Respondent. To conclude, therefore, the Arbitrator holds that the Respondent shall pay Claimant 1 a total of USD 112,000.00, net<sup>7</sup>, for unpaid bonus payments.

### 6.2.3 Claimant 1's salary payments

81. For the 2018-2019 season, the Respondent was obliged under Clause 3 of the Contract to pay Claimant 1 monthly salary payments of "*FIFTEEN THOUSAND AMERICAN DOLLARS – USD 15,000=NET*". As set out in paragraph 69 above, the Respondent acknowledged that these amounts were due for each of May and June 2019 when it emailed Claimant 2 on 24 July 2019. In any event, the Respondent has not disputed that these salary payments are unpaid. Clause 3 of the Contract states that the Respondent "*irrevocably guarantees payment*" to Claimant 1 of salary and bonus payments due under the Contract.

82. It is apparent from publicly available information that Claimant 1 played for the Respondent during the relevant payment period of May and June 2019.<sup>8</sup>

---

<sup>7</sup> Clause 4 of the Contract provides that bonus payments are to be paid 'net'.

<sup>8</sup> <https://basketball.latinbasket.com/player/Mathias-Calfani/Argentina/San-Lorenzo-de-Almagra/117887>



83. In light of the above, the Arbitrator finds that the Respondent has failed to pay Claimant 1 the salary payments totalling USD 30,000.00 net<sup>9</sup> and it is liable to pay that amount. Again, it is the Arbitrator's understanding that the purpose of the request of Claimant 1 is to seek performance and not a declaratory judgment only.

#### 6.2.4 Claimant 2's agent fees

84. As set out above, Claimant 1 continued to play for the Respondent during the 2017-2018 and 2018-2019 season and therefore, pursuant to Clause 15 of the Contract, Claimant 2 was entitled to agent fees of USD 13,000.00<sup>10</sup> net for the 2017-2018 season and USD 15,000.00 net for the 2018-2019 season.

85. Claimant 2 has provided evidence in the form of emails that he demanded payment of these outstanding agent fees on more than one occasion. The Respondent has not disputed that these amounts are due and has provided no explanation as to why they have not been paid.

86. In light of the above, the Arbitrator finds that the Respondent has failed to pay Claimant 2 outstanding agent fees totalling USD 28,000.00 net<sup>11</sup> and is liable to pay that amount.

---

<sup>9</sup> Clause 3 of the Contract provides that salary payments are to be paid 'net'.

<sup>10</sup> Clause 15 of the Contract states (in words) that the amount due is "*THIRTEEN THOUSAND FIVE HUNDRED AMERICAN DOLLARS*" but numerically "*USD 13,000*". Claimant 2 has claimed USD 13,000.00 and not USD 13,500.00 and therefore the Arbitrator considers this to be the relevant contractual figure.

<sup>11</sup> Clause 15 of the Contract provides that agent fees are to be paid 'net'.

### 6.2.5 Late payment penalties

87. The Claimants have claimed late payment penalties in respect of Claimant 1's unpaid salary, Claimant 1's unpaid bonus payments and Claimant 2's unpaid agent fees. Clause 3 of the Contract provides that:

*“—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” rule shall apply:  
- Starting from the tenth (10th) 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”.*

88. The Contract therefore contains a late payment penalty clause that, prima facie, covers Claimant 1's unpaid salary and Claimant 2's unpaid agent fees.
89. The provision of the Contract that relates to bonus payments (Clause 4: “*Bonus Monetary Compensation to Player*”) contains no late payment provision. It is therefore questionable whether Clause 3 of the Contract equally applies to late payment of bonuses.
90. Although the specific sub-paragraph in Clause 3 of the Contract entitled “*late payments*” refers expressly only to “*salary*” and “*agent fee*” the sub-paragraph preceding it expressly provides that the ‘*payment terms*’ in Clause 3 apply to bonuses as well. Specifically, it provides:

*“During the term of the employment as foreseen in [Clause] 1, CLUB irrevocably guarantees to PLAYER of the following monetary (salary **and bonuses**) compensation within the payment terms as follows hereunder”. [Emphasis added]*

91. In light of this, the Arbitrator finds that the Parties intended the late payment penalty provisions to apply to bonuses and therefore that late payment penalties are awardable in respect of Claimant 1's unpaid bonus payments.

6.2.5.1 Claimant 1's request for late payment penalties for unpaid bonuses

92. Claimant 1 seeks late payment penalties at a rate of USD 100.00 net per day on the unpaid bonuses in relation to the 2018 LDA Champion Title and 2018 LNB Champion Title, for 255 days of delay. This amounts to a total of USD 25,500.00 net.
93. Claimant 1 also seeks late payment penalties at a rate of USD 100.00 net per day on the unpaid bonuses in relation to the 2019 LDA Champion Title and 2019 LNB Champion Title, for 118 days of delay. This amounts to a total of USD 11,800.00 net.
94. USD 25,500.00 in late payment penalties relating to the 2018 bonuses would represent approximately 49% of the total principal amount being awarded to Claimant 1 in relation to those bonuses. If it were expressed as an *annual* rate of interest, it would be significantly higher than 49%. It is well established in BAT jurisprudence that late payment penalty provisions in contracts are enforceable, provided they are construed in a manner that does not lead to excessive results (see, for example, BAT 0036, 0306 and 0769). It falls to the Arbitrator to determine whether a late payment penalty of USD 25,500.00 is fair and proportionate in the circumstances.
95. The Respondent won the 2018 LNB Champion Title on 22 June 2018<sup>12</sup>, and pursuant to Clause 4 of the Contract, payment was due within 72 hours. Pursuant to Clause 3 of the Contract, late payment penalty payments are due following a grace period and so “*starting from the tenth (10<sup>th</sup>) day of delay*”. Therefore, the late payment penalties began to accrue from 5 July 2018. However, the Request for Arbitration was not filed until 20 March 2019. The Arbitrator considers that Claimant 1 should not profit from this delay in filing the Request for Arbitration. The Arbitrator decides, *ex aequo et bono*, that a fair amount would be 120 days' worth of late payment penalties. The Arbitrator considers that 120 days, plus the 10-day grace period, would have been sufficient time for

---

<sup>12</sup> <https://www.latinbasket.com/Argentina/games-schedule.asp?League=1&LName=Argentina&Year=2017-2018>

Claimant 1 to issue demands against the Respondent and then, issue proceedings before the BAT as required. Hence, the Arbitrator awards Claimant 1 USD 12,000.00 net<sup>13</sup> in late payment penalties in respect of unpaid bonuses for the 2018 LDA Champion Title and 2018 LNB Champion Title.

96. The claim for USD 11,800.00 in late payment penalties relating to the 2019 bonuses would represent approximately 20% of the total principal being awarded to Claimant 1 for those bonuses, over a period of for 118 days of delay. If it were expressed as an *annual* rate of interest, it would be significantly higher than 20%. As above, it falls to the Arbitrator to determine whether a late payment penalty of USD 11,800.00 is fair and proportionate in the circumstances.
97. The Respondent won the 2019 LDA Champion Title on 31 March 2019<sup>14</sup> and 2019 LNB Champion Title on 4 July 2019<sup>15</sup> and Claimant 1 filed his additional request for relief in relation to these bonuses on 30 July 2019. In his additional request for relief, Claimant 1 has stated that payment for the 2019 LDA Champion Title was “*due on April 3<sup>rd</sup>, 2019*” and has calculated 118 days from that date until 30 July 2019.
98. The Arbitrator considers that Claimant 1 could have made its request for additional relief sooner than 30 July 2019, in circumstances where proceedings were already on foot. Therefore, the Arbitrator decides, *ex aequo et bono*, that a fair amount would be 30 days’ worth of late payment penalties. The Arbitrator considers that 30 days, plus the 10-day grace period, would have been sufficient time for Claimant 1 to issue demands against the Respondent and, on failure to pay, update his request for relief given that the BAT proceedings were already ongoing. Hence, the Arbitrator awards

---

<sup>13</sup> Clause 3 of the Contract provides that late payments penalties are to be paid ‘net’.

<sup>14</sup> <http://www.fiba.basketball/ligamericas/2019/news/san-lorenzo-de-almagro-is-two-time-champion-of-the-americas>

<sup>15</sup> <http://www.laliganacional.com.ar/laliga/page/noticias/id/26101/title/San-Lorenzo-se-consagr%C3%B3-tetracampe%C3%B3n-de-La-Liga>

Claimant 1 USD 3,000.00 net<sup>16</sup> in late payment penalties in respect of unpaid bonuses for the 2019 LDA Champion Title and 2019 LNB Champion Title.

6.2.5.2 Claimant 1's request for late payment penalties for unpaid salary

99. Claimant 1 seeks late payment penalties at a rate of USD 100.00 net per day on the unpaid salary amount of USD 30,000.00 for 85 days of delay. This amounts to a total of USD 8,500.00 net.
100. In relation to the 2018-2019 season, Clause 3 of the Contract states that “*MONTHLY, EQUAL AND CONSECUTIVE PAYMENTS OF FIFTEEN THOUSAND AMERICAN DOLLARS – USD 15,000=NET. FIRST PAYMENT SHALL BE DONE ON SEPTEMBER 30th, 2018*” and so logically, each consecutive payment is to be made on the 30<sup>th</sup> of the month. Therefore, payment for May 2019 (the earliest of the two payments) was due on 30 May 2019. Pursuant to Clause 3 of the Contract, late payment penalty payments are due following a grace period and so “*starting from the tenth (10th) day of delay*”. Therefore, in the case of the May salary payment, late payment penalties began to accrue from 9 June 2019. Claimant 1 made its claim before the BAT in respect of the salary payments by letter dated 5 September 2019, i.e. 88 days after 9 June 2019.
101. USD 8,500.00 represents approximately 28% of the total amount being awarded to Claimant 1 for unpaid salary, for a period of 88 days. Again, if this were expressed as an *annual* rate of interest, it would be significantly higher than 28%.
102. In the circumstances of this case, the Arbitrator considers that a penalty payment representing 28% of the principal for a period of just 88 days (i.e. the period between the penalty falling due and Claimant 1 presenting a claim before BAT) would be

---

<sup>16</sup> Clause 3 of the Contract provides that late payments penalties are to be paid ‘net’.

disproportionate. The Arbitrator decides, *ex aequo et bono*, that a fair amount would be 30 days' worth of penalty payments. Again, the Arbitrator considers that 30 days, plus the 10-day grace period, would have been sufficient time for Claimant 1 to issue payment demands and update his request for relief. Hence, the Arbitrator awards Claimant 1 USD 3,000.00 net<sup>17</sup> in late payment penalties in respect of unpaid salary.

#### 6.2.5.3 Claimant 2's request for late payment penalties for unpaid agent fee

103. Claimant 2 seeks late payment penalties at a rate of USD 100.00 net per day on the unpaid agent fee of USD 28,000.00 for 452 days delay. This amounts to a total of USD 45,200.00 net. The agent fee for the 2017-2018 season (i.e. the earliest of the overdue agents fees) was due on 1 December 2017. Again, the Contract provides that such penalty payments are due "*starting from the tenth (10th) day of delay*", which in this case is 11 December 2017. The Claimants' Request for Arbitration is dated 20 March 2019, which is 464 days after that date.
104. USD 45,200.00 represents approximately 161% of the principal amount being awarded to Claimant 2 for unpaid agent fees. The Arbitrator finds that a late payment penalty of this size would be disproportionate. The Arbitrator notes that the principal amount owed to Claimant 2 has been outstanding for a significantly longer period of time than the salary amounts which are owed to Claimant 1. Hence, *ex aequo et bono*, the Arbitrator considers it is fair in the circumstances of this case that the period for which penalty payments should accrue in respect of Claimant 2's overdue amounts should be twice as long (to reflect the additional season for which Claimant 2 has been without his overdue amounts). This reflects the greater deleterious effect that non-payment would

---

<sup>17</sup> Clause 3 of the Contract provides that late payments penalties are to be paid 'net'.

have had on Claimant 2 and means that Claimant is entitled to 60 days, rather than 30 days, of late payment penalties at the rate of USD 100.00 net per day.

105. Accordingly, the Respondent shall pay USD 6,000.00 net in late payment penalties to Claimant 2.

#### **6.2.6 Interest**

106. The Claimants have claimed interest on the sums due to them from the Respondent at a rate 5% per annum from the date of the Request for Arbitration. The Claimants have correctly identified that the Contract does not expressly account for default interest. However, consistent with BAT jurisprudence, default interest can be awarded *ex aequo et bono* without being expressly agreed in a contract, and 5% per annum is generally a fair rate.
107. The Claimants have claimed interest from the date of the Request for Arbitration and consistent with previous BAT cases, this is a reasonable date from which to claim interest.
108. However, the Arbitrator notes that Claimant 1 is already being compensated in respect of unpaid salaries for some of this period by virtue of the late payment penalties being awarded. Therefore, the Arbitrator determines that interest in respect of the unpaid salaries shall only begin to accrue after the 30-day period of late payment penalties, that is to say interest shall accrue from 10 July 2019.
109. The Arbitrator also notes that Claimant 1 is already being compensated in respect of unpaid bonuses for 2019 LDA Champion Title and 2019 LNB Champion Title for some of this period by virtue of late payment penalties being awarded. Therefore, the Arbitrator determines that interest in respect of the 2019 bonuses shall only begin to

accrue after the 30-day period in respect of which late payment penalties are being awarded, that is to say interest shall accrue from 14 May 2019.

110. For the same reasons, the Arbitrator finds that interest on the unpaid bonuses for 2018 LDA Champion Title and 2018 LNB Champion Title bonuses shall only begin to accrue after the 30-day period in respect of which late payment penalties are being awarded, that is to say interest shall accrue from 8 May 2018<sup>18</sup>.
111. Claimant 2 has requested interest on the unpaid agents fees from 20 March 2019. The Arbitrator notes that the agents fees were due on 1 December 2017 and 1 December 2018. The Arbitrator accepts Claimant 2's claim for interest from 20 March 2019 because, even when allowing for a 60-day period from 1 December 2018 (in respect of which late payment penalties are being awarded), the agents fees were outstanding as of 20 March 2019.

## 7. Costs

112. 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.
113. On 19 February, 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*

---

<sup>18</sup> Respondent won the 2018 LDA Championship on 25 March 2018 (<http://www.fiba.basketball/ligamericas/2018/news/san-lorenzo-are-the-directv-liga-de-las-americanas-2018-champions>) and so payment of the bonus was due on 28 March 2018 (Clause 4). After the relevant 10 day grace period (Clause 3), penalty payments would be due from 8 April. Following the further 30-day period is 8 May 2018.



*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 10,006.00.*

114. 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.”*
115. The Claimants have been awarded 100% of the total principal sums that they claimed from the Respondent, and a relatively small proportion of the amounts they claimed in respect of late payment penalties. The Arbitrator also notes that the Respondent did not provide an answer to the Request for Arbitration, nor did it respond in full to each of the procedural orders. In light of this, and given that the Claimants were successful in less than half of their late payment penalty claims, the Arbitrator considers it is fair in the circumstances and in application of Article 17.3 of the BAT Rules, that 85% of the costs of the arbitration be borne by the Respondent and 15% of the costs be borne by the Claimants.
116. None of the Parties submitted an account of costs. In their Request for Arbitration, the Claimants claimed EUR 6,000.00 in legal fees and expenses (including the non-reimbursable handling fee). However, Claimant 2 acted as legal counsel for the Claimants and there is no evidence that the Claimants incurred any costs in respect of external legal counsel. Hence, consistent with BAT jurisprudence (such as BAT 0796), the Arbitrator finds that the Claimants should not be awarded compensation in respect

of legal fees. However, the Arbitrator does consider it reasonable for the Claimants to be awarded a contribution of EUR 3,000.00 towards the non-reimbursable handling fee.

117. Therefore, the Arbitrator decides:

- a) The Respondent shall pay to the Claimants EUR 8,505.10, being 85% of the costs of the arbitration advanced by them; and
- b) the Respondent shall pay to the Claimants EUR 3,000.00, as a contribution towards their legal costs.

## **8. AWARD**

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

- 1. Club Atletico San Lorenzo de Almagro – I.D.S. Sports shall pay Mr. Mathias Calfani Percincula USD 52,000.00 net as compensation for unpaid bonuses for 2018 plus interest at a rate of 5% per annum from 8 May 2018 until the date of payment.**
- 2. Club Atletico San Lorenzo de Almagro – I.D.S. Sports shall pay Mr. Mathias Calfani Percincula USD 60,000.00 net as compensation for unpaid bonuses for 2019 plus interest at a rate of 5% per annum from 14 May 2019 until the date of payment.**
- 3. Club Atletico San Lorenzo de Almagro – I.D.S. Sports shall pay Mr. Mathias Calfani Percincula USD 15,000.00 net in late payment penalties for unpaid bonuses.**
- 4. Club Atletico San Lorenzo de Almagro – I.D.S. Sports shall pay Mr. Mathias Calfani Percincula USD 30,000.00 net as compensation for unpaid salary plus interest at a rate of 5% per annum from 10 July 2019 until the date of payment.**
- 5. Club Atletico San Lorenzo de Almagro – I.D.S. Sports shall pay Mr. Mathias Calfani Percincula USD 3,000.00 net in late payment penalties for unpaid salary.**
- 6. Club Atletico San Lorenzo de Almagro – I.D.S. Sports shall pay Mr. Claudio Pereira Garcia USD 28,000.00 net in unpaid agent fees plus interest at a rate of 5% per annum from 20 March 2019 until the date of payment.**

- 7. The BAT declares that Mr. Claudio Pereira Garcia is entitled to receive from Club Atletico San Lorenzo de Almagro – I.D.S. Sports USD 6,000.00 net in late payment penalties for unpaid agent fees.**
- 8. Club Atletico San Lorenzo de Almagro – I.D.S. Sports shall pay jointly to Mr. Mathias Calfani Percincula and Mr. Claudio Pereira Garcia the amount of EUR 8,505.10 as reimbursement of the advance on BAT costs.**
- 9. Club Atletico San Lorenzo de Almagro – I.D.S. Sports shall pay jointly to Mr. Mathias Calfani Percincula and Mr. Claudio Pereira Garcia the amount of EUR 3,000.00 as a contribution towards their legal expenses.**
- 10. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 6 March 2020

Rhodri Thomas  
(Arbitrator)