

ARBITRAL AWARD

(BAT 1905/23)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Amani Khalifa

in the arbitration proceedings between

Mr. Vladimir Dragicevic

- Claimant 1 -

Mr. Jovan Brstina

- Claimant 2 -

Mr. Ivan Martinovic

- Claimant 3 -

all represented by Mr. José Lasa Azpeitia, Mr. Damià Tomàs, attorneys at law,

vs.

Aris BC Thessaloniki
2 Grigoriou Lambraki St., 54368 Thessaloniki, Greece

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Vladimir Dragicevic (hereinafter referred to as “Claimant 1” or the “Player”) is a Montenegrin professional basketball player.
2. Mr. Jovan Brstina (hereinafter referred to as “Claimant 2” or “Agent 1”) is a Serbian professional basketball agent.
3. Mr. Ivan Martinovic (hereinafter referred to as “Claimant 3” or “Agent 2”, and together with Claimants 1 and 2, “the Claimants”) is a Montenegrin professional basketball agent.

1.2 The Respondent

4. Aris BC Thessaloniki (hereinafter referred to as “the Club” or “the Respondent”, together with the Claimants, “the Parties”) is a professional basketball club competing in the Greek professional basketball league.

2. The Arbitrator

5. On 7 February 2023, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the “BAT”), appointed Ms. Amani Khalifa as arbitrator (hereinafter 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 (hereinafter the “BAT Rules”). None of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

6. The relevant facts and allegations presented in the written submissions and evidence are summarised below. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows.
7. Although the Arbitrator has considered all the facts, allegations and evidence submitted in the present proceedings, he refers in this Award only to those necessary to explain her reasoning.
8. On 18 September 2019, the Parties entered into an employment agreement pursuant to which the Respondent employed Claimant 1 for the 2019/2020 and 2020/2021 Greek basketball seasons (the “Employment Agreement”).
9. The key terms of the Employment Agreement are as follows:
10. By Article 2 of the Employment Agreement, the Respondent would pay Claimant 1 a total salary of EUR 210,000.00 across the two seasons as follows:

“The total net of taxes value of the base salary in this Agreement shall be Two Hundred and Ten Thousand Euros (210,0000.00EUR). The CLUB agrees to pay the PLAYER as follows.

Season 2019-2020

October 25, 2019	10,000,00EUR
November 25, 2019	10,000,00EUR
December 25, 2019	10,000,00EUR
January 25, 2020	10,000,00EUR
February 25, 2020	10,000,00EUR
March 25, 2020	10,000,00EUR
April 25, 2020	10,000,00EUR

May 25, 2020

10,000,00EUR

[...]

If the CLUB / PLAYER wants to terminate THE AGREEMENT ey can do it not later than July 15th 2020 with the payment of 20.000EUR to CLUB / PLAYER”

Season 2020-2021

September 25, 2020

13,000,00EUR

October 25, 2020

13,000,00EUR

November 25, 2020

13,000,00EUR

December 25, 2020

13,000,00EUR

January 25, 2021

13,000,00EUR

February 25, 2021

13,000,00EUR

March 25, 2021

13,000,00EUR

April 25, 2021

13,000,00EUR

May 25, 2021

13,000,00EUR

June 25, 2021

13,000,00EUR” (sic)

11. Article 3 provides as follows:

“All amounts described in Section 2 shall be paid in EUR to an account(s) of the PLAYER’S choice within forty-eight (48) hours of being earned. All amounts are net of taxes and are guaranteed, vested and owed upon execution of this Agreement and are not contingent upon any further events, except as stated in Sections 1.1A and 2 above. The CLUB shall be responsible for all appropriate taxes, customs, duties and other withholdings. [...]”

12. Article 5 provided as follows in relation to late payments:

“The CLUB shall make the payments to the PLAYER in cash to the bank account of the

PLAYER or directly to the PLAYER. In the event that payments or agent fees are not paid in full within thirty (30) business days after the scheduled payment date, the PLAYER shall not be required to practice or play in any scheduled games until all accrued interests, late fees and scheduled payments have been made. For any payments or agent fees not paid within thirty (30) business days after the scheduled payment date, the PLAYER shall be entitled to all remaining payments under Section 2 of this Agreement, as well as all accrued interests and late fees, and be free to leave the CLUB with no further obligation or withholding of clearance rights,”

13. The Employment Agreement provided as follows in the fourth bullet point after Article 5 with respect to Claimants 2 and 3’s remuneration:

“The CLUB agrees to pay the AGENT net of taxes fee equal to ten percent (10%) of the value of the PLAYER’s net taxes base salary in the Agreement per season. Agent fee shall [sic] be divided 50% to Mr. Jovan Brstina and 50% to Mr. Ivan Martinvic.

The fee shall be paid on October 30 of every year of this contract. The fee is fully valid upon PLAYER reporting to the CLUB and passing his physical. It is agreed that the role of the AGENT is to bring the PLAYER and the CLUB together and for this the AGENTS are entitled to the full fee...”

14. On 18 November 2021, the Respondent entered into similar agreements with each of Claimants 2 and 3 (the “Agent Debt Agreements”) pursuant to which it stated a follows:

“With the present, KAE ARIS undertakes that as soon as the above money [from the Greek government] is deposited in its bank account in its partner bank, it will give immediate order to be transferred to the [Claimants 2 and 3, as applicable], in an account that he has indicated to KAE ARIS, the remaining debt of the club to [Claimants 2 and 3, as applicable] of total [# 12000# euro to Claimant 2, and [# 5000# euro to Claimant 3]. We include the payment authorization that we already have sent to our Bank.

In case the club recalls the bank order, the club accepts the penalty of 2.000€.

In case that club fails to pay remaining debt of [12.000 EUR to Claimant 2, and 5.000EUR to Claimant 3] by 31.01,2022 to [Claimants 2 and 3, as applicable] of 2.000EUR and all remaining dues with regular penalties decided by BAT regarding the [Employment Agreement].”

15. On 12 December 2021, the Respondent and Claimant 1 signed a document pursuant to which the Respondent acknowledged that it owed Claimant 1 EUR 80,000.00 (the “Player Debt Agreement”). The Player Debt Agreement provides as follows:

“The Greek government has publicly pledged to withhold money from the taxation of betting companies operating in Greece, in order to return it to sports teams, including Basketball Clubs. The date that has been published is 31-1-2022.

With the present, KAE ARIS undertakes that as soon as the above money is deposited in its bank account in its partner bank, it will give immediate order to be transferred to the player, of total #80.000,00# euro. We include the payment authorization that we already have sent to our Bank.

The payment plan is as described below:

50.000,00€ by February 12, 2022

30.000,00€ by May 12, 2022

KAE ARIS resigns, explicitly and unreservedly, by any right of revoking the notified payment authorization to the cooperating bank of transferring the amount due to the player.

In addition, it is agreed that in the case of any revocation of the part of KAE ARIS to the cooperating bank of the payment authorization of the amount due to the player, if it is deposited in the bank account of KAE ARIS, an additional amount of EUR#30,000.00# will be due to the player, as unsubstantiated compensation.

In case that club fails to pay remaining debt of 80.000EUR by 31.05.2022 to the player’s

contract between club and Player for the season 2020/2021, club agrees to pay penalty to the player of 30.000 EUR and all remaining dues with regular penalties decided by the BAT.

In case the government does not deposit the above mentioned money, KAE ARIS undertakes to pay them by the end of the current period."

16. On 22 July 2022, the Claimants' attorneys sent the Respondent a warning letter noting that no payments had been made pursuant to the Employment Agreement, Player Debt Agreement and Agent Debt Agreements, and seeking payment of the following amounts within 10 days from the receipt of this letter: EUR 80,000.00 to Claimant 1, EUR 12,000.00 to Claimant 2, and EUR 5,000.00 to Claimant 3. The Claimants reserved their rights to pursue their claims before the BAT.
17. On 6 October 2022, having not heard back from the Respondent, the Claimants' attorneys sent the Respondent a further letter seeking payments as follows within 10 days from the receipt of this letter: EUR 110,000.00 net to Claimant 1, EUR 14,000.00 net to Claimant 2, and EUR 7,000.00 net to Claimant 3. These sums include the penalties provided for in the Player Debt Agreement and the Agent Debt Agreements. The letter confirmed that it was the final warning from the Claimants, and again reserved the Claimants' rights to pursue arbitration before the BAT.
18. On 12 October 2022, _____, General Director of the Respondent, notified the Claimants by email that _____, the Respondent's previous General Manager, no longer worked for the Respondent, and asked for some time to "*make the necessary arrangements and get in touch with [the Claimants' attorneys] as soon as possible*".
19. On 26 October, the Claimants' attorneys followed up on [General Director of the Respondent]' email, noting that nobody from the Respondent had contacted them since, and in light of the numerous warning letters and time since the Claimants' claims

accrued, they would offer the Respondent a final deadline of 1 November 2022 to settle the sums claimed before they pursued their claims before the BAT.

3.2 The Proceedings before the BAT

20. On 3 January 2023, the Claimants filed a Request for Arbitration in accordance with the BAT Rules and the non-reimbursable handling fee in the amount of EUR 4,000.00 was received in the BAT bank account on 29 December 2022.
21. On 13 February 2023, the BAT informed the parties that Ms. Amani Khalifa had been appointed as the Arbitrator in this matter, invited the Respondent to submit its Answer by 6 March 2023, and fixed the advance on costs to be paid by the Parties by 23 February 2023 as follows:

<i>"Claimant 1 (Mr. Vladimir Dragicevic)</i>	<i>EUR 4,000.00</i>
<i>Claimant 2 (Mr. Jovan Brstina)</i>	<i>EUR 500.00</i>
<i>Claimant 3 (Mr. Ivan Martinovic)</i>	<i>EUR 500.00</i>
<i>Respondent (ARIS BC)</i>	<i>EUR 5,000.00"</i>

22. On 23 February 2023, the BAT received the Claimants' share of the Advance on Costs in the total amount of EUR 5,000.00.
23. On 8 March 2023, the BAT wrote to the parties confirming receipt of EUR5,000.00¹ in respect of Claimants' share of the Advance on Costs, settled by Claimant 1. The BAT noted that the Respondent had failed to submit its answer and to pay its share of the Advance on Costs, and gave the Respondent a final opportunity to settle its share by 15

¹ The letter contains a typographical error as it refers to having received EUR 4,000.00 rather than EUR 5,000.00, however the BAT received EUR 5,000.00 and confirmed this to the Parties in separate correspondence.

March 2023. It also noted the Arbitrator could proceed with the arbitration and deliver an award in accordance with Article 14.2 of the BAT Rules.

24. On 17 March 2023, the BAT wrote to the parties noting that the Respondent had failed to file an Answer and pay its share of the Advance on Costs. It invited the Claimants to settle the Respondent's share in order to allow the arbitration to proceed. In light of the Respondent's failure to file an Answer, the BAT also adjusted the Advance on Costs as follows:

<i>"Claimant 1 (Mr. Vladimir Dragicevic)</i>	<i>EUR 3,500.00</i>
<i>Claimant 2 (Mr. Jovan Brstina)</i>	<i>EUR 250.00</i>
<i>Claimant 3 (Mr. Ivan Martinovic)</i>	<i>EUR 250.00</i>
<i>Respondent (ARIS BC)</i>	<i>EUR 4,000.00"</i>

25. Given the Claimants had already settled EUR 5,000.00, the BAT invited them to pay a further EUR 3,000.00 to settle the outstanding amount of the Respondent's share by 24 March 2023.
26. On 23 March 2023, the Claimants settled the remaining amount of the Respondent's share of the Advance on Costs.
27. On 5 April 2023, the BAT wrote to the Parties (a) confirming receipt of the full amount of the adjusted Advance on Costs as follows (EUR 3,000.00 settled by Claimant 1 on 22 March 2023 in respect of the Respondent's share of the Advance on Costs, and EUR 5,000.00 settled by Claimant 1 on 22 February 2023 in respect of the Claimants' share of the Advance on Costs); (b) declaring that the proceedings could therefore continue; (c) inviting the Claimants to submit a legible copy of Exhibit 1 to the Request for Arbitration by 12 April 2023.

28. On 10 April 2023, the Claimants submitted a legible copy of Exhibit 1.
29. On 11 April 2023, the BAT wrote to the parties (a) confirming receipt of the document submitted by the Claimants; (b) declaring the exchange of submissions completed; and (c) inviting the Claimants to submit a detailed account of their costs, including supporting documentation, by 18 April 2023.
30. On 18 April 2023, the Claimants filed their costs submissions. The BAT acknowledged receipt the same day, and shared this with the Respondent via email.

4. The Positions of the Parties

4.1 The Claimants' Position

31. The Claimants submit the following in substance:

4.1.1 Claimant 1

32. Claimant 1 alleges that the Respondent initially breached Article 2 of Employment Agreement by failing to pay “most of the salary instalments” amounting to EUR 80,000.00 during the 2020-2021 season, but that in good faith, the Claimant did not exercise its rights to stop playing or to terminate the Employment Agreement, instead he played all games and practices for that season.
33. Claimant 1 states that this debt is acknowledged by virtue of the Player Debt Agreement, and therefore claims that the Respondent is in breach of the Player Debt Agreement by failing to pay the amount of EUR 80,000.00 by the February and May 2022 instalment deadlines contained therein. In addition, Claimant 1 claims that the Respondent should pay the EUR 30,000.00 penalty stipulated in the Player Debt Agreement, explaining that it was specifically included to deter the Respondent from breaching its payment

obligations again. Claimant 1 argues that the Claimants repeatedly sought to avoid BAT proceedings by first agreeing to the Player Debt Agreement, and thereafter issuing two warning letters to the Respondent.

4.1.2 Claimants 2 and 3

34. Claimants 2 and 3 state that the Respondent breached its obligation to pay them their agency fee (EUR 12,000.00 to Claimant 2 and EUR 5,000.00 to Claimant 3) pursuant to Articles 5.5 and 5.6 of the Employment Agreement. Those articles provide that the agency fee is payable provided the player passes his physical examination, which he had done for both seasons as he completed them both. Like Claimant 1, Claimants 2 and 3 argue that (a) they acted in good faith by refraining from exercising their rights to terminate under Article 5; that (b) the Respondent acknowledged these sums in the Agent Debt Agreements, and (c) the penalties set out in the Agent Debt Agreements were agreed to deter further non-payments by the Respondent.
35. Accordingly, Claimant 2 claims EUR 12,000.00 in unpaid agency fees, along with the EUR 2,000.00 penalty and Claimant 3 claims EUR 5,000.00 in unpaid agency fees, along with the EUR 2,000.00 penalty in accordance with the Agent Debt Agreements.
36. The Claimants rely on several BAT cases in support of their contention that the BAT should uphold the penalty clauses, noting that the BAT has consistently upheld the doctrine of *pacta sunt servanda* (BAT 1533/20) and recognised the validity and enforceability of settlement agreements and late payment penalties (BAT 1437/19). They also contend that the amount of the penalties in these agreements is not excessive nor disproportionate, as they “*properly compensate the illegitimate lateness of the payment upon a concrete mutual designated agreement to such effect*”. In support of this contention, they note that in BAT 1437/19, the arbitrator found that a penalty of

USD28,000.00 was not disproportionate where the principal was USD64,000.00.

4.1.3 Interest

37. The Claimants also claim interest at a rate of 5% per annum on the principal sums claimed from the payment dates contained in the Player and Agent Debt Agreements. The Claimants assert that the BAT, by referring to BAT 1437/19, has held that *“in cases that there are agreed penalties, the pertinent legal interest of five per cent (5%) p.a. its as well accepted and granted on the principal owed amount”* (sic). In particular, the Claimants claim interest as follows:

	Principal (EUR)	Start date	Accrued as of date of request for arbitration (USD)
Claimant 1	50,000.00	12 February 2022	2,206.03
	30,000.00	12 May 2022	969.86
Claimant 2	12,000.00	31 January 2022	553.97
Claimant 3	5,000.00	31 January 2022	230.82

4.1.4 Claimants' Request for Relief

38. The Claimants' request for relief in their Request for Arbitration reads as follows:

XCVII. Claimants seeks relief whereby BAT would rule ex aequo et bono as follows:

i. Respondent is to be held liable for failing on disburse Claimants outstanding amounts by virtue of Claimants' Acknowledgment of Debt-Private Agreements (in connection with Claimant n°1 Employment Agreement).

ii. To declare Claimants entitlement to receive from Respondent the amounts NET of all taxes as stated on paragraph LXXVII of the present Request.

iii. Respondent is ordered to disburse to Claimants the pertinent interest per annum of five per cent (5%) over the net amounts as stated on paragraph LXXXI of the present Request.

iv. Respondent is ordered to pay expenses and reasonable legal fees on a net amount of EIGHT THOUSAND EUROS (€ 8,000.00) concretely related to the execution of the present Request for Arbitration and Respondent's lack of fulfillment of his obligations to which he committed in the Acknowledgment of Debt-Private Agreements (in connection with Claimant n°1 Employment Agreement).

v. Respondent, additionally, is ordered to pay the legal costs effectively incurred to have access to BAT proceedings, i.e., the non-reimbursable handling fee, which should be considered when assessing the Claimants' legal fees and expenses.

vi. Therefore, in virtue of the BAT Arbitration Rules, and concretely pursuant to Article 17 thereof, Respondent is ordered to pay TWELVE THOUSAND EUROS (€ 12,000.00) to pay expenses and reasonable legal fees as well as cost and the non-reimbursable handling fee.

vii. Respondent is, as well, ordered to disburse the advanced of costs eventually determined by BAT."

39. Paragraph LXXVII of the Request for Arbitration, to which the Claimants refer to under point ii. of their request for relief, reads as follows:

">ONE HUNDRED TEN THOUSAND EURO (€ 110,000.00) NET to Claimant n°1, corresponding to the unpaid salary arising from his employment agreement (€ 80,000.00) and the amount agreed as penalty for late payment, i.e., € 30.000,00 net, arising from Private Agreement signed on November 18th, 2021.

> FOURTEEN THOUSAND EURO (€ 14,000.00) NET to Claimant n°2, corresponding to the unpaid agency fees arising from Claimant's n°1 employment agreement (€ 12,000.00) and the amount agreed as penalty for late payment, i.e., € 2.000,00 net, arising from Private Agreement signed on November 18th, 2021.

> SEVEN THOUSAND EURO (€ 7,000.00) NET to Claimant n°3, corresponding to the unpaid agency fees arising from Claimant's n°1 employment agreement (€ 5,000.00) and the amount agreed as penalty for late payment, i.e., € 2.000,00 net, arising from Private Agreement signed on November 18th, 2021

40. Paragraph LXXXI of the Request for Arbitration, to which the Claimants refer to under point iii. of their request for relief, reads as follows:

Claimant n°1:

- *Fifty Thousand Euro (50,000.00) starting from February 12th, 2022, until the date of payment, being the amount accrued as of the date of filing the present Request for Arbitration of Two Thousand Two Hundred Twenty-Six US Dollars and Three cents (\$ 2,226.03); and*
- *Thirty Thousand Euro (30,000.00) starting from May 12th, 2022, until the date of payment, being the amount accrued as of the date of filing the present Request for Arbitration of Nine Hundred Sixty-Nine US Dollars and Eighty-Six cents (\$ 969.86).*

Claimant n°2:

- *Twelve Thousand Euro (12,000.00) starting from January 31st, 2022, until the date of payment, being the amount accrued as of the date of filing the present Request for Arbitration of Five Hundred Fifty-Three US Dollars and Ninety-Seven cents (\$ 553.97).*

Claimant n°3:

- *Five Thousand Euro (5,000.00) starting from January 31st, 2022, until the date of payment, being the amount accrued as of the date of filing the present Request for Arbitration of Two Hundred Thirty US Dollars and Eighty-Two cents (\$230.82)."*

4.2 Respondent's Position

41. The Respondent did not participate in these proceedings but has been duly notified of its existence and has received copies of all submissions of the Claimant and all

communications of the BAT by email and/or courier.

5. The jurisdiction of the BAT

42. As a preliminary matter, the Arbitrator wishes to emphasise that, since the Respondent did not participate in the arbitration, she will examine her jurisdiction *ex officio*, on the basis of the record as it stands.²
43. 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).
44. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
45. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.³
46. The jurisdiction of the BAT over the dispute results from the initial arbitration clause contained under Article 5.10 of the Employment Agreement, and the references to the BAT’s jurisdiction under the Player and Agent Debt Agreements.
47. Article 5.10 of the Employment Agreement reads as follows:

“Any dispute arising from or related to the present contract shall be submitted to the 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

² Judgement of the Swiss Federal Tribunal, 120 II 155, 162.

³ Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523

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 shall be English. The arbitrator shall decide the dispute ex aequo et bono"

48. The Player Debt Agreement provides as follows:

"In case that club fails to pay remaining debt of 80.000 EUR by 31.05.2022 to the player's contract between club and Player for the season 2020/2021, club agrees to pay penalty to the player of 30.000 EUR and all remaining dues with regular penalties decided by the BAT".

49. The Agent Debt Agreement between the Respondent and Claimant 2 provides as follows:

"In case that club fails to pay remaining debt of 12.000 EUR by 31.01.2022 to the Jovan Brstina Pick and Roll, club agrees to pay penalty to Jovan Brstina Pick and Roll of 2.000EUR and all remaining dues with regular penalties decided by the BAT regarding the contract between Vladimir Dragicevic and BC Aris for the season 2019/2020 and 2020/2021"

50. The Agent Debt Agreement between the Respondent and Claimant 3 provides as follows:

"In case that club fails to pay remaining debt of 5.000 EUR by 31.01.2022 to the Ivan Martinovic, club agrees to pay penalty to Ivan Martinovic of 2.000EUR and all remaining dues with regular penalties decided by the BAT regarding the contract between Vladimir Dragicevic and BC Aris for the season 2019/2020 and 2020/2021"

51. The Employment Agreement, Player and Agent Debt Agreements are in written form and thus the arbitration agreements fulfil the formal requirements of Article 178(1) PILA.

52. 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).
53. Whilst the references to the BAT are not identical across all of the agreements, this is largely because the Player and Agent Debt Agreements are simple contracts dealing with the obligations arising under the Employment Agreement. They do not contain any alternative dispute resolution method. BAT arbitrators have consistently applied the majority view in Swiss legal literature that holds that any dispute arising from a subsequent amendment of a contract (containing an arbitration clause) is – absent any indication to the contrary – covered by the arbitration clause in the original contract.⁴ In this case, the Player and Agent Debt Agreements clearly refer to the jurisdiction of the BAT as the “deciding” authority. The substantive obligations in those agreements clearly stem back to and supplement the Employment Agreement, which contains a valid BAT arbitration clause.
54. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimants’ claims under the Player and Agent Debt Agreements.

6. Other Procedural Issues

55. 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 law and the practice of the BAT.⁵ However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

⁴ See *ex multis* BAT 0382/13, BAT 0366/13.

⁵ See *ex multis* BAT cases 0001/07; 0018/08; 0093/09; 0170/11.

56. This requirement is met in the present case. The Respondent was informed of the commencement 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. Respondent, however, chose not to participate in this arbitration.

7. Discussion

7.1 Applicable Law – ex aequo et bono

57. 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".

58. Under the heading "Applicable Law", 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."

59. Article 5.10 of the Employment Agreement, as set out in paragraph 47 contains the standard BAT clause and provides that the arbitrator shall decide the dispute *ex aequo et bono*. The subsequent Player and Agent Debt Agreements do not refer to the governing law of the dispute. However, in accordance with the BAT jurisprudence referred to under paragraph 53 above, the BAT clause under the Employment Agreement providing for the dispute to be determined *ex aequo et bono* extends to the supplementary obligations arising from the Player and Agent Debt Agreements.
60. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to her in this proceeding.
61. 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’arbitrage⁶ (Concordat)⁷, 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.”⁸*
62. 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”.
63. In light of the foregoing considerations, the Arbitrator makes the findings below.

⁶ 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).

⁷ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

⁸ JdT 1981 III, p. 93 (free translation).

7.2 Findings

7.2.1 Claimants' unpaid amounts

64. The Arbitrator agrees with the Claimants' position that the Player and Agent Debt Agreements, which the Respondent freely entered into, are evidence of the Respondent acknowledging its liability for unpaid salaries and agency fees owed under the Employment Agreement. Although the Employment Agreement provides for agency fees to be split equally between Claimants 2 and 3, they are claiming unequal amounts in these proceedings (EUR 12,000.00 and EUR 5,000.00 respectively). However, the Arbitrator is satisfied that these claims are correct given that the claimed amounts correspond to those agreed in the Agent Debt Agreements.
65. Accordingly, the Respondent is in breach of its obligations under the Player and Agent Debt Agreements, and is liable to settle EUR 80,000.00 to Claimant 1, EUR 12,000.00 to Claimant 2, and EUR 5,000.00 to Claimant 3, representing the debts acknowledged in those agreements.
66. All of these sums are granted net of taxes. As set out above, they are all sums falling due under the Employment Agreement which expressly stated that the Respondent's obligation was to pay those sums net. In particular, Article 1 of the Employment Agreement states clearly that all amounts payable to Claimant 1 are described as being "*net of taxes and [are] guaranteed*", and the fourth paragraph following Article 5 of the Employment Agreement provides that the Respondent shall pay Claimants 2 and 3 the collective 10% agency fee "*net of taxes*".

7.2.2 Late payment penalties

67. The Parties expressly agreed to the application of late payment penalties in each of the Player and Agent Debt Agreements.
68. The Respondent agreed to pay:
- (i) a penalty of EUR 30,000.00 (against the principal sum of EUR 80,000.00) if it did not pay EUR 80,000.00 to Claimant 1 by 31 May 2022;
 - (ii) a penalty of EUR 2,000.00 (against the principal sum of EUR 12,000.00) if it did not pay EUR 12,000.00 to Claimant 2 by 31 January 2022; and
 - (iii) a penalty of EUR 2,000.00 (against the principal sum of EUR 12,000.00) if it did not pay EUR 12,000.00 to Claimant 2 by 31 January 2022.
69. As a general principle, BAT jurisprudence recognises parties' right to agree on penalties as a "*dissuasive measure to prevent late payments and as a form of sanction in case of delay*".⁹ This penalty is therefore presumptively valid in the present case such that each Claimant is *prima facie* entitled to recover penalties immediately upon the Respondent failing to meet the payment deadlines set out above.
70. The Claimants correctly note that the BAT will typically uphold a contractual penalty unless it is excessive and disproportionate to the basic obligation of the debtor,¹⁰ and in practice, arbitrators will also consider the parties' conduct alongside proportionality.
71. In this instance, the penalties were included to deter the Respondent from failing to make the agreed payments, as it had done under the Employment Agreement, which is a factor recognised as militating in favour of upholding a penalty in BAT1533/20. In addition, the

⁹ See e.g. FAT 0100/10.

¹⁰ See e.g. BAT 0036/09.

Claimants have clearly sought to engage with the Respondent on multiple occasions to obtain payment. In fact, in their attorney's first warning letter to the Respondent, they did not claim the penalty amount that had fallen due. AS such, the Claimants displayed good faith and patience in their dealings with the Respondent.

72. As for proportionality, BAT Arbitrators have previously held that penalties that are equal to the amount of the principal are not excessive .¹¹ Thus, the fact that the penalties requested are less than 50 percent of the principal debt is not sufficiently high for the penalty to be characterised as excessive. The penalties at hand each fall significantly below the principal amounts claimed and fairly compensate the Claimants for the Respondent's successive breaches of its obligations.
73. In light of the above, the Arbitrator considers the Respondent liable to settle the EUR 30,000.00 penalty to Claimant 1, and a EUR 2,000.00 penalty to each of Claimants 2 and 3.

7.2.3 Interest

74. As set out in more detail at paragraph 37 above, in paragraph LXXXI of the Request for Arbitration, the Claimants also claim interest at a rate of 5% per annum on the principal sums claimed from the payment dates contained in the Player and Agent Debt Agreements.
75. It has been consistently held in previous BAT cases that interest on unpaid sums at a rate of 5% per annum can be imposed starting from the day after the date the payment fell due until the date of full payment if the Claimant has pursued their claim diligently.

¹¹ See *ex multis* BAT 0092/10, BAT 1437/19.

76. BAT jurisprudence recognises that a claimant is already compensated for late payment by a penalty such that interest should not be payable alongside late payment penalties for the same period of time.¹² In line with findings of multiple BAT arbitrators,¹³ the Arbitrator considers it just and proportionate that interest of 5% be applied on only the principal sums of EUR 80,000.00 for Claimant 1, EUR 12,000.00 for Claimant 2, and EUR 5,000.00 for Claimant 3, from the date of the Request for Arbitration until complete payment of the respective amounts.

8. Costs

77. 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). [...]”

78. On 24 May 2023, the BAT President determined the arbitration costs in the present matter to be EUR 6.660.00.

79. 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.”

¹² See e.g. BAT 1026/17.

¹³ See e.g. BAT 0404/13, BAT 0894/16.

80. Considering that the Claimants were the prevailing parties in this arbitration (other than in relation to part of their interest claim), it is consistent with the provisions of the BAT Rules that the fees and costs of the arbitration be borne by Respondent alone. Given that the Claimants paid the entire Advance on Costs in the amount of EUR 8,000.00 (of which EUR 1,340.00 will be reimbursed to the Claimant by the BAT), the Respondent shall reimburse EUR 6,660.00 to the Claimants.
81. 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.”*
82. 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. In this case, the maximum amounts that the Claimants can claim are EUR 7,500.00 for the First Claimant and EUR 5,000.00 each for Claimants 2 and 3.
83. The Claimants claim a total of EUR 12,000 in respect of their legal fees and expenses as follows:
- (i) EUR 8,000.00 in respect of legal fees. The Claimants do not submit supporting documentation but give an itemised list of the work done by the Claimants' legal representatives;
 - (ii) EUR 4,000.00 in respect of the non-reimbursable handling fee.
84. Although the legal fees claimed by the Claimants are less than the maximum amount

permitted under Article 17.4 of the BAT Rules, the Arbitrator considers EUR 8,000.00 to be excessive given the failure by the Respondent to appear in the case and the relatively simple nature of the claims asserted. In the circumstances, the Arbitrator considers that they should be reduced and that fees of EUR 5,000.00 would be more reasonable and proportionate.

85. 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, 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 therefore holds that a total of EUR 9,000.00 represents a fair and equitable contribution by the Respondent to the Claimants' legal fees and expenses.
86. 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 1,340.00 to the Claimants, being the difference between the costs advanced by Claimant 1 on behalf of the Parties and the arbitration costs fixed by the BAT President;
 - (ii) The Respondent shall pay EUR 6,660.00 to Claimant 1, being the difference between the costs advanced by Claimant 1 and the amount Claimant 1 is going to receive in reimbursement from the BAT;
 - (iii) The Respondent shall pay to Claimant 1 EUR 9,000.00 for legal fees and expenses.

9. AWARD

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

- 1. Aris BC Thessaloniki shall pay Mr. Vladimir Dragicevic EUR 80,000.00 net of taxes, as compensation for unpaid salary payments, plus interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof until payment in full.**
- 2. Aris BC Thessaloniki shall pay Mr. Vladimir Dragicevic EUR 30,000.00 as a contractual penalty.**
- 3. Aris BC Thessaloniki shall pay Mr. Jovan Brstina EUR 12,000.00 net of taxes, as compensation for unpaid agency fees, plus interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof until payment in full.**
- 4. Aris BC Thessaloniki shall pay Mr. Jovan Brstina EUR 2,000.00 as a contractual penalty.**
- 5. Aris BC Thessaloniki shall pay Mr. Ivan Martinovic EUR 5,000.00 net of taxes, as compensation for unpaid agency fees plus interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof until payment in full.**
- 6. Aris BC Thessaloniki shall pay Mr. Ivan Martinovic EUR 2,000.00 as a contractual penalty.**
- 7. Aris BC Thessaloniki shall pay EUR 6,660.00 to Mr. Vladimir Dragicevic as reimbursement of his arbitration costs.**
- 8. Aris BC Thessaloniki shall pay Mr. Vladimir Dragicevic an amount of EUR 9,000.00 as reimbursement for his legal fees and expenses.**
- 9. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 16 June 2023

Amani Khalifa
(Arbitrator)