



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0211/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Ronell Taylor,

- Claimant 1 -

Mr. Elias Diamantopoulos,

- Claimant 2 -

Both represented by Mr. José Lasa Azpeitia, Laffer Abogados,
Calle Almagro, 13, 2ºD, 28010 Madrid, Spain

vs.

BC AEL Limassol Athlopedies LTD
P.O. Box 1606, Limassol, Cyprus

- Respondent -

1. The Parties

1.1 The Claimants

1. Mr. Ronell Taylor (hereinafter the “Player”) is a professional basketball player of US nationality. He is represented by Mr. José Lasa Azpeitia, attorney-at-law in Madrid, Spain.
2. Mr. Elias Diamantopoulos (hereinafter the “Agent”) is a FIBA certified agent of Greek nationality and the founder of the agency “Diamond Sports”, located in Athens, Greece. He is also represented by Mr. José Lasa Azpeitia.

1.2 The Respondent

3. BC AEL Limassol Athlopedies LTD (hereinafter the “Club”) is a professional basketball club located in Limassol, Cyprus. The Club is not represented in the present arbitration.

2. The Arbitrator

4. On 20 October 2011, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren, appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. On 13 August 2008, the Club and the Player entered into an employment agreement

(hereinafter the “Player Contract”) for the basketball seasons 2008-2009 and 2009-2010. The Player Contract was identified in its first paragraph as a “GUARANTEED CONTRACT” by which the Parties agreed on a net salary for the Player of USD 130,000.00 for the 2008-2009 season, and USD 170,000.00 for the 2009-2010 season to be paid by monthly instalments in accordance with the payment schedule in Clause 7 of the Player Contract. In addition, the Player Contract provided for the payment of bonuses to the Player and an agent fee for the Player’s agents (hereinafter the “Agent Fee”).

6. During the 2008-2009 season, the Club paid all Player’s salaries, but failed to pay any bonuses which allegedly amounted to USD 16,000.00. The Club also paid the entire Agent Fee for the 2008-2009 season and EUR 2,097.00 of the Agent Fee for the 2009-2010 season, but not the remaining Agent Fee for the 2009-2010 season in the amount of EUR 9,791.00. Although the bonuses were still not paid by the end of the 2008-2009 season, the Player decided to stay with the Club’s team for the 2009-2010 season. However, the Parties entered into negotiations about a reduction of the Player’s salary for the 2009-2010 season.
7. On 8 October 2009, the Club and the Player signed an addendum to the Player Contract (hereinafter the “Addendum”) by which the Player waived his bonuses earned during the 2008-2009 season and agreed to a reduced salary of EUR 70,000.00 for the 2009-2010 season. The salary for the 2009-2010 season should be paid in seven instalments of EUR 10,000.00 between 15 October 2009 and 15 April 2010.
8. The Addendum also contains the following clause:

“3) If the club breaches any of the clause[s] in this Addendum or the player current contract, the player and his representatives reserve the right to seek all compensation due to him from his original contract dated on August 13, 2008.”
9. During the 2009-2010 season, the Player received several payments from the Club amounting to EUR 51,737.56. However, the payments were not made on the agreed

payment dates and the paid amounts did not correspond to the agreed instalments. By letter of 7 December 2009, Mr. Derrick Powell, the Player's second agent from the agency "The Higgins Group", notified the Club about the outstanding salary amounts and the open Agent Fee for the 2009-2010 season. Mr Powell further indicated that the failure to make the agreed payments constituted a breach of the Addendum.

10. By letter of 4 January 2010, Mr. Powell notified the Club that because of the breach of the Addendum, *"we are reverting back to [the Player's] original contract dated August 13, 2008 and we are voiding the Addendum signed October 8, 2009."* By email of 19 January 2010 the Club responded to the Agent that 50% of the payments for the "Player's fees" would be transferred to the Agent's bank account on 26 January 2010 and the rest on 17 February 2010.
11. However, no payments were received on the above mentioned dates. On 29 April 2010, the Agent sent a letter titled "Final Notice" to the Club which reads in its relevant part as follows:

"At this point we are treating his non payment due March 15th 2010 and April 15th 2010 to our client as stated in paragraph 8 and the agent's fee that have been past due for over 6 Months as stated in the contract as a breach of contract. And we are informing you that we are terminating our Addendum signed on October 8, 2009 and reverting to our original CONTRACT dated August 13, 2008 and will be seek all compensation due to him from his original contract including all bonuses due from last season."(sic)

12. The Agent continued to request payment of the outstanding amounts. By email of 1 September 2010 to the Agent, the Club promised that EUR 5,000.00 and EUR 10,000.00 would be paid on 7 and 14 September 2010 respectively.
13. To date, none of the claimed payments has been made by the Club, neither to the Player nor to the Agent. Nevertheless, the Player continued playing with the Club's team until the end of the 2009-2010 season.

3.2 The Proceedings before the BAT

14. On 27 May 2011, the Claimants filed a Request for Arbitration together with exhibits. The non-reimbursable handling fee of EUR 2,000.00 was received in the BAT bank account on 31 August 2011.
15. By email of 13 September 2011, the Claimants' counsel informed the BAT that Mr. Powell had assigned his rights to the Agent and had withdrawn from the arbitration. This statement was supported by a letter of Mr. Powell dated 8 September 2011 which reads as follows:

"TO WHOM IT MAY CONCERN

I, the undersigned, declare:

I.- I am a licensed Players Agent.

II.- As a consequence of my intervention in the hiring of the professional player Mr. Ronell Taylor by the CLUB AEL ATHLOPEDIAS LTD BASKETBALL, together with the licensed Agent Elías Diamantopoulos operating as Diamond Sports Agency, an amount in form of commission was agreed on my favor.

III.- I declare to have received my pertinent share of the commission agreed with CLUB AEL ATHLOPEDIAS LTD BASKETBALL from Diamond Sports Agency pertinent share, I hereby authorize Diamond Sport Agency, as I have assigned my legal rights to (sic) him in order to claim before the Basketball Arbitral Tribunal the full amount corresponding to the commission generated and settled for the incorporation of the Player Mr. Ronell Taylor to the aforesaid basketball Club before the Basketball Arbitral Tribunal.

IV.- For sake of clarification, this assignment of rights and inherent authorization shall compress every amount owed by CLUB AEL ATHLOPEDIAS LTD BASKETBALL corresponding to Agent's fees related to the integration of the Player Mr. Ronell Taylor into the roster of the aforesaid basketball Club.

In witness whereof, I, Mr. Derrick Powell sign this letter for such purposes as may arise.

Mr. Derrick Powell"

16. By letter of 25 October 2011, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about the appointment of the Arbitrator.

Furthermore, a time limit was fixed for the Club to file its answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 15 November 2011. The BAT Secretariat also requested the Parties pay the following amounts as an Advance on Costs by no later than 8 November 2011:

<i>"Claimant 1 (Mr. Ronell Taylor)</i>	<i>EUR 3,500</i>
<i>Claimant 2 (Mr. Elias Diamantopoulos)</i>	<i>EUR 1,000</i>
<i>Respondent (BC AEL Limassol Athlopedies LTD)</i>	<i>EUR 4,500"</i>

17. By letter of 22 November 2011, the BAT Secretariat acknowledged receipt of the Player's and the Agent's shares of the Advance on Costs. In addition, the BAT Secretariat informed the Parties that the Club had failed to submit an Answer and to pay its share of the Advance on Costs, and noted that in accordance with Article 9.3 of the BAT Rules, the arbitration would not proceed until the full amount of the Advance on Costs was received. Therefore, the Claimants were requested to effect payment of the remaining share of the Advance on Costs in the amount of EUR 4,500.00 by no later than 2 December 2011.
18. By letter of 9 December 2011, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs. In the same letter, the Arbitrator declared the exchange of documents complete and invited the Parties to submit a detailed account of their costs until 20 December 2011.
19. On 19 December 2011, the Claimants' counsel submitted an account of costs as follows:



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"In light of the Procedural order delivered by BAT on December 9th, 2011, Claimants herewith present the requested detailed of costs generated so far throughout the proceedings.

➤ **PROCEEDING COSTS**

COSTS

RECEIVED FROM	DESCRIPTION	AMOUNT
<i>Taylor Quincy</i>	<i>Non reimbursable handling fee</i>	<i>2,000 euros</i>
<i>Taylor Quincy</i>	<i>Advance of Costs (Respondent's share)</i>	<i>4,500 euros</i>
<i>Taylor Quincy</i>	<i>Advance of Costs (claimant's share)</i>	<i>3,500 euros</i>
<i>Diamantopoulos Flont ilias</i>	<i>Advance of Costs (claimant's share)</i>	<i>1,000 euros</i>
	Total	11,000 euros

LEGAL FEES

DESCRIPTION	LEGAL FEES
<i>Draw up of law suit. Analysis of the agreement and meeting with clients.</i>	<i>1,500 euros</i>
<i>Draw up of request for arbitration.</i>	<i>3,500 euros</i>
<i>Communications with BAT. Communications to Client regarding payments of fee (respondent's share)</i>	<i>600 euros</i>
Total fees	5,600 euros

Should the Tribunal need further information or detail regarding the above, please do not hesitate to contact me."

20. The Club did not submit any account of costs.

21. By email of 22 December 2011, the BAT Secretariat invited the Club to comment on the Claimants' account of costs. However, the Club did not provide any comments, to date.
22. The Parties did not request the BAT hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the award on the basis of the written submissions available.

4. The Positions of the Parties

4.1 The Claimants' Position

23. The Player and the Agent submit the following in substance:
- The Player received all salary amounts for the 2008-2009 season, but not the agreed bonuses. Because of the results of the Club's team in the 2008-2009 season the Player is entitled to bonuses amounting to USD 16,000.00 (EUR 11,188.00).¹
 - The Club's failure to make the agreed payments in the 2009-2010 season, constitutes a breach of the Addendum. In accordance with Clause 3 of the Addendum, the Player is no longer bound by the reduced payments agreed in the Addendum but entitled to claim the entire compensation provided by the Player Contract.
 - According to Clause 7 of the Player Contract, the Player is entitled to USD

¹ All USD/EUR conversions in this Award have been taken from the Request for Arbitration. The Claimants have applied an exchange rate of 1 USD = 0.699 EUR. This rate leads to a lower EUR-amount as if the official rates on the date of the Request of Arbitration or the date of this Award would have been applied. The Arbitrator is bound by the Claimants' requests and cannot revise the exchange rate upwards.

170,000.00 (EUR 118,881.00). The Player Contract was a “GUARANTEED CONTRACT” and the Player played the entire contract period with the Club’s team. Hence, the Player is entitled to the full salary amount for the 2009-2010 season. The salaries for the 2009-2010 season which the Player received from the Club amount only to EUR 51,737.56. The amount of EUR 67,143.00² is still outstanding

- According to Clause 15 of the Player Contract, the Agent and the Player’s second agent, Mr. Derrick Powell, are entitled to an Agent Fee equal to 10% of the value of the Player’s base salary. The Club paid the full Agent Fee for the 2008-2009 season and an amount of EUR 2,097.00 for the 2009-2010 season. Because the agents were entitled to EUR 11,888.00 (corresponding to USD 17,000.00) for the Player’s second season the still outstanding Agent Fee amounts to EUR 9,791.00.
- Because of Mr. Powell’s assignment dated 8 September 2011, the Agent is authorized to claim the entire outstanding Agent Fee. The Agent is authorized to claim the Agent Fee although he did not personally sign the Player Contract which stipulates also the Agent Fee (see, e.g. BAT case 0128/10).
- Both, the Player and the Agent are entitled to “penalty interest” of 5% p.a. from the due date of each payment owed. Such interest is not stipulated in the Player Contract, but it is a general principle which has been accepted by BAT jurisprudence, that an obligee is entitled to default interest whether or not the obligation to pay such interest has been expressly agreed in the contract.

² The Arbitrator assumes the Claimants’ rounding from the Request for Arbitration.

4.2 Claimants' Request for Relief

24. In their Request for Arbitration the Player and the Agent (and the initial third Claimant, Mr. Powell, who withdrew later) requested the following relief:

"CLAIMANT

- LXXXIX. Claimant seeks relief whereby BAT would rule ex aequo et bono (as concretely settled between the Parties in the Agreement) as follows:*
- LXXX. Respondent shall be held liable for breach of the Addendum signed in October 8th, 2009 without just cause.*
- LXXXI. Respondent shall be ordered to pay the net amount of SIXTY SEVEN THOUSAND ONE HUNDRED AND FORTY THREE EURO (67.143 €) as being this amount, on the one hand, the one settled by the parties for season 2009/2010 in the Agreement as main remuneration for the Claimant services as a basketball player, and on the other hand, minus the amount already paid by the Respondent.*
- LXXXII. Respondent is ordered to pay the pertinent bonus of ELEVEN THOUSAND ONE HUNDRED AND EIGHTY EIGHT EURO (11.188 €) for season 2008/2009.*
- LXXXIII. Respondent is ordered to pay penalty for legal interest at five percent (5 %) per annum to every aforesaid amount, in accordance to the terms and conditions expressed ut supra, i.e., since the last due date April 30th, 2010.*
- LXXXIV. Respondent is ordered to pay expenses and reasonable legal fees on a net amount of FIVE THOUSAND EUROS (5.000 €) concretely related to the execution of the present Request for Arbitration and Respondent's refusal to submit the proper payment.*
- LXXXV. Respondent, additionally, is ordered to pay the legal costs effectively incurred to have access to BAT proceedings, i.e., the non-reimbursable handling fee of TWO THOUSAND EUROS (2,000€) and it should be considered when assessing the Claimant's legal fees and expenses.*
- LXXXVI. Respondent is, as well, ordered to disburse the advanced of costs eventually determined by BAT.*

CLAIMANT 2 AND 3

- LXXXVII. Claimant 2 and 3 seek relief whereby BAT would rule ex aequo et bono (as concretely settled between the Parties in the Agreement) as follows:*

LXXXVIII. Respondent shall be ordered to pay the net amount of NINE THOUSAND SEVEN HUNDRED AND NINETY ONE EURO (9.791 €) as being this sum the outstanding amount of the one settled by the parties for season 2009/2010 in the Agreement which has not been paid to date.

LXXXIX. Respondent is ordered to pay penalty for legal interest at five percent (5%) per annum to the previous amount, in accordance to the terms and conditions expressed ut supra, i.e., since the last due date of payment of salaries to the Claimant, on April 30th, 2010.”

4.3 The Respondent's Position and Request for Relief

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

5. The Jurisdiction of the BAT

26. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Club did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands³.

27. 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).

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

³ ATF 120 II 155, 162.

29. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.⁴

30. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Clause 4 of the Player Contract and the identical arbitration clause in Clause 4 of the Addendum, which both read as follows:

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

31. In accordance with Article 1.1 of the BAT Rules, these rules *“shall apply whenever the parties to a dispute have agreed in writing to submit the same to the BAT – including by reference to its former name “FIBA Arbitral Tribunal (FAT)”* (emphasis in the original). Article 18.2 of the BAT Rules says: “Any reference to BAT’s former name “FIBA Arbitral Tribunal (FAT)” shall be understood as referring to the BAT.” The Parties’ reference to the “FIBA Arbitral Tribunal (FAT)” in Clause 4 of the Player Contract as well as the Addendum is therefore understood as a reference to the BAT.

32. The Player Contract and the Addendum are in written form and thus the arbitration agreements fulfil the formal requirements of Article 178(1) PILA.

33. With respect to substantive validity, the Arbitrator considers that the Player Contract

⁴ 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.

and the Addendum were concluded between the Club and the Player but not signed by the Agent. Therefore, the question arises whether the arbitration agreement can also be binding upon non-signatories such as the Agent.

34. 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.⁵ 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.⁶
35. However, an extension of the arbitration agreement requires a legal relationship between the third party and the initial parties to the arbitration agreement, which must be of a certain intensity to justify the extension. The Arbitrator finds that the Player Contract itself refers to a sufficiently strong legal relationship between the Club, the Player and the Agent, that justifies an extension of the arbitration agreement to the Agent. Clause 15 of the Player Contract expressly states that the Agent is considered as one of the Player's exclusive agents, and stipulates the Club's obligation to pay an Agent Fee. Moreover, the Arbitrator finds that although the Player Contract was signed only by the Club and the Player, at least Clause 15 of the Player Contract must be considered as an agreement in favour of a third party, namely the Agent (and Mr Powell). Under Swiss arbitration law, the conclusion of an agreement in favour of a third party implies the application of the arbitration agreement, by analogy with Article

⁵ Decision of the Swiss Federal Tribunal dated 16 October 2003, BGE 129 III 727, 735, cons. 5.3.1.

⁶ PHILIPP FISCHER: When can an arbitration clause be binding upon non-signatories under Swiss law?, in: Jusletter of 4 January 2010.

112 of the Swiss Code of Obligations⁷.

36. The Arbitrator also considers that there is no other indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” in Clause 4 of the Player Contract as well as the Addendum clearly covers the present dispute.⁸
37. The Arbitrator finds therefore that the arbitration agreement in the Player Contract applies also to disputes between the Club and the Agent insofar as such disputes relate to the payment of the Agent Fee.
38. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Claimants’ claims.

6. Other Procedural Issues

39. Article 14.2 of the BAT Rules, which the Parties have declared to be applicable in the arbitration agreements, 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

⁷ Article 112 of the Swiss Code of Obligations provides: “¹ 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. ² 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. ³ 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.

⁸ See for instance BERGER/ KELLERHALS: International and domestic Arbitration in Switzerland, Berne 2010, N 466.

parties is in accordance with Swiss arbitration law⁹ and the practice of the BAT.¹⁰ However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

40. This requirement is met in the current case. The Club was informed of the initiation of the proceedings and of the appointment of the Arbitrator according to the relevant rules. It was also given opportunity to respond to Claimants' Request for Arbitration and to their account on costs. Still, the Club has chosen not to respond within the time limits set by the Arbitrator according to the BAT Rules.
41. The Request for Arbitration names "ELIAS DIAMANTOPOULOS DIAMOND SPORTS AGENCY" as the Second Claimant. Upon request by the BAT Secretariat, by email of 5 September 2011, the Claimants' counsel clarified that the Second Claimant is the Agent personally, and not his agency as a legal entity.

7. Applicable Law – *ex aequo et bono*

42. 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

⁹ 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*, 2nd ed., Basel 2007, Art. 182 PILA N 87; VISCHER, in: *Zurich Commentary to the PILA*, 2nd ed., Zurich/Basel/Geneva 2004, Art. 182 PILA N 29.

¹⁰ See *ex multis* BAT cases 0001/07, *Ostojic and Raznatovic vs. PAOK KAE*; 0018/08, *Nicevic vs. Beşiktaş*; 0093/09, *A.S.D. Pallacanestro Femminile Schio vs. Braxton*; 0170/11, *Haritopoulos and Kallergis vs. Panionios BC K.A.E. and Gallis*.

of rules of law. Article 187(2) PILA is generally translated into English as follows:

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

43. 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.”

44. In the arbitration agreements in Clause 4 of the Player Contract and the Addendum, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.

45. 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 1969¹¹ (Concordat)¹² 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.”¹³

46. 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.*”

¹¹ 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).

¹² KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Article 187 PILA N 289.

¹³ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

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

8. Findings

48. The Claimants request (a) outstanding salaries for the 2009-2010 season; (b) bonuses concerning the 2008-2009 season; (c) the remaining Agent Fee concerning the 2009-2010 season; and (d) “penalty interest” on the aforementioned amounts.

8.1 Is the Player entitled to outstanding salaries for the 2009-2010 season in the amount of EUR 67,143.00?

49. The Player submits that according to the Player Contract, he was entitled to salaries for the 2009-2010 season in the total amount of USD 171,000.00 (EUR 118,881.00). He received only EUR 51,737.56 which is confirmed by the banking statements submitted in this arbitration. In the correspondence with the Agent, the Club never disputed the quantum of the claimed salary, but explained its failure to pay the salaries by financial difficulties.

50. The Addendum provides for a substantial reduction of the Player’s salary. However, the reduction was subject to the Club’s compliance with the terms of the Addendum, in particular, with the “Payment Schedule 2009-10 Season” which provided for seven payments of EUR 10,000.00 between 15 October 2009 and 15 April 2010. Although not explicitly mentioned in the Addendum, the Arbitrator understands that the seven payments were planned by the Parties to be paid in monthly instalments due on the 15th day of each month. The Player submits that despite several reminders, the Club did not comply with the Payment Schedule. As a consequence, the provisions of the Player Contract applied again and the Addendum was no longer valid.

51. Indeed, the correspondence between the Agent and the Club demonstrates that the payments were not made in accordance with the Addendum: the Player received

neither the entire amount agreed upon nor did he receive the payments on time. The Agent therefore rightly notified the Club about its breach of the Addendum and (by his letter of 29 April 2010) invoked Clause 3 of the Addendum which led to the re-application of the provisions of the Player Contract. As a consequence, the Player is entitled to the full salary as agreed in the Player Contract. The remaining salary amounts to EUR 67,143.44 which has been adjusted by the Player in his request to EUR 67,143.00.

8.2 Is the Player entitled to bonuses in the amount of EUR 11,188.00?

52. The Player claims the unpaid bonuses for the 2008-2009 season in the amount of USD 16,000.00 (EUR 11,188.00). The bonuses had been waived in the Addendum. However, in view of the considerations set out in para. 51 above, the Addendum and the waiver to these bonuses no longer applied after the Club failed to comply with the provisions of the Addendum.
53. From the correspondence between the Agent and the Club, the Arbitrator concludes that the Club was well aware of its obligation to pay the bonuses for the 2008-2009 season. The Arbitrator also assured himself by a brief online search of publicly available information, that the Club actually achieved the results asserted by the Claimants.¹⁴
54. In fact, the Club repeatedly promised to comply with its payment obligations. On the other hand, there is no evidence that the Club actually made the promised payments. The Arbitrator therefore finds that the Player is entitled to bonuses in the total amount of EUR 11,188.00.

¹⁴ See e.g. www.eurobasket.com/team.asp?Cntry=Cyprus&Team=353&Year=2008-2009

8.3 Is the Agent entitled to an Agent Fee in the amount of EUR 9,791.00?

55. The Agent claims that the Club did not pay the entire Agent Fee for the 2009-2010 season in the amount of USD 17,000.00 (EUR 11,888.00) but only an amount of EUR 2,097.00. The outstanding Agent Fee adds up to EUR 9,791.00. The Addendum does not address the Agent Fee. However, Clause 2 of the Addendum states that “[a]ll other paragraphs of the Contract between AEL Athlopedies Ltd. Limassol Basketball Club and Ronell Taylor, dated on August 13, 2008 are left without changes and will remain in effect.” As a consequence, the obligation to pay the Agent Fee is not affected by the Addendum at all.
56. The obligation to pay the Agent Fee also for the 2009-2010 season was never disputed by the Club. In an email dated 8 October 2009, the Club confirmed in writing that the Agent Fee would remain the same (as in the 2008-2009 season), but that only the payment dates might be reviewed. The Arbitrator therefore finds that the Club is obligated to pay the Agent Fee also for the 2009-2010 season, and that there is no indication that the Club complied with this obligation to date.
57. It is true that the Player Contract provides that the Agent Fee is due to both, Mr. Powell and the Agent. However, on 8 September 2011 Mr Powell signed a valid assignment of claim in favor of the Agent, who is therefore entitled to claim the entire unpaid Agent Fee in the amount of EUR 9,791.00.

8.4 Are the Player and the Agent entitled to interest on the aforementioned amounts?

58. The Player and the Agent request “penalty interest” at the rate of 5 % p.a. from 30 April 2010.
59. According to BAT jurisprudence, default interest can be awarded even if the underlying

agreement does not explicitly provide for an obligation to pay interest.¹⁵ Although the Player Contract does not provide for the payment of default interest, this is a generally accepted principle which is embodied in most legal systems. The Arbitrator, deciding *ex aequo et bono*, considers interest in the requested rate of 5% p.a. to be fair and equitable also in the present case.

60. The Claimants request default interest since 30 April 2010 which is the last contractually agreed payment date. The Claimants' last invitation to the Club for payment of the outstanding amounts dates back to 15 September 2010. The Arbitrator finds that although it is entirely up to a claimant to determine the appropriate date to commence legal proceedings to enforce its claim, it would be unfair to burden a respondent with default interest if the claimant did not proceed expeditiously. In the present case, the Claimants initiated the BAT proceedings only 16 months after the last agreed payment date.
61. The Arbitrator, deciding *ex aequo et bono* and in view of the circumstances of this case, finds that a respite of 6 months would be acceptable. Therefore the term for which default interest is due, shall be reduced to approximately 6 months prior to the receipt of the BAT handling fee in the BAT banking account (i.e. 31 August 2011), which means that the starting date for the calculation of the default interest shall be 1 March 2011.

¹⁵ 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*.

8.5 Summary

62. The Player is entitled to an amount of EUR 78,331.00 – consisting of the outstanding salary in the amount of EUR 67,143.00 and bonuses in the amount of EUR 11,188.00 – plus interest on these amounts of 5 % p.a. since 1 March 2011.
63. The Agent is entitled to the outstanding agent fee in the amount of EUR 9,791.00 plus interest on this amount of 5 % p.a. since 1 March 2011.

9. Costs

64. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
65. On 6 February 2012 - considering that pursuant to Article 17.2 of the BAT Rules “the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator”, and that “the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised - the BAT President determined the arbitration costs in the present matter to be EUR 9,000.00.
66. Considering that the Claimants prevailed in the entirety of their main claims, the Arbitrator finds it fair that the fees and costs of the arbitration be borne by the Club alone and that it be required to cover the Player’s and the Agent’s legal fees and other

expenses.

67. Given that the Claimants paid an advance on costs of EUR 9,000.00 and that the Claimants paid a non-reimbursable handling fee of EUR 2,000.00, in application of article 17.3 of the BAT Rules the Arbitrator decides as follows:

- (i) The Club shall pay EUR 9,000.00 to the Claimants, being the amount of the costs advanced by them;
- (ii) Furthermore, the Arbitrator considers it adequate that the Player and the Agent are entitled to the payment of a contribution towards their legal fees and other expenses (Article 17.3. of the BAT Rules). The Arbitrator deems it appropriate to take into account the non-reimbursable handling fee of EUR 2,000.00 and further legal costs of EUR 5,600.00 when assessing the expenses incurred by the Claimants in connection with these proceedings. After having reviewed and assessed all the circumstances of the case at hand, especially that the Claimants prevailed in their main claims, the Arbitrator fixes the contribution towards Claimants' legal costs at EUR 7,600.00.

10. AWARD

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

- 1. BC AEL Limassol Athlopedies LTD is ordered to pay to Mr. Ronell Taylor the amount of EUR 78,331.00 plus interest of 5% p.a. since 1 March 2011.**
- 2. BC AEL Limassol Athlopedies LTD is ordered to pay to Mr. Elias Diamantopoulos the amount of EUR 9,791.00 plus interest of 5% p.a. since 1 March 2011.**
- 3. BC AEL Limassol Athlopedies LTD is ordered to pay the Claimants the amount of EUR 9,000.00 as a reimbursement of their advance on arbitration costs.**
- 4. BC AEL Limassol Athlopedies LTD is ordered to pay to the Claimants the amount of EUR 7,600.00 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, 13 February 2012

Stephan Netzle
(Arbitrator)