



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0316/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. James Gist

- Claimant 1 -

Bill A. Duffy International, Inc.
507 N. Gertruda Ave
Redondo Beach, CA 90277, USA

- Claimant 2 -

Both represented by Mr. Billy Kuenzinger, Bill A. Duffy International, Inc.

vs.

Fenerbahçe Spor Kulübü
Lefter Küçükandonyadis Tesisleri Münir Nurettin Selçuk Cad.
34726 İstanbul, Turkey

- Respondent -

represented by Mr. Özge Torkanlı, attorney at law

1. The Parties

1.1 The Claimants

1. Mr. James Gist is a professional basketball player from the USA (hereinafter referred to as “the Player” or “Claimant 1”).
2. Bill A. Duffy International Inc. is a basketball agency (hereinafter “the Agent” or “Claimant 2”) representing the Player.
3. Claimants 1 and 2 are referred to jointly as “the Claimants”.

1.2 The Respondent

4. Fenerbahçe Spor Kulübü (hereinafter also referred to as “the Club” or “the Respondent”) is a Turkish professional basketball club.

2. The Arbitrator

5. On 5 September 2012, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). Neither of the parties has raised any objections to the appointment of the Arbitrator nor to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

6. The Player and the Club signed a fully guaranteed employment contract on 1 July 2011 (the “Contract”), whereby the Player was engaged for the 2011/2012 and 2012/2013

seasons.

7. Clause 2 of the Contract contained a schedule of monthly payments for both seasons according to which the Player would be paid a total of USD 950,000 in monthly salary installments for the 2011/2012 season and USD 1 million for the 2012/2013 season.
8. Clause 2 also stipulated that following the 2011-2012 season, the Player would have the right to terminate the Contract to play in the NBA, by providing the Club with notice thereof by registered letter no later than 16 July 2012.
9. Regarding late payments, clause 5 of the Contract provided that:

“In the event payments are not paid in full within thirty (30) business days after the scheduled payment date, the PLAYER shall not be required to practice or play in any scheduled games until all accrued penalty charges and scheduled payments have been made. For any payments not paid within thirty (30) business days after the scheduled payment date, the PLAYER shall be entitled to all remaining payments under Sections 2A and 2B of this Agreement and be free to leave the CLUB with no further obligation or withholding of clearance rights”.

10. With respect to the Agent’s fees, clause 10 of the Contract stipulated that:

“The CLUB agrees to pay Mr. Rade Filipovich and Mr. Ivo Nakic the “Agent” (acting as representative of the PLAYER) a fee equal US\$ 100,000.00 net of any Turkish taxes for the 2011-2012 contract year and in following years, which is equal to US\$ 100,000.00 net of any Turkish taxes for the 2012-2013 (if the contract is not terminated following the conclusion of the 2011/2012 season) [...] The Club’s obligation to pay the AGENT shall survive any premature termination of the Agreement or any termination of the Agent’s services by the Player [...] All payments hereunder shall be fully guaranteed and vesting and owing in full upon execution by both parties hereunder. Payment shall be paid via wire to account: “Bill A. Duffy International, Inc., Wells Fargo Bank California...”.

11. In his Request for Arbitration, the Player claimed that he had not been paid his salary for the months of April, May and June 2012 and as a result, he was free to leave the Club in the summer of 2012 and entitled to claim those unpaid salaries corresponding to the 2011/2012 season as well as the total amount of salary guaranteed for the next season (2012/2013 season). The Agent was claiming its unpaid fee relating to the 2012/2013 season.

12. However, in light of the Club's Answer and the information provided therein including the fact that the three salary payments corresponding to the amounts due to the Player in April, May and June 2012 had been made between June and July 2012, the Player revised his claim in his next submission. In particular, the Player abandoned his claim for payment of the April-June 2012 salaries – claiming instead, an amount of USD 30,067 allegedly due for underpayments during prior months.
13. With respect to the amount of USD 30,067 for outstanding 2012 salaries now being claimed by the Player, the Club submits that such amount corresponds to a series of fines for misconduct, which were deducted from the Player's monthly salaries at the relevant times without the Player complaining.
14. The Player concedes the deductions corresponded to fines, but contends that he orally objected to the sanctions at the time.
15. With respect to the circumstances and chronology of events surrounding the late payment of the April-June monthly salaries and the Player's departure from the Club during the late summer of 2012, the parties' allegations differ in part.
16. Concerning the discussions and the exchanges of emails between the parties between June-November 2012, it stems from the documents and the parties' contentions that on the Agent's side, Mr. Rade Filipovich (President of Bill A. Duffy International, Inc.), Mr. Nikos Spanos (representative of the Agent in Turkey and Greece) and Mr. Quique Villalobos (representative of the Agent in Spain) were the main persons directly involved and that on the Club's side its General Manager (GM) Mr. Kemel Dincer took an active part.
17. The following chronology of events is based on the written documents filed by the parties and on their respective allegations:
 - According to the Claimants, until May 2012, the Club never voiced any particular complaints about the Player or indicated they were not interested in him remaining

with the team for the next season.

- At the end of the season, in May 2012, the Player returned to the United States, his country of residence.
- The Claimants contend that on 11 May 2012, during a meeting in Istanbul between representatives of the Agent (Rade Filipovich and Nikos Spanos) and of the Club (including the Club's then GM, Mr. Nedim Karakas), the Agent raised the concern that the payments being made to the Player were all late. The Club answered by requesting that the Player be patient until the end of the season when they would provide information in that regard, notably because the Club was holding elections for a new President and Board. The Club also indicated for the first time that they were not happy with the Player.
- The Claimants allege that at the end of May 2012, Nikos Spanos met again at the Club's facilities with Nedim Karakas, who repeated his request that the Player be patient until the elections had taken place and also stated that the Club would prefer if the Player could find a new team.
- Regarding the Player's desires and status for the next season, the Respondent's contentions are different. The Club alleges that it: *"... held negotiations with the Player's representative to keep him in the team in the 2012-13 season. During those negotiations the player's representative told us that they were inquiring the prospects of signing with another team because the player had played short time and had a bad season. Hence, we verbally informed the player's representative that the player could sign with another club only if the player and the Club mutually agree, otherwise we would not pay any indemnity. [...] We were willing to keep the player in the team. We were always in contact with the Player representative in this regard. However, the player representative negotiated with other clubs on grounds that the player had played short time and had a bad season in 2011-12, and communicated us the details of his negotiations. However, we hired his flat and*

paid rent pursuant to his contract, thinking that the player would be back when the trainings started. In addition all the benefits supplied to the player under his contract were provided until we were aware that he signed with another club”.

- According to the Claimants, between 10-12 June 2012 during a camp in Treviso, Rade Filipovich, Nikos Spanos and Quique Villalobos met with the Club’s new General Manager Mr. Kemal Dincer, and the latter repeated the Club was not happy with the Player. The Agent’s representatives said they would try to find a new team for the Player but that the Club would still owe him the guaranteed salary for the next season (2012/2013) even if he did not play for it.
- On 12 June 2012, Kemal Dincer sent his contact details by email to Rade Filipovich and added “*Rade, That was nice to meet you*”.
- The Claimants contend that on 19 June 2012, Nikos Spanos met in the Club’s offices in Istanbul with Kemal Dincer and Mr. Özsoy (a board member). He was told that the Club did not want to keep the Player under any circumstances and that the Agent must find a new club for him at all cost. Nikos Spanos answered that they would try but were of course not sure of obtaining the same salary for the Player and would therefore inform the Club to discuss a solution once a new club had been located.
- An exchange of emails dated 19 June 2012 confirms the foregoing meeting did take place.
- In a subsequent email, Kemal Dincer wrote to Nikos Spanos, “... *On the other hand as agreed yesterday we are waiting to hear from you for the release of Gist*” and on 26 June Nikos Spanos replied: “*Just wanted to keep you updated on the issue of James that we discussed. As you have seen the market is moving extremely slow. The top greek teams do not have coaches yet while just this weekend the Turkish teams signed theirs. Moreover Spanish teams have not proceed with any moves*

yet. We have been discussing with a few teams and i am very optimistic but none of them can really move yet. So we need to be patient some more but will definitely find our solution”.

- On 19 June 2012, the Club paid into the Player’s Turkish bank account, the amount corresponding to his April 2012 salary (USD 95,000).
- On 4 July 2012, the Club paid into the Player’s Turkish bank account, the amount corresponding to his May 2012 salary (USD 95,000).
- On 6 July 2012, the Club paid into the Player’s Turkish bank account, the amount corresponding to his June 2012 salary (USD 95,000), meaning that no further salary payments were outstanding for the 2011/2012 season.
- The Claimants allege that around mid-July 2012, Rade Filipovich spoke by telephone with the Club’s coach, Mr. Pianigianni, who said the Club never talked to him about the Player and that he doubted there was a spot on the team for the Player and that he should prepare for training camp but that he (the coach) would need to ask the Club officials.
- The Claimants contend that furthermore, during that period, the Player told the Agent that he was not willing to resolve matters with the team for the upcoming season until the Club had paid his outstanding salaries and reached a resolution on the contract guarantees.
- According to the Claimants, the Player’s foregoing position was the basis for the Agent’s notice letter of 12 July 2012 to the Club demanding payment of the outstanding salaries (relating to the monthly installments of April, May and June 2012).
- In that letter, the Agent put the Club on notice that it was in default under the Contract with respect to the payment of USD 285,000 in salaries (representing 3 x

USD 95,000) to the Player, which it must pay immediately (by 18 July 2012) failing which “...we will have no alternative but to examine all legal remedies for collecting on the contract balance through arbitration with the FIBA BAT”.

- On 30 July 2012, Kemal Dincer and Nikos Spanos had several email exchanges in which the latter stated, among other matters, “*I know your feelings about Gist but in theory he is exactly what you are describing to me. Athletic, can shoot and has European experience. We can work together with him in case u think he had character issues which I am not sure if he has. In his worse and most disappointing year, he finished with 9.3 points and 5 reb in 23 minutes without any coaching. Regardless of us looking in the market for him, I would propose to discuss his issue with the coach once more*”, but Mr. Dincer replied “*No chance. Please show your best ability to sign with a Club*”.
- The Claimants allege that it is at this point in time (on 30 July 2012), after receiving the foregoing response from Mr. Dincer, that the Player “[...] *knew he was certainly not going to return to Respondent [...] Until that time, the parties continued to see if they could resolve the issue and work out a deal for Mr. Gist to return to the Respondent for the 2012/2013 season. This Arbitration was then commenced on August 12, 2012 when it became clear that a deal could not be reached*”.
- In another email, answering the question from Mr. Dincer “*Any positive improvement for J. Gist?*”, Nikos Spanos said: “*Hello, we are working on Panathinaikos case but they have budget problems as you know and he is second or third option in a three more teams but waiting to hear from them*”.
- The Claimants contend that in the beginning of August 2012, a conference call took place between Rade Filipovich, Nikos Spanos and Mr. Özsoy during which the Agent’s representatives enquired about what the new board members’ position was and indicated that the Agent had received some offers but the Club would still have to pay. They allege that Mr. Özsoy replied that the Club did not want the Player on

the team, that it would not strike a deal with him, that it would not pay him anything and that he was a bad player and person.

- On 6 August 2012, Rade Filipovich sent an email to Kemal Dincer stating, among others: *“1. I just wanted to follow up with you in three different points: 1. We didn’t receive any official letter for invitation for James Gist for the training camp even he is still in full and official contract with you guys. We have to prepare the player to start preparation on time and also if he needs to extend his working visa for season 2012/2013. 2. We didn’t have any response from the club regarding the late salaries from the last season. What is the problem with this? I hope we are going to find a solution without any unnecessary arbitrations. 3. Interest in Europe is starting to be bigger and bigger for James. Because of that unfortunate situation in the second part of the season, his value is not the same like it was a year ago when we brought him to Fenerbache [...] Besides Bamberg, we also had interest from his former coach Vlada Jovanovic from Ukraine’s Donetsk, also Sasha Obradovic from Alba Berlin showed interest in James Gist. We are also working to try to find other teams and maybe soon we are going to have some Spanish team to have interest in James. We need additional 7 days”.*
- In connection with the Agent’s foregoing enquiry about the status of the Player’s April-June salaries, the Respondent states that: *“The mail that was sent by Rade Filipovic to get information about the matter was again sent to Mr. Kemal Dinçer’s private mail account. As soon as he noticed receipt of the mail, he called the Club’s accounting department to check if there was any problem. As the payment was made, it was not deemed necessary to send a mail in response. No information is given to any player after payments are made. The club has no such obligation. It is entirely the player’s obligation to check it”.*
- On 7 August 2012, Nikos Spanos followed up with a further email to Kemal Dincer stating: *“I spoke a while ago with the gm of Bamberg, the team that has interest in James. My understanding was that he called you but it did not seem feasible to*

make the transfer. Please let me know how you need me to intervene with the issue. As you have asked us to do, we are looking for a situation where James can be moved. However, as I had mentioned in the past, the financial situation of the market in Europe and the misuse of the previous coach of the player makes it impossible to have an offer similar to his existing contract. Therefore, the only way that James can be moved is that you pay part of his contract. I am waiting for your communication as this is a problem we will face also with any other possible proposal for James. If you believe that a meeting between us will help, I am available to be in Istanbul any day. Also, if anything has changed and your coach wants James in the team please let me know as he will be thrilled to stay in Fenerbahce. Finally please inform me about preparation of the team because James has not received any invitation or info from you concerning the beginning of training camp. You understand the player has a contract and want to be ready for preparation”.

- On 14 August 2012, the Agent (via Quique Villalobos) made a formal financial proposal to Malaga for the engagement of the Player for the next season.
- On 15 August 2012, the Claimants filed a Request for Arbitration with BAT against the Club, in which they invoked “... *the termination of the contract based on the Club’s default*” among the grounds for their claims.
- According to the Respondent, the team’s pre-season training began on 20 August 2012 with an 11-day camp at its sport complex Arena. The Player was not present, which led the Club to request an independent official to come to the camp on 22 August in the afternoon to confirm the Player’s absence.
- According to the Claimants, the Player “[...] *did not inform the Respondent he would not be at the training session because (1) he was not a member of the team at the time [...] and (2) despite requests from his representatives, he was unaware of when the training began*”.

- The Respondent states that it “[...] *did not send any notice to any player [...]*” regarding the camp of 20 August because all the relevant dates and the programme for the prior medical test (to take place on 16-17 August at the Medical Park Hospital) were announced on the Club’s official website in a document dated 11 August 2012.
- On 21 August 2012, the Player signed an employment agreement (the “Malaga Player Agreement”) with the Spanish club Baloncesto Malaga S.A.D (“Malaga”) and on the following day he signed a agreement for the exploitation of his image rights by Malaga (the “Malaga Image Agreement”). The above-mentioned agreements between the Player and Malaga are jointly referred to as the “Malaga Agreements”.
- Under the Malaga Agreements, the Player would receive a total gross amount of EUR 550,000 for the 2012-2013 season, to be paid in monthly installments during said season.
- Furthermore, in connection with the Player’s Malaga Agreements, the Agent signed with Malaga on the same date a contract stipulating that it would receive fees in a total amount of EUR 41,000, to be paid in two installments on 15 October 2012 and 15 February 2013. According to the Agent, the October 2012 payment in an amount of EUR 20,500, was duly received.
- The Claimants allege that they notified the Club verbally that the Player had signed with Malaga. According to the Claimants: *“This took place in early September, 2012 during a conversation between Rade Filipovich and Nikos Spanos of BDA, and Kemal Dincer of Respondent. Respondent was also informed of the amount of the contract. The purpose of that conversation was to schedule a meeting in order to discuss whether the parties could resolve the issues around Mr. Gist, and the fact that the Respondent owed money to Mr Gist on his contract. They were not able to reach resolution, and as such, this arbitration has continued”*.

- The Respondent alleges that, *“It was through the internet media we learned that the player made an agreement with Malaga Club. The Player did not send us any notice on this matter”* and, as to the timing, *“We became aware of the Player’s agreement with Malaga Club during the time we started our trainings. Thereupon, we established contact with the Player’s representative. The representative said they would come to Istanbul, and hold a meeting to discuss the matter. The meeting was held [...]”*.
- On 4 September 2012, the Player requested FIBA’s *“immediate assistance”* to obtain a letter of clearance and he was successful in his application. The Club did not participate in the proceedings before FIBA.
- On 17 September 2012, Kemal Dincer wrote to Nikos Spanos: *“You had sent us the letter on July 12, 2012 for the payment of the USD 95,000 [...] 3 (April, May, June) salaries for J. Jist (sic). But these payments were already been sent to the player’s account in June and July (before the date of your letter)”*. In relation to the foregoing email, the Respondent alleges that: *“The player’s representative received information on the matter on the phone. The mail in question was sent to the Player’s representative to confirm the information provided verbally”*.
- On 19 September 2012, after the Player’s move to Malaga, representatives of the Agent met with Kemal Dincer to discuss resolving the issues without going to arbitration. During that meeting the Club offered to pay the Player compensation in an amount of USD 100,000, as the equivalent of a full agency fee, but the Agent requested at least USD 500,000 for the Player, representing the difference between the guaranteed salary under the Contract for the 2012/2013 season and the value of the Malaga Agreements. No compromise was achieved.
- On 21 December 2012, the Player signed a contract with Panathinaikos for the remainder of the season (the *“Panathinaikos Contract”*) and transferred to that club.

- According to the Panathinaikos Contract, the player would receive a total salary of USD 300,000, net of Greek tax, for the remainder of the 2012-2013 season, to be paid in 6 monthly installments between January-June 2013.
- According to the Claimants, the Player had already received the equivalent of USD 200,000 in salaries from Malaga on the date he transferred to Panathinaikos.
- Moreover, the Claimants state that in relation to the Panathinaikos Contract, the Agent is to receive total fees in an amount of USD 30,000 to be paid in two installments on 15 March and 15 June 2013, meaning that in total for the Malaga Agreements and the Panathinaikos Contract the Agent will receive the equivalent of USD 55,000 in fees relating to the 2012/2013 season (USD 25,000 from Malaga and USD 30,000 from Panathinaikos).

3.2 The Proceedings before the BAT

18. On 15 August 2012, the Claimants filed a Request for Arbitration in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 6,983.00 on 14 August 2012.
19. On 12 September 2012, the BAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

<i>“Claimant 1 (Mr. James Gist)</i>	<i>EUR 5,012</i>
<i>Claimant 2 (Bill A. Duffy International, Inc.)</i>	<i>EUR 2,005</i>
<i>Respondent (Fenerbahce Spor Kulübü)</i>	<i>EUR 7,000”</i>
20. On 24 and 26 September 2012, the Claimants paid their respective shares of the advance on costs.
21. On 3 October 2012, the Respondent submitted its Answer.

22. On 16 October 2102, the Respondent paid its share of advance on costs.
23. By Procedural Order of 30 October 2012, a second round of written submissions was fixed.
24. On 31 October 2012, the Claimants filed their reply to the Answer.
25. On 13 November 2012, the Respondent filed its rejoinder.
26. By Procedural Order of 28 November 2012, the Parties were requested to answer questions addressed to them by the Arbitrator.
27. On 12 December 2012, the Parties filed their answers to the questions.
28. By Procedural Order of 29 January 2013, the Parties were requested to answer and file simultaneously various additional questions from the Arbitrator.
29. On 5 February 2013, the Parties filed their answers to the additional questions.
30. By Procedural Order of 7 February 2013, the proceedings were closed and the Parties invited to submit their statements of costs.
31. On 12 February 2013, the Claimants submitted their statement of costs.
32. On 15 February 2013, the Respondent submitted its statement of costs.
33. On the same day, the Parties were invited to file any observations they might have on the other party's statement of costs.
34. On 20 February 2013 and following a request by the Claimants, the Arbitrator requested additional information from the Respondent in relation to its statement of costs, which the Respondent provided on 22 February 2013. No other observations were filed on the Parties' statements of costs.

4. The Positions of the Parties

4.1 The Claimants' Position

35. In a nutshell and in substance, the Player contends that:

- With respect to the 2011-2012 season, it is true that the monthly salaries for April-June 2012 were finally paid by the Club in June-July 2012, but these three payments were by then delayed to a point where, under the conditions of clause 5 of the Contract, the Club was in breach and the Player was entitled to treat the Contract as automatically terminated as a result of the delay, thereby regaining his freedom to play elsewhere. This is also confirmed by FIBA's decision of 14 September 2012 confirming his right to obtain clearance and register with Malaga, further to his signing of an employment contract with the Spanish club on 21 August 2012.
- Moreover, despite the fact that he had complained about those late payments on a number of occasions in May-June 2012 and finally sent a letter of notice to the Club on 12 July 2012, the Club did not inform him when they finally paid. The first time the Club told him that it had already paid was in an email dated 17 September 2012 to his Agent.
- Therefore and because he had left for his residence in the United States in May 2012 when the season came to a close, he had not been aware of these three payments made later by the Club onto his Turkish bank account; and it is only in September 2012, after having filed the Request for arbitration and signed with Malaga, that he had learnt of the payments.
- It is obvious that the Club acted in this manner on purpose, i.e. delayed disclosing it had finally paid the outstanding salaries for April-June 2012, in order to be able to subsequently claim in bad faith that he was in breach for not reintegrating the Club.

- In any event, under clause 5 of the Contract, he was entitled to deem the Contract terminated without any other formality due to the Club already being much more than 30 days late in making the outstanding salary payments in question.
- In addition, the Club has previously been systematically late in paying his monthly salaries and had unduly withheld a total amount of USD 30,067 in fines for alleged issues of discipline, with respect to which the Player had neither been notified in writing nor heard and which he unsuccessfully objected to verbally at the time.
- Consequently, he must be deemed to have terminated the Contract for just cause as a result of the Club's breaches and be entitled to compensation for the resulting damage.
- With respect to the 2012-2013 season, it is untrue and misleading for the Club to allege that it was content to keep him on the team for that season and expected him to be present at the first training camp for the team scheduled to begin on 20 August 2012 in Turkey.
- On the contrary, soon after the end of the 2011-2012 season, from early June 2012 onwards, the Club's representatives made it quite clear that the Club did not want him on the team for the forthcoming season and that his agents should look for a new Club.
- In fact, over the summer the Club's representatives became adamant in that respect, and in addition to enquiring with the Agent how the search for a new club was advancing, they began making groundless critical comments about his capacities and personality and refused a number of proposals by the Agent in June, July and early August that the Club might reconsider its position and keep him on the team.
- On 30 July 2012, the Club's management sent the Agent an email making it clear that it would not be maintaining the Player on the team for the forthcoming

(2012/2013) season.

- Furthermore, contrary to what it had done for the prior season (2011/2012), the Club did not invite him to, or inform him directly about, the first training camp for the new season, despite his Agent enquiring about it on several occasions in email exchanges with the Club's representatives in early August 2012. Neither did the Club make any travel arrangements.
- In light of the Club's position taken from June 2012 onwards, the Agent undertook to actively seek a new Club for him, but from the very beginning made it quite clear to the Club that a change of club could not be at the expense of his guaranteed salary under the Contract for the 2012-2013 season, in the sense that he was not willing to lose out financially and therefore an adequate solution needed to be found.
- Even after he signed the Malaga Agreements in August 2012, representatives of his Agent and of the Club met on 19 September 2012 to discuss his indemnification for the loss of contractually-guaranteed income, but the Club offered him an amount that was insufficient to compensate his loss.
- In light of this chronology of events – and given the fact that under the Malaga Agreements his total salary is nearly 50% less (after deduction of taxes and social security) than what he would have earned with the Club for the 2012/2013 season, and that the Malaga Agreements are also less advantageous in a number of other respects – principles of fairness require fixing the damage owed to him for the Club's breach of contract in an amount of USD 1 million, corresponding to the salary he was guaranteed under the Contract with the Club for the 2012/2013 season.

36. In a nutshell and in substance, the Agent is claiming that it is entitled to its full fee relating to the 2012/2013 season, i.e. to a payment of USD 100,000, since clause 10 of the Contract expressly provides that such fee is fully guaranteed and will be due even if

the Contract is prematurely terminated.

37. In their reply of 31 October 2012, the Claimants requested the following relief:

For the Player:

- “1. \$30, 067 for the 2011/2012 season;*
- 2. \$1,000.000 for the 2012/2013 season.”*

For the Agent:

- “1. \$100.000 for the agent fee pertaining to the 2012/2013 season*
- For both Claimants, costs of this action plus attorney’s fees.”*

4.2 Respondent's Position

38. In a nutshell and in substance, the Respondent contends that:

- With respect to the three April-June 2012 salary payments initially claimed by the Player in his Request for Arbitration, the Club paid them respectively on 19 June, 4 July and 6 July 2012. Consequently, that claim was without merit in addition to the fact that the delays were within a normal range in terms of payment practices in European basketball.
- Furthermore, because the Club had already paid those outstanding salaries well before the Player put the Club on notice to pay by means of a letter dated 12 July 2012, it naturally ignored the notice letter.
- When, in August 2012, the Agent subsequently enquired about the non-payment of the April-June salaries, the Club did not respond immediately because the Agent’s email was sent to Mr. Dincer’s private email address and when the latter verified with the Club’s accountant he was told the amounts had been duly transferred to the Player’s bank account.

- The three payments in question in June-July 2012 were made by the Club onto the Player's same Turkish bank account to which all the other payments for the season had been made previously, and the Player had free access to that account, including accessibility via Internet.
- The Player is incorrect in stating that any other amounts were outstanding for the 2011-2012 season, since: *"The sum of US\$ 30.067 – which the plaintiff claimed to have not been paid for the season 2011-2012 is the amount of fines deducted from the player's salary due to violations of Disciplinary Regulations throughout the referred season. Disciplinary sanctions to be applied throughout the season are notified to all our players before the relevant season, and also submitted to Turkish Basketball Federation. The fines deducted are within the knowledge of the player and James Gist has not raised any objection against the fines duly deducted. Other than James Gist, the Player, similar deductions were also applied to the rest of the team. The fact that this amount which the player claims to have not been paid in full hasn't been claimed by the player on any occasion until today indicates that he's been aware of such deduction and doesn't act in good faith"*.
- In addition, he did not even mention the foregoing sum in his Request for Arbitration and only made a claim in that connection in his reply to the Club's Answer brief.
- For the above reasons, the Club cannot be deemed to have breached its contractual obligations in any manner and the Player was not entitled to simply walk away from the Contract.
- With respect to the loss of USD 1 million being claimed for the 2012-2013 season, the Player has no valid ground. It was the Player who wished to leave the Club due to a bad season and it was always made clear to his Agent that he would have to seek the Club's agreement before signing with a new club, i.e. there needed to be a mutual agreement between the parties otherwise the Club would pay no indemnity

because the Player was bound by his Contract with the Club.

- *“We were willing to keep the player in the team [...] However, the player representative negotiated with other clubs on grounds that the player had played short time and had a bad season in 2011-12, and communicated us the details of the negotiations. However, we hired his flat and paid its rent pursuant to the contract, thinking that the player would be back when the training started. In addition, all benefits supplied to the player under his contract were provided until we were aware that he signed with another club”.*
- When the season training began on 20 August 2012, the Player did not turn up as he had the duty to, and he presented no excuse for his failure, thereby breaching his contractual obligations.
- *“The Club did not serve any written notice to any of its players in relation to the preliminary season trainings. The date at which trainings were to start were announced at the official website as evidenced from the document we had presented before. Even though the Club does not make any announcement, normally the player has to endeavour to reach Club officials to get information on this matter. The player did neither call the club nor his coach or team friends to get information in this regard. In addition, although he had to call the Club and/or officials for the flight ticket to be arranged by the Club pursuant to his contract with the club and to notify his return date, he did not establish contact with anybody”.*
- *“In the meantime, we were informed through the media that the Player James Gist signed a contract with Malaga Club, about which the Player did not sent any notice to the Club.”*
- If the Player chose to sign a contract with a new club for a lower salary, that was his free choice and he cannot complain about it afterwards or claim any losses from the Club.

- In addition, it is unfair that after terminating the Contract without cause he should claim compensation when he is receiving a new salary from Malaga.
- The Agent's claim is also unfair and lacks any legal basis because its right to a fee is dependant on the Player's contract and the latter terminated the Contract without cause after breaching his obligations.

39. In its Answer, the Club requested the following relief:

“a) the Player James Gist is in breach of contract, and the unjust and baseless claims of both claimants are dismissed.

b) All cost and legal fees are charged to the claimants related to the hereby arbitration.”

5. The Jurisdiction of the BAT

40. 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).

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

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

43. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under clause 14 of the Contract, which reads as follows:

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

“Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties’ domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.”

44. The foregoing arbitration agreement is in written form and thus fulfils the formal requirements of Article 178(1) PILA.
45. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).
46. Moreover, the arbitration agreement stipulates that it covers all disputes arising out of the Contract, which under its clause 10 also covers the Club’s duty to pay the Agent’s fees and to do so onto the account of Claimant 2. Although, the agents named in the Contract are individuals, it is clear from its clause 10 (providing that the agency fees will be paid to the agency company which is Claimant 2 in this arbitration) and from the evidence adduced in this arbitration that those individuals were representing Claimant 2. Furthermore, Mr. Rade Filipovich, the President of Claimant 2, was one of the signatories of the Contract.
47. Consequently, the arbitration agreement covers all aspects of the dispute being raised in this proceeding and all the parties to this proceeding are bound by it. In addition, none of the parties challenged the jurisdiction of the BAT in their submissions.
48. For the above reasons, the Arbitrator has jurisdiction to adjudicate the claims submitted by the Player and the Agent against the Club.

6. Discussion

6.1 Applicable Law – ex aequo et bono

49. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the Arbitrators to decide “en équité” instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

“the parties may authorize the arbitral tribunal to decide ex aequo et bono”.

50. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

“Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.”

51. Clause 14 of the Contract provides that if and when any dispute between the parties hereto is submitted to the BAT: *“The arbitrator shall decide the dispute ex aequo et bono”.*

52. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Claimants against the Club in this arbitration in front of the BAT.

53. 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'arbitrage² (Concordat)³, under

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

³ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

which Swiss courts have held that arbitration “en équité” is fundamentally different from arbitration “en droit”:

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

54. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives “a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case.”⁵
55. This is confirmed by Article 15.1 of the BAT Rules in fine, according to which the Arbitrator applies “general considerations of justice and fairness without reference to any particular national or international law”.
56. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2 Findings

57. This case essentially raises the following questions:
- Is the Club contractually liable to reimburse the Player an amount of USD 30,067, which was deducted by the Club in the form of fines (corresponding to disciplinary sanctions) from his salary during the 2011-2012 season?
 - Did the Player terminate for just cause the Contract in the summer of 2012?
 - If so, is the Club liable to pay him compensation for the loss of all or part of his

⁴ JdT 1981 III, p. 93 (free translation).

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

contractual salary for the 2012/2013 season, and is the Club liable to pay all or part of the Agent's commission relating to that season?

- If the Player lacked a just cause for termination, are there any other grounds upon which the Club is liable to pay compensation to the Player for diminished earnings in the 2012/2012 season, and is the Club nonetheless liable to pay all or part of the Agent's commission relating to the 2012/2013 season?

58. With respect to the first question, it is uncontested that the amount of USD 30,067 was deducted as fines from his salary during the 2011/2011 season.
59. However, no evidence beyond the Player's allegations has been adduced to establish that he was prevented from being heard about the fines or that he objected to them at the time.
60. In particular, although some of the fines were given by the Club very early in the season, there is no evidence of him putting the Club on notice in any manner that he objected to the sanctions and was reserving his rights; and even in his Request for Arbitration filed on 15 August 2012 – three months after the end of the season – the Player did not make any claim in this respect and only brought up the matter in his reply of 31 October 2012 to the Club's Answer brief.
61. The Arbitrator finds that in these circumstances, the Player is equitably estopped from formally raising this claim for the first time on 31 October 2012, since his prior absence of formal complaint over a long period will have given the Club the impression the matter was settled and because the Player himself appears to have ultimately accepted the fines as a matter of the past by not making a claim in this relation in his initial submission in this proceeding.
62. Concerning the second question, relating to the conditions of termination of the Contract, the Player has not specified when exactly he deems to have terminated the

Contract for just cause, although he has the burden of proof in that respect and the timing of the termination is an important factor in determining whether or not the termination was justified.

63. It appears from the Player's submissions that he never verbally or in writing gave the Club a notice of termination but that, in effect, he simply determined to signal through his behaviour – by not turning up at the Club's pre-season training and by signing instead a contract with Malaga on 21 August 2012 – that he deemed the Contract to be terminated.
64. Indeed, although the Player has submitted that it is around 30 July 2012 that he personally determined not to return to the Club – further to his Agent receiving on that date a very affirmative email from Mr. Dincer stating that the Club was no longer interested in the Player being on the team – the Player's resolution to terminate his relationship was not communicated to the Club at that point in time.
65. On the contrary, in two separate emails of 6 and 7 August 2012 to the Club, the Player's Agent indicated that the Player needed information about when to join the Club's pre-season training because “[...] *he is still in full and official contract with you guys*” and that “[...] *if anything has changed and your coach wants James in the team please let me know as he will be thrilled to stay in Fenerbahce*”.
66. It is not clear from the record how much communication, if any, then took place between the Parties between the date of the foregoing emails (7 August) and the 21st of August when the Player signed with Malaga.
67. The evidence demonstrates that the Club did not want the Player on the team for the forthcoming season (2012/2013) and that it had clearly communicated this to him (via his Agent) as well as requested the Agent to actively seek a new team for the Player, while at the same time, the Agent regularly updated the Club over the summer about the results of its search for new teams.

68. However, the Player himself has submitted that he first informed the Club about the fact that he signed with Malaga “[...] in early September, 2012 during a conversation between Rade Filipovich and Nikos Spanos of BDA, and Kemal Dincer of Respondent”.
69. In light of the chronology events, the Arbitrator finds that the Player in effect terminated the Contract on 21 August 2012 by the act of signing the Malaga Agreement (instead of integrating the Club’s pre-season training camp), but that this unilateral act of termination cannot be deemed to have taken effect vis-à-vis the Club until it was communicated to the Club in early September.
70. To determine whether this unilateral termination of the Contract by the Player took place with just cause, it is necessary to assess whether the Club had committed a prior breach of contract that it failed to remedy.
71. In this relation, the question of whether the Contract required a notice of breach to be given prior to termination can be left open because by means of his letter of 12 July 2012, the Player gave the Club a deadline until 18 July 2012 to make the alleged late payments of his April-June 2012 salaries.
72. Contractually speaking and in terms of fairness, that written notice of 12 July implied that if the alleged late salary payments were made within the fixed deadline, the breach would be remedied, meaning the Player would have no further cause of action.
73. As it turns out, and although the Player may not have been aware of the fact, on the date the notice letter was sent to the Club, the latter had already paid onto the Player’s Turkish bank account, all three outstanding monthly salaries being claimed.
74. Consequently, the Club cannot be deemed to have been in breach of contract for late payments on the date of the letter of notice (12 July 2012) or beyond, unless a different breach by Club subsequently occurred.
75. During the period between 12 July 2012 and the unilateral termination of the Contract

by the Player (occurring *de facto* by his act of signing the Malaga Agreement on 21 August 2012), the Player did not put the Club on notice again (but simply enquired about the May-June salaries) and he has not expressly invoked any further material breach, but is alleging in essence that the Club did not want him on the team any longer and that it did not even inform him of the pre-training season or propose to organize his travel to Turkey to participate.

76. However, the mere fact of not wanting the Player on the team for the next season and of not inviting him to the pre-season training – which the Arbitrator finds are established facts – do not, in themselves, constitute a breach of contract, unless coupled with the non-performance of contractual obligations, such as e.g. the refusal to pay the Player's salary, to provide other contractual benefits and more generally to respect the Player's rights.
77. The Player has not claimed that any such rights linked to the forthcoming season were violated – which stands to reason because the 2012/2013 season had not yet begun when the Player signed the Malaga Agreement – while the evidence adduced does not establish that if the Player had not found a new team for the 2012/2013 under conditions that satisfied him and he had therefore decided to invoke his contractually guaranteed rights the Club would have defaulted. To reach such a conclusion would therefore be speculative.
78. For the above reasons, the Arbitrator finds that the Club cannot be deemed to have materially breached the Contract prior to its unilateral termination by the Player and that, formally speaking, he therefore did not have a just cause for termination.
79. The foregoing conclusion leads to the final question of whether the Player has any other grounds upon which to claim compensation.
80. In that respect, the Claimants are arguing in essence that the Club acted in bad faith and tricked him into believing he could terminate the Contract unilaterally and sign the Malaga Agreements without losing his guaranteed rights under the Contract, by not

informing him, despite his written notice of 12 July 2012 and his subsequent pressing enquiries about their payment, that his April-June 2012 salaries actually had been paid, contrary to what he believed at the time and was invoking.

81. In that connection, the Arbitrator is satisfied by the evidence that the Player was not focused on his Turkish bank account after returning to the United States in May 2012 at the end of the season, and that since the Club was over two months late in paying the April-May salaries the Player ended up not seeing the payments when they arrived on his account and thought he had no other option but to put the Club on notice.
82. Furthermore, the Arbitrator finds that although, strictly speaking, it is true that it was not the Club's responsibility after receiving the 12 July 2012 notice letter to inform the Player that he had already been paid, it would have been fair to do so; and that for the Club to not tell the Player's Agent after subsequent complaints/enquiries in July and early August 2012 that the payments had been made was unfair and potentially misleading because, at that point in time, the Player needed to clearly understand what his contractual position was in order to evaluate his options.
83. In that relation, the Arbitrator is not convinced by the Club's affirmation that Mr. Dincer did not react because the email enquiries were made to his personal email address. Indeed, on numerous other occasions during the same period Mr. Dincer reacted very quickly to emails from the Agent, and he himself asked the Agent for information.
84. This lack of transparency and ambiguous behaviour of the Club could lead the Player to believe in good faith that the Club had not and would not pay him the April-June 2012 salaries he thought were outstanding, i.e. that it was in breach of contract, and therefore cause him to be less cautious in accepting Malaga's offer without first informing the Club and seeking a final arrangement to deal with the matter of compensation for his guaranteed salary for the 2012/2013.
85. In addition, based on the evidence adduced, the Arbitrator does not find it credible that the Club did not send any form of individual invitation to its players for the forthcoming

pre-season training, since according to the information posted on Internet, invoked by the Club itself, the players were to undergo a medical examination in Istanbul several days before the camp was to begin (meaning they would need to know exactly where to go and when) and because the Player has produced evidence that the previous year he was personally informed.

86. The foregoing elements, combined with the evidence that the Club affirmed to the Agent in July/August 2012 on several occasions that the Club absolutely did not want the Player on the team for the forthcoming season, establish that the Club was no longer interested in the Player turning up at the pre-season training camp and was happy to leave his Agent the task of continuing to seek a new contract for him, while at the same time the Club ceased communicating with the Player and left him, until September 2012, in the belief that it remained in default with regard to the payment of his April-June 2012 salaries.
87. Given the chronology of events, the Player had good reasons to feel undesired by the Club and to believe incorrectly, but in good faith, that because the Club was in breach of contract due to being indebted to him for salaries owed for the past season (the April-June 2012 salaries), he could risk making the move to Malaga (and thereby *de facto* terminating his Contract with the Club) without reaching a prior arrangement with the Club or putting it on notice again.
88. It was somewhat negligent of the Player to not regularly check his Turkish bank account but at the same time it would have been simple and normal for the Club to promptly tell the Player after receiving the July 2012 notice and the further complaints from his Agent that, in fact, all the outstanding salaries had been duly paid. Maintaining an ambiguity was unfair, or at least negligent, and no doubt contributed to the Player signing with Malaga while believing he could seek some compensation from the Club for lost earnings.
89. For all the above reasons, the Arbitrator finds it equitable that the Club should

compensate the Player for part of the reduction in salary/lost benefits he incurred by signing with Malaga rather than first insisting on his contractual rights vis-à-vis the Club for the 2012/213 season.

90. In fixing the amount, the Arbitrator finds it fair to also take into account that the Player's behaviour was partly negligent and that, according to the evidence, he did not feel very satisfied about his 2011-2012 season with the Club and was therefore in any event somewhat inclined to seek a new club.
91. Taking all of these elements into consideration, the Arbitrator finds it equitable that the Club be requested to pay compensation to the Player in an amount of USD 200,000, which is somewhat less than 50% of the difference in financial value (salary wise) between what he could have earned with the Club for the 2012/2013 season under the guaranteed terms of the Contract and what he will effectively be earning overall for the same season thanks to the combination of his successive payments from Malaga and Panathinaikos.
92. Finally with respect to the Agent's claim, and although under the terms of clause 10 of the Contract the Agent's fees were payable irrespective of the termination of the Contract by the Player, the Arbitrator finds it fair in the circumstances of this case that the fees the Agent is contractually entitled to from Malaga and Panathinaikos in relation to its negotiation of the Malaga Agreement and the Panathinaikos Contract for the 2012/2013 season, be deducted from the compensation owed by the Club.
93. Consequently and based on the conclusive evidence adduced of the amount of agency fees payable to the Agent by Malaga and Panathinaikos for the 2012/2013 season, the Agent will be awarded compensation in an amount of US 45,000 (= USD 100,000 – USD 55,000).

7. Costs

94. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
95. On 15 March 2013 - 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 to be EUR 13,977.
96. The Arbitrator finds that because the Player’s negligence (in verifying the status of his bank account) contributed to causing the damage being claimed and because the Claimants only prevailed in a limited proportion of their claims, it fair in this case that the fees and costs of the arbitration (including the non-reimbursable handling fee) be borne in equal parts by the Parties and that the Claimants and the Respondent each bear their own legal fees and expenses.
97. In light of the foregoing and given that the Claimants paid a total advance on costs of EUR 7,000 as well as a non-reimbursable handling fee of EUR 7,000, whereas the Respondent paid an advance on costs of EUR 7,000, the Arbitrator decides that in application of article 17.3 of the BAT Rules, the Club shall pay EUR 3,500 to the Claimants being 50% of the non-reimbursable handling fee paid to the BAT by the latter.

8. AWARD

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

1. Fenerbahçe Spor Kulübü shall pay Mr. James Gist an amount of USD 200,000 as compensation for diminished earnings relating to the 2012/2013 season.
2. Fenerbahçe Spor Kulübü shall pay Bill A. Duffy International, Inc. an amount of USD 45,000 as compensation for agency fees due in relation to the 2012/2013 season.
3. Fenerbahçe Spor Kulübü shall pay Mr. James Gist and Bill A. Duffy International, Inc. an amount of EUR 3,500 as reimbursement of part of the non-reimbursable handling fee.
4. Each party shall bear its own legal fees and expenses.
5. Any other or further-reaching requests for relief are dismissed.

Geneva, seat of the arbitration, 19 March 2013,

Quentin Byrne-Sutton
(Arbitrator)