



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 1891/22)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Clifford J. Hendel

in the arbitration proceedings between

Mr. Braian Angola-Rodas

represented by Ms. Giannoula Papavasileiou, attorneys at law,

vs.

AEK NEA KAE 2014

- Claimant -

- Respondent -

1. The Parties

1.1 Claimant

1. Mr. Braian Angola-Rodas (the "Player") is a Colombian professional basketball player.

1.2 Respondent

2. AEK NEA KAE 2014 (the "Club") is a professional basketball club from Athens, Greece, competing domestically in the highest professional league in Greek basketball.

2. The Arbitrator

3. On 13 December 2022, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Clifford J. Hendel as arbitrator (the "Arbitrator") pursuant to Articles 0.4 and 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 14 July 2021, the Player and the Club entered into an agreement whereby the latter engaged the former for the 2021/2022 and 2022/2023 seasons (the "Employment Agreement").
5. Clause 7 of the Employment Agreement provides for the Player to receive an annual

base salary of USD 165,000.00 net for the 2021/2022 season and USD 300,000.00 net for the 2022/2023 season.

6. Regarding the first season, the agreed USD 165,000.00 net were to be paid by the Club in ten equal installments of USD 16,500.00 on the last day of each month, from 30 September 2021 until 30 June 2022.
7. However, by the end of that first season, the Club had only made partial payments to the Player in the amount of USD 111,156.90.
8. Even though the Employment Agreement was originally expected to last for two seasons, on 23 July 2022 the Parties mutually agreed the early termination of the same by virtue of the signing on such date of a termination agreement (“the Termination Agreement”).
9. Clause 2 of the Termination Agreement provides as follows:

“The Parties agree that the PLAYER will receive from the CLUB the amount of 30.000 usd net of Greek taxes as a final settlement of the debts of season 2021/22 from the CLUB. The said amount will be paid in 2 installments, 15.000 usd net on 30 August 2022 and 15.000 usd net on 30 December 2022”.

10. Clause 4 of the Termination Agreement establishes the consequences of a potential failure to comply with the above mentioned payment obligation, as follows:

“In case said amounts are not paid within 5 days of the above stated days, the PLAYER at his option will have the right to proceed with arbitration in the BAT for collecting the said amounts. In such a case the CLUB will be obligated to pay all amounts owed according to the AGREEMENT for season 2021/22 and not only the ones agreed upon with this RESOLUTION”.

11. As the Club did not comply with the first payment, by letter of 17 October 2022, the Player’s counsel granted the Club a term until 21 October 2022 in order to remedy its

breach.

12. As the Club failed to pay the amount owed by 21 October 2022, the Player's counsel sent a further e-mail on 24 October 2022 announcing the definitive breach of the Termination Agreement and claiming payment of all the amounts still due regarding the 2021/2022 season (even though the Player mistakenly referred to the amount of USD 50,000.00 instead of USD 53,843.10 net, which is the amount claimed in his request for relief in the Request for Arbitration, and which corresponds to the exact difference between the USD 165,000.00 net agreed for the said first season and the USD 111,156.90 net that the Player declares he had actually received).

3.2 The Proceedings before the BAT

13. On 21 November 2022, Claimant filed the Request for Arbitration (dated 20 November 2022) giving rise to this proceeding. He also duly paid the non-reimbursable handling fee of EUR 4,000.00, which was received by the BAT on 23 November 2022.
14. On 13 December 2022, the BAT informed the Parties that Mr. Clifford J. Hendel had been appointed on that same date as the Arbitrator in this matter, invited Respondent to submit its Answer by 9 January 2023 and fixed the advance on costs to be paid by the Parties on or before 23 December 2022 as follows:

<i>"Claimant (Mr. Braian Angola-Rodas)</i>	<i>€ 3,500.00</i>
<i>Respondent (AEK NEA KAE 2014)</i>	<i>€ 3,500.00"</i>

15. By Procedural Order of 10 January 2023, the BAT confirmed receipt of Claimant's payment of his part of the abovementioned advance on costs on 28 December 2022. However, in light of Respondent's failure to timely pay its share and file an Answer to the Request for Arbitration, it was granted a final opportunity until 17 January 2023 in order to do so.

16. Respondent did not file any Answer nor pay its part of the advance on costs.
17. Considering Respondent's failure to pay its share of the advance on costs and file an Answer and in accordance with Article 9.3.1 of the BAT Rules, the BAT Secretariat decided to adjust the advance on costs to EUR 3,000.00 each party. Therefore, taking into account that Claimant had already paid an amount of EUR 3,500.00, an amount of EUR 2,500.00 only was still outstanding, for which Claimant was given a deadline until 26 January 2023.
18. Claimant made such payment in substitution on 26 January 2023.
19. By Procedural Order of 30 January 2023, the BAT confirmed receipt of the full amount of the advance on costs and the Arbitrator declared the exchange of documents completed in accordance with Article 12.1 of the BAT Rules and invited the Parties to indicate (by no later than 6 February 2023) how much of the applicable maximum contribution to costs should be awarded to them and why, including a detailed account of their costs and any supporting documentation in relation thereto. By that same Procedural Order, Claimant was also invited to provide by 6 February 2023 an English translation of the bank statement submitted as Exhibit 2 to the Request for Arbitration, indicating by the same time-limit whether it was a statement of his bank account or of Respondent's bank account.
20. On 2 February 2023, Claimant's counsel provided an English translation of Exhibit 2 to the Request for Arbitration, clarifying in his e-mail to the BAT that it was "*the statement of the Respondent's bank account, sent to us when we asked for a detailed statement of the payments he [sic] had made to the Claimant*".
21. Claimant filed his costs submission on 3 February 2022. Respondent failed to do so.

4. The Positions of the Parties

4.1 Claimant's Position

22. Claimant considers that the Termination Agreement was breached due to the Club's failure to fulfill its payment obligations.
23. Therefore, as a consequence of the non-payment, Claimant asserts that he is entitled to all outstandings corresponding to the first season of the Employment Agreement.
24. In light of the foregoing, in his Request for Arbitration, Claimant requested the following relief:

*"A. 53.843,1 **usd** net of any taxes for salaries*

B. Interest of 5% from the day of filing up to the payment

C. Non reimbursable handling fee

D. Court fees as decided by the court

E. Attorney's fees and expenses." (emphasis as in the original)

4.2 Respondent's Position

25. Respondent has not participated in this proceeding, but has been duly notified of its existence and has received copies of all submissions of Claimant and all communications of the BAT.

5. The jurisdiction of the BAT

26. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the

basis of the record as it stands.¹

27. 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).
28. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
29. The dispute is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA².
30. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under Clause 5 of the Termination Agreement, which reads as follows:

“[...] Any dispute arising from or related to the present resolution, 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, 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”.

31. The Termination Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
32. 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

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

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

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

33. The jurisdiction of the BAT over Claimant's claim arises from the Termination Agreement. The wording "[a]ny dispute arising from or related to the present resolution [...]" clearly covers the present dispute.
34. For the above reasons, the Arbitrator has jurisdiction to adjudicate Claimant's claim.

6. Other Procedural Issues

35. 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 BAT³. However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
36. This requirement is met in the present case. Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules. It was also given sufficient opportunity to respond to Claimants' Request for Arbitration, and to their Account on Costs. Respondent, however, chose not to participate in this Arbitration.

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

7. Discussion

7.1 Applicable Law – *ex aequo et bono*

37. 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”.

38. 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.”

39. Clause 5 of the Termination Agreement provides that: “[t]he arbitrator shall decide the dispute *ex aequo et bono*”.

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

41. 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 those rules.”⁶

42. 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*”.

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

7.2 Findings

7.2.1 Breach of the Termination Agreement

44. The central issue under discussion in the present matter is whether the Club breached the Termination Agreement, by virtue of which the Parties decided to part ways after the first season of the Employment Agreement.

45. The main consequence of such a breach would be the Player’s entitlement to all the outstanding monies corresponding to the 2021/2022 season which were still unpaid.

46. Respondent not having participated in this proceeding, it is not disputed and appears

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.

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

indisputable that the requested amount is due and owing by the Club (Claimant having attached to his Request for Arbitration a translated copy of the Club's bank account with a detailed statement of the payments made to Claimant during the validity of the Employment Agreement, which was not contested by the Club).

47. Therefore, the Arbitrator finds it fair and reasonable to award the USD 53,483.10 net to the Player.

7.2.2 Interest

48. Although no contractual provision in the Employment Agreement or the Termination Agreement stipulated the obligation to pay interest on overdue amounts to Claimant, he requested in the Request for Arbitration "*interest of 5%*".

49. In accordance with consistent BAT jurisprudence, and deciding *ex aequo et bono*, the Arbitrator considers it fair and reasonable to award the said 5%-interest on the outstanding amount.

50. As for the time when such interest should accrue, and in order to avoid any potential *ultra petita*, the Arbitrator considers it fair and reasonable that interest should commence from the day of filing of the Request for Arbitration (as understood to be requested in Claimant's request for relief), i.e. 21 November 2022.

8. Costs

51. Article 17.2 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 general rule, shall grant the prevailing party a contribution towards its reasonable legal

fees and expenses incurred in connection with the proceedings.

52. On 6 April 2023 – 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 3,300.00.
53. Considering that Claimant 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, as well as his reasonable costs and expenses, be borne by the Club.
54. Claimant claims legal fees and expenses in the amount of EUR 8,625.00. He also claims for the expense of the non-reimbursable handling fee.
55. Taking into account the factors required by Article 17.3 of the BAT Rules, the provision in the arbitration agreements as regards costs, the maximum awardable amount prescribed under Article 17.4 of the BAT Rules (in this case, EUR 7,500.00), 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 the amount requested (plus the non-reimbursable handling fee) needs to be slightly moderated. In particular, taking into account the straightforward nature of the dispute and the lack of participation from Respondent’s side.
56. Given that Claimant paid advances on costs of EUR 6,500.00 as well as a non-reimbursable handling fee of EUR 4,000.00 (which will be taken into account when

determining Claimant's legal fees and expenses), the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

- (i) The BAT shall reimburse EUR 3,200.00 to Claimant, being the difference between the costs advanced by Claimant and the arbitration costs fixed by the BAT President;
- (ii) Respondent shall pay EUR 3,300.00 to Claimant, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT;
- (iii) Respondent shall pay to Claimant EUR 7,000.00 (EUR 4,000.00 for the non-reimbursable fee + EUR 3,000.00 for legal fees and expenses), representing the reasonable amount of her legal fees and other expenses.

9. AWARD

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

- 1. AEK NEA KAE 2014 shall pay Mr. Braian Angola-Rodas a total amount of USD 53,483.10 net, plus interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 21 November 2022 until payment.**
- 2. AEK NEA KAE 2014 shall pay Mr. Braian Angola-Rodas an amount of EUR 3,300.00 as reimbursement for his arbitration costs.**
- 3. AEK NEA KAE 2014 shall pay Mr. Braian Angola-Rodas an amount of EUR 7,000.00 as contribution towards his legal fees and expenses.**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 14 April 2023.

Clifford J. Hendel
(Arbitrator)