



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0318/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Steven Hunter

- Claimant 1 -

Priority Sports and Entertainment

325 N La Salle Drive, Suite 650, Chicago, IL 60610, USA

- Claimant 2 -

both represented by Mr. Brad Ames, Priority Sports and Entertainment,
325 N La Salle Drive, Suite 650, Chicago, IL 60610, USA

vs.

Polisportiva Dinamo S.R.L.

Via le Umberto 46, 07100 Sassari (SS), Italy

- Respondent -

represented by Mr. Massimo Coccia and Mr. Mario Vigna, attorneys at law,
Piazza Adriana 15, 00193 Rome, Italy

1. The Parties

1.1. The Claimants

1. Mr. Steven Hunter (hereinafter the “Player”) is a professional basketball player of US nationality. He is represented by Mr. Brad Ames, a FIBA licensed agent in Chicago, USA, and President of the basketball representation of Priority Sports and Entertainment.
2. Priority Sports and Entertainment (hereinafter the “Agency”) is a full service management firm located in Chicago, USA, inter alia acting as an agency in basketball and American football. It is also represented by Mr. Brad Ames.

1.2. The Respondent

3. Polisportiva Dinamo S.R.L. (hereinafter the “Club”) is a professional basketball club located in Sassari, Italy. The Club is represented by Mr. Massimo Coccia and Mario Vigna, attorneys at law in Rome, Italy.

2. The Arbitrator

4. On 7 September 2012, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren, 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”). None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

5. The Parties have filed elaborate submissions describing the entire history of the events relating to the dispute. The Arbitrator has carefully reviewed all these submissions. The following contains a short summary of the facts deemed relevant for the Arbitrator's decision.
6. In the fall of 2011, the Club became interested in engaging the Player. The contact had been made by Mr. Giovanni Funicello, a FIBA certified agent based in San Pedro, California, USA (hereinafter "Mr. Funicello").
7. In October 2011, the Club invited the Player for a "try out" (according to the Club: "*a trial to ascertain fitness and skills opening to determine response and discover weaknesses*"). The Player arrived in Sassari, Italy in the morning of 25 October 2011. On the same day, the Player was medically examined by Prof. Andrea Manunta, an orthopaedic specialist at the Università degli Studi di Sassari and the Club's team doctor (hereinafter the "Club's Team Doctor"). After completing the medical examination, the Player participated in the "try out" which was organised by the Club and which lasted until 27 October 2011.
8. On 27 October 2011, the Player and the Club signed an employment agreement (hereinafter "Player Contract") for one basketball season, i.e. the 2011/2012 season. The Club agreed to a fully guaranteed base salary of USD 200,000.00 net to be paid in several instalments. After signing the Player Contract, the Player returned to the USA to apply for a visa for a permanent stay in Italy. Thereafter, he came back to Italy and started training and playing with the Club's team. He participated in 6 out of the 34 games the team played from 6 November to 18 December 2011 and played 119 total minutes.

9. On 15 November 2011, the Agency and the Club signed an agreement titled “Agent’s Commission” (hereinafter the “Agent Agreement”) under which the Club agreed to pay agent fees of USD 10,000.00 each to the Agency and to Mr. Funiciello on or before 15 November 2011.
10. The first four instalments of the agreed salary including the “image payments” (i.e. USD 53,500.00 in total) were timely paid to the Player. Of the fifth instalment which amounted to USD 11,500.00 due on 10 December 2011, the Club paid only USD 1,048.00. The Club also submits that, in the morning of 23 December 2011, the Club’s General Manager dropped off a bank check in the amount of USD 9,820.00 with Ms. Cabras, the doorkeeper at the Player’s apartment building. Ms. Cabras never saw or met the Player and returned the bank check to the Club after Christmas 2011. No further payments have been made by the Club to the Player or to the Agency but the outstanding amounts were subject to several emails and fax-letters which were exchanged between the Agency and the Club.
11. On several occasions during his participation in training and games with the Club’s team, the Player felt pain and swelling of _____. He was treated by the Club’s medical staff but the situation worsened. On 19 December 2011, a magnetic resonance image was made of the Player’s _____ and Prof. Maurizio Conti, a specialist radiologist at the Università degli Studi di Sassari, issued a medical report. Thereafter, the Club’s Team Doctor met with the Player and discussed the issue. However, the concrete content of that discussion is in dispute between the Parties.
12. On 21 December 2011, the Agency wrote to the Club that the Player would return to the United States for a second medical opinion regarding that _____ injury, as provided by paragraph 2 of the Player Contract.
13. On 22 December 2011, the Club’s sport director Mr. Pasquini replied that the _____ injury was not the result of an injury suffered during the term of the Player Contract. Therefore, paragraph 2 of the Player Contract was not applicable.

14. On 23 December 2011, the Club's Team Doctor issued a medical report with the following conclusion:

“Conclusion: *the history, etiology, instrumental tests, and physical examination at the expense of local Steven Hunter lays for “_____”, dating back over 10 years, that caused inability to play basket [sic].”*

15. Also on 23 December 2011, the Agency sent a letter to the Club's General Manager which reads in its main relevant parts as follows:

“Dear Mr. Pasquini

[...] As noted in our letter dated December 21, 2011, Player has exercised Player's right described above to return to the United States for a second medical opinion due to injury issues related to Player's _____ that have not been resolved while in Italy, Player expects Club to continue to honor the terms of the Agreement,

[...] This letter shall serve as notice that, in the event the past due payment in the amount of \$10,452.00 USD is not received by Player on or before Sunday, December 25, 2011, Player shall exercise Player's right described in the Paragraph above to terminate the Agreement and accelerate all future payments from Club to Player required under the Agreement.

In addition, per the “Agent's Commission” page of the Agreement, Club was required to make a payment to Priority Sports in the amount of \$10,000.00 USD no later than November 15, 2011. To date, Priority Sports has received no payment from Club.

[...] Please make the required payments to Player and Priority Sports immediately.

Sincerely,

Brad Ames”

16. The Player left his apartment in Sassari on 24 December 2011 and returned to the USA. Before leaving, he handed over his car keys to a teammate. He did not return to the Club and never practised or played with the Club's team again.
17. Also on 24 December 2011, the Club's President sent a letter to the Player stating that the Player had concealed from the Club a pre-existing medical issue; that the pain had started after only two trainings after he had signed the Player Contract; that the Player was unable to run more than five minutes; that the Player repeatedly arrived late to the training sessions; and that his behaviour was not acceptable. The letter also explicitly reiterated that the Club had not authorized the Player to seek a second medical opinion

in the United States and that the Player had nevertheless left his domicile. The letter then said that the Club had no choice but to terminate the Player Contract.

18. On 27 December 2011, the Agency sent a letter by email and facsimile to the Club which reads in its main relevant parts as follows:

“Dear Mr. Pasquini

As of the date of this letter, Steven Hunter has not received the following scheduled payments due as agreed upon in the agreement (hereinafter referred to as “Agreement”) signed between Polisportiva Dinamo S.r.l. (“Club”) and Steven Hunter (“Player”) on October 27, 2011:

<u>Payment Due Date</u>	<u>Amount Past Due</u>	<u>Days Late</u>
December 10, 2011	\$ 10,452.00 USD	17

[...] On behalf of the Player, we hereby exercise Player’s option described in the Paragraph above to terminate the Agreement and accelerate all future payments from Club to Player required under the Agreement.

[...] If the outstanding amount of \$145,452.00 USD is not received by Player from Club on or before January 6, 2012, we will appeal to the Basketball Arbitral Tribunal as outlined in the Paragraph above to seek resolution of this matter.

In addition, per the “Agent’s Commission” page of the Agreement, Club was required to make a payment to Priority Sports & Entertainment in the amount of \$10,000.00 USD no later than November 15, 2011. To date, Priority Sports has received no payment from Club. The Agent’s Commission payment in the amount of \$10,000.00 USD due November 15, 2011 is currently forty two (42) days late.

[...] We hereby additionally utilize and exercise Player’s option described in the Paragraph above to terminate the Agreement and accelerate all future payments from Club to Player required under the Agreement.

If the outstanding amount of \$10,000.00 USD is not received by Priority Sports from Club on or before January 6, 2012, we will appeal to the Basketball Arbitral Tribunal to seek resolution of this matter.

Sincerely,

Brad Ames”

19. By letter of 28 December 2011, the Club requested that the Player explain his absence from the training sessions on 24, 25 and 26 December 2011. A similar letter addressing the Player’s absence from two games (on 27 and 30 December 2011) and three further training sessions (on 28, 29 and 30 December 2011) was sent by the Club to the Player on 31 December 2011.

20. By letter of 29 December 2011, the Club replied to the Agency's letter of 27 December 2011. The letter reads in the English translation provided by the Club as follows:

"Re: Your Notice 27 December 2011.

Following your notice 27 December, in order to fully challenge its content and explain, in addition to what already communicated to you about the athlete Steven Hunter's position, the following.

After some problems in receiving previous payments in due time by bank transfer and as agreed with Mr. Steven Hunter himself, the payment of \$9,820.00 has been made by bank cheque of Banco di Sardegna n. 0175050721-01 (a copy attached herewith) delivered at the porter's lodge of the building located in V.le Umberto 28, Sassari, where the athlete lived, to the person in charge of the receiving delivery who acknowledged receipt of it.

So, Mr. Steven Hunter did not pick up the bank cheque, so that the above porter's service following our request after we received your letter mentioned above in which you complained about the failure of payment, gave back the cheque to the club for no collection due to exclusive athlete's fault. The sum is thus available to Mr. Hunter at our club's base while we reserve the right to keep the amounts necessary to the recovery of damages caused by him to the car and amounting to EUR 5,000,00 plus sanctions due to the eight training dropped and the match not played as they will be determined.

Therefore, no responsibility can be attached to our club for the facts above.

By the way, without any withdrawal to what mentioned above, we challenge Mr. Hunter's will to have recourse to any rescinding clause since no breach is imputable to our club.

It is clear, therefore, that Mr. Hunter is not in the position to ask for the termination of the contract nor for the payment of the residual sums as well as your company cannot ask any sums as commissions.

In the same way and for the same reasons, your athlete cannot validly demand any FIBA letter.

Sincerely

Dinamo Polisportiva S.r.l."

21. On 3 January 2012, "Sisa Sardegna Scari", one of the Club's sponsors, notified the Club about the economic damage caused by the unavailability of one of the Club's players for an advertising campaign. "Sisa Sardegna Scari" reserved the right *"to assess the suffered damages in the suitable ways and in the appropriate places"*.
22. Between 4 and 17 January 2012, the Agency and the Club exchanged further emails and tried to find a settlement. However, no settlement could be reached to date.

23. On 28 January 2012, the Club sent by registered mail a letter titled “*Notice of firing*” to the Player. As submitted by the Claimants, this letter was sent only in Italian. The English translation of the letter provided by the Club reads as follows:

“Dear Mr. Steven Hunter

This is to inform you we decided to proceed, and in fact we proceed, with your dismissal, which must be deemed valid beginning on the present day. Such a decision is adopted following the disciplinary challenge formally communicated to you on 31 December 2011 by recorded delivery in which we contested your absence, without previous notice or authorization by our club, in the official competitions of the Italian Championship, A League, of 27 and 30 December 2011, versus respectively Montegranaro and Pesaro, valid for 12th and 13th matches of the first round. We also contested in the same letter your unjustified absence, without previous notice or authorization by our club, in 5 trainings which took place on 28,29,30 December 2011.

Nevertheless, no notice or communication have been received by our club within the five-days term from receipt of the disciplinary challenge and, in addition, your behaviour, in breach of correctness and good faith, has not yet terminated, since your absence in the trainings and official competitions is still going on after the dates indicated above.

The fact that from your departure from Sassari to the present day the club did not receive any communication whatsoever from you is particularly serious.

Since this is a justified dismissal (per giusta causa), no redundancy payment (indennità sostitutiva) will be available to you.

Thanks

Best Regards

Polisportiva Dinamo S.r.l.”

3.2. The Proceedings before the BAT

24. On 16 August 2012, the BAT Secretariat received a Request for Arbitration filed by Mr. Brad Ames on behalf of both the Player and the Agency. The non-reimbursable handling fee of EUR 2,988.00 was received in the BAT bank account on 21 August 2012.
25. By letter of 13 September 2012, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Club to file its answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the “Answer”)

by no later than 4 October 2012. The BAT Secretariat also requested that the Parties pay the following amounts as an Advance on Costs by no later than 25 September 2012:

<i>"Claimant 1 (Mr. Hunter)</i>	<i>EUR 3,500</i>
<i>Claimant 2 (Priority Sports and Entertainment)</i>	<i>EUR 1,000</i>
<i>Respondent (Polisportiva Dinamo SRL)</i>	<i>EUR 4,500"</i>

26. On 25 September 2012, the Club's counsels informed the BAT Secretariat about their appointment the day before and submitted a power of attorney. In addition, the Club's counsels requested an extension of the time limit to file the Answer. By email of 26 September 2012, the BAT Secretariat informed the Parties about the Arbitrator's decision to grant an extension of the time limit to file the Answer in view of the circumstances invoked by the Club's counsels and therefore invited the Club to file its Answer by no later than 15 October 2012.
27. On 15 October 2012, the Club submitted its Answer and a counterclaim (hereinafter the "Counterclaim") together with several exhibits.
28. By letter of 16 October 2012, the BAT Secretariat acknowledged receipt of the Answer, the Counterclaim and the Claimants' shares of the Advance on Costs. In addition, the BAT Secretariat informed the Parties that the Club had failed to pay its share of the Advance on Costs, and noted that in accordance with Article 9.3 of the BAT Rules, the arbitration would not proceed until the full amount of the Advance on Costs was received, which also applies to counterclaims. Consequently, the Club was requested again to pay the outstanding share of the Advance on Costs by no later than 26 October 2012 and was informed that in case of failure, the Counterclaim should be deemed withdrawn.
29. By letter of 7 November 2012, the BAT Secretariat informed the Parties that the Club's share of the Advance on Costs was received in the BAT bank account on 24 October 2012 and acknowledged receipt of the full Advance on Costs. Furthermore, the

Arbitrator invited the Claimants to comment on the Club's Answer and Counterclaim by no later than 28 November 2012 (hereinafter the "Claimants' Reply").

30. By letter dated 26 November 2012, the Claimants' counsel requested an extension of the time limit to file the Reply. By email of 28 November 2012, the BAT Secretariat informed the Parties about the Arbitrator's decision to grant an extension in consideration of the circumstances invoked by the Claimants' counsel and invited the Claimants to file their Reply by no later than 7 December 2012.
31. On 11 December 2012, the BAT Secretariat acknowledged receipt of the Claimants' Reply dated 7 December 2012. Furthermore, the Club was invited to comment on Claimants' Reply by no later than 10 January 2013 (hereinafter the "Club's Rejoinder").
32. On 17 December 2012, the Club's counsels requested an extension of the time limit to file the Club's Rejoinder by 24 January 2013. By email of the same day, the BAT Secretariat forwarded the Club's request to the Claimants and the Arbitrator asked for their comments and to inform the BAT by no later than 20 December 2012 whether they agree with the requested extension. By letter of 19 December 2012, the Claimants objected to the Club's request for an extension until 24 January 2013 but agreed to an extension until 17 January 2013. On 20 December 2012, the Arbitrator extended the time limit for filing the Club's Rejoinder by no later than 17 January 2013.
33. On 21 January 2013, the Club's Rejoinder dated 17 January 2013 and its exhibits were received at the BAT Secretariat.
34. By letter of 22 March 2013, the BAT Secretariat requested that all Parties reply to specific questions of the Arbitrator by no later than 5 April 2013. In accordance with Article 9.3 of the BAT Rules, the BAT Secretariat also requested the Parties to pay the following amounts as additional Advance on Costs by no later than 3 April 2013:

<i>"Claimant 1 (Mr. Hunter)</i>	<i>EUR 1,150</i>
<i>Claimant 2 (Priority Sports and Entertainment)</i>	<i>EUR 350</i>
<i>Respondent (Polisportiva Dinamo SRL)</i>	<i>EUR 1,500"</i>

35. Moreover, the BAT Secretariat informed the Parties about the consequences in case of non-payment: if the Claimants failed to pay, the Request for Arbitration would be deemed withdrawn; if the Club failed to pay, the Counterclaim would be deemed withdrawn.
36. By email dated 22 March 2013, the Club's counsels requested an extension of the above mentioned time limits by one week because of the Easter holidays. By email of 25 March 2013, the BAT Secretariat informed the Parties that the Arbitrator granted the extension and that the Parties were invited to pay their additional shares of the Advance on Costs by no later than 10 April 2013 and to submit their responses to the Arbitrator's questions by no later than 12 April 2013.
37. On 12 April 2013, the Claimants and the Club submitted their responses together with further exhibits.
38. By letter of 24 April 2013, the BAT Secretariat acknowledged receipt of the full additional Advance on Costs and of the Parties' submissions in accordance with the BAT's letter dated 22 March 2013. Furthermore, it informed the Parties about the Arbitrator's decision to declare the exchange of documents complete and to invite the Parties to submit a detailed account of their costs by no later than 2 May 2013.
39. Later on 24 April 2013, the Club informed the BAT by email that it intended to reserve the right to further comment on the Claimants' submission of 12 April 2013. By email of 25 April 2013, the Club submitted some further comments.
40. By letter of 30 April 2013, the Claimants submitted their account of costs and attached an explanation why they utilized the services of an attorney together with a detailed list of the attorney's services ("attorney BAT log"). The account of costs reads as follows:

"Player

A. Non-reimbursable handling fee of EUR 2,809.10.

B. Advance on Costs of EUR 4,213.80.

C. Additional Advance on Costs of EUR 1,150.00.

D. Attorney's Fees of EUR 13,572.40 (see attached attorney BAT log)

TOTAL: EUR 21,745.30

Agent

A. Non-reimbursable handling fee of EUR 190.90.

B. Advance on Costs of EUR 286.20.

C. Additional Advance on Costs of EUR 342.50.

TOTAL: EUR 819.60”

41. By letter of 7 May 2013, the BAT Secretariat acknowledged receipt of the Club’s unsolicited submissions of 24 and 25 April 2013 and invited the Claimants to submit their comments by no later than 14 May 2013. Furthermore, it acknowledged receipt of the Claimants’ account of costs and invited the Club to submit its comments, if any, by no later than 14 May 2013. Finally, it informed the Parties that the Club was granted a final opportunity to submit a detailed account of costs by the same time limit.
42. On 9 May 2013, the Club submitted an account of costs as follows:

<i>“ATTORNEYS FEE (e.g. correspondence with the client and the BAT, examination of the dossier and defensive briefs of other parties, legal research, defensive and investigative activity, drafting Answer, drafting Rejoinder, drafting replies to the Arbitrator’s queries)</i>	<i>EUR 15.000,00</i>
<i>GENERAL EXPENSES (12,5% of fees)</i>	<i>EUR 1.875,00</i>
<i>SOCIAL SECURITY (4%)</i>	<i>EUR 600,00</i>
<i>TOTAL</i>	<i>EUR 17.475,00</i>
<i>ADVANCE ON COSTS PAID TO BAT</i>	
<i>TOTAL</i>	<i>EUR 6.000,00</i>
<i>TOTAL COSTS</i>	<i>EUR 23,475.00”</i>

43. By letter dated 14 May 2013, the Claimants commented on the Club’s unsolicited submission of 24 and 25 April 2013 and submitted an “affidavit” of the Player.
44. By letter of 27 May 2013, the BAT Secretariat acknowledged receipt of the Claimants’ submission and the Club’s account of costs and invited the Claimants to submit their comments, if any, on the Club’s account of costs by no later 31 May 2013. By the same letter, the Arbitrator granted the Club the right to amend by no later than 7 June 2013, its submissions regarding two specific issues raised in the Player’s “affidavit”. In

accordance with Article 9.3 of the BAT Rules, the BAT Secretariat also requested the Parties to pay the following amounts as additional Advance on Costs by no later than 7 June 2013:

<i>“Claimant 1 (Mr. Hunter)</i>	<i>EUR 1,750</i>
<i>Claimant 2 (Priority Sports and Entertainment)</i>	<i>EUR 750</i>
<i>Respondent (Polisportiva Dinamo SRL)</i>	<i>EUR 2,500”</i>

45. On 30 May 2013, the Claimants asked for further specification of the Club’s account of costs.
46. On 7 June 2013, the Club submitted its comments in reply to the Procedural Order of 27 May 2013.
47. On 11 June 2013, the BAT Secretariat acknowledged receipt of the additional advances of costs and of the Parties’ most recent submissions. Also, the Parties were informed of the Arbitrator’s decision that the exchange of documents was finally completed and that he would be rendering the final award as soon as possible.
48. The Parties did not request the BAT hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the BAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions available.

4. The Positions of the Parties

4.1. The Claimants’ Position

49. In the Request for Arbitration, the Claimants’ Reply and their response to the Arbitrator’s specific questions, the Claimants submit the following in substance:
50. Regarding the Player’s claims:
 - The Club was well aware of the Player’s _____ surgery in 2009. The Player was completely honest, open and forthright during the physical examination on

25 October 2011. The Player revealed all truthful information that was available to him at the time. His previous diagnosis relating to his _____ was sporadic in nature and any symptoms were non-existent at the time of the physical examination. During the examination and the following “try out”, the Club had the opportunity to perform whatever medical or physical tests it deemed necessary.

- During the examination of 25 October 2011, the Player provided the Club’s Team Doctor with x-rays of his _____ taken on 7 January 2011. Information about the Player’s former injuries and surgeries were also publicly available in online reports and databases. However, they became irrelevant once the Player had successfully passed the examination of 25 October 2011 and the following “try out” as stipulated in the last paragraph of Clause 2 of the Player Contract.
- Until 26 October 2011, the Agency was not involved in this matter because the Club chose to engage Mr. Funciello for any contact with the Player although the Club was aware that the Player was represented by the Agency. Thus, all of the Club’s arguments regarding “pre-contractual duties” of the Claimants are “flawed and illogical” and have to be rejected.
- During the further medical examination conducted by the Club’s Team Doctor on 19 December 2011, the Player revealed the same information as already provided by occasion of the examination of 25 October 2011. Thus, the Club is incorrect in stating that the Player “regretfully disclosed” further information regarding his _____. In particular, the Player’s US orthopaedic surgeon, Dr. Carter, did not warn the Player that previous surgeries would only provide temporary relief of pain but was rather optimistic that they would considerably help the Player. It has to be noted that the Club blamed the Player for withholding medical information only after the Player invoked his right to return to the USA for a second medical opinion.
- According to Clause 5 (d) of the Player Contract, the Player was entitled to return to the USA for a second medical opinion after the medical examination of

19 December 2011 at which the Club's Team Doctor told the Player that he wanted to conduct surgery on him. The Club was informed about the Player's intention to invoke the right for a second opinion in the USA right after the examination and some time before the Player left Italy. The Claimants are not aware of an "explicit denial of authorization" to leave Italy. Thus, the Club's notifications of any "absence" at matches and practises have to be considered irrelevant.

- The Player intended to return to Italy after the second medical examination in the USA. However, since he also had to take a surgery and a longer stay in the USA into consideration, he took all his belongings with him from Italy to the USA. For the same reason, he also handed over the keys for the apartment and the keys to a teammate. The Club's assumption that the Player intended not to return is incorrect.
- As *ex aequo et bono* is the applicable law, Clause 5 (d) of the Player Contract should be interpreted based on the intention of this provision instead of a "technical interpretation" of the wording. Such intention is to provide the Player with an option to obtain an alternative medical opinion should he incur a serious injury during the term of the Player Contract. The Player "sustained" his injury after participating in multiple practises and a league match.
- By 10 December 2011, the Club was obliged to pay a salary instalment of USD 11,500.00. On 23 December 2011, the Player reminded the Club that the amount of USD 10,452.00 was still outstanding and set a new time limit for payment until 25 December 2011. No payment was received within that extended time period. Thus, the Club breached the Player Contract and the Player was no longer obliged to provide his services and had the right to terminate the Player Contract. The Player did not breach the Player Contract, in particular, he never asked the Club "to break the contract". As the Player Contract was a no-cut, guaranteed agreement, the Player is entitled to the full salary for the 2011/2012 season.

- All previous payments from the Club to the Player were made via “direct deposit” into the Player’s bank account and he never received any amounts via bank check. Thus the Club’s alleged delivery of a bank check – in the incorrect amount – is a tactical attempt “to cover up the late payment in a timely fashion”.
- Several letters to the Player and the Agency were sent by the Club in Italian language. The English translations were submitted only in the present arbitration. The Club was well aware that both addressees were not able to understand letters in Italian. In addition, any previous correspondence was conducted in English.

51. Regarding the Agency’s claims:

- According to the Agent Agreement, the Player was entitled to cease his services and to terminate the Player Contract while accelerating all future payments required under the Player Contract.
- An invoice was issued and provided to the Club on 1 December 2011. However, until today, the Club has failed to pay the agreed agent fee which represents a breach of contract by the Club.

52. Regarding the Club’s Counterclaim:

- The Player did not breach the Player Contract and therefore the Club is not entitled to any damages.
- The Player was never informed about the Club sponsor’s letter dated 3 January 2012 regarding damages. That letter does not mention the Player by name. The Club “could have fulfilled its obligation to its sponsor by simply complying” with the Player Contract and corresponding payments.
- Prior to the Answer, the Player was never confronted with the alleged car damage. Even if such damage existed, the Player would only be liable for an amount up to USD 1,000.00, which is the “deductible” amount of the insurance

policy as agreed in Clause 5 (b) of the Player Contract.

4.2. The Claimants' Request for Relief

53. In their Request for Arbitration, the Claimants request the following relief:

- "1) Immediate payment from Club to Player for the remainder of Player's full-guaranteed base salary, in the amount of One Hundred Forty Five Thousand Four Hundred Fifty Two US Dollars (\$145,452.00 USD);*
- 2) Immediate payment from Club to Player in the amount of One-Thousand Seven-Hundred US Dollars (\$1,700.00 USD) owed to Player for interest penalties per Paragraph 2 of Agreement;*
- 3) Immediate payment from Club to Priority Sports in the amount of Ten Thousand US Dollars (\$10,000.00 USD) for Agent's commission per Agents' Commission addendum;*
- 4) Immediate payment from Club to Priority Sports in any amount the Arbitrator deems equitable for interest penalties accrued as a result of Club's failure to pay Agent's commission;*
- 5) Immediate reimbursement from Club to Player and Priority Sports for the BAT application fee, plus any additional costs of arbitration, legal fees, and/or expenses related to this BAT case; and*
- 6) Immediate payment from Club to Player and Priority Sports of any and all other amounts the Arbitrator finds equitable in light of Club's improper Agreement termination."*

4.3. The Respondent's Position

54. In the Answer, the Club's Rejoinder and the Club's response to the Arbitrator's specific questions, the Club submits the following in substance:

55. Regarding the Player's claims:

- At the medical examination of 25 October 2011, the Player was explicitly asked to disclose his physical conditions. Although he was fully aware of the _____ [medical condition], the Player did not disclose his real physical situation and did not present any documents. *Inter alia*, the Player falsely described his _____

surgery in 2010 as a _____ and thus misled the Club's Team Doctor. The Club contests that the Player presented any x-rays to the Club's Team Doctor, in particular the ones disclosed in this arbitration.

- When the Player failed to disclose all information, he breached his pre-contractual duties. If the Club had been aware of Player's real physical condition, the Club would not have entered into the Player Contract or at least would have done so on different terms. The Club accepted the risk of employing the Player only based on his apparent good health. Any press articles quoted by the Claimants did not reveal the Player's severe _____ condition. In addition, the Agency was well aware of the Player's "try out" with the Club as admitted by the Agency in the Claimants' Reply.
- It was not until the second examination on 19 December 2011 that the Player regretfully disclosed his real medical situation, in particular, that in 2010, the Player's US surgeons discovered a _____ and that the treatment was designed for temporary relief only. Based on this additional information, the Club's medical team performed further examinations which then led to the Club's Team Doctor's report dated 23 December 2011. This report states an _____. However, the Club's Team Doctor did not recommend surgery as claimed by the Claimants. After the additional examination of 19 December 2011, the Player asked the Club to "break" the Player Contract for returning to the USA.
- Clause 5 (d) of the Player Contract is inapplicable. It grants a right for a second medical opinion only if the "injury was caused during the term" of the Player Contract. The Player's _____ pain was not the result of such an injury, but rather a pre-existing physical problem that the Player concealed from the Club. Consequently, the Club did not allow the Player to return to the USA.
- Because of previous difficulties in completing a bank transfer, on 23 December 2011, the Club's President delivered a bank check in the amount of USD 9,820.00 to the porter's lodge of the building where the Player's apartment was based. The

amount of the bank check corresponds to the monthly salary of USD 10,000.00 according to the “Italian League Agreement” minus USD 180.00 for the severance payment to the Italian Basketball Players Association. The Player expressly agreed to payment by bank check. Although the Player failed to pick up the bank check, the Club fulfilled its duty of payment in time and did not breach the Player Contract. Minor discrepancies in one single payment do not entitle the Player to termination. Later, the bank check was kept at the Club’s headquarters to be collected by the Player, but entirely subject to offset regarding the car damage – which is in general, not denied by the Claimants – and sanctions for missed matches.

- It is obvious that the Player intended to permanently stay in the USA after leaving Italy on 24 December 2011: he left the keys of both his apartment and his car with a teammate and he gifted his TV and other belongings to him. Moreover, the Player has not provided any information about a second medical examination which was the alleged reason for his travel to the USA. Due to the Player’s unauthorized departure to the USA, his failure to participate in training sessions and games from 24 December 2011 on, and not providing any evidence regarding the alleged second medical opinion, the Club was entitled to terminate the Player Contract.
- The Player’s termination of the Player Contract of 27 December 2011, was unlawful for several reasons: e.g. (a) the Club was not too late in salary payments; (b) the Player was not party to and had not signed the Agent Agreement and therefore non-payment of the agent fee did not entitle the Player to terminate.
- The Club announced termination of the Player Contract on 24 December 2011 but then affirmed its termination by letter of 28 January 2012.
- As the Arbitrator is empowered to decide the dispute *ex aequo et bono*, he has to consider the damage suffered by the Club due to the Player’s concealment in the way of reducing the Player’s salary reflecting his true value.

56. Regarding the Agency's claims:

- If the Arbitrator decides to retroactively void the Player Contract on the basis of the Player's fraudulent misrepresentation, the Club cannot be expected to pay an agent fee and the Agency is not entitled to remuneration under the Agent Agreement.
- The Club's President, being the Club's legal representative, has never received an invoice from the Agency although it had the chance to raise this issue on several occasions.

57. Regarding the Club's Counterclaim:

- The Club is entitled to compensation because of Player's serious breaches of the Player Contract which led to the "renouncement of an advertising campaign" of the Club's most important sponsor and corresponding financial damage.
- As the Player did not provide any information about the car accident, the insurance company rejected the "opening of a file about the accident". Consequently, the Player is liable to reimburse the full amount of the car damage.

4.4. The Respondent's Request for Relief

58. In its Answer, the Club requests the following relief:

- "(1) Where contract is deemed voided or terminated by the Club for just cause, Player is not entitled to the remainder of the base salary, in the amount of One Hundred Forty Five Thousand Four Hundred and Fifty-Two Dollars (\$145,452.00 USD);*
- (2) Where contract is deemed voided or terminated by the Club for just cause, Player is not entitled to payment in the amount of One-Thousand Seven-Hundred US Dollars (\$1,700.00 USD) allegedly owed to Player for interest penalties per Paragraph 2 of the Agreement.*
- (3) Where contract is deemed voided, Priority Sports is not entitled to payment in the amount of Ten-Thousand US Dollars (\$10,000 USD) pursuant to the Agent's Commission.*

Counterclaim:

- (4) *Where contract is deemed voided, the Club is entitled to repayment in the amount of Fifty Four Thousand Five Hundred and Forty Eight US Dollars (\$54,548.00 USD) and to payment in the amount of One-Hundred and Fifty Thousand Euros (€ 150,000 Euros) for the damages resulting from Player's misrepresentation.*
- (5) *Where the contract is deemed terminated by the Club for just cause, the Club is entitled (i) to payment in the amount of One Hundred Forty Five Thousand Four Hundred and Fifty-Two Dollars (\$145,452.00) for Player's breach of contract and to an additional payment in the amount of One-Hundred and Fifty Thousand Euros (€150,000 Euros) for loss of sponsorship agreements resulting from Player's breach of contract.*

In any case:

- (6) *Immediate reimbursement from Player and Priority Sports to Club for the BAT application fee, plus any additional costs of arbitration, legal fees, and/or expenses related to this BAT case and other costs or any other amount the BAT considers equitable."*

5. The Jurisdiction of the BAT

59. 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).
60. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
61. 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.

5.1. Player/Club

62. The jurisdiction of the BAT over the dispute between the Player and the Club results from the arbitration agreement in Clause 11 of the Player Contract which reads as follows:

“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 (PIL), irrespective of the parties’ domicile. The language of the arbitration shall be English. The arbitrator upon appeal shall decide the dispute ex aequo et bono.”

63. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA. Furthermore, the Arbitrator considers that there is no other indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).

5.2. Agency/Club

64. The Arbitrator notes that the Agent Agreement does not contain a separate arbitration clause. There are strong indications that the arbitration agreement in the Player Contract applies also to the Agency’s claim against the Club since (a) the text of the arbitration agreement in the Player Contract refers to “[a]ny dispute arising from or related to the present contract”, which includes the Agency’s claim, and (b) the Player Contract was also signed by the Agency.
65. Irrespective of the interpretation of the arbitration clause in the Player Contract, the Arbitrator accepts jurisdiction over the Agency’s claim because the Club did not raise an objection of lack of jurisdiction related to the Agency’s claim but replied to the merits of this claim. This constitutes entry of an unconditional appearance and is enough to establish the jurisdiction of BAT even if the arbitration agreement in the Player Contract would not be regarded as a sufficient basis for the adjudication of the Agency’s claim.

6. Other Procedural Issues

6.1. Counterclaim

66. Together with its Answer of 15 October 2012, the Club filed a Counterclaim.

67. According to Article 11.2 of the BAT Rules, the Club is entitled to submit a Counterclaim together with the Answer. The Counterclaim is not specifically directed against one or the other Claimant and concerns therefore the same Parties as the main claim. It is also closely related to the subject matter of the Claimants' claim. The counterclaim against the Player is subject to the same arbitration agreement as the Player's claim. To the extent the counterclaim is directed also against the Agency, the jurisdiction of BAT may be based either on the arbitration agreement or on the Agency's entry of appearance when the Agency replied on the merits of the counterclaim and did not raise any challenge to the jurisdiction of BAT.
68. The Club has paid its shares of the Advance on Costs. The Claimants have not disputed the admissibility of the Counterclaim which will therefore be decided in the framework of this arbitration procedure.

7. Applicable Law – ex aequo et bono

69. 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".

70. 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."

71. In the arbitration agreement in Clause 11 of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et*

bono without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to him *ex aequo et bono*.

72. 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 1969¹ (Concordat),² under which Swiss courts have held that “arbitrage en *équité*” is fundamentally different from “arbitrage 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.”*³

73. 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”.⁴

74. In light of the foregoing considerations, the Arbitrator makes the findings below:

8. Findings

75. The following findings are based on the entirety of the Parties' submissions. The facts which the Arbitrator deems relevant for his decision have been cited in Section 2 above and will be addressed in more detail in the following paragraphs, while other issues presented by the Parties (e.g. the realisation of the license agreement between the Club and Promotum Procuratori Associati S.A. which dealt with the Player's image

¹ 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).

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

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

⁴ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

rights, the fact that certain letters of the Club were sent in Italian language only or the involvement of Mr Funciello prior to the signing of the Player Contract) are not expressly mentioned in this award because the Arbitrator found that they did not immediately affect the outcome of this arbitration.

76. The Arbitrator has now to decide on the Claimants' requests for the payment of the remaining salary (para 8.1. below), the agent fee (para 8.3.) and "interest penalties" (para 8.2. and para 8.4.) and on the Respondent's requests for repayment of paid salaries (para 8.5.) and compensation (para 8.6.).

8.1. Is the Player entitled to remaining salary in the total amount of USD 145,452.00?

77. To determine whether the Player is entitled to the remaining salary, the Arbitrator will examine the following questions:

1. Have the Club and the Player validly concluded the Player Contract or must that contract be considered null and void because of fundamental error because the Player did not fully disclose his ____ problems to the Club?
2. If the Player Contract was validly concluded:
 - a. When and by whom was the Player Contract terminated?
 - b. If it was by the Player's termination letter: Was the Player entitled to terminate the Player Contract because the Club was in default with the salary instalment due on 10 December 2011?
 - c. If it was by the Club's termination letter: Was the Club entitled to terminate the Player Contract because the second medical examination revealed the seriousness of the Player's ____ injury, or because the Player walked away and was not available for training sessions and matches?
 - d. What are the financial consequences of the termination of the Player Contract?

8.1.1. Validity of the Player Contract (fundamental error)

78. The Club concedes that it was aware of the Player's ____ surgery in 2009 and the _____ surgery in 2010. However, the Club says that the Player described the 2010 proceedings only as a “normal washout” or joint debridement but he did not fully disclose the details of his actual medical condition. If the Club had known about the severe ____ problems that existed in the fall of 2011, it would not have signed the Player Contract – at least not on the proposed terms. The Player Contract must therefore be “voided.”
79. The Player says that he was honest and open, and that he truthfully responded to all questions which were asked during the medical examination by the Club's Team Doctor. At the time of the medical examination, there were no symptoms of a medical condition or any functional limitations of his _____. The Player also asserts that he showed the Club's Team Doctor x-rays of his _____ which had been taken on 7 January 2011, which is disputed by the Club. If the Club wanted to learn more about the medical history of the Player, it should have asked the Agency. In addition, the Club had the chance of a “try-out” of the Player before the Player Contract was signed. In short, at the time when the Player Contract was signed, the Player was not handicapped in any way and he did not hide any information from the Club.
80. The principle of *pacta sunt servanda* is one of the leading principles in BAT jurisprudence. A signed contract is deemed valid and enforceable unless a party demonstrates (i) that it was in fundamental error regarding specific facts which must be considered in good faith to be an essential basis of the contract, (ii) that it was induced to enter into the contract by fraud of the other party, or (iii) that it signed the contract under duress from the other party. Duress can be safely excluded as a reason for invalidating the Player Contract since it has not been claimed by the Club.
81. The Club submits that the Player knew of the bad condition of his ____ and should have informed the Club prior to the signing of the Player Contract. In particular, such disclosure should have been made by occasion of the medical examination on

25 October 2011. According to the Club, the Player's non-disclosure constituted a violation of his "pre-contractual" duties and led to the invalidity of the Player Contract.

82. The Arbitrator agrees that in principle, it is an essential basis for an employment contract of any player, whether or not this is explicitly stated therein, that the player is fit to play. This implies an obligation of the contractual parties to address and clarify this material point when they negotiate the contract.
83. Which efforts must be made by which party has been identified by prior BAT jurisprudence, especially in the award BAT 0213/11 and in the award BAT 0263/12. Accordingly, it is the player's obligation to disclose to a club the relevant facts which are necessary for that club to make a learned decision whether and under which conditions to enter into a contract. A player has met his disclosure obligation if he informs the club in good faith about prior surgeries and other medical interventions which related to his athletic skills and if he responds to the best of his knowledge to the specific questions of the club. It may still be that a player, despite his responses in good faith, is not fully aware of his health condition or the consequences of prior injuries. It is therefore up to the club to perform further medical examinations to get a better picture of the player's health status and to narrow the risk that there were hidden health problems which could affect the player's playing abilities during the term of the player contract. Factors like age and prior injuries may require the club applying an even higher degree of diligence when performing a medical examination.
84. The essential issue here is therefore whether there was a pre-existing medical problem which materially affected the Player's playing abilities and which was not identified prior to the signing of the Player Contract despite the Club's discovery efforts.
85. It is undisputed that the Player suffered from a ____ injury since a number of years which required surgery in the year 2009 and further _____ in the year 2010. The evidence submitted by the Parties also demonstrates that the Player was complaining of his ____ problems shortly after he began training and playing with the Club's team. On the other hand, no particular incident has been reported during the period when the

Player played with the Club's team which led to the ____ problems or aggravated them. Hence, the Arbitrator concludes that the ____ problems must have been related to a pre-existing medical condition of the Player.

86. Undisputedly, the Club was aware of the fact that the Player had suffered from ____ problems and underwent surgery in the past. However, the Club claims that it did not know of the seriousness of these problems and of the risk that they could worsen during the term of the Player Contract. As held above, the Club's ignorance can invalidate the Player Contract only if it continued despite its adequate efforts to clarify the medical status prior to the signing of the Player Contract.
87. There is no indication in the file that the Player did not say the truth or concealed any material information in bad faith. What should he have said more? The Arbitrator has no other reliable information but that the Player replied to the Club's questions to the best of his knowledge. It was then up to the Club to examine the Player's health further (as it was done later on 19 December 2011), especially since it was aware of the prior surgery and _____ of the Player. This information should have alerted the Club, particularly since the Player asked for a "guaranteed salary" which had to be paid also when the Player was injured.
88. The Player Contract explains what has to be understood as a "*fully guaranteed*" salary, namely that it "*is not contingent upon anything other than the Player not materially breaching this Agreement.*" Even more, the same Clause 2 of the Player Contract also says: "*In this regard, if the Player is removed or released from the Club or released from the Club due to the Player's lack of or failure to exhibit skill, Player's death, illness, injury or other mental or physical disability (whether incurred on or off the court) or for any other reason whatsoever other than Player's direct and material breach of this Agreement, Club shall nevertheless be required to pay to the Player, on the dates set forth above, the full amounts set forth above.*" That is a very serious provision by which the Club accepted a substantial risk to continue paying the Player's salary when he was not able to play, for whatever reasons except because of breach of contract, and it

should have caused the Club to apply utmost diligence before accepting such an obligation.

89. More specifically, the Club should have asked its medical staff for a more comprehensive and thorough medical examination – as eventually done on 19 December 2011 which revealed _____. However, this was not done prior to the signing of the Player Contract.
90. The Arbitrator therefore concludes that the Player Contract was validly concluded and the Club cannot claim invalidity of the Player Contract because of fundamental error, fraud or duress.

8.1.2. When and by whom was the Player Contract terminated?

91. The Parties have different views on how and by whom the Player Contract was terminated. The Club's view is that the Player Contract was terminated by the letter of 24 December 2011 or one of its later letters to the Player or the Agency. The Player relies on his termination letter dated 27 December 2011.
- (a) The Club's letter to the Player of 24 December 2011 says that *"[a]t the moment, in consideration of the seriousness of this situation, which led to the impossibility for you to comply with the obligations provided in the contract and to respect your duties, there is no other solution than to declare the termination of the contract for a fact to be exclusively chargeable to you."*
- (b) By letter of 27 December 2011 to the Player's Italian agency, the Club listed a number of violations of the Player Contract, including the Player's non-availability for the Club's sponsor. It then said: *"Thus, at present, according to Article 7, because of the above serious violations of his obligations, the contract has to be considered terminated from this moment for reasons imputable to your client."*

- (c) On 27 December 2011, it was the Player who notified the Club in writing of his termination of the Player Contract because of non-payment of the December 2011 salary which was due on 10 December 2011.
- (d) By letter of 28 January 2012 to the Player, the Club then wrote: *“This is to inform you we decided to proceed, and in fact we proceed, with your dismissal, which must be deemed valid beginning on the present day (...). Since this is a justified dismissal, no redundancy payment will be available to you.”*

92. The Arbitrator finds that the Club’s letter of 24 December 2011 does not constitute an unconditional statement of the Club’s intention to terminate the Player Contract with immediate effect. The same applies to the Club’s letter of 27 December 2011. This understanding is supported by the Club’s subsequent actions which consisted of further warnings to the Player that he had missed the trainings sessions of 24, 25 and 26 December 2011, the official matches of the team of 27 and 30 December 2011 and further training sessions of 28, 29 and 30 December 2011. No such warnings would have been necessary if the Club had considered that the Player Contract was terminated on 24 or 27 December 2011. From the Club’s perspective, it was rather, its letter of 28 January 2012 which had to be understood as the Club’s definite declaration of termination of the Player Contract.

93. However, before the Club’s letter to the Player of 28 January 2012, it was the Player (through his agent) who sent a termination letter to the Club on 27 December 2011. The Player invoked Clause 2, third paragraph of the Player Contract which provides that

“[i]f any scheduled payment is not received by Player’s bank within fifteen (15) days of the date due, the Player’s performance obligations shall cease, Player shall have the right, at Player’s option, to terminate this Agreement and accelerate all future payments required under this Agreement and Player shall be free to leave Italy with his FIBA Letter of Clearance to play basketball anywhere in the world Player chooses, but the duties and liabilities of Club under this Agreement shall continue in full force and effect.”

94. It is undisputed that the Club had paid the contractual amounts due in November 2011 (namely USD 12,000.00 on 4 November 2011, USD 11,500.00 on 10 November 2011 and USD 22,000.00 on 30 November 2011). Of the payment due on 10 December 2011, the Club paid only USD 1,048.00. That means that on 27 December 2011, the Club was in default of the remaining payment due on 10 December 2011 (USD 10,452.00) by more than 15 days.
95. The Club submits that on 23 December 2011, a representative of the Club had brought a check of USD 9,820.00 to the domicile of the Player where it was handed over to the concierge when the Player was not present. The Player did not pick up the check which was then returned to the Club “for the Player to collect at his convenience.” However, the Player did not collect that check there either. The personal delivery of the check became necessary because the Club’s bank was unable to execute any international banking transfers in the month of December 2011.
96. Even if the Arbitrator accepts that the Club’s bank was not able to make international transfers during the month of December 2011 (despite the fact that a transfer had obviously been possible on 10 December 2011), it was the Club’s risk when it let time lapse and made an effort to execute payment only 13 days after the due date just to find out that a banking transfer with its own house bank was not possible. There are no indications that the Club made any attempt with another bank and it did not even notify the Agency or the Player of its intent to deposit the check at the Player’s place. No further attempts were made by the Club to complete the salary payment as provided by the Player Contract.
97. In addition, the amount allegedly deposited by check was still short of what the Club owed to the Player. Although it is true that the amount was “only” USD 632.00 less than the contractual amount, the Arbitrator does not accept the explanation that this “minor discrepancy on one single payment” was characteristic for “most employment relationships between players and clubs.” It is not compatible with the principle of *pacta sunt servanda* to tolerate deviations from the Player Contract with respect to the amount to be paid or the time when the payment should be made. There is also no

indication that the Player acted in bad faith when he invoked the termination clause of Clause 2, third paragraph of the Player Contract. The Agency even sent a warning letter to the Club before exercising the termination right.

98. As a matter of fact, the Club deposited the check with the concierge on the same date as the Agency sent its payment reminder to the Club. It can be left open whether it was by pure chance or whether it was that letter which caused the Club's payment effort because a warning letter is not a requirement for exercising the termination right of Clause 2, third paragraph of the Player Contract.
99. The Arbitrator therefore finds that the Club failed to make the payment due to the Player on 10 December 2011 and that its payment efforts on 23 December 2011 were not sufficient to cure its default. The Player was therefore entitled to invoke Clause 2, third paragraph of the Player Contract and to terminate the engagement with the Club by letter of 27 December 2011.
100. Since the Player Contract was terminated by the Player's letter of 27 December 2011, there is no need to review further whether also the Club's letter of 28 January 2012 qualified as a letter which validly terminated the Player Contract.

8.1.3. The consequences of the termination of the Player Contract

101. The Player claims the full remaining salary for the remaining term of the terminated Player Contract. According to Clause 2, second paragraph of the Player Contract,

“the payment of the guaranteed Base Salary, as stated in this Paragraph 2, to Player is not contingent upon anything other than the Player not materially breaching this Agreement. (...) In this regard, even if Player is removed or released from the Club or this Agreement is terminated or suspended by the Club due to the Player's lack of or failure to exhibit sufficient skill, Player's death, injury or either mental or physical disability (whether incurred on or off the court) or for any other reason whatsoever other than Player's direct and material breach of this Agreement, Club shall nevertheless be required to pay to the Player, on the dates set for the above, the full amounts set forth above.”

102. The fact that the Player rightfully terminated the Player Contract because of the Club's default regarding the salary payments does not exclude that the Player was himself in breach of the Player Contract when he terminated it. In that case, the Club would be dispensed from paying the otherwise due salaries. Although not explicitly addressed by the Player Contract, the Arbitrator finds that this exemption from the principle of the guaranteed salary payment must apply to any salary payment before or after the termination of the Player Contract and irrespectively of whether the Player Contract was terminated by the Player or the Club.
103. The Club submits that the Player had been in breach of the Player Contract because (i) he did not disclose his pre-existing medical condition; and (ii) because he left the Club on 24 December 2011 without the Club's authorisation.
104. With respect to the first breach alleged by the Club (undisclosed pre-existing medical condition), the Arbitrator already held that it was up to the Club to execute such medical examinations which were appropriate and necessary under the specific circumstances prior to the signing of a Player Contract which contains a "guaranteed" salary clause. Once the Player Contract was signed, the Club and the Player were bound and the Club was not entitled to terminate it even if a later examination revealed a pre-existing medical condition. The failure to disclose the pre-existing medical condition therefore did not constitute a material breach of the Player Agreement by the Player and does not justify a cancellation or reduction of the Club's obligation to pay the salary.
105. With respect to the second breach of the Player Contract alleged by the Club (i.e. the Player's unauthorized leave from the Club), the Arbitrator finds the following:
106. It is true that the Player had informed the Club on 22 December 2011 that he intended to seek a second opinion from a doctor in the USA. The Club did not authorize the Player's plan.
107. Clause 5 (d) of the Player Contract allows the Player to return to the USA for a second medical opinion if he was seriously injured during the term of the Player Contract.

However, the Club submits that the reason for the Player's return to the USA was not an injury which he suffered "*during the term of this contract*" but a pre-existing medical condition which did not justify the Player's absence. Whether or not the Club's refusal was justified can be left open because of the following:

108. The Club submits that the Player did not travel to the USA to see his doctor but left the Club with the clear intention not to come back. That is why he handed over the keys of his apartment and his car to a teammate. The Player disputes that he intended not to return. Indeed, he did not travel back to Italy, but that was a consequence of the termination of the Player Contract because of the Club's failure to pay his salary.
109. Under the circumstance, the burden of proof of the Player's plan to seek a second medical opinion and then returning to the Club lies on the Player. However, there is no evidence whatsoever supporting the Player's submission. In particular, there is no evidence at all that the Player went to see a doctor and solicited a second opinion. Nor did the Player inform the Club about the date and scope of the alleged medical examination in advance.
110. Furthermore, the Arbitrator is not convinced by the Player's explanation why he emptied his apartment and returned the keys for the flat and the car to a teammate and why he gave away his TV set. That would not have made any sense if the Player just intended to see a doctor back home and then to return to the Club immediately after the examination. The Arbitrator therefore concludes that the Player left the Club without the intention of returning. In other words, he simply walked away from his on-going contract. This constituted a material breach of contract at the time when the Player left the Club on 24 December 2011.
111. According to Clause 2 of the Player Contract, the payment of the salary is not contingent upon anything other than the Player not materially breaching this Agreement. The Arbitrator found that the Player walked away on 24 December 2011 and was therefore in breach of the Player Contract. After that date, the Club was no

longer obliged to pay a salary to the Player. On the other hand, all salaries due up to that date must be paid to the Player.

112. The salary payments are due according to the payment schedule of Clause 2 of the Player Contract. The Arbitrator will therefore not apply a *pro rata* calculation. At the time of termination of the Player Contract, the open payments therefore consisted of the unpaid December 2011-installment of USD 11,500.00 minus the partial payment of USD 1,048.00, resulting in an open amount of USD 10,452.00.

8.1.4. Payments claimed by the Club

113. The Club claims that the Player owes certain amounts to the Club.

(a) Car damage

114. The Club claims that the Player damaged a car which was leased by the Club and for which the Club had to pay the repair costs of EUR 5,000.00. The Player asserts that he did not know that he damaged the car and that the repair costs were unsubstantiated. He also claims that it was for the insurance company to cover the repair costs in excess of EUR 1,000.00 as set out in Clause 5 lit. b of the Player Contract. The Club refers to a statement of the insurance company by which the payment obligation was denied because the Player did not assist in the identification of the reasons of the damage.

115. There are pictures of a damaged BMW in the file and it is not disputed that this was the Player's car. However, there is no invoice or other document which would allow the Arbitrator to verify the claimed amount. The damage claim must therefore be dismissed because of lack of substantiation.

(b) Penalty because the Player missed eight games

116. The Club also claims a penalty from the Player because he failed to attend eight trainings and one match, as set out in its letter of 27 December 2011 in response to the

Player's termination letter of the same day. This penalty was to be set off against the payment of the salary for December 2011. The penalty is contested by the Player. Indeed, there are some indications that the Player had to stop exercising because of his ____ problems. However, there is no evidence on record which would confirm that a penalty was then imposed on the Player and what the legal basis of such a sanction would be. The Arbitrator therefore dismisses the Club's penalty claim.

8.2. Is the Player entitled to “interest penalties” in the total amount of USD 1,700.00?

117. In Clause 2 of the Player Contract, the Parties agreed that “any payment to Player pursuant to the above shall be subject to an interest penalty of One Hundred Dollars (\$100.00USD) per day for each day said payment was due”. The Claimants request “interest penalties” for the late payment of the December 2011 salary instalment of 17 days and therefore the amount of USD 1,700.00 to be paid to the Player.

118. The Arbitrator understands these “interest penalties” as late payment penalties rather than default interest. The BAT has consistently held that such penalty clauses are subject to review by the Arbitrator to ensure that they are not excessive.⁵ The Arbitrator finds that an amount of USD 100.00 per day for the period of 17 days is not excessive because it is not disproportionate to the Club's basic obligation stipulated in Clause 2 of the Player Contract, in particular not to the respective instalment payment in the amount of USD 11,500.00 to be paid by 10 December 2011.

119. When determining the commencement date of the requested late payment penalty, the Arbitrator considers the wording of the penalty clause in the Player Contract (“*for each day said payment was due*”) and holds that the duty to pay late payment penalty commenced on 11 December 2011. Furthermore, since penalty clauses like Clause 2 of the Player Contract are to be considered as “a dissuasive measure to prevent late

⁵ See for instance BAT 0158/11, Stimac vs. KK Crvena Zvezda Beograd (“Red Star”); 0114/10, U1st Sports Overseas Ltd., U1st Sports Atlanta LLC vs. Club Baloncesto Valladolid SAD; 0086/10, Queenan vs. Basketball Club Pecs Noi Kosariabda Kft; 0036/09, Tigran Petrosean, TP Sports vs. WBC “Spartak” St. Petersburg.

payments and as a form of sanction in case of delay together with the Player's right not to participate in practices and games,"⁶ the Arbitrator finds that the period during which the late payment penalty is due ends on the day of the termination of the Player Contract by the Player, i.e. on 27 December 2011.

120. Consequently, the Player is entitled to late payment penalties for 17 days which amount to USD 1,700.00 in total.

8.3. Is the Agency entitled to agent fee in the total amount of USD 10,000.00?

121. Based on the Agent Agreement, the Agency claims an agent fee in the amount of USD 10,000.00 to be paid by 15 November 2011. In the Agent Agreement, the agent fee is expressly referred to as "Agent's Commission" which indicates that the purpose of the payment was to remunerate the Agency for the placement of the Player with the Club. On the other hand, there are no indications that the agent fee was also intended to compensate the Agency for any services.

122. Thus, the agent fee became due upon the mutual signing of the Player Contract and was payable on or before 15 November 2011. The fact that the Player Contract was terminated by the Player a few weeks later does not matter, since the agent fee was not contingent upon the duration of the Player Contract. The Arbitrator therefore finds that the agent fee is due in its entirety and without any deductions.

8.4. Is the Agency entitled to "interest penalties"?

123. The Agency also claims "interest penalties" which again are understood by the Arbitrator as late payment penalties instead of default interest. The Agency does not request a specific amount but rather "*any amount the Arbitrator deems equitable*".

⁶ See for instance BAT 0109/10, Plaisted vs. Basketball Club Zadar (KK Zadar) and BAT 0100/10, Taylor vs. KK Crvena Zvezda.

124. The Agent Agreement does not provide for the payment of a late payment penalty. According to the Agent Agreement, the consequences of late payment of the agent fee are the Player's right not to participate in practices and games and, in addition, the Player's right to terminate the Player Contract and to accelerate all future payments required under the Player Contract.

125. Furthermore, Clause 2 of the Player Contract stipulates a late payment penalty only with regard to the Club's payment obligations to the Player (*"It is agreed that any payment to Player pursuant to the above shall be subject to an interest penalty ..."*). The payment of the agent fee is not covered by that penalty clause.

126. Neither the Agent Agreement nor the Player Contract oblige the Club to pay late payment penalties to the Agency and the Claimants have not demonstrated any other basis for the Agency's claim for "interest penalties". Consequently, the Arbitrator finds that the Agency is not entitled to late payment penalties.

8.5. Is the Club entitled to repayment of salary already paid to the Player in the total amount of USD 54,548.00 and EUR 150,000.00 because of "Player's misrepresentation"?

127. In case the Player Contract is found to be void, the Club requests by way of a counterclaim the repayment of the salary already paid to the Player in the amount of USD 54,548.00.

128. As already held by the Arbitrator (see paras. 78 to 90), the Player Contract was validly signed and the Club cannot claim invalidity of the Player Contract because of fundamental error. In addition, the Player was entitled to invoke Clause 2, third paragraph of the Player Contract and to terminate the engagement with the Club by letter of 27 December 2011 (see para. 100). Consequently, the Player is entitled to the remaining salary until he left the Club, and the Club is not entitled to claim any repayment of salary already paid to the Player.

129. In addition, the Club claims payment of EUR 150,000.00 “for the damages [sic] resulting from Player’s misrepresentation” if the Player Contract was voided. The Club’s claim that the Player Contract be voided *ex tunc* because of fundamental error has been dismissed. Thus, the Club has no further claim based on the concept of fundamental error. Besides, the Club does not further specify this (partial) claim which must also be dismissed because of lack of substantiation.

8.6. Is the Club entitled to further compensation from the Player?

130. The Club not only requests the Arbitrator to hold that the Claimants are not entitled to the claimed amounts but also demands payment from the Claimants of USD 145,452.00 “for Player’s breach of contract” and an additional payment of EUR 150,000.00 “for loss of sponsorship agreements resulting from Player’s breach of contract”. To support this claim the Club submits that due to, *inter alia*, the Player’s alleged unauthorized departure one of the Club’s most important sponsors (SISA Supermercati Italiani) was forced to renounce an advertising campaign and is now requesting damages. The Club claims compensation also for “future sponsorships it would have received had the Player remained with the Club until the end of the 2011-2012 season.”

131. The first of these claims (USD 145,452.00) corresponds to the remainder of the Player’s base salary under the Player Contract. The Arbitrator understand that this was not a separate claim but basically the Club requests that the Player’s claim for the remaining salary shall be dismissed since there is no separate reasoning for a counterclaim of USD 145,520.00 if no such compensation has been awarded to the Player.

132. With respect to the second of these claims (EUR 150,000.00 because of loss of sponsorship opportunities) the Arbitrator has already held that the Player was entitled to terminate the Player Contract on 27 December 2011. It was therefore at the Club’s risk if the Player’s leave led to an issue between the Club and its sponsor. Apart from that, the Arbitrator does not see any evidence in the file that the Club’s sponsor is

actually claiming damages because of the Player's leave. Likewise, there is no evidence for loss of future sponsorship opportunities. Consequently, the Arbitrator finds that the Club's claim for compensation of damages that could be claimed by the Club's sponsor or the loss of future sponsorship opportunities is unsubstantiated and must therefore be dismissed.

8.7. Summary

133. The Player is entitled to the salary due until the termination of the Player Contract of 23 December 2011 (USD 10,452.00), and the requested penalty for the late payment of the December 2011 salary of USD 1,700.00, amounting to USD 12,152.00.

134. The Agency is entitled to the full Agency Fee of USD 10,000.00.

135. The Club is not entitled to any payments from the Player. In particular, its claims for the repayment of the paid salaries of USD 54,548.00 and the damages resulting from Player's misrepresentations in the amount of EUR 150,000.00 or a compensation of EUR 150,000.00 because of loss of sponsorship opportunities are dismissed.

9. Interest

136. Neither the Claimants nor the Club claim payment of default interest in the Request for Arbitration and the Counterclaim respectively. The Arbitrator has set out above (para. 116) that the request for "interest penalty" must be understood as a request for the payment of late payment penalties and not as a claim for default interest. Late payment penalties have been awarded where such penalties have explicitly been provided. Consequently, the Arbitrator does not award any default interest in excess of the late payment penalties.

10. Costs

137. 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. Of the requested amount of USD 157,152.00, the Claimants are awarded USD 22,152.00. They succeeded, however, with regard to the Respondent's counterclaim of USD 54,548.00 (repayment of paid salaries), EUR 150,000.00 (damages because of Player's misrepresentations) and another EUR 150,000.00 (loss of sponsorship opportunities). The Respondent was successful with its request to dismiss the claim by 85% but it has not been successful with regard to its counterclaims.
138. On 8 October 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 16,985.00
139. Considering the outcome of the claim and the counterclaim and the circumstances of the present case, in application of Article 17.3 of the BAT Rules the Arbitrator finds it fair that the Respondent shall bear a larger part of the fees and costs of the arbitration reflecting the fact that it was successful with regard to the Claimants' claim but was unsuccessful with respect to its voluminous counterclaims, which contributed greatly to the time spent by the Arbitrator on this matter. The Arbitrator finds *ex aequo et bono* that the Respondent shall bear 2/3 of the fees and costs of the arbitration while the Claimants shall bear 1/3.

140. Given that all parties contributed to the Advances on Costs of EUR 16,985.00, in application of Article 17 of the BAT Rules the Arbitrator decides that the Respondent shall pay EUR 2,823.33 to the Claimants, being the difference between the amount advanced by it (EUR 8,500.00) and the amount it is ordered to pay ($\frac{2}{3}$ of EUR 16,985.00 = EUR 11,323.33).
141. Furthermore and based on the same considerations as set out above, the Arbitrator considers it adequate that the Respondent contributes an amount of EUR 5,000.00 to Claimant's legal costs.
142. Finally, the Arbitrator has noted that the Claimants asked for further specification of the Club's account of costs. However, considering the outcome of the case the Arbitrator finds a further specification of the Respondent's costs unnecessary and dismisses the Claimants' request.

11. AWARD

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

- 1. Polisportiva Dinamo S.R.L. is ordered to pay to Mr. Steven Hunter the amount of USD 10,452.00 as the remaining salary and the further amount of USD 1,700.00 as interest penalties.**
- 2. Polisportiva Dinamo S.R.L. is ordered to pay to Priority Sports and Entertainment the amount of USD 10,000.00 as agent fee.**
- 3. Polisportiva Dinamo S.R.L. is ordered to pay to Mr. Steven Hunter and to Priority Sports and Entertainment the amount of EUR 2,823.33 as a reimbursement of their shares of the advance of arbitration costs.**
- 4. Polisportiva Dinamo S.R.L. is ordered to pay to Mr. Steven Hunter and Priority Sports and Entertainment the amount of EUR 5,000.00 as a contribution to their legal fees.**
- 5. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 15 October 2013

Dr. Stephan Netzle
(Arbitrator)