Arbitration CAS 2010/A/2240 Shanxi Zhongyu Professional Basketball Club v. Lee A. Benson & Jose F. Paris, award of 29 April 2011

Panel: Prof. Petros Mavroidis (Greece); Sole arbitrator

Basketball
Contract of employment
Decision ex aequo et bono
Admissibility of an expert's opinion related to the authentication of a signature
Interpretation of a contractual relationship
Obligations of the parties arising from a contractual relationship

1. **The parties to a dispute can agree that a dispute will be decided *ex aequo et bono*. According to Swiss doctrine, deciding a case *ex aequo et bono* may be aptly summarised as a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, the adjudicating body must stick to the circumstances of the case.**

2. **In application of art. R44.2 para. 2 of the CAS Code, a qualified expert opinion can be requested in order to authentify a signature. Bearing in mind the prescribed provisions as to burden and standard of proof, it must be determined whether the expert's evaluation is soundly based in primary facts, and whether the expert's consequent appreciation of the conclusion to be derived from those facts is equally sound. To be admitted into evidence, the reliability and the consistency of the expert opinion with the facts of the case should be accepted to the comfortable satisfaction of the panel.**

3. **As regard the interpretation of a contract, a panel must seek the true and mutually agreed upon intention of the parties. When it cannot be established, a contract must be interpreted according to the requirements of good faith. A panel has to determine how a declaration or an external manifestation by a party could have been reasonably understood depending on the individual circumstances of the case.**

4. **Considering on the one hand that the rights and obligations deriving from a first contract were terminated together with the contract itself by another contract and that the player received the salary corresponding to the work performed from the beginning of the latter contract until its valid termination, the player cannot be awarded any further compensation. On the other hand, where there is no indication that an agent's fees were to be reduced or suspended in the event of a premature termination of an employment relationship between a player and a club, the agency fee should be paid.**

Shanxi Zhongyu Professional Basketball Club (the "Club" or the "Appellant"), is a Chinese basketball club with its registered office in Taiyuan, in Shanxi province, China. It is a member of the Chinese Basketball Association (CBA), itself affiliated to FIBA ASIA, which is the governing body for basketball in Asia.

Mr Lee A. Benson (the "Player" or, together with Mr José F. Paris, the "Respondents") is a professional basketball player. He was born on 11 November 1973 and is of American nationality.

Mr José F. Paris ("Mr. Paris" or, together with Mr Lee A. Benson, the "Respondents") is a licensed basketball players' agent. His office is located in San Juan, Puerto Rico.

1. The first contract

Between August and September 2009, the parties entered into a first employment contract, which contains the description of each party's respective obligations ("First Contract"). It is undisputed that this document was signed by the following persons:

- on 28 August 2009, by Mr José F. Paris and by Mr Ma Liang, identified as the *"Player's and/or the Team's agent"*;
- on 4 September 2009, by the Player;
- on 20 September 2009, by the Club.

The main characteristics of this First Contract can be summarised as follows:

- According to article 1, the *"Team hereby employs the Player as a skilled basketball player for a guaranteed term of 6 Month(s) from the day of September 20, 2009 to the day of official last regular season or playoff game in the 2009-10 CBA Basketball season"*.
- Among other obligations, the Club agreed to pay to the Player a monthly net salary of USD 60,000, in the following instalments:

20 September 2009	$ 20,000
10 October 2009	$ 40,000
20 November 2009	$ 60,000
20 December 2009	$ 60,000
20 January 2010	$ 60,000
20 February 2010	$ 60,000
20 March 2010	$ 60,000
Total	**$ 360,000**

- The Player agreed notably to play on the Club's team during the regular season, the play-offs, the league All-Star games, exhibition games. He also undertook to attend promotional activities, training camps and practices.
- Article 8 of the contract empowers the Club to impose upon the Player a fine and/or a suspension, should he breach the *"Team rules"* or any provision of the agreement (8.1),

should the CBA regulations so provide (8.2), should he not attend a game without justifiable reason (8.3), should he be unfit to play for reasons other than injuries sustained as a direct result of participating in any basketballs activities (8.4), or should he be on leave (8.5).

- Article 9 of the contract allows the parties to resolve disputes through CBA mediation with the possibility of bringing the dispute before the courts of China or of the United States of America. Article 10 provides for disputes resolution by the FIBA Arbitral Tribunal.
- Article 11 of the contract reads as follows:

"A. The Team may terminate this Contract upon written notice to the Player if the Player shall:

1) at any time, fail, refuse or neglect to conform his personal conduct to the CBA rules or sportsmanship (criminal acts or not), or the Team's rules; or

2) at any time commit a significant and inexcusable physical attack against any official or employee of the Team or the CBA, or any person in attendance at any CBA game or event, considering the totality of the circumstances, including but not limited to the degree of provocation (if any) that may have led to the attack, the nature and scope of the attack, and the extent of any injury resulting from the attack; or

3) at any time, fail, in the reasonable opinion of the Team's management, to exhibit sufficient skill or physical ability he supposes to have, provided, however, that if this Contract is terminated by the Team, in accordance with the provision of this subparagraph, prior to the beginning of any Regular Season, and the Player, at the time of such termination, is unfit to play skilled basketball as the result of an injury resulting directly from his playing for the Team, the Player shall continue to receive his full salary of the Regular Season, less all workers' compensation benefits and any insurance paid or payable to the Player and is entitled to his home travel expenses; or

4) at any time, in any other manner, materially breach this Contract.

B. The Player and the Team may terminate this Contract through consultations and mutual agreement. This contract cannot be amended without the written consent of the Player, the Team and the Agent's.

C. The contractual relations between the Player and the Team shall not in any way affect the contractual relations between the Team and the Agent's, unless this Contract, the CBA or FIBA rules otherwise provide".

- The Club accepted to pay to each agent, Mr José F. Paris and Mr Ma Liang, USD 18,000 on 25 September 2009 and accepted that those agents *"will be entitled to same 10% commission on any future deals between PLAYER and CLUB".*

2. The second contract

Before the Court of Arbitration for Sport, the Club filed the English and the Chinese versions of a contract dated 20 September 2009, which bear its signature as well as the Player's ("Second Contract"). However, the Player denies having signed these documents.

This agreement, which is actually a standard contract form of the CBA, provides that *"The Team hereby employs the Player as a skilled basketball player for a term of 6 Month(s) from the day of September 20, 2009 to the day of official last regular season or playoffs game in the 2009-2010 CBA Basketball Season"*. According to this document, the Club agreed to pay to the Player a monthly net salary of USD 30,000.

In its written submissions and at the hearing before the Court of Arbitration for Sport, the Club explained that this Second Contract was a sham, meant to circumvent CBA Regulations according to which the total monthly salaries of two foreign players cannot exceed USD 60,000. It confirmed that the purpose of this second agreement was not to renegotiate the terms of the First Contract but was made for the sake of appearance and did not reflect the real intention of the parties, who were eager to present to CBA a document that fulfilled all the requirements prescribed by the applicable CBA regulations.

3. The third Contract

Before the Court of Arbitration for Sport, the Club filed a document entitled *"Contract Termination Agreement"*, dated 11 December 2009. The Player denies having signed this document, which reads in pertinent parts:

> *"(…) because Party A [the Club] have to adjust their team roster, and Party B [the Player] is not fit for what Party A need, through peaceably consultation and negotiation, the contract between Party A and Party B cease to be effect. If there is any dispute beyond the contract, Party A will not take any responsibility for it. Party A and Party B have reach a consensus that to make this Contract Termination Agreement as fellow:*
>
> *1) Through communication, Party A should pay Party B the full month salary which is in total = 60,000 dollars.*
>
> *2) All the Money that Party B borrowed from Party A should be cut from Party B's Salary. (Party B borrowed 1,627 dollars for airline tickets, and 7,000 dollars for prepaid. In total = 8, 627 dollars)*
>
> *3) Herein, Party A should pay Party B in total = 51,373 dollars. And that money should be transfer to Party B's account before 15th Dec 2009.*
>
> *Since Party A and Party B have the agreement as above, there should be not any more economic dispute between Party A and Party B".*

The Club also submitted written witness statements of Mr Zhang Bei Hai, its general manager, of Mr Du Li Hui, its head of the finance department, and Mr Li Ren, its ex-coach, confirming that they were present when the Player signed the "Contract Termination Agreement".

In addition and in support of the alleged existence of the "Contract Termination Agreement", the Club filed a bank statement dated 15 December 2009, showing that a sum of USD 49,373 had been wired on a bank account opened under the Player's name. It also submitted a handwritten declaration signed by the Player, who confirmed having received *"2,000 USD from the Club today 2009 – 12 – 15"*.

4. The fourth Contract

Before the Court of Arbitration for Sport, the Club filed the English version of a contract dated 13 January 2010, which bears its signature as well as the Player's (the "Fourth Contract"). However, the latter claims that he had not signed this document.

The Club also submitted a written witness statement of Mr Zhang Bei Hai, its general manager, attesting that he was present when the Player signed the Fourth Contract.

This agreement incorporates the following significant changes from the First Contract:

- The term of the contract is three months, starting 13 January 2010.
- The space provided on the contract for the Player's salary is left blank.
- The clause specifying the agent's rights and obligations was suppressed.
- A new clause was introduced and describes the conduct which the Player must adopt.
- Article 8 of the contract allows the parties to resolve disputes through CBA mediation or before the Chinese courts. The possibility to bring the dispute before American courts or the FIBA Arbitral Tribunal has been revoked.
- Article 9 of the contract is identical to article 11 of the First Contract except for the following amendments:
  - -- Clause A.3 reads henceforth:

    The Team may terminate this Contract upon written notice to the Player if the Player shall: (…)

    3) at any time, fail, <u>in the sole opinion</u> of the Team's management, to exhibit sufficient skill or physical ability he supposes to have, provided, however, that if this Contract is terminated by the Team, in accordance with the provision of this subparagraph, prior to the beginning of any Regular Season, and the Player, at the time of such termination, is unfit to play skilled basketball as the result of an injury resulting directly from his playing for the Team, the Player shall continue to receive his full salary of the Regular Season, less all workers' compensation benefits and any insurance paid or payable to the Player and is entitled to his home travel expenses; or (emphasis added)
  - -- Clause B of the First Contract has been replaced by *"The Player and the team have reached the agreement that each party may terminate this Contract. Since the termination date of the contract, the Team will suspend the Player's payment".*
  - -- Clause C of the first contract has been deleted.
- The space provided on the contract to indicate the number of annexes is left blank.

The Club submitted that the parties entered into a *"foreign players employment contract supplementary agreement",* which constituted an integral part of the Fourth Contract. This document was allegedly signed by the Club and the Player on 13 January 2010. The latter denies having signed this additional agreement.

Among other things, this *"supplementary agreement"* provides that *"when* [the Player] *that there is no training required by* [the Club] *in violation of the provisions of dropping out, which do not obey the management of behaviour,* [the Club] *may notify* [the Player] *unilaterally lift the "employment contract for foreigner players".* [The Player] *shall not claim for any reason other economic loss to* [the Club]*".*

According to the Club, the Fourth Contract was also supplemented by a handwritten timetable of the payments to be made to the Player. This document was allegedly signed by the Club and the Player on 18 January 2010. Here also, the latter denies having signed this document, which reads as follows:

"Jan 18th 2010: 20,000 Rmb

Jan 23rd 2010: (Payment from Jan 13th to Jan 31st) 19 days x 2,000 USD = 38,000 USD

1st Feb: 20,000 USD

10th Feb: 20,000 USD

20th Feb: 20,000 USD

1st Mar: 20,000 USD

10th Mar: 20,000 USD".

The following facts are undisputed:

- On 28 January 2010, the Club and the Player signed the following statement *"Shanxi Zhong yu released Lee Benson JR. from the team on 30th Jan".*
- The Player received the following amounts:
  - USD 20,000 received on 20 September 2009
  - USD 40,000 received on 10 October 2009
  - USD 60,000 received on 20 November 2009
  - USD 60,000 received on 15 December 2009
  - USD 40,000 received on 25 January 2010
- Mr José F. Paris received from the Club a payment of USD 7,500 in a timely manner.
- No further payments were made by the Club to the Player or to Mr José F. Paris after 25 January 2010.

5. Proceedings before the FIBA Arbitral Tribunal

On 17 March 2010, the Player and Mr Paris filed a request for arbitration to the FIBA Arbitral Tribunal (the "FAT").

Pursuant to the applicable FAT Rules, a Single Arbitrator was appointed. After careful review of the facts and evidence on record, the FAT Single Arbitrator considered himself *"fit to proceed with the arbitration and deliver the award".*

On 31 August 2010, the FAT Single Arbitrator held that the First Contract signed by the Club and the Player was a fix-term agreement, which could not come to an end before the expiration of the agreed period. Consequently, he was of the opinion that the Player was entitled to claim for compensation of what he would have earned until the expiration of the fixed agreement period, unless:

a) based on article 8 of the First Contract, the Club was authorized to suspend the payment of salary;

b) there was a just cause for termination of the employment relationship with immediate effect; or

c) the parties mutually agreed to terminate the First Contract.

The FAT Single Arbitrator found that the requirements of article 8 of the First Contract were not met and that the said contract *"does not provide that payments can be suspended in any other situation"*. Furthermore, he held that it has not been established that the Club had a just cause to put an immediate end to the First Contract and that *"the Club has not demonstrated that the Player signed either the* ["Contract Termination Agreement", dated 11 December 2009] *or the* [Fourth Contract dated 13 January 2010]*"*, failing therefore to prove the alleged mutually agreed contract termination.

In addition, the FAT Single Arbitrator accepted the Player's explanations according to which the "release document" signed on 28 January 2010 was actually a lay off and neither a termination of the employment relationship by mutual consent nor an agreement by the Player to forgo the payments due to him in February and March 2010.

As regards Mr Paris' fees, the FAT Single Arbitrator considered that *"the Agent was entitled to the payment of an agency fee of USD 18,000 (50% of USD 36,000) in respect of the whole Contract term. No reason for non-payment of the Agent has been put forward"*.

As a result, on 31 August 2010, the FAT Single Arbitrator decided the following:

"(…)

Shanxi Zhongyu Basketball Club is ordered to pay to Mr. Lee Benson the following amounts in respect of salary, together with 5 % interest p.a. on those amounts from the date shown:

Amount	*Date from which interest should be calculated*
USD 20,000	*20 January 2010*
USD 60,000	*20 February 2010*
USD 60,000	*20 March 2010*

I- Shanxi Zhongyu Basketball Club is ordered to pay to Mr. José Paris USD 10,500.00 together with 5 % interest p.a. on that amount from 25 September 2009.

II- Shanxi Zhongyu Basketball Club is ordered to pay to Mr. Lee Benson and Mr. José Paris EUR 5,140.91 as reimbursement of the Advance on Costs.

III- Shanxi Zhongyu Basketball Club is ordered to pay to Mr. Lee Benson and Mr. José Paris EUR 8,000.00 as a contribution towards their legal fees and expenses.

IV- Any other or further-reaching claims are dismissed".

On 1 September 2010, the Club was notified of the decision issued by the FAT (the "Appealed Decision").

6. Proceedings before the Court of Arbitration for Sport

On 22 September 2010, the Club filed a statement of appeal with the CAS. On 15 October 2010, it submitted an appeal brief, containing a statement of the facts and legal arguments accompanied by supporting documents. It challenged the above mentioned Appealed Decision with the following request for relief:

"The Appellant respectfully requests the Arbitral Tribunal:

A. As to the validity of the Appeal

To declare receivable the present brief of appeal.

B. As to the competence of the Court of Arbitration for Sports

To declare the invalidity of the arbitration clause and to disclaim the Court for Arbitration for Sports' competence.

C. As to the damages claimed by the Respondents

I. To quash and make void the Arbitral Award n° 0082110 issued on August 31,2010 by the FIBA.

II. To certify that no amount is due by Shanxi Zhongyu Professional Basketball Club do to Mr. Lee Benson.

III. To certify that no amount is due by Shanxi Zhongyu Professional Basketball Club do to Mr. Jose Paris.

IV. To order Mr. Lee Benson and Mr. Jose Paris to pay all arbitration costs (including fees and disbursements of the Arbitrator).

V. To order Mr. Lee Benson and Mr. Jose Paris to pay all the Appellant's costs relating to the present arbitral proceedings, including his attorney's fees and any such other costs that the Appellant will specify in due course".

On 7 December 2010, the Respondents submitted their joint answer, with the following request for relief:

"To order the immediate payment of the FAT Award 0082/10 as follows: (…)

1. Mr. Lee A. Benson is to receive the salary and 5% interest per table below:

Amount	*Date from which interest should be calculated*
USD 20,000	*20 January 2010*
USD 60,000	*20 February 2010*
USD 60,000	*20 March 2010*

2. Mr José F. Paris is to receive USD 10,500.00 together with 5 % interest on that amount from 25 September 2009.

3. Mr José F. Paris and Mr Lee Benson are to receive EUR 5,140.91 as reimbursement of the Advance on Costs.

4. Mr José F. Paris and Mr Lee Benson are to receive EUR 8,000.00 as a contribution towards their legal fees and expenses.

5. To order the Appellants to pay the Respondents costs relating to the present arbitral proceeding, including fees and expensed and any such other costs that the Respondent will specify in due course".

A hearing was held on 22 March 2011 at the CAS premises in Lausanne, Switzerland.

LAW

CAS Jurisdiction

1. The jurisdiction of CAS derives from articles 17 of the FAT Rules and R47 of the CAS Code.

2. CAS jurisdiction is confirmed by article 10 of the First Contract signed by the Parties which reads as follows:

"Any dispute arising from or related to the present Contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules according to section L.2.1.4 by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono".

3. It can also be noted that the Appealed Decision states that *"Awards of the FAT can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland and any such appeal must be lodged with CAS within 21 days from the communication of the award"*.

4. CAS jurisdiction is further confirmed by the order of procedure duly signed by the parties, without any reserves. Finally and during the hearing, the Club expressly accepted CAS jurisdiction to hear the case and hence to abide by the FAT Rules .

5. It follows that CAS has jurisdiction to decide on the present dispute.

6. Under article R57 of the CAS Code, the CAS Sole Arbitrator has the full power to review the facts and the law.

Applicable law

7. Article R58 of the CAS Code provides the following:

   "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

8. It is generally accepted that the choice of the place of arbitration also determines the law to be applied to arbitration proceedings. The Swiss Code of Private International Law ("PILA") is the relevant arbitration law (DUTOIT B., Droit international privé Suisse, commentaire de la loi fédérale du 18 décembre 1987, Bâle 2005, N. 1 on article 176 PILA, page 614). Article 176 par. 1 PILA provides that the provisions of Chapter 12 of the PILA regarding international arbitration shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its usual residence in Switzerland.

9. The CAS is recognized as a true court of Arbitration. It has its seat in Switzerland. Chapter 12 of the PILA shall therefore apply, the parties in the present matter having neither their domicile nor their usual residence in Switzerland. This is consistent with article 2.2 of the FAT Rules, which provides that *"Arbitration proceedings before the FAT are governed by Chapter 12 of [PILA], irrespective of the parties' domicile"*.

10. Article 187 par. 1 PILA provides that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected"*.

11. Article 187 par. 2 PILA provides that *"the parties may authorize the arbitral tribunal to rule according to equity"*.

12. Article 15.1 of the FAT Rules provides that *"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"*.

13. As noted above, the First Contract provides that *"the arbitrator and CAS shall decide the dispute ex aequo et bono"*. In addition, in the present case, it results from their respective written and oral submissions that the parties agree that the matter under appeal must be decided ex aequo et bono.

14. Accordingly, the CAS Sole Arbitrator shall decide the dispute ex aequo et bono. Deciding a case ex aequo et bono may be aptly summarised as follows: *"a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, [the arbitrator] must stick to the circumstances of the case"*. (POUDRET/BESSON, Comparative law of International Arbitration, London 2007, No. 717, pp. 625-626. CAS 2010/A/2234, par 34, page 6. See also DUTOIT B., *ibidem*, N. 10 on article 188 PILA, page 568).

Admissibility

15. The appeal was filed timely. Furthermore, it complied with all other requirements of article R48 of the Code. It follows that the appeal is admissible. Neither of the parties has submitted otherwise.

Merits

16. The issues to be resolved by the CAS Sole Arbitrator are:
    a) What contract(s) did the parties actually enter into?
    b) What are the mutual obligations arising from the established contractual relationship?

A. What contract(s) did the parties actually enter into?

a) Introduction

17. The FAT Single Arbitrator pointed out that the central issue of the dispute was whether the Player signed the *"Contract Termination Agreement"* dated 11 December 2009 and/or the Fourth Contract, dated 13 January 2010.

18. The Respondents submit that the Player exclusively signed the First Contract and the statement dated 28 January 2010 according to which *"Shanxi Zhong yu released Lee Benson JR. from the team on 30th Jan"*. They contend that all the other documents were fabricated by the Club, which forged the Player's signature.

19. The FAT Single Arbitrator proceeded to compare the signature on the disputed contracts with all the other documents which bore the Player's signature and which were filed before him. Based on his own evaluation of the evidence and for the following reasons, the FAT Single Arbitrator considered *"that the Club has not demonstrated that the Player signed either the [Contract Termination Agreement] or the [Fourth Contract]":*

- The signature on the *"Contract Termination Agreement"* was markedly different form the one which was on all the other signed documents filed before the FAT Single Arbitrator. In addition, the said signature seemed to appear *"in a place where it is conceivable that someone may have printed the Player's name"*.
- The Club alleged that had the Player not signed the *"Contract Termination Agreement"*, it would not have paid to him USD 49,373 on 15 December 2009. The FAT Single Arbitrator dismissed this argument as *"even if the Parties had not entered into the* [Contract Termination Agreement] *a payment of USD 60,000 would have been due on 20 December 2009"*, in accordance with the payment schedule set out in the First Contract.
- The Player's signatures on the Fourth Contract *"are not as markedly different from the signatures on other documents"*. However, the Club filed two copies of this Fourth Contract at two different moments during the FAT proceedings. The FAT Single Arbitrator noted that *"there are inconsistencies between the two versions of the Second Contract provided by the Club"*. Furthermore, he also noted *"that the Club has not submitted any evidence as to the circumstances in which the* [Contract Termination Agreement] *and the* [Fourth Contract] *were entered into, or the circumstances under which the Player stopped playing for the Club"*.

b) The expertise

20. Considering that:

- one of the main issues in the present case is whether the Player's signature on the litigious documents is genuine,
- it is nearly impossible for the untrained observer to detect a forged signature,
- such a handwriting evidence evaluation obviously takes into consideration a set of different variables, such as the type of printed material present, the paper, the handwriting and the shape of handwritten characters and also requires training, experience and specific tools involving computing science, probability, statistics,

the CAS Sole Arbitrator was of the opinion that the authentification of the Player's signature called for a qualified expert opinion.

21. Consequently, on 19 January 2011, the parties were informed that the CAS Sole Arbitrator decided to appoint an expert in graphology from the *"institute de police scientifique de l'Université de Lausanne"*, in application of article R44.2 para. 2 of the Code.

22. The appointed expert, Dr Raymond Marquis, was required to compare the uncontested genuine signatures of the Player (which were included in a set of a dozen of documents) with the litigious

signatures of the Second Contract, the *"Contract Termination Agreement"* dated 11 December 2009, the Fourth Contract, the *"foreign players employment contract supplementary agreement"*, dated 13 January 2010 and the handwritten timetable of the payments to be made to the Player, allegedly signed on 18 January 2010. The parties received a copy of the expert opinion on 15 March 2011.

23. At first, the expert examined the litigious signatures with the naked eye as well as with various sophisticated devices and observed that no evidence of prior tracing was observed, which eliminates the hypothesis of an indirect tracing of the questioned signatures. He also detected that the litigious signatures are all original and are not the result of a reproduction process (such as a photocopy or a printing) as they were written with a writing instrument. *"The general graphical appearance and the particular characteristics (detailed features of shape and construction) of the questioned signatures in the name of Mr Lee A. BENSON were then analysed, and compared to the features of the group of the reference specimens in the name of Mr Lee A. BENSON"*.

24. Based on his meticulous analysis described in detail in his report, the expert came to the conclusion that the Second Contract, the Fourth Contract and the *"foreign players employment contract supplementary agreement"*, dated 13 January 2010 were signed by the Player. At the hearing before the CAS, Dr Raymond Marquis affirmed that he had absolutely no doubt that the Player's signature on those documents was genuine.

25. Regarding the *"Contract Termination Agreement"* dated 11 December 2009 and the handwritten timetable of the payments to be made to the Player, allegedly signed on 18 January 2010, the expert concluded that *"it is not possible to determine whether the questioned signature [on those documents] was written by the [Player] or by someone else"*.

26. Given the CAS Sole Arbitrator's lack of specific scientific expertise, it seems reasonable that he should limit himself to reviewing whether the expert had considered the correct issues and exercised his appreciation in a manner which does not appear arbitrary or illogical. In other words, bearing in mind the prescribed provisions as to burden and standard of proof, the CAS Sole Arbitrator must determine whether the expert's evaluation is soundly based in primary facts, and whether the expert's consequent appreciation of the conclusion be derived from those facts is equally sound. The CAS Sole Arbitrator will necessarily take into account, inter alia, the impression made on him by the expert in terms of his standing, experience, and cogency of his evidence. In any event, the CAS Sole Arbitrator should not substitute his own subjective appreciation to the one of the expert.

27. The expert opinion was delivered by Dr Raymond Marquis, head of research projects at the School of Forensic Science, which is affiliated with the Faculty of Law and Criminal Justice, University of Lausanne, Switzerland. This school of Criminal Sciences is known for being a high quality institution, and indeed one of the very best establishments in its area of expertise and enjoys worldwide reputation. As can be read on its web site, it plays an essential role in the ongoing training of judicial authorities as well as in delivering a service activity of international scope. At the hearing, Dr Raymond Marquis convincingly explained and justified the conclusions of his expert opinion. He provided clear and consistent answers to all the questions raised during the hearing. It can be observed that the CAS Sole Arbitrator neither saw nor heard

any evidence to persuade him that Dr Raymond Marquis' expert opinion was not credible or lacked the requisite evidentiary foundation.

28. In addition and aside from Dr Raymond Marquis' report, it appears that the effective signature by the Player of the Fourth Contract is consistent with the circumstances of the case:

- The Club alleges that in mid-December 2009, the Player left the Club and then returned in mid-January 2010. Where he went and what he did during this period of time remains unclear.
- The Player does not contest that he left the Club for a while before he returned some time in January 2010. At least, he did not challenge this version of the facts. In particular, he did not bring any evidence to support that he kept performing his work uninterruptedly until the end of January 2010.
- Whereas the Club asserts that the Player left on the basis of the *"Contract Termination Agreement"* and supports its assertion with the early payment of the December salary, the Player does not give any convincing explanation with respect to his absence, since he only mentions the Released Agreement of 28 January 2010, while the *International Air Passenger Transportation Receipt* filed by the Appellant is dated 21 December 2009, and limits himself to state that the Club *"asked him to return under the only contract that was signed by the Player on 4 September 2009"*. In this regard, the CAS Sole Arbitrator observes that if the Player accepts that he returned to the Club, he must also accept that he had previously left it.

29. Hence, and based on these circumstances, it appears plausible that, in mid-January 2010, the Player and the Club considered their previous contractual relationship as terminated. As they both accepted to work together again, it is not unreasonable to think that they decided to sign a new contract, i.e. the Fourth Contract.

30. As a consequence, the CAS Sole Arbitrator has accepted to his comfortable satisfaction that Dr Raymond Marquis report and testimony are reliable, consistent with the facts of the case and must be admitted into evidence.

c) Conclusion

31. On these findings of the evidence, the CAS Sole Arbitrator finds that it has been proven by the Club as well as by the circumstances that the Player unquestionably signed the following agreements:

- The First Contract;
- The Second contract;
- The Fourth Contract;
- The *"foreign players employment contract supplementary agreement",* which constituted an integral part of the Fourth Contract.

B. What are the mutual obligations arising from the established contractual relationship?

a) Introduction

32. The parties have agreed that the CAS Sole Arbitrator shall decide the dispute *ex aequo et bono*. As exposed here above, this implies that the CAS Sole Arbitrator must not apply general and abstract rules, but must stick to the circumstances of the case. However, he is bound by the terms of the agreements entered into by the parties (DUTOIT B., *ibidem*, N. 10 on article 188 PILA, page 568).

33. Preliminary, it appears that, from the beginning, the contractual relationship between the parties has always been quite complicated. A First Contract was concluded but, immediately thereafter, a Second Contract was signed, in order to hide the Player's real wages from the CBA. Given this, the CAS Sole Arbitrator finds that no criticism can be validly raised for having allegedly amended the First Contract (a CBA standard form contract), in a manner that is not compatible with the CBA regulations. In this regard, it must be noted that the amendment of such agreement seems to be current practice as the First, the Second and the Fourth Contracts are CBA standard form contracts but none have the same content. In particular, the Fourth Contract does not include any reference to the Player's salaries or to any existing annexe (despite the Club's submission that there are two of them), and its article 9 in relation with the *"Termination and modification of the contract"* cannot be found in any other agreement.

34. With respect to the Player and notwithstanding the fact that his allegations are in contradiction with the expert's opinion, he did not give any explanation as to the circumstances of his first departure in December 2009 or of his release at the end of January 2010. In particular, the Player has not established nor made plausible that, as soon as the First Contract came into effect, he carried out correctly and extensively all his contractual obligations, that he attended all the training sessions, games and related activities as requested by his employer, that he complied with his employer's instructions or has always represented the club in the best manner possible.

35. The CAS Sole Arbitrator cannot accept the version of the facts presented by the Player as plausible. Recall that the Player had claimed that he had merely acknowledged receipt of the "Release Agreement" on 28 January 2010 and that he *"did not ask to be released. He was told that he was released because he did not meet the Club's style of playing"*. The CAS Sole Arbitrator would expect an employee who is "released" to try to demonstrate that such a "release" was actually groundless and constituted a premature and unjustified termination of the labour contract. According to the Player, he signed the "Release Agreement" and left the Club, without further consideration. It seems that in the Player's judgement, the fact that he was hired for a *"guaranteed term of 6 month(s)"* entitled him to claim for compensation of what he would have earned until the expiration of the fixed agreement period, no matter how well he carried out the work assigned to him. Such an approach is very unlikely in any employee-employer relationship, especially when high wages are at stake (USD 60,000 net per month).

b) Regarding the Club – Player relationship

36. The Club contends that the statement signed on 28 January 2010, according to which *"Shanxi Zhong yu released Lee Benson JR. from the team on 30th Jan"* put an end to the Fourth Contract, in accordance with its article 9B. According to the Club and under this provision, the Player is not entitled to any further payment after 30 January 2010.

37. The Respondents claim that, under the terms of the First Contract, the Player is entitled to the payment of his salary irrespective of whether or not he has played any or all matches for the Club during the contract term.

38. The CAS Sole Arbitrator has to seek the true and mutually agreed upon intention of the parties. When it cannot be established, the contract must be interpreted according to the requirements of good faith. The CAS Sole Arbitrator has to determine how a declaration or an external manifestation by a party could have been reasonably understood depending on the individual circumstances of the case.

39. For the reasons already exposed, the CAS Sole Arbitrator accepts that the Player has signed the Fourth Contract. The relevant provisions are the following ones:

"- Article 9: Termination and modification

A. The Team may terminate this Contract upon written notice to the Player if the Player shall: (…)

3) at any time, fail, in the sole opinion of the Team's management, to exhibit sufficient skill or physical ability he supposes to have, provided, however, that if this Contract is terminated by the Team, in accordance with the provision of this subparagraph, prior to the beginning of any Regular Season, and the Player, at the time of such termination, is unfit to play skilled basketball as the result of an injury resulting directly from his playing for the Team, the Player shall continue to receive his full salary of the Regular Season, less all workers' compensation benefits and any insurance paid or payable to the Player and is entitled to his home travel expenses; or (…)

B. The Player and the team have reached the agreement that each party may terminate this Contract. Since the termination date of the contract, the Team will suspend the Player's payment".

- Article 11: Entire Agreement

(…) This contract contains the entire agreement between the Player and the Team. There are no other agreements of any kind, oral or written, that has not been disclosed to the CBA, between the Player and the Team or any Team Affiliate".

40. According to the unambiguous wording of article 11 here above, it appears that the Parties have accepted that *"This contract contains the entire agreement between the Player and the Team. There are no other agreements of any kind, oral or written"*. This implies that the parties were willing to restart their relationship with a new contract and that the Player, implicitly at least, accepted to terminate the First Contract. To allege otherwise, would not only be inconsistent with standard practise but it would also come to the absurd situation where the Player could claim for the same month

a salary of USD 60,000 based on the First Contract and another USD 60,000 based on the Fourth Contract. In addition, the CAS Sole Arbitrator finds it very hard to believe that the two parties accepted to enter into a new employment contract without having resolved the past and, in particular, without considering the former respective commitments or obligations as honoured or extinguished.

41. The termination was also made in conformity with article 11 of the First Contract, which provides that *"The Player and the Team may terminate this Contract through consultations and mutual agreement. This contract cannot be amended without the written consent of the Player, the Team and the Agent's unless this Contract, the CBA or FIBA rules otherwise provide"*. Whereas the amendment of the First Contract requires the signature of a) the Player, b) the Team and c) the Agent, its termination can be achieved by the mutual agreement of the Player and the Club. The termination occurred when the Fourth Contract was signed between those two parties and the formal intervention of the Player's agent was not necessary for the Fourth Contract to come into force. Incidentally, it can be observed that the First Contract does not reflect the possible consequences in case of non-compliance with article 11, second sentence.

42. Based on the foregoing, it appears that the only question that remains is, whether the Fourth Contract was validly terminated by the Club.

43. Two provisions of the Fourth Contract deal with this issue:

- Article 9 A.3) according to which the Player left it to the discretion of the Club a) to determine whether the Player *"fail (…) to exhibit sufficient skill or physical ability he supposes to have"* and, consequently b) to terminate the Contract *"at any time"* upon written notice.
- Article 9 B which provides that the Club and the Player have agreed that they each are entitled to terminate the Fourth Contract, in which case *"Since the termination date of the contract, the Team will suspend the Player's payment"*.
- Article 9 B enables the Player as well as the Club to terminate the contract with immediate effect, without requiring any formal notice. Hence, the requirements of this article are unquestionably met when the Player was notified of his release on 28 January 2010, signed the notification and from the moment the Club stopped paying his wages.

44. The Player submitted that he *"did not ask to be released. He was told that he was released because he did not meet the Club's style of playing"*. This assertion is irrelevant as the Player's agreement for the termination was not required by article 9B. Whether he asked and/or agreed to be released does not change the fact that according to this provision, the Club was allowed to unilaterally terminate the contract, which it did a) expressly with the notice signed by the Player on 28 January 2010 and b) implicitly/jointly by stopping the payment of the Player's salary.

45. Considering a) that the First Contract as well as the rights and obligations deriving from it were terminated by the Fourth Contract and b) that it is undisputed that the Player received the salary corresponding to the work performed from the beginning of the Fourth Contract until its valid termination, the CAS Sole Arbitrator comes to the conclusion that the Player cannot be awarded any further compensation.

46. Furthermore, he should then neither be reimbursed the advances of costs he paid to the FAT nor received any contribution towards his legal fees and expenses.

c) Regarding Mr José F. Paris

47. Mr José F. Paris claims that he is entitled to the full payment of his fees whereas the Club submits that they should be reduced proportionally to the actual length of the employment relationship with the Player.

48. It is undisputed that Mr José F. Paris' fees derive from the First Contract and it is also undisputed that he received a payment of USD 7,500. According to the applicable agreement, the Club accepted to pay to each agent, Mr José F. Paris and Mr Ma Liang, USD 18,000 on 25 September 2009. It also accepted that those agents "will be entitled to same 10% commission on any future deals between PLAYER and CLUB".

49. There is no indication that Mr José F. Paris's fees were to be reduced in the event of a premature termination of the employment relationship between the Player and the Club. Likewise, there is no provision in the First Contract which allows the Club to suspend payment of the agency fee. Moreover, the Club's submission is inconsistent with the fact that it contractually undertook to make the payment of the fees on 25 September 2009, i.e. approximately when the First Contract came into force.

50. Based on the foregoing, the CAS Sole Arbitrator reaches the conclusion that the sum to be awarded to Mr José F. Paris amounts to USD 10,500.

51. In view of the above, the CAS Sole Arbitrator finds no reasons to depart from the position expressed by the FAT Single Arbitrator in the Appealed Decision, according to which *"the payment obligation from the Club to the Agent arose on 25 September 2009 in accordance with the Contract. Therefore, in exercising his powers ex aequo et bono, the Arbitrator finds it just and equitable to apply a rate of 5% per annum to the outstanding debt, in an amount of USD 10,500, from 25 September 2009"*.

52. In addition, the CAS Sole Arbitrator cannot help but notice that based on the First Contract, Mr José F. Paris would be entitled to claim a 10 % commission on the salary due to the Player under the Fourth Contract. However, due to the legal maxim *ultra petita*, the CAS Sole Arbitrator cannot award to Mr José F. Paris any larger amount than that which was requested by the latter. In any event, he would not have been allowed to lodge such a counterclaim before CAS).

The Court of Arbitration for Sport rules:

1. The appeal filed on 22 September 2010 by Shanxi Zhongyu Professional Basketball Club is partially upheld.

2. The decision of the FIBA Arbitral Tribunal of 31 August 2010 is partially reformed in the sense that:

   Shanxi Zhongyu Professional Basketball Club must not pay any compensation to Mr Lee A. Benson but is ordered to pay to Mr José F. Paris USD 10,500.00 together with 5 % interest p.a. starting on 25 September 2009 until the effective date of payment;

   Mr Lee A Benson shall not receive EUR 5,140.91 as reimbursement of the FAT advance of costs but Mr José F. Paris shall receive EUR 5,140.91 as reimbursement of the FAT advance of costs.

   Mr Lee A Benson shall not receive EUR 8,000 as a contribution towards his fees and expenses related to the FAT proceedings but Mr José F. Paris shall receive EUR 8,000 as a contribution towards his fees and expenses related to the FAT proceedings.

(…)

6. All other or further claims and counterclaims are dismissed.