



**BASKETBALL**  
ARBITRAL TRIBUNAL

**ARBITRAL AWARD**

(BAT 0993/17)

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Stephan Netzle**

in the arbitration proceedings between

**Mr. Malik Hairston**

c/o Mr. Andrew Latack and Ms. Sara Pervil, CAA Sports LLC,  
405 Lexington Avenue, 19<sup>th</sup> Floor, New York, NY 10174, United States

**- Claimant -**

represented by Mr. Ergun Benan Arseven and Mr. Metin Abut, attorneys at law,  
Abdi Ipekci Caddesi No: 19-1 Nisantasi, 34367, Istanbul Turkey

vs.

**AEK Athens BC**

466 Irakleiou Ave and Kuprou, Herakleion 14122, Athens, Greece

**- Respondent -**

represented by Mr. Alexandros Alexiou, President

## **1. The Parties**

### **1.1 The Claimant**

1. Mr. Mailk Hairston (hereinafter the "Player") is a professional basketball player of US nationality.

### **1.2 The Respondent**

2. AEK Athens BC (hereinafter the "Club") is a professional basketball club located in Greece.

## **2. The Arbitrator**

3. On 8 May 2017, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), Prof. Richard H. McLaren OC appointed Dr. Stephan Netzle as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). Neither 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**

4. On 23 June 2015, the Player and the Club signed a contract whereby the Club engaged the Player for the 2015/2016 and the 2016/2017 basketball seasons

(hereinafter the “Player Contract”). It was agreed that at the beginning of each season, the Player had to pass a medical examination. Otherwise, the Player Contract would “automatically be terminated.”

5. The Parties agreed that the Player Contract was a no-cut, fully-guaranteed agreement and that the Player would receive a net salary of USD 500,000.00 for the 2015/2016 season and of USD 550,000.00 for the 2016/2017 season. The compensation was to be paid in several instalments, i.e. one instalment of USD 100,000.00 upon passing the physical examination at the beginning of each season and ten monthly instalments of USD 40,000.00 during the 2015/2016 season and USD 45,000.00 during the 2016/2017 season.
6. The Player passed the medical examination at the beginning of the 2015/2016 season (the “Medical Test 2015”). The Player played in almost all games of the Club during the entire 2015/2016 season. He suffered from a \_\_\_\_\_ at the end of the 2015/2016 season but came back to play the playoffs of that season.
7. Since the Club’s salary payments were constantly delayed, the Player repeatedly reminded the Club of the outstanding salary payments. On 11 August 2016, the outstanding salaries for the 2015/2016 season were nearly settled.
8. On 22 and 23 August 2016, the Player underwent the medical and physical examinations for the next season (the “Medical Test 2016”).
9. On 24 August 2016 the Club notified the Player that he had failed the Medical Test 2016.
10. On 25 August 2016, the Club provided the results of the Medical Test 2016 to the Player. The Club considered the Player’s results to be insufficient because several examined parameters (e.g. fat measurements, isokinetic examination and beep test) were not satisfactory, and therefore terminated the Player Contract. On the same date,

the Player notified the Club, that he did not agree with the results of the Medical Test 2016 and requested a physical examination with a doctor of his choice.

11. On 29 August 2016, the Player underwent a medical examination with a doctor of his own choice (the “Re-examination”). The Club was not represented at the Re-examination.
12. On 30 August 2016, the Player’s agents informed the Club that the doctors conducting the Re-examination had found that the Player’s results were sufficient and requested the Club that the Player should be included in the team for the next season.
13. By letter/email of 31 August 2016, the Club rejected the Player’s request and stated the following:

*“therefore*

- *We refuse your claims that you passed any of the above mentioned medical or physical exams, as false and unfounded and we refute any of your objections;*
- *We declare that the contract, dated 23 June 2015 and signed by us (AEK B.C.) and you, has been terminated, due to your failure on passing the medical exams.*
- *We further ask you to release the house and car provided to you by giving the keys to the Assistant Team Manager Mr. Kekos and compensate the cost of the extra round business tickets used, which were paid by us on behalf of you for airplane tickets expenses and was (the cost) supposed to be deducted by your salary of the 2016-2017 season.”*

14. On 26 and 31 August 2016, the Club publicly announced that the Player Contract had been terminated because of the insufficient physical condition of the Player.
15. On 2 January 2017, the Player’s engagement by basketball Club Hapoel Jerusalem was made public.

### 3.2 The Proceedings before the BAT

16. On 24 March 2017, the Player filed a Request for Arbitration, which was received by the BAT Secretariat on the same day.
17. The non-reimbursable handling fee of EUR 7,000.00 was received in the BAT bank account on 6 April 2017.
18. On 16 May 2017, the BAT Secretariat sent a letter to the Parties in which it confirmed receipt of the Request for Arbitration and of the handling fee. A time limit was fixed for the Club to file its Answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 6 June 2017. The BAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs by no later than 16 August 2017:

<i>"Claimant (Mr. Malik Hairston)</i>	<i>EUR 7,000</i>
<i>Respondent (AEK Athens BC)</i>	<i>EUR 7,000"</i>

19. By email of 26 May 2017, the Club requested a prolongation of the time limits for filing its Answer and for paying its share of the Advance on Costs, which was granted by the Arbitrator.
20. By letter of 16 June 2017, the BAT Secretariat acknowledged receipt of the Player's share of the Advance on Costs in a total amount of EUR 7,000.00. It informed the Parties, that the Club had failed to pay his share of the Advance on Costs and to file the Answer within the given time limits. Furthermore, the Club was granted a final time limit to file an Answer and the Player was invited to substitute for the payment of the Club's share of the Advance on costs.
21. By letter dated 27 June 2017, the Club informed the Arbitrator that it had paid its share of the Advance on Costs meanwhile and asked for an extension of the time limit to file

the Answer by another 15 days. The Arbitrator partially granted the Club's request and extended the time limit to 10 July 2017.

22. On 23 August 2017, BAT Secretariat acknowledged receipt of the full amount of the Advance on costs paid equally by both Parties and of the Answer. It noted the Club's wish to hold a hearing in person. It invited the Player to comment on the Answer and to address the following questions by no later than 5 September 2017:

- *“The Respondent asked for a hearing in person. What is the Claimant's view?”*
- *Did the Parties agree on what should be examined on the occasion of the initial medical examination before the beginning of the 2015/2016 season?*
- *Which standards had to be met to pass the initial medical examination before the 2015/2016 season?*
- *How did the medical examinations on 22 and 23 August 2016 and then again on 29 August 2016 differ from the initial medical examination before the 2015/2016 season?*
- *Was there any agreement on how the medical examination before the beginning of the 2016/2017 season should be carried out and which standards should be met by the Player to pass that examination?*
- *Please provide a list of all payments made by the Club to the Player, including all payment dates.”*

23. By letter of 27 September 2017, the BAT Secretariat acknowledged receipt of the Player's second submission and invited the Player to provide the BAT with copies of bank statements showing all dates and amounts of payments received from the Club by no later than 9 October 2017. The Club was asked to comment on the issues raised by the Player and to respond to the following questions within the same time-limit.

- *“Does the Club follow (or request the examining medical personnel to follow) any guidelines, specifications, measurement standards or checklists for the medical examination of a player?”*
  - *If yes, please provide the BAT with any guidelines, specifications, measurement standards or checklists that have to be followed when carrying out a medical examination of a player.*
  - *If no: How does the Club determine whether a Player is medically fit to play?*
- *Please explain the instructions that have been given to the medical examiner before the examinations before the beginning of the 2015/2016 season and of 22/23 and 29*



*August 2016 have been carried out.*

- *The Claimant passed the initial medical examination before the beginning of the 2015/2016 season. How did that examination differ from the one that was carried out on 22/23 and 29 August 2016? How do you explain the different result of these examinations?*
- *Please provide a list of all payments made by the Club to the Player, including all payment dates."*

24. On 5 October 2017, the Club requested an extension of the time limit for filing its comments of 10 days. This request was granted by the Arbitrator.

25. After consultation of the Parties, the Arbitrator decided to hold a hearing in this case. His decision was communicated to the Parties on 5 January 2018. On 29 January 2018, the BAT Secretariat informed the Parties of the exact schedule of the hearing and requested the Parties to file the results of the medical and physical examination which was carried out before the beginning of the 2015/2016 season.

26. On 31 January 2018, a hearing was held at the conference centre at the Munich airport conference centre. The Arbitrator was accompanied by Dr. med. Jochen Hahne a medical expert who was charged by the Arbitrator with the task to assess the physical condition of the Player from a neutral point of view (the "Independent Expert"). None of the Parties raised any objection against the participation of the Independent Expert.

27. On 1 February 2018, the Parties were invited to provide the following post-hearing documentation:

- *The same data and information, which the Respondent has listed on the pages 5-7 in its Answer of 10 July 2017 with regards to the Claimant's medical and physical examination for the 2016/2017 season, for the Claimant's first two medical and physical examinations, namely the one of January 2015 and the one before the start of the 2015/2016 season.*
- *Detailed information about the methods which were used in each of the three medical examinations to determine the Claimant's body fat and the exact results of each body fat measurement.*
- *All the required information must be provided in English."*

28. On 15 February 2018, the Club filed certain documents in Greek language and requested an extension of the time limit for filing translations and additional documents. On 27 February 2018, a part of the requested translations was submitted. The Arbitrator granted a further prolongation of the time limit to enable the Club to file the remaining translations. However the Club failed to do so within the given time limits despite having been reminded to do so several times.
29. On 22 May 2018, the Independent Expert provided his expert report (the “Expert Report”) to the BAT. On 25 May 2018, both Parties were requested to file comments on the Expert Report.
30. On 13 June 2018, the BAT acknowledged receipt of both Parties’ comments to the Expert Report. It declared the exchange of documents complete and requested both Parties to file an account of their costs. The Parties submitted the accounts of their costs on 5 and 6 July 2018.
31. On 13 July 2018, the BAT requested the Parties to pay the following amounts as an additional Advance on Costs by no later than 23 July 2018:

<i>“Claimant (Mr. Malik Hairston)</i>	<i>EUR 3,000</i>
<i>Respondent (AEK Athens BC)</i>	<i>EUR 3,000”</i>

32. The additional advance on costs was paid by the Claimant on 24 July 2018 (EUR 3,000.00) and, after the Respondent had failed to pay its share despite an extension of the deadline to do so, on 27 August 2018 (EUR 2,985.00).



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

### **4.1 The Player's Position**

33. The Player submitted in essence the following:

- The Player's results obtained in the Medical Test 2016 and the Re-examination were satisfactory and the Club's termination of the Player Contract on the grounds of insufficient physical condition was unjustified.
- The Club interpreted the results of the medical tests in an arbitrary way. It used the results of the medical tests as a pretext to get rid of the Player. The true reason for the Club to terminate the Player Contract was not the Player's allegedly insufficient physical condition but the Club's wish to terminate the employment relationship with the Player. The option of an unsatisfactory medical test just provided a welcomed excuse.
- The Club's accusation that the Player had failed 18 parameters of the medical examination is clearly wrong. This becomes obvious when considering that between 24 and 31 August 2016, the Club reduced the number of allegedly failed parameters from 18 to 3. This change in the assessment demonstrates the Club's bad faith.
- The Club's standards are subjective and do not reflect medical standards. They also seem having been adjusted every now and then and were not consistently applied on all the Club's players.
- The main reason why the Club wanted to terminate the Player Contract was that the Player repeatedly complained about the late salary payments. The insufficient

Medical Test 2016 was only a pretext to terminate a contract.

- Moreover, the Player was not given the same preparation to the medical test as the other players. Since the Club had failed to pay the due salaries for the 2015/2016 season until after the beginning of the season preparation, he stayed in the USA until he was paid the full amount. Upon receipt of the full amount he immediately joined the team.
- In any event, the Club's notification of the Player's failure to pass the Medical Test 2016 was late. According to the Player Contract, if the Club did not inform the Player that he had failed the medical test within 48 hours, the test result was deemed to be sufficient. The Player underwent the Medical Test 2016 on 22 and 23 August 2016 and was officially notified of the allegedly unsuccessful test result only on 25 August 2016. Hence the Club implicitly agreed that the Player had passed the Medical Test 2016.
- By occasion of the Re-examination by a doctor of the Player's choice who was independent and not influenced by the Club, the Player was found healthy enough to play professional basketball. The unilateral termination of the Player Contract was not justified and therefore illegal.
- The Club failed to provide a visa for the Player's partner. That is why she had to pay a fine in the amount of USD 1,332.00 which must be reimbursed to the Player.
- The Club must pay the Agent Fee for the 2016-2017 season in the amount of USD 55,000.00 to the Player.
- According to Art. 10 Player Contract, the Club must pay a daily penalty fee of USD 500.00 for late salary payments. The Club was late in paying most of the

salary instalments during the 2015-2016 season to the Player which amounts to a total sum of USD 75,000.00.

#### 4.2 The Player's Request for Relief

34. In his Request for Arbitration dated 24 March 2017, the Player requested the following relief:

1. *"The Claimant has a material and procedural right under the Agreement to seek relief from BAT to order the Club to pay in full the Player's salary for the 2016-2017 season, expenses made by the Player for issuance of visa of his partner and representation fee of his agent:*
2. *In this regard, the Claimant seeks, in reservation of any further rights, relief and requests an award in the following terms:*
  - a. *Respondent be ordered to immediately pay USD **450,320.00** as 2016-2017 season salary (USD 550,000.00 – USD 99,680.00) to the Player and the interest accruing from such amount up until payment: Immediate payment from Club to Player for the remainder of the fully-guaranteed base salary in the amount of Three Hundred Twenty-Six Thousand Six Hundred US Dollars (\$326,600.00 USD);*
  - b. *Respondent be ordered to immediately pay **USD 1,332.00** to the Player in return for monetary fine paid by the Player due to the Respondent's failure for issuance of visa to his partner and the interest accruing from such amount up until payment;*
  - c. *Respondent be ordered to immediately **USD 55,000.00** to the Player in order for the Player to pay representation fees of his agent, Andrew Latack;*
  - d. *Respondent be ordered to immediately pay to the Player the late payment penalty amounting to USD **75,000.00**.*
  - e. *Respondent be ordered to pay all BAT application fee plus additional costs of arbitration, legal fees, and/or expenses related to this BAT case."*

#### 4.3 Club's Position

35. Upon 72 hours of the Player's arrival in Greece at the beginning of both the 2015/2016 and the 2016/2017 seasons, the Player was obliged to undergo a medical test to check

whether or not he was physically capable to play with the team. The validity of the Player Contract for each season was conditional upon passing the medical tests.

36. After the end of the 2015/2016 season, before the Player left Greece, he was provided with a training plan for improving his fitness and to make sure that he would pass the medical tests at the beginning of the 2016/2017 season.
37. Upon arrival to Greece at the beginning of the new season, the Player underwent the Medical Test 2016. The Club estimated that it would take approximately two months for the Player to reach the expected fitness level. However, the results were insufficient, and the Player failed to fulfil eighteen parameters requested by the Club, The Club therefore decided not to continue the employment relationship with the Player and terminated the Player Contract.
38. As the Player was the most valuable and crucial player of the team and was therefore paid a very high salary, it was obvious that he had to meet top standards when it came to his fitness. However, the Player's fitness results were even worse, compared to normal players with much lower salaries.
39. The Player had the right to undergo a Re-examination by a doctor of his own choice to demonstrate that the results of the Medical Tests 2016 were not correct. However, the Player refused to undergo the so-called beep test which was part of the test requested by the Club. Moreover, the Re-examination which was taken by the Player on his own request did not correspond to the tests which are usually performed on the Club's other players.
40. The Player's refusal to undergo the beep test can be interpreted as a failure. The Player therefore failed to prove that his endurance fulfilled the requirements twice, namely at the Medical Test 2016 and the Re-examination. A player may not pick those elements of the medical examination he likes and ignore the others. Neither did the

other results of the Re-examination meet the Club's requirements. In particular, the Player's fat measurement results were not satisfactory although another measurement method was applied.

#### **4.4 Club's Request for Relief**

41. In its Answer dated 10 July 2017, the Club requested the following relief:

*"WE ASK*

- *A Period of 20 days for collecting the above mentioned documents and testimonies translated in English and provided to your Tribunal*
- *A Hearing in public meeting, including witness testimonies, in date to be defined by Your Tribunal*
- *Your Arbitral Tribunal to reject all the requests and claims of the Claimant*
- *The cost of 7.000,00 euros paid by us, as defined advance on costs, to be returned to our company.*
- *A compensation for our legal and judicial expenses to be defined at the equal cost of 7.000,00 euros against the Claimant."*

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

42. 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).

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



44. The Arbitrator finds that the dispute at hand is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.<sup>1</sup>

45. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in clause 16 of the Player Contract, which reads as follows:

*“This Agreement contains the entire agreement between the parties and there is no oral or written inducements promises or agreements except as contained herein. Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties’ domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the BAT and against decisions of the Court of Arbitration of Sport (CAS) upon appeal as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator of FAT and CAS upon appeal shall decide the dispute according with Greek Law.*

46. In accordance with Article 1.1 of the BAT Rules, these rules “shall apply whenever the parties to a dispute have agreed in writing to submit the same to the BAT – including by reference to its former name “FIBA Arbitral Tribunal (FAT)”. In addition, article 18.2 of the BAT Rules provides that “Any reference to BAT’s former name “FIBA Arbitral Tribunal (FAT)” shall be understood as referring to the BAT.” The Parties’ reference to both the “FIBA Arbitral Tribunal (FAT)” and to FIBA Basketball Arbitral Tribunal (BAT) in clause 16 of the Player Contract is therefore understood as a reference to the BAT.

47. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

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



48. 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 (referred to by Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” in clause 16 of the Player Contract clearly covers the present dispute.<sup>2</sup>
49. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Player’s claim.

## **6. Hearing**

50. In its Answer to the Request for Arbitration the Club requested a hearing to be held. The Player on the other hand did not find that a hearing was necessary.
51. After having taken into consideration the complexity of the matter and the amount in dispute, the Arbitrator found it justified to hold a hearing in person with the Parties, in compliance with Art. 13.2 of the BAT Rules.
52. The Arbitrator also decided to seek assistance from the Independent Expert who was invited to participate in the hearing.
53. The hearing was held on 31 January 2018 at the Munich Airport. The following persons attended the hearing:
- a. On behalf of the Player: Mr Malik Hairston, claimant; Mr. Ergun Benan Arseven, counsel; Mrs. Sara Pervil, agent; Mr. Michael Haas, agent’s representative.

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<sup>2</sup> See for instance BERGER/ KELLERHALS: International and domestic Arbitration in Switzerland, Berne 2010, N 466.

- b. On behalf of the Club: Mr. Alexandros Alexiou, president of the Club; Mr Jose Lasa, counsel; Dr. Ikralis Patsopoulos, expert witness; Mr. Michail Mavronas, Interpreter.
  - c. BAT: Dr. Stephan Netzle, Arbitrator; Heiner Kahlert and David Menz, BAT counsels; Dr. med. Jochen Hahne, Independent Expert.
54. At the end of the hearing, the Arbitrator asked the Independent Expert to provide his Expert Opinion which was submitted to the Parties for comments. Both the Expert Opinion and the Parties' comments have been taken into account for the purposes of the present award.

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

55. 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".*

56. 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."*

57. In their arbitration agreement in clause 16 of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et*

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

58. The concept of “*équité*” (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l’arbitrage of 1969<sup>3</sup> (Concordat)<sup>4</sup> under which Swiss courts have held that arbitration “*en équité*” is fundamentally different from arbitration “*en droit*”:

*“When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.”<sup>5</sup>*

59. 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”.
60. Considering the foregoing, the Arbitrator makes the following findings:

## **8. Findings**

### **8.1 The requirement to pass a medical examination before the following season**

61. It is undisputed that the Player had to pass a medical test before the Player Contract continued for the following season 2016-2017.

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<sup>3</sup> That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

<sup>4</sup> KARRER, in: Basel commentary to the PILA, 2<sup>nd</sup> ed., Basel 2007, Article 187 PILA N 289.

<sup>5</sup> JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

62. According to para. A) in the “CONDITION PRECEDENT” Section of the Player Contract, passing the medical examination is a condition precedent for the continuation of the Player Contract for the second season.

*“A) Medical examination: the validity and execution of this Agreement is contingent upon the passing of the medical examinations as set forth in the Section 6 of this Agreement. If this condition is not satisfied this Agreement will not come into existence.”*

63. Article 6 para. 1 of the Player Contract says:

*“6. MEDICAL EXAMINATION AND VALIDITY OF THIS AGREEMENT. The Parties agree that the Player’s initial medical exam will be administered and fully completed within 72 hours upon Player’s arrival in Greece for each season of this contract. If the results of the medical exam are not presented in writing to Player and Player’s representative within 48 hours of the issuance of the exams results, then the Player shall be deemed to have passed the medical exam and this Agreement shall be fully guaranteed. In the event that Club instructs the Player to practice, Player will have been deemed to pass the medical exam and the Agreement shall come into full-force and effect and be fully guaranteed. It is expressly agreed that this Agreement will be entered into force once the Player will duly pass a fitness test, underwent a thorough medical examination for each of this contract. Should the Player not pass the medical examinations for each season of this contract, this agreement will be automatically terminated and the Player will have no right to claim any compensation to other amounts due according to this Agreement. Should Player disagree with the outcome of the aforementioned thorough physical examination, the Club agrees that Player undergoes at his own costs a second thorough physical examination administered by an independent Sports Physician. Club and Player may each appoint a physician of their choice to attend such examination. If Player does not pass this second physical examination, the Club will definitively have the right to terminate.”*

## **8.2 Timely notification of the test results by the Club?**

64. The first issue in dispute is, whether the Club respected the deadline to inform the Player about the results of the Medical Test 2016. The Club was obliged to notify the Player about the test results within 48 hours. If the Club missed this deadline, the Player was deemed having passed the medical test and the Player Contract continued to be in force and could not be terminated by the Club any more.

65. The Player underwent the Medical Test 2016 on 22 and 23 August 2016. The Club notified the Player about the negative test results on 24 August 2016. However, the notification was not supported by signed medical documents. It was only on 25 August 2016 when the Club provided the duly signed medical documents to the Player, which provided the detailed data demonstrating why the latter had not passed the Medical Test 2016.
66. The Player submits that the first part of the Medical Test 2016 took place on 22 August 2016. If there had been unsatisfactory results, these should have been communicated to the Player on 24 August 2016, at the latest. As this was not done, the Player was deemed having passed the tests, which were conducted on 22 August 2016.
67. The Arbitrator does not agree. The medical examination cannot be split into individual tests whose results must be notified separately and within 48 hours after each single test. All tests together (i.e. those performed on the 22nd and the 23rd of August) rather constitute one medical examination. It is the overall result of the medical examination which results from several specific tests and which must be communicated within 48 hours upon conclusion of the last test. This deadline was respected when the Club notified the Player about the result of the Medical Test 2016 on 24 August 2016, i.e. well before the expiration of the 48 hours deadline. This also included the submission of the supporting documents by the Club on the following day.

### **8.3 The “automatic” termination of the Player Contact**

68. There seems to be a misunderstanding about the “automatic” termination of the Player Contract “should the Player not pass the medical examination for the next season” as addressed in Article 6 of the Player Contract. The Club argues that the Player Contract ended without further ado when the medical test revealed unsatisfactory results. It therefore communicated the termination of the Player Contract before the results of the



Re-examination became known. The Arbitrator does not share this understanding. This provision entitled the Club to terminate the Player Contract only when the failure to pass the medical test was confirmed by the “second thorough physical examination”, i.e. the Re-examination, if such a second test was requested. Since the Player requested a Re-examination and since these results were communicated to the Club on 30 August 2016, it was only the Club’s letter of 31 August 2016 which terminated the Player Contract. Whether the termination of the Player Contract was justified is a separate issue.

#### **8.4 “Passing the medical examination” as a condition precedent for the continuation of the Player Contract**

69. Article 6 of the Player Contract stipulates that *“[s]hould the Player not pass the medical examination for each season of this contract, this Agreement will be automatically terminated.”* To determine whether the Player passed or failed the medical examination, the applicable standards must be defined. The Player Contract does not contain any provision on how the medical examination must be carried out, which factors need to be tested and which standards must be met to pass the test. The Player Contract does not even say what the purpose of the medical examination was – i.e. whether the goal was to determine the fitness level after the Player’s return from the summer break or whether any hidden defects should be discovered to assess the risk of a later injury.

70. The Club has not provided any internal regulations on this issue, and it answered in the negative to the Arbitrator’s question whether there existed any written guidelines on medical examinations in basketball. The Arbitrator is also not aware of any regulations or standards on medical examinations issued by the Club’s national federation, FIBA or a professional association of sports doctors, as desirable this might be to avoid arbitrary decisions.



71. The Arbitrator also requested the Club to provide the details of the Medical Test 2015 and to confirm that the same procedures and standards were applied. If the Player was found sufficiently healthy in 2015, there must have been specific reasons why he was no longer deemed fit to do his job. The Club could not provide the full results of the Medical Test 2015. It explained however that the standards were allegedly higher in 2016 than in the year before because the Club wanted to achieve higher goals in the 2016/2017 season. However, the Club did not explain in what respect and to which extent these standards changed.
72. In its submissions, the Club also refers to generally accepted standards based on medical literature, which were then compared with the specific measurements of the Medical Test 2016. This is certainly correct but does not resolve the issue that Article 6 para. 1 of the Player Contract is not referring to any such standards but grants the Club unlimited discretion to determine the elements of the medical examination and to decide whether the Player had met them.
73. The Arbitrator is also aware that medical entry tests are mostly performed without reference to specific standards but that new medical tests of a player for the following season, from which the continuation of a player contract would depend, are rather exceptional. The circumstances of a medical entry test are however different from the circumstances of a re-testing of a player's health and fitness for the following season. An entry test is usually performed after the parties have negotiated a contract. The club is eager to reinforce its team with a new player and will be more tolerant when it comes to the assessment of the player's fitness. When the player is tested for the following season, the club knows the player much better and has probably formed an opinion on whether the player has added to the team's success and is worth the investment. If the club's enthusiasm has cooled down during the season because the performance was not as hoped-for, the club's managers will have a more critical look at the player's physical test results and may even regard the medical test as a welcomed opportunity to terminate the player contract.

74. The Player asserts that this was exactly what the Club did, namely using the medical examination as a chance to get rid of the Player: he was earning a rather high salary and the overall performance of the Club's team in the 2015/2016 season was not what the team management had expected. Indeed, it is striking that the Club did not make any efforts to keep the Player in its team for the next season and offered him further support to get back in full shape. When the Club assessed the results of the Medical Test 2016 and the Re-examination, it did neither rely on any standards or guidelines nor did it compare the results with those of the previous year but made the assessment of the medical tests difficult to comprehend. The Club did not attend the Re-examination but went public with the termination of the Player Contract even before it was informed about the test results. The Arbitrator has therefore a certain understanding of the Player's argument that the Club was not unhappy having found a justification for the termination of the Player Contract.
75. Under the circumstances and deciding *ex aequo et bono*, the Arbitrator finds Article 6 para. 1 of the Player Contract too unspecific and overly broad to serve as a legal basis for the unilateral termination of the Player Contract Article 6 para. 1 does not only provide the Club with an unlimited discretion to determine the scope and the standards of the medical examinations. It also lacks any proportionality which means that even minor deficiencies may lead to the termination of the Player Contract at the Club's sole discretion although such deficiencies could be healed or eliminated before the start to the following season. As a consequence, it is not possible to make an objective determination, based on Article 6 para. 1 of the Player Contract, whether the Player passed or failed the medical examination. Consequentially, the Arbitrator holds that the Club's unilateral termination of the Player's Contract was based on an inoperative provision which rendered it unjustified and invalid.

## 8.5 The consequences of the unjustified termination of the Player Contract

76. As a consequence of the unjustified termination of the Player Contract, the Player is entitled to a compensation for the damage suffered because of the Club's breach of contract. This compensation consists of the loss of the income for the remaining term of the Player Contract and any costs which were caused by the termination. On the other hand, there may be circumstances, especially the Player's own fault, which require a reduction of the compensation. The compensation must also be reduced by any alternative income earned or income during the remaining term of the Player Contract.

### (a) Remaining Salary and contributing fault of the Player

77. The starting point for the determination of the compensation due to the Player is his contractual salary of USD 550,000.00 which he would have earned during the 2016-2017 season if the Player Contract had not been terminated.

78. While the Club had no right to terminate the Player Contract based on the ambiguous and unspecified Article 6, para. 1, the medical examinations that took place on 22, 23 and 29 August 2016 demonstrated that the Player was not sufficiently fit to play basketball on European top level when he returned to the team after the summer break. While this was not a valid ground for an early termination of the Player Contract, it constituted a breach of the Player's duties as set out in Article 6 para. 2 (a) and b) of the Player Contract which says:

*"The player shall during the term:*

*a) Report at times and places reasonably fixed by the Club in a sufficiently good physical condition to compete on a high level;*

*b) Keep himself in reasonably good physical condition throughout the season;*

*(...)*

79. The results of the medical examinations of 22, 23 and 29 August 2016 may not have been sufficient for the termination of the Player Contract, but they nevertheless

provided an image of the Player's fitness after his return to the Club. The Medical Test 2016 consisted of the following tests:

- (a) Measurement of the fat tissue;
- (b) Blood tests to determine the levels of cholesterol;
- (c) Isokinetic evaluation, especially with respect to the knees and shoulders,
- (d) Ergometric tests, with flexibility and maximum power measurements, and
- (e) the so-called "beep test" by which the aerobic ability is measured.<sup>6</sup>

80. The medical examination was performed by various doctors and specialists under the supervision of Dr med. Iraklis Patsopoulos, Director of the Sport Injuries Department at Euroclinic in Athens and Medical Supervisor of the Club. No objection has been raised against the expertise of the examiners. Upon conclusion of the Medical Test 2016, Dr Patsopoulos reported the following:

*"These are the final results from the evaluation of the above mentioned player of our team:*

- Yesterday he did not manage to be in normal levels regarding **fat tissue**: "percentage of \_\_\_\_\_ for the fat tissue" as our nutritionist Konstantinos Xenos referred to us (see attachment of his manuscript), The accepted levels for a male athlete are 6-12%.
- In **blood tests** he had levels of \_\_\_\_\_ something that somebody must take also into consideration
- On Monday 22/08, **isokinetic evaluation** which was held under guidance of Stavros Toilos in IASO GENERAL HOSPITAL he was considered (from George Vavetsis) out of proper condition because he had crucial deficits in \_\_\_\_\_
- In **ergometric tests** that took place on Tuesday 23/08 (under responsibility of George Vavetsis) he was also characterized "overweight" because he was above the normal levels of Body Mass Index (BMI). He achieved BMI index \_\_\_\_\_ while the normal values (team standards) are below 25,00 Kg/m<sup>2</sup>
- Regarding flexibility of his body he was also below standards for an athlete achieving \_\_\_\_\_

<sup>6</sup> The beep test is used to examine the aerobic ability of an athlete. It consists of running a defined distance in regressing intervals of time. The time lap between the beeps gets shorter with each beep. As soon as the athlete does not manage to reach the end of the distance within the required time, the test ends. The earlier the athlete fails to reach the required distance, the worse the test result.

\_\_\_\_\_, with normal values (team standards) >35cm.

- In Maximum Isometric Power he was out of accepted limits (140kg, with normal values (team standards) \_\_\_\_\_)
- In Beep test (aerobic capacity) he was \_\_\_\_\_ while the normal values (team standards) are > Stage:12 – Level:5
- In Neuromuscular Effectiveness he was constantly out of normal values (team standards) achieving in \_\_\_\_\_ (Team Standards: >3%) and in \_\_\_\_\_ (Team Standards: >38 cm).

*Taking into account all these parameters, Malik Hairston is not able to compete in high level practices and games because he has \_\_\_ parameters out of limits, parameters that are considered to be crucial for basketball player. There is also something very important in this evaluation of this athlete: he is amenable to have an injury while participating because of his muscular misbalance.*

*He is obviously not fit to play in our tem and he needs a lot of time to recover and come back to participate in high level activity*

*Thank you for your attention.”*

81. Upon receipt of the results from the medical examination, the Player arranged a Re-examination as provided by Article 6 para. 1 of the Player Contract. The Re-examination took place on 29 August 2016 in Athens. The Club was informed of the date and place of the Re-examination but did not delegate a representative.
82. On 30 August 2016, the Player’s agent notified the Club, that the Player had passed the Re-examination. The Club was also provided with a summary of the test results.
83. By letter of the following day, the Club denied the Player’s assertion and found that according to both, the Medial Test 2016 and the Re-examination, the Player had failed to meet the necessary standards to play high-level basketball: The Club found the Player’s results of the Re-examination still unsatisfactory. At the Re-examination, the isokinetic evaluation of both knees led to results which were allegedly below the Club’s standards. The Club also objected to the fat measurement method which was applied in the Re-examination and concluded that the measured percentage of \_\_\_\_\_ was still exceeding the acceptable standard of 8 – 10 %. Finally, the Club noted that the Player had refused to participate in the Beep Test and therefore relied on the beep test results of the Medical Test 2016, which the Player had failed.



84. It is difficult to assess whether the Re-evaluation results matched those of the Medical Test 2015, especially because of some missing results of the Medical Test 2015 and the different testing methods. The question whether the Player was sufficiently fit to continue playing with the team also in the 2016/2017 season must therefore be determined based on medical expertise.
85. The Independent Expert concluded the following:

**“Case Malik Hairston vs AEK Athens**

**Background:**

*Player Malik Hairston signed a contract with AEK Athens on June 23rd, 2015 for 2 seasons 2015-2016 and 2016-2017, under the term and condition that the player should pass a medical exam within 72 hours upon Player's arrival in Greece for each season of the contract. It was expressly agreed that the agreement would be entered into force once the player would duly pass a final test, underwent a thorough medical examination for each season of the contract.*

*It has to be mentioned that the player suffered from a \_\_\_\_\_ at the end of the first season and came back to play the playoffs at this season. This fact is important for a final evaluation.*

*At the end of August 2016 the player underwent again a medical test and the results reported 23-08-2016 said:*

*„Taking into account all the parameters, Malik Hairston is not able to compete in high level practices and games because he has \_\_\_ parameters out of limits, parameters that are considered to be crucial for a basketball player. (...)*

*He is obviously not fit to play in our team and he needs a lot of time to recover and come back to participate in high level activity.”*

*Question:*

*Was the player unable to recover quickly and to participate in high level activity?*

*To come to a final conclusion, I was able to see the data of the medical exams of the player of the seasons 2015/16 and 2016/17.*

*It has to be mentioned that the data I was able to see was not always conclusive. I was only able to see relative numbers of the tests but not absolute numbers.*

**Individual values of the player:**

**Percentage of body fat:**

*The percentage of body fat mentioned in the test of 2016 was \_\_\_\_\_. It is mentioned that the acceptance level for a male athlete is 6-12 %.*

*Unfortunately, the data did not show us a value from 2015.*



Anyways, it has to be mentioned that a body fat of \_\_\_\_ is high for a professional athlete but it is not a value that does not allow a player to participate in high level basketball. Especially in basketball there are couple of players that have a higher percentage of body fat and are able to play Euroleague top-level and being key players of their teams. That does not mean that a reduction of the body fat would not help the player to perform even better.

**Isokinetic evaluation:**

**Knee:**

**Peak torque of knee extensors:**

In 2015 the peak torque of the extensors of the right knee was slightly lower than expected, referring norms of professional basketball at the examined velocities. The maximum torque of left knee was normal. The difference between the 2 legs was overall about \_\_\_\_, which is acceptable.

In 2016 the peak torque of the right extensors was low but better than the left one. So, 2016 the left knee showed a weakness which was not showed before. The difference between both sides was between \_\_\_\_\_.

It has to be mentioned that a difference of 10 Wo is acceptable - so in this case the player was out of the range. In general, about 10 days of good preparation and strengthening is needed to decrease the difference between 2 extremities for about 10 Wo if there is not a bigger injury or a pain syndrome causing the difference.

**Evaluation of maximum strength of knee flexors:**

In 2015 the maximum force of the flexors of the right knee is slightly lower while the left one is normal. The difference between both legs was in a normal range.

In 2016 the peak torque of the flexors was also below borders and almost equal on both legs. (Unfortunately, no absolute numbers were in the given data).

Comparing these values it shows that the player showed an \_\_\_\_\_ of the maximum strength of the flexors in both knees.

**Evaluation of ratio agonist-competitor muscle**

In 2015 the right knee was weaker than the left knee. A major problem was that the extensors of the right knee were weaker than the flexors \_\_\_\_\_. Also in that period it was recommended to the athlete to increase the strength and endurance of the extensors of the right knee.

In 2016 these values were \_\_\_\_\_.

Comparing the values of 2015 and 2016 it shows that the player came with a similar problem in the season 2015/16.

Looking at the left knee it was normal in 2015 and in 2016 only normal at 60 degrees while it was written that in the 2 other angulation velocities the results were unacceptable. It has to be mentioned that from the data I saw it was really difficult to understand what unacceptable exactly means (no absolute numbers were given).

Anyways it has to be mentioned that the left knee in 2016 was in a worse condition than in 2015 looking at the report of the team.

**Shoulders:**

Regarding the mentioned data of the shoulder it is difficult to get clear information.

**The report says:**

Regarding the peak torque of external rotators the data shows that in 2016 the rotators of the right shoulder in all three angulation velocities were in \_\_\_\_\_ level (Again it has to be mentioned that I was not able to see absolute numbers.).

In comparison between internal-external rotators of the right upper limb regarding peak torque the internal rotators produced \_\_\_\_\_ the power of extensors which is described as out of the limits, while the left side showed normal borders.

The ratio peak torque of the internal rotators/body weight was \_\_\_\_\_ and described as \_\_\_\_\_.

In 2015 it is said, that the maximum force of the external rotators of the right shoulder in all angular velocities was slightly lower. Already in 2015 it was recommended to the athlete to increase the strength and the endurance of external rotators of the right shoulder.

In general, it has to be underlined that it was very difficult to get good and valid information about the shoulder-situation. Data does not seem to be very consistent and precise. Most of the values are relative values. Reading the data it is very often difficult to figure out whether these are the values of the right and left side. No absolute numbers are given.

**Conclusion:**

Regarding the data it is very difficult to say whether the player was able to play basketball on high performance level.

One aspect which is mentioned very often and outlined as one of the most important factors for performing professional basketball was the percentage of body fat.

From my opinion the values the player showed \_\_\_\_\_ were not at all a factor to say, that the player was not able to play professional basketball on European top level. Body fat can be very individual and is also very different depending on the position of the player. Of course, it has to be mentioned that \_\_\_\_\_ percent are high for a professional athlete and that a lower body fat may also improve the performance of the player. But it does not exclude a player from playing high professional basketball.

The club mentions several results of isokinetic tests. These tests show \_\_\_\_\_ of both knees and the right shoulder at the beginning of season 2016/2017. Unfortunately I was not able to see absolute numbers and to compare them with the year before (2015).

There is no doubt that there were \_\_\_\_\_ in both knees and the right shoulder before the season of 2016.

Comparing the written data it also seems that these \_\_\_\_\_ got bigger in 2016 compared to 2015.

But again, from my opinion the data is very inconsistent and not precise.

**Discussion/Conclusion:**

Why did the \_\_\_\_\_ in the knees increased compared to first season. One reason may be a \_\_\_\_\_ the player suffered at the end of regular season of year 1. He was taken out for 4-6 weeks during the end of regular season but played the playoffs for the team. It has to be asked whether the \_\_\_\_\_ caused by the injury were eliminated and in which condition the player was sent back on court to play the playoffs? Unfortunately, we did not get any data from this period of time.

Regarding the right shoulder it is even more difficult to give a precise answer. Is the \_\_\_\_\_ of the right shoulder before the second season valid?

Why this question?

Why should a player who had a \_\_\_\_\_ in the right shoulder 2015 suffer at the beginning of season 2016 from a \_\_\_\_\_ without having had any injury or surgery?

Looking at the data of the medical test in 2015/2016 a : \_\_\_\_\_ of the right knee and the right shoulder were already mentioned - a special strengthening program for the right knee and shoulder were recommended.

But the player passed the medical test anyways.

Finally, I come to the conclusion, that from the data we saw it is very difficult to say whether the player was able to participate directly in team practice at the beginning of season 2016/17. From my opinion he should have undergone a special individual strengthening program with athletic coaches and therapists - but it should have been possible to bring him back in good condition in a couple of weeks/months to get him ready for regular season.

From the data I did not see a severe injury which excluded the player in general to come back to professional basketball in a short period of time.

In general, it has to be mentioned that the whole data we got was not very conclusive. It was difficult to compare the results of both seasons. No absolute numbers were given. Relations between muscle groups were described e.g. as „slightly lower“ or „slightly abnormal“. These examples make clear that it is very difficult to compare or even to evaluate exactly the \_\_\_\_\_.

One thing I would say: The data I saw does not show anything which excludes with 100 % the player to perform professional basketball on European top level. A period of recovery including a special athletic training and strengthening would have been needed. The exact time of recovery is not predictable from the data I got.

If there are any questions feel free to contact me.

Best regards,

Sig. Dr. med. J. Hahne

Munich, 22-05-2018

Specialist in Orthopedics and Traumatology, Sports-Medicine Team Physician FC Bayern Basketball and Soccer, German Soccer National Team”

86. To sum up, the Independent Expert concluded that basically, the physical state did not prevent the Player from playing professional basketball. The Player's body fat percentage was certainly very high but did not *per se* constitute an absolute exclusion criterion but the isokinetic evaluation showed that the Player was not in a good shape. The Independent Expert found that the Player still needed a further period of recovery and special training ("*...in a couple of weeks/months to get him ready for the regular season*") until he eventually reached the necessary fitness level to play on European top level. He could however not predict the exact time of recovery based on the available medical data. Whether the additional time of recovery and special training would be enough to improve also the beep test results is also difficult to assess. The fact that the Player found a new club only in January 2017 may give an indication of how long the period of recovery and improvement may have lasted. It is in any event concerning that such a finding was made after the summer break when the Player had ample time to recover and improve his physical condition.
87. The Player was entitled to a considerable salary and considered a team leader and role model. He was also aware that his future with the Club depended on whether he passed the annual medical examination to demonstrate that he was fit to play top-level basketball. The Club could therefore expect from him as a professional athlete to use the summer break for his personal recovery and improvement of his fitness, irrespectively of whether he received written instructions or a training plan. It seems, however, that the Player was not sufficiently prepared when he returned to the Club's team.
88. The Arbitrator therefore concludes that the Player had not fully complied with his professional and contractual duty to maintain a sufficiently good shape to continue playing as a high-paid team leader right from the beginning of the 2016/2017 season. He must therefore accept a reduction of the compensation which the Arbitrator fixes at 1/3 of the otherwise payable annual salary which amounts to USD 165,000.00.



**(b) Alternative Income**

89. According to BAT jurisprudence, the Player has a duty to mitigate the damages. The Player signed a new employment agreement with Hapoel Jerusalem BC and joined the team on 26 December 2016. He was entitled to USD 99,860.00 for the remaining 2016-2017 season.
90. It took the Player more than four months after the termination of the Player Contract to sign a new employment agreement. The question arises whether he could have signed a contract with a new club earlier. It seems however that he needed some time to get back in shape before he could find a new employment. The next question is whether the Player settled for an appropriate salary, considering that the Player Contract provided a monthly salary of USD 50,000 for the 2015/2016 season and of USD 55,000 for the 2016/2017 season while his monthly salary dropped to less than USD 20,000 under his contract with Hapoel Jerusalem BC. There are no indications that the Player sold his services below value, to the contrary. He was forced to search for a new club after the new season had already begun, and he was, as the medical examination showed, not in an optimum shape which would have allowed him to ask for a higher salary. These are factors which clearly limited the Player's options. Hence the Arbitrator finds that the Player did everything what could reasonably be expected from him to mitigate the Club's damage. Therefore, the amount of USD 99,860.00 but no further deemed income shall be deducted from the otherwise due compensation.

**(c) Fine for the Club's failure to provide a visa for the Player's partner**

91. According to Art. 11 Player Contract, the Club has "complete responsibility regarding the application for and issuance of work permits, visas licences, and other documentation that may be required for the Player and partner to provide services

outlined in this Agreement to the Club.” However, the Player and his partner have an obligation to cooperate with the Club for receipt of the required documentation.

92. The Player’s girlfriend was fined with EUR 1,220.00 on 1 June 2016. On that date this amount was equivalent to USD 1,332.00. The Player finds that since it was the Club’s duty under the Player Contract to organise the permits, it must pay the fine related to the absence of the visa. The Club on the other hand submits that it could not apply for the visa, since the Player’s girlfriend did not file the necessary documents.
93. The Arbitrator notes that neither the alleged fine, the absence of the visa nor the failure to provide documents have been supported by any evidence. The Arbitrator finds that the Player, who claims the compensation has not met the burden of proof for the fine and the Club’s breach, and the Club has no obligation to reimburse the fine.

**(d) Agent Fee**

94. Art. 20 Player Contract stipulates the Club’s duty to pay an Agent Fee of USD 50,000.00 for the 2015-2016 season and of USD 55,000.00 for the 2016-2017 season. According to this provision, the amount payable by the Club is a compensation of the Agent Fee which is due by the Player to his Agent. The Agent is not a party to this arbitration. The Agent Fee must be paid into the account indicated by the Agent, but it is the Player who may claim the payment from the Club either to himself or to the Agent.
95. The Club did not pay the Agent Fee for the 2016-2017 season because of the termination of the Player Contract. However, since the Arbitrator found that the termination was unjustified, the Agent is entitled to the fee of USD 55,000.00 for the 2016/2017 season, subject to certain deductions as set out below.



96. The Arbitrator finds it fair that the Agent Fee is subject to the same reduction as the Player's compensation, namely by 1/3 because of the own fault of the Player, as it would have been the co-responsibility of the Agent to make sure that the Player was fit when he returned to the Club's team after the summer break. In addition, the Agent Fee must be reduced by the amount of the fee which the Agent earned when he completed the transfer of the Player to Hapoael Jerusalem. Since a 10% agent fee is usual, the otherwise due Agent Fee shall be reduced by another USD 9,986.00. The Arbitrator therefore holds that a compensation for the Agent Fee of USD 26,682.50 must be paid by the Club to the Player.

**(e) Penalty Fee for late payments in the 2015-2016 season**

97. Pursuant to Art. 10 Player Contract, any delay in the payment of a salary instalment leads to a penalty fee of USD 500.00 a day for a maximum of 15 days. A penalty becomes due for every single payment that was delayed. This obligation is separate from the compensation which became due because of the unjustified termination of the Player Contract.

98. During the 2015/2016 season, none of the salary instalments was fully paid in time. Every single salary instalment was paid with more than 30 days of delay. Hence a penalty fee of USD 500.00 per day for 15 days (i.e. USD 7,500.00) was due for every salary instalment.

99. As the Parties agreed that the salary was to be paid in ten monthly instalments, the Club owes the Player ten times USD 7,500.00. This amount sums up to USD 75,000.00. The Arbitrator finds this penalty not excessive when comparing to the entire sum due.

## 8.6 Interests

100. The Player is requesting default interest on the compensation for unjustified termination of the Player Contract at the applicable Swiss statutory rate of 5% p.a.
101. The Player Contract does not stipulate an obligation to pay interest on overdue amounts to the Player. Nevertheless, according to standing BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. This is a generally accepted principle which is embodied in most legal systems. However, it is also generally accepted that the obligee must request payment of interest from the obligor if not agreed in the underlying agreement in advance or where the contract makes it clear that the parties intended that performance take place at or before a precise point in time. To the extent default interest is awarded, the Arbitrator, deciding *ex aequo et bono*, follows consistent BAT jurisprudence and considers interest at 5% p.a. to be fair and equitable also in the present case.
102. The starting date of the interest is the day following the termination of the Player Contract. The termination notice was sent on 31 August 2016. Hence, late payment interest must be calculated and paid from 1 September 2016.

## 8.7 Summary

103. In sum, the Club owes the Player the following amounts:

Reduced compensation for the unjustified termination of the Player Contract	USD 366,685.00
+ Compensation for the Agent Fee:	USD 26,682.00
+ Penalty Fee for late payments 2015/2016:	USD 75,000.00

./. Alternative income:	USD 99,860.00
<hr/>	
Total compensation	<b>USD 368,507.00</b>

## 9. Costs

104. 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 rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
105. On 25 September 2018 - 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 19,095.00.
106. Considering that the Player prevailed in this claim by approximately 2/3, it is fair that the fees and costs of the arbitration are borne 2/3 by the Club and 1/3 by the Player.
107. Given that the Player paid an advance on costs of EUR 12,985.00 and the Club paid an advance on costs of EUR 7,000, in application of article 17.3 of the BAT Rules the Arbitrator decides that the Club shall reimburse EUR 5,730.00 to the Player. The difference between the Advance on Costs paid by the Player and the arbitration costs as determined by the BAT President shall be reimbursed by the BAT to the Player.

108. Furthermore, the Arbitrator considers it adequate that the Player is entitled to the payment of a contribution towards his legal fees and other expenses (Article 17.3. of the BAT Rules). The amount in dispute comes to USD 581,462.00 which corresponded to EUR 539,157.00 on the date of the Request for Arbitration (24. March 2017). The Arbitrator notes that both Parties spent considerable time and efforts in these proceedings and also convened to a hearing in Munich. The Parties' costs as submitted to the BAT therefore exceeded the maximum contribution of EUR 20,000.00 according to Article 17.4 of the BAT Rules.
109. Taking into consideration the Parties' accounts of costs, the outcome of the proceedings and the limits set out in Art. 17.4 of the BAT Rules, the Arbitrator determines the Club's contribution to the Player at EUR 6,666.65. In addition, the Player is entitled to the reimbursement of the 2/3 of the handling fee, amounting to EUR 4,666.70. The total contribution of the Club to the Player therefore amounts to EUR 11,333.00.

## **10. AWARD**

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

- 1. AEK Athens B.C. is ordered to pay to Mr. Malik Hairston the amount of USD 368,507.00 plus interest of 5% p.a. on the amount of USD 366,685.00 since 1 September 2016.**
- 2. AEK Athens B.C. is ordered to pay to Mr. Malik Hairston the amount of EUR 5,730.00 as a reimbursement of the advance on arbitration costs.**
- 3. AEK Athens B.C. is ordered to pay to Mr. Malik Hairston the amount of EUR 11,333.00 as a reimbursement of his legal costs and expenses.**
- 4. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 1 October 2018

Stephan Netzle  
(Arbitrator)