



Arbitration CAS 2015/A/4288 El Jaish Sports Club v. Giovanni Funicello, award of 28 April 2016

Panel: Mr Ivaylo Dermendjiev (Bulgaria), Sole Arbitrator

Basketball

Fees of a FIBA licensed professional basketball players' agent

Extension of an arbitration agreement to third parties

Extent of the obligation by the club for payment of the players' agent fees

1. **An extension of an arbitration agreement to a third party requires that the initial parties and the third party have a legal relationship of sufficient intensity to justify the extension. A players' agent who is not *stricto sensu* a party to an employment contract between a club and a player, but who, nevertheless, is expressly mentioned in that contract as being the players' agent, and who has signed the respective employment contract, is bound by the arbitration agreement contained in the respective contract with regards to disputes relating to the payment of the agency commission.**
2. **If an employment contract between a club and a player foresees that the club is obliged to not only pay the players' agent fees for the initial employment of the player, but to also pay agent fees in case the club contracts the player for future years, the club is obligated to pay the agent the respective agent fees irrespective of whether the agent in question has been involved in the negotiations of the player's contract(s) for the future season. However any payment of agent fees for future contracts is limited by the principles of fairness and justice.**

I. PARTIES

1. El Jaish Sports Club (the "Appellant" or the "Club") is a professional basketball club based in Doha, Qatar and is a member of the Qatar Basketball Federation, which in turn is a member of the Fédération Internationale de Basketball (FIBA).
2. Mr. Giovanni Funicello (the "Respondent" or the "Agent") is a FIBA licensed professional basketball players' agent based in California, USA.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions and supporting evidence submitted in these proceedings. Additional facts and

allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his award only to the submissions and evidence he considers necessary to explain his reasoning.

4. T. (the "Player"), an American professional basketball player, used the services of the Respondent to contract with the Club in 2013 for the 2013/2014 sports season.
5. The Player and the Club signed a "Draft Basketball Athlete's Contract Offer" (the "2013 Draft") on 12 September 2013 according to the Respondent's own submission before the CAS. Pursuant to Article 16 of such document:

"There are agent's commission for its efforts in facilitating the contract between the club and the player [T.], the club here agrees to pay a commission of 10% of the total contract between the two parties. First payment will be in the amount of \$3600 and if the club continues with the player then the balance will be paid in full no later than 5 days after the player has sustained being signed for the rest of the season. Additionally, the first payment will be made 48 hours after player's arrival in Doha and has passed the physical. If the club doesn't make the payments to the agent the player may refrain from any activity at the request of the agent with penalty to the player. Additionally, there will be a late fee of \$200 USD per day late after 7 days of the fees not being paid. If after 20 days the fees or the player's salary aren't paid the player and agent are entitled to entire payments in full and the player may depart the club while the club will still have to pay the entire fee and salary in full along with player's letter of clearance. If the club contracts the player for future years the club is obligated to pay agent Giovanni Funicello Fiba license #2013500050 an agent fee of 10% for all future seasons contracted".

6. The Player's salary was to be the equivalent (in Qatari Riyals) of USD 12,000 per month from his arrival in September 2013 until 30 April 2014. Furthermore, this document bears the signature of the Respondent.
7. The Sole Arbitrator notes that the BAT Award refers to a contract of 9 December 2013 which is also the date mentioned in the Respondent's notice of 28 October 2014. The date specified on such document is "9/12/2013" which can be interpreted as being 9 December 2013 or 12 September 2013. As the season started on 19 September 2013, the Sole Arbitrator is convinced that no contract could have been entered into in December 2013, *i.e.* almost 3 months after the arrival of the Player in Qatar and that the Respondent's notice of 24 October 2014 contained a clerical mistake in this respect.
8. At an unspecified date, the Player and the Club signed a "Basketball Athlete's Contract Offer" which content is different from the 2013 Draft concerning the Respondent (the "2013 Contract"). Article 16 of this contract provides the following:

"There are agent's commission for its efforts in facilitating the contract between the club and the player [T.], the club here agrees to pay a commission of 10% of the total contract between the two parties".

9. The period of the contract was set from the date of arrival of the Player on 19 September 2013 until 30 April 2014. The Player's salary as mentioned above remained unchanged. However, it appears, even if the wording of the contract in English is unclear, that the Player was entitled to an additional amount of USD 3,000 for his first salary if he successfully passed a medical test. Finally, this document does not bear the name or the signature from the Respondent.
10. The Player played for the Appellant during the 2013/2014 season which ended on 30 April 2014.
11. The Respondent received from the Appellant the following payments: USD 3,600 on 18 November 2013 and USD 5,280 on 9 January 2014.
12. In the period between May and September 2014, the Appellant and the Player were in the process of negotiating a new employment contract for the 2014/2015 basketball season.
13. The Appellant, on 15 June 2014, sent to the Respondent a draft contract in this respect. Such offer provided for a monthly salary of USD 18,000 to the Player and also provided that there shall be a commission of 10% due to the Respondent for his efforts in facilitating the contract between the Player and the Club. Such document again contained the name of the Respondent but was not signed either by him or by the Player.
14. On 14 July 2014, the Player informed the Appellant that he had hired the services of a new agent, Mr. Eric Fleisher, and that his previous relations with the Respondent had been terminated.
15. On 20 September 2014, the Appellant and the Player signed a new "Basketball Athlete's Contract Offer" by which the Player was engaged by the Appellant for the 2014/2015 basketball season.
16. On 28 October 2014, the Respondent, acting through his counsel, sent to the Appellant a legal notice demanding payment of 10% of the Player's salary for the 2014/2015 basketball season based on the provision of Article 16 of the "Agreement signed in Doha on December 9, 2013" which according to the Respondent provided for a 10% commission on the Player's salary for each further season with the Appellant. No indication or evidence is presented that such notice was actually delivered to the Appellant. The Appellant never answered such notice nor has it paid any additional amounts to the Respondent.
17. On 11 February 2015, the Respondent filed with the Basketball Arbitral Tribunal (BAT) a Request for Arbitration identifying as respondents in this procedure the Club and, in the alternative, the Player.
18. The proceedings before BAT took place between 2 March 2015 and 6 October 2015 without the Appellant taking any position on the Request for Arbitration and further submissions of the Respondent. On 6 October 2015, the BAT sent to both the Respondent and the Appellant the award without grounds issued with respect to the Respondent's Request for Arbitration. Pursuant to such award, the Appellant was ordered to pay to the Respondent an amount of

USD 16,200 as compensation for unpaid agent's fees, together with interest on such amount at a rate of 5% p.a. from 4 September 2014.

19. According to the BAT Award (with reasons), "*the BAT sent the Award to Appellant by e-mail, fax and courier on 6 October 2015. No "read receipt" was received for the e-mail, the fax transmission was not completed, and the courier delivered the award late (on 15 November 2015)*".
20. On 7 October 2015, the Respondent sent to the Appellant a notice of payment of the amounts awarded in the BAT Arbitral Award. No indication exists that such notice actually reached the Appellant.
21. Between 7 October 2015 and 3 November 2015, the Respondent provided FIBA with the BAT Award and requested FIBA to impose sanctions on the Appellant in accordance with Article 3-300 of the FIBA Internal Regulations.
22. On 3 November 2015, FIBA sent to the Appellant and to the Qatar Basketball Federation a letter requesting the Appellant to make the payments as awarded in the BAT Award and communicated the BAT Award without grounds. This letter was received by the Qatar Basketball Federation on 4 November 2015 and notified to the Appellant by the Qatar Federation on 5 November 2015.
23. On 15 November 2015, the Appellant's legal representative requested the BAT to issue its Arbitral Award with reasons and stated that no previous communications on the proceedings before BAT were ever received by it.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

24. On 17 November 2015, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the Respondent and FIBA with respect to the Arbitral Award (BAT 0664/15) rendered by the BAT on 6 October 2015 (the "BAT Award"). In its Statement of Appeal, the Appellant requested *inter alia* a stay of the pending procedures before FIBA for the enforcement of the BAT Arbitral Award and BAT being ordered to issue the grounds of the Arbitral Award, as well as a suspension of the time limits in the procedure before CAS until the grounds of the award are received by the Appellant. Furthermore, the Appellant requested the appointment of a sole arbitrator.
25. Pursuant to Article S20 of the Code of Sports-related Arbitration (the "Code"), the matter was assigned to the Appeals Arbitration Division of the CAS and was dealt with in accordance with Article R47 *et seq.* of the Code.
26. By its letter dated 23 November 2015, the CAS invited the respondents to provide their position on the Appellant's requests.
27. On 23 November 2015, the Appellant requested the withdrawal of FIBA as a respondent and maintained its request for a suspension of time limits in the procedure before CAS until the grounds of the BAT Award were notified. By a letter dated 27 November 2015 and in the

absence of any objection from the Agent within the deadline prescribed on 23 November 2015, the CAS Court Office suspended the Appellant's deadline for filing the Appeal Brief and set a new deadline of 10 days from receipt of the BAT Award for the Appellant to do so.

28. On 1 December 2015, in a letter addressing the parties, the CAS Court Office noted that the Respondent did not file any objection to the Appellant's request for the appointment of a sole arbitrator and, in accordance with Article R50 of the Code, confirmed that it will be for the President of the CAS Appeals Arbitration Division, or her Deputy, to decide the issue, taking into account the circumstances of the case.
29. On 4 December 2015, the Respondent informed the CAS Court Office that he did not object to referring the case to a sole arbitrator.
30. On 7 December 2015, the Respondent informed the CAS Court Office that the motivated award from BAT had been notified to the parties on the same date.
31. On 8 December 2015, the CAS Court Office confirmed that the Appellant's deadline to file its appeal brief shall be of 10 days from its receipt of the motivated BAT Award.
32. On 8 December 2015, the Appellant requested the CAS to extend the deadline for filing the appeal brief to 18 days after receipt of the grounds of the BAT Award (extension of 8 days) due to its earlier filing of the Statement of Appeal or, in the alternative, to 15 days (extension of 5 days) based on the fact that it was only on 7 December 2015 that it got an overall picture of the entire case before the BAT.
33. On 10 December 2015, the Respondent objected the Appellant's request for an 8-day extension but did not object the alternatively requested extension of 5 days.
34. On 10 December 2015, the CAS Court Office confirmed that the Appellant's deadline to file its appeal brief shall be extended by 5 days.
35. On 19 December 2015, the Appellant filed its Appeal Brief.
36. On 7 January 2016, the CAS Court Office confirmed receipt of the Appellant's payment of its share on the advance of costs for the procedure and on behalf of the President of the Appeals Arbitration Division, confirmed that Mr. Ivaylo Dermendjiev, attorney-at-law in Sofia, Bulgaria, was appointed as Sole Arbitrator in this procedure.
37. On 18 January 2016, the Respondent filed his Answer in accordance with Article R55 of the Code.
38. Both parties in their respective submissions confirmed that no hearing was necessary and agreed that an award be rendered on the basis of the written submissions only.
39. On 25 January 2016, the CAS Court Office, on behalf of the Sole Arbitrator, issued an Order of Procedure to the parties for the present matter.

40. On 28 January 2016, the Appellant returned a signed copy of the Order of Procedure. Furthermore, together with its letter, the Appellant filed further documents and information to rebut an argument put forward by the Respondent in his Answer.
41. On 2 February 2016, the Respondent returned the Order of Procedure and requested that the Sole Arbitrator declares the Appellant's additional filing inadmissible.
42. By signing the Order of Procedure, both parties expressly confirmed that their right to be heard had been fully respected.
43. The Sole Arbitrator decides to declare the Appellant's filing of 25 January 2016 inadmissible in accordance with Article R56 of the Code.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

44. The Appellant's submissions, in essence, may be summarized as follows:
45. The Statement of Appeal is admissible and timely filed as it was on 5 November 2015 when the Appellant first became aware of the existence of the BAT Award. CAS has jurisdiction over the appeal against the BAT Award based on the arbitration clauses contained in both the Draft and the Contract of 2013.
46. As to the applicable law, the Appellant maintains that the Sole Arbitrator is authorized to decide the dispute "*ex aequo et bono*" without reference to any law pursuant to Article 187 (2) PILA and Article 15.1 of BAT Rules.
47. The Appellant submits that the Draft of 2013 was a "draft" contract containing basic terms of the agreement and that the Arabic version of the same draft is quite different from the English version. In continuation of the relations with the Player, the Appellant and the Player signed a new contract being the final version of their agreement and in which clause 16 has a different wording from what the Respondent relied upon in his submission before the BAT. The Contract itself does not refer to subsequent seasons with respect to the payment of a commission towards the Respondent.
48. The Appellant maintains that the contract for the 2014/2015 season with the Player was concluded without the assistance of the Respondent as agent as the Club was informed on 14 July 2014 by the Player himself that he was no longer represented by the Respondent but by another agent – Mr. Eric Fleisher. Accordingly, the negotiations on the 2014 contract were continued with the participation of Mr. Fleisher and new drafts were exchanged with him.
49. On 20 September 2014 and with the assistance of Mr. Eric Fleisher, the new 2014 contract was concluded and the Player continued his engagement with the Club for the 2014/2015 basketball season. Any agency commission pursuant to such contract shall be paid to Mr. Fleisher only.

50. In any event, despite its position that CAS has jurisdiction in the present matter, the Appellant maintains that the BAT Award should be annulled as the Respondent was not a party to the arbitration agreement with the Appellant and/or the Player. According to the Appellant, the simple fact of a signature of the Respondent on the execution page of the 2013 Draft does not make the Respondent a party to the Contract and the arbitration clause of the same contract.
51. The Appellant's position in this respect is that according to the applicable Swiss Law (as BAT is an arbitration institution seated in Switzerland and Swiss Private International Law applies) the extension of the arbitration clause contained in clause 14 of the 2013 Draft to third parties is possible "*only if such third party in relation to the conclusion of the performance of the main contract, acted in a way in which the opposed side, in good faith, could understand that the third party wished to join and accept the main contract as well as the arbitration agreement*", which was not the case here.
52. In the Appellant's view, the presence of the Agent and his signature on the 2013 Draft does not make the Respondent a party to it, but the Club simply acknowledged its "*unilateral commitment to pay a commission*". Further, the Appellant maintains that the existence of the Respondent's signature on the execution page of the same contract does not give rise to an admissible claim of the Respondent before the BAT.
53. In its Appeal Brief, the Appellant requested the following reliefs:
- (a) *The appeal filed against the Decision of the BAT is admissible;*
 - (b) *BAT did not have jurisdiction to rule upon the dispute between Mr. Giovanni Funicello and El Jaish Sports Club and consequently the Decision of the BAT dated 6 October 2015 is annulled and set aside.*
 - (c) *On a subsidiary basis, the appeal filed by El Jaish Sports Club is upheld and the Decision of the BAT dated 6 October 2015 is annulled and set aside.*
 - (d) *Accordingly, El Jaish Sports Club does not owe any amount to Mr. Giovanni Funicello;*
 - (e) *Giovanni Funicello has to pay El Jaish Sports Club the amount of EUR 4.998.00 to cover the payment of the same amount made by El Jaish Sports Club as condition to receive the grounds of the Decision of the BAT plus such a rate of interest, as the Panel shall deem appropriate in the circumstances, from the date of its payment by Appellant to FIBA;*
 - (f)
 - (g) *Mr. Giovanni Funicello shall bear the entire procedural cost for this arbitration procedure;*
 - (h) *Mr. Giovanni Funicello shall pay El Jaish Sports Club its legal costs and expenses relating to this arbitration procedure in an amount to be determined by the decision of the CAS.*

B. *The Respondent*

54. The Respondent's submissions, in essence, may be summarized as follows:

55. On 12 September 2013, the Club, the Player and the Agent signed a contract under which the Player's performance should start upon his arrival in Qatar but the length of the contract was guaranteed for 3 months only after which period the Club could decide whether to renew the contract. The said contract stipulated for the remuneration of the Player. It also contained an arbitration clause referring the disputes to the BAT with a possible appeal to the CAS.
56. The basic interpretation and argument of the Respondent as to the above is that according to Article 16 of the same the Club had to pay the Respondent a commission amounting to 10% of the Player's salary for the first year and 10% of any further salaries agreed with the Player for the consecutive years of the Player's employment with the Club.
57. The Player concluded the 2013/2014 season with the Appellant and the Respondent received the agreed commission of 10% for the 2013/2014 salaries of the Player.
58. After the end of the season, the Player expressed interest in continuation of his employment with the Appellant and therefore the Respondent entered into negotiations with the Appellant during which several e-mails and SMS correspondence was exchanged and the Respondent received a draft contract from the Appellant concerning the Player's further engagement.
59. At the end of the negotiations, in July 2014, the relations between the Respondent and the Player were abruptly terminated. However, the Respondent relying on clause 16 of the 2013 Draft maintains that he has a claim for a commission of 10% of the Player's salary agreed with the Appellant irrespective of whether the Respondent continued or discontinued to perform as the Player's Agent.
60. In the absence of any response or any payment from the Appellant pursuant to his notice, on 11 February 2015, the Respondent submitted his Request before the BAT. After a procedure before the BAT in which the Appellant did not take part even though properly notified by the BAT, the latter issued the award subject of the appeal. The same award was announced by the Respondent to the Appellant together with his request for payment pursuant to the award. In the absence of any reply thereto, the Respondent applied to FIBA for the enforcement of the BAT Award.
61. The Respondent maintains that the appeal of the Appellant is inadmissible. Unlike what is purported by the Appellant, the Respondent assumes that all documents related to the procedure before the BAT were properly notified to the Appellant. The reasoning is that the Appellant in its Statement of Appeal made reference to documents that should have not been in its possession should the notifications by the BAT be not received.
62. According to the Respondent, if the BAT Award was dated and communicated to parties on 6 October 2015 and the Statement of Appeal submitted on 17 November 2015, the appeal shall be declared inadmissible.
63. As to the jurisdiction and the applicable law, the Respondent does not object to the Appellant's positions thereto. Further, the Respondent maintains that being a party to the 2013 Draft between the Appellant and the Player, he is also a party to the arbitration clause contained in

the same Draft. According to the Respondent, the objections of the Appellant as to the jurisdiction of the BAT are objections as to the existence of the arbitration clause and thus not to the jurisdiction of the CAS. The Respondent fully supports the argumentation of the applicability of the arbitration agreement towards his claim given by the BAT in the motivated award.

64. The Respondent opposes the Appellant's position that the so-called 2013 Contract replaced the 2013 Draft. The Respondent's position is that according to the text of the 2013 Draft, the Respondent is entitled to commission of 10% of the Player's salary not only for the first year of employment (season 2013/2014) but also for any consecutive season of the Player with the Club. The Respondent also contests the Appellant's interpretation of Article 16 of the Contract that it is a "unilateral commitment to pay the commission" but refers to it as an "agreement" between the Club and the Respondent.
65. The Respondent also contests the validity of the so-called 2013 Contract arguing that it has no date on it to consider whether it was executed after the first one. The Respondent purports that two or more contracts with the Player have been concluded for the 2013/2014 sporting season, which according to him was a usual practice. The 2013 Contract was made just for the purpose of submitting it to the Qatar Basketball Federation and therefore his signature was not present there. As a summary, the Respondent contests that the so-called 2013 Contract had replaced the text of clause 16 of the 2013 Draft, on which he relies. The Respondent argues that no *novatio* is evident from the 2013 Contract and that it could not revoke obligations towards him evolving from the previously signed contract. Finally, in this respect, the Respondent holds that the Appellant may not use the translation of the Arabic version of the 2013 Draft in substantiating its claim as the contract contains provisions for precedence of language versions.
66. In the Answer the Respondent requested the following relief:
 - *The Basketball Arbitral Tribunal correctly considered its jurisdiction.*
 - *The CAS has jurisdiction upon Appeal and decides [ex] aequo at bono;*
 - *The Statement of Appeal has been filed after the expiring of the term of 21 days after receiving of the BAT Award, and is not admissible;*
 - *The objections and the arguments of the Club that had to be claimed before the BAT are not admissible in the present Appeal proceedings;*
 - *The BAT Award correctly ordered the Club to pay the 2014 / 2015 Agent fee to the Agent, and this decision has to be upheld.*
 - *The BAT Award correctly ordered the Club to pay to the Agent the costs of the BAT Proceedings (EUR 4,975.00) and contribution of his legal fee (EUR 4,300.00), and this decision has to be upheld.*

- *The Appellant shall bear the entire procedural costs of the CAS procedure, as well as the Agent's legal costs to be determined at the discretion of the CAS.*

V. JURISDICTION

67. Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

68. Article 14 of the 2013 Draft provides that:

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

69. The exact same provision is included in the 2013 Contract.

70. According to the FIBA Internal Regulations governing the BAT (Book 3, Chapter VII) para. 290:

“BAT Awards shall be final and binding upon communication to the parties”.

71. Both parties expressly agree that CAS has jurisdiction to hear the appeal against the BAT Award. This has also been confirmed by the signature of the Order of Procedure by both parties. The question whether BAT had jurisdiction to hear the Respondent's claim is a question on the merits which shall be addressed below.

72. Accordingly, the Sole Arbitrator is satisfied that the CAS has jurisdiction to hear this dispute.

VI. ADMISSIBILITY

73. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt

of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

74. The FIBA provisions as to the time-limits for lodging an appeal against a BAT award are silent.
75. Therefore, by reference to Article R49 of the Code, the time limit for appeals filed under the existing FIBA rules would be again 21 days from receipt of the decision appealed.
76. The Respondent maintains that the Appellant received notification of the BAT Award on 6 October 2015. On the contrary, the Appellant maintains that it has acquainted itself only on 5 November 2015.
77. In order to determine whether the appeal was filed within the prescribed period, the Sole Arbitrator has to ascertain when the BAT Award was received by the Appellant and then decide whether the deadline in Article R49 of the Code has been complied with.
78. It is well established under Swiss procedural law that the time limit for an appeal starts to run on the day following the communication of the decision appealed against. The same principle is incorporated in Article R32 of the Code. In this respect, the Sole Arbitrator must be satisfied that the appealed decision was properly notified so as to trigger the running of the time limit.
79. The Respondent maintains that the BAT Award has been notified to the Appellant on 6 October 2015 but simply relies on the fact that this is the date when such award was sent to the Appellant but not that it has been received. The Respondent does not give any specific date or provide any evidence of this notification being delivered to the Appellant.
80. On the contrary, the Appellant provides various arguments and evidence that it has been notified on 5 November 2015 at the earliest. According to the motivated BAT Award, it is clear that even the BAT which is responsible for notification of its award confirms that the notification was not received before 5 November 2015 by the Appellant: the e-mail sent did not receive a “read” message, the fax transmission was not completed and the courier delivery was delivered late – on 15 November 2015.
81. As to the Respondent’s argument that the Appellant in its Statement of Appeal made reference to documents that should have not been in its possession should the notifications by the BAT be not received, the Sole Arbitrator cannot follow it. In fact, the Appellant became aware of the BAT Award as from 5 November 2015 and could indeed rely on what has been communicated to it to file its appeal with the CAS.
82. In view of the above, the Sole Arbitrator finds that by filing its Statement of Appeal on 17 November 2015, the Appellant’s appeal is admissible.

VII. APPLICABLE LAW

83. Article R58 of the Code provides as follows:

The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

84. The Arbitration clause contained in clauses 14 of the 2013 Draft and Contract on which both parties rely clearly provide that both the BAT and the CAS shall decide the dispute “*ex aequo et bono*”.
85. Both parties, in their respective submissions, have expressly confirmed that the Sole Arbitrator shall decide the matter *ex aequo et bono*.
86. Accordingly, pursuant to Article R58 of the Code and the express statement of both parties, the Sole Arbitrator shall decide the case *ex aequo et bono* without reference to any substantive law.

VIII. LEGAL ANALYSIS AND REASONING

A. *The jurisdiction of the BAT*

87. The Sole Arbitrator needs first to assess whether the BAT had jurisdiction to hear the claim from the Respondent based on the 2013 Draft.
88. As correctly stated in the BAT Award, an extension of an arbitration agreement to a third party requires that the initial parties and the third party have a legal relationship of sufficient intensity to justify the extension.
89. The Sole Arbitrator concurs with the Appellant that the Respondent was not a party *stricto sensu* to the 2013 Draft. However, he is expressly acknowledged as being the Player’s agent. His name is expressly mentioned in such document at clause 16 and his name added on the signatories’ page. He did sign the 2013 Draft. Furthermore, it is not disputed that the Respondent took part in the negotiations of the contract. The latter confers a clear and detailed obligation on the Appellant to make payments to the Respondent, which it did. The only issue between the parties concerns whether it is clause 16 of the 2013 Draft or the same article of the 2013 Contract which is binding.
90. In those circumstances, the Sole Arbitrator finds that the arbitration agreement in the 2013 Draft applies to disputes between the Respondent and the Appellant insofar as such disputes relate to the payment of the agency commission.
91. In view of the above, the Sole Arbitrator is satisfied that the BAT correctly retained jurisdiction to hear and decide the Respondent’s request.

- B. *The alleged breach of the Appellant's right to be heard before the BAT*
92. The Sole Arbitrator does not need to address any of the Appellant's allegations in this respect as, according to the consistent CAS case law, appeals before the CAS being a *de novo* procedure, any procedural flaws in the first instance are cured by the present appeal.
- C. *Is the Respondent entitled to any commission following the Player's subsequent signing of a new employment contract with the Appellant for the 2014/2015 season and if so, in which amount?*
93. In order to assess whether the Respondent would be entitled to any commission following the Player's signature of a new employment contract with the Appellant for the 2014/2015 season, the Sole Arbitrator needs to assess whether the 2013 Draft or the 2013 Contract is the one binding the parties.
94. In this respect, the Sole Arbitrator considers that the Appellant's argument that the 2013 Contract replaced the 2013 Draft cannot be retained.
95. The 2013 Contract is undated and only contains the signature of the Player and the Appellant. On the contrary, the 2013 Draft is signed by both the Appellant and the Respondent. In a claim between the Player and the Appellant, the reasoning below might not be applicable. However, in the context of a contractual relationship between the Appellant and the Respondent, the Sole Arbitrator can only take into consideration the 2013 Draft. In fact, the Respondent not being part of the 2013 Contract, it would be contrary to all principles of good faith and equity to consider that the Player and the Appellant may affect the rights and obligations of the Respondent without the latter being aware of such situation. The Appellant has not adduced any evidence that the Respondent agreed to a modification of clause 16 of the 2013 Draft, as provided under the same provision in the 2013 Contract.
96. In view of the above, the Sole Arbitrator considers that clause 16 of the 2013 Draft is binding upon the Appellant in its contractual relations with the Respondent. According to such provision: *"There are agent's commission for its efforts in facilitating the contract between the club and the player [T.], the club here agrees to pay a commission of 10% of the total contract between the two parties. First payment will be in the amount of \$3600 and if the club continues with the player then the balance will be paid in full no later than 5 days after the player has sustained being signed for the rest of the season. Additionally, the first payment will be made 48 hours after player's arrival in Doha and has passed the physical. If the club doesn't make the payments to the agent the player may refrain from any activity at the request of the agent with penalty to the player. Additionally, there will be a late fee of \$200 USD per day late after 7 days of the fees not being paid. If after 20 days the fees or the player's salary aren't paid the player and agent are entitled to entire payments in full and the player may depart the club while the club will still have to pay the entire fee and salary in full along with player's letter of clearance. If the club contracts the player for future years the club is obligated to pay agent Giovanni Funicello Fiba license #2013500050 an agent fee of 10% for all future seasons contracted"*.
97. Therefore, as the Player and the Club concluded a new employment contract for the 2014/2015 season, the Respondent, pursuant to the principle of *pacta sunt servanda*, should be entitled to the payment of a 10% commission on the amount of such new contract.

98. For the 2014/2015 season, the Sole Arbitrator notes that the Appellant agreed to pay the Player a monthly salary of USD 18,000 for a period of 8 months. Those figures are the ones included in the new draft forwarded by the Appellant to the Respondent on 15 June 2015 and no evidence has been adduced by the Appellant that the final salary agreed upon between it and the Player was finally of a lesser value. The Sole Arbitrator therefore considers that the value of such new contract was of USD 144,400 and the Respondent would be entitled to a commission of USD 14,400. In this respect, the Sole Arbitrator respectfully differs from the calculation of the BAT in its award which incorrectly provided for a period of 9 months. Such amount of USD 14,400 was actually the one paid by the Appellant to the Player's new agent, confirming the above calculation.
99. In view of the last finding above, the Sole Arbitrator also considers that there has been no variation between the draft submitted by the Appellant to the Respondent on 15 June 2014 and the agreement finally concluded between the Player and the Club for the 2014/2015 season. Therefore, and in the absence of any convincing evidence from the Appellant on the involvement of the Player's new agent as from 14 July 2014, apart from one email dated 18 July 2014 with no enclosure showing any such involvement, the Sole Arbitrator sees no reason why the above amount should be reduced.
100. The fact that the Appellant would pay a commission twice to two agents is not the Respondent's responsibility in view of the above findings. However, it should be pointed out that in the Sole Arbitrator's view, this situation would only be valid for the season at stake and not for all further season as this would create a prejudice to the Player as the Appellant would then have to pay two commissions and that this would lead to a result which is contrary to the principles of fairness and justice.

D. Conclusion

101. In view of all the above findings, the Sole Arbitrator decides to partially uphold the Appellant's appeal. The BAT Award shall only be amended as to the amount of compensation for unpaid agent's fees which shall be reduced to USD 14,400.
102. As the BAT Award is only modified with respect to the calculation of the above amount, the Sole Arbitrator sees no reason to impose on the Respondent the payment of any amount to cover the Appellant's payment as a condition to receive the grounds of the BAT Award.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by El Jaish Sports Club on 17 November 2015 against the award of the BAT rendered on 6 October 2015 is admissible.
2. The appeal filed by El Jaish Sports Club on 17 November 2015 against the award of the BAT rendered on 6 October 2015 is partially upheld.
3. The award of the BAT rendered on 6 October 2015 is confirmed, save for point 1 which is amended as follows: El Jaish Sports Club is ordered to pay to Mr. Giovanni Funicello USD 14,400 as compensation for unpaid agent's fees, together with interest on such amount at a rate of 5% per annum from 4 September 2014 onwards.

(...)

6. All other motions or prayers for relief of the parties are dismissed.