

ARBITRAL AWARD

(BAT 1752/21)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Clifford J. Hendel

in the arbitration proceedings between

Mr. Jonas Mačiulis

- Claimant 1 -

Mr. Marius Rutkauskas

- Claimant 2 -

both represented by Ms. Jolanta Špakauskaitė, attorney at law

vs.

AEK NEA KAE 2014 (AEK Athens BC)
466 Irakleiou Ave and Kuprou Herakleion Attica
14122 Athens, Greece

- Respondent -

1. The Parties

1.1 The Claimants

1. Mr. Jonas Maciulis (“the Player” or “Claimant 1”) is a Lithuanian professional basketball player.
2. Mr. Marius Rutkauskas (“the Agent” or “Claimant 2”, and together with Claimant 1, “the Claimants”) is a Lithuanian FIBA licensed agent.

1.2 The Respondent

3. AEK NEA KAE 2014 (“the Club”, and together with the Claimants, “the Parties”) is a professional basketball club competing in the Greek professional basketball league.

2. The Arbitrator

4. On 16 December 2021, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Clifford J. Hendel as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 (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. The relevant facts and allegations presented in the Parties’ written submissions and evidence are summarised below. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows.

6. Although the Arbitrator has considered all the facts, allegations and evidence submitted by the Parties in the present proceedings, he refers in this Award only to those necessary to explain its reasoning.

3.1.1 The Agreements

7. On 5 July 2019, the Player, an agency not involved in the present case, and the Club entered into an agreement, entitled “Contract of Athletic Services”, executed in the English language, whereby the latter engaged the Player for the 2019/20 season (“Contract 1”).¹
8. According to Article 1 of Contract 1:

“TERM OF AGREEMENT

The term of this Contract shall cover the 2019-2020 basketball season, starting on 10/08/2019 and ending on 15/06/2020 or three (3) days after the last official game of the Club, whichever comes first. [...]

9. With regard to the Player’s salary for the 2019/20 season, Article 7 of Contract 1 provides:

“SALARY & SIGNING BONUSES COMPENSATION

a) *The Club agrees to pay the Player for rendering his services to the Club the following NET amounts:*

Season 2018-2019 [sic]

€ 220.000 *(Euros two hundred and twenty thousand) net of Greek taxes, paid into 10 (ten) equal instalments of € 22.000 (Euros twenty two thousand) on the last day of each month, commencing with September 30th, 2019 and ending on June 30th 2020.*”

¹ Exhibit 1 to the Request for Arbitration (“RfA”).

10. Further, Article 8 of Contract 1 provides:

“BONUSES

- a) *The Club agrees to pay the Player the following NET target bonuses for every season of this Contract:*
- *In case both Panathinaikos and Olympiakos participate in the 2019-2020 Greek League and the Club reaches 3rd position after the play-offs, the Player shall receive the net amount of € 5.000*
 - *In case the Club reaches 2nd position after the play-offs, the Player shall receive the net amount of € 15.000*
 - *In case the Club wins the Championship, the Player shall receive the net amount of € 30.000*
 - *In case the Club plays the Greek Cup Final, the Player shall receive the net amount of € 5.000*
 - *In case the Club wins the Greek Cup, the Player shall receive the net amount of € 10.000*
 - *In case the Club qualifies for the semi-finals of the Basketball Champions League, the Player shall receive the net amount of € 15.000*
 - *In case the Club wins the Basketball Champions League, the Player shall receive the net amount of € 25.000*
- b) *All bonuses are net and non-cumulative. The player will be entitled to only the highest amount achieved in each competition. All bonuses are NET of Greek income taxes and social security charges. All bonuses, upon achieved, are guaranteed as part of salary and must be paid by the Club to the Player within Sixty (60) days of their achievement.”*

11. Article 10 of Contract 1 provides:

“TAXATION

All of the above said payments regarding paragraphs 7 (seven) and 8 (eight) of this Contract shall be NET of Greek income taxes. Club is responsible to pay all applicable taxes and charges on behalf of Player to the relevant authorities and shall furnish Player with all appropriate tax receipts and relevant documents at the end of each fiscal year and no later than 30/3 of the following year.”

12. On 5 May 2020, during the COVID-19 Lockdown, the Player and the Club entered into an agreement entitled “Resolution of Agreement” by means of which the Club acknowledged it owed certain amounts to the Player for the 2019/20 season and agreed

on a payment schedule (“Settlement 1”).²

13. Article 1 of Settlement 1 provides:

“By signing this RESOLUTION all the above parties acknowledge that there exists a contract between the CLUB and the PLAYER dated July 5th 2019 (hereinafter “PRIOR CONTRACT”)”

14. According to Article 2 of Settlement 1:

“In satisfaction of the CLUB’s entire responsibility to the PLAYER as it relates to the PRIOR CONTRACT, the Club will pay the following payments:

a. the CLUB will pay the full salary of the PLAYER due February 29th 2020 in the amount of EUR 22.000 (Euros twenty two thousand) net of any Greek taxes no later than May 15th 2020

b. the CLUB will pay the full Greek Cup Winner bonus of the Player in the amount of EUR 10.000 (EUR ten thousand) net of any Greek taxes on October 15th 2020

c. the CLUB will pay the full salary of the PLAYER due March 30th 2020 in the amount of EUR 22.000 (Euros twenty two thousand) net of any Greek taxes on November 15th 2020”

15. Article 3 of Settlement 1 further provides:

“Upon payment of these amounts the PLAYER agrees that he will no longer seek any further payment from the CLUB in accordance with the PRIOR CONTRACT. [...]”

16. However, Article 4 of the Settlement 1 adds:

“In the event that any scheduled payments of this RESOLUTION are not made by the Club within 5 days of the applicable payment date, the Player has to send written notice to the Club and if the Club does not fulfil financial obligation towards Player in total within 5 days, the entire PRIOR CONTRACT’s financial responsibility of the CLUB towards the PLAYER will be due and payable immediately (minus any amounts already paid under this RESOLUTION).”

² Exhibit 2 to the RfA.

17. On 30 July 2020 the Player, the Agent, and the Club entered into a new agreement, also entitled “Contract of Athletic Services”, executed in the English language, by means of which the Club engaged the Player for the 2020/21 basketball season (“Contract 2”).³

18. Article 2 of Contract 2 provides:

“TERM OF AGREEMENT

The term of this Contract shall cover the 2020-2021 basketball season, starting on 10/08/2020 and ending on 15/06/2021 or three (3) days after the last official game of the Club, whichever comes first [...].”

19. With regard to the Player’s salary, Article 7 of Contract 2 provides:

“SALARY & SIGNING BONUSES COMPENSATION

a) *The Club agrees to pay the Player for rendering his services to the Club the following NET amounts:*

Season 2020-2021

€ 150.000 *(Euro one hundred fifty thousand) net of Greek taxes, paid into 10 (ten) equal instalments of € 15.000 (Euros fifteen thousand) on the last day of each month, commencing with September 30th, 2020 and ending on June 30th 2021.”*

20. Further, Article 8 of Contract 2 provides:

“BONUSES

a) *The Club agrees to pay the Player the following NET target bonuses for every season of this Contract:*

Season 2020-2021

- *In case the Club wins the Championship, the Player shall receive the net amount of € 15.000*
- *In case the Club wins the Greek Cup, the Player shall receive the net amount of €*

³ Exhibit 6 to the RfA.

- 5.000
- *In case the Club qualifies for the semi-finals of the Basketball Champions League, the Player shall receive the net amount of € 10.000*
 - *In case the Club wins the Basketball Champions League, the Player shall receive the net amount of € 20.000*

 - *In case the Player participates in at least 20 official games of the Club for the 2020-2021 season, he will receive the amount of € 5.000 paid in a one instalment on July 15th 2021*
- b) *All bonuses are net and non-cumulative. The Player will be entitled to only the highest amount achieved in each competition. All bonuses are NET of Greek income taxes and social security charges. All bonuses, upon achieved, are guaranteed as part of salary and must be paid by the Club to the Player within Sixty (60) days of their achievement.”*

21. Article 10 of Contract 2 reads (in identical terms as Contract 1) as follows:

TAXATION

All of the above said payments regarding paragraphs 7 (seven) and 8 (eight) of this Contract shall be NET of Greek income taxes. Club is responsible to pay all applicable taxes and charges on behalf of Player to the relevant authorities and shall furnish Player with all appropriate tax receipts and relevant documents at the end of each fiscal year and no later than 30/3 of the following year.”

22. Article 12 of Contract 2 provides further benefits to the Player:

AMENITIES

In addition to the compensation outlined in paragraphs 7 (seven) and 8 (eight) of this Agreement, and at no cost to the Player, Club shall provide the Player with the following amenities, for the duration of this Contract:

[...]

b) *HOUSING: The Club will pay a maximum of 1.000 euros per month (a total amount of 10.000 euros) for the player’s housing. This amount will be paid into 10 (ten) equal installments of € 1.000 (Euros one thousand) on the last dat of each month, commencing with September 30th 2020 and ending on June 30th 2021.*

The club will help the player to find the most suitable house for him and his family. Apartment lease agreement shall be concluded directly by the Club. The Club will cover the costs of any communal tax charges during the basketball season.

[...]"

23. With regards to the Agent's fees, Article 14 of Contract 2 provides:

"AGENT FEES"

The Club agrees to pay as agent fees to the Player's Agents, the following amount (payments will be transferred to the Agents' designated bank accounts):

- € 7.500 (Euros seven thousand and five hundred), plus VAT wired to the designated bank account of **Marius Rutkauskas**, paid on February 1st 2021
- € 7.500 (Euros seven thousand and five hundred), plus VAT wired to the designated bank account of **Marius Rutkauskas**, paid on April 10th 2021"

24. On 2 June 2021, the Player and the Club entered into a new settlement agreement (entitled "Settlement of Agreement") by means of which the Club acknowledged it owed certain amounts to the Player under Contract 1 and Contract 2, and agreed on a payment schedule ("Settlement 2").⁴

25. Article 1 of Settlement 2 provides:

"By signing this SETTLEMENT all the above parties acknowledge that there existed 2 contracts between the CLUB and the PLAYER dated July 5th 2019 and July 30th 2020 (hereinafter "PRIOR CONTRACTS")."

26. According to Article 2 of Settlement 2:

"So long as the CLUB does not default in the below mention payments, in satisfaction of the CLUB's entire responsibility to the PLAYER as it relates to the PRIOR CONTRACTS, the Club will pay to the PLAYER, and the PLAYER will accept, the following payments:

- 15.000 Euros net by no later than June 15th 2021
- 15.000 Euros net by no later than July 15th 2021
- 15.000 Euros net by no later than October 15th 2021
- 15.000 Euros net by no later than December 15th 2021

⁴ Exhibit 7 to the RfA.

- 15.000 Euros net by no later than January 15th 2022
 - 15.000 Euros net by no later than February 15th 2022
 - 15.000 Euros net by no later than March 15th 2022
 - 15.000 Euros net by no later than April 15th 2022
- Total: 120.000 Euro net of any Greek taxes.**

27. Finally, Article 4 of Settlement 2 provides for the parties' (Player and Club) original agreement as to compensation for both contractual seasons to revive in the event of breach by the Club of the Settlement 2, in the following terms:

“In the event that any scheduled payments of this SETTLEMENT are not made by the Club within 30 days of the applicable payment date, the Player has to send written notice to the Club and if the Club does not fulfill financial obligation towards Player in total within 5 days, the entire PRIOR CONTRACT's financial responsibility of the CLUB towards the PLAYER will be due and payable immediately (minus only any amounts already paid under this SETTLEMENT).”

In such case, the player will also have the right to immediately inform the Greek league about the breach of the settlement.”

3.1.2 Factual background of the dispute

28. On 25 May 2020, the Agent, on behalf of the Player, sent an email to the Club requesting the payment of the amounts (salary) due to him under Settlement 1.⁵
29. On 23 October 2020, the Agent sent a second email to the Club, on behalf of Player, requesting the payment of further amounts (bonus) due under Settlement 1.⁶
30. On 30 November 2020, the Agent sent a third email to the Club, requesting payment to

⁵ Exhibit 3 to the RfA.

⁶ Exhibit 4 to the RfA.

the Player of further amounts under Settlement 1.⁷

31. There is no evidence on the record of any reply from the Club to the emails of 25 May 2020, 23 October 2020, and 30 November 2020. In any event, it is understood that the Club and the Player resolved their disputes in respect of Settlement 1 by entering into Settlement 2.
32. On 16 November 2021, the Agent addressed a warning letter to the Club, by email, requesting payment of both the amounts owed by the Club to the Player (under Settlement 2) and to himself (under Contract 2):⁸

“Dear Mr. Chinas,

I am writing regarding the failure of AEK NEA KAE Basketball Club (the Club) to adhere to its obligations under the Settlement agreement signed on June 2nd, 2021 (the Agreement) between the Club and Jonas Maciulis (the Player).

Pursuant to Article 2 of the Agreement, the Club was required to make guaranteed salary payments of 15,000 Euros NET to the Player each month (except November) until April 15th, 2022. However, the Club has only made 2 payment according to the schedule in the Agreement. The Club has not made payment for October in the amount of 15,000 Euros NET. The October payment is now 32 days late.

Moreover, the Club was also required to pay a fully guaranteed agent fee in the amount of 15,000 Euros NET of all taxes, fees and charges to the Agent in equal instalments – the first one on February 1st, 2021; and the second one on April 10th, 2021, but these payments also remain outstanding.

In accordance with the Article 4 of the Agreement, we are sending you the notice and encourage the Club to cover its obligations to the Player and his agent in 5 calendar days from sending this notice.

It has to be mentioned that we will exercise all rights to collect such amounts with filing a claim to the Basketball Arbitral Tribunal as it is stated in the Article 5 of the Agreement.”

⁷ Exhibit 5 to the RfA.

⁸ Exhibit 8 to the RfA.

33. There is no evidence on the record of any reply from the Club.

3.2 The Proceedings before the BAT

34. On 3 December 2021, the Claimants filed a Request for Arbitration dated the same day, in accordance with the BAT Rules, and the non-reimbursable handling fee in the amount of EUR 3,000 was received in the BAT bank account on 25 November 2021.

35. On 20 December 2021, the BAT informed the Parties that Mr. Clifford J. Hendel had been appointed as the Arbitrator in this matter, invited the Respondent to file its Answer by 17 January 2022, and fixed the advance on costs to be paid by the Parties as follows:

<i>“Claimant 1 (Mr. Maciulis)</i>	<i>EUR 5,000.00</i>
<i>Claimant 2 (Mr. Rutkauskas)</i>	<i>EUR 1,000.00</i>
<i>Respondent (AEK Athens BC)</i>	<i>EUR 6,000.00”</i>

36. On 24 and 28 December 2021, the BAT received an advance on costs paid by Claimants in the total amount of EUR 6,000.

37. On 18 January 2022, the BAT informed the Parties that the Respondent had failed to submit its Answer to the Request for Arbitration and to pay its share of the advance on costs. The Respondent was given a final opportunity until 25 January 2022 to pay its share of the advance on costs and to file an Answer to the Request for Arbitration. The Respondent was informed 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.

38. On 26 January 2022, the BAT informed the Parties that Respondent had failed to submit its Answer to the Request for Arbitration and to pay its share of the advance on cost, and invited the Claimants to substitute for the Respondent’s share by 7 February 2022. In accordance with Article 9.3.1 of the BAT Rules, the BAT Secretariat decided to adjust

the advance on costs as follows:

<i>“Claimant 1 (Mr. Maciulis)</i>	<i>EUR 3,250.00</i>
<i>Claimant 2 (Mr. Rutkauskas)</i>	<i>EUR 1,000.00</i>
<i>Respondent (AEK Athens BC)</i>	<i>EUR 4,250.00”</i>

39. On 27 January 2022, the BAT received a further advance on costs paid by Claimants in the total amount of EUR 2,500.
40. On 3 February 2022, the Parties were notified that the exchange of submissions was closed in accordance with Article 12.1 of the BAT Rules. The Claimants were granted a deadline until 10 February 2022 to set out how much of the applicable maximum contribution to costs should be awarded to them and why, and to include a detailed account of their costs, including any supporting documentation in relation thereto.
41. On 14 February 2022, the BAT the BAT transmitted copies of the account of costs submitted by the Claimants, and informed the Parties that the award would be rendered in due course.

4. The Positions of the Parties

4.1 The Claimants' Position

42. The Claimants request the payment of the amounts allegedly due to them by the Club for the provision of their respective professional services- the Player claims his outstanding compensation for the 2019/20 and 2020/21 basketball seasons, including salary, bonuses and housing; the Agent claims his fees for the 2020/21 season.
43. The Player acknowledges that he has received from the Club the total amount of

EUR 122,000 under Contract 1 and Contract 2.⁹ The Player claims the following outstanding amounts:¹⁰

“24.1. According to Contract 1 (for 2019/2020 season) EUR 113.000, i.e.:

24.1.1. EUR 22.000 salary payment which was due 31 March 2020;

24.1.2. EUR 22.000 salary payment which was due 30 April 2020;

24.1.3. EUR 22.000 salary payment which was due 31 May 2020;

24.1.4. EUR 22.000 salary payment which was due 30 June 2020;

24.1.5. EUR 10.000 bonus for winning a Greek cup on 16 February 2020;

24.1.6. EUR 15.000 bonus for qualifying to semi-finals of Basketball Champions League on 1 October 2020.

24.2. According to Contract 2 (for 2020/2021 season) EUR 43.000, i.e.

24.2.1. EUR 15.000 salary payment which was due 31 May 2021;

24.2.2. EUR 15.000 salary payment which was due 30 June 2021;

24.2.3. EUR 5.000 bonus payment (for participation in 20 official games) which was due 15 July 2021;

24.2.4. EUR 1.000 payment for housing which was due 30 November 2020;

24.2.5. EUR 1.000 payment for housing which was due 31 December 2020;

24.2.6. EUR 1.000 payment for housing which was due 31 January 2021;

24.2.7. EUR 1.000 payment for housing which was due 28 February 2021;

24.2.8. EUR 1.000 payment for housing which was due 31 March 2021;

24.2.9. EUR 1.000 payment for housing which was due 30 April 2021;

24.2.10. EUR 1.000 payment for housing which was due 31 May 2021;

⁹ Exhibit 9 to the RfA.

¹⁰ RfA, p. 5.

24.2.11. *EUR 1.000 payment for housing which was due 30 June 2021.*”

44. In their Request for Arbitration, the Claimants requested the following relief:

“[...] Claimants respectfully request the Arbitrator to issue an award deciding as follows:

*1) AEK NEA KAE 2014 (AEK Athens BC) shall pay Mr. Jonas Mačiulis **EUR 156.000** net as compensation for outstanding salary payments, bonuses and housing for 2019/2020 and 2020/2021 seasons plus **EUR 9.672,05** interest (i.e. 5% per annum for the period prior to RfA) plus interest at 5% per annum on such amount from 4 December 2021 until full payment.*

*2) AEK NEA KAE 2014 (AEK Athens BC) shall pay Mr. Marius Rutkauskas **EUR 15.000** net as compensation for outstanding agent fees for 2020/2021 season plus **EUR 554,79** interest (i.e. 5% per annum for the period prior to RfA) plus interest at 5% per annum on such amount from 4 December 2021 until full payment.*

3) AEK NEA KAE 2014 (AEK Athens BC) shall reimburse Mr. Mr. Jonas Mačiulis and Mr. Marius Rutkauskas all their arbitrations costs, also legal fees and expenses.

*Total amount in dispute: **EUR 181.226,84**”*

4.2 Respondent's Position

45. The Respondent has not participated in this proceeding, but has been duly notified of its existence and has received copies of all submission of the Claimants and all communications of the BAT.

5. The jurisdiction of the BAT

46. 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 stands.

47. 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).

48. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
49. The dispute is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA¹¹.
50. The jurisdiction of the BAT over the Player's claims results from the arbitration clause contained under Article 18 of Contract 1, Article 19 of Contract 2, and Article 5 of Settlement 2 (all three identically drafted), which read as follows:

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

51. The jurisdiction of the BAT over the Agent's claims results from the arbitration clause contained under Article 19 of Contract 2.
52. All the agreements are in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
53. 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 agreement under Swiss law

¹¹ Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

(referred to by Article 178(2) PILA).

54. The jurisdiction of BAT over the Claimants' claims arises from the agreements. The wording "[a]ny dispute arising from or related to the present Contract [...]" clearly covers the present dispute.
55. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimants' claim.

6. Other Procedural Issues

56. 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.¹² However, the Arbitrator must make every effort to allow the defaulting party to assert its rights. 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. Respondent, however, chose not to participate in this Arbitration.
57. None of the parties requested a hearing. In accordance with Article 13.1 of the BAT Rules, the Arbitrator will decide the Claimants' claims based on the written submissions and the evidence on record.

¹² See *ex multis* BAT cases 0001/07; 0018/08; 0093/09; 0170/11.

7. Discussion

7.1 Applicable Law – *ex aequo et bono*

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

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

59. Under the heading “ Law Applicable to the Merits”, Article 15 of the BAT Rules reads as follows:

“15.1 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.

15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead.”

60. Article 18 of Contract 1, Article 19 of Contract 2, and Article 5 of Settlement 2 (each identically drafted) expressly provide that the Arbitrator shall decide the dispute *ex aequo et bono*.

61. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

62. 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*¹³ (Concordat),¹⁴ 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.”*¹⁵

63. 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”.

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

7.2 Findings

7.2.1 Player’s unpaid compensation for the 2019/20 and 2020/21 seasons

65. Claimant 1 seeks the amount of EUR 113,000, net of taxes, for his unpaid salaries and bonuses for the 2019/20 season, as agreed under Contract 1 (see detail in para. 43, above).

66. Claimant 1 further seeks the amount of EUR 43,000, net of taxes, for his unpaid salaries, bonuses and housing compensation for the 2020/21 season, as agreed under Contract

¹³ 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).

¹⁴ P.A. Karrer, *Basler Kommentar*, No. 289 ad Art. 187 PILA.

¹⁵ *JdT* 1981 III, p. 93 (free translation).

2 (see detail in para. 43, above).

67. As set out above (Section 3.1.1), in Article 1 of Settlement 2 the “*parties acknowledge that there existed 2 contracts between the CLUB and the PLAYER dated July 5th 2019 [Contract 1] and July 30th 2020 [Contract 2] (hereinafter “PRIOR CONTRACTS”).*”¹⁶
68. Further, Article 4 of Settlement 2 provides for the parties’ (Player and Club) original agreement as to compensation for both contractual seasons to revive in the event of breach by the Club of the Settlement 2, in the following terms:

“In the event that any scheduled payments of this SETTLEMENT are not made by the Club within 30 days of the applicable payment date, the Player has to send written notice to the Club and if the Club does not fulfill financial obligation towards Player in total within 5 days, the entire PRIOR CONTRACT’s financial responsibility of the CLUB towards the PLAYER will be due and payable immediately (minus only any amounts already paid under this SETTLEMENT).

In such case, the player will also have the right to immediately inform the Greek league about the breach of the settlement.”

69. The Respondent not having participated in the proceeding, it is not disputed - and it appears indisputable - that the requested amounts are due and owing by the Club.
70. Claimant 1 complied with the formal requirement provided in Article 4 of Settlement 2 by sending the written notice of 16 November 2021 to the Club.¹⁷
71. Additionally, as rightly pointed out by the Claimants, Settlement 2 was entered into on 2 June 2021, long after the breakout of the Covid-19 pandemic and, therefore,

¹⁶ Exhibit 7 to the RfA.

¹⁷ Exhibit 8 to the RfA.

paragraphs 4 and 5 of the – non-binding - COVID-19 Guidelines Issued on 20 April 2020 by the BAT President, Vice-President and Arbitrators (“BAT Covid-19 Guidelines”) are applicable. Paragraph 4 provides that “[a]bsent any general grounds for invalidity, amicable settlements entered into with a view to addressing the consequences of the COVID-19 crisis will be respected by the arbitrator. This is irrespective of whether the contents of the settlement are consistent with the further principles set out” in the BAT Covid-19 Guidelines. According to paragraph 5, “[a]micable Settlements entered into after the beginning of the Lockdown Period will be rebuttably presumed to have been executed by the parties with a view to addressing the consequences of the COVID-19 crisis”.

72. Therefore, the Club shall pay the Player’s outstanding compensation (i) for the 2019/20 season in the amount of EUR 113,000 net, and (ii) for the 2020/21 season in the amount of EUR 43,000, net – EUR 156,000, net, in total.

7.2.2 Unpaid Agent’s fees for the 2020/21 season

73. Claimant 2 requests the amount of EUR 15,000, net, for his unpaid fees for the 2020/21 season.
74. Claimant 2 was not a party to Settlement 2- the basis of his claim is Article 14 of Contract 2 (see Section 3.1.1, above).
75. The Respondent not having participated in the proceeding, it is not disputed - and it appears indisputable - that the requested amount is due and owing by the Club. *Pacta sunt servanda.*
76. Therefore, the Club shall pay the Agent’s outstanding fees for the 2020/21 season in the amount of EUR 15,000, net.

7.2.3 Interest

77. Claimant 1 has requested interest at a rate of 5% per annum on the amount of EUR 156,000, starting for each respective amount set out in column 2 of the following schedule from the dates indicated in column 3 of the same, provided in para. 27 of the Request for Arbitration, until full payment:

<i>due date</i>	<i>amount due</i>	<i>starting date for interest</i>	<i>date of RfA</i>	<i>number of days</i>	<i>annual interest</i>	<i>amount of interest</i>
3/31/2020	€ 22,000.00	4/1/2020	12/3/2021	611	5%	€ 1,841.37
4/30/2020	€ 22,000.00	5/1/2020	12/3/2021	581	5%	€ 1,750.96
5/31/2020	€ 22,000.00	6/1/2020	12/3/2021	550	5%	€ 1,657.53
6/30/2020	€ 22,000.00	7/1/2020	12/3/2021	520	5%	€ 1,567.12
2/16/2020	€ 10,000.00	2/17/2020	12/3/2021	655	5%	€ 897.26
10/1/2020	€ 15,000.00	10/2/2020	12/3/2021	427	5%	€ 877.40
11/30/2020	€ 1,000.00	12/1/2020	12/3/2021	367	5%	€ 50.27
12/31/2020	€ 1,000.00	1/1/2021	12/3/2021	336	5%	€ 46.03
1/31/2021	€ 1,000.00	2/1/2021	12/3/2021	305	5%	€ 41.78
2/28/2021	€ 1,000.00	3/1/2021	12/3/2021	277	5%	€ 37.95
3/31/2021	€ 1,000.00	4/1/2021	12/3/2021	246	5%	€ 33.70
4/30/2021	€ 1,000.00	5/1/2021	12/3/2021	216	5%	€ 29.59
5/31/2021	€ 1,000.00	6/1/2021	12/3/2021	185	5%	€ 25.34
6/30/2021	€ 1,000.00	7/1/2021	12/3/2021	155	5%	€ 21.23
5/31/2021	€ 15,000.00	6/1/2021	12/3/2021	185	5%	€ 380.14
6/30/2021	€ 15,000.00	7/1/2021	12/3/2021	155	5%	€ 318.49
7/15/2021	€ 5,000.00	7/16/2021	12/3/2021	140	5%	€ 95.89
total:	€ 156,000.00				total:	€ 9,672.05

78. Claimant 1 further requests interest on the same amount at a 5% rate per year, from 4 December 2021 until full payment.

79. Likewise, Claimant 2 has requested interest at a rate of 5% per annum on the amount of

EUR 15,000, until full payment, according to the following schedule:¹⁸

- On the amount of EUR 7,500, Claimant 2 requests interest at the 5% rate starting from 2 February 2021 (the day after the date the payment was due under Contract 2);
 - On the further amount of EUR 7,500, Claimant 2 requests interest at the 5% rate starting from 11 April 2021 (the day after the date the payment was due under Contract 2).
80. Not having participated in the proceeding, the Respondent has not disputed the Claimants' request for interest.
81. The agreements do not provide for interest. However, in accordance with consistent BAT jurisprudence, and deciding *ex aequo et bono*, the Arbitrator considers it fair and reasonable to award interest at the rate of 5% per annum, until complete payment, as follows:
82. Claimant 1 shall be awarded interest on the amount of EUR 156,000 at the 5% rate, from the day following the date the respective amounts were due under Contract 1 and Contract 2, until full payment, per the following schedule:
- On the amount of EUR 22,000, Claimant 1 shall be awarded interest at the 5% rate starting from 1 April 2020;
 - On the further amount of EUR 22,000, Claimant 1 shall be awarded interest at the

¹⁸ See detail in paras. 28 and 29 of the RfA.

5% rate starting from 1 May 2020;

- On the further amount of EUR 22,000, Claimant 1 shall be awarded interest at the 5% rate starting from 1 June 2020;
- On the further amount of EUR 22,000, Claimant 1 shall be awarded interest at the 5% rate starting from 1 July 2020;
- On the amount of EUR 10,000, Claimant 1 shall be awarded interest at the 5% rate starting from 17 February 2020;
- On the amount of EUR 15,000, Claimant 1 shall be awarded interest at the 5% rate starting from 2 October 2020;
- On the amount of EUR 1,000, Claimant 1 shall be awarded interest at the 5% rate starting from 1 December 2020;
- On the further amount of EUR 1,000, Claimant 1 shall be awarded interest at the 5% rate starting from 1 January 2021;
- On the further amount of EUR 1,000, Claimant 1 shall be awarded interest at the 5% rate starting from 1 February 2021;
- On the further amount of EUR 1,000, Claimant 1 shall be awarded interest at the 5% rate starting from 1 March 2021;
- On the further amount of EUR 1,000, Claimant 1 shall be awarded interest at the 5% rate starting from 1 April 2021;
- On the further amount of EUR 1,000, Claimant 1 shall be awarded interest at the 5%

rate starting from 1 May 2021;

- On the further amount of EUR 1,000, Claimant 1 shall be awarded interest at the 5% rate starting from 1 June 2021;
- On the further amount of EUR 1,000, Claimant 1 shall be awarded interest at the 5% rate starting from 1 July 2021;
- On the amount of EUR 15,000, Claimant 1 shall be awarded interest at the 5% rate starting from 1 June 2021;
- On the further amount of EUR 15,000, Claimant 1 shall be awarded interest at the 5% rate starting from 1 July 2021;
- On the amount of EUR 5,000, Claimant 1 shall be awarded interest at the 5% rate starting from 16 July 2021.

83. Claimant 2 shall be awarded interest on the amount of EUR 15,000 at the 5% rate, from the day following the date the respective amounts were due under Contract 2, until full payment, per the following schedule:

- On the amount of EUR 7,500, Claimant 2 shall be awarded interest at the 5% rate starting from 2 February 2021;
- On the further amount of EUR 7,500, Claimant 2 shall be awarded interest at the 5% rate starting from 11 April 2021.

8. Costs

84. In respect of determining the arbitration costs, Article 17.2 of the BAT Rules provides as follows:

“At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4). [...]”

85. On 22 March 2022, the BAT President determined the arbitration costs in the present matter to be EUR 6,350.

86. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 of the BAT Rules provides as follows:

“The award shall determine which party shall bear the arbitration costs and in which proportion. [...] When deciding on the arbitration costs [...], the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties.”

87. Considering that the Claimants were the prevailing party in this arbitration, it is consistent with the provisions of the BAT Rules that costs of the arbitration be borne by the Respondent alone. Given that the Claimants paid the entire Advance on Costs in the amount of EUR 8,500 (of which EUR 2,150 will be reimbursed to the Claimants by the BAT), Respondent shall reimburse EUR 6,350 jointly to the Claimants.

88. In relation to the Parties' legal fees and expenses, Article 17.3 of the BAT Rules provides that

“as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding [...] on the amount of any contribution to the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties.”

89. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses (in this case, Claimant 1 up to EUR 10,000 and Claimant 2 up to EUR 5,000).
90. The Claimants claim legal fees in the total amount of EUR 11,375 – EUR 9,375 for Claimant 1 and EUR 2,000 for Claimant 2. They also claim for the expense of the non-reimbursable handling fee (EUR 3,000).
91. Taking into account that the Claimants have succeeded in full with their prayers for relief, that they were represented by the same attorney, that the Claimants' cost submission is sufficiently detailed and prudent, that the complexity of factual and legal issues was relatively low and that the Claimants' submissions were limited to the (reasonably concise) Request for Arbitration, the Arbitrator considers it fair and reasonable to award the amount of EUR 7,000 in legal fees, as well as the payment of the non-reimbursable handling fee in the amount of EUR 3,000.
92. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:
- (i) The BAT shall reimburse EUR 2,150 to the Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the BAT President;
 - (ii) The Club shall pay EUR 6,350 jointly to the Claimants, being the difference between the costs advanced by them and the amount they are going to receive in reimbursement from the BAT;
 - (iii) The Club shall pay jointly to the Claimants EUR 7,000 representing the amount of their legal fees, as well as EUR 3,000 for the non-reimbursable handling fee.

9. AWARD

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

- 1. AEK NEA KAE 2014 shall pay Mr. Jonas Maciulis EUR 156.000, net of Greek taxes, as compensation for unpaid salaries, bonuses and housing for the 2019/20 and 2020/21 seasons, plus interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof, until complete payment, according to the schedule provided in paragraph 82 of the present Award.**
- 2. AEK NEA KAE 2014 shall pay Mr. Marius Rutkauskas EUR 15,000, as compensation for unpaid fees for the 2020/21 season, plus interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof**
 - on the amount of EUR 7,500, commencing on 2 February 2021, until complete payment.**
 - on the further amount of EUR 7,500, commencing on 11 April 2021, until complete payment.**
- 3. AEK NEA KAE 2014 shall pay jointly to Mr. Jonas Maciulis and Mr. Marius Rutkauskas an amount of EUR 6,350 as reimbursement of their arbitration costs.**
- 4. AEK NEA KAE 2014 shall pay jointly to Mr. Jonas Maciulis and Mr. Marius Rutkauskas an amount of EUR 10,000 as reimbursement of their legal fees and expenses (including the non-reimbursable handling fee).**
- 5. Any other or further requests for relief are dismissed.**



BASKETBALL
ARBITRAL TRIBUNAL

Geneva, seat of the arbitration, 24 March 2022

Clifford J. Hendel
(Arbitrator)