

## **ARBITRAL AWARD**

**(BAT 0529/14)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Quentin Byrne-Sutton**

in the arbitration proceedings between

**Mr Anis Georges Feghali**

**- Claimant -**

represented by Mr. Anthony Fares Skaff, attorney at law,  
Sin el Fil, Horch Tabet, Fouad Chehab Blvd, 4th floor  
P.O. Box 45340, Hazmieh, Lebanon

vs.

**Cercle sportif maristes, Champville club**  
P.O. Box 55-273/ Sin el Fil, Beirut, Lebanon

**- Respondent -**

represented by Mr. Chady Antonios Saad, attorney at law,  
Said Freiha Street, Gardenia 3, Hazmieh, Baabda, Lebanon

## **1. The Parties**

1. Mr Anis Georges Feghali is a Lebanese professional basketball player (hereinafter referred to as “the Player” or “Claimant”).
2. Cercle sportif maristes, Champville club, is a Lebanese basketball club (hereinafter referred to as “the Club” or “the Respondent”).

## **2. The Arbitrator**

3. On 13 March 2014, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the “BAT”) appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter 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 5 August 2012, the Player and the Club entered into a fully-guaranteed Agreement for three seasons (2012-2013, 2013-2014 and 2014-2015) (the “Agreement”) – to commence on 5 August 2012 – for annual base salaries of respectively USD 30,000, 36,000 and 42,000, plus bonuses.
5. According to the Player:
  - He was never paid his last monthly salary (of July 2013) for the 2012-2013 season.
  - Despite being under contract with the Club for the 2013-2014 season and his monthly salaries for that season becoming due from 31 August 2013 onwards, he

was paid no salary between August and December 2013.

- Consequently, he put the Club on written notice on 6 December 2013 for late payment, and, having still not been paid thereafter, he terminated the Agreement by written notice of 4 February 2014.

6. According to the Club:

- Due to problems within the Lebanese Basketball Federation and its dispute with FIBA about certain aspects of the Lebanese basketball league, the Club (and other professional basketball clubs in the Lebanon) began having difficulties during the 2012-2013 season and ended up in a situation of *force majeure* during the entire second semester of 2013 (corresponding to what should have been the first half of the 2013-2014 basketball season) due to the fact that the top professional league of the Lebanese basketball championship was postponed, i.e. no official games took place.
- As a result of the foregoing disruption, the Club's first practices "*... were launched at the beginning of the first week of the month of December 2013 ...*" without foreign players yet being present, the Club's foreign coach only arrived on 13 December 2013, the Club played a first friendly game on 5 January 2014 and only played its first official game of the 2013-2014 season on 1 February 2014, after which the championship was accelerated and several official games were scheduled a week in order to make up for the lost games.
- The Player was invited to attend practice from the outset but did not turn up despite having been repeatedly requested to do so, reason for which on 30 December 2013 a representative of the Club sent him an SMS as follows: "*Hi Anis, Why you are not coming to practice? I asked you before is everything OK? Please let us know. Because everyone is wondering*", to which the Player replied in French "*Hi mr chibany parce que vs n avez pas payer mon argent du contrat et je suis obliger daler a fiba pour chercher tout mon contract*".

7. In the above-described circumstances, the Club considered the Player to be taking advantage of the situation – among others because he had a full time job in a bank in parallel to his activity as a professional basketball player - and it deemed the Player's termination of the Agreement to be unjustified. Therefore, the Club did not pay the Player any salaries.
8. The Player, in contrast, considered the Club to have breached its contractual duties by not paying him, and that, as a result, he was entitled not to attend practice, to terminate the Agreement after having put the Club on notice and to look for a new club, which led him to accepting a contract with a second-division club in the Lebanon for the remainder of the season (the "new contract").
9. Because the parties thus disagreed on the cause of termination of the Agreement and the Player was not paid, he decided to file a claim with the BAT.

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

10. On 25 February 2014, the BAT received the Claimant's Request for Arbitration and the non-reimbursable handling fee in an amount of EUR 2,000.
11. The Claimant paid his share of the Advance on Costs and substituted for the Respondent, thereby paying a total amount of EUR 9,000.
12. The Respondent filed an Answer dated 11 April 2014.
13. By Procedural Order of 7 May 2014, the Parties were requested to answer various questions from the Arbitrator.
14. On 23 May 2014, both Parties filed their replies to the Arbitrator's questions.
15. By Procedural Order of 30 May 2014, the exchange of written documents was deemed completed and the Parties were invited to submit their statements of cost, which they

both did on 6 June 2014. On 18 June 2014, the Claimant filed comments on Respondent's advance on costs.

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

##### **4.1 The Claimant's Position**

16. The Player submits in substance that he validly terminated the Agreement for good cause because the Club was many months late in paying contractual salaries due and had been put on notice; and therefore that he is entitled to the full guaranteed contractual remuneration for three seasons, plus bonuses. In that relation, he points out that, according to article 13/H of the Agreement, he was entitled to work in parallel in a bank.

17. In his Request for Arbitration, the Claimant requested the following relief:

*"a) Monthly salary from July 31, 2013 to July 31, 2015. Equivalent of 80.500 usd.*

*b) Bonuses.*

*c) Costs of the arbitration.*

*d) Legal fees 12% and legal expenses 5000 euro.*

*e) Interest of the amounts above mentioned from July 2013 till the day of full payment upon your judgment arbitral decision."*

##### **4.2 The Respondent's Position**

18. The Club submits in substance that the BAT lacks jurisdiction, and that, in any event, the Player's claim lacks merit because the Club was in a situation of *force majeure* during the second semester of 2013, which the Player took advantage of by refusing to practice while he was earning money from a full-time job in a bank.

19. In its Answer, the Club requested the following relief:

*“- Reject to complaint in the form as it contradicts the provisions of article 12 of the agreement signed with the club and considering that the Lebanese court namely the court of Mount Lebanon are the competent forum to rule over this case.*

*- Additionally to reject the complaint in substance as the responsibility of the player Georges Anis FEGHALI was confirmed for the termination of the contract signed between him and the client on the full liability of the first and since the actions of the player are aimed to circumvent the repercussion and consequences yet to blame the client which committed and still to the ethical sports principles and the provisions stipulated in the contract signed with the player Anis Georges FEGHALI.*

*- To preserve all the rights of the client of any kind namely its right to sue the player Anis Georges FEGHALI before the competent Lebanese courts to recover the rights of the client confirmed and due by him”*

## **5. The Jurisdiction of the BAT**

20. In this case the Club has objected to the jurisdiction of the BAT on the basis that allegedly the Parties chose “*the court of Mount Lebanon*”, rather than the BAT, as the forum within which to resolve any disputes.
21. Therefore, the merits of the Club’s jurisdictional argument must be examined as a preliminary matter.
22. In making its jurisdictional argument, the Club invoked article 12 of the Agreement, which reads as follows:

*“The Courts of Mount Lebanon shall be competent to resolve any litigation which may occur related to the validity, interpretation or execution of the present agreement. (This Agreement shall be construed, interpreted and enforced according to the Lebanese laws and jurisdictions).*

*And in all cases, all parties hereto agree that any suit, action, claim or dispute arising out of this agreement shall be brought for resolution in the FIBA Basketball Arbitral Tribunal (BAT) court of Law.*

*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 (PILA), irrespective of parties' domicile. The language of arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono".*

23. The Club submits in essence that the framework of the Agreement was drafted by the Player's representative and it included the reference to BAT as currently contained in article 12 of the Agreement, but that the Club insisted in adding a clause which gives jurisdiction to the Lebanese courts in priority, this being why it figures at the beginning of article 12.
24. It also contends that the reference to BAT arbitration is void under Lebanese law because such law requires that any choice of arbitration be unambiguous.
25. No evidence was adduced regarding the content of any discussions or written negotiations between the Parties pertaining to the adoption of the final wording of article 12 of the Agreement.
26. The Arbitrator finds it clear from the Parties' allegations and the wording of article 12 of the Agreement that they ultimately agreed to this provision containing an option in favour of the Club to submit disputes to the Courts of Mount Lebanon and an option in favour of the Player to submit disputes to BAT (otherwise one or the other possibility would have been eliminated from the wording of the provision), meaning that the forum elected in case of a dispute would depend on which party was claimant. In other words, the choice of one and the other forum was not exclusive.
27. In that relation, it is noteworthy that neither forums are specified as being "exclusive" and although, chronologically within article 12 of the Agreement, the reference to the Courts of Mount Lebanon comes first, the following paragraph begins with the words "**And in all cases**, all parties hereto agree that any suit, action, claim or dispute arising out of this agreement shall be brought for resolution in the FIBA Basketball Arbitration Tribunal (BAT) court of Law" (our emphasis). In addition, contrary to what the Club argues, the reference to BAT is not unclear in content, since it constitutes a reproduction of the BAT standard arbitration clause and leaves no doubt as to form and

type of arbitration being elected.

28. For the above reasons, the Arbitrator finds that article 12 of the Agreement provides the Parties with a choice of two alternative forums in case of a dispute arising between them, with the consequence that the tribunal in front of which a claim is first filed has jurisdiction over the dispute in question.
29. Thus, the reference to the Courts of Mount Lebanon in article 12 of the Agreement does not prevent the Player from submitting a dispute to the BAT, on the basis of the reference to BAT also contained in such provision.
30. That being said, the validity of this choice of arbitration now needs verifying under the applicable law.
31. 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, Chapter 12 of the Swiss Private International Law Act (PILA) governs this BAT arbitration proceeding.
32. Under the provisions of the PILA, the jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
33. In this case, the Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.
34. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in article 12 of the Agreement quoted and discussed above.
35. The foregoing arbitration agreement is in written form and thus fulfils the formal requirements of Article 178(1) PILA.
36. With respect to its substantive validity, the Arbitrator considers there is no indication in the file that casts doubt on the validity of the arbitration agreement under Swiss law



(referred to by Article 178(2) PILA). Furthermore, it covers the substance of the claims and was accepted by all the Parties to the dispute as indicated above.

37. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Player's claims against the Club.

## **6. Discussion**

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

38. With respect to the law governing the merits of the dispute, Article 187(2) PILA provides that the parties may authorize 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”.

39. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

*“Unless the parties have agreed otherwise 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.”*

40. Article 12 of the Agreement provides that if a dispute between the Parties is submitted to the BAT: *“The arbitrator shall decide the dispute ex aequo et bono”*.

41. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought against the Club.

### **6.2 Findings**

42. As a preliminary comment, the Arbitrator notes that the total amount of contractually-stipulated salary which remained unpaid on the date of the Player's termination of the Agreement (in February 2014), i.e. the last monthly salary (July 2013) due for the 2012-

2013 season and the first six months of salary pertaining to the 2013-2014 season (August 2013 to January 2014), is uncontested.

43. The main questions are therefore whether or not the termination of the Agreement was justified and what is owed or not to the Player as a result.
44. In that connection, the Arbitrator finds that the Club has established the existence of a type of *force majeure* having disrupted and negatively affected its organization and activities during at least the first half of the 2013-2014 season, i.e. from August to December 2013, since the Club had no responsibility for and no control over the postponement of the Lebanese first division basketball championship during that period. Furthermore, that disruption will necessarily have complicated the Club's financial situation due to absence of official games and the requirements of sponsors.
45. At the same time, no evidence has been adduced that the Club ever invoked *force majeure* at the time as a reason for its late payments, or that the Player complained about late payments until putting the Club on notice on 6 December 2013, i.e. until four months had lapsed since the last unpaid monthly instalment became due on 31 July 2013. The Player's notice letter of 6 December 2013 does refer to prior complaints having been made, but no evidence of any such complaints or of their content has been filed. Neither has any evidence been adduced of discussions between the Parties or between the Club and any other players during the six-month period when the championship was postponed.
46. Also relevant are the facts that official practice only resumed at the beginning of December 2013, and that by the date of 30 December 2013 when the Club sent an SMS to the Player to enquire why he was not coming to practice, the latter had already put the Club on notice three weeks earlier (on 6 December) that the Club was in breach of contract for late payments.
47. In the above circumstances, the Arbitrator finds that although, formally speaking, the Club was in breach of contract for late payment, the situation was quite particular due

to the postponement of the championship, and an amicable discussion between the Parties to achieve some form of compromise as to the performance of their respective obligations during that period would have been useful and fair; all the more so because, although the Agreement entitled the Player to have a full-time job in a bank in parallel to his activity as a professional basketball player, the fact that he had one did put him in a less precarious financial situation at a time when the Club was objectively faced with difficulties it was not responsible for.

48. For the above reasons, the Arbitrator finds, *ex aequo et bono*, that despite the Player's notice of 6 December 2013 and subsequent termination of the Agreement in February 2014 being justified, it would be unfair if the termination entailed all the normally-applicable contractual consequences in terms of damage.
49. In addition, it needs to be taken into account that, after his termination of the Agreement, the Player found an engagement with another club for the rest of the 2013-2014 season, albeit for a lower monthly salary, and that no allegations have been made or evidence adduced by him regarding his plans for the forthcoming season (2014-2015) or that he will no longer be benefitting from full-time employment in a bank in parallel with his activity as a professional basketball player.
50. Bearing in mind all the foregoing elements – notably the contractual guarantees, the Player's contractual permission to have another job in parallel and the fact that he had/has a full-time job, the existence of a force majeure situation suffered by the Club which led to the termination by the Player and the latter's engagement by another club for a lower salary – the Arbitrator finds it fair and just, overall, that in the particular circumstances of this case the Player not receive any compensation for the season-and-a-half that were guaranteed beyond the termination, but that he receive compensation for the fact that, without him being at fault, he was unable to play for the Club during the first half of the 2013/2014 season and therefore justifiably terminated his contract and was only able to find a lesser-paid engagement with a second-division club for the remainder of the season.

51. Consequently, the Arbitrator finds, *ex aequo et bono*, that the Player shall be awarded the July 2013 salary which remained unpaid in relation to the 2012-2013 season, i.e. USD 2,500 free of tax, plus the equivalent of six months salary pertaining to the 2013-2014 season, i.e. USD 18,000 (6 x USD 3,000) free of tax, making a total of **USD 20,500**; the rest of his claim being dismissed.
52. Finally, the Arbitrator finds it fair that the amount of USD 2,500 bear interest from the day after its contractual due date, i.e. from 1 August 2013 onwards, and that the 6-month indemnity being awarded bear interest from the day after the Player's termination of the Agreement, i.e. from 5 February 2014.

## **7. Costs**

53. Article 17 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.
54. On 28 July 2014 - pursuant to Article 17.2 of the BAT Rules and 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 6,240.00.
55. Considering the Player only prevailed in a part of its claims, the Arbitrator finds it fair that 75% of the fees and costs of the arbitration be borne by the Club, and that it be required to cover its own legal fees and expenses as well as 50% of those of the Player.
56. Given that the Player paid a non-reimbursable handling fee of EUR 2,000 (which will be taken into account when determining the his legal fees and expenses) and paid the

entire advances on costs in an amount of EUR 9,000, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

- (i) BAT shall reimburse EUR 2,760 to the Player, being the difference between the costs advanced by it and the arbitration costs fixed by the BAT President;
- (ii) The Club shall pay to the Player EUR 4,680, being 75% of the arbitration costs fixed by the BAT President;
- (iii) The Club shall pay to the Player EUR 5,750 (2,000 for the non-reimbursable fee + 3,750 for 50% of the legal fees) representing the amount of his legal fees and other expenses.

## **8. AWARD**

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

- 1. Cercle sportif maristes, Champville club shall pay Mr. Anis Georges Feghali the following amounts as compensation:**
  - **USD 2,500.00 net, plus interest at 5% per annum on such amount from 1 August 2013 onwards.**
  - **USD 18,000.00 net, plus interest at 5% per annum on such amount from 5 February 2014 onwards.**
- 2. Cercle sportif maristes, Champville club shall pay Mr. Anis Georges Feghali an amount of EUR 4,680.00 as a partial reimbursement of his arbitration costs.**
- 3. Cercle sportif maristes, Champville club shall pay Mr. Anis Georges Feghali an amount of EUR 5,750.00 as a contribution to his legal fees and expenses.**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 31 July 2014

Quentin Byrne-Sutton  
(Arbitrator)