BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0154/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Spencer John Gloger

- Claimant 1 -

Bill A. Duffy International, Inc.
BDA Sports Management, 507 N Gertruda Avenue, Redondo Beach, CA, 90278, USA

- Claimant 2 -

Both represented by Mr. José Lasa Azpeitia, attorney-at-law,
Laffer Abogados, c/ Almagro 13, 2 D, Madrid, Spain

vs.

Club C.B. Atapuerca
c/ Cascajera (Polideportivo El Plantio), s/n, Burgos, Spain

- Respondent -

Represented by Mr. Julián Ruiz Navazo, attorney-at-law,
c/ Lain Calvo 25, 2 B, Burgos, Spain

1. The Parties

1.1. The Claimants

1. Mr. Spencer John Gloger (hereinafter the “Player”) is a professional basketball player of US nationality. He is represented by Mr. José Lasa Azpeitia, attorney-at-law in Madrid, Spain.

2. Bill A. Duffy International, Inc. (hereinafter the “Agency”) is a management agency. It operates as “BDA Sports Management” and provides services to professional basketball players. The Agency is located in Redondo Beach, CA, USA. Its chairman and CEO is Mr. Bill Duffy. In this arbitration, the Agency is also represented by Mr. José Lasa Azpeitia, attorney-at-law in Madrid, Spain.

1.2. The Respondent

3. Club C.B. Atapuerca (hereinafter the “Club” or “Respondent”) is a professional basketball club located in Burgos, Spain. The Club is represented by Mr. Julián Ruiz Navazo, attorney-at-law in Burgos, Spain.

2. The Arbitrator

4. On 25 January 2011, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT") appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules").

5. None of the Parties has raised objections to the appointment of the Arbitrator or to the

declaration of independence rendered by him.

3. Facts and Proceedings

3.1. Background Facts

6. On 6 October 2009, the Player underwent a surgery on _____. After this, he did not play any official games in the 2009/2010 season.

7. On 30 July 2010, Claimants and the Club entered into an employment contract (hereinafter the "Player Contract") according to which the Player would be employed by the Club as a basketball player for the 2010/2011 season. Clause 1 of the Player Contract reads in its main relevant parts as follows:

> *"1. DURATION*
>
> *[...] This contract shall be valid since the date of its signature and it shall remain valid until five (5) days after the last official match of season 2010-2011, save it is early terminated according to the dispositions contained herein.*
>
> *[...]*
>
> *The CLUB agrees that the PLAYER shall undergo a standard medical examination for basketball players. The CLUB and the PLAYER agree that such medical examination shall be supervised by a doctor appointed by the CLUB and that the PLAYER shall undergo such examination before taking part in any training or physical activity. Should the CLUB allow the PLAYER to participate in any training or match before he has undergone such medical examination, the CLUB waives its right to submit the PLAYER to said examination and it shall be considered as successfully accomplished. If the PLAYER does not receive notice of the result of such examination within the forty eight hours after undergoing it, it shall be understood that he has successfully accomplished it."*

8. The Parties agreed that the Player Contract was a "guaranteed contractual agreement" and that in the event the Player suffered an injury, all payments stipulated in the Player Contract would be neither suspended nor failed to be received (Clause 4 of the Player Contract). The Player Contract stipulated a net salary of USD 70,000.00 payable in ten

installments of USD 7,000.00 due on the 10th day of each month starting on 10 September 2010 (Clause 2 of the Player Contract). In addition, the Player Contract provided for some benefits for the Player like housing, transport or medical expenses (Clause 3 of the Player Contract). In the event that the aforementioned payments were 10 days late, the Player was entitled to a "surcharge" of USD 100.00 per day.

9. In Clause 5 of the Player Contract, the Club agreed to pay to the Agency an agent fee in the amount of USD 7,000.00 due on 15 December 2010, and a late payment penalty of USD 100.00 per day if any payments mentioned in this clause were 30 days late. Clause 5 of the Player Contract also states that *"(i)t is understood and agreed by the parties that the CLUB shall not pay to the AGENTS any amount should the player fail to fulfill the medical examination".*

10. On 4 August 2011, the Club announced on its official website that it had hired the Player.

11. In the morning of 23 August 2011, the Player was subject to the Club's general standard medical examination which was performed by Dr. Ruiz Perez, the Club's team doctor. In the evening of the same day, the Player participated in the first practice session of the Club's team. He also participated in the following preseason practice sessions and played preseason games on 3, 5 and 8 September 2010.

12. Immediately after the game of 8 September 2010, the Player was examined by Dr. Crespo Rivero, a trauma specialist, because the Player's _____ had become _____ and painful during the game. Thereafter, the Player paused. He did not participate in the following practice sessions or in the next preseason game which took place in the evening of 14 September 2010.

13. In the morning of 14 September 2010, the Player underwent an MRI examination at the doctor's office of Dr. Crespo Rivero.

14. During the following days, the Parties kept in contact with each other, at least by email.

On or before 18 September 2010, Claimants were informed by the Club about the results of the MRI examination. However, the Player did not participate in any of the Club's practice sessions or preseason games.

15. On 23 September 2010, the Club requested the Player to attend a further examination with the Club's medical services which was scheduled on the same day, but the Player refused to attend. By email of the same date, the Player's agent explained the Player's refusal to the Club.

16. In the morning of 24 September 2010, the Club asked the Player again to attend a medical examination which was now arranged with the Club's team doctor at the hospital. The Player attended this examination.

17. By letter of 24 September 2010, the Club informed the Player that it considered the Player Contract to be void. The letter reads as follows:

> *"Dear Mr. Spencer Gloger*
>
> *This entity signed a contract with you on 30th July 2010 for the provision of your services as professional basketball player in the Club Baloncesto Atapuerca for season 2010/2011.*
>
> *Nevertheless, recently this entity has been aware that you, as of the date of the signature of such contract, suffered an injury arising from a previous surgical operation that hinders you from providing the services for which you were going to be contracted. You were aware of this fact and you intentionally concealed it from this Club.*
>
> *Such circumstance voids the contract signed between the parties as it seems obvious that there has been a defect of the consent of the entity. This essential requirement that hinders the effective provision of services by the player was concealed from the Club and had it been known, the Club would have never agreed to the above mentioned contract. Therefore, the contract signed between the parties is null and void according to the dispositions of Article 1256 et seq. of the Civil Code.*
>
> *Furthermore, you have not passed the medical examination necessary to determine your fitness as player of this entity. You have always declared to this Club that you had successfully overcome the surgical operation which took place last season and that you did not have any sequela (sic) or limitation. Despite this Club has asked in several occasions for the presentation of medical reports and tests determining your effective recovery of such surgical operation and the lack of sequel or injuries deriving thereof, you have always put us off with excuses and*

you have never provided the requested reports proving your statements.

Thus, following your constant negative, we have been forced to develop a MRI to determine the health of your _____. Such test has revealed that you suffer an injury derived from the surgical operation you underwent, which is previous to the signature of the contract, and which results determine the failure to pass such medical examination and therefore your lack of aptitude to provide your professional services to this entity.

Therefore, given the fact that you have not passed the mandatory medical examination to join this entity, as you suffer a previous injury concealed from us, the contract signed on 30th July, shall have no effect as it does not fulfill an essential requirement for its entry into force such as the attitude of the player for the provision of services.

Moreover, and should the Courts consider this contract as valid or with effect, we inform you, subsidarily (sic) and hereby, that your behavior represents a serious breach of your professional obligations and a cause of disciplinary dismissal with effect from today's date.

In fact, you have not only maliciously concealed the injury you have been suffering since the previous season, saying that you were totally recovered, but also you have in addition, failed to provide in several occasions the reports and necessary documentation for this Club to confirm by means of its own medical reports the success of the surgical operation and the absence of sequel, which clearly represents a proof of your bad faith and a breach of good faith which shall prevail in any professional relationship.

Furthermore, last 23nd September you were requested to appear before the trauma doctor of the Club to undergo a medical revision, you refused to do it without just case despite you were advised on the fact that it could be the cause of dismissal. In addition, today you have been requested to attend a medical revision which you have once more rejected, even refusing the reception of the notice from the entity. Such behavior represents a breach of the instructions of your employer, which shows a clear, repeated and serious disobedience of the orders of the company.

Bearing in mind that these behaviors represent on their own, a cause of dismissal, it seems obvious that the concurrence of both behaviors imply a special seriousness which makes totally consistent the decision of the entity to proceed to your dismissal.

Therefore and given that the entity has provided you a house in Burgos, we hereby request you to leave it within the next 24 hours, handing the key to the Management of the Club.

In addition, we inform you that this entity reserves its right to start the relevant legal sanctions to claim any damages your behaviour may have caused.

We request you to sign this letter, as prove (sic) of its reception."

18. On 19 October 2010, the Player was examined by Dr. Venuto, Newport Beach, USA

i.e. the same doctor who performed the _____ surgery on 6 October 2009.

19. By letter of 2 November 2010, Claimants' counsel informed the Club that the Player was still willing to fulfill his obligations as agreed in the Player Contract and to find an amicable solution for the issues between the Player and the Club.

3.2. The Proceedings before the BAT

20. In accordance with the BAT Rules, Claimants' counsel filed on behalf of Claimants a Request for Arbitration dated 20 December 2010 which was received by the BAT on 17 January 2011.

21. By letter dated 2 February 2011, the BAT Secretariat confirmed receipt of the Request for Arbitration as well as the payment of the non-reimbursable handling fee of EUR 2,000.00 received in the BAT bank account on 18 January 2011 and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for Respondent to file its Answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules by no later than 23 February 2011 (hereinafter the "Answer"). The BAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs by no later than 16 February 2011:

"Claimant 1 (Mr. Spencer John Gloger)	*EUR 3,500*
Claimant 2 (Bill A. Duffy International, Inc.)	*EUR 1,000*
Respondent (Club C. B. Atapuerca)	*EUR 4,500"*

22. By email of 9 February 2011, Claimants' counsel provided the BAT Secretariat with the residential addresses of Claimants as requested by the BAT Secretariat.

23. On 15 February 2011, the BAT Secretariat informed the Parties that Respondent had requested an extension of the time limit to file its Answer and that in view of the circumstances of the case the Arbitrator had granted such extension by no later than 4 March 2011.

24. By letter of 21 March 2011, the BAT Secretariat acknowledged receipt of Respondent's Answer filed on 4 March 2011, and receipt of the full amount of the Advance on Costs. Since the Arbitrator found that it might be worthwhile for the Parties to attempt a settlement taking the form of a consent award, in accordance with Article 12.3 of the BAT Rules he invited the Parties to state by no later than 28 March 2011 if they were interested in entering into settlement discussions.

25. On 25 and 28 March 2011, the Parties expressed their desire to make an attempt to resolve the dispute amicably. The Arbitrator then decided to hold a telephone conference on 18 April 2011.

26. On 4 April 2011, the BAT Secretariat informed the Parties that the FIBA Arbitral Tribunal (FAT) had been renamed Basketball Arbitral Tribunal (BAT) as of 1 April 2011 and that, absent any objections by the Parties on or before 11 April 2011, the new name would be applied also to the present proceedings. None of the Parties raised any objections within the said time limit.

27. On 18 April 2011, the telephone conference took place, but the Parties did not reach a settlement. By letter of the same date, the BAT Secretariat requested the Parties to pay the following additional Advance on Costs by no later than 27 April 2011:

"Claimant 1 (Mr. Spencer John Gloger)	*EUR 2,000*
Claimant 2 (Bill A. Duffy International, Inc.)	*EUR 1,000*
Respondent (Club C. B. Atapuerca)	*EUR 3,000"*

28. By letters of 6 May 2011, the BAT Secretariat acknowledged receipt of the full amount of the additional Advance on Costs and informed the Parties that, to avoid enormous costs and time of a hearing in person, the Arbitrator had decided not to hold a hearing but to ask the Parties to reply in writing and by no later than 16 May 2011 to questionnaires which were submitted to the Parties separately.

29. On 16 May 2011, the Parties submitted their responses with further exhibits.

30. By letter of 6 June 2011, the Arbitrator declared the exchange of documents complete and invited the Parties to submit a detailed account of their costs until 13 June 2011.

31. On 13 June 2011, in addition to the legal costs and fees already listed in the Claimants' Request for Relief amounting to EUR 12,000.00 (see below para. 40), Claimants submitted an account of additional costs as follows:

> *"Herewith I enclose the additional costs to be incorporated to the costs already resented to BAT within this proceeding.*
>
> *Claimant requests for Respondent to be ordered to pay expenses and reasonable legal fees on a the* [sic] *net amount provided within the Request for Arbitration in the terms and conditions therein solicited and, additionally, to incorporate the following amount to be added up to the total one already requested, and for Respondent to be ordered to disburse such final amount*

Communications with BAT. *Conference call with Respondent and BAT Arbitrator*	*400 Euro*
Claimant 1 and 2 Response review for Arbitration	*800 Euro*
Total additional fees	*1.200 Euro"*

32. By email of 13 June 2011, Respondent submitted a statement about its costs, supported by two banking receipts, as follows:

> *"Please find enclosed a detailed account of ATAPEURCA CB costs (Banking income dated on 15 february 2011 -4.500 EUR- and 26 april 2011 -3.000 EUR-, as it was required)."*

33. On 14 June 2011, the BAT Secretariat invited the Parties to submit their comments, if any, on the other parties' account of costs by no later than 17 June 2011. The Parties did not submit any comments.

4. The Positions of the Parties

4.1. Summary of Claimants' Submissions

34. The Claimants submit that the Player has never concealed his prior _____ injury or the surgery. In fact, the Club was well aware of both. Because of these circumstances, the parties to the Player Contract had agreed that their contract would become valid only upon passing a medical examination which should take place before the first training session. The Club never asked for any further information regarding the Player's old injury. At the time of signing the Player Contract, the Player was no longer injured and was fit to play.

35. On 23 August 2010, the Club took the appropriate measures to test the Player's fitness. The Player successfully passed the medical examination. Otherwise he would not have been admitted to the training sessions and/or the preseason games.

36. Until 24 September 2010, both parties considered the Player Contract to be valid. This is supported by the facts that the Club paid the Player the first installment of the agreed salary in the amount of USD 6,967.00 which was due on 10 September 2010. This payment was received by the Player on 16 September 2010. Furthermore, the Club reported about the player on its website. The Club did not notify the Player that he had failed the medical examination before 18 September 2010.

37. Claimants contest that the Club lawfully terminated the Player Contract because the Player had concealed a prior injury. Contrary to the Club's statements, the Player did attend the medical examination of 24 September 2010. If there were reasons for disciplinary sanctions, a warning should have been given to the Player before the Player Contract was terminated.

38. When considering the Player's actual damage, the agreed amenities (automobile and

medical expenses) have to be taken into account as well. The Player is also entitled to default interest of 5% p.a. from the date of termination of the Player Contract.

39. Since the Player successfully passed the medical examination upon which the Player Contract became valid, the Agency is entitled to an agent fee of USD 7,000.00. Such amount should have been paid on 15 December 2010, which was not. The Agency is therefore also entitled to a late payment surcharge of USD 100.00 per day and additional default interest of 5% p.a.

4.2. Claimants' Request for Relief

40. Claimants submit the following requests for relief:

"CLAIMANT

- *Claimant seeks relief whereby FAT would rule ex a[equ]o et bono (as concretely settled between the Parties in the Agreement) as follows:*
  - *Respondent shall be held liable for the premature, unilateral termination of the Agreement without just cause.*
  - *Respondent is ordered to pay the net amount of SIXTY THREE THOUSAND AMERICAN DOLLARS (US$ 63.000) as being this sum the amount settled by the parties as main remuneration for the Claimant services as a basketball player, minus the amount already paid by the Respondent on September 16th 2010.*
  - *Respondent is ordered to pay an additional net amount TWO THOUSAND EIGHT HUNDRED DOLLARS (US$ 2.800) as damages in amenities lost by the termination without cause of the Agreement.*
  - *Respondent is ordered to pay penalty for legal interest at five percent (5%) per annum, in accordance to the terms and conditions expressed ut supra.*
  - *Respondent is ordered to pay expenses and reasonable legal fees on a net amount of TEN THOUSAND EUROS (10.000€)/THIRTEEN THOUSAND ONE HUNDRED AND THIRTY US DOLLAR (US$ 13.130) concretely related to the execution of the present request for arbitration and Respondent's refusal to submit the proper payment.*

Draw up of law suit. Study of the agreement with Respondent. Meeting with Player, conversation and communication with Player and Spanish and US Agents. Communications to Respondent on behalf of Claimant 2.	*2.500 Euros*
Draw up of Request for Arbitration	*6.500 Euros*
Translations	*1.000 Euros*
Legal fees and expenses in Euros	*10.000 Euros*
Legal fees and expenses in dollars	*13.130 US Dollars*
Non reimbursable handling fee	*2000 Euros/2.626 US Dollars*

- *Respondent ADITIONALLY, is ordered to pay the legal costs effectively incurred to have access to FAT proceedings, i.e., the non-reimbursable handling fee of TWO THOUSAND EUROS (2,000€)/ TWO THOUSAND SIX HUNDRED TWENTY SIX DOLLAR (US$ 2.626) and it should be considered when assessing the Claimant's legal fees and expenses.*

- *In virtue thereof Claimant requests for this amount to be considered additionally to the amount considered adequate to compensate the total legal fees and expenses generated to Claimant, amounting a total of FIFTEEN THOUSAND AND SEVENHUNDRED AND FIFTY SIX US DOLLARS.*

Total legal fees and expenses in Euros	*12.000 Euros*
Total legal fees and expenses in dollars	*15.756 US Dollars*

- *Respondent is ordered to disburse the advanced (sic) of costs eventually determined by FAT and to be paid by Claimant.*

CLAIMANT 2

- *Claimant 2 seeks relief whereby FAT would rule ex a[equ]o et bono (as concretely settled between the Parties in the Agreement) as follows:*

  - *Respondent shall be held liable for the premature, unilateral termination of the Agreement without just cause.*

- *Respondent is ordered to pay the net amount of SEVEN THOUSAND AMERICAN DOLLARD (US$ 7.000) as being this sum the amount settled by the parties as fees for the Claimant 2 services as agent.*

- *Respondent is ordered to pay penalty for legal interest at five percent (5%) per annum, since 15th December 2010 until 15th January 2011 included, date from wherein a substituting penalty of 100 per day should be applicable.*

- *Subsidiary to the above, Claimant 2 requests for a 5% legal interest to be accrued since the date wherein the payment should have been delivered by Respondent, i.e., 15th December 2010.*

- *Respondent is ordered to pay Claimant 2 expenses and reasonable legal fees on a net amount of TWO THOUSAND EUROS (2,000€)/ TWO THOUSAND SIX HUNDRED TWENTY SIX DOLLAR (US$ 2.626) concretely related to the execution of the present request for arbitration and Respondent's refusal to submit the proper payment.*

Draw up of law suit. Study of the agreement with Respondent. Meeting with Agent, conversation and communication with Spanish and US Agents. Communications to Respondent on behalf of Claimant 2.	*900 Euros*
Draw up of Request for Arbitration	*1.100 Euros*
Total fees in Euros	*2.000 Euros*
Total fees in dollars	*2.626 US Dollars"*

4.3. Summary of Respondent's Submissions

41. The Club submits that the Player Contract is null and void and that it is not obliged to pay any further sums to Claimants. The Player arrived injured but concealed the scope of his injury and withheld medical data regarding his surgery which took place about one year before.

42. In addition, the Player Contract was subject to the condition that the Player would pass a standard medical examination performed by a doctor chosen by the Club. The Player failed to pass such examination because a few days after the beginning of the pre-season training he suffered pain in the _____ which had been subject to surgery.

43. At the medical examination on 23 August 2010, it was agreed with the Player that he could start the pre-season training with the Club's team in the evening but that the medical examination would be continued depending on the Player's "development" after the beginning of the pre-season training. In September 2010, the Player suffered pain symptoms from _____. He was sent to a trauma specialist. This additional examination and the respective report of the trauma doctor formed part of the standard medical examination which took place on 23 August 2010.

44. Immediately after the MRI examination of 14 September 2010, the Player's representative was informed about the result of the examination which was within the 48 hours time limit stipulated by Clause 1 of the Player Contract. The medical reports show that the Player did not pass the medical examination and was not fit to play. This is supported by the fact that the Player was not contracted by another club in the 2010/2011 season.

45. On 24 September 2010 Respondent's legal advisors informed the Player about the termination of the Player Contract. The reasons for that termination are stated in the Answer (page 10, para. e6) as follows: *[T]he player had not dully* [sic] *satisfied the requested medical examination (that is, because of the existence of hidden defect – which renders the agreement radically void-; apart this reason, Atapuerca BC stated major information hidden such as a surgery procedure performed a year before the signature of the agreement; continuous refusal to provide documents about it; refusal to undergo medical examinations; etc.)"*

46. Since the medical examination was not finished on 23 August 2010, the fact that the Player trained and played in the pre-season cannot be understood as successful completion of the medical examination. In addition, the payment of USD 6,967.00 can also not be understood as the Club's satisfaction with the medical examinations because this payment was made only for the time the Player participated in training and pre-season games. Although the Player stayed less than one month, the Club wanted to show its good faith and loyalty towards the Player by paying a full monthly

salary.

47. The Player's claim for reimbursement of car insurance relates to a time period prior to the date of the Player Contract and his claim for medical insurance "lacks of objectivity".

48. The Club does not owe any amounts to the Agency because the Player Contract must be considered null and void and no other agreement exists between the Club and the Agency.

4.4. Respondent's Request for Relief

49. The Club submits the following request for relief:

> *"That considering all and any facts described herein to answer the Claim, to reject completely the economic demands requested, pronouncing that states that Atapuerca BC does not owe any amount of money to the plaintiffs, in any concept, neither for expenses nor costs nor interests; in the contrary, the plaintiffs will have to be sentenced to pay to Atapuerca BC a total amount of:*
>
> - *Spencer J. Gloger will have to pay a total amount of 9000€ for the expenses of Atapuerca BC's legal defense (study of the case 2.500€, answer to the claim and appearance in COURT 6.500€).-*
> - *Bill A. Duffy International, Inc, will have to pay a total amount of 2000€ for expenses of Atapuerca BC's legal defense (study of the case 900€, answer to the claim and appearance in COURT 1.100€).-*
>
> *Moreover,*
>
> - *Spencer J. Gloguer*[sic] *and Bill A. Duffy International, Inc, will have to pay a total amount of 1000€ for the expenses of translations executed, and other 4.500€ that Atapuerca BC provided at the beginning of this procedure in concept of provision of funds, credited to the account of FIBA (Arbitral Tribunal), which receipt is enclosed hereafter (Pre-exhibit 2)."*

5. Jurisdiction

50. 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).

51. The jurisdiction of the BAT presupposes the arbitrability of the dispute as well as the existence of a valid arbitration agreement between the parties.

5.1. Arbitrability

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

5.2. Formal and substantive validity of the arbitration agreement

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

> *"1 The arbitration agreement must be concluded in writing, by telegram, telex, telefax or any other means of communication which allow proof of the agreement by text.*
>
> *2 Furthermore, the arbitration agreement shall be valid if it conforms to the law chosen by the parties, to the law governing the dispute, in particular the principal contract, or to Swiss law."*

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[1] Decision of the Swiss Federal Tribunal 4P.230/2000 dated 7 February 2001, cons. 1, reported in ASA Bulletin 2001, p. 523 et seq., with reference to the decision of the Swiss Federal Tribunal dated 23 June 1992, BGE 118 II 353, 356, cons. 3b.

54. The Arbitrator finds that the jurisdiction of the BAT over the dispute between Claimants and Respondent results from Clause 13 of the Player Contract which reads as follows:

> *"13. IN THE EVENT OF DISPUTE*
>
> *The present contract has a substitutive nature and therefore annuls, substitutes, derogates and extinguishes any other agreement, either verbal or oral, existing until the date of the present agreement.*
>
> *In the event of discrepancies or conflicts which may arise in the interpretation or execution of the present contract or of any litigious issue arising from the present contract, both parties agree to submit to the jurisdiction and competence of the ARBITRATION COURT OF THE FIBA (FAT) in Geneva and, shall be solved according to the procedures of such body. The language of any potential procedure will be English. The resolution of the procedure shall be solved ex aequo et bono."*

55. The Player Contract is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.

56. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (cf. Article 178(2) PILA). In particular, the wording *"[i]n the event of discrepancies or conflicts which may arise in the interpretation or execution of the present contract or of any litigious issue arising from the present contract"* in Clause 13 of the Player Contract clearly covers the present dispute.[2]

57. The jurisdiction of BAT has not been disputed by Respondent.

58. The Arbitrator thus finds that he has jurisdiction to decide the claims of Claimants.

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[2] *See for instance* BERGER/ KELLERHALS: International and domestic Arbitration in Switzerland, Berne 2010, N 466.

6. Other Procedural Issues

59. In accordance with Article 12.3 of the BAT Rules the Arbitrator invited the Parties to enter into settlement discussions and consequently to hold a telephone conference on 18 April 2011.

60. Since the Parties did not reach a settlement and to avoid costs and time of a hearing in person, according to Articles 12.2 and 13.1 of the BAT Rules the Arbitrator decided not to hold a hearing but to ask the Parties to reply in writing to questionnaires which were simultaneously submitted to the Parties. Since none of the Parties requested the BAT to hold a hearing in person, the Arbitrator decided in accordance with Article 13.1 of the BAT Rules to deliver the award on the basis of the written submissions of the Parties.

7. Applicable Law – *ex aequo et bono*

61. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the arbitrators to decide *"en équité",* as opposed to a decision according to the rules 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".*

62. In their arbitration agreement in Clause 13 of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide the dispute *ex aequo et bono*. Consequently, the Arbitrator will decide the present matter *ex aequo et bono*.

63. The concept of *équité* (or *ex aequo et bono*) used in Article 187(2) PILA originates from

Article 31(3) of the *Concordat intercantonal sur l'arbitrage* of 1969[3] (Concordat),[4] 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."*[5]

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

> *"the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand".*[6]

65. 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".*

66. In light of the foregoing developments, the Arbitrator makes the following findings:

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3 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).

4 KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Article 187 PILA N 289.

5 JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

6 POUDRET/BESSON: Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

8. Findings

8.1. Did the Player pass the entry medical examination upon which the Player Contract became valid and enforceable?

67. The Arbitrator's starting point is the Player Contract. It is undisputed that the validity of the Player Contract was subject to the passing of the standard medical examination organized by the Club. This standard medical examination took place on 23 August 2010 and the Player joined the training session with the Club's team on the same day.

68. While Claimants submit that the Player passed the standard medical examination without any reservations, the Club says that it reserved the right to further examine the Player's medical status so as to ascertain that his sporting performance was not affected by the prior _____ surgery. Such further examinations took place during the month of September 2010 and led to the conclusion that the Player was not fit to play.

69. The Arbitrator notes that when the Player Contract was negotiated and signed, it was a fact known to the Club representatives that the Player had undergone a _____ surgery in October 2009. This has been confirmed by Respondent's own statement in this arbitration. Such knowledge can also be assumed because of the fact that the parties agreed on a substantially lower salary than the Player earned before. However, it is not documented to what extent the medical condition, which led to the _____ surgery on 6 October 2009, was given particular attention by Dr. Ruiz Perez, who performed the standard medical examination of 23 August 2010, since no medical report was issued immediately after that examination.

70. The Arbitrator finds the statement of the Player credible according to which the operated _____ was indeed an issue during the standard medical examination of 23 August 2010, but that Dr. Ruiz Perez concluded that it did not constitute an obstacle for the Player to take up his sporting activities with the Club. Considering the fact that the prior surgery was a fact known to the Club's representatives, it would have been

difficult to accept that it was not addressed at that medical examination.

71. The Club rather submits that on 23 August 2010, further medical examinations had been reserved. Again, lacking any medical report, there is no evidence in support of the Club's submission that a reservation regarding further medical examinations was made during this medical examination. The affidavit signed by Dr. Ruiz Perez which refers to an agreement of the Player to undergo further medical tests was written seven months later and may have been influenced by the events which led to the present arbitration. In addition, the Player Contract provides that *"(i)f the PLAYER does not receive notice of the result of such examination within the forty eight hours after undergoing it, it shall be understood that he has successfully accomplished it*" (see Clause 1 of the Player Contract). No such notice is on record in this arbitration. Failing any evidence of an explicit reservation, the Arbitrator finds that the Player passed the medical examination and the Player Contract became valid and enforceable.

72. It is undisputed that the Player participated in the games of 3, 5 and 8 September 2010. According to the medical reports of the trauma specialist Dr. José Crespo Rivero, the Player was examined again on 8 September 2010. According to Dr. Rivero, the examination was "a consequence of a progressive worsening of his [the Player's] _____." According to the Player, the examination and subsequent treatment of the _____ became necessary because of the _____ problems which surfaced in the course of the game of 8 September 2010.

73. As a matter of fact, the Player trained and played without any apparent health problems until 8 September 2010. This has not been disputed and no evidence to the contrary was submitted. The Arbitrator therefore concludes that the statement of the Player is accurate according to which his _____ problems must have occurred during the game of 8 September 2010 and that he was medically examined immediately after this game. After a short examination, Dr. Rivero put ice on the _____ and prescribed _____. That examination took place in the locker room and not in a medical practice or hospital.

74. An MRI was arranged the next morning and performed on 14 September 2010. On 15 September 2010, the Club announced to the Player's Spanish agent that a full report of the MRI would follow. The final results of the MRI are contained in Dr. Rivero's two reports and also in the termination letter of 24 September 2010. Dr. Rivero found that the actual _____ problems had been caused by the surgery of 6 October 2009.

75. However, the Arbitrator finds that both the medical examination and treatment immediately after the game of 8 September 2010 and the MRI of 14 September 2010 were not part of the initial medical examination before the Player Contract became effective, but rather, were measures which were applied by the Club as a consequence of the injury of the Player which emerged more than two weeks after the initial medical examination. No documentary evidence has been submitted by the Club according to which the Player was notified that the Club considered these medical examinations and treatments as parts of the initial medical examination and as a condition for the Player Contract to become valid and enforceable.

76. It is well possible, or even likely that the recurrence of the Player's _____ injury was related to the same medical condition which already led to the _____ surgery of 6 October 2009 or to that surgery itself. However, the Club knew about the surgery, it examined the Player by way of a standard entry examination and accepted him without any proven reservation. The Club also agreed to a "guaranteed contract" which provided that the *"payments shall neither be suspended nor failed to be received should the Player suffer any injury"* (see Clause 4 of the Player Contract). In so doing, the Club assumed the risk that the earlier medical condition or a new injury would disable the Player to continue to play. Such risk was also reflected by the "price" of the Player who accepted a salary which was 50% of the previous compensation.

8.2. Did the Player conceal a medical condition which prevented him to play professional basketball?

77. The above allocation of the risk of an injury presupposes that the Club made an

informed decision when it accepted the Player to its team. This requirement would not be met if the Player concealed a medical condition of which he was aware or should have been aware that it would handicap his sporting performance. In other words, the "guaranteed contract" does not protect cheating.

78. It is the Club's submission that the Player should have informed the Club in more detail about the surgery of 6 October 2009 and the circumstances which made this surgery necessary. By failing to do so, he concealed a substantial fact.

79. As already stated above, the Club was aware of the Player's surgery of 6 October 2009. The surgery was also discussed between the Player and Dr. Ruiz Perez at the medical examination of 23 August 2010 and no subsequent medical report was filed.

80. The medical report of the surgery of 6 October 2009 was not submitted by the Player nor did Dr. Ruiz Perez find it necessary to ask for it. Whether it was the Player's duty to bring these documents with him or whether it was Dr. Ruiz Perez' obligation to request them can be left open because of the following consideration: the operative report was submitted in this arbitration and it does not contain any reservation as to the Player's ability to continue to play basketball.

81. This was further confirmed by Dr. Ralph J. Venuto's letter of 19 October 2010 in which he reported of another examination which took place the same day:

> *"_____ will in no way prohibit him from playing professional basketball on a regular full-time basis without any problems. I made this very clear to him. I recommended no treatment at this time. I again advised him that he could return to professional basketball with no limitations."*

82. On the other hand, a less positive prognosis was made by Dr. Crespo Rivero in his medical reports. The first is undated, whereas the second bears the date of February 24, 2011. Dr. Crespo Rivero confirmed that the MRI was decisive to identify "_____". He then concludes that although there was a fast recovery after the surgery,

> *"the player's _____medical development will not be as satisfactory as i[t] should be to*

> *support the rhythm of the training and game of the current league, that is why pain and recurring effusion symptoms could become quite frequent, prohibiting him from doing sport practice on a regular full-time basis."*

83. It is not up to the Arbitrator to favor one medical opinion over the other. The Arbitrator finds however, that the Player acted in good faith when he relied on the conclusion of the surgery report at the moment the Player Contract was negotiated and signed and when he was examined by Dr. Ruiz Perez on 23 August 2010 since this was the only information available at that time. By contrast, the information which was relevant for Dr. Crespo Rivero's opinion, namely the acute medical condition which occurred on 8 September 2010 and the MRI of 14 September 2010, was not available then.

84. Respondent does not submit that Dr. Ruiz Perez would have carried out the medical examination in a different way or drawn different conclusions if he had been in possession of the surgery report. In fact, the surgery report does not contain any indication which must be understood in good faith as a reservation against the Player's ability to play professional basketball in the future. The Player can therefore not be accused of having concealed any adverse information about his health because such adverse information did simply not exist.

8.3. Did the Player breach the Player Contract when he refused to attend the medical treatment which was planned on 23 September 2010?

85. There are no written reports on any medical treatment after 8 September 2010. Only on 23 September 2010, the Player was ordered by the Club to see a trauma doctor in order "to undergo a medical revision." The Player however refused to keep this appointment. This refusal is described in the Club's termination letter of 24 September 2010 as one of the grounds for the Player's dismissal.

86. Claimants justify Player's refusal to see the trauma doctor on 23 September 2010 by the ambiguous position of the Club with respect to the Player's status. The Player's agent understood from previous emails and phone calls that the Club wanted to terminate the Player Contract because of the Player's _____ problems. The Player

would not do anything before the Club had clearly expressed its legal position.

87. The Arbitrator has already found that the Player Contract became valid and enforceable after the medical examination of 23 August 2010 and was not cancelled because of the alleged concealment of an adverse medical condition. This also means that the Player was still under the obligation to follow the Club's orders as far as his professional duties were concerned. These duties included the Player's obligation to follow the Club's directions with regard to the medical treatment of injuries or diseases. This duty is of particular importance because the Player Contract was drafted as a guaranteed contract which obliged the Club to continue to pay the Player's salary even if he became unable to play basketball because of an injury or a disease. Consequentially, the Club had a protected interest to apply all measures to restore the Player to health.

88. By refusing to keep the appointment with the doctor on 23 September 2010 which was arranged by the Club, the Player violated the Player Contract. However, the Arbitrator finds that this violation was not a sufficient reason for the Club to terminate the Player Contract without further warning. The Club relied its termination right on Clause 8 of the Player Contract. However, it is unclear whether Clause 8 of the Player Contract entitles the Club to immediately terminate the Player Contract upon any breach or whether this right is restricted to the consumption of prohibited drugs as explicitly mentioned in the immediate context of the termination right. In any event, the immediate termination of the Player Contract is the ultimate sanction reserved to the Club: the principle of proportionality requires that the breach to be sanctioned must be substantial and the Player must have been given a chance to remedy the alleged breach before the Club is taking recourse to the right to terminate the Player Contract.

89. None of these requirements has been met in this case: although the Arbitrator does not accept the Player's refusal to attend the medical treatment of 23 September 2010 this was not a substantial or irreparable breach and no prior warning was given to the Player either. However, the Arbitrator finds *ex aequo et bono* that the behavior of the

Player contributed to the manner how the Club reacted on this refusal which must be taken into consideration when the quantum of the compensation for the unjustified termination of the Player Contract is determined.

8.4. The quantum of the compensation of the Player

90. The Club's termination of the Player Contract was not justified. The Club is therefore obliged to compensate for the resulting damage incurred by the Player. According to the standing practice of the BAT, the damage suffered by a player whose contract has been terminated early and without justification consists of the salary and other benefits provided by the Player's employment agreement which he would have earned if the employment relationship had operated until the regular termination of the agreement. Any amounts which the Player earned from other sources during this term must be set off.

8.4.1 Salary

91. According to Clause 2 of the Player Contract, the Player was entitled to an annual salary of USD 70,000.00. He obtained the salary for September 2010 in the amount of EUR 7,000.00 and he did not earn any other amounts before the agreed termination of the Player Contract. The remaining salary amounts to USD 63,000.00. However, the Arbitrator finds *ex aequo et bono* that an amount of 25% has to be deducted because of the breach of contract by the Player when he refused to see the doctor on 23 September 2010 which results in a remaining amount of USD 47,250.00.

8.4.2 Amenities

92. The Player also claims amenities in the amount of USD 2,800.00 consisting of a car insurance policy and a health insurance policy.

93. In principle, the loss of amenities constitutes a head of compensable damage. However, in accordance with BAT jurisdiction[7], the costs for insurance and medical care may be reimbursed only if the player contract contains a respective obligation and if the claimed costs concern the period of time when the player was actually engaged by the club. Since it is impossible to provide the Claimant ex post with the respective insurances for elapsed periods of time, the Claimant may only request to liquidate the damage he actually suffered by not having been insured by the Respondent. This damage may be equivalent to the costs for replacement insurance or to medical expenses the Claimant incurred during the time in which he was not covered by insurance.

94. In the present case, the Player Contract does not stipulate the Club's obligation to reimburse the Player's payments regarding car or medical insurances, but only the duty to make certain benefits available to the Player: according to Clause 3 of the Player Contract, the Club is obliged to provide the Player with a car in Spain covered by a respective car insurance and to directly pay several maintenance costs (see subtitle "Local Transport"). The same obligation to directly pay incurred costs applies to medical expenses which *"incurred during the life of the contract"* (see subtitle "Medical Expenses"). Therefore, the Arbitrator finds *ex aequo et bono* that only such costs which have been agreed in the Player Contract and which directly relate to the engagement of the Player with the Club can be charged to the Club. Living expenses after the leave of the Player are not damages attributable to the Club.

95. According to the policy declaration submitted by Claimants (exhibit no. 37 of the Request for Arbitration), the car insurance policy refers to a car in the USA and was for the policy period from 6 October 2010 to 6 April 2011. The car insurance policy is therefore not related to the employment of the Player with the Club. The submitted invoice for the health insurance policy (exhibit no. 38 of the Request for Arbitration) is

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7 *See* 0008/08 FAT, Djoric vs. PBC Lukoil Academic Sofia Basketball Club.

dated 1 December 2010 and covers a period which begun more than two months after the date when the Player left the Club and returned to the USA. Since the Player failed to provide any evidence about the coverage of the insurance and its term, it is also to be considered unrelated to the engagement with the Club.

96. Thus, the Player's claim for reimbursement of certain living costs is dismissed.

8.5. The claim on the agent fee

97. According to Clause 5 of the Player Contract, the Agency is entitled to an agent fee of USD 7,000.00 upon conclusion of the Player Contract. The Club is not obliged to pay the agent fee if the Player does not pass the medical examination.

98. The Arbitrator has held that the Player passed the medical examination on 23 August 2010 and that no reservation regarding further tests was made at the time. The condition for the payment of the agent fee has therefore been met.

99. The Arbitrator has also found that the Player did not commit a material breach which justified a dismissal of the Player. The agent fee is therefore due in its entirety and shall not be reduced.

8.6. Late payment penalties

100. The Parties have agreed to late payment penalties in the Player Contract, i.e. a penalty of USD 100.00 per day of delay stipulated in Clause 2, last paragraph of the Player Contract with respect to the salary and the amenities of the Player and in Clause 5, last paragraph of the Player Contract with respect to the agent fee. However, while Claimants request late payment penalties from 15 January 2011 with respect to the agent fee, they do not request such late payment penalties regarding the Player's claims.

101. The BAT has consistently held that late payment penalty clauses are generally lawful but subject to review by the Arbitrator so as to ensure that they are not disproportionate to the amount claimed as principal.[8] In addition, in accordance with BAT-jurisprudence, the Arbitrator holds that the purpose of the penalty clauses in the Player Contract was a *"dissuasive measure to prevent late payments"* and that, once the employment relationship was terminated, *"penalty payments ceased to accrue"*.[9] This has to be applied no matter which party had terminated the relationship.

102. As stated above, the Player Contract was terminated on 24 September 2010 and therefore Claimants' request for late payment penalties starting from 15 January 2011 has to be rejected.

8.7. Interest

103. Regarding the Player's claims, Claimants request interest at 5% p.a. from the termination of the Player Contract until the effective payment. Regarding the agent fee, Claimants ask for legal interest of 5% p.a. from 15 December 2010 until 15 January 2011 and in the alternative, i.e. in the event no late payment penalty would be awarded, since 15 December 2010. No such obligation is stipulated in the Player Contract.

104. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest on overdue

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8 *See ex multis* 0158/11 BAT, Stimac vs. KK Crvena Zvezda Beograd; 0114/10 FAT, U1st Sports Overseas Ltd. & U1st Sports Atlanta LLC vs. Club Baloncesto Valladolid SAD; 0109/10 FAT, Plaisted vs. Basketball Club Zadar (KK Zadar); 0100/10 FAT, Taylor vs. KK Crvena Zvezda Beograd; 0086/10 FAT, Queenan vs. Basketball Club Pecsi Noi Kosariabda Kft; 0036/09 FAT, Tigran Petrosean & TP Sports vs. WBC "Spartak" St. Petersburg.

9 *See* 0109/10 FAT, Plaisted vs. Basketball Club Zadar (KK Zadar) and 0100/10 FAT, Taylor vs. KK Crvena Zvezda Beograd.

salaries[10]. Although the Player Contract does not provide for the obligation of the debtor to pay default interest, this is a generally accepted principle which is embodied in most legal systems. The Arbitrator, deciding *ex aequo et bono*, considers interest in the requested rate of 5% p.a. to be fair and equitable in the present case.

105. The Agency is entitled to default interest from the day following the date when the agent fee became due and therefore the default interest in the rate of 5% p.a. commences on 16 December 2010.

106. Regarding the Player's claims, the Arbitrator takes into consideration that the contractually agreed salary entitlement was converted into the right to claim damages when the Player Contract was terminated. Such compensation for the entire unpaid salary became due at the date of the termination, i.e. 24 September 2010. Therefore, the Arbitrator holds *ex aequo et bono* that the Player is entitled to default interest from the day following the date of the termination and thus the calculation of the default interest at 5% p.a. commences on 25 September 2010.

9. Costs

107. 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 states that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

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10 *See ex multis* 0092/10 FAT, Ronci, Coelho vs. WBC Mizo Pecs 2010; 0069/09 FAT, Ivezic, Draskicevic vs. Basketball Club Pecsi Noi Kosariabda Kft; 0056/09 FAT, Branzova vs. Basketball Club Nadezhda.

108. On 3 August 2011, considering that pursuant to Article 17.2 of the BAT Rules *"the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator"*, and that *"the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time"*, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised, the BAT President determined the arbitration costs in the present matter at EUR 14,984.54.

109. In the present case, in line with Article 17.3 of the BAT Rules and considering that Claimants prevailed in their principal claims by approximately 75%, the Arbitrator finds it fair that 75% of the fees and costs of the arbitration be borne by Respondent and 25% by Claimants.

110. Given that the paid Advance on Costs amounts to EUR 14,984.54 in total and that Claimants paid EUR 7,490.00 and Respondent EUR 7,494.54 of that total amount, the Arbitrator decides that:

(i) Respondent shall pay the difference between the costs advanced by Claimants and 25% of the present arbitration costs, i.e. EUR 3,743.89.

(ii) Furthermore, the Arbitrator considers it adequate that Claimants are entitled to the payment of a contribution towards their legal fees and other expenses (Article 17.3. of the BAT Rules). The Arbitrator holds it adequate to take into account the non-reimbursable handling fee of EUR 2,000.00 and the further legal costs of EUR 13,200.00 when assessing the expenses incurred by Claimants in connection with these proceedings. After having reviewed and assessed all the circumstances of the case at hand, the Arbitrator fixes the contribution towards Claimants' legal fees and expenses at EUR 11,400.00.

10. AWARD

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

1. **Club C.B. Atapuerca is ordered to pay to Mr. Spencer John Gloger the amount of USD 47,250.00 plus interest of 5% p.a. since 25 September 2010.**

2. **Club C.B. Atapuerca is ordered to pay to Bill A. Duffy International, Inc. the amount of USD 7,000.00 plus interest of 5% p.a. since 16 December 2010.**

3. **Club C.B. Atapuerca is ordered to pay jointly to Mr. Spencer John Gloger and Bill A. Duffy International, Inc. the amount of EUR 3,743.89 as a reimbursement of the advance on arbitration costs.**

4. **Club C.B. Atapuerca is ordered to pay jointly to Mr. Spencer John Gloger and Bill A. Duffy International, Inc. the amount of EUR 11,400.00 as a contribution towards their legal fees and expenses.**

5. **Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 17 August 2011

Stephan Netzle
(Arbitrator)