



**BASKETBALL**  
ARBITRAL TRIBUNAL

**ARBITRAL AWARD**

(BAT 0170/11)

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Stephan Netzle**

in the arbitration proceedings between

**Mr. Dimitris A. Haritopoulos**

- Claimant 1 -

**Mr. Iossif S. Kallergis**

16 Makedonias str., 55535 Thessaloniki, Greece

- Claimant 2 -

Both represented by Mr. Pantelis Dedes, attorney-at-law,  
Dedes-Makroglou and Associates, 2 Xanthou str., 10673 Athens, Greece

vs.

**Panionios BC K.A.E.**

1 Hrisostomou str., 17123 Nea Smyrni, Athens, Greece

- Respondent 1 -

**Mr. Fanis Gallis**

1 Hrisostomou str., 17123 Nea Smyrni, Athens, Greece

- Respondent 2 -

## **1. The Parties**

### **1.1. The Claimants**

1. Mr. Dimitris A. Haritopoulos (hereinafter the “Player”) is a professional basketball player of Greek nationality. He is represented by Mr. Pantelis Dedes, attorney-at-law in Athens, Greece.
2. Mr. Iossif S. Kallergis (hereinafter the “Agent”) is a certified FIBA agent of Greek nationality and registered with FIBA under the license No. 2007019463. He is also represented by Mr. Pantelis Dedes, attorney-at-law in Athens, Greece.

### **1.2. The Respondents**

3. Panionios BC K.A.E. (hereinafter the “Club”) is a professional basketball club located in Nea Smyrni, Athens, Greece. The Club has not participated in the present arbitration proceedings.
4. Mr. Fanis Gallis (hereinafter the “Former President”) is a former president of the Club’s board of directors. The Former President has not participated in the present arbitration proceedings.

## **2. The Arbitrator**

5. On 11 April 2011, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”) appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”).

6. None of the Parties has raised objections to the appointment of the Arbitrator or to the declaration of independence rendered by him.

### **3. Facts and Proceedings**

#### **3.1. Background Facts**

7. On 15 October 2009, the Player and the Club agreed on the Player's employment by the Club as a basketball player for the 2009/2010 season. For this purpose, the Player and the Club signed an employment contract (hereinafter the "Player Contract") and a document titled "*ANNEX TO SPORTS SERVICES CONTRACT*" (hereinafter the "Annex").
8. In these documents, the Player and the Club agreed on the following payments:
  - a monthly salary of EUR 826.00 to be paid at the end of every month during the time period from 15 October 2009 to 30 June 2010; and
  - Christmas, Easter and holiday bonuses "*pursuant to the relevant provisions of law*" (Article 5.1 para. A of the Annex); and
  - a "*bonus for the signing of the contract for the 2009-2010 season*" in the total net amount of EUR 83,436.00 payable in ten equal monthly installments due on the last day of each month from October 2009 to July 2010 (Article 5.1 para. B of the Annex).
9. The signed Player Contract and the signed Annex were forwarded to the Greek League, "HEBA" (Hellenic Association of Basketball Companies). The HEBA checked and ratified both documents and the Player participated in the Club's practices and matches throughout the 2009/2010 season.

10. During the 2009/2010 season, the Club made three payments to the Player amounting to EUR 27,000.00, but failed to pay the agreed salaries in full. On 16 July 2010, the Player requested a court bailiff to submit an “extrajudicial protest – invitation” to the Club claiming for an outstanding amount of EUR 68,000.00 to be paid within ten days. In the case of non-payment, the Player reserved his right to file a claim before the BAT. On 21 July 2010, the Player’s protest letter was served on the Club by a court bailiff of the Athens Court of First Instance.
11. On 30 August, 30 September and 15 December 2010, the Player received three further payments from the Club in the total amount of EUR 13,000.00.
12. According to Article 9 of the Annex, the Club also agreed to pay to the Agent and Mr. Kostas V. Papadakis, another certified FIBA agent who was involved in the negotiations between the Player and the Club (“Mr. Papadakis”), the net amount of EUR 9,500.00 as an agent fee for their services rendered in connection with the Player’s employment. This agent fee should have been paid until December 2010 as follows: EUR 5,500.00 to the Agent and EUR 4,000.00 to Mr. Papadakis.
13. To date, the Club paid only EUR 1,500.00 to the Agent. The Agent’s share of the agent fee is still outstanding.

### **3.2. The Proceedings before the BAT**

14. In accordance with the BAT Rules, Claimants’ counsel filed on behalf of Claimants and on behalf of Mr. Papadakis, a Request for Arbitration dated 25 February 2011 which was received by the BAT on the same day. An “Additional Request for Arbitration” was filed on 28 February 2011 and received by the BAT on the same day.
15. By letter dated 12 April 2011, the BAT Secretariat confirmed receipt of the Request for Arbitration and the “Additional Request for Arbitration” as well as the payment of the non-reimbursable handling fee of EUR 2,000.00 received in the BAT bank account on 1

March 2011 and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for Respondents to file their Answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules by no later than 3 May 2011 (hereinafter the "Answer"). The BAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs by no later than 26 April 2011:

<i>"Claimant 1 (Mr. Dimitris Athanasiou Haritopoulos)</i>	<i>EUR 3,000</i>
<i>Claimant 2 (Mr. Iossif Spyridon Kallergis)</i>	<i>EUR 1,000</i>
<i>Claimant 3 (Mr. Kostas Vasiliou Papadakis)</i>	<i>EUR 1,000</i>
<i>Respondent 1 (Panionios BC K.A.E.)</i>	<i>EUR 2,500</i>
<i>Respondent 2 (Mr. Fanis Gallis)</i>	<i>EUR 2,500"</i>

16. In the same letter, the BAT Secretariat informed the Parties that the FIBA Arbitral Tribunal (FAT) had been renamed Basketball Arbitral Tribunal (BAT) as of 1 April 2011 and that, absent any objections by the Parties on or before 11 April 2011, the new name would be applied also to the present proceedings. None of the parties raised any objections within the said time limit.
17. By email of 21 April 2011, Claimants' counsel informed the BAT Secretariat that the initial third claimant, Mr. Papadakis, had reached a settlement agreement with the Club. Accordingly, Mr. Papadakis was no longer a party to this arbitration and the claim for Mr. Papadakis' share of the agent fee in the amount of EUR 4,000.00 was withdrawn.
18. By letter of 5 May 2011, the BAT Secretariat acknowledged receipt of the Player's and the Agent's shares of the Advance on Costs and informed the Parties that Respondents had failed to submit their Answer. In view of the withdrawal of Mr. Papadakis' claim and in accordance with Article 9.3 of the BAT Rules, the BAT Secretariat re-adjusted the Advance on Costs to EUR 9,000.00 in total as follows:

<i>"Claimant 1 (Mr. Dimitris Athanasiou Haritopoulos)</i>	<i>EUR 3,500</i>
<i>Claimant 2 (Mr. Iossif Spyridon Kallergis)</i>	<i>EUR 1,000</i>
<i>Respondent 1 (Panionios BC K.A.E.)</i>	<i>EUR 2,250</i>
<i>Respondent 2 (Mr. Fanis Gallis)</i>	<i>EUR 2,250"</i>

19. In its letter, the BAT Secretariat also informed the Parties that Respondents had failed to pay their shares of the Advance on Costs and noted that in accordance with Article 9.3 of the BAT Rules the arbitration would not proceed until the full amount of the Advance on Costs was received. Therefore, the Claimants were requested to effect payment of the re-adjusted shares of the Advance on Costs of Respondents and the remaining EUR 500.00 of the Player's share, i.e. EUR 5,000.00 in total, by no later than 11 May 2011.
20. By letter of 7 June 2011, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs. The Arbitrator declared the exchange of documents complete and invited the Parties to submit a detailed account of their costs until 17 June 2011. Respondents did not submit an account of costs.
21. On 11 July 2011, the BAT Secretariat received Claimants' detailed account of costs which was initially sent to the e-mail address "FATsecretariat@fiba.com" on 9 June 2011. This account reads as follows:

<i>"A) Claimant's Expenses for BAT</i>		
<i>26/4/2011</i>	<i>Advance on costs – 1st Claimant's share</i>	<i>3,000</i>
<i>28/4/2011</i>	<i>Advance on costs – 2<sup>nd</sup> Claimant's share</i>	<i>1,000</i>
<i>9/5/2011</i>	<i>Advance on costs – Respondent's share</i>	<i>4,500</i>
<i>9/5/2011</i>	<i>Advance on costs – 1st Claimant's share</i>	<i>500</i>
	<i>Total</i>	<i>9,000 €</i>
 <i>B) Claimant's Expenses for BAT</i>		
<i>Haritopoulos-Papadakis-Kellergis</i>	<i>Study of the case</i>	<i>2,000</i>
	<i>Request of arbitration</i>	<i>5,000</i>
	<i>Additional request</i>	<i>500</i>
	<i>Translations, long distance calls, e-mails, photocopies etc</i>	<i>250</i>
	<i>Account of costs</i>	<i>500</i>
	<i>Total</i>	<i>8,250 €"</i>

22. On the same date, the Arbitrator invited Respondents to submit their comments, if any, on the Claimants' account of costs by no later than 15 July 2011. The Respondents did not submit any comments.
23. 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 deliver the award on the basis of the written submissions of the Parties.

#### **4. The Positions of the Parties**

##### **4.1. Summary of Claimants' Submissions**

24. At all times during the term of the Player Contract the Player performed his services according to the directives of the Club's representatives. The Player Contract was a no-cut guaranteed contract. Because of the Club's repeating defaults to pay the agreed monthly installments, the Player and the Agent repeatedly asked for the payments but the Club did not comply with its payment obligations. Therefore, the Club owes the amounts of EUR 52,522.00 to the Player and EUR 4,000.00 to the Agent.
25. According to article 118 A para. 4 of the Greek Law 2725/1999, all persons acting as members for the board of directors of a legal entity such as a "Basketball Société Anonyme" are personally and fully liable for any entity's debts incurred during their period in office. The Former President was the acting president of the Club's board of directors at the time of signature of the Player Contract and signed it in the name of the Club. Consequently, the Former President is personally and totally liable for all debts towards the Player and third parties.
26. According to Greek law, the legal interest rate for default is 8.75% p.a. and thus the Respondent is obliged to pay interest at this rate. Alternatively, an interest rate of 5% p.a. as stipulated in article 104 of the Swiss Code of Obligations should be applied.
27. The agreed signing bonus, the performance bonuses and the agent fee are "clean", i.e. free of taxes or any other withholdings for third parties.
28. According to article 14 of the Greek Law 2238/1994, the Club is obliged to withhold an

income tax of 21.2% of any payments made to the Player and to forward these withholdings to the proper tax authority. At the end of each year, the Club is obliged to provide the Player with a certificate of payment.

#### 4.2. Claimants' Request for Relief

29. Considering the "Additional Request for Arbitration" with an amendment to No. 4.2 of the initial Request for Relief and considering the withdrawal of Mr. Papadakis' claim for agent fee in the amount of EUR 4,000.00, Claimants submit the following requests for relief:

*4.1 Hold that the Respondents owe to the Player the total amount of fifty two thousand five hundred twenty two Euros ( 52,522 ) and to the Agent the total amount of four thousand Euros ( 4,000 ).*

*4.2 Hold that the Respondents owe to the Player the total amount of nineteen thousand one hundred forty five Euros ( 19,145 ) for non paid taxes ( 21,2 % X 92,522 Euros ).*

*4.3 Hold that the Respondent owe to the Player the total amount of three thousand eight hundred fifty Euros ( 3,850 ) as interest from the due date of each instalment till today.*

*4.4 Order the Respondents to pay to the First Claimant the remaining amount of fifty two thousand five hundred twenty two Euros ( 52,522 ) according to the contract, with interest rate of 8,75% per annum or in the alternative with the interest rate decided by the FAT Arbitrator ex aequo et bono, as follows: (1) 2,460 Euro for the payment due on 15 January 2010, (2) 8,343.60 Euros for the payment due on 15 February 2010, (3) 8,343.60 Euros for the payment due on 15 March 2010, (4) 8,3343.60[sic] Euros for the payment due on 15 April 2010, (5) 8,343.60 Euros for the payment due on 15 May 2010, (6) 8,343.60 Euros for the payment due on 15 June 2010 and (7) 8,343.60 Euros for the payment due on 15 July 2010 plus three thousand eight hundred fifty Euros ( 3,850 ) as interest.*

*4.5 Order the Respondent to pay the Second Claimant the remaining amount of four thousand Euros ( 4,000 ) with interest rate of 8,75% or in the alternative with the interest rate decided by the FAT Arbitrator ex aequo et bono.*

*4.6 Hold that the costs of the present arbitration be borne by the Respondent alone.*

*4.7 Hold and order the Respondend [sic] to pay to the Claimants the arbitration fees as well as their legal fees and other expenses, as will be ascertained by the Arbitartor [sic] in time, with interest rate of 8,75% or in the alternative with the interest rate decided by the FAT Arbitrator ex aequo et bono."*

#### **4.3. Summary of Respondents' Submissions**

30. Despite several invitations by the BAT, Respondents neither engaged in the arbitration proceedings at hand nor did they make any submissions within the time limits set by the Arbitrator in accordance with the BAT Rules.

#### **5. Jurisdiction**

31. As a preliminary matter, the Arbitrator wishes to emphasize that, since Respondents did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.<sup>1</sup>
32. 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).
33. The jurisdiction of the BAT presupposes the arbitrability of the dispute as well as the existence of a valid arbitration agreement between the parties.

#### **5.1. Arbitrability**

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

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<sup>1</sup> Decision of the Swiss Federal Tribunal of 19 April 1994, reported in ATF 120 II 155, 162.

is thus arbitrable within the meaning of Article 177(1) PILA.<sup>2</sup>

## **5.2. Formal and substantive validity of the arbitration agreement**

### **5.2.1 In General**

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

*"1 The arbitration agreement must be concluded in writing, by telegram, telex, telefax or any other means of communication which allow proof of the agreement by text.*

*2 Furthermore, the arbitration agreement shall be valid if it conforms to the law chosen by the parties, to the law governing the dispute, in particular the principal contract, or to Swiss law."*

### **5.2.2 Regarding the Player and the Club**

36. The Arbitrator finds that the jurisdiction of the BAT over the dispute between the Player and the Club results from Article 9 of the Annex which reads as follows:

*"Article 9. Other Terms*

*In addition to the terms referred to in Article 6 of the Contract, as regards any dispute that may arise during the implementation of the Contract, the two contracting parties reserve the right to request the arbitration of FIBA, with the possibility to file an appeal before the Court of Arbitration for Sports (CAS), Lausanne, Switzerland. The arbitration is controlled by Article 12 of the Swiss law on the Private International Law, regardless of the origin of this contract's parties. English shall be the language of the arbitration. The parties expressly accept that they have no right to file an appeal against the decision pronounced by FIBA's arbitration and the CAS in Swiss or other courts of justice. Upon receipt of the request the arbitration and the CAS shall decide on the dispute ex aequo et bono."*

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<sup>2</sup> Decision of the Swiss Federal Tribunal 4P.230/2000 dated 7 February 2001, cons. 1, reported in ASA Bulletin 2001, p. 523 et seq., with reference to the decision of the Swiss Federal Tribunal dated 23 June 1992, BGE 118 II 353, 356, cons. 3b.

37. The Annex is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.
38. The reference in Article 6.3 of the Player Contract to the “*sports, jurisdictional and arbitral bodies of HEBA and HBF (Hellenic Basketball Federation)*” as competent bodies for the termination or cessation of the terms of the Player Contract and in Article 6.4 of the Player Contract to the Athens courts in case of financial disputes do not affect the jurisdiction of BAT in the present arbitration. In Article 9 of the Annex, the Player and the Club have expressly stated that they – “*in addition*” to Article 6 of the Player Contract – should have the right to request “*the arbitration of FIBA*”, i.e. the right to file a request to the BAT. Thus, the Claimants may submit their claim against the Respondents either to the Athens courts or the BAT. Furthermore, there is no indication that a claim is pending before a jurisdictional or arbitral body of HEBA or before a state court in Athens. The extrajudicial protest of 16 July 2010, which was served on the Club on 21 July 2010, did not establish the jurisdiction of a state court but was a mere debt collection measure which did not prevent the Player from filing his Request for Arbitration dated 25 February 2011 with the BAT.
39. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (cf. Article 178(2) PILA). In particular, the wording “*any dispute that may arise during the implementation of the Contract,*” in Article 9 of the Annex clearly covers the present dispute.<sup>3</sup>
40. Consequently, the Arbitrator holds that he has jurisdiction to decide the dispute between the Player and the Club.

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<sup>3</sup> See for instance BERGER/ KELLERHALS: International and domestic Arbitration in Switzerland, Berne 2010, N 466.

### 5.2.3 Regarding the Agent and the Club

41. The Arbitrator notes that neither the Player Contract nor the Annex was signed by the Agent. The question therefore arises whether the arbitration agreement can also be binding upon non-signatories such as the Agent.
42. The Swiss Federal Tribunal has held in a decision dated 16 October 2003 (BGE 129 III 727) that while the validity of the arbitration agreement between the initial parties was subject to the formal requirements of Article 178 (1) PILA, the validity of its extension to non-signatory parties was not.<sup>4</sup> Therefore, once an arbitration agreement complies with the formal requirements with respect to its initial signatories, the extension of that arbitration agreement to other parties does not need to satisfy such requirements.<sup>5</sup>
43. However, an extension of the arbitration agreement requires a legal relationship between the third party and the initial parties to the arbitration agreement which relationship must be of a certain intensity to justify the extension. The Arbitrator finds that the Player Contract and the Annex refer to a sufficiently strong legal relationship between the Club and the Agent which justifies an extension of the arbitration agreement. Article 10 para. A of the Player Contract explicitly states that the Agent is considered the Player's "attorney" in connection with the Player Contract. In addition, Article 9 of the Annex names the Agent as the Player's "representative" and establishes the Club's obligations to pay an agent fee which must be considered as an agreement in favor of a third party, namely the Agent. Under Swiss arbitration law, the conclusion of an agreement in favor of a third party implies the application of the

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<sup>4</sup> Decision of the Swiss Federal Tribunal dated 16 October 2003, BGE 129 III 727, 735, cons. 5.3.1.

<sup>5</sup> PHILIPP FISCHER: When can an arbitration clause be binding upon non-signatories under Swiss law?, in: Jusletter of 4 January 2010.

arbitration agreement, by analogy with Article 112 of the Swiss Code of Obligations<sup>6</sup>.

44. The Arbitrator therefore finds that the arbitration agreement in the Annex applies also to disputes between the Club and the Agent insofar as such disputes relate to the payment of the agent fee.

#### 5.2.4 Regarding the Former President

45. The Arbitrator notes that the Former President is not personally a party to the Player Contract nor to the Annex but was, according to Claimants' allegation, the acting president of the Club's board of directors at the time of the signature of the Player Contract and of the Annex and has signed the Player Contract in the name of the Club.
46. The question therefore arises whether the Former President has explicitly agreed to be personally bound to the arbitration agreement or whether the arbitration agreement can also be binding upon him as a non-signatory. As stated above, an extension of the arbitration agreement to the Former President requires a legal relationship of certain intensity between him and the initial parties to the arbitration agreement, i.e. the Player and the Club.
47. Claimants have not submitted any information which would demonstrate that the Former President explicitly agreed to arbitration before the BAT. Since the name of the Club's signatory is not reproduced on the English text of the Player Contract or on the Annex, the Arbitrator is not able to verify whether the signature on the Player Contract and on the Annex is actually the Former President's. But even if the Former President

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<sup>6</sup> Article 112 of the Swiss Code of Obligations says: "<sup>1</sup> A person who, acting in his own name, has entered into a contract whereby performance is due to a third party is entitled to compel performance for the benefit of said third party. <sup>2</sup> The third party or his legal successors have the right to compel performance where that was the intention of the contracting parties or is the customary practice. <sup>3</sup> In this case the obligee may no longer release the obligor from his obligations once the third party has notified the obligor of his intention to exercise that right." (see English translation on the website of the Federal Authorities of the Swiss Confederation under <http://www.admin.ch/ch/e/rs/c220.html>); BERGER/KELLERHALS, op. cit., N 514.

signed one or both of the two documents, the Arbitrator holds that such a signature was provided by him in the name of the Club but not in his own name or on his own behalf. In contrast to the Agent, the Former President had no personal interest in the Player Contract and therefore the principles described in para. 44 above do not apply to him.

48. The issue of the Former President's liability for the Club's debts according to Greek law has to be distinguished from the issue of jurisdiction according to an arbitration agreement. The first one is a matter of the merits of the claim while the latter is a formal requirement to any arbitration proceeding. Because of the considerations in paras. 46 and 47, it is not necessary for the Arbitrator to determine whether the provisions of Greek law 2725/1999 apply although the Claimants chose to proceed under Article 9 of the Annex, which orders the Arbitrator to decide on the issue *ex aequo et bono*, and not under Article 6 of the Player Contract which refers to Greek law 2725/1999.
49. In view of the above, and in the absence of a respective arbitration agreement, the Arbitrator has no jurisdiction over the Former President. Since the Former President did not participate in the arbitration at all, its silence is not, on any analysis, a tacit acceptance of jurisdiction to determine Claimants' claims against the Former President.
50. The Arbitrator thus finds that he has jurisdiction to decide the claims of Claimants against the Club but not against the Former President.

## **6. Other Procedural Issues**

51. Article 14.2 of the BAT Rules specifies that "the Arbitrator may nevertheless proceed with the arbitration and deliver an award" if "the Respondent fails to submit an Answer". The Arbitrator's authority to proceed with the arbitration in case of default by one of the

parties is in accordance with Swiss arbitration law<sup>7</sup> and the practice of the BAT.<sup>8</sup> However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

52. This requirement is met in the current case. Respondents were informed of the initiation of the proceedings and of the appointment of the Arbitrator in line with the relevant rules. They were also given opportunity to respond to Claimants' Request for Arbitration and to their account on costs. Still, Respondents have chosen not to respond within the time limits set by the Arbitrator according to the BAT Rules.

## 7. Applicable Law – *ex aequo et bono*

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

*"the parties may authorize the arbitral tribunal to decide ex aequo".*

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Decision of the Swiss Federal Tribunal dated 26 November 1980, in: *Semaine Judiciaire (SJ)* 1982, p. 613 et seq., p. 621; KAUFMANN-KOHLER/RIGOZZI: *Arbitrage international - Droit et pratique à la lumière de la LDIP*, Bern 2010, N 483; LALIVE/POUDRET/REYMOND: *Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989, Art. 182 PILA N 8; RIGOZZI: *L'Arbitrage international en matière de sport*, Basel 2005, N 898; SCHNEIDER, in: *Basel commentary to the PILA*, 2<sup>nd</sup> ed., Basel 2007, Art. 182 PILA N 87; VISCHER, in: *Zurich Commentary to the PILA*, 2<sup>nd</sup> ed., Zurich/Basel/Geneva 2004, Art. 182 PILA N 29.

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See *ex multis* FAT 0001/07, *Ostojic and Raznatovic vs. PAOK KAE*; FAT 0018/08, *Nicevic vs. Beşiktaş*; FAT 0030/09, *Vujanic vs. Enterprise Men's Basketball Club "Dynamo" Moscow*; FAT 0093/09, *A.S.D. Pallacanestro Femminile Schio vs. Braxton*.

54. In their arbitration agreement in Article 9 of the Annex, Claimants and the Club have explicitly directed and empowered the Arbitrator to decide the dispute *ex aequo et bono*.
55. The Claimants refer also to the Greek law 2725/1999 to support their claim against the Former President. This issue has become moot since the Arbitrator found that he was not competent to decide upon this claim because of lack of jurisdiction (see paras. 49-50 above). The Claimants have not invoked any other statutory provision to motivate their claim except the legal provisions to determine the amounts of “the Christmas, Easter bonus and holiday bonus”. Consequently, the Arbitrator will decide the present matter *ex aequo et bono* and refer to the legal provisions to find out the amounts of the above-mentioned bonuses.
56. The concept of *équité* (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the *Concordat intercantonal sur l’arbitrage* of 1969<sup>9</sup> (Concordat),<sup>10</sup> 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.”<sup>11</sup>*

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

*“the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the*

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<sup>9</sup> 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).

<sup>10</sup> KARRER, in: *Basel commentary to the PILA*, 2<sup>nd</sup> ed., Basel 2007, Article 187 PILA N 289.

<sup>11</sup> JdT (*Journal des Tribunaux*), III. *Droit cantonal*, 3/1981, p. 93 (free translation).

*circumstances of the case at hand*".<sup>12</sup>

58. This is confirmed by Article 15.1 of the BAT Rules in fine according to which the arbitrator applies "general considerations of justice and fairness without reference to any particular national or international law".
59. In light of the foregoing developments, the Arbitrator makes the following findings:

## **8. Findings**

### **8.1. Preliminary Remarks**

60. According to the Player Contract, the Player is entitled to nine monthly salaries of EUR 826.00 each, amounting to EUR 7,434.00, bonuses for Christmas, Easter and holiday allowance, and a signing bonus of EUR 83,436.00. He has been with the Club during the entire term of the Player Agreement and there are no reasons why he should not be entitled to any of these payments. No "bonuses of sport objectives" have been claimed.
61. From the contractually agreed amounts, those amounts which the Player has received from the Club, i.e. EUR 40,000.00, must be deducted.
62. The Agent is entitled to EUR 4,000.00 being the rest of the agent fee of EUR 4,000.00 resulting from the contractually agreed amount (EUR 9,500.00) less the payment made by the Club (EUR 1,500.00) and the amount which was due to Mr. Papadakis, which is not anymore claimed in this arbitration (EUR 4,000.00). There are no reasons which would require a reduction of the agent fee due by the Club to the Agent.

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<sup>12</sup> POUURET/BESSION: Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

63. There are still three open issues, namely (i) how the Player's bonuses for Christmas, Easter and summer holidays are to be calculated, (ii) to which extent the Club is liable for the taxes on the contractually agreed payments to the Player and the Agent, and (iii) whether the Player and the Agent are entitled to interest.

### **8.2. Calculation of the bonuses for Christmas, Easter and the holiday allowance**

64. The Player Contract refers to "Christmas, Easter and the holiday allowance pursuant to the relevant provisions of law" in the amount of EUR 1,652.00 without further substantiation. The reference to the "relevant provisions of law" is however to be understood as a method of calculation and not a choice of law.
65. The "relevant provisions of law" refer to the payment of two additional monthly salaries payable in three installments on Christmas (one monthly salary), on Easter (1/2 monthly salary) and before the summer holidays (1/2 monthly salary) which was the legal situation at the time in Greece. These two salaries indeed amount to EUR 1,652.00 which are due as part of the Club's monetary obligations towards the Player.

### **8.3. Taxes**

66. The Player claims that the Club shall be held responsible for the payment of the taxes due on all contractually agreed amounts. He requests that the Club shall pay to him the tax amounts due on all contractually agreed amounts (and not only on the still open salary and bonus payments) of EUR 92,522.00 in total. The tax corresponds to 21.2% of EUR 92,522.00 and adds up to EUR 19,145.00.
67. The Player submits that the Greek professional basketball clubs are obliged by law to withhold 21.2% of the salary and bonus payments, to forward these amounts to the tax authorities and to provide the players with a certificate of payment. There is no evidence that the Club has paid the taxes on the Player's salaries and bonuses in 2009 and 2010.

68. Firstly, while the Arbitrator concurs with the Player that the signing bonus has been agreed “net (namely free of any kind of tax and deductions)”, no such agreement was made with respect to the monthly salaries. The monthly salaries are therefore to be understood as gross amounts from which the Club may withhold the tax amount provided by law. The “bonuses” for Christmas and Easter and the holiday allowances consist of two additional monthly salaries for which no exemption with respect to the withholding tax has been agreed either.
69. While the Club is obliged to pay the taxes on all salaries and bonuses to which the Player is contractually entitled to the tax authorities (i.e. on EUR 92,522.00) and to submit the respective payment certificate to the Player, it is also entitled to withhold 21.2% from the agreed salaries and the bonuses for Christmas and Easter and the holiday allowances (i.e. 21.2% of EUR 9,086 = EUR 1,926.23).
70. Secondly, the Player does not request the Club to pay the taxes due on his salaries and bonuses *to the tax authorities* but to pay the respective amount *to him*. The Player does not give reasons for his request which departs from the legal provision invoked by him (see para. 67 above), according to which the employing Club is responsible for the payment of the taxes on the salaries and bonuses paid to its players.
71. Failing such explanation, the Arbitrator can only confirm the system as provided by law and also as explicitly agreed in Article 5.2 of the Player Contract which requires the Club to pay all taxes due on the contractually agreed salaries and bonuses and to deduct and withhold the respective amounts from the contractual payments. The Club is therefore entitled to withhold 21.2% of the salaries due (including the bonuses for Christmas and Easter and the holiday allowance) in the amount of EUR 1,926.23 which must be forwarded, together with the tax due on the signing bonus (for which the Club is contractually prohibited to withhold any amounts) to the tax authorities. Should the Club fail to comply with its tax obligations and should the tax authorities claim the tax amounts from the Player, the latter would be entitled to reimbursement of these amounts from the Club.

72. The Annex also provides that the agent fee must be paid “net (free of taxes and other deductions)”. The Club is therefore not entitled to withhold any amounts from the agent fee but must pay the net amount plus interest as determined below. The provision that the agent fee must be paid “by check” is not understood as a mandatory legal obligation but a mere payment instruction by the Agent which can be amended by the Agent as the beneficiary of the payment at any time.

**8.4. Interest on outstanding salaries, agent fee, arbitration fee and legal fees and expenses**

73. Claimants request interest at 8.75% p.a. on all payments due from the moment when these amounts became due for payment. No such obligation is stipulated in the Player Contract.

74. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest on overdue salaries.<sup>13</sup> Although the Player Contract does not provide for the obligation of the debtor to pay default interest, this is a generally accepted principle which is embodied in most legal systems.

75. If the parties have not agreed a specific interest rate, the Arbitrator prefers not to take recourse to certain national interest rates but to follow the established BAT jurisprudence and apply the same interest rate of 5% throughout the world of basketball. The Arbitrator therefore, deciding *ex aequo et bono*, considers interest in the rate of 5% p.a. on the claims of the Player and the Agent to be fair and equitable also in the present case.

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<sup>13</sup> See *ex multis* 0092/10 FAT, Ronci, Coelho vs. WBC Mizo Pecs 2010; 0069/09 FAT, Ivezic, Draskicevic vs. Basketball Club Pecs Noi Kosariabda Kft; 0056/09 FAT, Branzova vs. Basketball Club Nadezhda.

76. The interest shall be calculated from the dates when the individual payments became due according to the Player Contract. The monthly salaries became due by the end of each month. The 10 installments of the signing bonus became due by the end of the months October 2009 until July 2010. There is no provision about the payment dated of the bonuses for Christmas and Easter and the holiday allowance. The Arbitrator therefore calculates the interest on these payments from the expiry date of the Player Contract.
77. The starting dates of the respective interest amounts are as follows:

PAYMENTS DUE		PAYMENTS RECEIVED		INTEREST	
Date	Amount (EUR)	Date	Amount (EUR)	Starting date	Outstanding amount (EUR)
31 October 2009	8,343.60 + 650.89	30 October 2009	9,500.00	---	- 505.51
30 November 2009	8,343.60 + 650.89	---	---	1 December 2009	8,488.98
31 December 2009	8,343.60 + 650.89	1 January 2010	9,500.00	1 January 2010	7,983.47
31 January 2010	8,343.60 + 650.89	---	---	1 February 2010	16,977.96
28 February 2010	8,343.60 + 650.89	---	---	1 March 2010	25,972.45
31 March 2010	8,343.60 + 650.89	30 March 2010	8,000.00	1 April 2010	26,966.94
30 April 2010	8,343.60 + 650.89	---	---	1 May 2010	35,961.43
31 May 2010	8,343.60 + 650.89	---	---	1 June 2010	44,955.92
30 June 2010	8,343.60 + 650.89 +1,301.78	---	---	1 July 2010	55,252.19

PAYMENTS DUE		PAYMENTS RECEIVED		INTEREST	
Date	Amount (EUR)	Date	Amount (EUR)	Starting date	Outstanding amount (EUR)
30 July 2010	8,343.60	---	---	1 August 2010	63,595.79
---	---	30 August 2010	3,000.00	31 August 2010	60,595.79
---	---	30 September 2010	5,000.00	1 October 2010	55,595.79
---	---	15 December 2010	5,000.00	16 December 2010	50,595.79

78. This results in the following interest amounts:

- 5% interest on EUR 8,488.98 from 1 to 31 December 2009 = EUR 36.05
- 5% interest on EUR 7,983.47 from 1 to 31 January 2010 = EUR 33.90
- 5% interest on EUR 16,977.96 from 1 to 28 February 2010 = EUR 65.12
- 5% interest on EUR 25,972.45 from 1 to 31 March 2010 = EUR 110.29
- 5% interest on EUR 26,966.94 from 1 to 30 April 2010 = EUR 110.82
- 5% interest on EUR 35,961.43 from 1 to 31 May 2010 = EUR 152.71
- 5% interest on EUR 44,955.92 from 1 to 30 June 2010 = EUR 184.75
- 5% interest on EUR 55,252.19 from 1 to 31 July 2010 = EUR 234.63
- 5% interest on EUR 63,595.79 from 1 to 30 August 2010 = EUR 261.35
- 5% interest on EUR 60,595.79 from 31 August to 30 September 2010 = EUR 257.32
- 5% interest on EUR 55,595.79 from 1 October to 15 December 2010 = EUR 578.81
- 5% interest on EUR 50,595.79 from 16 December 2010 to 25 February 2011 =

EUR 499.02

79. The interest on the Player's salaries and bonuses until 25 February 2011 (i.e. the date of the Request for Arbitration) therefore amounts to EUR 2,524.77. The Player has requested the payment of interest on the salaries and bonuses "till today", which is the date of the Request for Arbitration (i.e. 25 February 2011) but not beyond. The Arbitrator is limited by this request and cannot award interest for a longer period of time.
80. With regard to the interest on the agent fee, the Arbitrator relies on Article 9 of the Annex according to which the agent fee is payable "until the month of December 2010". This means that the agent fee must be paid on or before the end of the month of December 2010, and that the starting date for the calculation of the default interest is 1 January 2011. The request for the interest on the agent fee contains no limits, neither with respect to the amount nor with respect to the date until which such interest shall be calculated. The relevant final date is therefore the date of payment of the agent fee according to this award.
81. The Claimants also request the payment of interest on the costs. This does not correspond to the standing practice of BAT or CAS and has no legal foundation either in the Player Contract / Annex or in Article 17 of the BAT Rules. The compensation for costs and legal fees is therefore awarded without interest.

## **8.5. Summary**

### **8.5.1 Player**

82. The Player is entitled to the full signing bonus of EUR 83,436.00 (without withholdings) and the salaries (including the bonuses for Christmas and Easter and the holiday allowance) in the amount of EUR 9,086.00, i.e. EUR 92,522.00 in total, from which the already paid amount of EUR 40,000.00 must be deducted and EUR 1,926.21 shall be

withheld by the Club for tax purposes. The open amount payable to the Player adds up therefore to EUR 50,595.79 to which the amount of interest (EUR 2,524.77) until 25 February 2011 is added (= EUR 53,120.56).

### **8.5.2 Agent**

83. The Agent is entitled to his share of the agent fee of EUR 9,500.00 which, after deduction of the amount already paid by the Club (EUR 1,500.00) and the share of Mr. Papadakis (EUR 4,000.00), results to an amount EUR 4,000.00 plus interest of 5% p.a. since 1 January 2011.

## **9. Costs**

84. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the award or communicated to the parties separately. Furthermore, Article 17.3 of the BAT Rules states that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
85. On 6 September 2011, considering that pursuant to Article 17.2 of the BAT Rules “the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator”, and that “the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised, the BAT President determined the arbitration costs in the present matter at EUR 9,000.00.

86. In the present case, in line with Article 17.3 of the BAT Rules and considering that Claimants prevailed in their main claims against the Club but failed against the Former President due to lack of jurisdiction, the Arbitrator finds it fair that 80% of the fees and costs of the arbitration be borne by the Club and 20% by the Claimants.
87. Given that Claimants paid the totality of the Advance on Costs of EUR 9,000.00, the Arbitrator decides that:
- (i) The Club shall pay 80% of the costs advanced by Claimants, being EUR 7,200.00.
  - (ii) Furthermore, the Arbitrator considers it adequate that Claimants are entitled to the payment of a contribution towards their legal fees and other expenses (Article 17.3 of the BAT Rules). The Arbitrator holds it adequate to take into account the non-reimbursable handling fee of EUR 2,000.00 and further legal costs in the amount of EUR 8,250.00<sup>14</sup> when assessing the expenses incurred by Claimants in connection with these proceedings. After having reviewed and assessed all the circumstances of the case at hand, the Arbitrator fixes the contribution towards Claimants' legal fees and expenses at EUR 8,200.00.

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<sup>14</sup> The Arbitrator holds that Claimants' account of costs was submitted in time. Although the BAT Secretariat received the detailed account not before 11 July 2011, it was submitted by Claimants to a FIBA e-mail address within the time limit set by the Arbitrator.

## **10. AWARD**

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

- 1. Panionios BC K.A.E. is ordered to pay to Mr. Dimitris A. Haritopoulos the amount of EUR 50,595.79 plus interest in the amount of EUR 2,524.77, i.e. EUR 53,120.56 in total.**
- 2. Panionios BC K.A.E. is ordered to pay to Mr. Iossif S. Kallergis the amount of EUR 4,000.00 plus interest of 5% p.a. since 1 January 2011.**
- 3. Panionios BC K.A.E. is ordered to pay jointly to Mr. Dimitris A. Haritopoulos and Mr. Iossif S. Kallergis the amount of EUR 7,200.00 as a reimbursement of the advance on arbitration costs.**
- 4. Panionios BC K.A.E. is ordered to pay jointly to Mr. Dimitris A. Haritopoulos and Mr. Iossif S. Kallergis the amount of EUR 8,200.00 as a contribution towards their legal fees and expenses.**
- 5. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 7 September 2011

Stephan Netzle  
(Arbitrator)