

ARBITRAL AWARD

(BAT 1576/20)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert

in the arbitration proceedings between

Mr. Stefan Jankovic

- Claimant -

represented by Mr. Billy J. Kuenzinger, attorney at law,

vs.

AEK NEA KAE – 2014 AEK Basketball Club
466 Irakleio Ave and Kuprou Herakleion Attica
14122 Athens, Greece

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Stefan Jankovic (“Player”) is a Canadian-Serbian professional basketball player.

1.2 The Respondent

2. AEK NEA KAE – 2014 AEK Basketball Club (“Club”) is a Greek professional basketball club.

2. The Arbitrator

3. On 18 July 2020, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Klaus Reichert as arbitrator (“Arbitrator”) pursuant to Articles 0.4 and 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 (“BAT Rules”). None of the Parties have raised any objection to the appointment of the Arbitrator, to his declaration of independence and impartiality, or to his conduct of this arbitration.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. By a contract dated 20 August 2019 (“Contract”), Club retained the playing services of Player for a total salary, net of any Greek taxes, of EUR 150,000.00 for the 2019-2020 season. That total amount of EUR 150,000.00 was agreed to be paid in ten monthly instalments of EUR 15,000.00 beginning on 30 September 2019 continuing to 30 June 2020.

5. Club paid amounts falling due for the months of September, October, and November 2019. Following those payments there remained to be paid a further EUR 105,000.00 had all gone according to the contractual plan.
6. On 30 December 2019, Club entered into an agreement with Player entitled “*Resolution of Agreement*” (the “Resolution”) in order to “resolve” the Contract. The Resolution effected the release of Player. Club was to pay EUR 45,000.00, net of any Greek taxes, to Player in three equal payments of EUR 15,000.00. The milestones were 30 January 2020, 28 February 2020, and 30 March 2020. Club did not pay either of the first two milestone payments.
7. On 3 March 2020, Player sent a demand letter seeking the missed milestone payments. That letter also stated that if Club did not pay then, pursuant to the Resolution, the Club would be responsible for paying the entire original Contract amount (as a matter of clause 5 of the Resolution). Club did not respond.
8. On 25 March 2020, Player sent a second demand letter to Club noting that due to the default of payment by it as per the Resolution, the full remaining amount of the Contract (EUR 105,000.00) was due.
9. Player did sign a new contract following the Resolution (NBA G-League) and subtracts an amount of EUR 7,984.89 from the aforementioned EUR 105,000.00 by way of mitigation.

3.2 The Proceedings before the BAT

10. On 16 June 2020, Player filed a Request for Arbitration (dated 10 June 2020) in accordance with the BAT Rules. Player paid the non-reimbursable handling fee of EUR 3,000.00 on 16 June 2020.

11. On 22 July 2020, 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. Stefan Jankovic) EUR 4,000.00 [adjusted on 21 September 2020 to EUR 3,500]

Respondent (AEK NEA KAE 2014) EUR 4,000.00 [adjusted on 21 September 2020 to EUR 3,500]”

12. The advance on costs in the total amount of EUR 7,000.00 was paid as follows (both on behalf of Player): (a) EUR 4,000.00 on 26 August 2020; and (b) EUR 3,000.00 on 30 September 2020.
13. Club did not submit an Answer to the Request for Arbitration.
14. On 5 October 2020, the Parties were invited to set out (by no later than 12 October 2020) 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.
15. Player filed his costs submission on 5 October 2020. Club did not file any costs submission.

4. The Positions of the Parties

4.1 Claimants' Position

16. Player's position is, in substance, recorded above in Section 3.1.

17. In the Request for Arbitration, Player seeks the following relief: “97,015.11 EUR for the 2019/2020 season”.

4.2 Respondent's Position

18. As already noted, Club did not participate in this arbitration.

5. The jurisdiction of the BAT

19. 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
20. First, the Vice-President of BAT 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. Secondly, according to Article 1.3 of the BAT Rules it now falls to the Arbitrator to finally decide jurisdiction.
21. 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).
22. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
23. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus

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

arbitrable within the meaning of Article 177(1) PILA.²

24. The jurisdiction of the BAT over the dispute is said by Claimants to result from clause 11 of the Contract and clause 7 of the Resolution, both of which provide 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 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.”

25. The Contract and the Resolution are both in written form and thus the arbitration agreements fulfil the formal requirements of Article 178(1) PILA.
26. 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).
27. The predicate wording “[a]ny dispute arising from or related to the present contract [...]” clearly covers the present dispute.
28. For the above reasons, the Arbitrator rules and finds, pursuant to Article 1.3 of the BAT Rules, that he has jurisdiction to finally decide and rule upon Player’s claims.

6. Other Procedural Issues

29. Article 14.2 of the BAT Rules specifies that “*the Arbitrator may [...] proceed with the*

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

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.

30. 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. It was also given sufficient opportunity to respond to Player's Request for Arbitration. Club, however, chose not to participate in this arbitration.
31. None of the parties requested a hearing. In accordance with Article 13.1 of the BAT Rules, the Arbitrator will decide Player's claims based on the written submissions and the evidence on record.

7. Discussion

7.1 Applicable Law – ex aequo et bono

32. 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”.

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

33. 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."

34. Clause 11 of the Contract and clause 7 of the Resolution provide, expressly, that the Arbitrator shall decide the dispute *ex aequo et bono*. Consequently, the Arbitrator shall proceed accordingly.
35. 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

36. 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

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).

particular national or international law”.

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

7.2 Findings

38. By way of introduction, the Arbitrator recalls the consistent position taken now over many years by BAT arbitrators that the doctrine of *pacta sunt servanda* (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the corner-stone principle by which the merits of the claims are examined.

39. Secondly, and also by way of introduction, the Arbitrator notes the following principles of contract interpretation which are reflected in prior reasoned BAT awards. It is a matter of particular importance for the doctrine of *pacta sunt servanda* that there is clarity as to the methods by which the “pacta” (*i.e.* the content of the obligations concerned) are duly ascertained. As already noted above, it is abundantly clear that an arbitrator, sitting in Switzerland and mandated to rule *ex aequo et bono*, is not bound by any particular set of national legal rules. However, it is also the case that such an arbitrator is not free to do whatever it is they want and, for example, completely disregard the words used by parties in their contractual documentation on a plea *ad misericordiam* from one side or the other.

40. The sort of principles which might inform the exercise of interpretation in the context of a BAT arbitration include: (a) looking at all of the contractual language chosen by parties through the eyes of a reasonable reader to see what is the ordinary and natural meaning of the words used; (b) the overall background context of professional basketball and general common understanding amongst such users together inform the ordinary and natural meaning of the words used; (c) when it comes to considering the centrally relevant words to be interpreted in a particular case, the less clear they are, or, to put it another way, the worse their drafting, the more ready an arbitrator might be to depart

from the ordinary and natural meaning; that is simply the obverse of the sensible proposition that the clearer the ordinary and natural meaning the more difficult it is to justify departing from it; (d) the description or label given by parties to something in a contract is not inflexibly determinative of its true nature; (e) the mere fact that a contractual arrangement, if interpreted according to its ordinary and natural language as described above, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from that language; and (f) in general, it is not the function of an arbitrator when interpreting an agreement to relieve a party from the consequences of his or her imprudence or poor advice. Accordingly, when interpreting a contract, *ex aequo et bono*, an arbitrator avoids re-writing it in an attempt to assist an unwise party or to penalise an astute party. Also, parties should not seize on a literal translation of the phrase *ex aequo et bono* and consider that “justice” and “equity” provide them with a route to unprincipled and unmoored indulgence for poor contractual choices.⁷

41. Turning to Player’s claims, the Arbitrator will now set out the relevant provisions of the Resolution (and these are to be interpreted according to the principles set out above):

“1. By signing this RESOLUTION all the above parties acknowledge that there exists a contract between the CLUB and the PLAYER dated 20th August 2019 (hereinafter “PRIOR CONTRACT”) and this contract will be resolved on 30th December, 2019

2. So long as the CLUB does not default in these payments, in satisfaction of the CLUB’s entire responsibility to the PLAYER as it relates to the PRIOR CONTRACT, the Club will pay to the PLAYER, and the PLAYER will accept, the following payments:

- a. CLUB will pay 15.000 Euros net of any Greek taxes, on 30th January 2020
- b. CLUB will pay 15.000 Euros net of any Greek taxes, on 28th February 2020
- c. CLUB will pay 15.000 Euros net of any Greek taxes, on 30th April 2020
- d. One single ticket for the route Belgrade-USA/Canada

3. Upon payment of these amounts the PLAYER agrees that he will no longer seek any further payment from the CLUB in accordance with the PRIOR CONTRACT.

⁷ See BAT 0756/15, para. 60.

CLUB will have the responsibility to provide the tax certificates for any payments made upon request of the PLAYER

4. The PLAYER has the obligation to return the apartment and car, provided to him by the club, in good condition and without any damages.

5. In the event that any scheduled payments of this RESOLUTION are not made by the Club within 30 days of the applicable payment date, the Player has to send written notice to the Club and if the Club does not fulfill financial obligation towards Player in total within 20 days, the entire PRIOR CONTRACT's financial responsibility of the CLUB towards the PLAYER will be due and payable immediately (minus only any amounts already paid under this RESOLUTION). If the CLUB is required to pay in full the PRIOR CONTRACT due to such a default, then if the PLAYER has signed a contract with a new team, any amounts receivable by his new club will be deducted from the financial obligations of the CLUB."

42. Player has demonstrated to the satisfaction of the Arbitrator that he sent the prescribed written notice to Club (as per clause 5 of the Resolution) once there was a default in payment. Player has also demonstrated that this written notice did not elicit a satisfactory response from Club (*i.e.* payment). Thus, in accordance with clause 5 of the Resolution, the amount which was originally due under the Contract was re-engaged. That is the consequence as per the terms of clause 5 of the Resolution as interpreted by the Arbitrator.
43. Player has submitted that, by way of mitigation, he received EUR 7.984.89 pursuant to a contract with the NBA G-League (as set out in para. 1.D of the Request for Arbitration). This amount has been duly subtracted from the amount (EUR 105,000.00) which was left over on the Contract by the time of the Resolution. The final amount, therefore, sought by Player from Club is EUR 97,015.11 and the Arbitrator accepts his calculations in that regard.
44. For completeness, the Arbitrator notes two matters in passing. First, Player's claim accrued prior to the COVID-19 pandemic, and therefore no abatement or other similar consideration applies. Secondly, bearing in mind that the Contract (and the Resolution) each provide for payment net of any Greek taxes, the Arbitrator adds that phrase to the dispositive section of this Award (in line with para. 49 of Award 1547/20).

8. Costs

45. 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). [...]”

46. On 2 December 2020, the BAT Vice President determined the arbitration costs in the present matter to be EUR 4,700.00.

47. 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.”

48. Considering that Player prevailed 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. Accordingly, the Club shall pay EUR 4,700.00 to the club. The remainder of the advance on costs in the amount of EUR 2,300.00 will be reimbursed by the BAT to the Player.

49. In relation to Player’s 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.”

50. 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.

51. Player claims legal fees in the amount of EUR 1,062.50 plus EUR 3,000.00 for the non-reimbursable handling fee.
52. 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 7,500.00), the fact that the non-reimbursable handling fee in this case was EUR 3,000.00, and the specific circumstances of this matter, the Arbitrator holds that EUR 3,000.00 for the non-reimbursable handling fee and EUR 1,062.50 for Player's legal fees represent a fair and equitable contribution by Club in this regard.
53. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:
 - (i) Club shall pay EUR 4,700.00 to Player, being the costs advanced by him;
 - (ii) Club shall pay to Player EUR 4,062.50 representing the total of his legal fees and other expenses.

9. AWARD

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

- 1. AEK NEA KAE – 2014 AEK Basketball Club is ordered to pay Mr. Stefan Jankovic EUR 97,015.11, net of any Greek taxes, by way of unpaid salary.**
- 2. AEK NEA KAE – 2014 AEK Basketball Club is ordered to pay Mr. Stefan Jankovic an amount of EUR 4,700.00 in respect of arbitration costs.**
- 3. AEK NEA KAE – 2014 AEK Basketball Club is ordered to pay Mr. Stefan Jankovic EUR 4,062.50 in respect of his legal fees and expenses.**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 7 December 2020

Klaus Reichert
(Arbitrator)