

**ARBITRAL AWARD**

**(BAT 1774/22)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Stephan Netzle**

in the arbitration proceedings between

**Mr. Nikolaos Spanos**

represented by Ms. Giannoula Papavasileiou, attorney at law

vs.

**AEK Athens BC**

466 Irakleio Ave and Kuprou Herakleion Attica, 14122 Athens, Greece

**- Claimant -**

**- Respondent -**

## **1. The Parties**

### **1.1 The Claimant**

1. Mr. Nikolaos Spanos (the "Agent" or "Claimant") is a Greek basketball agent.

### **1.2 The Respondent**

2. AEK Athens BC (the "Club" or "Respondent") is a professional basketball club competing in the Greek Basketball League.

## **2. The Arbitrator**

3. On 21 January 2022, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Stephan Netzle as arbitrator (the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 January 2022 (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 3 December 2020, the Agent and the Club signed a settlement agreement under which the Club shall compensate the Agent with the amount of EUR 92,000.00 plus VAT for "*services provided by the Agent concerning scouting and promotion services of players of the Club, as well as past agency fees for services provided by the Agent individually for [player L.M. and coach L.B.]*" ("Settlement Agreement").

5. Article 2 Settlement Agreement provides for the following payment schedule:

*"In satisfaction of the CLUB's entire responsibility to the AGENT as it relates to the above services, the Club will pay to the AGENT and the AGENT will accept, the following payments:*

*9.200 Euro payable at the end of each month starting January 2021 and until and including October 2021*

**Total: 92.000 Euro plus any VAT applicable"**

6. Article 4 Settlement Agreement provides the following regulation in case the Club does not fulfill its payment duties:

*"In the event that any scheduled payments of this SETTLEMENT are not made by the CLUB within 30 days of the applicable payment date, the AGENT has to send written notice to the Club and if the Club does not fulfill financial obligation towards AGENT in total within 5 days, then all amounts of this SETTLEMENT will immediate become due and payable and the AGENT will have the right to immediately move with arbitration to collect all amounts of this SETTLEMENT."*

7. On 10 June 2021, the Agent and the Club entered into a second agreement, according to which the latter acknowledged that the Agent had advanced an amount of USD 12,000.00 to the player Moses Kingsley on behalf of the Club in order to preserve the Club's cash flow ("Second Agreement"). Pursuant to Article 2 Second Agreement, the Club undertook to pay the amount of USD 12,000.00 to the Agent by 30 October 2021 at the latest.

8. Article 3 Second Agreement provides the following regulation in case the Club does not fulfil its payment duties:

*"In the event that any scheduled payments of this AGREEMENT are not made by the CLUB within 10 days of the applicable payment date, then all amounts of this AGREEMENT will immediate become due and payable and the AGENT will have the right to immediately move with arbitration to collect all amounts of this AGREEMENT"*

9. On 6 December 2021, the Agent sent two e-mails to the Club stating that these e-mails should be considered as final notice for payment. In addition, he informed the Club that

in case the full payment was not received by 10 December 2021, he would immediately "*move on with arbitration in [sic] the BAT.*"

10. The Club has never responded to these e-mails nor did it make any payments.

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

11. On 17 January 2022, the BAT received a Request for Arbitration dated 30 December 2021 filed by the Claimant in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 4,000.00 was received in the BAT bank account on 18 January 2022.
12. By letter dated 24 January 2022, the BAT Secretariat (a) notified the parties of the Arbitrator's appointment; (b) invited the Respondent on behalf of the Arbitrator to file an Answer to the Request for Arbitration in accordance with Article 11.4 BAT Rules by no later than 14 February 2022; and (c) fixed the amount of the Advance on Costs to be paid by the parties by 3 February 2022 as follows:

<i>"Claimant 1 (Mr. Nikolaos Spanos)</i>	<i>EUR 4,500.00</i>
<i>Respondent (AEK Athens)</i>	<i>EUR 4,500.00"</i>

13. By letter dated 15 February 2022, the BAT Secretariat acknowledged receipt of the Claimant's share of the Advance on Costs (i.e. EUR 4,500.00) and informed the parties that the Respondent failed to submit its Answer to the Request for Arbitration and to pay its share of the Advance on Costs. In the same letter, the BAT Secretariat fixed a final deadline until 22 February 2022 for the Respondent to pay its share of the Advance on Costs and to submit an Answer.
14. By letter dated 28 February 2022, the BAT Secretariat noted that the Respondent failed to pay its share of the Advance on Costs and to submit an Answer to the Request for

Arbitration. In the same letter, the BAT Secretariat informed the parties that it had decided to adjust the Advance on Costs based on Article 9.3.1 BAT Rules as follows:

<i>"Claimant (Mr. Nikolaos Spanos)</i>	<i>EUR 3,500.00</i>
<i>Respondent (AEK Athens)</i>	<i>EUR 3,500.00"</i>

15. In the same letter, the BAT Secretariat set a deadline until 10 March 2022 for the Claimant to pay the Respondent's share of the Advance on Costs in the remaining amount of EUR 2,500.00.
16. On 2 March 2022, the Claimant paid the remaining Advance on Costs of EUR 2,500.00.
17. By letter dated 21 March 2022, the BAT Secretariat informed the parties that the Arbitrator had declared the exchange of submissions complete. Finally, the BAT Secretariat granted the parties a deadline until 28 March 2022 to provide a detailed account of their costs.
18. On 26 March 2022, the Claimant submitted his cost statement for legal services. The Respondent failed to submit its account of costs.

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

##### **4.1 The Claimant's position**

19. According to Article 4 Settlement Agreement, the Agent shall send a written notice to the Club if the latter has not complied with the payment schedule 30 days of the applicable payment date. This was done by e-mail of 6 December 2021. As the Club did not pay the amounts due within five days as stipulated in Article 4 Settlement Agreement, all payment instalments became immediately due and the Agent was entitled to claim full

payment with the BAT. Therefore, the Agent is entitled to a remuneration of EUR 92,000.00.

20. In addition, according to Articles 1 and 2 Second Agreement, the Agent paid an amount of USD 12,000.00 to the player Moses Kingsley on behalf of the Club and the Club is obliged to pay the amount back by 30 October 2021. On 6 December 2021, the Agent sent a written notice to the Club as provided by Article 3 Second Agreement. The Club is therefore obliged to pay the Agent an amount of USD 12,000.00 in addition to the remuneration set out in para. 19 above.

21. In his Request for Arbitration, the Agent requests the following relief:

*"A. The Respondent – 'the Club' should pay the Claimant – 'the Agent' the following amounts.*

*- 92.000 Euro plus any applicable VAT.*

*- 12.000 usd.*

***B. Interest of 5% per annum for payments made after the agreed date, as follows:***

*-2.490,30 euros for 92.000 euros from the date that each payment was due and payable until today*

*-96,99 usd for 12.000 usd from the 1<sup>st</sup> of November until today*

***C. Non reimbursable handling fee***

***D. Court fees as decided by the court***

***E. Attorney's fees and expenses***

***F. Interest** calculated on 5% of the the amount **of 92.000euro** and 12.000 usd from today and until payment.*

*Total amount in dispute: 94.490,30 euros and 12.096,99 usd.*

*(Excluding interest amounts after filling & legal/arbitral costs"*



#### 4.2 The Club's Position

22. The Respondent did not make any submissions in this arbitration.

#### 5. The jurisdiction of the BAT

23. Since the Respondent did not participate in the arbitration, the Arbitrator examines the jurisdiction of the BAT *ex officio*, on the basis of the record as it stands.<sup>1</sup>

24. Pursuant to Article 2.1 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 PILA.

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

26. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA<sup>2</sup>.

27. The jurisdiction of the BAT over the dispute results from the arbitration clauses contained under Article 5 Settlement Agreement and Article 4 Second Agreement, which read as follows:

*"[...] Any dispute arising from or related to the present contract, shall be resolved by arbitration, and shall be submitted to the FIBA Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva,*

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<sup>1</sup> Judgement of the Swiss Federal Tribunal, 120 II 155, 162.

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

*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."*

28. The Settlement Agreement and the Second Agreement are in written form and thus the arbitration clauses fulfil the formal requirements of Article 178(1) PILA.
29. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreements under Swiss law (referred to by Article 178(2) PILA).
30. The jurisdiction of BAT over the Agent's claims arises from the Settlement Agreement and the Second Agreement. The wording "*[a]ny dispute arising from or related to the present contract [...]*" clearly covers the present dispute.
31. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Agent's claim.

## **6. Other Procedural Issues**

32. Article 14.2 of the BAT Rules specifies that "*the Arbitrator may [...] proceed with the arbitration and deliver an award*" if "*the Respondent fails to submit an Answer*". The Arbitrator's authority to proceed with the arbitration in case of default by one of the parties is in accordance with Swiss arbitration law and the practice of the BAT.<sup>3</sup> However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
33. This requirement is met in the present case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with

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



the relevant rules. Specifically, the BAT letters dated 24 January 2022 and 15 February 2022 were both successfully delivered to the Club by courier. The Club was also given sufficient opportunity to respond to Claimant's Request for Arbitration, including a grace period. The Club, however, chose not to participate in this arbitration.

## 7. Discussion

### 7.1 Applicable Law – *ex aequo et bono*

34. 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".*

35. Under the heading "Applicable Law", Article 15 BAT Rules reads as follows:

*"15.1 The Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.*

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

36. As seen above, Article 5 Settlement Agreement and Article 4 Second Agreement stipulate that: *"[t]he arbitrator shall decide the dispute ex aequo et bono".*

37. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.
38. The concept of "équité" (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage<sup>4</sup> (Concordat)<sup>5</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>6</sup>*
39. This is confirmed by Article 15.1 BAT Rules, according to which the Arbitrator applies "general considerations of justice and fairness without reference to any particular national or international law".
40. In light of the foregoing considerations, the Arbitrator makes the findings below.

## 7.2 Findings

### 6.2.1 Agent's claims based on the Settlement Agreement and the Second Agreement

41. According to Article 1 Settlement Agreement, the Agent is entitled to a compensation for certain services provided to the Club on several previous occasions in the total amount of EUR 92,000.00 plus VAT. This amount was payable in ten monthly instalments of

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<sup>4</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>5</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

<sup>6</sup> JdT 1981 III, p. 93 (free translation).

EUR 9,200.00 starting at the end of January 2021 until the end of October 2021. Pursuant to Article 4 Settlement Agreement, the Agent shall send a written notice to the Club if the latter is in default with any scheduled payments for more than 30 days. In case the Club does not pay the outstanding amounts within five days, the entire outstanding amount under the Settlement Agreement becomes immediately due and the Agent has the right to immediately proceed with arbitration.

42. On 6 December 2021, the Agent sent the following e-mail to the Club:

*"Further to our agreement signed on 3rd of December for the payment of 92.000 euro for services provided, please consider this as the final notice for payment. In case the full amount is not received by 10 December 2021, we will immediately move on with arbitration in the BAT for collecting the said amounts"*

43. Pursuant to the Second Agreement, the Agent advanced an amount of USD 12,000.00 to the player Moses Kingsley on behalf of the Club. According to Article 2 Second Agreement, the Club was obliged to return this amount to the Agent by no later than 30 October 2021.

44. On 6 December 2021, the Agent sent another e-mail to the Club with the following content:

*"further to the Agreement signed on 10 of June according to which our agency paid 12.000 usd on your behalf to Mr Kingsley, please consider this email as a notice for immediate payment (which was due on 30 October 2021). In case said payment is not provided by 10 of December we will immediately move on with arbitration in the BAT for collecting the said amounts"*

45. According to the Claimant, the Club neither paid the instalments as agreed in the Settlement Agreement nor the amount due based on the Second Agreement. There is no indication in the file that could cast doubt on the Claimant's allegation. The Club failed to submit an Answer to the Request for Arbitration contesting the amounts owed or explaining why the Club was not in the position to fulfil the financial obligations as stipulated in the Settlement Agreement and the Second Agreement.

46. Furthermore, the Agent fully complied with the obligations set out in Article 5 Settlement Agreement and Article 4 Second Agreement, according to which he had to send a written notice to the Club.
47. Therefore, the Arbitrator concludes that the Agent is entitled to the amount agreed in the Settlement Agreement of EUR 92,000.00 plus VAT plus the amount of USD 12,000.00 based on the Second Agreement.

#### 6.2.2 Interest

48. The Agent requests

*"Interest of 5% per annum for payments made after the agreed date, as follows:*

*-2.490,30 euros for 92.000 euros from the date that each payment was due and payable until today*

*-96,99 usd for 12.000 usd from the 1st of November until today*

*[...]*

***Interest** calculated on 5% of the the amount **of 92.000euro** and 12.000 usd from today and until payment."*

49. Neither the Settlement Agreement nor the Second Agreement contain a regulation concerning interest. 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. As requested by the Agent and in correspondence with the standing BAT jurisprudence the default interest rate is of 5% per annum.
50. As to the date from which the interest for the compensation starts to run, the Arbitrator notices that the Settlement Agreement foresees that the instalments shall be paid at the end of each month starting from January 2021 until October 2021. The due dates for the instalments are the following: 31 January 2021, 28 February 2021, 31 March 2021, 30 April 2021, 31 May 2021, 30 June 2021, 31 July 2021, 31 August 2021, 30 September

2021 and 31 October 2021. Therefore, the interest for the first instalment started on 1 February 2021, for the second instalment on 1 March 2021, for the third instalment on 1 April 2021, for the fourth instalment on 1 May 2021, for the fifth instalment on 1 June 2021, for the sixth instalment on 1 July 2021, for the seventh instalment on 1 August 2021, for the eighth instalment on 1 September 2021, for the ninth instalment on 1 October 2021 and for the tenth and last instalment on 1 November 2021.

51. The amount due under the Second Agreement (USD 12,000.00) was payable on 30 October 2021. Therefore, the starting date for the interest would be on 31 October 2021. However, as the Claimant requested interest only from 1 November 2021, the Arbitrator orders interest from that date on.

## **8. Conclusion**

52. Based on the foregoing, and after taking into due consideration all the evidence submitted and all arguments made in this procedure, the Arbitrator concludes the following:
- The Club shall pay the Agent an outstanding compensation of EUR 92,000.00 plus VAT, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) of EUR 9,200.00 from 1 February 2021, of EUR 9,200.00 from 1 March 2021, of EUR 9,200.00 from 1 April 2021, of EUR 9,200.00 from 1 May 2021, of EUR 9,200.00 from 1 June 2021, of EUR 9,200.00 from 1 July 2021, of EUR 9,200.00 from 1 August 2021, of EUR 9,200.00 from 1 September 2021, of EUR 9,200.00 from 1 October 2021 and of EUR 9,200.00 from 1 November 2021 until payment in full.
  - The Club shall pay the Agent the outstanding amount of USD 12,000.00 based on the Second Agreement, together with interest at 5% per annum on any



outstanding balance (as may be the case from time to time) thereof from 1 November 2021 until payment in full.

## 9. Costs

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

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

54. On 30 March 2022, the BAT Vice-President determined the arbitration costs in the present matter to be EUR 5,300.00.

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

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

56. Considering the fact that that the Claimant was the prevailing party in all reliefs in this arbitration, it is consistent with the provisions of the BAT Rules that the arbitration costs be borne by the Club alone. Given that the Claimant paid the entire Advance on Costs in the amount of EUR 7,000.00 (of which EUR 1,700.00 will be reimbursed to the Claimant by the BAT), the Club shall reimburse EUR 5,300.00 to the Agent.

57. In relation to the parties' legal fees and expenses, Article 17.3 BAT Rules provides that

*"as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings"*



*(including any reasonable costs of witnesses and interpreters). When deciding [...] on the amount of any contribution to the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties."*

58. Moreover, Article 17.4 BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses. The maximum contribution for an amount in dispute between EUR 100,001.00 and EUR 200,000.00 excluding handling fee according to Article 17.4 BAT Rules is EUR 10,000.00. The amount in dispute in this case is EUR 94,490.30 plus USD 12,096.99 (i.e. EUR 10,687.30<sup>7</sup>), i.e. in total EUR 105,177.60.
59. The Agent claims legal fees in the total amount of EUR 5,750.00. In his request for relief, he also claims for the expense of the non-reimbursable handling fee.
60. The Respondent did not submit an account of its costs.
61. Considering the outcome of the proceedings and the limited volume of work of the Claimant's counsel, the Arbitrator finds it fair and adequate that the Respondent shall pay a contribution of EUR 4,000.00 to the Claimant, plus the non-reimbursable handling fee of EUR 4,000.00. The Respondent shall bear its own legal costs and fees.

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<sup>7</sup> Currency date: 30 December 2021, i.e. the date of the Request for Arbitration.

## **10. AWARD**

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

- 1. AEK Athens BC shall pay Mr. Nikolaos Spanos a compensation of EUR 92,000.00 (plus VAT), plus interest of 5% per annum on any outstanding balance (as may be the case from time to time) of EUR 9,200.00 from 1 February 2021, of EUR 9,200.00 from 1 March 2021, of EUR 9,200.00 from 1 April 2021, of EUR 9,200.00 from 1 May 2021, of EUR 9,200.00 from 1 June 2021, of EUR 9,200.00 from 1 July 2021, of EUR 9,200.00 from 1 August 2021, of EUR 9,200.00 from 1 September 2021, of EUR 9,200.00 from 1 October 2021 and of EUR 9,200.00 from 1 November 2021, each until payment in full.**
- 2. AEK Athens BC shall pay Mr. Nikolaos Spanos an amount of USD 12,000.00, plus interest of 5% per annum on any outstanding balance (as may be the case from time to time) from 1 November 2021 until payment in full.**
- 3. The costs of this arbitration until the present Award, which were determined by the Vice-President of the BAT to be in the amount of EUR 5,300.00 shall be borne by AEK Athens BC alone. Accordingly, AEK Athens BC shall pay EUR 5,300.00 to Mr. Nikolaos Spanos as reimbursement for his arbitration costs. The balance of the Advance of Costs, in the amount of EUR 1,700.00, will be reimbursed to Mr. Nikolaos Spanos by the BAT.**
- 4. AEK Athens BC shall pay Mr. Nikolaos Spanos an amount of EUR 8,000.00 as reimbursement for his legal fees and expenses.**
- 5. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 5 April 2022

Stephan Netze  
(Arbitrator)