



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0361/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Annett Rombach

in the arbitration proceedings between

Mr. Dwight Hardy Jr.

- Claimant -

represented by Mr. Guillermo Lopez Arana and Mr. Mikel Abete Vecino,
Attorneys at Law, c/ Maestro Ripoll 9, 28006 Madrid, Spain

vs.

S.S. Felice Scandone Avellino spa

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

- Respondent -

represented by Mr. Florenzo Storelli, Attorney at Law,
V. le Cadorna 50, 55100 Lucca, Italy

1. The Parties

1.1 The Claimant

1. The Claimant, Mr. Dwight Hardy Jr. (the "Player" or "Claimant"), is a professional basketball player from the United States of America.

1.2 The Respondent

2. S.S. Felice Scandone Avellino spa (the "Club" or "Respondent") is a professional basketball club with its seat in in Avellino, Italy.

2. The Arbitrator

3. On 25 February 2013, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the "BAT") appointed Ms. Annett Rombach as arbitrator (the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the "BAT Rules"). Neither of the Parties has raised any objections to the appointment of the Arbitrator nor to her declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. On 21 July 2012, the Parties entered into a labor contract (the "Player Contract"), pursuant to which Respondent engaged the Player as a professional basketball player for the 2012-2013 and 2013-2014 seasons. Pursuant to clause 5 of the Player Contract, the Player's base salary for the 2012-2013 season was agreed at USD

260,000 net, to be paid in 10 monthly shares of USD 23,000¹ on the 10th day of each month, plus an additional amount of USD 30,000 to be paid after the passing of the physical examination. For the 2013-2014 season, the Player was to receive a base salary of USD 260,000 net, to be paid in ten monthly shares of USD 26,000², payable on the 10th day of each month.

5. In the preamble of the Player Contract, the Parties declare:

“[t]hat the S.S. Felice Scandone is interested in contracting the services of Mr. Dwight Hardy as a basketball player for the 2012-2013 and 2013-2014 seasons. Provided that the Player has obtained a Cotonou passport before the first official Lega 1 game of the Club in the 2012-2013 season. The parties expressly submit the validity and enforceability of the present contract to the condition precedent.”

6. At the time of the conclusion of the Player Contract, the Player was in possession of a U.S. passport. It was envisioned between the Club and the Player that the Player, who has a Congolese father, would obtain a “Cotonou passport”, meaning a Congolese passport, which was to enable the Player to play in Italy as a non-foreign player.³
7. On 16 August 2012, the Player passed the physical examination and the Club effectuated its first payment.
8. On 22 September 2012, the Player obtained a Congolese passport, which was certified as legal and valid by the competent authorities in Congo on 5 October 2012. Following

¹ A portion of USD 10.000 thereof relates to an image rights contract between the Parties.

² A portion of USD 13.000 thereof relates to an image rights contract between the Parties.

³ The Cotonou agreement is “is the most comprehensive partnership agreement between developing countries [including Congo] and the EU” (see <http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/>). On the basis of the Cotonou agreement and as a holder of a Congolese passport, the Player was expected to be treated like an EU-player, namely he would not count against the quota of foreign players that the Club is allowed to hire under domestic regulations.

the issuance of his Congolese passport, the Player tried to obtain a working visa from the Italian Embassy in Congo, which was rejected due to alleged discrepancies in the Player's file regarding his birth place and parentage.

9. As a result of the rejection of the Player's visa by the Italian Embassy, the Italian Federation (the "FIP") – through its prosecutor's office – commenced an internal investigation with respect to the discrepancies that prevented the issuance of the Player's visa. As part of the investigation, the Club's President was summoned by FIP's prosecutor's office, as "*a person informed of the facts*".
10. On 28 October 2012 – under circumstances that are in dispute between the parties – the Player left Italy to fly to the United States, where he stayed until the investigation proceedings before the FIP's prosecutor's office were closed. The investigation was closed on 26 November 2012 with the prosecutor's office ordering

*"the dismissal of investigation No. 18/12-12 into Dwight Hardy Junior given that the documents state that he was born in Brazzaville (Congo) on 2nd December 1986 and that there is no evidence to support any infringement of the regulations."*⁴

11. Shortly after the FIP issued its order, the Player obtained a working visa for Italy and returned to Avellino on 6 December 2012. On 7 December 2012, the Player and the Club signed the Italian League contract (the "League Contract"). The Club then provided the Player with a membership card and, subsequently, he played in six matches in December 2012 and January 2013.
12. On 14 December 2012, the Player's agent sent a letter to the Club requesting salary and image payments of USD 82,000 in accordance with the Player Contract. The Club did not respond to the letter, nor did it satisfy Player's payment request.

⁴ Certified translation of exhibit 7 submitted by Respondent.

13. On 27 December 2012, the Player's agent sent another letter to the Club, reading (in relevant part) as follows:

"As of today, we have not received any communications or payments from your Club so I send this letter informing you that we have no other option than to claim the mentioned amounts [USD 82,000] before the Basketball Arbitral Tribunal (BAT), as the organization in charge of resolving these disputes in accordance with what is set forth in the labor contract.

I also inform you that my client will claim the mentioned amount without prejudice to enter a further claim before the same Tribunal asking to terminate the contract and asking for all the outstanding salary amounts in case your club remains in breach of its payment obligations towards him."

14. With letter dated 21 January 2013, the Player's agent informed the Club that the Claimant would terminate the Player Contract. The relevant parts of the letter read as follows:

*"Following the previous conversations and communications regarding the situation of the Player Mr. Dwight Hardy and given the fact that your Club has not given a satisfactory response, **Mr. Dwight Hardy hereby exercises his option to terminate the agreement** signed on July 21st 2012 ("Agreement") between SS Felice Scandone ("Club") and Mr. Hardy ("Player")..."*

(emphasis in the original)

15. On 7 March 2013, the Player signed a new labor contract with the Italian second division team Basket Barcellona s.r.l. (covering the remainder of the 2012-2013 season). Under his new labor contract, Claimant was to receive USD 60,000 from March 2013 until June 2013.

3.2 The Proceedings before the BAT

16. On 3 January 2013, Claimant filed a Request for Arbitration (with several exhibits) which was received by the BAT Secretariat on the following day. The non-reimbursable handling fee of EUR 2,000 was received in the BAT bank account on 7 January 2013.

17. On 28 February 2013, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 22 March 2013 (the “Answer”), and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 13 March 2013 as follows:

<i>“Claimant (Mr. Dwight Hardy Junior)</i>	<i>EUR 4,500</i>
<i>Respondent (SS Felice Scandone)</i>	<i>EUR 4,500”</i>

18. On 4 March 2013, Claimant filed additional claims against Respondent and requested a respective amendment of his Request for Arbitration (the “Amendment”). Respondent was invited to comment on the Amendment by 22 March 2013.
19. On 22 March 2013, Respondent submitted his Answer to the Request for Arbitration and the Amendment and introduced a counterclaim (the “Counterclaim”). As some of the documents were illegible (as a result of the facsimile transmission), the BAT Secretariat requested Respondent to provide better copies thereof, which Respondent submitted by e-mail of the same day.
20. By letter to the Parties dated 26 March 2013, in view of the Counterclaim filed by Respondent and in accordance with Article 9.3 of the BAT Arbitration Rules, the BAT Secretariat adjusted the Advance on Costs as follows:

<i>“Claimant (Mr. Dwight Hardy Junior)</i>	<i>EUR 4,500</i>
<i>Respondent (SS Felice Scandone)</i>	<i>EUR <u>6,500</u>”</i>

(emphasis in the original)

21. The Parties were requested to pay the outstanding portions of their respective share of the Advance on Costs by 8 April 2013.
22. By e-mail of 27 March 2013, Claimant confirmed that it would pay its share of the Advance on Costs within the deadline. Furthermore, Claimant sought confirmation that

in addition to the original Request for Arbitration, the Amendment was also under review by the Arbitrator. The BAT Secretariat, on the same day, confirmed that the Arbitrator was reviewing all documents submitted by the Parties up until that moment.

23. On 11 April 2013, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs.
24. Upon invitation by the Arbitrator, Claimant submitted comments on Respondent's Answer and Counterclaim on 25 April 2013 (the "Reply").
25. By Procedural Order of 3 May 2013, Respondent was invited to comment on Claimant's Reply by no later than 17 May 2013. In addition thereto, the Arbitrator requested Respondent to provide a legible copy of Exhibit 9 and an English translation of Exhibits 7 and 8 to his Request for Arbitration. Claimant was requested to inform the Arbitrator whether he secured a new contract following the termination of his employment with Respondent on 21 January 2013, and to provide a copy of any such contract.
26. In accordance with the Procedural Order, Claimant submitted a copy of his new employment contract with the second division team Basket Barcellona Srl on 13 May 2013. Respondent submitted his comments to Claimant's Reply on 17 May 2013. He also filed (certified) translations of the exhibits 7 and 8 (on 13 May 2013 and on 22 May 2013).
27. By Procedural Order of 28 May 2013, the Arbitrator declared the exchange of documents completed and invited the Parties to submit a detailed account of their costs by no later than 7 June 2013.
28. On 5 June 2013, Respondent submitted the following account of costs:



BASKETBALL ARBITRAL TRIBUNAL

“1) Advance of Respondent’s costs:	Euro 6.500,00
2) Lawyer’s handling fee:	
- N. 2 of statement of defence:	Euro 4.500,00
- Examination and study acts:	Euro 3.000,00
- Communication between parts [sic] and arbitrator and costs for official translation of acts:	Euro 1.000,00
Total:	Euro 15.000,00”

29. On 7 June 2013, Claimant submitted its account of costs as follows:

“- Arbitral fees:	
• Handling fee:	2,000 €
• Advance on costs (Claimant)	4,500 €
- Legal report	800 €
- Legal advising during the procedure	500 €
- Translations	150 €
- Copies of documents	25 €

TOTAL: 7,975 EUROS”

30. On 7 June 2013, the BAT Secretariat forwarded the cost accounts to the Parties and requested their comments on the other side’s account of costs by no later than 14 June 2013. Neither party filed any comments.

31. The Parties did not request the BAT to hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the BAT Rules not to hold a hearing and to render the award solely based on the written record before her.

4. The Positions of the Parties

32. This section of the award does not contain an exhaustive list of the Parties’ contentions, its aim being to provide a summary of the substance of the Parties’ main arguments. In considering and deciding upon the Parties’ claims in this award, the Arbitrator has accounted for and carefully considered all of the submissions made and

evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award or in the discussion of the claims below.

4.1 Claimant's Position and Request for Relief

33. Claimant submits the following in substance:

- The Player Contract between Player and Club became fully effective when the Player obtained a valid Congolese passport on 22 September 2012, seven days before the first official Italian league game. The competent Congolese authorities and ultimately the FIP confirmed the validity of the passport so that the Player could – eventually – be registered as a Cotonou player.
- It is irrelevant that Player did not obtain a working visa for Italy before the official start of the 2012-2013 season. The Player Contract's validity was conditioned solely on the timely issuance of the Congolese passport and not on any further documentation the issuance of which was outside the Player's control.
- The procedure for obtaining a Professional Athlete visa in Italy cannot be initiated by the Player. The visa is issued through the League's and the Italian Olympic Committee's approval. It was the Club who managed the visa situation.
- The Player always followed the instructions of the Club. Specifically, the Player travelled to the United States on 28 October 2012 upon the Club's request to obtain an Italian visa at the Italian consulate in New York City. Hence, the Player never abandoned the team. As per the Club's instructions, he also participated in training sessions, practice games and pre-season activities after he signed the Player Contract.
- After his return from the United States, the Player continued to honour the Player Contract and performed the duties stipulated thereunder despite the Club's default on its payment obligations.

- As a result of the validity of the Player Contract, Claimant is entitled to all payments stipulated thereunder, and he vigorously denies any alleged payment claims by the Club.

34. Pursuant to the Request for Arbitration and the Amendment, Claimant submits the following request for relief:

“1. To award the claimant with:

a) *Immediate payment by the Respondent of **270,000 USD net** corresponding to:*

- **220.000 USD as the remaining owed salary of the entire 2012-13 season.**

- **50.000 USD net as the amount to be paid by the club to the Player in the event the Club executes the unilateral option to terminate the labor contract of the Player at the end of the 2012-13 season for the 2013-14 season, established in the fifteenth clause of the aforementioned contract.**

- **Plus the interests at the applicable Swiss statutory rate, starting for [sic] September 10th 2012**

2. **To award the Claimant with the full costs of this arbitration plus reasonable attorney’s fees.”**

(emphasis in the original)

4.2 Respondent's Position and Request for Relief

35. Respondent submits the following in substance:

- The Player Contract is invalid and unenforceable because the Claimant did not obtain an Italian working visa and a FIP membership card before the official start of the 2012-2013 season. The validity of the Player Contract was expressly conditioned on the issuance of a Cotonou passport that is valid for the purpose

of allowing the Player to obtain the necessary documents for registration as a Cotonou athlete.

- The Congolese passport obtained by the Player was unfit for the purpose of equipping him with a working visa and a FIP membership card in time for the beginning of the 2012-2013 season.
- It was the Player's obligation to submit proper documentation that would allow the Club to register him as a Cotonou athlete. The Club did everything it could to obtain a working visa and a FIP membership card for the Player and cannot be blamed for the unsuitability of the documentation provided by the Player.
- The Player decided to leave Italy to go the United States on 28 October 2012 without having received any instruction from the Club. He thereby acknowledged the invalidity of the Player Contract.
- Only upon the Player's unauthorized departure from Italy did the Club cease to make further payments to him, relying on the legal principle of *inadimplenti non est adimplendum* (One has no need to respect his obligation if the counter-party has not respected his own).
- The Player's return to Italy once he was in possession of a visa was not requested by the Club. The Club, however, was still interested in contracting the Player for the remainder of the season, also in light of the fact that it had already paid him USD 44,000 in September 2012 (in reliance on the Player Contract to become effective).
- The Club commenced a negotiation and provisionally agreed on a new contract with the Player (the League Contract signed on 7 December 2012) until the negotiations between the parties would result in the conclusion of a new player contract (which eventually never happened because of the Player's decision to terminate his relationship with the Club).

36. According to the Answer to the Request for Arbitration (including the Amendment), Respondent submits the following request for relief:



BASKETBALL

ARBITRAL TRIBUNAL

“- in theory, reject in toto the request for relief made by Mr. Dwight Hardy Junior against the Society in consideration of the invalidity and unenforceability of the Labor Agreement enforced by the claimant, and condemn Mr. Dwight Hardy Junior to refund the amount of 44.000,00 USD, unjustly received, being in fact failed its title eligibility.

- Subordinately, reject in toto the request for relief made by Mr. Dwight Hardy Junior against the Society in consideration of no breach of Labor Agreement is attributable to the Society, in accordance with the principles of aequo et bono, which rule the present arbitration, and in particular the principle of “inadimplenti non est adiplendum” and condemn Mr. Dwight Hardy Junior to refund the amount of 44.000,00 USD, unjustly received, because of there isn’t any title eligibility;

- Furthermore, if the BAT still wants to recognize a fair and reasonable compensation for the player’s real performances, considering the sum of 44.000,00 USD already received by the player and the sum of 30.000,00 USD recognized to him by the society, the compensation of the predicted amounts and so condemn Mr. Dwight Hardy Junior to refund to the Society the difference. {sic}”

5. The Jurisdiction of the BAT

37. Pursuant to Art. 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”).
38. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
39. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Art. 177(1) PILA.
40. The jurisdiction of the BAT in this dispute follows from Clause 16 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 [sic] of the parties’ domicile. The language of the arbitration shall be In [sic] English. The arbitrator shall decide the dispute ex aequo et bono.”

41. The agreement is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA.
42. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity of the arbitration agreement in the present matter under Swiss law (cf. Article 178(2) PILA). In particular, the wording, “[a]ny dispute arising from or related to the present contract” in Clause 16 of the Player Contract clearly covers the present dispute. Furthermore, Respondent did not contest the jurisdiction of the BAT.
43. The Parties’ dispute about the validity of the Player Contract, being the agreement containing the arbitration clause, does not call into question the validity of the arbitration agreement. Article 178 (3) PILA clearly states that the (potential) invalidity of the main contract does not generally affect the parties’ arbitration agreement. This separability doctrine, which is well established in Switzerland and many other jurisdictions, ensures that the arbitration agreement – as a separate contract – survives the invalidity or unenforceability of the main contract even when the arbitration clause forms an integral part of the main contract. Only in the (exceptional) event that the arbitration agreement suffers from the same defect as the rest of the main contract, the arbitration clause shares the fate of the main contract and must be deemed void.
44. This is not the case here. Respondent’s challenge with respect to the validity of the Player’s Contract must be considered independent from the arbitration agreement. The question of whether or not the condition precedent in the preamble was fulfilled in time

cannot have any bearing on the Parties' intention to submit their disputes arising out of the (contested) contract to the BAT. This interpretation is confirmed by the fact that Respondent never challenged the jurisdiction of the BAT despite its efforts to bring about the invalidity of the Player Contract. In fact, Respondent even brought a claim itself on the basis of the same arbitration agreement, seeking repayment of monies it had transferred to the Player in accordance with the Player Contract after his passing of the physical examination.

45. In view of all the above, the Arbitrator, therefore, holds that she has jurisdiction to decide the claims submitted to her in the present matter.

6. Admissibility of the Amendment to the Request for Arbitration

46. In his Request for Arbitration, Claimant initially sought payment of outstanding salaries which had (allegedly) become due until the filing of the Request for Arbitration on 4 January 2013. He expressly reserved the right to terminate the Player Contract and request payment of all outstanding salaries for 2012-2013 and 2013-2014 in case Respondent continued to refuse to fulfil its (alleged) obligations under the Player Contract. On 4 March 2013, after he had terminated the Player Contract, Claimant extended his original claim and requested all salaries outstanding for the entire 2012-2013 season plus the amount the Club has to pay in the event of a unilateral termination of the Player Contract under Clause 15 of the Player Contract.
47. The BAT Rules are silent with respect to the admissibility of an amendment to the Request for Arbitration. Following general considerations of procedural economy and efficiency, the Arbitrator finds that the Amendment is admissible. The request was submitted only a short time after the initiation of the arbitration and did not cause any delay. The additional claims are based on the same alleged breach as the original claim. Finally, Respondent commented on the Amendment in his Answer and in his Rejoinder without objecting to its procedural admissibility.

7. Admissibility of the Counterclaim

48. Art. 11.2 of the BAT Rules provides that the Respondent may file a counterclaim with his Answer. No particular prerequisites apply to the filing of such counterclaim. In particular, the BAT Rules do not provide that claim and counterclaim must show any material link. Furthermore, and in line with the standing BAT jurisprudence on the interpretation of Article 9.3 of the BAT Rules, the Counterclaim is admissible since the Respondent paid its share of the Advance on Costs.
49. The Arbitrator also has jurisdiction to decide over the Counterclaim. Respondent seeks the repayment of monies it had paid to the Player under the Player Contract. There can be no doubt that the arbitration clause covers such claim.

8. Applicable Law – *ex aequo et bono*

50. 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 reads as follows:

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

51. 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.”

52. In Clause 16 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 her in this proceeding *ex aequo et bono*. This also applies to Claimant's claims for the payment of interest, despite the fact that Claimant, in his request for relief, claims interest "at the applicable Swiss statutory rate". The Parties' choice of law generally extends to ancillary claims (such as claims for the payment of interest) absent any agreement between them to the contrary. There is nothing in the record suggesting that the parties agreed to have interest claims governed by Swiss law.

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

9. Findings

54. The central issues that must be resolved in deciding the present dispute are: (i) whether or not the Player Contract became valid upon the Player obtaining a Congolese passport on 22 September 2012 (see below 9.1); (ii) whether or not the League Contract signed on 7 December 2012 replaced any agreement that may have previously existed between the Parties (see below 9.2); and (iii) what consequences the findings on the first two questions trigger with respect to the quantum of the claims presented here (see below 9.3). Finally, the merits of the Counterclaim will be addressed (see below 9.4).

9.1 Did the Player Contract become valid upon Player obtaining a Congolese passport?

55. In the preamble of the Player Contract, the Parties expressly submit the validity of their agreement to the condition precedent that "*the Player has obtained a Cotonou passport before the first official Lega 1 game of the Club in the 2012-2013 season*".

56. It is undisputed between the Parties that the Player was issued a Congolese passport on 22 September 2012 (one week before the Club played its first Lega 1 game), and

that this passport was certified legal and valid by the competent authorities in Congo on 5 October 2012. It is also undisputed that the Italian embassy in Congo denied the issuance of an Italian working visa due to certain inconsistencies in the documents provided to it; that the FIP initiated an investigation about these inconsistencies; and that the investigation ended without a regulatory breach having been determined. Finally, it is undisputed that the Player eventually obtained a working visa and a FIP membership card, which allowed him to participate in games on behalf of the Club as of 7 December 2012.

57. The Parties disagree on the legal bearing these events have for the fulfilment of the above-cited condition precedent. Claimant argues that the issuance of the Congolese passport on 22 September 2012 was sufficient to fulfil the condition precedent. Respondent believes that the issuance of the passport alone was insufficient to trigger the stipulated condition. It employs an interpretation of the clause under which the passport to be issued to the Player had to be valid *for the purpose* of registering the Player at FIP as a so-called Cotonou athlete. Because the passport presented by the Player was unsuitable to obtain a working visa and a FIP membership card before the beginning of the 2012-2013 season, the condition precedent was, in Respondent's view, not fulfilled, and the Player Contract was void.
58. The Arbitrator does not agree with Respondent's view. Respondent's broad interpretation finds no support in the wording of the Player Contract, which defines the condition precedent in unambiguous terms ("*provided that the Player has obtained a Cotonou passport*"). There is no indication, and Respondent does not proffer any explanation, that the Parties intended to establish additional conditions for the Player Contract to become valid, beyond the requirement of a Cotonou passport to be issued to the Player prior to the first league game of the 2012-2013 season. Because of the far-reaching consequences the non-fulfilment of a contractual condition precedent has for the Player's employment situation, an extensive interpretation beyond the clear language of the disputed provision must be rejected. If Respondent really had the

intention to condition the validity of the Player Contract on any events other than the ones expressly mentioned in it, the Respondent should have ensured that this intent is unambiguously reflected in the contractual language. This is all the more true because the Player's influence on the issuance of a working visa and FIP membership card is (at best) limited. With respect to the Player's license, this is evidenced in Clause 3 of the Player Contract, providing that *"[t]he Club shall process the license in order to permit the Player to play with the first team of the Club..."*.

59. In addition thereto, the Arbitrator notes that the Club does not appear to have disputed the validity of the Player Contract before the initiation of the present proceedings. There is nothing on the record suggesting that the Club communicated its view of the invalidity of the Player Contract at any time after the beginning of the season, when the condition precedent needed to be fulfilled. The Club did not send any notice to the Player. It also did not seek reimbursement of certain payments it had made to Player before the submission of its Answer in these proceedings, which occurred almost six months after the beginning of the 2012-2013 season. It immediately added the Player to the team roster once the visa and license were eventually obtained, without making any reservation with respect to the purported invalidity of the Player Contract. These circumstances indicate that the Club itself felt bound by the Player Contract before the present dispute arose.
60. Consequently, the Arbitrator finds that the Player Contract's condition precedent was fulfilled when the Player obtained a Congolese passport on 22 September 2012. On that day, the Player Contract became retroactively effective, irrespective of the subsequent difficulties to provide the Player with a visa and FIP membership card.

9.2 Does the League Contract dated 7 December 2012 replace the Player Contract?

61. Respondent, in his Rejoinder, purports that the League Contract between the Club and the Player dated 7 December 2012 is a new contract which would – even if the Player Contract was deemed valid – replace the prior agreement between the Parties.
62. The League Contract is a one page skeleton agreement based on the template contract which the Italian federation requires to be signed for the purpose of registering the Player and providing him with a license. It includes no more but the very basic terms of the agreement between the Player and the Club, i.e. the names and addresses of the Parties and the salary to be paid to the Player for the 2012-2013 season. Pursuant to the League Contract, the Player was to receive an amount of EUR 179,270.00, without that a reference is made to a payment schedule or any other payment conditions. The Arbitrator notes that the salary amount stipulated under the League Contract apparently differs from the amounts stipulated under the Player Contract. Therefore, it must be determined, for the purpose of calculating the salary compensation to which the Player might be entitled (see the discussion below at 9.3), which of the contracts forms the relevant agreement between the Parties in the present dispute.
63. The starting point for any discussion of this nature is that the most recent contract in time will be the prevailing one, absent a sufficient reason for the Arbitrator to find that the most recent contract does not prevail (*jus posterior derogat priori*).⁵
64. In light of the circumstances invoked by the Parties, the Arbitrator finds that there is indeed sufficient reason in the present case to deviate from the starting point of *jus posterior derogat priori*. The arguments and evidence put forward by both Parties

⁵ This principle is also established in standing BAT jurisprudence, see e.g. BAT Award 0136/10 (Fields, Glass vs. B.C. Spartak St. Petersburg).

clearly establish that the League Contract was not intended to override the terms of the Player Contract, irrespective of the fact that Respondent contests the validity of the Player Contract.

65. As an initial matter, the Arbitrator notes that the League Contract submitted by the Club does not bear the Player's signature and is therefore not fully executed. Accordingly, there is good reason to assume that the League Contract did not become formally valid. This question can, however, be left undecided, because the evidence on the record shows that the Parties did not consider the League Contract as the governing agreement between them.
66. First, Respondent himself repeatedly references the Player Contract, and not the League Contract, in describing the relationship between the Parties. In its Answer, Respondent relies on the Player Contract to calculate the compensation to which Claimant is – in its view – entitled for the period in which he played for the Club (instead of referring to the League Contract's salary arrangement).⁶ Respondent further discusses Claimant's claim for buy-out compensation in clause 15 of the Player Contract and explains that the prerequisites for this type of compensation are not fulfilled, as the Club did not exercise the termination option. In fact, had Respondent felt bound by the League Contract, it would have simply argued that there is no buy-out compensation provided for in that agreement. Respondent also chose not to contest the jurisdiction of the BAT although the League Contract does not contain any dispute resolution clause (let alone one in favour of BAT). Yet, the Club itself relied on the arbitration agreement under the Player Contract in filing its Counterclaim as a part of the present proceeding.

⁶ See Section 4 of the Answer: *"To quantify the predicted compensation can be referenced [sic] to the salaries agreed in the invalid Labor Agreement..."*.

67. Second, Respondent's assertion that the League Contract replaced the Player Contract contradicts its own submission that the Parties were negotiating a new agreement after the Player returned from the United States, and that those negotiations were brought to an end by the Player's decision to initiate the present arbitration. The Club's reference to alleged negotiations between it and the Player *after* the signing of the League Contracts, evidences that the Parties took the League Contract for what it actually is: an additional agreement the Player needed to sign for the purpose of receiving a license to play basketball in Italy, and this agreement was not intended to alter the real agreement (here: the Player Contract) between the Club and the Player.
68. Third, it is apparent that a rudimentary one-page contract is not suitable to replace an elaborate contract prepared by the Parties prior to the beginning of the season. There is no logical explanation for why the Parties would want to abandon what they carefully negotiated earlier, without any corresponding replacements. Respondent does not offer any such explanation.
69. In view of these arguments, the Arbitrator finds that the League Contract does not replace the Player Contract validly agreed upon between the Parties.

9.3 To which amounts is Claimant entitled on the quantum side of his case?

70. The quantum side of Claimant's case consists of four positions: (i) outstanding salary payments until the termination of the Player Contract on 21 January 2013, (ii) additional (lost) salary payments for the remainder of the 2012-2013 season after the termination of the Player Contract, (iii) buy-out compensation under Clause 15 of the Player Contract, and (iv) interest on the amounts Respondent owes.

i) Outstanding Salary Payments until the termination of the Player Contract

71. Because the Player Contract was in full force and effect at all times, the Player is entitled to the (salary and image rights) payments stipulated thereunder. The Club owes the Player the following payments pursuant to clause 5 of the Player Contract:

- USD 30,000 net after passing the physical examination
- USD 23,000 (net) on 10 September 2012
- USD 23,000 (net) on 10 October 2012
- USD 23,000 (net) on 10 November 2012
- USD 23,000 (net) on 10 December 2012
- USD 23,000 (net) on 10 January 2013

72. From the total amount of USD 145,000 (net) due on 10 January 2013, an amount of USD 44,000 already paid by Respondent must be deducted.⁷ Therefore, Claimant is entitled to salary and image right payments in a total amount of USD 101,000 (net) for the time until the Player terminated the Player Contract on 21 January 2013.

73. The Arbitrator, deciding *ex aequo et bono*, does not consider it necessary to reduce the contractual compensation to which the Player is entitled even though he was prevented from participating in the Club's games before he obtained the visa in early December 2012. Pursuant to Clause 8 of the Player Contract, the agreement between the Parties was fully guaranteed, meaning that *"[i]n regards to all salary monies payable to the Player, the termination or suspension of this contract by the Club on account of injury, illness, or disability suffered or sustained by the Player, or on account of the Player's*

⁷ Claimant submits that Respondent had paid it only USD 30,000 after the passing of the physical examination. The Arbitrator, however, finds that Claimant indeed received a higher amount (i.e. USD 44,000) based on the payment vouchers submitted by Respondent (Exhibit 2 and 2 bis).

failure to exhibit sufficient skill shall in no way affect the Player's right to receive the sums payable under this contract at such times as the sums become due."

74. Clause 8 of the Player Contract illustrates the general principle that the Player's contractual payment claims remain unaffected by his inability to participate in the Club's games. While Clause 8, by way of example, primarily addresses physical reasons, the principle must apply all the more in the present case, where Claimant's inability to play for the Club was caused by legal reasons outside his control. The process of registering the Player based on the passport provided by him was primarily under the Club's control. In this context, the Club's allegation that it was Claimant's responsibility to provide proper documentation for the issuance of the visa and FIP license cannot be credited. The Club did not proffer any reliable evidence suggesting that it was the Player's fault that the issuance of the working visa was denied by the Italian embassy in Congo and that a FIP investigation was commenced thereafter. In fact, the dismissal of the investigation and the authority's finding that "*there is no evidence to support any infringement of the regulations*" indicates that the whole investigation process, which delayed the Player's registration as a Cotonou athlete, was not caused by any fault on the Claimant's side.
75. Claimant is entitled to full salary and image right compensation even for the time he spent (apart from his team) in the United States (from 28 October 2012 until 6 December 2012). There is no evidence in the record indicating that the Player left Italy in breach of the Club's instructions. Respondent's assertion that it was not involved in the Player's decision to travel to the United States is unsubstantiated and runs counter to the Club's continued interest in having the Player registered for the Italian league as soon as possible. In fact, the Player's trip to the United States eventually resulted in the issuance of a working visa enabling the Player to be provided with a FIP membership card.

76. For all of the above reasons, the Arbitrator finds that Claimant must be fully compensated for all outstanding payments until the termination of the Player Contract, i.e. must receive the amount of USD 101,000, which equals the amounts stipulated under the Player Contract (USD 145,000 in total) minus the amounts already received by the Player (USD 44,000).

ii) Additional Salary Payments for the remainder of the 2012-2013 season

77. By letter of 21 January 2013, Claimant effectively terminated the Player Contract for just cause, exercising his rights under Clause 11 of the Player Contract, which – in relevant part – sets forth as follows:

“In addition, if any scheduled payment is not received by the Player ... within 15 days of the due date, the Player’s performance obligations shall cease, 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.”

78. It is undisputed that the Club failed to make any payments to the Player since October 2012. The Player’s agent sent several warning letters that remained without any response. Therefore, the Player had a right to terminate the Player Contract in compliance with Clause 11.

79. The termination of the Player Contract, did not however discharge the Club from its duty to pay the Player the agreed salary and image rights compensation. The Player Contract makes clear that *“the duties and liabilities of Club under this agreement shall continue in full force and effect”*. This means that the Parties agreed that the Club remained liable for the contractual payments also after the termination of the Player Contract. Accordingly, the Player is principally entitled to such payments.

80. The Arbitrator must therefore calculate the compensation which is due by the Club for the period between the actual termination date and – following Claimant’s request for

relief – the end of the 2012-2013 season. According to generally accepted principles of the law of damages and also of labor law, any amounts which the Player earned or might earn by exercising reasonable care during the remaining term of the Player Contract must be deducted.⁸

81. With regard to the season 2012-2013, there are no indications that the Player earned or could have earned more than the amount of USD 60,000 as agreed with his new club. The Arbitrator therefore finds that the Player is entitled to compensation equal to the difference between the salary agreed in the Player Contract from February 2012 until the end of the season (5x USD 23,000 = 115,000) and the salary actually earned in the same period (USD 60,000), which amounts to USD 55,000.

iii) Buy-out compensation

82. In his request for relief, Claimant seeks an amount of USD 50.000 (net) *“as the amount to be paid by the club to the Player in the event the Club executes the unilateral option to terminate the labor contract of the Player at the end of the 2012-13 season for the 2013-14 season, established in the fifteenth clause of the aforementioned contract”*.

83. Clause 15 of the Player Contract stipulates as follows:

“The Club shall have the unilateral right to terminate the present agreement for the 2013-2014 season, from the end of the 2012-2013 official season until June 30th 2013, providing that the Club formally communicates the player or his agent its intention by written communication and paying the amount of 50,000 USD to the player.”

84. The requirements of Clause 15 of the Player Contract are clearly not met in the case at hand. The Claimant, who bears the burden of proof for showing that the prerequisites

⁸ These principles are also reflected in the BAT jurisprudence, see e.g. *ex multis* BAT Award 237/11 (Ivanovic, GPK Sports Management Limited vs. Kolossos Rhodes Basketball Club).

of his claim are fulfilled, failed to submit that the Club indeed terminated the Player Contract by written communication within the designated time window.

85. However, the question arises whether Claimant's request for buy-out compensation can be interpreted as a request for salary and image rights compensation with respect to the 2013-2014 season (to which Claimant would generally be entitled pursuant to the principles explained above). The Arbitrator finds that this is not possible.
86. The Arbitrator is not in a position to override the clear and unequivocal language of a written request without any indication that the requesting party indeed means something different. A request for buy-out compensation is fundamentally different from a request for lost salary compensation. A buy-out compensation is a payment claim triggered by the execution of a buy-out option by one party within a specified time window (mostly after the end of the season). It does not require that the agreement was breached at any time and is the result of a regular cancellation of the contract within the stipulated notice periods. As such, the buy-out compensation is not a damage claim. In contrast thereto, the claim for lost salary is a genuine damage claim resulting from the extraordinary termination of the contract due to the other side's breach of the agreement.
87. In light of these conceptual differences between both claim types and with regard to the fact that Claimant did not explain his request for buy-out compensation in any meaningful way, the Arbitrator rejects a re-interpretation of Claimant's request and finds that the claim for buy-out compensation must be dismissed.

iv) Interest on the aforementioned amounts

88. Claimant requests the payment of interest on the outstanding payments from 10th September 2012 "at the applicable Swiss statutory rate".

89. As a preliminary matter and as mentioned *supra* in para. 52, the Arbitrator finds that the issue of (default) interest is one that is governed by the same substantive law applicable to Claimant's main (salary and image rights) claims, i.e. must be decided in accordance with the principles of *ex aequo et bono*.
90. The Player Contract does not provide for any obligation by the Club to pay interest in case of non-payment. However, it is a generally accepted principle embodied in most legal systems and reflected in the BAT jurisprudence⁹ that default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. The Arbitrator, deciding *ex aequo et bono* and in accordance with constant BAT jurisprudence, considers an interest rate of 5% per annum to be fair and just to avoid that the Club derives any profit from the non-fulfillment of its obligations.
91. With respect to the starting date, it is necessary to differentiate between the time period before and after the termination of the Player Contract.
92. For the time until the Player terminated the Player Contract, the Arbitrator finds that default interest should accrue immediately from the day after the stipulated payment became due (i.e. the 11th day of each month). The payment due dates are explicitly set out in Clause 5 of the Player Contract so that Respondent knew at what time it was obligated to effectuate the payments. The Arbitrator, deciding *ex aequo et bono*, finds that it is just and equitable to award interest from the earliest possible day.
93. With regards to the time after the Player terminated the Player Contract, the Arbitrator notes, as an initial matter, that she follows settled BAT jurisprudence, which (in accordance with general labor law principles) determines that in case of a lawful

⁹ See, *ex multis*, the following BAT awards: 0092/10, Ronci, Coelho vs. WBC Mizo Pecs 2010; 0069/09, Ivezic, Draskicevic vs. Basketball Club Pecs Noi Kosariabda Kft; 0056/09, Branzova vs. Basketball Club Nadezhda; 0237/11, Ivanovic, GPK Sports Management Limited vs. Kolossos Rhodes Basketball Club.

contract termination, all outstanding amounts become due immediately on the day of the contract termination. A request for compensation for all outstanding amounts with respect to the 2012-2013 season was made in the termination letter on 21 January 2013. The starting date for default interest on the lost salary compensation claims is the day following the date of the termination letter, i.e. 22 January 2013.

9.4 The Counterclaim

94. The Club seeks reimbursement from the Player for the first two payments it remitted after the Player had passed the physical examination. Respondent's Counterclaim rests on the argument that the Player Contract was void *ab initio* due to the unfulfilled condition precedent discussed in detail above. Because the Arbitrator decided that the Player Contract became valid (with retroactive effect) when the Player obtained the Congolese passport, the Counterclaim fails at the outset and must be dismissed in its entirety.

9.5 Summary

95. The Player is entitled to an amount of USD 156,000.00 – consisting of the outstanding salary for a part of the season 2012-2013 in the amount of USD 101,000.00 and compensation for the lost salaries for the rest of the season 2012-2013 in the amount of USD 55,000.00 – plus interest of 5% p.a. as follows:

- from 11 September 2012 on the amount of USD 9,000.00,
- from 11 October 2012 on the amount of USD 23,000.00,
- from 11 November 2012 on the amount of USD 23,000.00,
- from 11 December 2012 on the amount of USD 23,000.00,
- from 11 January 2013 on the amount of USD 23,000.00,
- from 22 January 2013 on the amount of USD 55,000.00.

96. All amounts are to be understood net of all deductions for social insurance and/or taxes.

10. Costs

97. 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 legal fees and expenses incurred in connection with the proceedings.
98. On 16 July 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”; 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”, and 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 11,000.00.
99. Considering the outcome and the circumstances of the present case and given that Claimant succeeded with the preponderant part of his claim, the Arbitrator deems it appropriate that Respondent shall bear 70% of the arbitration costs relating to the main claim. Respondent shall bear the arbitration costs relating to the (dismissed) Counterclaim entirely. Therefore, considering that Claimant paid an advance on costs of EUR 4,500.00 and the Club an advance on costs of EUR 6,500.00 (EUR 4,500.00 plus EUR 2,000.00 for the Counterclaim), in application of Article 17.3 of the BAT Rules the Arbitrator decides that the fees and costs of the arbitration costs shall be borne by the Claimant in the amount of EUR 2,700.00 and by the Club in the amount of EUR

8,300.00 (= 70% of EUR 9,000.00 [main claim] plus EUR 2,000.00 [Counterclaim]). Hence, Respondent shall reimburse Claimant in the amount of EUR 1,800.00 for the costs advanced by the latter.

100. Furthermore, the Arbitrator considers it adequate that the Player is entitled to the payment of a contribution towards his legal fees and other expenses (Article 17.3. of the BAT Rules). The Arbitrator deems it appropriate to take into account 70% of the non-reimbursable handling fee of EUR 2,000.00 and 70% of further legal costs of EUR 1,475.00 when assessing the expenses incurred by the Claimants in connection with these proceedings. Accordingly, the Arbitrator fixes the contribution towards Claimants' legal costs at EUR 2,432.50. Respondent shall bear its own legal costs in their entirety.

11. AWARD

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

- 1. SS Felice Scandone Avellino spa is ordered to pay to Mr. Dwight Hardy Jr. USD 156,000.00 net together with interest of 5% p.a. on this amount**
 - from 11 September 2012 on the amount of USD 9,000.00,
 - from 11 October 2012 on the amount of USD 23,000.00,
 - from 11 November 2012 on the amount of USD 23,000.00,
 - from 11 December 2012 on the amount of USD 23,000.00,
 - from 11 January 2013 on the amount of USD 23,000.00,
 - from 22 January 2013 on the amount of USD 55,000.00.
- 2. SS Felice Scandone Avellino spa is ordered to pay to Mr. Dwight Hardy Jr. EUR 1,800.00 as a reimbursement of the arbitration costs advanced by him.**
- 3. SS Felice Scandone Avellino spa is ordered to pay to Mr. Dwight Hardy Jr. EUR 2,432.50 as a contribution towards his legal fees and expenses.**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 22 July 2013

Annett Rombach
(Arbitrator)