



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 1823/22)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert

in the arbitration proceedings between

Mr. Nikolaos Zisis

- Claimant -

represented by Mr. Sofoklis Pilavios and Ms. Christina Syrengela,
attorneys at law

vs.

AEK NEA KAE 2014 Basketball Club AEK B.C.
ANO LIOSIA OLYMPIC HALL
59 Konstantinoupoleos, 13342 Ano Liosia, Athens, Greece

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Nikolaos Zisis ("Player") is a Greek professional basketball player.

1.2 The Respondent

2. AEK NEA KAE 2014 Basketball Club AEK B.C. ("Club") is a Greek professional basketball club.

2. The Arbitrator

3. On 4 June 2022, Prof. Ulrich Haas, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert as arbitrator ("Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal ("BAT Rules"). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence or to his conduct of these proceedings.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. On 17 January 2020, Player was retained by Club as a professional basketball player for the then-remaining part of the 2019-2020 season and the 2020-2021 season.
5. On 24 March 2022, Player and Club entered into an agreement ("Agreement") whereby they stipulated the amount of salaries, bonuses and unpaid taxes owed to the former by the latter (EUR 157,644.95). The Parties further stipulated that this amount would be paid by Club to Player in nine instalments commencing with a payment of EUR 20,000.00

on 5 April 2022. The Agreement also obliged Club to provide Player a tax certificate for 2021 and also to pay all taxes on behalf of Player. In the event that any payment was past due for more than 7 calendar days Player could present a termination notice to Club and thereupon all monies under the Agreement became immediately due.

6. Club did not pay the first two instalments to Player under the Agreement and on 6 May 2022 his counsel sent a termination notice demanding payment of the full amount of EUR 157,644.95 by no later than 13 May 2022. No such payment was made.
7. Player brings this arbitration to compel payment.

3.2 The Proceedings before the BAT

8. On 16 May 2022, Player filed a Request for Arbitration (of the same date) in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 4,000 on 13 May 2022.
9. On 7 June 2022, the BAT informed the Parties that Mr. Klaus Reichert had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

*“Claimant (Mr. Nikolaos Zisis) EUR 4,500.00
Respondent (AEK B.C.) EUR 4,500.00”*

10. On 7 July 2022, the BAT informed the Parties that the advance on costs was adjusted in accordance with Article 9.3.1 of the BAT Rules given that Club had both failed to file and Answer and pay its share of the advance on costs. The adjusted advance on costs was as follows:

*“Claimant (Mr. Nikolaos Zisis) EUR 4,000.00
Respondent (AEK B.C.) EUR 4,000.00”*

11. Player paid the advance on costs in full (EUR 4,500.00 on 8 June 2022, and EUR 3,500.00 on 11 July 2022).
12. Club did not submit its Answer to the Request for Arbitration by the deadline (extended by procedural order until 6 July 2022) or at all. Club did not participate in this arbitration.
13. On 12 July 2022, the Parties were invited to set out (by no later than 19 July 2022) how much of the applicable maximum contribution to costs should be awarded to them and why. The Parties were also invited to include a detailed account of their costs, including any supporting documentation in relation thereto. Finally, the Parties were also notified that the exchange of submissions was closed in accordance with Article 12.1 of the BAT Rules.
14. Player filed his costs submission on 12 July 2022. Club, as already noted above, did not participate in the arbitration and did not file any claim for costs.

4. The Positions of the Parties

4.1 Player's Position

15. Player's position is simply as follows, namely, in the Agreement, which was a settlement of existing debts, Club committed to pay him a specified and agreed amount of money, and has not done so. He seeks the money to which he is entitled by means of this arbitration.
16. Player's requests for relief are as follows:

"On the basis of the facts and the evidence presented, the Claimant herewith respectfully requests the Arbitrator:

i) To establish that the Respondent Club breached the terms of the Settlement Agreement of 24 March 2022;

ii) To order the Respondent Club to pay the Claimant the amount of **one hundred fifty-seven thousand six hundred forty-four Euros and ninety-five (€157.644,95), net of all taxes, as the remainder amount due on the basis of the Settlement Agreement concluded in writing on 24 March 2022;**

iii) To order the Respondent to pay the aforementioned amount with default interest at a rate of 5% p.a. starting as of 6 April 2022 (i.e. the following day after the first instalment fell due and outstanding) until full and effective payment;

iv) To order the Respondent as the party in breach to pay and reimburse all **expenses, arbitration costs and legal fees** incurred by the Claimant in connection with these arbitration proceedings.”

4.2 Club's Position

17. Club did not participate in this arbitration so it is not possible to articulate or summarise such position.

5. The jurisdiction of the BAT

18. As a preliminary matter, the Arbitrator wishes to emphasize that, since Club did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.¹ Also, the Arbitrator notes that the BAT President has determined pursuant to Article 11.1 of the BAT Rules, *prima facie*, that the subject matter of this arbitration is arbitrable and the arbitration could thus proceed. Accordingly, according to Article 1.3 of the BAT Rules, it now falls to the Arbitrator to finally decide jurisdiction.
19. 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).

¹ Judgement of the Swiss Federal Tribunal, 120 II 155, 162.

20. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
21. 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) PILA².
22. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in clause 6 of the Agreement, which reads as follows:

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

23. The Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA. The Arbitrator notes that not only is there a signature placed on the document on behalf of Club, such signature is also covered by a stamp or chop which appears to be that of Club.
24. 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).
25. The predicate wording, namely, “[a]ny dispute arising from or related to the present Agreement [...]” clearly covers the present dispute as it expressed in the widest possible terms.

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

26. For the above reasons, the Arbitrator has jurisdiction to adjudicate Player's claim.

6. Other Procedural Issues

27. Article 14.2 of the BAT Rules specifies that "*the Arbitrator may [...] proceed with the arbitration and deliver an award*" if "*the Respondent fails to submit an Answer.*" The Arbitrator's authority to proceed with the arbitration in case of default by one of the Parties is in accordance with Swiss arbitration law and the practice of the BAT.³ However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

28. This requirement is met in the present case. Club was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules (there is confirmation of receipt from the courier dated 8 June 2022). It was also given sufficient opportunity to respond to Player's Request for Arbitration. The Arbitrator is compelled to draw the obvious inference that Club chose not to participate in this arbitration.

7. Discussion

7.1 Applicable Law – ex aequo et bono

29. 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

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

187(2) PILA is generally translated into English as follows:

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

30. Under the heading "Law Applicable to the Merits", Article 15 of the BAT Rules reads as follows:

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

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

31. As already noted above, clause 6 of the Agreement stipulates that: *“The arbitrator shall decide the dispute ex aequo and bono.”*
32. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this arbitration.
33. The concept of “*équité*” (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l’arbitrage⁴ (Concordat)⁵, under which Swiss courts have held that arbitration “*en équité*” is fundamentally different from arbitration “*en droit*”:

“When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to

⁴ That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

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

*those rules.*⁶

34. 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*”.
35. In light of the foregoing considerations, the Arbitrator makes the findings below.

7.2 Findings

36. A number of guiding principles, clearly established by well over a decade of FAT/BAT awards rendered by all of the arbitrators serving in this Tribunal, can be succinctly recalled. First, *pacta sunt servanda* is the key to the resolution of any dispute arising from a contract which has contained within it an arbitration clause stipulating the application of the BAT Rules. Secondly, interpretation of contractual language chosen by parties to such contracts is not a hostage to literalism, but rather the Arbitrator takes care to read all the terms as a whole taking into account the context (particularly the reasonable expectations of participants in the international professional basketball community). However, the phrase *ex aequo et bono*, or justice and equity, is not a reason, in and of itself, to simply discard the ordinary meaning of contractual language merely because it is perceived to be inimical or presently inconvenient to one side or the other.
37. Bearing the foregoing in mind, the Arbitrator turns to the case at hand.
38. Having reviewed the Agreement, the Arbitrator considers that Player’s case is persuasive. He and Club undoubtedly arranged their affairs in a specific manner by

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

wrapping up all amounts due (which Club expressly confirmed, by clause 2 of the Agreement, it owed – “*accepts and acknowledges that owes to the Player the total amount of €157.644,95*”) and agreeing upon a payment schedule.

39. Club has not paid those amounts to Player and it is, therefore, appropriate that the obligations it took upon itself are upheld and enforced.
40. Thus, the Arbitrator awards Player his prayers for relief in respect of the missed payments. The Arbitrator has carefully compared such prayers for relief with the terms of the Agreement and they are consistent.
41. Turning to interest, Player seeks interest at 5% (which is the rate consistently awarded in BAT awards) as and from 6 April 2022 on the full and stipulated amount of EUR 157,644.95. That date is the day after the first instalment was due to be paid. Given that it was not paid, and Player having duly served warning on Club on 6 May 2022 (to no avail), the Agreement’s provision (clause 5 that the full amount was to be immediately paid after 7 calendar days, 14 May 2022 is the appropriate commencement date. Club had until 13 May 2022 to make payment of the relevant instalment/s, but failed to do so, and, thus, 14 May 2022 is the first day of Club’s full liability to pay the entire amount.

8. Costs

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

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

43. On 28 August 2022, the BAT President determined the arbitration costs in the present matter to be EUR 2,850.00.

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

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

45. Considering that Player was the prevailing party in this arbitration, it is consistent with the provisions of the BAT Rules that the fees and costs of the arbitration be borne by Club alone. Given that the Player paid the entire Advance on Costs in the amount of EUR 8,000.00 (of which EUR 5,150.00 will be reimbursed to Player by the BAT), Club shall pay EUR 2,850.00 to Player.

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

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

47. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses.

48. Player claims legal fees in the amount of EUR 8,500.00. He also claims for the expense of the non-reimbursable handling fee in the amount of EUR 4,000.00.

49. Taking into account the factors required by Article 17.3 of the BAT Rules, the maximum awardable amount prescribed under Article 17.4 of the BAT Rules (in this case, EUR 10,000.00), the fact that the non-reimbursable handling fee in this case was EUR 4,000.00, and the specific circumstances of this case, the Arbitrator holds that a

total of EUR 8,000.00 (including the non-reimbursable handling fee) represents a fair and equitable contribution by Club to Player in this regard. In particular, Player only had to make one substantive submission on the merits of this case. The Request for Arbitration was a straightforward, short document, and the underlying facts and documentation in this case had little if any complexity.

50. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:

- (i) The BAT shall reimburse EUR 5,150.00 to Player, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President;
- (ii) Club shall pay EUR 2,850.00 to Player, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT;
- (iii) Club shall pay Player EUR 8,000.00 (EUR 4,000.00 for the non-reimbursable fee plus EUR 4,000.00 for legal fees), representing a contribution by it to his legal fees and other expenses.

9. AWARD

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

- 1. AEK NEA KAE 2014 Basketball Club AEK B.C. is ordered to pay Mr. Nikolaos Zisis EUR 157,644.95, net of all Greek taxes, as the remaining amount due on the basis of the Settlement Agreement concluded in writing on 24 March 2022, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 14 May 2022 until payment in full.**
- 2. AEK NEA KAE 2014 Basketball Club AEK B.C. is ordered to pay Mr. Nikolaos Zisis EUR 2,850.00 as reimbursement for his arbitration costs.**
- 3. AEK NEA KAE 2014 Basketball Club AEK B.C. is ordered to pay Mr. Nikolaos Zisis EUR 8,000.00 by way of contribution to his legal fees and expenses.**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 29 August 2022

Klaus Reichert
(Arbitrator)