



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0449/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Ron Steele

- Claimant 1 -

Mr. John Greig

SportsTalent, 704 - 228th Ave N.E. Suite 412,
Sammamish, WA 98074

- Claimant 2 -

Mr. Tamar Slay

- Claimant 3 -

all represented by Mr. Richard Faulkner,
Blume, Faulkner, Skeen & Northam, LSBN 05470,
111 W. Spring Valley Rd. Suite 250, Richardson, TX 75081, USA

vs.

S.S. Sutor Srl

Via Martiri d'Ungheria 108
63812 Montegranaro (FM), Italy

- Respondent -

1. The Parties

1.1 The Claimants

1. Mr. Ron Steele is a professional basketball player (hereinafter also referred to as “the Player” or “Claimant 1”).
2. Mr. John Greig (hereinafter referred to as “the Agent” or “Claimant 2”) is the Player’s agent.
3. Mr. Tamar Slay is a professional basketball player (hereinafter also referred to as “Claimant 3”).
4. Claimants 1, 2 and 3 are referred to jointly as the “Claimants”.

1.2 The Respondent

5. S.S. Sutor Srl (hereinafter also referred to as “the Club” or “Respondent”) is a professional basketball club in Montegranaro, Italy.

2. The Arbitrator

6. On 30 October 2013, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Quentin Byrne-Sutton 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

A. Claimants 1 and 2

7. On 21 July 2012, the Club and the Player entered into an Agreement (the “Agreement”) for the 2012/2013 season, whereby the latter would receive a total salary of USD 140,000, to be paid in installments between 10 September 2012 and 10 June 2013 (as set out in the payment schedule under Article IV of the Agreement).
8. According to Article VII of the Agreement, all the amounts due to the Player were net of Italian tax and “*Tax receipts of tax deposits shall be provided to the Player at the end of each fiscal year*”.
9. Article XII of the Agreement stipulated that the Player’s two agents, one of whom was Claimant 2, were entitled to be paid by 30 September 2012 a commission representing 10% of the Player’s total net salary, i.e. a fee amounting to USD 14,000.
10. By written notice of 22 February 2013 (hereinafter the “Termination Letter”), invoking late payments (including the non-payment of the agency fees), the Player terminated the Agreement and demanded his release from the Club.
11. On 5 March 2013, after terminating the Agreement and in order to mitigate his damages, the Player signed a new contract with a basketball club in Israel (hereinafter the “Israeli Contract”) for the remaining period of the 2012/2013 season. The Player affirms that this is the only contract he entered into with the club in Israel.
12. Under the Israeli Contract the Player earned a total amount of USD 45,000, net of Israeli tax.
13. According to section F of the Israeli Contract, his agent “*Jon Craig of Sport Talent*” was

entitled to an agency fee of USD 2,250. Claimant 2 declares that he is the agent referred to in the section F of the Israeli Contract, his name having simply been misspelled.

14. On 9 March 2013, due to difficulties in obtaining his release, the Player signed with the Club a form of settlement agreement entitled "*Appendix for Cancellation*" (hereinafter the "Appendix").
15. According to the terms of the Appendix, the Club remained obliged to pay the fees of the agents in an amount of USD 14,000 (by 20 March 2013) and the Player obtained his immediate release from the Club in exchange for him accepting a reduced balance of salary payments, compared to the salaries outstanding under the Agreement. The Player was thus to receive three monthly installments, totaling an amount of USD 20,000, to be paid between March-May 2013. In that relation, the parties also signed a document entitled "*Act of Resolution by Mutual Consent of Professional Sports Contract*".
16. Claimants 1 and 2 submit that thereafter the Club did not make any of the payments stipulated in the Appendix.
17. The Player considers that because the Club did not make any payments under the Appendix, its duty to pay the entire guaranteed salary under the Agreement revived.
18. The Player affirms that the total amount received by him from the Club by the end of the season only amounted to USD 51,000, meaning that the balance of salary owed to him under the Agreement by the Club is **USD 89,000**, from which one must deduct for reasons of mitigation of damage the sum of USD 45,000 earned under the Israeli Contract for the remainder of the 2012/2013 season.
19. Thus, the Player submits he is still owed a balance of **USD 44,000** by the Club as well as interest and is entitled to the delivery of tax certificates.

20. The Agent submits that the Club still owes him his 50% share of the commission that was provided in the Agreement and confirmed in the Appendix, representing **USD 7,000** (10% x 140,000: 2), plus interest.

B. Claimant 3

21. On 19 August 2012, the Club and Claimant 3 entered into an Agreement (the “Employment Agreement”) for the 2012/2013 season, whereby the latter would receive a total net salary of USD 140,000, to be paid in installments between 10 October 2012 and 10 July 2013 (as set out in the payment schedule under Article 2 of the Agreement).
22. Based on bank statements adduced as evidence, Claimant 3 affirms that a number of the due payments were made late and that others were never made, meaning that the total amount received by him to date only amounts to **USD 75,688.83**.
23. According to the evidence filed by Claimant 3, within the foregoing total amount paid by the Club, the last payment received by him from the Club during the 2012/2013 season dates from May 2013; and it made two further payments to him on 10 and 17 September 2013.
24. Thus, according to Claimant 3, the balance of salary owed to him by the Club under the Agreement is **USD 64,311.17** (USD 140,000 – 75,688.83).
25. In that connection Claimant 3, submits that he “... *remained with Sutor for the entirety of the 2012-2013 season, playing his last game on 5 May 2013. Sutor indicated to ... [him] that it would not timely release ... [his] letter of clearance if ... [he] attempted to play for a different team.... Sutor, throughout the season, continuously promised to make payment in full to ... [him]. ... [He] was also playing at a high level and chose to stay and hopefully collect his money, rather than leave and potentially not find new, comparable employment*”.

26. Claimant 3 also submits that, in application of Article 4 of the Employment Agreement, he is entitled to receive an amount of USD 4,700 as a penalty for the late payments.

3.2 The Proceedings before the BAT

27. The Claimants filed an initial Request for Arbitration dated 10 September 2013, which included another claimant, and paid the non-reimbursable handling fee of EUR 2,000, which was received by the BAT in two payments on 12 and 25 September 2013.
28. On 24 October 2013, the BAT wrote to the Parties indicating that the various claims were being disjoined into two cases, but that, in order to promote cost and time efficiency, both cases would be assigned to the same arbitrator.
29. On 26 October 2013, the Claimants' Counsel acknowledged receipt of the foregoing procedural instructions from the BAT and filed a new Request for Arbitration, dated 28 October 2013, which was adapted to account for the fact that the claims had been disjoined but otherwise identical to the initial Request for Arbitration.
30. On 11 November 2013, the BAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the Advance on Costs to be paid by the Parties as follows:

<i>"Claimant 1 (Mr. Ron Steele)</i>	<i>EUR 1,500</i>
<i>Claimant 2 (Mr. John Greig)</i>	<i>EUR 500</i>
<i>Claimant 3 (Mr. Tamar Slay)</i>	<i>EUR 2,500</i>
<i>Respondent (S.S. Sutor Srl)</i>	<i>EUR 4,500"</i>

31. In the foregoing letter, the BAT also underlined that: "*The Answer shall be filed by the Respondent in accordance with Art. 11.2 of the BAT Rules by no later than Monday, 2 December 2013*" and reminded the parties that "[...] according to Art. 14.2 of the BAT Rules the Arbitrator may proceed with the Arbitration even if the

Respondent fails to submit an Answer or to submit his Answer in accordance with Art. 11.2 of the BAT Rules”.

32. All the Parties failed to pay their respective portions of the Advance on Costs within the fixed deadlines and the Respondent failed to submit an Answer within the fixed deadline or to communicate with the BAT in any manner in that connection.
33. Consequently, on 4 December 2013, the BAT sent a reminder to the Parties and fixed a new deadline for the payment of the Advance on Costs; and in the Procedural Order also stipulated that the Respondent is

*“... granted a final opportunity to file an Answer to the Request for Arbitration by no later than **Friday, 13 December 2013**. The Respondent is hereby given notice of the fact that, in accordance with Article 14.2 of the BAT Rules, if the Respondent fails to submit an Answer the Arbitrator may nevertheless proceed with the arbitration and deliver an award”.*

34. Despite the foregoing extension of the deadline, the Club failed to submit an Answer.
35. On 3 December 2013, Claimant 3 paid his portion of the Advance on Costs.
36. By Procedural Order of 18 December 2013, the Claimants were given the opportunity to substitute for the Respondent’s non-payment of its portion of the Advance on Costs and Claimants 1 and 2 were requested to pay their outstanding shares of the Advance on costs within the same deadline.
37. On 20 December 2013, the Player filed a “*Request for Expedited Award Without Reasons and Accounting of Attorney’s Fees*”. In their Request, the Claimants requested that

“...this tribunal immediately close these proceedings, reduce the advance on costs such that Claimants do not have to pay Respondent’s share, and issue an award without reasons for the full amount claimed by Claimants, including all attorney’s fees already incurred and reasonable and necessary fees for the future collection of the award. In the alternative, Claimants respectfully request the arbitrator extend the deadline for payment of Respondent’s share of the advance on costs to 10 February 2013.”

38. Four exhibits (A, B, C and D) were attached to the Claimants' foregoing Request. Exhibit A was a letter dated 13 November 2013 from the Club to the Claimants' attorneys disputing claims against the Club. Exhibit B was an email message indicating that the Club had made two additional payments to the Claimants on 10 and 17 September 2013. Exhibit C was a letter dated 24 September 2013 from the Club to the Claimants' attorneys relating to a parallel case. Exhibit D was an "Accounting of Attorney's Fees".

39. In their foregoing request, the Claimants also stated:

"Respondent's liability to Mr. Slay must be reduced by EUR 9,420.00, the amount Respondent paid to Mr. Slay after the commencement of this case. As stated above, Respondent deposited into Mr. Slay's bank account EUR 4,700.00 on or about 10 September 2013 and EUR 4,720.00 on or about 17 September 2013. These amounts are verified by Mr. Marco in Exhibit "B," and must be accounted for so Mr. Slay does not receive a recovery greater than that which Respondent is obligated to him".

40. On 23 December 2013, Claimants 1 and 2 paid a part of the outstanding Advance on Costs.

41. On 3 January 2014, the Claimants' Counsel made the following request to the BAT by email:

"This email is a request that the BAT extend the 3 January 2014 deadline to pay the team's share of the advance on costs in the above matter to 10 January 2014. On or about 23 December 2013, this law firm emailed to the BAT Claimants' Motion for Expedited Award without Reasons, Accounting of Payment made by Respondent, and Accounting of Attorney's Fees or, in the alternative, Motion to Extend Deadline to Pay Respondent's Share of Advance on Costs. The BAT acknowledged receipt of same on that date. But the Arbitrator has yet to respond to Claimants Motion. The procedural order from 18 December 2013 issued by the Arbitrator in the above matter states that the deadline for Claimants to pay the team's share of the advance on costs is 3 January 2014. Because both Christmas and New Year's Day occurred mid-week this year we are unsure of the availability of the Arbitrator or the BAT since 23 December 2014. Therefore, out of an abundance of caution, Claimants respectfully request an extension of the 3 January 2014 deadline to pay the remaining advance on costs to 10 January 2014 to give 1) the Arbitrator time to decide on this Motion, and 2) our clients time to comply with the Arbitrator's decision, whatever that may be".

42. By Procedural Order of 3 January 2014, the BAT acknowledged receipt of the Player's

requests dated 23 December 2013 and 3 January 2014 and of additional portions of the Advance on Costs, granted the requested extension of time for the payment of the balance of the Advance on Costs and informed the Claimants with respect to their Request dated 20 December 2013 that:

"The Arbitrator has decided to reject the Claimants' request for an award without reasons because it is clear from both the language and logic of the BAT Arbitration Rules - and is also in conformity with the practice of the BAT - that the proceedings advance in the normal manner if and when a claimant substitutes for a respondent's non payment of its share of the advance on costs; the purpose of the rule being to enable enough funding to be available for ordinary proceedings including a reasoned award even if a respondent partially or fully defaults. Article 16 of the Rules serves a different purpose. It is designed to allow for the issuance of awards without reasons - subject to the possibility of subsequently requesting the reasons - but only when the amount in dispute does not exceed EUR 30,000; such condition not being fulfilled in this case".

43. By Procedural Order of 13 January 2014, the Claimants were informed that there remained a part of the Advance on Costs for them to pay.
44. By Procedural Order of 14 January 2014, the Claimants were requested to answer questions put by the Arbitrator and to file related documents.
45. On 20 January 2014, the Claimants submitted their response to the questions except that Claimant 3 requested an extension to complete his response.
46. On 22 January 2014, the BAT acknowledged receipt from the Claimants of the balance of the Advance on Costs.
47. By Procedural Order of 22 January 2014, Claimant 3 was granted an extension to finalize his response to the Arbitrator's questions, the Respondent was given the opportunity to comment on the Claimants' existing response and the parties were invited to submit their statements of costs.
48. On 29 January 2014, the Claimants filed their statement of costs and Claimant 3 submitted the additional part of his response to the Arbitrator's questions. The Respondent did not file any comments on the Claimants' submission of 20 January

2014 or file any statement of costs.

49. By Procedural Order of 3 February 2014, the Respondent was given the opportunity by 7 February 2014 to comment on the submission filed by Claimant 3 on 29 January 2014.
50. The Respondent made no submission within the fixed deadline.

4. The Positions of the Parties

4.1 The Claimants' Position

51. The Claimants have formulated three categories of claims. They are requesting damages for breach of contract and the delivery of tax receipts (A), provisional measures (B) and permanent injunctive relief (C).

A. Damages for Breach of Contract and Delivery of Tax Receipts

52. With regard to their damage claims, the Claimants submit in substance that they duly fulfilled their contractual duties under their respective contracts with the Club and did not receive in exchange the contractually-provided remuneration stipulated in the Agreement (Claimants 1 and 2) and in the Employment Agreement (Claimant 3), i.e. that the Club breached its contractual obligations and must fully compensate them. They submit that the amounts owed are net of tax and that therefore corresponding tax receipts must be delivered by the Club.
53. Claimant 1 argues in addition that he terminated the Agreement for good cause and that the Appendix which reduced the amounts owed by the Club under the Agreement never became effective because the novation of the Agreement by the Appendix was subject to the payments under the latter being made, which never occurred; and that in any event the Appendix was void and unenforceable because there was no

consideration for the Club's debt being reduced – given that it already had the duty under the Agreement to release him – and because the Club acted unfairly by unduly withholding his release with a view to negotiating a reduction of its debt.

54. Claimant 1 submits also that he duly mitigated his damage by seeking and obtaining an employment with a new club for the outstanding part of the season after terminating the Agreement.
55. Claimant 3 argues in addition that in accordance with the terms of his Employment Agreement and in keeping with BAT jurisprudence, he is entitled to penalties for late payments.
56. In relation to the above submissions, the Claimants formulated the following requests for relief in their Request for arbitration:

i. Claimant 1

- (a) \$44,000.00 salary for 2012-2013 season;*
- (b) interest on \$4,000.00 principal from 30 October 2012;*
- (c) interest on \$4,000.00 principal from 10 December 2012;*
- (d) interest on \$19,000.00 principal from 30 December 2012;*
- (e) interest on \$4,000.00 principal from 10 January 2013;*
- (f) interest on \$4,000.00 principal from 10 February 2013;*
- (g) interest on \$9,000.00 principal from 30 February 2012;*
- (h) 2012 tax certificate for amounts already paid in fiscal year 2012—\$51,000.00;*
- (i) tax certificate for the year in which amount due is paid.*

ii. Claimant 2

- (a) \$7,000.00 for agent fees;*
- (b) interest on \$7,000.00 principal from 30 September 2012;*

(c) tax certificate for the year in which amount due is paid.

iii. Claimant 3

(a) \$78,709.26 salary for 2012-2013 season plus interest from 7 May 2013 [on 29 January 2014, this claim was modified to account for the payments received from the Club in September 2013, making the final claim USD 64,311.17];

(b) \$4,700.00 for late-payment penalty plus interest from 7 May 2013;

(c) 2012 tax certificate for amounts already paid in fiscal year 2012—\$58,213.94;

(d) 2013 tax certificate for amounts already paid in fiscal year 2013—\$3,076.80;

(e) tax certificate for the year in which amount due is paid.”

B. Provisional Measures

57. With respect to their request for provisional measures, the Claimants submit that:

“... Provisional orders are appropriate because (a) the harm caused by Respondent is not adequately reparable by an award of damages, (b) such harm substantially outweighs any harm likely to result to Respondent by an award of provisional orders, and (c) there is a reasonable possibility that Claimants will succeed on the merits of his claims. Upon information and belief, Respondent has recently distributed funds for the sole benefit of the Club for the 2013-2014 season and not to uphold its obligations for the 2012-2013 season. Upon information and belief, Respondents paid to the Italian League the amount required to remain in Serie A for the 2013-2014 season and for taxes owed. Also, Respondent will likely attempt to fill out its roster this summer for the beginning of the 2013-2014 season, which will further deplete its funds. Yet Respondent has failed to remit any payment on its obligations owed for the 2012-2013 season. Clearly a reasonable possibility exists that Claimants will succeed on the merits of their claims as the Agreement is no-cut and guaranteed and none of the Claimants have received the full amount owed”.

58. In that relation, the Claimants formulated the following requests for relief in their Request for Arbitration:

“A partial final award for security of at least \$157,306.26 be placed in a trust account with the Basketball Arbitral Tribunal including:

(a) the amount of salary payment due Mr. Steele under the Agreement in the amount of \$44,000.00;

(b) the amount of agent fees due Mr. Greig under the Agreement in the amount of \$7,000.00;

(c) the amount of salary payment due Mr. Slay under the Agreement in the amount of \$7,000.00;

(d) the maximum amount of attorney's fees allowed by BAT Rules in the amount of 20,000.00 EUR; and

(e) costs and expenses for the arbitration of this claim, including compensation and expenses due the Arbitrator, in an amount to be determined by the Arbitrator.”

C. Permanent Injunctive Relief

59. With respect to their request for permanent injunctive relief, the Claimants submit that:

“The Arbitration Tribunal is empowered with vast authority to enforce its awards through broad remedial awards, sanctions, and injunctive relief. This flexibility of fashioning remedies through arbitral awards is granted to the Arbitrator via the BAT arbitration clauses, now included in nearly every basketball contract governed by FIBA, and the “ex aequo et bono” authority granted to the Arbitrator by the BAT arbitration rules and the express terms of the Agreement. The BAT rules provide that the BAT was created to “provide parties involved in disputes arising in the world of basketball with an efficient and effective means of resolving these disputes.” BAT Rule 0.1. However, the BAT website reveals numerous Clubs currently under sanction by FIBA because of unsatisfied or non-compliance with arbitral awards. Consequently, additional measures are essential to ensure proper compliance with the decisions of this Tribunal. Thus, Claimants seek permanent injunctive relief be awarded upon final determination by the Arbitrator of the Claimants’ claims against Respondent. Permanent injunctive relief is appropriate because (a) Respondent has committed a wrongful act; (b) imminent harm to Claimants and future foreign employees of Respondent is likely; (c) irreparable injury to Claimants and future employees of Respondent is likely; and (d) there is an absence of an adequate remedy at law”.

60. In that relation, the Claimants formulated the following requests for relief in their Request for arbitration:

“(a) barring Respondent from scouting, recruiting, or signing any and all foreign players for participation in basketball activities for which Respondent is allowed to participate for the 2013-2014 season, contingent upon full payment of the award owed to Claimants;

(b) barring participation by Respondent in any practices, trainings, physical preparation, or games for the Italian League, or any other basketball activities for which Respondent is allowed to participate, for the 2013-2014 season, contingent upon full payment of the award owed to Claimants;

(c) barring Respondent from collecting any and all money or other benefits from sponsors for the 2013-2014 season, contingent upon full payment of the award owed to Claimants;

(d) barring Respondent from recruiting or signing any and all new sponsors for the 2013-2014 season, contingent upon full payment of the award owed to Claimants;

(e) ordering Respondent to pay any and all appropriate fees and expenses to the Basketball Arbitral Tribunal;

(f) ordering Respondent to inform all foreign players for a period of five (5) years in writing in English and/or the player's native language that one (1) or more foreign players have not been timely paid money due them under their contracts with Respondent;

(g) ordering Respondent to inform all foreign players in writing for a period of five (5) years in English and/or the player's native language that one (1) or more foreign players have been forced to resort to arbitral proceedings to collect money due them under their contracts with Respondent;

(h) ordering Respondent to file for a period of five (5) years copies with the president of the Basketball Arbitral Tribunal and/or FIBA of (f) and (g) above, confirmed in writing and signed by both the foreign player and Respondent;

(i) ordering Respondent to inform for a period of five (5) years all of their sponsors that they have had an arbitral proceeding initiated against them by a foreign player for Respondent's failure to pay money due the player under his contract with Respondent;

(j) ordering Respondent to inform for a period of five (5) years every team in the Italian League that they have had an arbitral proceeding initiated against them by a foreign player for Respondent's failure to pay money due the player under his contract with Respondent;

(k) in the event that enforcement action is necessary relating to the award by the Arbitrator of this Arbitration, that the Arbitrator order Respondent to deposit into a trust account with the Basketball Arbitral Tribunal or, alternatively, to pay directly to the Claimants additional fees in the amount of 50,000.00 Euros to pursue enforcement of the Arbitral Award in Italy, Europe, and any other State or Nation under the New York Convention or wherever assets of Respondent may be found".

4.2 Respondent's Position

61. As previously stated, despite several invitations to do so, the Club has not made any submissions in these proceedings.

5. The Jurisdiction of the BAT

62. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration, he will examine his jurisdiction ex officio, on the basis of the record as it stands¹.

A. Damages for Breach of Contract and Delivery of Tax Receipts

63. 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).

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

65. 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.²

66. The Claimants are invoking the jurisdiction of the BAT over the dispute on the basis of the arbitration clauses contained under Article X of the Agreement (Claimants 1 and 2) and Article 12 of the Employment Agreement (Claimant 3), which are identical and read as follows:

“Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties’ domicile. The language of the arbitration shall be English. Awards of the BAT

¹ ATF 120 II 155, 162.

² Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

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 BAT 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 shall decide the dispute ex aequo et bono.”

67. In formulating their claims, Claimants 1 and 2 are also invoking the breach of the Appendix, which in its last paragraph contains an arbitration clause in favour of the BAT that is identical to the foregoing clauses in the Agreement and the Employment Agreement.
68. The foregoing arbitration agreements are in written form and thus fulfil the formal requirements of Article 178(1) PILA.
69. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreements under Swiss law (referred to by Article 178(2) PILA).
70. Furthermore, the Arbitrator finds that the three arbitration agreements combined cover the subject matter of the claims between all the named Parties.
71. For the above reasons, the Arbitrator finds he has jurisdiction to adjudicate the Claimants' claims against the Club.

B. Provisional Measures

72. Under both article 183(1) of the PILA, which is the *lex arbitri*, and Article 10 of the BAT Arbitration Rules, the Arbitrator has jurisdiction to make an order for provisional and conservatory measures relating to the issues in dispute.
73. Therefore the Arbitrator finds he has jurisdiction to decide upon the provisional measures being requested by the Claimants.

C. Permanent Injunctive Relief

74. The Claimants' request for permanent injunctive relief contains eleven prayers for relief, which are lettered from C - (a) to (k).
75. Prayers for relief C - (a) to (d) and C - (f) to (k), i.e. ten out of the eleven prayers, are all essentially of the same nature, to the extent they seek in various manners to obtain a form of sanction against the Club, i.e. they request measures to be ordered which extend beyond what may be characterized as contractual remedies aimed at obtaining the performance in kind of contractual obligations or damages for non-performance.
76. For a number of reasons, the Arbitrator lacks the powers and jurisdiction to adjudicate any of those ten prayers for relief.
77. In that respect, it is noteworthy that the Claimants have partly misunderstood the function and jurisdiction of the BAT when affirming that: "*The Arbitral Tribunal is empowered with vast authority **to enforce its awards** through remedial awards, sanctions, and injunctive relief*" (emphasis added).
78. An arbitral tribunal only has the powers and jurisdiction which are conferred upon it via the parties' consent to the arbitration agreement and any applicable rules and regulations which affect the scope of that agreement, including any mandatory limitations imposed by the *lex arbitri*.
79. The BAT having been instituted by FIBA as an independent arbitral tribunal – under Articles 27 and 32 of the FIBA General Statutes, the BAT is not a FIBA judicial body but an independent international arbitration organization recognized by FIBA – the BAT's powers and jurisdiction are partially defined by the delineation of its competence in the FIBA General Statutes and the FIBA Internal Regulations (hereinafter referred to collectively as the "FIBA Regulations") in relation to FIBA's judicial and non-judicial bodies.

80. Consequently, the standard arbitration clause recommended in the BAT Rules as well as any arbitration clause inserted into a contract which constitutes an agreement to arbitrate in front of the BAT must be interpreted as including the limitations of the BAT's jurisdiction and powers deriving from the FIBA Regulations.
81. It is clear from the FIBA Regulations that all powers to take sports or disciplinary sanctions of any nature against basketball clubs, as well as the competence to examine such sanctions upon appeal, are vested only with FIBA's judicial and non-judicial bodies. In other words, as an independent international arbitral body, the BAT is not invested by the FIBA Regulations with any jurisdiction or powers to take sanctions or to review sanctions against basketball clubs.
82. In addition, Article 3-300 of the FIBA Internal Regulations lists the sanctions that can be imposed on basketball clubs (and other parties to BAT arbitrations) for failing to honour a BAT award, and Article 3-301 provides that it is FIBA's Secretary General or his delegate who are exclusively competent for taking any such sanctions upon request and that such sanctions may be appealed to the FIBA Appeals' Panel.
83. For the above reasons, the arbitration agreements forming the basis of the Arbitrator's jurisdiction in this case cannot be deemed to confer on him the powers to order the sanctions requested by the Claimants in their prayers for relief C – (a) to (d) and C - (f) to (k).
84. Consequently, the Arbitrator lacks jurisdiction with respect to those prayers for relief.
85. Prayer for relief C - (e) is of a different nature, since it requests "*ordering Respondent to pay any and all appropriate fees and expenses to the Basketball Arbitral Tribunal*".
86. It is not altogether clear what the foregoing prayer for relief intends to cover. If it is a reference to the requirement under the BAT Rules that the Respondent pay a share of the Advance on Costs to the BAT Secretariat, that is an administrative matter which is managed by the BAT Secretariat and, in the present case, the BAT Secretariat has

already duly handled this matter.

87. If it is a request by the Claimants to be awarded arbitration costs and legal expenses, that is a matter which falls within the scope of Arbitrator's jurisdiction as determined by the arbitration agreements examined under section 5(A) of this award and which the Arbitrator shall adjudicate under section 8 of this award.

6. Other Procedural Issues

88. Article 14.2 of the BAT Rules specifies that "*the Arbitrator may [...] 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.³ However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
89. This requirement is met in the present case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules. It was also given sufficient opportunity to respond to Claimants' Request for Arbitration, and to their Account on Costs. Respondent, however, chose not to participate in this Arbitration.

7. Discussion

7.1 Applicable Law – ex aequo et bono

90. 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

³ See *ex multis* BAT cases 0001/07; 0018/08; 0093/09; 0170/11.

chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the Arbitrators to decide “*en équité*” instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

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

91. 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.”

92. Article X of the Agreement and Article 12 of the Employment Agreement as well as the final paragraph of the Appendix include a sentence providing that if and when any dispute is submitted to the BAT: “*The arbitrator shall decide the dispute ex aequo et bono*”.

93. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Claimants against the Club in this arbitration in front of the BAT.

94. 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’arbitrage⁴ (Concordat)⁵, 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.”⁶

95. This is confirmed by Article 15.1 of the BAT Rules in fine, according to which the

⁴ 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).

⁵ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

⁶ JdT 1981 III, p. 93 (free translation).

Arbitrator applies “*general considerations of justice and fairness without reference to any particular national or international law*”.

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

7.2 Findings

A. Provisional Measures

97. The Arbitrator finds that the conditions for ordering the provisional measures being requested are not met in the present case because – beyond asserting that the Club is using its funds/patrimony in manners that are inappropriate and likely to endanger the Club’s capacity to pay its alleged debts to the Claimants – the latter have adduced no evidence to support their affirmations in question, i.e. have not even brought *prima facie* evidence thereof; nor provided *prima facie* evidence that the Club is in a financial and/or legal situation which will prevent it from honouring its debts if they exist. Thus, the Claimants have not fulfilled the condition of demonstrating the likelihood of irreparable harm.

98. For the above reasons, no provisional measures were ordered prior to this award and the Claimants’ request for provisional measures shall be dismissed.

B. Damage Claim and Request for Tax Receipts

(i) Claimants 1 and 2

99. Despite having had ample opportunity to make submissions, the Respondent did not contest any of the allegations of Claimants 1 and 2 as to the facts of their claims on the merits, nor did it challenge the evidence adduced in that connection.

100. Furthermore, on their face, the content of the Agreement, of the Termination Letter and of the Appendix all confirm the reality of the allegations of Claimants 1 and 2 regarding

the amount of payments stipulated in the Agreement that remained unpaid by the Club at the end of the 2012/2013 season.

101. The credibility of the Player's claim is further reinforced by the fact that he spontaneously submitted that he had found a new club in Israel for the remaining part of the 2012/2013 season and deducted from his claim the sum he earned under the Israeli Contract.
102. Based on the documents on record, the Arbitrator finds that, contractually speaking and in fairness, the Player is well founded in arguing that in good faith the reduced total payment envisaged under the Appendix was implicitly subject to the condition that it must be fully paid in order for the reduced amount to replace the Club's higher debt under the Agreement. Furthermore, based on principles of good faith, the Player is correct in arguing that the validity of the Appendix was questionable in any event for lack of consideration (since under the Agreement the Club had the contractual duty to release the Player) and because it was signed under the pressure of the Player needing to obtain his release quickly in order to start playing with the club in Israel. Thus, and because the Arbitrator deems it to be established that no payments were made by the Club under the Appendix, the Arbitrator finds that in effect the Appendix did not reduce the Club's debt owed under the Agreement.
103. The Arbitrator also finds it established that the Club breached its contractual duties under the Agreement, that therefore the Player was entitled to terminate the Agreement and to sign with the Israeli club, and that by doing so he fulfilled his duty to mitigate.
104. For the foregoing reasons, the Arbitrator considers the Player's claim for the principal amount of **USD 44,000** to be contractually well-founded and fair, and it will be admitted.
105. Regarding the Agent's claim, the Arbitrator finds it established that the Club breached its contractual duties under the Agreement by not paying his fee and thereafter again failed to pay despite have undertaken to do so under the terms of the Appendix.

106. However, for reasons of fairness, the Arbitrator finds that the fee the Agent subsequently earned under the Israeli Contract for placing the Player for the remainder of the same season, after the Player terminated his Agreement with the Club, must be deducted from the amount he is claiming from the Club.
107. Consequently, the Agent shall be awarded a reduced principal amount of **USD 4,750**, representing the difference between the USD 7,000 owed to him under the Agreement and the USD 2,250 he earned under the Israeli Contract.
108. Article IV of the Agreement expressly stipulates that all the contractual remuneration owed to the Player is net of Italian tax and that a receipt of the tax deposits made by the Club shall be delivered to the Player. Consequently, the amounts awarded shall be net of tax, and because the end of the 2012 and 2013 fiscal years have passed since the Agreement was signed, the Player's request for receipts of tax deposits will be granted for those two years.
109. However, with respect to the Agent, the Agreement is silent in that connection, i.e. contains no indication that the amounts owed are net of tax or that the Club must deliver tax certificates. Article XII of the Agreement merely stipulates the Agent's 10 % commission shall be calculated on the basis of the Player's net salary. The Arbitrator finds that net payments cannot be presumed in the absence of any evidence to the contrary, and will therefore dismiss the Agent's request to be awarded the fee due net of tax and to receive a tax receipt.
110. With respect to the principal amounts being awarded to the Player and the Agent under the Agreement, in keeping with BAT jurisprudence interest at 5% per annum will be awarded on those sums.
111. Since it is difficult to make out from the allegations and the evidence adduced what exact part of the contractual instalments due to the Player were outstanding on what dates and furthermore part of the damage was mitigated by the payments received under the Israeli Contract, the Arbitrator finds it fair in the circumstances of this case,

and decides *ex aequo et bono*, to award interest on the total amount being claimed by the Player (USD 44,000) from 15 March 2013 onwards. That date accounts for the fact that the Player validly terminated the Agreement on 21 February 2013 due to late payments, that under Article IV of the Agreement all contractually-stipulated monies became due beyond 15 days delay in payment of an instalment and that no payments were made by the Club on the basis of the Appendix.

112. With respect to the principal amount owed to the Agent (USD 4,750), the interest shall run from the day after that part of the fee was owed under the Agreement, i.e. from 1 October 2012 onwards.

(ii) *Claimant 3*

113. Despite having had ample opportunity to make submissions, the Respondent did not contest any of the allegations of Claimant 3 as to the facts of his claims on the merits, nor did it challenge the evidence adduced in that connection.

114. Furthermore, on their face, the content of the Employment Agreement and of the bank statements adduced by Claimant 3 confirm the reality of his allegation that despite him playing for the Club for the entire 2012/2013 season, he is still owed a total of **USD 64,311.17** in outstanding salaries.

115. The credibility of the claim is further reinforced by the fact that during the course of these proceedings, Claimant 3 spontaneously submitted evidence of the fact that he had received further payments from the Club in September 2013 that reduced the amount of his total claim to the foregoing amount.

116. Consequently, the principal amount of USD 64,311.17 will be awarded on the basis that it is contractually owed and in application of the principle *pacta sunt servanda*.

117. Article 2 and 4 of the Employment Agreement expressly stipulate that all the contractual remuneration owed to Claimant 3 is net of tax and that a receipt of the tax

deposits made by the Club shall be delivered to him upon his request. Consequently, the amount awarded shall be net of tax, and because the end of the 2012 and 2013 fiscal years have passed since the Employment Agreement was signed, his request for receipts of tax deposits will be granted for those two years.

118. With respect to the principal amount of USD 64,311.17 being awarded, in keeping with BAT jurisprudence interest at 5% per annum will be awarded on that sum. Although according to the Employment Agreement certain salary instalments only became due in June and July 2013, the Arbitrator finds it fair in the circumstances of this case that the interest run on the total amount from 7 May 2013 onwards as requested by the Claimant 3, i.e. from shortly after the last game of the season, since a large part of the amount being claimed and awarded corresponds to instalments that became contractually due between January and May 2013 but were never paid.
119. Concerning the amount of USD 4,700 being claimed as a penalty for the late payments, the Arbitrator finds that, in the circumstances this case, such claim is not justified because according to the wording of article 4 of the Employment Agreement Claimant 3 only had the “*discretion*” to request payment of a daily penalty of USD 50 (the clause stipulates that late payments “... *can be subject to interest penalty of fifty Dollars (\$50.00) a day at the Player’s discretion until the full compensation due under the Agreement is paid by the Player*”), i.e. a penalty was not automatically triggered by a delay, and according to the evidence on record he never at the time put the Club on notice that he had decided to invoke the penalty notwithstanding the fact that he was continuing to practice and play for the team.
120. Indeed, given the fact that the potential daily penalty was open ended, i.e. not limited in time, the wording of the clause and fairness required that Claimant 3 put the Club on notice clearly and immediately if he decided to invoke his discretion to apply the penalty. There is no evidence adduced that he did this or that he put the Club on notice in any manner, while the fact that he continued to practice and play would in good faith have given the Club the opposite impression, i.e. that he was being patient. In that

relation, Claimant 3 has alleged the Club was continuously promising to catch up the late payments, however there is no evidence adduced that this was based on him invoking a penalty and/or threatening to stop practicing and playing.

121. For the above reasons, the claim for payment of a daily penalty is dismissed.

8. Costs

122. 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.

123. On 18 March 2014 – 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.

124. Considering that the Claimants prevailed in less than half of their multiple prayers for relief of various nature and that addressing the Claimants’ prayers for relief in question was time consuming, the Arbitrator finds it is fair that 75% of the fees and costs of the arbitration be borne by the Club and that it be required to cover its own legal fees and expenses as well as make a contribution to those of the Claimants in an amount representing 75% of the Claimants’ legal fees deemed admissible.

125. Given that the Claimants paid advances on costs of EUR 9,000 as well as a non-reimbursable handling fee of EUR 1,985 (which will be taken into account when determining the Claimant's legal fees and expenses), while the Club failed to pay any advance on costs, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:

- (i) The Club shall pay EUR 6,750.00 to the Claimants, being 75% of the arbitration costs;
- (ii) The Club shall pay to the Claimants EUR 10,000 (1,985 for the non-reimbursable fee + 8,015 for legal fees) representing a contribution to their legal fees and other expenses. The total amount awarded does not exceed the maximum compensation stipulated in Article 17.4 of the BAT Rules for cases of this value.

9. AWARD

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

- 1. S.S. Sutor Srl shall pay Mr. Ron Steele an amount of USD 44,000, net of tax, as contractual damages, plus interest at 5% per annum on such amount from 15 March 2013 onwards.**
- 2. S.S. Sutor Srl shall deliver to Mr. Ron Steele tax certificates for all the sums paid to him relating to the fiscal year 2012 and for all the sums paid to him relating to the fiscal year 2013.**
- 3. S.S. Sutor Srl shall pay Mr. John Greig an amount of USD 4,750 as contractual damages, plus interest at 5% per annum on such amount from 1 October 2012 onwards.**
- 4. S.S. Sutor Srl shall pay Mr. Tamar Slay an amount of USD 64,311.17, net of tax, as contractual damages, plus interest at 5% per annum on such amount from 7 May 2013 onwards.**
- 5. S.S. Sutor Srl shall deliver to Mr. Tamar Slay tax certificates for all the sums paid to him relating to the fiscal year 2012 and for all the sums paid to him relating to the fiscal year 2013.**
- 6. S.S. Sutor Srl shall pay jointly to Mr. Ron Steele, Mr. John Greig and Mr. Tamar Slay an amount of EUR 6,750.00 as a partial reimbursement of their arbitration costs.**
- 7. S.S. Sutor Srl shall pay jointly to Mr. Ron Steele, Mr. John Greig and Mr. Tamar Slay an amount of EUR 10,000 as a contribution to their legal fees and expenses.**
- 8. Any other or further-reaching requests for relief are dismissed.**



BASKETBALL
ARBITRAL TRIBUNAL

Geneva, seat of the arbitration, 20 March 2014

A handwritten signature in black ink, appearing to read 'Q. BS'.

Quentin Byrne-Sutton
(Arbitrator)