



**BASKETBALL**  
ARBITRAL TRIBUNAL

**ARBITRAL AWARD**

(BAT 0328/12)

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Stephan Netzle**

in the arbitration proceedings between

**Mr. Bryant Dunston**

**Excel Sports Management LLC**

1700 Broadway, 29<sup>th</sup> Floor New York, NY 10019, USA

**BeoBasket Ltd.**

Strahinjica bana 18, 11000 Belgrade, Serbia

**Mr. Panos Kapazoglou**

all represented by Mr. Michael Lindeman, Excel Sports Management,  
1700 Broadway, 29th Floor New York, NY 10019, USA

vs.

**Aris BSA 2003**

Grigorou Lambraki 2, 54636 Thessaloniki, Greece

- Claimant 1 -

- Claimant 2 -

- Claimant 3 -

- Claimant 4 -

- Respondent -

## **1. The Parties**

### **1.1 The Claimants**

1. Mr. Bryan Dunston (hereinafter the "Player") is a professional basketball player of US nationality.
2. Excel Sports Management LLC is an agency representing professional basketball players and located in New York, USA.
3. BeoBasket Ltd. is an agency also representing professional basketball players and located in Belgrade, Serbia.
4. Mr. Panos Kapazoglou is a FIBA-licensed basketball agent of Greek nationality.
5. All four Claimants are represented by Mr. Michael Lindeman from Excel Sports Management LLC, New York, USA.

### **1.2 The Respondent**

6. Aris BSA 2003 (hereinafter the "Club") is a professional basketball club located in Thessaloniki, Greece.

## **2. The Arbitrator**

7. On 23 October 2012, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), Prof. Richard H. McLaren, appointed Dr. Stephan Netzle as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

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

#### **3.1 Summary of the Dispute**

8. On or before 26 July 2010, the Player and the Club entered into an employment agreement (hereinafter the “Player Contract”) for the 2010/2011 basketball season. In addition to the Player Contract, a further document titled “Annex of the Agreement” (hereinafter the “Annex”) was signed. According to Article 2 of the Annex, the Club agreed to pay agent fees in the total amount of USD 17,000.00 (USD 8,500.00 to Claimant 2, USD 5,100.00 to Claimant 3 and USD 3,400.00 to Claimant 4) by no later than 15 September 2010.
9. The Player started training and playing with the Club’s team. However, as submitted by the Claimants, the Club paid the Player’s first salary instalments late and failed to pay the agreed agent fees.
10. On or before 4 February 2011, the Player and the Club agreed to mutually terminate their contractual relationship and signed a termination agreement titled “Private Agreement – Annulment of the contract for the athletic services # 0118/2010” (hereinafter the “Termination Agreement”). By a separate document titled “Recognition of debt – Agreement of payment” (hereinafter the “Payment Agreement”), the Club agreed to pay an amount of USD 48,000.00 to the Player. However, as submitted by the Claimants, only the first instalment of USD 12,000.00 was paid to the Player.
11. By letter of 15 September 2011, the Claimants’ counsel requested the Club pay the outstanding amount of USD 36,000.00 plus the outstanding agent fee of USD 17,000.00 by no later than 1 October 2011. In case of non-payment, the Claimants’ counsel announced that he would file a claim with the BAT.
12. By letter of 19 September 2011, the Club asked the Claimants’ counsel for an extension for payment until 20 October 2011.

13. By letter of 26 October 2011, the Claimants' counsel referred to the Club's letter of 19 September 2011 and noted that the due amounts were still outstanding. He informed the Club that in case the Claimants would not receive "some form of payment" by 4 November 2011, the matter would be submitted "to the FIBA".
14. As submitted by the Claimants, no further payments were made by the Club and the amount of USD 36,000.00 due to the Player and agent fees amounting to USD 17,000.00 are still outstanding.

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

15. On 20 September 2012, the BAT Secretariat received the Claimants' Request for Arbitration dated 19 September 2012. Further documents were provided by Claimants' counsel on 23 October 2012. The non-reimbursable handling fee of EUR 1,985.00 was received in the BAT bank account on 1 October 2012.
16. By letter of 23 October 2012, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Club to file its answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 13 November 2012. The BAT Secretariat also requested the Parties pay the following amounts as an Advance on Costs by no later than 1 November 2012:

<i>"Claimant 1 (Mr. Bryant Dunston)</i>	<i>EUR 2,000</i>
<i>Claimant 2 (Excel Sports Management LLC)</i>	<i>EUR 1,000</i>
<i>Claimant 3 (Beobasket Ltd.)</i>	<i>EUR 1,000</i>
<i>Claimant 4 (Mr. Panos Kapazoglou)</i>	<i>EUR 1,000</i>
<i>Respondent (Aris BSA 2003)</i>	<i>EUR 5,000"</i>

17. By email of 14 November 2012, the Club's President requested a suspension of the proceedings for the period of two months because of attempted settlement negotiations

with Claimant 4. Therefore, on 15 November 2012 the Arbitrator requested the Claimants to confirm by no later than 22 November 2012 that “they all are in settlement negotiations with the Club and that they agree with a two-month suspension of the proceedings.” On 19 November 2012, the Claimants replied that no settlement negotiations took place and that the Claimants did not agree with a two-month suspension.

18. By letters of 22 and 23 November 2012, the BAT Secretariat informed the Parties about the Arbitrator’s decision to reject the Club’s request for a two-month suspension and that the Club was granted a final opportunity to file the Answer by no later than 29 November 2012. Furthermore, the BAT Secretariat confirmed receipt of the Claimants’ share of the Advance on Costs and informed the Parties about the Club’s failure to pay its share and that the arbitration would not proceed until receipt of the full amount of the Advance on Costs. The BAT Secretariat then invited the Claimants to substitute the Club’s share of the Advance of Costs by 3 December 2012.
19. By letter of 5 December 2012, the BAT Secretariat informed the Parties about the Club’s failure to submit the Answer and Claimants’ failure to pay the Club’s share of the Advance on Costs. The Claimants were granted a further opportunity to pay the remaining Advance on Costs by no later than 14 December 2012.
20. By letter of 8 January 2013, the BAT Secretariat acknowledged receipt of the full Advance on Costs and informed the Parties that the proceedings would now continue. Moreover, the Arbitrator requested further information from the Claimants by no later than 18 January 2013.
21. By letter of 14 January 2013, the BAT Secretariat acknowledged receipt of the Claimants’ reply of 11 January 2013 regarding the procedural order of 8 January 2013. By the same letter, the BAT Secretariat invited the Club to comment on the Claimants’ submission by 21 January 2013. However, the Club did not file any comments.

22. By letter of 11 February 2013, the BAT Secretariat informed the Parties that the Arbitrator had decided to declare the exchange of documents complete. The Parties were therefore invited to submit a detailed account of their costs until 18 February 2013.
23. On 14 February 2013, the Claimants submitted an account of costs as follows:
- “Advance on Costs – Claimant 1 (Mr. Bryant Dunston) = EUR 2,000  
Advance on Costs – Claimant 2 (Excel Sports Management LLC) = EUR 1,000  
Advance on Costs – Claimant 3 (Beobasket Ltd.) = EUR 1,000  
Advance on Costs – Claimant 4 (Mr. Panos Kapazoglou) = EUR 1,000  
Advance on Costs – Respondent (Aris BSA 2003)(paid by Claimants) = EUR 5,000  
Total Legal Fees – Claimants 1,2,3 & 4 = EUR 4,000  
**Total Costs = EUR 14,000”***
24. The Club did not submit any account of costs.
25. By letter of 19 February 2013, the BAT Secretariat forwarded the Claimants’ account of costs to the Club and informed the Parties that while the Claimants had not explicitly requested reimbursement of costs in any of their submissions, the Arbitrator understood the Claimants’ submission of their account of costs as formal request for reimbursement. The Respondent was therefore invited to submit its comments, if any, on the Claimants’ costs and on the Arbitrator’s interpretation of the Claimants’ request by no later than 22 February 2013. The Club did not file any comments.
26. 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**

27. The Claimants submit the following in substance:

- The reasons for the mutual termination in February 2011 were the Club's numerous late payments of the Player's salary instalments and its failure to pay the agreed agent fees.
- According to the Payment Agreement, the Club agreed to a settlement payment of USD 48,000.00 to the Player. However, only the initial payment of USD 12,000.00 has been made to date. The four instalments of USD 9,000.00 each, which were due on 30 March, 30 April, 30 May and 30 June 2011, are still outstanding. Consequently, the Club is obliged to pay to the Player the amount of USD 36,000.00.
- The Claimants 2, 3 and 4 assisted the Club and the Player when they concluded the Player Contract. However, the Club has not paid any of the agent fees agreed in the Annex although said fees had to be paid on 15 September 2010. Consequently, the Club is obliged to pay agent fees in the amount of USD 8,500.00 to the Claimant 2, USD 5,100.00 to the Claimant 3 and USD 3,400.00 to the Claimant 4.
- Since March 2011, the Claimants have repeatedly requested payment of the outstanding instalments to the Player as well as of the outstanding agent fees.

### **4.2 The Claimants' Request for Relief**

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

*“USD 36,000: Settlement payment to Bryant Dunston (Claimant 1)  
USD 8,500: Agent Fee to Excel Sports Management (Claimant 2)  
USD 5,100: Agent Fee to BeoBasket LTD (Claimant 3)  
USD 3,400: Agent Fee to Panos Kapazoglou (Claimant 4)  
plus interest at the applicable Swiss statutory rate from the applicable due dates.”*

#### **4.3 The Respondent’s Position and Request for Relief**

29. Despite several invitations by the BAT, the Club engaged in the arbitration proceedings only once, namely at the beginning of the proceedings to request a two-month suspension. It did not file an answer to the Request for Arbitration and did not make any further submissions.

#### **5. The Jurisdiction of the BAT**

30. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Club did not participate in the arbitration except its request for suspension of the proceedings, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.
31. 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).
32. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
33. 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.

34. The jurisdiction of the BAT over the dispute results from the arbitration clauses contained in Article 1 of the Annex and Clause 1 of the Payment Agreement, the relevant parts of which read as follows:

Article 1 of the Annex:

*“The article 12 of the Agreement signed between the parties on the 26th of July 2010 is changed by contracting parties and now will have the following text:*

*‘Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President.*

*The seat of the arbitration shall be Geneva, Switzerland.*

*The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of parties’ domicile.*

*The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.”*

Clause 1 of the Payment Agreement:

*“All 3 sides recognize and accept that in case that the above mentioned amount will not be paid on time and in full, the Player has the right to submit his dispute to the Athletic Courts of Greek League and FIBA Arbitral Tribunal (FAT) basketball court and to claim any remaining amount owed.”*

35. 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)”. 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 Article 1 of the Annex as well as Clause 1 of the Payment Agreement is therefore understood as a reference to the BAT.
36. The Annex and the Payment Agreement are in written form and thus the arbitration agreements fulfil the formal requirements of Article 178(1) PILA.
37. The fact that Clause 1 of the Payment Agreement refers also to the “Athletic Courts of Greek League” does not affect the competence of the BAT to decide this dispute since

this arbitration clause explicitly provides the Player two alternatives to claim outstanding amounts, i.e. the right to file a claim with the “Athletic Courts of Greek League” and the “FIBA Arbitral Tribunal (FAT) basketball court” which is to be understood as reference to the BAT. Indeed, the Player chose to submit his claim to the BAT. Moreover, the further reference to “the Arbitration of Greek basketball association and HEBA (ESAKE and EKO)” in Article 12 of the Player Contract does not impact the BAT’s jurisdiction because Article 1 of the Annex explicitly states that it substitutes Article 12 of the Player Contract as new arbitration clause in favour of the BAT.

38. With respect to substantive validity of the arbitration agreements, the Arbitrator considers that the Payment Agreement, on which the Claimants base their request for the outstanding amount to be paid to the Player, was signed by the Club and the Player. The Annex, on which the Claimants base their request for the outstanding agent fees, bears the signatures of the Club, the Player and, under the title “Agents”, those of two persons whose identity is unknown.
39. Whether or not the Claimants 2, 3 and 4 eventually signed the arbitration agreement as part of the Annex, is irrelevant. 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 third parties was not.<sup>1</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>2</sup>

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<sup>1</sup> Decision of the Swiss Federal Tribunal dated 16 October 2003, BGE 129 III 727, 735, cons. 5.3.1.

<sup>2</sup> PHILIPP FISCHER: When can an arbitration clause be binding upon non-signatories under Swiss law?, in: Jusletter of 4 January 2010.

40. 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 Annex itself refers to a sufficiently strong legal relationship between the Club and all four Claimants, which would justify an extension of the arbitration agreement to the Claimants 2, 3 and 4. The Preamble of the Annex expressly states that the Claimants 2, 3 and 4 are considered as the Player's agents and Article 2 of the Annex stipulates the Club's obligation to pay agent fees to them. Moreover, the Arbitrator finds that at least Article 2 of the Annex must be considered as an agreement in favour of a third party, namely the Claimants 2, 3 and 4. Under Swiss arbitration law, the conclusion of an agreement in favour of a third party extends the scope of the arbitration agreement also to the beneficiaries<sup>3</sup>.
41. The Arbitrator finds therefore that the arbitration agreement in the Annex applies also to disputes between the Club and the Claimants 2, 3 and 4 insofar as such disputes relate to the payment of agent fees related to the Club's engagement of the Player.
42. The Arbitrator also considers that there is no other indication in the file which could cast doubt on the validity of the arbitration agreements under Swiss law (referred to by Article 178(2) PILA). In particular, the wordings "*[a]ny dispute arising from or related to the present contract*" in Article 1 of the Annex and "*in case that the above mentioned amount will not be paid on time and in full, the Player has the right [...] to claim any remaining amount owed*" in Clause 1 of the Payment Agreement cover the present dispute. In addition, the jurisdiction of BAT has not been disputed by the Club.

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<sup>3</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.

43. For the above reasons, the Arbitrator finds that he has jurisdiction to decide the present dispute and to adjudicate the Claimants' claims.

## **6. Respondents' failure to submit an Answer**

44. 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 and the practice of the BAT<sup>4</sup>. However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

45. 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 which is proven by the Club's request to suspend the proceedings filed after receipt of information about the initiation of the proceedings and the appointment of the Arbitrator. Furthermore, the Club was given the opportunity to respond to the Claimants' Request for Arbitration and to the Claimants' account on costs. Still, the Club has chosen not to respond.

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

46. 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

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<sup>4</sup> 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*.

may authorize the arbitrators to decide “*en équité*” instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

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

47. 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.”*

48. In the arbitration agreement in Article 1 of the Annex, the Arbitrator has explicitly been empowered to decide this dispute *ex aequo et bono* without reference to any other law (see para. 34 above). As Article 1 of the Annex substitutes Article 12 of the Player Contract, the reference to Greek legislation in Article 12 of the Player Contract does not affect the applicable law.

49. The further arbitration agreement in Clause 1 of the Payment Agreement does not contain any reference to any law but rather generally refers to arbitration before the BAT and therefore also to Article 15.1 *in fine* of the BAT Rules where the concept of “*équité*” (or *ex aequo et bono*) used in Article 187(2) PILA has been confirmed, according to which the Arbitrator applies “*general considerations of justice and fairness without reference to any particular national or international law.*”

50. Therefore, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.

51. 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*<sup>5</sup> (Concordat),<sup>6</sup> under which

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<sup>5</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).

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>7</sup>*

52. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives “a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case”.<sup>8</sup>

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

## 8. Findings

54. The Claimants request (1) an outstanding amount of USD 36,000.00 be paid to the Player, (2) agent fees in the total amount of USD 17,000.00 be paid to the agencies/agent and (3) interest on these amounts.

### 8.1 Outstanding amount of USD 36,000.00 owed to the Player

55. The Payment Agreement which replaced the Player Contract with respect to the relationship between the Player and the Club is now the basis for the Player’s claim. Article 1 of the Payment Agreement stipulates the Club’s obligation to pay the total amount of USD 48,000.00 to the Player and lists the payment terms as follows:

<sup>6</sup> P.A. KARRER, Basler Kommentar, No. 289 ad Art. 187 PILA.

<sup>7</sup> JdT 1981 III, p. 93 (free translation).

<sup>8</sup> POUURET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

*“12,000 USD at 10.02.2011  
9,000 USD at 30.03.2011  
9,000 USD at 30.04.2011  
9,000 USD at 30.05.2011  
9,000 USD at 30.06.2011”*

56. The first instalment of USD 12,000.00 has been paid as agreed but the rest of USD 36,000.00 in total is still outstanding. This debt has not been disputed by the Club. To the contrary, the Club's request for an extension of the time limit of 10 September 2011, which was an immediate reaction to the Player's request to pay the remaining instalments, indicates that the Club acknowledged the amount due. There is no indication that this amount has been paid in whole or in part, to date.
57. The Arbitrator finds therefore that the Club is obliged to pay the amount of USD 36,000.00 to the Player.

## **8.2 Outstanding agent fees in the total amount of USD 17,000.00**

58. The claim for payment of the agent fees is based on the Annex which was not terminated or otherwise substituted by the Payment Agreement when it comes to the agent fees. Article 2 of the Annex stipulates the Club's obligation to pay the total amount of USD 17,000.00 to “Agents for their services in negotiations, [...] for the player Bryant Dunston” and lists the exact amounts to be paid to the different agents as follows:

*“a) amount of 8.500 USD to Excel Sports Management USA  
b) amount of 5.100 USD to BeoBasket LTD  
c) amount of 3.400 USD to Panos Kapazoglou”*

59. Both the Annex and the Player Contract clearly state in their preambles that the Player was represented by the Claimants 2, 3 and 4. There is no indication in the file that

these three agencies/agents did not provide “their services in negotiations, [...] for the player Bryant Dunston”.

60. The agent fees were also mentioned in the reminders of the Claimants’ counsel of 15 September and 26 October 2011. When the Club asked by its letter dated 19 September 2011, for an extension of the payment date, it explicitly referred twice to the “[o]utstanding amounts owed to player Bryant Dunston and to your agency.” Although the Club did not explicitly mention the open agent fees owed to the Claimants 3 and 4, there is no indication that any agent fees had been paid.
61. The Arbitrator finds therefore that the Club is obliged to pay the open agent fees of USD 17,000.00 to Claimants 2, 3 and 4, as stipulated in the Annex.

### **8.3 Additional guarantees**

62. When the Payment Agreement was signed, the Club handed over to Claimant 4, five bank cheques in the total amount of USD 48,000.00 as guarantee for the settlement payments. Upon separate question of the Arbitrator, the Claimants’ counsel replied that these bank checks had not been able to be cashed because they were not covered by sufficient funds in the respective banking account. He also admitted that these checks are still in the possession of the Claimant 4.
63. Although these cheques have since expired and despite the fact that the Club has not requested that they should be returned, the Arbitrator finds that they are collateral to the payments stipulated in the Payment Agreement and must be returned to the Club once the requested payments have been received by the Player.

### **8.4 Interest**

64. The Claimants also request interest “at the applicable Swiss statutory rate from the applicable due dates”.

65. Neither the Annex nor the Payment Agreement provide for the payment of default interest regarding outstanding agent fees and salary instalments respectively. Article 5 of the Player Contract refers yet to an “interest penalty of 50 (Fifty) USD per day for each day said payment was due”. However, the Player Contract has been replaced by the Payment Agreement which does not refer to the “interest penalty” any more. Furthermore, in the Claimants’ counsel’s letters to the Club of 15 September and 26 October 2011, only the outstanding amounts of USD 17,000.00 and 36,000.00 were requested but no interest or penalty was claimed.
66. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest.<sup>9</sup> This is a generally accepted principle which is embodied in most legal systems. However, it is also generally accepted that the obligee has to request payment of interest from the obligor. The Claimants have claimed interest only in their Request for Arbitration.
67. The Arbitrator, deciding *ex aequo et bono*, finds that the starting date for the calculation of the default interest shall be the day of receipt of the Request for Arbitration by the BAT, i.e. 19 September 2012. The Arbitrator has taken into consideration that the Claimants did not claim interest before filing the Request for Arbitration with the BAT. The Arbitrator has also considered the long time period between the termination of 4 February 2011 and the filing of the Request for Arbitration (more than 19 months) and even between the last reminder of 26 October 2011 and the filing of the Request for Arbitration (about 11 months) which should not allow the Claimants to “earn money by waiting”.
68. Regarding the interest rate, the Arbitrator holds that the parties agreed in the arbitration agreements to have their dispute decided *ex aequo et bono* and therefore any interest

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<sup>9</sup> 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*.

rate according to national law is not applicable. This applies also for any interest rate according to Swiss law. However, still deciding *ex aequo et bono* and in line with BAT jurisprudence, the Arbitrator considers interest in the rate of 5% p.a. to be fair and equitable in the present case.

69. Consequently, the Arbitrator finds that the Claimants are entitled to interest as follows:
- the Player is entitled to interest of 5% p.a. on the amount of USD 36,000.00 since 19 September 2012;
  - Claimant 2 is entitled to interest of 5% p.a. on the amount of USD 8,500.00 since 19 September 2012;
  - Claimant 3 is entitled to interest of 5% p.a. on the amount of USD 5,100.00 since 19 September 2012 and
  - Claimant 4 is entitled to interest of 5% p.a. on the amount of USD 3,400.00 since 19 September 2012.

## **9. Costs**

70. 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. As a general rule, the Arbitrator shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
71. On 2 May 2013 - considering that pursuant to Article 17.2 of the BAT Rules “the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator”, and that “the fees of the Arbitrator shall be calculated on

the basis of time spent at a rate to be determined by the BAT President from time to time”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised - the BAT President determined the arbitration costs in the present matter to be EUR 8,525.00.

72. Considering the outcome and the circumstances of the present case, the Arbitrator finds it fair that the fees and costs of the arbitration shall be borne by the Club alone.
73. Given that the Claimants paid the totality of the advance on the arbitration costs of EUR 9,970.00, the Arbitrator decides that:
  - (i) the BAT shall reimburse EUR 1,445.00 jointly to the Claimants;
  - (ii) the Club shall pay jointly to the Claimants the difference between the costs advanced by the Claimants and the amount which is going to be reimbursed to them by the BAT, i.e. EUR 8,525.00.
74. Furthermore, the Arbitrator considers it adequate that the Claimants are jointly entitled to a contribution towards their legal fees and other expenses (Article 17.3. of the BAT Rules). The Arbitrator has taken note of the fact that the Claimants' Request for Arbitration does not contain an explicit request for reimbursement of their legal fees and other expenses. However, the Arbitrator understands the Claimants' submission of their detailed account of costs as a request to have the listed amounts reimbursed by the Club. The Club has not objected to such request after having been invited to comment on the Claimants' account of costs and on how the Arbitrator understands it. Considering the Claimants' account of costs which indicates as legal expenses and fees of all Claimants the amount of EUR 4,000.00 and also considering the non-reimbursable handling fee of EUR 1,985.00 paid by the Claimants, the Arbitrator deems it appropriate to take into account such amounts when assessing the expenses incurred by the Claimants in connection with these proceedings and to hold that the Club shall reimburse the amount of EUR 5,985.00 to the Claimants.

## **10. AWARD**

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

- 1. Aris BSA 2003 is ordered to pay to Mr. Bryan Dunston the amount of USD 36,000.00 plus interest of 5% p.a. since 19 September 2012.**
- 2. Upon receipt of the above payment, Mr. Panos Kapazoglou shall return the personal bank check issued by Marfin Egnatia Bank in the name of the Club's President and expiring on 10 February 2011 in the amount of USD 12,000.00 and the four checks issued in the name of Aris BSA 2003 in the amount of USD 9,000.00 each and expiring on 30 March 2011, 30 April 2011 30 May 2011 and 30 June 2011 to Aris BSA 2003.**
- 3. Aris BSA 2003 is ordered to pay to Excel Sports Management LLC the amount of USD 8,500.00 plus interest of 5% p.a. since 19 September 2012.**
- 4. Aris BSA 2003 is ordered to pay to BeoBasket Ltd. the amount of USD 5,100.00 plus interest of 5% p.a. since 19 September 2012.**
- 5. Aris BSA 2003 is ordered to pay to Mr. Panos Kapazoglou the amount of USD 3,400.00 plus interest of 5% p.a. since 19 September 2012.**
- 6. Aris BSA 2003 is ordered to pay jointly to Mr. Bryan Dunston, Excel Sports Management LLC, BeoBasket Ltd. and Mr. Panos Kapazoglou the amount of EUR 8,525.00 as a reimbursement of their advance on arbitration costs.**
- 7. Aris BSA 2003 is ordered to pay jointly to Mr. Bryan Dunston, Excel Sports Management LLC, BeoBasket Ltd. and Mr. Panos Kapazoglou the amount of EUR 5,985.00 as a contribution towards their legal fees and expenses.**



**BASKETBALL**  
ARBITRAL TRIBUNAL

**8. Any other or further-reaching prayers for relief are dismissed.**

Geneva, seat of the arbitration, 03 May 2013

Stephan Netzle  
(Arbitrator)