

ARBITRAL AWARD

(BAT 0324/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Raj Parker

in the arbitration proceedings between

Mr. Omar Abdul Thomas

c/o DoubleB Management s.a.s, Via IV Novembre 92, 20021 Bollate (MI), Italy

- First Claimant -

DoubleB Management s.a.s.

Via IV Novembre 92, 20021 Bollate (MI), Italy

- Second Claimant -

Bell Sports Inc.

c/o DoubleB Management s.a.s, Via IV Novembre 92, 20021 Bollate (MI), Italy

- Third Claimant -

all represented by Mr. Enrico Zorzi, Studio Legale Zorzi – Corneli

vs.

S.S. Felice Scandone Avellino

c/o PalaDelMauro - c/da Zoccolari, 83100 Avellino (AV), Italy

- Respondent -

represented by Mr. Edoardo Lombardi, Bird & Bird

1. The Parties

1.1 The Claimants

1. Mr. Omar Abdul Thomas (hereinafter "Claimant 1") is a professional basketball player from the USA.
2. DoubleB Management s.a.s. (hereinafter "Claimant 2") is a professional basketball agency based in Italy.
3. Bell Sports Inc. (hereinafter "Claimant 3") is a professional basketball agency incorporated in the USA.
4. In these proceedings, all Claimants are represented by Mr. Enrico Zorzi of Studio Legale Zorzi - Corneli, Via Nicola Palma 12, 64100 Teramo, Italy.

1.2 The Respondent

5. S.S. Felice Scandone Avellino (hereinafter the "Respondent") is a professional basketball club in Italy.
6. In these proceedings, the Respondent is represented by Mr. Edoardo Lombardi of Bird & Bird, Via di San Sebastianello, 9 (00187), Rome, Italy.

2. The Arbitrator

7. On 19 October 2012, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT") appointed Raj Parker as arbitrator (hereinafter the

“Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules").

8. None of the Parties have raised objections to the appointment of the Arbitrator or to the declaration of independence issued by him.

3. Facts and Proceedings

3.1 Background Facts

9. On 21 June 2010, Claimant 1 and the Respondent entered into a contract of employment in relation to the 2010-2011 and 2011-2012 seasons (hereinafter the “Player Contract”).
10. The Player Contract contains, among others, the following provisions:

“The parties acknowledge that they are signing a guaranteed contract, respecting principles of labour law.

ARTICLE 1 – TERM

Player will be an employee of Club for the seasons 2010-2011 and 2011-2012. His employment duties are defined below. Player is an employee of Club for purposes including promotions and event participation in groups organised and/or sponsored by Club. Player’s obligations under this Agreement will cease once Club concludes all of its play in league, cup and tournament. This Agreement is fully guaranteed for all payments in that Player must be paid all payments regardless of circumstances, including but not limited to lack of skill, injury(s), death or any other circumstances. In the event of death, all salary payments due at that time will go to Player’s next of kin.

This Agreement is valid only if the player is holding a European passport.

[...]



BASKETBALL

ARBITRAL TRIBUNAL

ARTICLE 4 – PAYMENTS

Player will receive a total amount of payments of \$300,000 net US Dollars for the season 2010/2011 to be paid according to the following schedule:

<i>On Arrival</i>	<i>\$10,000</i>
<i>On September 15, 2010</i>	<i>\$20,000</i>
<i>On October 15, 2010</i>	<i>\$30,000</i>
<i>On November 15, 2010</i>	<i>\$30,000</i>
<i>On December 15, 2010</i>	<i>\$30,000</i>
<i>On January 15, 2011</i>	<i>\$30,000</i>
<i>On February 15, 2011</i>	<i>\$30,000</i>
<i>On March 15, 2011</i>	<i>\$30,000</i>
<i>On April 15, 2011</i>	<i>\$30,000</i>
<i>On May 15, 2011</i>	<i>\$30,000</i>
<i>On July 30, 2011</i>	<i>\$30,000</i>

Player will receive all monies due within 3 days of club's last official game.

Player will receive a total amount of payments of \$350,000 net US Dollars for the season 2011/2012 to be paid according to the following schedule:

<i>On Arrival</i>	<i>\$10,000</i>
<i>On September 15, 2011</i>	<i>\$25,000</i>
<i>On October 15, 2011</i>	<i>\$35,000</i>
<i>On November 15, 2011</i>	<i>\$35,000</i>
<i>On December 15, 2011</i>	<i>\$35,000</i>
<i>On January 15, 2012</i>	<i>\$35,000</i>
<i>On February 15, 2012</i>	<i>\$35,000</i>
<i>On March 15, 2012</i>	<i>\$35,000</i>
<i>On April 15, 2012</i>	<i>\$35,000</i>
<i>On May 15, 2012</i>	<i>\$35,000</i>
<i>On June 15, 2012</i>	<i>\$35,000</i>

Player will receive all monies due within 3 days of club's last official game.

BONUSES

ITALIAN CHAMPIONSHIP

- \$10,000 USD if team will reach playoffs
- \$10,000 USD each round won

ITALIAN CUP

- \$5,000 USD if Team will reach Final Eight
- \$5,000 USD each round won
- \$5,000 USD if Team qualifies for European Cup (Bonuses for eurocup)



BASKETBALL ARBITRAL TRIBUNAL

2011-12 to follow)

In the event Club is 10 or more days late a payment of Salary, a late fee of \$50 per each late day will be assessed. In the event Club is 20 or more days late with a salary payment, Player will have no duties to perform under this agreement and may cancel the Agreement by written notice to Club, in which case Club agrees to release the Players FIBA Players Card immediately upon any request and all monies due to Player under this Agreement will become due immediately. If Player chooses to continue performing, he will not lose or waive his rights hereunder. Upon the conclusion of the Season, Player will cease to have any duties or obligations under this Agreement, and all monies that are not yet paid as base salary and/or bonus will be paid to Player within 3 business days of the last official game of Club for each season of this agreement.

[...]

ARTICLE 5 – ESCAPE

Buyout is fixed at 150,000 usd with Player having the right to terminate this agreement by written notice on or before July 10, 2011. And payment to the Club no later than July 15, 2011.

[...]

ARTICLE 8 – DISPUTE

Governing Law of the Agreement is covered by the National Laws of Italy the provisions and terms as stated herein in English and through any disputes between the parties will be resolved by the Italian courts. This English contract will govern in said disputes and will be the only contract recognized. The Club warrants that this is a valid contract under Italy Law and that any other league or team contract is not valid and this agreement is the one the parties will abide by. Any provision that cannot be enforced shall be modified to reflect the intentions of the parties as contained herein and to restore to the Player all rights to compensation and benefits under this Agreement. In the event of the Player sustaining a serious injury he will be permitted to ask a second medical opinion of a doctor of his choice in the United States (player expenses) and his contract will be full guaranteed.

[...]

ARTICLE 12 - ARBITRATION

Any dispute arising from or related to the present Contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law

(PIL), irrespective of the parties' domicile. The language of the arbitration of FIBA shall be English. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.

[...]"

11. On or around 21 June 2010 Claimant 2, Claimant 3 and the Respondent entered into an agency fee agreement (hereinafter the "Agent Contract"). The Agent Contract states:

"AGREEMENT

*"This Agreement, by and between **S.S. Felice Scandone Avellino** ("Club") **BELL SPORTS, Inc.** of the USA and Luigi Bergamaschi of Double B Management of Italy and its successors and assigns ("Double B/Bell"), is meant to clarify the arrangement between the parties regarding the contract of **OMAR THOMAS** ("Player") to play for Club in 2010-2012. Whereas, DoubleB/Bell assisted Club in locating and contracting with Player, Club promises to pay the DoubleB/Bell for the season 2010-2011 \$30,000 USD net on September 30, 2010. For the season 2011/2012, Club promises to pay to DoubleB/Bell \$35,000 net USD on September 30, 2011. In the event Club contracts with Player for following future season, Club agrees to pay to BELL the amount of 10% of the base salary of Player for any and all such seasons.*

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

12. Claimant 1 played for the Respondent throughout the 2010-2011 season. In July 2011,

a Slovenian passport, belonging to Claimant 1 was seized by Italian immigration authorities. On 12 October 2011, the “Procura Federale” of the “Federazione Italiana Pallacanestro” (hereinafter the “Italian Federation”) found that Claimant 1’s Slovenian passport was in fact a fraudulent document, which Claimant 1 had used to falsely represent himself as European Community player. On 6 December 2011, the Italian Federation banned Claimant 1 from competition for sixteen months. On 10 February 2012, the Italian Federation declared an appeal filed by Claimant 1 against the sixteen-month ban to be inadmissible.

13. The Respondent failed to make certain salary and bonus payments (as provided for in the Player Contract) to the Respondent in respect of the 2010-2011 season. On 11 November 2011, Claimant 1’s legal representative sent a letter to the Respondent. The letter: (i) informed the Respondent that the Player Contract had been “resolved in fact and law”; and (ii) requested payment of outstanding sums due under the Player Contract. Claimant 1 did not play for the Respondent during the 2011-2012 season.
14. No payments have been made by the Respondent pursuant to the Agent Contract. On 18 November 2011, Claimant 2 wrote to the Respondent, requesting payment of agency fees relating to the 2010-2011 season pursuant to the Agent Contract.

3.2 The Proceedings before the BAT

15. On 7 September 2012, the Claimants filed a Request for Arbitration in accordance with the BAT Rules. The BAT received the non-reimbursable handling fee of EUR 3,000.00 from the Claimants on 7 September 2012.
16. By letter dated 23 October 2012, the BAT Secretariat fixed a time limit until 13 November 2012 for the Respondent to file its Answer to the Request for Arbitration. By the same letter, and with a time limit for payment of 5 November 2012, the following

amounts were fixed as the Advance on Costs:

<i>“Claimant 1 (Mr. Omar Abdul Thomas)</i>	<i>EUR 3,000</i>
<i>Claimant 2 (DoubleB Management)</i>	<i>EUR 1,000</i>
<i>Claimant 3 (Bell Sports)</i>	<i>EUR 1,000</i>
<i>Respondent (S.S. Felice Scandone Avellino)</i>	<i>EUR 5,000”</i>

17. Claimant 2 paid its share of the Advance on Costs on 26 October 2012. Claimant 1 paid his share of the Advance on Costs on 1 November 2012. Claimant 3 paid its share of the Advance on Costs on 2 November 2012. The Respondent paid its share of the Advance on Costs on 8 November 2012.
18. On 6 November 2012, the Arbitrator granted the Respondent an extension until 20 November 2012 to file its Answer, in order to enable the Respondent to collate documents from the Italian Federation in support of its case.
19. The Respondent filed its Answer to the Request for Arbitration together with a counterclaim (hereinafter the “Counterclaim”) on 20 November 2012.
20. On 28 November 2012, the Arbitrator issued a Procedural Order (hereinafter the “First Procedural Order”) in which he:
 - (i) requested further information from the Claimants;
 - (ii) invited the Claimants to respond to the Respondent’s Counterclaim; and
 - (iii) requested that the Respondent provide further details of the damages claimed in the Counterclaim.
21. The Respondent submitted its response to the First Procedural Order on 13 December 2012.

22. On 14 December 2012, the Arbitrator granted the Claimants an extension until 17 December 2012 to file their response to the First Procedural Order, in order to enable the Claimants to arrange translation of certain documents.
23. On 17 December 2012, the Claimants submitted their response to the First Procedural Order.
24. By Procedural Order dated 28 December 2012, the Arbitrator declared the exchange of documents complete, and requested that the Parties submit detailed accounts of their costs by 8 January 2013. By email dated 8 January 2013, the BAT Secretariat extended the deadline for the Parties to submit detailed accounts of their costs until 11 January 2013.
25. On 10 January 2013, the Respondent submitted an invoice which had been issued by its legal representative on 30 November 2012. The invoice stated:

“	Euro
<i>BAT – Answer and counterclaim vs Mr. Thomas +2</i>	7,000.00
<i>General disbursements 5%</i>	350.00
<i>Milan Bar Tax 4%</i>	294.00
<i>Subtotal</i>	7,644.00
<i>V.A.T. 21%</i>	1,605.24
<i>Stamps for per official translation (Spese anticipate ART. 15 Dpr 633/72)</i>	43.86
<i>Total including VAT</i>	9,293.10
<i>Withholding Tax 20%</i>	1,470.00
Total Due	€7,823.10”

26. The Respondent also submitted a “pro-forma invoice” dated 9 January 2013 issued by its legal representative, reflecting further costs “to be incurred by S.S. Scandone with reference to the BAT procedure”. The invoice stated:

“ **Euro**



BASKETBALL
ARBITRAL TRIBUNAL

<i>BAT against Thomas + 2</i>	7,000.00
<i>General disbursements 5%</i>	350.00
<i>Milan Bar Tax 4%</i>	294.00
<i>Subtotal</i>	7,644.00
<i>V.A.T. 21%</i>	1,605.24
<i>Total including VAT</i>	9,249.24
<i>Withholding Tax 20%</i>	1,470.00
Total Due	€7,779.24

27. On 11 January 2013, Claimant 1 submitted the following account of costs:

“LEGAL COSTS

Omar Abdul Thomas – Avellino

Authority: BAT

Value of dispute \$130,000.00 (€98,300.00)

	Onorari	Diritti	Spese
<i>Study phase of the dispute</i>	1,950.00	0.00	0.00
<i>Introductory phase of the dispute</i>	990.00	0.00	0.00
<i>Preliminary stage of the dispute</i>	1,930.00	0.00	0.00
<i>Conclusions and final demands</i>	2,930.00	0.00	0.00
<i>Non-reimbursable handling fee</i>			3,000.00
Total:	7,800.00	0.00	3,000.00

Riepilogo:

<i>Legal Fees</i>	€	7,800.00
<i>Total Expenses</i>	€	3,000.00
TOTAL	€	10,800.00

*Plus 4% Cassa Avvocati e 21% VAT^{***}*

28. On 11 January 2013, Claimant 2 and Claimant 3 submitted the following account of costs:

“LEGAL COSTS

Bergamaschi (DoubleB) + Bell Sport – Avellino

Authority: BAT

Value of the dispute \$30,000.00 (€24,000.00)

	Onorari	Dirtti	Spese
<i>Study phase of dispute</i>	1,200.00	0.00	0.00
<i>Introductory phase of the dispute</i>	600.00	0.00	0.00
<i>Preliminary stage of the dispute</i>	1,200.00	0.00	0.00
<i>Conclusions and final demands</i>	1,500.00	0.00	0.00
<i>Transactions costs</i>			320.00
<i>Certifications fees</i>			43.86
Total	4,500.00	0.00	363.86

Riepilogo:

<i>Legal Fees</i>	€	4,500.00
<i>Total Expenses</i>	€	363.86
TOTAL	€	4,863.86

Plus 4% Cassa Avvocati e 21% VAT"

29. By email dated 12 January 2013, the BAT Secretariat sent the Parties' respective account of costs to one another and requested that the Parties submit any comments on the other side's account of costs by no later than 17 January 2013. None of the Parties submitted any comments on the accounts of costs.
30. Since none of the Parties filed an application for a hearing, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the award on the basis of the written submissions of the Parties.

4. The Parties' Submissions

4.1 The Claimants' Request for Arbitration

31. The Claimants submit that Claimant 1 played for the Respondent during the 2010-2011 season pursuant to the Player Contract. The Claimants submit that the Respondent

paid Claimant 1 only USD 200,000.00 in salary in relation to the 2010-2011 season, instead of USD 300,000.00, as provided for under the Player Contract. The Claimants also claim the Respondent failed to pay USD 20,000.00 of bonus payments that Claimant 1 earned during the 2010-2011 season. Accordingly, Claimant 1 claims USD 120,000.00 in outstanding salary and bonus payments from the Respondent. Claimant 1 also claims from the Respondent penalty payment fees of USD 50.00 per day for late payment of the outstanding salary payments, pursuant to Article 4 of the Player Contract.

32. The Claimants further submit that the Player Contract should be considered terminated and void for two reasons: (i) the Respondent failed to make payments under it; and (ii) Claimant 1 no longer held a European passport from June 2011. Article 1 of the Player Contract states “[t]his Agreement is valid only if the Player is holding a European passport.”
33. Claimant 2 and Claimant 3 submit that the Respondent has failed to pay agency fees of USD 30,000.00 provided for under the Agent Contract, despite the fact that Claimant 2 and Claimant 3 performed the Agent Contract by assisting the Respondent in locating and contracting with Claimant 1. Accordingly, Claimant 2 and Claimant 3 claim from the Respondent USD 30,000.00 in unpaid agency fees, together with interest at a rate of 5% per annum.
34. The Claimants’ request for relief states:

“REQUEST FOR RELIEF

Concerning claimant 1 – Mr Omar Abdul Thomas (PLAYER):

*The Player requests the court to award the Player with the following due payments from the Club **S.S. Scandone Avellino**:*

- *To pay the Player the remaining sum of \$120,000.00 net of guaranteed salary and bonus for 2010/2011 season;*

- *To pay to the Player penalty fee for late payment calculated in \$ 50.00 per each day of late, starting from 10th November 2011 until actual payment;*
- *To pay to the Player all arbitration proceeding costs;*
- *To pay to the Player all legal fees and expenses of accrued to the Player from these arbitration proceedings;*

Concerning claimant 2 – Luigi Bergamaschi (FIBA AGENT Lic. n. 200802474) of “DoubleB Management s.a.s.” and of “Bell Sports Inc.” (AGENT)

*The Agent requests the court to award the Agents with the following due payments from the Club **S.S. Felice Scandone Avellino:***

- *To pay to the Agent the fee of \$30,000.00 net for 2010/2011 season;*
- *To pay to the Agent interest at the applicable Swiss statutory rate (5%) for the delayed payments from 18th November 2011;*
- *To pay to the Agent all arbitration proceeding costs;*
- *To pay to the Agent all legal fees and expenses of accrued to the Agents from these arbitration proceedings;”*

4.2 The Respondent's Answer

35. The Respondent does not dispute that it has failed to pay Claimant 1 USD 120,000.00 in outstanding salary and bonus payments for the 2010-2011 season.
36. However, the Respondent submits that no sums were payable under the Player Contract because the Player Contract is invalid or null and void. The Respondent submits that Claimant 1 has never held a valid European passport and so the Player Contract has never been valid because Article 1 of the Player Contract provides that it is valid only if Claimant 1 is holding a European passport.
37. The Respondent submits that the Slovenian passport which Claimant 1 claims that he

held during the 2010-2011 season is a forged document.

38. The Respondent submits that the Player Contract is invalid and so the arbitration agreement contained in the Player contract is also invalid. The Respondent submits that, accordingly, the BAT does not have jurisdiction to determine the Claimants' claim.
39. The Respondent submits, in the alternative, that if the BAT does have jurisdiction to determine the dispute, the Claimants' claims should fail because the Claimants had no entitlement to the sums claimed on the basis that Claimant 1 has never held a valid European passport and so the Player Contract has never been valid.
40. The Respondent submits that the Agent Contract was signed "*as an appendix*" of the Player Contract and, as such, the Agent Contract is invalid on the basis that the Player Contract is invalid. On these grounds, the Respondent submits that no agency fee is payable to Claimant 2 and Claimant 3.

4.3 The Respondent's Counterclaim

41. The Respondent has made a counterclaim against Claimant 1. Specifically, the Respondent seeks damages from Claimant 1 as follows:
 - (i) Compensation for the costs incurred in searching for a replacement player for Claimant 1 (which the Respondent suggests could be determined at EUR 5,000.00).
 - (ii) EUR 15,000.00 as compensation for the costs incurred in employing a replacement player for Claimant 1.
 - (iii) Compensation to reflect the fact that the Respondent was unable to

benefit from any contribution after the 2010-2011 season (because Claimant 1 ceased playing for the Respondent).

- (iv) Compensation to reflect the fact that the Respondent was unable to “sell” Claimant 1’s contract after the 2010-2011 season. The Respondent suggests that USD 150,000.00 would be an appropriate amount of compensation because Article 5 of the Player Contract provides that Claimant 1 can be “bought out” of the Player Contract for USD 150,000.00.
- (v) Compensation for the reputational damage suffered by the Respondent and caused by various regulatory investigations into the matter of Claimant 1’s forged Slovenian passport.
- (vi) Compensation for costs incurred by the Respondent in providing to Claimant 1 a furnished apartment, a car and return plane tickets from Italy to the USA.

42. In the request for relief in the Respondent’s Counterclaim, the Respondent states:

“Request for Relief

Respondent’s requests (in addition to the rejection of Claimants’ requests):

- 1) *Declaration of lack of jurisdiction from the Arbitrator;*
- 2) *Repayment and restitution of all the amounts already paid to Mr. Thomas (USD 200,000);*
- 3) *Damages evaluated in USD 100,000 or to be differently evaluated by the Arbitrator ex aequo et bono;*
- 4) *Payment by Claimants, jointly or severally, to the Respondent of all arbitration proceeding costs;*

5) *Payment by Claimants, jointly or severally, to the Respondent of all legal fees and expenses accrued by SS Scandone.”*

4.4 Claimant 1’s response to the Respondent’s Counterclaim

43. Claimant 1 admits paying EUR 40,000.00 for a Slovenian passport, but claims that he acquired the passport in good faith and that he was unaware the passport was illegitimate until July 2011.
44. Claimant 2 and Claimant 3 submit that they were unaware that Claimant 1’s Slovenian passport was not valid at the time that the Agent Contract was signed. Claimant 2 and Claimant 3 further submit that Claimant 1 had obtained the Slovenian passport before they began acting as his agent. Claimant 2 and Claimant 3 state that (unlike Claimant 1) no disciplinary proceedings were brought against them by either the Italian Federation or any Italian state authority.
45. The Claimants deny the Counterclaim in full. In response to the claims made by the Respondent in its Counterclaim, the Claimants submit as follows:
 - (i) The Respondent suffered no direct or indirect consequences as a result of Claimant 1 holding a Slovenian passport that was not valid. In particular, no disciplinary proceedings were brought against the Respondent.
 - (ii) The “buyout” clause in the Player Contract which the Respondent submits should be used to determine the level of compensation payable in order to reflect the fact that the Respondent was unable to sell Claimant 1’s contract, is for the benefit of Claimant 1 and not the Respondent.

- (iii) The Respondent breached the Player Contract by failing to make salary payments.
 - (iv) Claimant 1 played 34 games for the Respondent and was MVP of the Italian league for the 2010-2011 season and should be rewarded accordingly.
46. As an alternative, the Respondent submits that the Arbitrator could consider the salary and benefits that Claimant 1 has already received as sufficient compensation for the services rendered to the Respondent by him during the 2010-2011 season.

5. Jurisdiction

47. 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).
48. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.

5.1 Arbitrability

49. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and

is thus arbitrable within the meaning of Article 177(1) PILA.¹

5.2 Formal and substantive validity of the arbitration agreements

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

"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.

3 The validity of an arbitration agreement may not be contested on the grounds that the principal contract is invalid or that the arbitration agreement concerns a dispute which has not yet arisen."

51. Article 8 of the Player Contract stipulates:

"ARTICLE 8 - DISPUTE

Governing Law of the Agreement is covered by the National Laws of Italy the provisions and terms as stated herein in English and through any disputes between the parties will be resolved by the Italian courts. This English contract will govern in said disputes and will be the only contract recognized. The Club warrants that this is a valid contract under Italy Law and that any other league or team contract is not valid and this agreement is the one the parties will abide by. Any provision that cannot be enforced shall be modified to reflect the intentions of the parties as contained herein and to restore to the Player all rights to compensation and benefits under this Agreement."

52. Article 12 of the Player Contract stipulates:

"ARTICLE 12 - ARBITRATION

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

53. The Agent Contract stipulates:

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

54. The Arbitrator notes that the FIBA Arbitral Tribunal was renamed the Basketball Arbitral Tribunal on 1 April 2011 (see also Article 18.2 of the BAT Rules).

55. The Player Contract and the Agent Contract are both in written form and thus the arbitration clauses in each contract fulfil the formal requirements of Article 178(1) PILA.

56. The Arbitrator notes that Article 8 of the Player Contract provides for disputes to be referred to the Italian courts, whereas Article 12 of the Player Contract states that "[a]ny dispute arising from or related to the present Contract shall be submitted to the FIBA Arbitral Tribunal". The Arbitrator notes that Article 8 is not stated to be an exclusive jurisdiction clause in favour of the Italian courts. Therefore, the effect of Article 8, when

read in conjunction with Article 12, is not to prohibit the Parties from referring a dispute arising out of the Player Contract to the BAT for determination. Furthermore, none of the Parties has suggested that the present dispute should be referred to the Italian courts instead of BAT, or that BAT should not determine the dispute because of the provisions of Article 8 of the Player Contract.

57. The Respondent submitted that there is no valid arbitration agreement between the Parties and therefore the BAT has no jurisdiction to determine the present dispute. The Respondent argued that the Player Contract was not valid because it is a requirement under Article 1 that Claimant 1 must hold a European passport for the Player Contract to be valid. The Respondent submitted that Claimant 1 did not hold a valid European passport and so the Player Contract is not valid. The Respondent argued that, because the Player Contract is not valid, it follows that the arbitration agreement contained within the Player Contract is not valid either.
58. Pursuant to Article 1.3 of the BAT Rules, “[t]he Arbitrator shall have the power to rule on his/her own jurisdiction, including on any objection with respect to the existence, scope or validity of the arbitration agreement.”
59. Article 178(3) PILA specifically states that the “*validity of an arbitration agreement may not be contested on the grounds that the principal contract is invalid*”. On the basis of this provision of the PILA (and regardless of whether or not Claimant 1 held a European passport), the Arbitrator rejects the Respondent’s argument that the BAT does not have jurisdiction to determine the present dispute because the Player Contract is invalid or null and void.
60. With respect to substantive validity of the Agent Contract, the Arbitrator considers that there are no indications which could cast doubt on the validity of the arbitration agreement under Swiss law (cf. Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present Contract” covers the present dispute.

61. In light of the above, the Arbitrator finds that the BAT has jurisdiction to hear this dispute.

6. Discussion

6.1 Applicable Law – ex aequo et bono

62. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the Parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the Parties may authorize the arbitrators to decide “*en équité*”, as opposed to a decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

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

63. 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.”

64. Article 8 of the Player Contract provides that the “[g]overning Law of the Agreement is covered by the National Laws of Italy”. However, Article 12 of the Player Contract states that “[t]he arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono”. The Arbitrator finds that effect of these provisions is that any disputes relating to the Player Contract that are to be determined by the Italian courts in accordance with Article 8 are to be determined with reference to Italian law, whereas any disputes that are to be determined by BAT in accordance with Article 12 are to be determined ex

aequo et bono. The Arbitrator notes that the present dispute is one that has been referred for determination by BAT in accordance with Article 12.

65. The Agent Contract states “[t]he arbitrator and CAS upon appeal shall decide the dispute *ex aequo et bono*”.
66. In light of the above, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.
67. 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*² (Concordat),³ under which Swiss courts have held that arbitration *en équité* is fundamentally different from arbitration *en droit* :

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

68. 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
69. 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

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.

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

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

any particular national or international law”.

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

6.2 Findings

6.2.1 The validity of the Player Contract

71. Claimant 1 claims unpaid salary and bonuses which are payable under the Player Contract. Claimant 1's claim therefore turns on the validity of the Player Contract. Article 1 of the Player Contract provides: “[t]his Agreement is valid only if the Player is holding a European passport.”

72. The Respondent submits that the Player Contract is not valid because Claimant 1 did not at any point hold a valid European passport. The Respondent has submitted substantial evidence to support its assertion that the Slovenian passport which Claimant 1 held was a forgery, and not a valid European passport. Such evidence includes a decision of the Italian Federation which states that Claimant 1 admitted, during the course of an investigation, that his Slovenian passport was a forgery. Furthermore, Claimant 1 has not disputed the fact that the Slovenian passport was a forgery. Instead, Claimant 1 has argued that he was unaware that the practice of purchasing a European passport (at a cost of EUR 40,000.00) was improper and that he acted at all times in good faith. The Arbitrator finds that the question of whether or not Claimant 1 acted in good faith is irrelevant to the determination of whether or not he held a valid European passport.

73. In their submissions, the Claimants suggested that Claimant 1 was able to terminate the Player Contract at the end of the 2010-2011 season because, at that time, Claimant 1 was “no longer in possession of a European passport.” The implication of

this submission is that Claimant 1 had, until then, been in possession of a European passport. While it is true that Claimant 1 held a forged, unlawful European passport, he did not hold a valid one. The Player Contract provides that Claimant 1 must hold “a *European passport*”. The Player Contract does not specify that the European passport must be “valid” or “lawful”. However, the Arbitrator finds that the reference to “European passport” in the Player Contract must be a reference to a valid, lawful European passport, and cannot include forged or otherwise illegitimate passports.

74. One of the purposes of such provisions in the contracts of sportsmen playing professional sport within the EU is to assist clubs in selecting players who are EU citizens and therefore fall within quotas which prescribe the number of non-EU players that a club is entitled to field in a given competition. It would defeat the purpose of provisions such as the one contained in Article 1 of the Player Contract if the term “European passport” included forged or invalid passports.
75. In light of the foregoing, the Arbitrator finds that Claimant 1 did not hold a European passport during the term of the Player Contract. Accordingly, and pursuant to Article 1, the Arbitrator finds that the Player Contract was not a valid agreement. In light of this, the Arbitrator finds that the provisions of the Player Contract in relation to salary, bonuses and late payment penalties are not enforceable against the Respondent. Claimant 1’s claims for outstanding salary and bonus payments are therefore rejected by the Arbitrator.
76. Furthermore, given that the Player Contract was not valid, the Arbitrator finds that the Respondent was not obliged to make the salary payments of USD 200,000.00 that it has made to Claimant 1.

6.2.2 The Respondent's Counterclaim

77. The Respondent claims various damages from Claimant 1. In relation to each heads of damage, the Arbitrator finds *ex aequo et bono* as follows:

- (i) The Respondent is entitled to compensation for costs incurred in *searching* for a replacement player for Claimant 1, because those costs were incurred as a consequence of Claimant 1 holding a forged European passport, in breach of the Player Contract.
- (ii) The Respondent is entitled to a limited amount of compensation for costs incurred in *employing* a replacement player for Claimant 1 because those costs were incurred as a consequence of Claimant 1 holding a forged European passport.
- (iii) The Respondent is entitled to a limited amount of compensation to reflect the fact that the Respondent was unable to benefit from any contribution from the Player after the 2010-2011 season.
- (iv) The Respondent is not entitled to compensation to reflect the value attributable to the buy-out clause in the Player Contract. The Respondent is already compensated for being deprived of Claimant 1 for the 2011-2012 season, on account of the fact that the Arbitrator is awarding it damages as set out in sub-paragraphs (i) – (iii) above. The Arbitrator finds, *ex aequo et bono*, that no further compensation in this regard is payable.
- (v) The Respondent is not entitled to compensation for any reputational damage caused by various regulatory investigations into the matter of Claimant 1's forged Slovenian passport, because the Respondent has

failed to prove that it has suffered substantive reputation harm.

- (vi) The Respondent is not entitled to compensation for costs incurred by the Respondent in providing to Claimant 1 a furnished apartment, a car and return plane tickets from Italy to the USA, because the Respondent has failed to provide any evidence that it incurred such costs (such as receipts, invoices or bank statements), despite the fact that the Arbitrator specifically requested further details of such damages in the First Procedural Order.

78. In determining the total amount of the damages owed by Claimant 1 to the Respondent, the Arbitrator has considered the facts and circumstances of the case and in particular, the following factors:

- (i) The contribution made by Claimant 1 to the Respondent's team prior during the 2010-2011 season (in which Claimant 1 was Most Valuable Player/MVP of the Italian League). This is a factor in determining the loss suffered by the Respondent when it was deprived of Claimant 1's services for the 2011-2012 season.
- (ii) The evidence that the Respondent submitted to show that it incurred costs of EUR 15,000.00 in employing a replacement player for Claimant 1 (which includes a copy of the agreement that the Respondent signed with a replacement player).
- (iii) The fact that the Respondent submitted no evidence to show what costs it incurred in searching for a replacement player for Claimant 1.

79. Furthermore, while Claimant 1 was not entitled to any salary or bonus payments under the Player Contract (even those which were in fact paid), he did provide a very

substantial contribution to the Respondent's team during the 2010-2011 season, playing in 34 games and winning the MVP award of the Italian league. The Arbitrator finds, *ex aequo et bono*, that Claimant is entitled to be remunerated for the services that he provided to the Respondent during the 2010-2011 season.

80. In light of the above considerations, the Arbitrator finds, *ex aequo et bono*, that the amount that the Respondent has already paid Claimant 1 in salary for the 2010-2011 season (USD 200,000.00) is a fair and reasonable sum which reflects both Claimant 1's contribution to the Respondent and Claimant 1's liability for the damages claimed by the Respondent. The Arbitrator therefore finds that the Respondent's counterclaim is partially successful, however no payment is required to be made by Claimant 1 to the Respondent because the Respondent has been sufficiently compensated by the contribution made by Claimant 1 to the Respondent's team during the 2010-2011 season.

6.2.3 The validity of the Agent Contract

81. The Respondent claims that the Agent Contract "*can be considered as an appendix*" to the Player Contract and so, because the Player Contract is invalid, the Agent Contract is invalid by extension.
82. The Arbitrator rejects this argument. The Arbitrator finds that the Agent Contract is not an appendix of the Player Contract, but a separate, stand-alone agreement for the following reasons:
- (i) It is not stated anywhere in the Player Contract that there are any annexes or appendices to the Player Contract.
 - (ii) It is not stated anywhere in the Agent Contract that the Agent Contract is an appendix to the Player Contract.

- (iii) The Agent Contract is stated to be an “Agreement” between Claimant 2, Claimant 3 and the Respondent.
- (iv) Neither Claimant 2 nor Claimant 3 are parties to the Player Contract.
- (v) The Agent Contract contains contractual provisions and features which would be commonly found in a stand-alone contract, but may be less commonly found in an appendix to a contract (for example, the Agent Contract contains its own a governing law and jurisdiction clause and its own signature block).

83. The Arbitrator notes that the Claimants describe the Agent Contract in their Request For Arbitration as a “*separate agreement, connected to the player’s contract*”. The Arbitrator deems this a more accurate description of the Agent Contract than the Respondent’s submission that it is an “*appendix*” to the Player Contract. The Agent Contract is “connected” to the Player Contract in the sense that the Agent Contract refers to the Player Contract, however, for the reasons given above, the Agent Contract is a separate and distinct contract to the Player Contract.

84. In light of the above, the Arbitrator finds that the Agent Contract, as a stand-alone agreement, is not rendered invalid by the fact that the Player Contract is invalid.

85. The Agent Contract relates to Claimant 1’s employment with the Respondent for the seasons 2010-2011 and 2011-2012. Under the Agent Contract, the Respondent expressly states that it will pay Claimant 2 and Claimant 3 USD 30,000.00 for their assistance in “*locating and contracting with*” Claimant 1. It is not in dispute that Claimant 2 and Claimant 3 did assist the Respondent in locating and contracting with Claimant 1. Neither is it in dispute that Claimant 2 and Claimant 3 were unaware that Claimant 1’s Slovenian passport was a forgery at the time the Player Contract and Agent Contract were entered into. As such, the Arbitrator considers, *ex aequo et bono*,

that Claimant 2 and Claimant 3 should be entitled to some remuneration for the services that they rendered to Claimant 1 for the 2010-2011 season. The Agent Contract provides that the Respondent should pay Claimant 2 and Claimant 3 USD 30,000.00 in relation to the 2010-2011 season. The Arbitrator finds that this sum is an appropriate starting point in determining a fair level of remuneration for Claimant 2 and Claimant 3, but that it should be discounted to reflect the fact that the contract which Claimant 2 and Claimant 3 assisted the Respondent and Claimant 1 in entering into was ultimately invalid. In light of this, the Arbitrator finds, *ex aequo et bono*, that the Respondent shall pay USD 15,000.00 to Claimant 2 and Claimant 3 as compensation for unpaid agency fees.

6.2.4 Interest

86. Claimant 2 and Claimant 3 claim interest on the unpaid agency fees at a rate of 5% per annum from 18 November 2011. The Agent Contract provides that the agency fees for the 2010-2011 season were payable on 30 September 2011. On 18 November 2011, Claimant 2 wrote to the Respondent, requesting payment of the agency fees due under the Agent Contract.
87. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. Although the Agent Contract does not provide for the payment of default interest, it is a generally accepted principle which is embodied in most legal systems. Indeed, payment of interest is a customary and necessary compensation for late payment, and the Arbitrator considers that there is no reason why Claimant 2 and Claimant 3 should not be awarded interest in this case. The Arbitrator further considers, in line with the jurisprudence of the BAT, that 5% per annum is a reasonable rate of interest and that such rate should be applied in this case, accruing from the date requested by Claimant 2 and Claimant 3, because payment had fallen due by that date. Accordingly, the Arbitrator finds that the Respondent shall pay interest on the sum of USD 15,000.00 at

a rate of 5% per annum from 18 November 2011.

7. Costs

88. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the award or communicated to the Parties separately. Furthermore, Article 17.3 of the BAT Rules provides that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
89. 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 at EUR 8,855.00.
90. The Arbitrator notes that Claimant 1 was unsuccessful in establishing his claim, Claimant 2 and Claimant 3 were partially successful in establishing their claims, and the Respondent was partially successful in establishing its Counterclaim. Thus, the Arbitrator decides that in application of Article 17.3 of the BAT Rules, and in light of the circumstances of the case, Claimant 1 shall bear 80% of the costs of the arbitration and the Respondent shall bear 20% of the costs of the arbitration.
91. The Respondent has claimed in total EUR 15,502.34 in legal fees and expenses. The Arbitrator considers that such fees and costs are excessive for this case, given the

volume and content of submissions that were required to be made and having in mind also the maximum contribution set out in Article 17.4 of the BAT Rules. In the circumstances, the Arbitrator finds that it would be reasonable for Claimant 1 to pay to the Respondent EUR 8,000.00 as a contribution towards the Respondent's legal fees and expenses. Claimant 2 and Claimant 3 have claimed in total EUR 4,863.86 for legal fees and expenses. The Arbitrator considers it appropriate to take into account the non-reimbursable fee (EUR 3,000.00) paid by the Claimants when assessing the expenses incurred by the Parties in connection with these proceedings. The Arbitrator notes that Claimant 2 and Claimant 3 were only partially successful in establishing their claims. In the circumstances, the Arbitrator finds that it would be reasonable for the Respondent to pay EUR 1,000.00 to Claimant 2 and EUR 1,000.00 to Claimant 3 as a contribution towards their legal fees and expenses.

92. Therefore, the Arbitrator decides:

- (i) Claimant 1 shall pay to the Respondent EUR 2,084.00, as reimbursement of arbitration costs advanced by the Respondent;
- (ii) Claimant 1 shall pay to Claimant 2 EUR 1,000.00, as reimbursement of arbitration costs advanced by Claimant 2;
- (iii) Claimant 1 shall pay to Claimant 3 EUR 1,000.00, as reimbursement of arbitration costs advanced by Claimant 3;
- (iv) BAT shall reimburse EUR 1,145.00 to the Respondent, being the difference between the costs advanced by it (EUR 5,000.00) less 20% of the arbitration costs fixed by the BAT President (EUR 1,771.00) and less the amount to be reimbursed to it by Claimant 1 (EUR 2,084.00);



BASKETBALL
ARBITRAL TRIBUNAL

- (v) Claimant 1 shall pay to the Respondent EUR 8,000.00, as a contribution towards the Respondent's legal fees and expenses;
- (vi) The Respondent shall pay to Claimant 2 EUR 1,000.00, as a contribution towards Claimant 2's legal fees and expenses; and
- (vii) The Respondent shall pay to Claimant 3 EUR 1,000.00, as a contribution towards Claimant 3's legal fees and expenses.

8. AWARD

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

- 1. S.S. Felice Scandone Avellino is ordered to pay to DoubleB Management s.a.s. and Bell Sports Inc. USD 15,000.00 as compensation for unpaid agency fees relating to the 2010-2011 season, together with interest payable at a rate of 5% per annum from 18 November 2011 until the date that payment is made.**
- 2. Mr. Omar Abdul Thomas is ordered to pay to S.S. Felice Scandone Avellino EUR 8,000.00 as reimbursement for its legal fees and expenses.**
- 3. S.S. Felice Scandone Avellino is ordered to pay to DoubleB Management s.a.s. EUR 1,000.00 as reimbursement for its legal fees and expenses.**
- 4. S.S. Felice Scandone Avellino is ordered to pay to Bell Sports Inc. EUR 1,000.00 as reimbursement for its legal fees and expenses.**
- 5. Mr. Omar Abdul Thomas is ordered to pay to DoubleB Management s.a.s. EUR 1,000.00 as reimbursement of the advance on BAT costs.**
- 6. Mr. Omar Abdul Thomas is ordered to pay to and Bell Sports Inc. EUR 1,000.00 as reimbursement of the advance on BAT costs.**
- 7. Mr. Omar Abdul Thomas is ordered to pay to S.S. Felice Scandone Avellino EUR 2,084.00 as reimbursement of the advance on BAT costs.**
- 8. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 15 April 2013

Raj Parker
(Arbitrator)