BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0107/10)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Mr. Thomas Kelati

- Claimant 1 -

Mr. David Maravilla

- Claimant 2 -

Both represented by Mr. Frank P. Kostouros, Attorney at law, 17 North Wabash, Suite 660, Chicago, Illinois 60602, USA

vs.

Olympiacos Piraeus B.C., Akti Themistokleus 2 & Igias 1-3, 18536 Piraeus, Greece

- Respondent -

Represented by Mr. Massimo Coccia, Mr. Mario Vigna, Attorneys at law, Piazza Adriana 15, 00193 Rome, Italy and Mr. Dimitris Prassos and Mr. George Prassos, Attorneys at law, 53-55 Akti Miaouli, 18536 Piraeus, Greece

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1. The Parties

1.1 The Claimants

1. Mr. Thomas Kelati (the “Player” or “Claimant 1”) is a professional basketball player of both US and Polish nationality.

2. Mr. David Maravilla (the “Agent” or “Claimant 2”) is a FIBA licensed agent of US nationality.

1.2 The Respondent

3. Olympiacos Piraeus B.C. (the “Club” or “Respondent”) is a professional basketball club located in Piraeus, Greece.

2. The Arbitrator

4. On 9 August 2010, the President of the Basketball Arbitral Tribunal (the "BAT") appointed Prof. Dr. Ulrich Haas as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). None 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

5. On 17 July 2009, the Parties signed an employment contract titled "Standard Player/Club Contract" according to which the Respondent engaged Claimant 1 as a player for the seasons 2009-2010 and 2010-2011 (the "Contract").

6. In Clause 1 of the Contract, the Parties agreed that the term of the Contract would begin on 17 July 2009 and end upon the conclusion of the Club's last official match of the 2010-2011 season. Clause 2 of the Contract stipulated an amount of USD 800,000 as "fully guaranteed salary" for the 2009-2010 season and the amount of USD 1,000,000 for the 2010-2011 season. In Clause 6 of the Contract the Parties agreed that the Contract would enter in full force and become binding only under the condition that the Player passed successfully the medical examination and the doping control test. Clause 11 of the Contract stipulated an agent fee in the amounts of USD 80,000 for the 2009-2010 season and USD 100,000 for the 2010-2011 season.

7. Immediately after his arrival in Greece, on 28 and 29 July 2009, the Player was examined by the Club's doctor, Dr. Konstantinos A. Chatzoulis (the "Team Doctor"), and his medical team. In the medical examination the Player had to undergo - *inter alia* - a Magnetic Resonance Imaging (MRI) examination, which was performed at a specified therapeutic centre by Dr. S. Lachanis, a radiologist.

8. On 29 July 2009, Dr. Lachanis issued his report of the MRI examination and noted that the findings of the MRI were consistent […].

9. On 30 July 2009, the Team Doctor issued a first examination report directed to the Club's General Manager, Mr. Christos Stavropoulos. The Team Doctor diagnosed that

the Player suffered from […] for more than a year and that, in his opinion, the Player needed surgery. Furthermore, the Team Doctor announced a second examination report shortly.

10. On 31 July 2009, the Club's General Manager informed the Agent about the first results of the medical examination. The General Manager's email reads as follows:

> *"Dear Mr. Maravilla,*
>
> *We just received from our doctor of his first medical note regarding the results of the medical exams of the athlete Thomas Kelati.*
>
> *The medical note refers to the findings after the two first tests (clinical examination and MRIs), copy of which is attached hereto and its contents are self-explanatory. A second medical report will follow soon on blood and dynamic tests.*
>
> *We regret to advise you that, as mentioned in detail in the aforesaid medical note, the medical results are considered unacceptable since the athlete is in an unsatisfactory health condition.*
>
> *Therefore we are of the opinion that there is a breach from the side of the athlete of clause 6 of the Standard Player/Club Contract dated July 17, 2009.*
>
> *The matter is currently under further deep consideration by the administration, the coach and the technical team as well as the medical team of the Club.*
>
> *Taken into account the above, we reserve all our rights as stipulated by the relevant contract and governing law, including termination of the contract.*
>
> *Sincerely,*
>
> *Christos Stavropoulos*
>
> *General Manager Olympiacos B.C."*

11. On 1 August 2009, the second part of the examination report was issued by Dr. George Leon, head of the Club's Ergophysiological Study & Scientific team. He concluded that the Player had a […] and that this *"problem"* had to be addressed seriously, which would mean *"adequate rehabilitation breaks, in and out of the basketball court"* for at least 10-12 weeks.

12. Back in the USA, the Player sought after a second medical opinion and, on 10 August 2009, he was examined by Dr. Daniel J. Garnett in Seattle, Washington. In his report, Dr. Garnett stated that the Player did not need surgery. The relevant part of his report reads as follows:

> *"DISCUSSION: The anatomy of the area and the nature of […] was explained to the patient. […]. Surgery is entirely elective. The surgery is indicated if there is pain that is difficult to control, pain that requires significant medication, or if there is limitation in physical activity. The surgery is not required simply because there is a change on an MRI scan. From the interview today there is certainly no absolute need for surgery at this time and the patient should be able to perform without intervention."*

13. On 12 August 2009, the Club signed the NBA player Von Wafer playing on the same position as Claimant. After notification of that engagement, by email of the same date, the Agent asked the Club to issue an official notification whether the Club wanted the Player in its roster or not. Also on the same date, the Club's General Manager replied to the Agent by email which reads as follows:

> *"Dear Mr. Maravilla,*
>
> *Following our message dated July 31st 2009 and our subsequent discussions thereafter, we regret to inform you that due to the unsuccessful medical and physical exams of the player Thomas Kelati performed in Greece on July 28th & 29th, 2009 and following careful and continuous consideration of the aforementioned results, the prospects of the current health condition of the athlete and the pressing needs of the club, we have no option but to terminate the contract dated July 17th, 2009 between the said player and the club.*

Therefore, according to clause 6 and other relevant terms and conditions of the above contract, our agreement is now considered as null and void, producing no legal effects as from the date of its conclusion, without prejudice to our rights.

Sincerely,

Christos Stavropoulos

General Manager OLYMPIACOS PIRAEUS B.C."

14. On 13 August 2009, the Agent requested the original MRI scan which was mailed to the Player on 18 August 2009 and received by him on 21 August 2009.

15. Also on 13 August 2009, the Player was once more examined by a doctor in Seattle, Washington, Dr. Joseph E. Chebli. In his report, regarding the issue of surgery Dr. Chebli stated that in his opinion a surgical therapy was not appropriate *("Thomas is able to perform at his maximal desired level without physical encumbrance or limitation by pain. I feel that surgery could potentially harm him at this time.").*

16. In his email of 1 September 2009, the Agent challenged the Team Doctor's medical report and announced that the Player would file a claim against the Respondent with the BAT.

17. On 24 September 2009, the Player underwent a complete physical examination performed by Dr. John G. Moe, the team physician of the NBA club Los Angeles Lakers. In his report, Dr. Moe stated that the Player was in *"excellent physical condition with no active medical problems"* and *"cleared for full participation as a professional basketball player".* After successfully passing this examination, on 30 September 2009 the Player was engaged by the Los Angeles Lakers but only for the pre-season until 21 October 2009 and without receiving any remuneration.

18. On 1 November 2009, the Player signed an employment contract with the Spanish club Valencia Basket Club S.A.D. for the remaining time of the 2009-2010 season. On 5 November 2009, the Player successfully passed a complete physical examination performed by Dr. Miguel Frasquet Pons, the team doctor of Valencia Basket Club S.A.D.

3.2 The Proceedings before the BAT

19. On 14 July 2010, the Claimants' counsel filed on behalf of the Claimants a Request for Arbitration in accordance with the BAT Rules which was received by the BAT with several exhibits on 16 July 2010. The non-reimbursable fee of EUR 4,000 was paid on 22 March 2010 (EUR 3,000) and on 19 August 2010 (EUR 1,000).

20. On 6 September 2010, the BAT informed the Parties that Prof. Dr. Ulrich Haas had been appointed as Arbitrator in this matter, invited the Respondent to file its answer by no later than 27 September 2010 and fixed the amount of the Advance on Costs to be paid by the Parties as follows:

"Claimant 1 (Mr. Kelati)	*EUR 4,000*
Claimant 2 (Mr. Maravilla)	*EUR 1,000*
Respondent (Olympiacos)	*EUR 5,000"*

21. On 16 September 2010, Claimant 2 paid the amount of EUR 1,000 as his share of the advance on costs. On 20 September 2010, Claimant 1 paid the amount of EUR 4,000 and Respondent the amount of EUR 5,000 as their shares of the advance on costs.

22. On 24 September 2010, Respondent requested an extension of the time limit for filing its answer until 15 November 2010. By email of the same day, the BAT invited the Claimants to comment on the Respondent's request by no later than 29 September 2010. On 29 September 2010, the Claimants' counsel informed the BAT that the

Claimants had no objection to an extension. By letter of the same day, the Arbitrator granted the extension and fixed the time limit for the submission of the Respondent's answer until 15 November 2010.

23. On 15 November 2010, the Respondent submitted its answer (the "Answer") together with several exhibits. Furthermore, the Respondent requested - *inter alia* - that a hearing be held.

24. By letter of 22 November 2010, the BAT invited the Claimants to comment on the Answer by no later than 1 December 2010. On 24 November 2010, the Claimants' counsel requested an extension of the time limit, which was granted by the Arbitrator.

25. On 10 December 2010, the Claimants submitted their comments (the "Reply") to Respondent's answer together with several exhibits. Furthermore, in their Reply Claimants objected to the holding of a hearing.

26. On 14 January 2011, in compliance with the Arbitrator's procedural directions dated 4 January 2011, the Respondent submitted its comments on Claimants' Reply (the "Rejoinder") together with several exhibits. In its Rejoinder the Respondent agreed with the Claimants that there was no need for a hearing to be held. Furthermore, the Rejoinder reads *inter alia*:

> *"Given that the Claimants expressly renounced to claim any image damages, the Respondent's objection as to the jurisdiction ratione materiae of the FAT is hereby dropped as well."*

27. On 27 January 2011, the Arbitrator decided in accordance with Article 13.1 of the BAT Rules to render the award on the basis of the Parties' written submissions. The Arbitrator accordingly issued a Procedural Order providing that the exchange of documents was completed and invited the Parties to submit their accounts on costs.

28. On 4 February 2011, the Respondent submitted the following account of costs:

"BILL OF COSTS

This is the bill of costs of Olympiacos Piraeus BC in the FAT case 0107/10 Maravilla, Kelati vs. Olympiacos Piraeus BC.

ATTORNEYS FEE (e.g. correspondence with the client and the FAT, examination of the dossier, legal research, defensive and investigative activity, drafting Answer, drafting Rejoinder)	*Euro 15.000,00*
EXPENSES	*Euro 1.875,00*
ADVANCE ON COSTS	*Euro 5.000,00*
TOTAL OF COSTS	*Euro 21.875,00*

Date: 04/Feb/2011"

29. On 7 February 2011, the Claimants submitted the following account of costs:

"David Maravilla:

Non-reimbursable handling fee (FIBA FAT):	*EUR 3.000*
Advance on costs (FIBA FAT):	*EUR 1.000*
Attorney retainer:	*$5,000 USD*

Additional attorney fees: *$3,375 USD*

Thomas Kelati:

Advance on costs (FIBA FAT): *EUR 4.000*

Attorney retainer: *$5,000 USD"*

30. On 8 February 2011, the Parties were invited to submit their comments, if any, on their counterpart's account of costs by no later than 11 February 2011. The Parties did not submit any comments.

31. By letter dated 4 April 2011, the BAT Secretariat informed the Parties that the FIBA Arbitral Tribunal (FAT) had been renamed into Basketball Arbitral Tribunal (BAT) and that, unless one of the Parties opposed by 11 April 2011, the new name would be applied also to the present proceedings. Neither of the Parties raised any objections within the said time limit.

4. The Positions of the Parties

4.1 The Claimants' Position

32. The Claimants submit the following in substance:

- Although the Player first felt minimal discomfort […] in June 2007, he was never restricted in his play and had never skipped any practices or matches due to this discomfort. The Team Doctor's recommendation for surgery was unwarranted and his diagnosis clearly erroneous because four other doctors rebutted his diagnosis. The Player has clearly proven that he had no […] in August 2009 and that he was able to compete at the highest professional level without surgery or any treatment

whatsoever.

- After the notification of the examination results, the Player was not released from the Contract but remained under contract with the Club while its management was determining the next steps of action. This is proven especially by the email of 30 July 2009 from the Club's General Manager to the Agent but also by reports on the website "red planet". The Club retained the Player's rights, *"keeping him off of the market for other potential teams to sign him"* for two weeks until a replacement had been found for him. Only thereafter, on 12 August 2009, the Club terminated the Contract.

- The late termination of the Player's contract was unjustified and caused irreparable harm to him as he had turned down several other offers in order to contract with the Club. Moreover, in mid August 2009, the chances to find a new club offering the same level of salary were minimal.

- In reply to Respondent's "Verwirkung" argument, Claimants submit that the Player's damage was verifiable only after completing the 2009-2010 season.

33. In their Request for Arbitration, the Claimants requested the following relief:

> *"1. That Olympiacos be ordered to pay the Claimant, Thomas Kelati, the amount of $550,000 United States currency in actual damages accrued for the 2009-2010 season. ($800,000 due for the 2009-2010 portion of the Olympiacos contract, less $250,000 that claimant earned for the 2009-2010 season from Valencia).*
>
> *Additionally, that a 5% interest rate (or a rate decided by the FAT Arbitrator) be added to this amount.*
>
> *2. That Olympiacos be ordered to pay the Claimant, David Maravilla, $68,000 United States Currency for agent fees associated with the 2009-2010 season. ($80,000 that was negotiated in the Olympiacos contract for 2009-2010, less $12,000 earned on the Valencia contract for the 2009-2010 season). Additionally, that a 5% interest rate (or a rate decided by the FAT Arbitrator) be*

added to this amount.

3. Hold that Respondent be ordered to reimburse Claimants the arbitration fees associated with this case."

4.2 Respondent's Position

34. The Respondent submits the following in substance:

- As a result of the Claimants' inactivity during almost one year before the actual filing of the Request for Arbitration, their claims shall be deemed inadmissible due to the "Verwirkung" principle.

- The Player did not successfully pass the medical and physical examination executed by doctors appointed by the Club. The Claimants had accepted these doctors since neither the Player nor the Agent ever raised any objection against them. The doctors had neither a personal issue with the Player or the Agent nor any interest in denying the passing of the medical examination.

- The diagnosed […] was the most significant injury but this does not indicate that the […] and the problems with […] could be ignored. Moreover, during the examination it was ascertained that the Player was actually in pain in the […] area which was witnessed not only by the Team Doctor but also by some of the other members of the medical team.

- Clause 6 of the Contract creates a so-called "condition precedent" (also known as "suspensive condition" in civil-law countries) which must be applied even in decisions ex aequo et bono. It follows from Clause 6 (3) that the Contract is not binding until the Player passes the required medical/physical examination, the results of which must be satisfactory in the view of the appointed doctors. Therefore, the Player's failure to pass the examination was an objective occurrence

which did not allow the Contract to enter into full force and effect. Thus, the Club had no need to terminate the Contract.

- The outcome of any examination performed by other doctors at a later stage is irrelevant because the key moment to evaluate the medical and physical condition of the Player according to the Contract is the time of the Player's arrival at the Club. Furthermore, the various doctors differ in their opinions only about the extent and the seriousness of the injury but none of them has denied the existence of an injury. In any event, because of negative experiences with players suffering […] in the past the Club has established a special routine when examining (new) players upon their arrival. This special routine includes a specialized MRI protocol in order to be able to safely diagnose injuries like […].

- In his correspondence after the notification of the examination results, the Agent accepted the medical findings without reservation. In particular in his email dated 5 August 2010 the Agent clearly stated that there would be enough time to have the required surgery done on the Player. Furthermore, in his email of 13 August 2010 he accepted that the Contract had not entered into force and only requested the original MRI scans.

- International basketball players are able to be hired or transferred at any moment until very late in the season and there is no evidence that the Player had an offer during the first ten days after failing the medical examination. To avoid any risk with lengthy injuries the Club decided not to enter into new negotiations with the Player. The negotiations with the new player Von Wafer were only initiated after the negative outcome of the Player's medical examination.

- Finally, the Respondent challenges the documents submitted by the Claimants (agreements between the Player and the Agent on the one hand and Valencia Basket Club S.A.D. on the other hand) as unreliable. The Club alleges that the

Player and the Agent received higher amounts than declared in these documents.

35. In its Answer the Respondent requested the following relief:

> *"For all the above reasons and those which may be added at a later stage, Olympiacos respectfully requests the FAT:*
>
> *On a preliminary basis,*
>
> *To declare the inadmissibility of all requests raised by Claimants on the basis of the "Verwirkung" principle.*
>
> *Should the above motion fail, to declare the lack of jurisdiction ratione materiae of FAT with regard to the claim for image damages.*
>
> *On the merits,*
>
> *To adjudge and declare that the Agreement never entered into full force and effect because of Mr. Kelati's failure to pass medical/physical exams and, thus, the non-occurrence of the condition precedent set forth in Article 6 of the Agreement.*
>
> *Accordingly, to adjudge and declare that Olympiacos has no payment obligation whatsoever towards the Claimants under the Agreement.*
>
> *To dismiss any request for compensation for image rights and any other motions for relief submitted by the Claimants.*
>
> *Only eventualiter as a subordinate ground, in the event that the FAT were to believe that the Agreement entered into force and that there was an unlawful termination of the Agreement, to declare that no damages were caused or to adjudicate a substantial reduction of the amounts claimed by the Claimants.*
>
> *To order the Claimants to pay the full costs of this arbitration and a contribution towards the Respondent's legal and other costs and, accordingly, impose to Claimants the overall payment of Euro 30.000 as legal and other costs or any other amount the FAT considers equitable."*

36. In the Rejoinder the Respondent withdrew its objection as to the jurisdiction of BAT.

5. Jurisdiction

37. 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).

38. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

5.1 Arbitrability

39. 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[1].

5.2 Formal and substantive validity of the arbitration agreement

40. Article 9 of the Contract reads - *inter alia* - as follows:

> *"Exclusively and only for the financial disputes that may arise out of the terms hereof between the Club and the Player, shall be competent for their resolution the bodies of HEBA, the relevant committees for the resolution of financial disputes or the bodies of FIBA (FAT) as described below:*
>
> *Any dispute arising from or related to the present contract (the pretyped contract and this addendum) shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT 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. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private*

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

International Law. The arbitrator and CAS shall decide the dispute ex aequo et bono."

41. The Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

42. With respect to substantive validity, the Arbitrator notes that the Respondent in its Rejoinder no longer challenged the jurisdiction of BAT in the present matter and that its previous objection as to the jurisdiction *ratione materiae* of the BAT was *"dropped".*

43. In view of all the above, the Arbitrator holds that he has jurisdiction to decide the matter in dispute.

6. Applicable Law

44. 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 reads as follows:

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

45. 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."

46. Clause 9 of the Contract provides in relation to the applicable law as follows:

> *"09. GOVERNING LAW. This Agreement shall be governed by the laws of Greece and shall be interpreted and enforced in accordance with the Laws of Greece, the provisions of HEBA and the provisions of FIBA.*
>
> *[…]*
>
> *The arbitrator and CAS shall decide the dispute ex aequo et bono."*

47. The reference to "ex aequo et bono" on the one hand and to "the laws of Greece" on the other hand is – at first sight – somewhat contradictory. The Arbitrator holds, however, that the contents of the mission conferred upon him by the Parties to the Contract derive first and foremost from the part of Clause 9 which is directly addressed to him, i.e. that part of the clause which says that the Arbitrator "*shall decide the dispute ex aequo et bono*". This interpretation does not deprive the reference to "the laws of Greece" of any meaning. According to Clause 9 the competence of the Arbitrator in relation to potential disputes arising out of the Contract is restricted. The provision limits the jurisdiction of the Arbitrator "exclusively" to "financial disputes that may arise out of the terms [the Contract]". Hence, the reference to the "laws of Greece" remains applicable whenever an institution/adjudicating body – other than the BAT – is called upon to interpret or enforce the provisions of the Contract. To sum up, therefore, the Arbitrator holds that the Parties agreed on BAT arbitration and the respective set of rules applicable to BAT proceedings, including the concept of ex aequo et bono. This is evidenced by the part of Clause 9 of the Contract in which the powers of the Arbitrator are addressed, i.e. to determine the Parties' "dispute ex aequo et bono".

48. Consequently, the Arbitrator will decide the present matter ex aequo et bono.

49. 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'arbitrage of 1969[2] (Concordat),[3] under

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[2] That is the Swiss statute that governed international and domestic arbitration before the enactment of the

which Swiss courts have held that "arbitrage en équité" is fundamentally different from "arbitrage 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."*[4]

50. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

> *"the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand".*[5]

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

7. Findings

52. The Claimants request payment of damages and agent fees in a total amount of USD 618,000 plus interest.

53. The main issues for the Arbitrator to decide are the following:

a) Are the Claimants' requests inadmissible due to the "Verwirkung" principle?

PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

3 KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 187 PILA N 289.

4 JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

5 POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

b) Is Claimant 1 entitled to damages in the amount of USD 550,000?

c) Is Claimant 2 entitled to agent fees in the amount of USD 68,000?

7.1 Are the Claimants' requests inadmissible due to the "Verwirkung" principle?

54. The Respondent submits that the Claimants are estopped from invoking their rights in these judicial proceedings. Their claims should be declared inadmissible due to the "Verwirkung" principle.

55. The Arbitrator acknowledges that there are widespread differences in the various legal systems in relation to the legal nature of the concept of "Verwirkung".[6] While some legal systems derive the principle of "Verwirkung" from the prohibition of an unlawful exercise of a right and, thus, qualify the principle as a matter of substantive law, other legal systems consider the "Verwirkung" principle to be a tacit waiver of the right to assert, or a procedural prohibition of asserting the claim in question.[7] That said, the question of which legal qualification is to be followed, can be left unanswered here, since the Arbitrator holds that the prerequisites of the principle of "Verwirkung" are not fulfilled in the case at hand.

56. The principle of "Verwirkung" requires that the creditor has failed during a significant period of time to exercise his right. Further to this objective criterion the principle of "Verwirkung" requires that the debtor had reasonable grounds to rely on the assumption that the creditor would not avail himself of his right or claim in the future.

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6 KEGEL/SCHURIG, Internationales Privatrecht, 9th edition 2004, § 17 VI 1; NAGEL/GOTTWALD, Internationales Zivilprozessrecht, 6th edition 2007, § 5 margin nos. 42 *et seq*.

7 MünchKommBGB-SPELLENBERGER, 4th edition 2006, Art. 32 EGBGB margin no. 125.

57. Regarding the “significant period of time”, in general a stringent standard has to be applied. In an environment in which contracts are rather short-lived and players move quickly from one club to the other, the period of one year could - in principle - be seen as a limit. Accordingly, a party to the contract that does not avail itself of a right or claim for a period of one year after the end of the contract could be perceived by the other contracting party as having accepted the status quo. In any event, the individual circumstances of each case will have to be taken into account.

58. In the case at hand, the Claimants submit that they had to wait until the end of the 2009-2010 season in order to be able to assess and calculate the damage suffered. This argument, though, is not convincing because Claimants knew the amount of the Player's salaries with the new club well in advance, i.e. at the signing of the new contract and were, thus, able to assess the damage. Irrespective of Claimants’ arguments, however, the Arbitrator is of the view that the objective prerequisites of the "Verwirkung" principle are not fulfilled. In the case at hand the Request for Arbitration was received by the BAT Secretariat on 16 July 2010 and therefore less than a year after the Player’s medical examination on 28 and 29 July 2009. In addition, correspondence has been exchanged between the Parties after the medical examination was performed. On 1 September 2009 the Agent announced that he and the Player would file a claim before the BAT. Therefore, the time period of inaction which forms the basis of the Respondent’s “Verwirkung” objection is shorter than one year and thus not long enough to justify the application of such principle against the Claimants.

59. Furthermore, the Arbitrator is of the view that the second prerequisite of the "Verwirkung" principle is also not fulfilled in the case at hand. In its Rejoinder (margin no. 12) the Club submitted that it had planned its budget and marketing strategy for the 2010-2011 season in reliance upon the Claimants’ continued inaction. However, in view of the last correspondence between the Parties on 1 September 2009, i.e. the Agent’s email to the Club, the Arbitrator holds that the Club could not reasonably have

interpreted the Claimants' silence as an acceptance of the status quo. Indeed, the last sentence of said email unambiguously states that:

> *"This is no longer an issue for you and I to discuss rather to be handled by FAT."*(sic)

60. In view of all of the above, the Arbitrator holds that there is no room for the "Verwirkung" principle to apply to the claims at hand.

7.2 Is Claimant 1 entitled to damages in the amount of USD 550,000?

61. Claimant 1 requests payment in the amount of USD 550,000 for damage caused by the Respondent.

62. It is undisputed between the parties that the Contract was no longer effective after the email of the Club's General Manager dated 12 August 2009. However, the Parties differ in their views for the time period before that date. While Claimants submit that the Contract was terminated by the Respondent on 12 August 2009 and, hence, was effective before that date, the Respondent submits that in view of Clause 6 of the Contract the latter never became binding upon the Parties.

63. As a first step, the Arbitrator will assess the legal nature of Clause 6 of the Contract, i.e. whether the said clause must be qualified as a "condition precedent" or a termination option (i). The Arbitrator will then assess whether the conditions of Clause 6 of the Contract are fulfilled or not, i.e. whether or not the Player failed to pass the medical examination (ii). Finally, the Arbitrator will assess whether or not the Club breached a duty of care or good faith in respect of the Player (iii).

(i) Is Clause 6 of the Contract a "condition precedent"?

64. Clause 6 of the Contract reads as follows:

> *"6. MEDICAL EXAMINATION. Parties agree that Player's medical/physical exams and doping control will be administrated and fully completed immediately upon Player's arrival in Greece and prior to the Player participating in any practice of the Club. Player will be notified of the results of the exam within 72 hours.*
>
> *If examination is not completed within the first 72 hours after arrival, it is understood that Club declines right to complete such exams but the Club obligations shall continue.*
>
> *Only in the event that the Player passes successfully the medical/physical exams and the doping control, this contract shall be in full force and effect."*

65. The last sentence of Clause 6 clearly states that the Contract shall (only) be effective if the Player successfully passes the medical examination. The latter took place on 28 and 29 July 2009. The clear wording of Clause 6 indicates that the Parties wanted the passing of the medical examination to be a prerequisite for the validity of the Contract. Therefore, the clause must be interpreted as a condition precedent. If the Parties had intended the clause to be a termination option only, they would have adopted a wording similar to Clause 12 of the Contract. Hence, the different wording used by the Parties in Clause 6 and 12 of the Contract is a clear indication that Clause 6 must be interpreted as a condition precedent.

66. This legal qualification of Clause 6 of the Contract is further backed by the BAT jurisprudence. In FAT 0066/09[8] a clause providing for a medical examination was considered a condition precedent to the validity of a player's contract and a legitimate means to protect the club's interests. The relevant parts of that Arbitral Award read as follows:

[8] FAT 0066/09, Albert vs AEP Olimpias Patron, Arbitral Award dated 27 May 2010.

> *"78. Good health and playing condition is an essential basis of every player's contract, even if such condition is not explicitly mentioned in the player's contract itself. The employer may rely on the expectation that a new player can be fielded according to the information provided by the player about his health prior to the signing of the contract and the needs of the team. It is the primary duty of any new player to disclose to the employer, prior to the signing of a player's contract, any pre-existing medical condition which would prevent him from fulfilling his contractual obligations and playing with the team as provided by the agreement. If a new player is hiding a pre-existing medical condition, he is deceiving the employer and the employment agreement lacks of an essential condition. Under such circumstances and subject to the terms of the employment agreement, the employer may step down from the contract if such withdrawal is communicated in a timely manner.*
>
> *[..]*
>
> *81. Considering that it is customary for professional sports clubs to check the health of new players and to engage them only if such medical examination does not reveal any pre-existing medical condition the Arbitrator finds the above-mentioned reference to constitute a sufficient proviso which entitled the Club (a) to request the Player to undergo a medical exam and (b) to withdraw from the Contract if there were objective and comprehensible medical reasons not to engage the Player. […]"*

67. In view of all of the above, Clause 6 of the Contract has to be interpreted as a condition precedent and not as a termination option.

(ii) <u>Has the Player failed the medical examination?</u>

68. The Contract does not expressly stipulate the standards and terms according to which the medical examination is to be deemed successful or not. Thus, in the absence of an express agreement by the Parties the relevant terms and standards have to be determined by taking into account the interests of the Parties and the general practice and customs of the relevant business sector.

69. In line with BAT jurisprudence (Arbitral Award in FAT 0066/09) the Arbitrator finds that a club must rely upon "objective and comprehensible medical reasons" in order not to

engage the player it contracted. The relevant part of that Arbitral Award reads as follows:

> *"79. The employer may also provide for medical exams to find out more about the health of the new player. Such medical examination may lead the employer to the conclusion that the new player was not fit for playing with the team in which case the employer is entitled not to accept the player. However, the medical exam must result in objective and comprehensible medical reasons for the employer not to engage a new player. The fact that a new player may be subject to medical exams is not a free pass for the employer to withdraw from a signed contract."*

70. The aforementioned test (objective and comprehensible reasons) must also be applied in the case at hand. Therefore, the question is: would a reasonable person find that the Player passed the medical examination or not?

71. The medical examination took place on 28 and 29 July 2009 and was initiated right after the Player's arrival in Greece. After the first two tests (clinical examination and MRIs) the Team Doctor - in his written report dated 30 July 2009 - diagnosed […] and the need for surgery. The Team Doctor based his diagnosis on the MRI findings.

72. Moreover, the Respondent submitted an affidavit by the Team Doctor (Exhibit 7 to the Answer) evidencing that the Player was in pain in the […] area during the examination. The Team Doctor's statement on page 3 of his affidavit reads as follows:

> *"Starting the clinical evaluation and studying the athlete's history there were no reports related to […] pain. However, in performing our scheduled dynamic tests […]* ***pain […] was revealed.***
>
> *Discussing this symptom the athlete told us that he was suffering from […] pain since 1,5 year ago, periodically, during his sports activities and sometimes the pain was intense. He also supported that this was the main reason for changing the way he was shooting the ball […]."*(sic)

73. On page 6 of his affidavit, the Team Doctor repeated that the Player had been suffering […] pain during the medical examination and that this had been witnessed by two other

persons of his medical team, Dr. Leon and Dr. Tournakis. The Claimants did not object to these statements of the Team Doctor and therefore the fact that the Player was in actual pain during the examination remains undisputed. Furthermore, the Claimants acknowledged in their Request (page 2) that the Player first felt minimal discomfort in his […] area in June 2007.

74. The fact that the Player had some medical problems in the […] area is also evidenced by some other medical experts that have examined the Player or reviewed the documents and MRI scans. In this context reference is made to:

- Medical report of Dr. Lachanis, the radiologist who executed the MRI scanning during the medical examination, dated 29 July 2009 (Exhibit 4 to the Answer):

  […]

- Second part of the examination report, issued by Dr. Leon on 1 August 2009 (Exhibit 8 to the Answer):

  "Conclusion

  This athlete has good physique profile but due to probable past intense game obligations in conjunction with inadequate […] rehabilitation/healing from an accident, he has […]"

- Medical opinion of Dr. Garnett, dated 10 August 2009 and submitted by the Claimants (Request's exhibit 6):

  "IMPRESSION: […]

  DISCUSSION: The anatomy of the area and the nature of […] was explained to the patient. [...]"

- Medical opinion of Dr. Chebli, dated 13 August 2009 and submitted by the Claimants (Exhibit 9 to the Request):

  "IMPRESSION:

[…] not encumbering his activities."

- Medical opinion of Dr. Tsikouris, dated 7 November 2010 and submitted by the Respondent (Exhibit 15 to the Answer):

  […]

- Medical opinion of Prof. Dr. Meyers, dated 10 November 2010 and submitted by the Respondent (Exhibit 16 to the Answer):

  "Based on my review of the history, physical examination, MRI, and corresponding reports given to me, Thomas Kelati's symptoms do appear to be consistent with [...]."

75. Two physicians that have examined the Player, however, did not diagnose any medical problems regarding the Player's […]. This is true for Dr. Moe, team physician of the NBA club Los Angeles Lakers who had examined the Player on 27 September 2009, and Dr. Pons, the team doctor of the Spanish club Valencia Basket Club S.A.D who had examined the Player on 5 November 2009. It cannot be followed from these two examinations that the Team Doctor did not apply the required objective standard when drawing up his report. Dr. Moe and Dr. Pons examined the Player two or more months after the Respondent performed its medical examination. The relevant key date to assess whether or not the Club applied an objective standard when conducting the medical examination is, however, the end of July (28 and 29 July) 2009. Any examinations at a later stage and / or the engagement of the Player by other clubs are not - as such - corroborating evidence that the Team Doctor erred at the time when issuing his medical report.[9]

76. To sum up, therefore, the Arbitrator accepts that at the moment of the medical

[9] See FAT 0039/09, Capin vs Azovmash Mariupol Baskteball Club, Arbitral Award dated 17 August 2009.

examination on 28 and 29 July 2009 the Player suffered from some kind of medical problems in his […] area. Furthermore, these problems had an impact on the Player's physical activity. This is confirmed by the Player's undisputed statement that he had changed his way of shooting the ball due to […] pain since one and a half years before the medical examination. In addition, it is not disputed that the Team Doctor had the necessary experience and skills to examine the Player, to issue a diagnosis and to recommend a certain treatment. Finally, it is not disputed that the Team Doctor applied techniques designed to detect […]. It is disputed between the Parties, however, whether the medical problem was severe enough for the Club's conclusion that the Player failed the medical examination. The latter would be undoubtedly true if the Player needed surgery as a consequence of his medical problem. The various experts that acknowledged a medical problem of the Player differed in their view on how the Player should be treated. Some of the experts recommended surgery (besides the Team Doctor, this was recommended by the medical experts Dr. Tsikouris and Prof. Dr. Meyers). Other experts rather advised conservative treatment (e.g. Dr. Chebli). Whether or not surgery was needed to treat the problem, is the result of a difficult evaluation. This follows from the expert opinion of Dr. Garnett, whose medical opinion was submitted by the Claimants. Dr. Garnett stated in his report – *inter alia*:

> *"[...] Surgery is entirely elective. The surgery is indicated if there is pain that is difficult to control, pain that requires significant medication, or if there is limitation in physical activity. The surgery is not required simply because there is a change on an MRI scan. [...]"*

77. Evaluating the impact of the medical problem on the Player's physical ability and assessing the need for surgery necessarily implies a certain margin of appreciation. This margin of appreciation - in the case at hand - should not be interpreted too narrowly. This follows from the terms of the Contract. First of all the Contact provided only for a short timeframe to conduct the medical examinations on the Player and to submit the diagnosis. Since the Contract was a so-called guaranteed contract the Team Doctor had to assess the impact of the Player's medical problem not only for the

upcoming weeks but for the whole term of the Contract (in the present case for two years). In addition, it must be noted that the prognosis by the Team Doctor had vast economic impacts on the Club, since the value of the Contract was more than USD 1,800,000 and the Contract did not foresee the possibility of termination for medical reasons. In view of the above the Arbitrator holds that the medical examination must be deemed failed not only if it is established that the Player needed surgery. Rather the standard must be lowered to the point where the medical examination is deemed failed if there is a certain risk that the Player will need surgery in view of his medical problem.

78. Considering all of the above the Arbitrator concludes that the Club did not trespass its margin of discretion in the case at hand. There is no indication that the Team Doctor or the other medical experts of his team had any personal issues with the Player, that the medical examination of the Player was not conducted in good faith, that the Team Doctor was not apt or skilled to examine the Player or that he did not apply reasonable techniques and standards when examining him. Furthermore, the Arbitrator holds that – on the key date – there was a certain risk that the Player would need surgery to treat his medical condition. Thus, the Club's decision that the Player failed to pass the medical examination must be considered in line with the applicable objective standard.

(iii) Has the Club breached any duties towards the Player?

79. The Claimants submit that the Respondent retained the Player's rights for two weeks by *"keeping him off the market for other potential teams to sign him"*. As a result, the Player allegedly suffered irreparable harm because he had turned down several other offers in order to contract with the Club.

80. According to Clause 6 para. 1 of the Contract, the Club was obliged to inform the Player about the results of the medical examination within 72 hours. Clause 6 para. 2 of

the Contract further provides:

> *"If examination is not completed within the first 72 hours after arrival, it is understood that Club declines right to complete such exams but the Club obligations shall continue."*

81. On 31 July 2009 the Club's General Manager sent an email to the Player's representative. According to Clause 6 of the Contract, the 72-hours time limit started with the Player's arrival at the Club. Considering the Parties' submissions, the Player's arrival was on 28 July 2009. As the email of the Club's General Manager was sent and received on 31 July 2009 at 9:08 (at least nothing to the contrary has been submitted by the parties), the Arbitrator holds that the email was received by the Player within the 72-hours time limit stipulated in Clause 6 of the Contract.

82. It is questionable – at least at first sight – whether or not the email sufficiently informed the Player about the results of the medical examination. On the one hand, the email by the Club stated: *"We regret to advise you that, as mentioned in detail in the aforesaid medical note, the medical results are considered unacceptable since the athlete is in an unsatisfactory health condition. Therefore we are of the opinion that there is a breach from the side of the athlete of clause 6 of the Standard Player/Club Contract dated July 17, 2009."* On the other hand, the Club did not expressly refer to the consequences of Clause 6 of the Contract, but stated as follows: *"The matter is currently under further deep consideration by the administration, the coach and the technical team as well as the medical team of the Club. Taken into account the above, we reserve all our rights as stipulated by the relevant contract and governing law, including termination of the contract."*

83. The Contract contains no requirements as to form and contents in respect of the letter advising the Player of the results of the medical examination. Therefore, the email by the Club has to be interpreted according to general principles. The Arbitrator notes that the Club expressly stated that the Player's medical results were "unacceptable" and

that the Player was in an "unsatisfactory health condition". The wording "unacceptable" clearly shows that at the moment of this statement, i.e. 31 July 2009, the Player did not successfully pass the medical examination. Furthermore, the Club expressly refers in its email to Clause 6 of the Contract. In addition, it states that – in view of the results of the medical examination – it reserves all its rights according to the Contract. The Arbitrator, therefore, holds that the Club's email must be understood as a notice that, due to the unsatisfactory results of the medical examination, the Contract has no binding force. The fact that the Club also reserved its rights to terminate the Contract does not affect the aforementioned findings.

84. However, the Club's email dated 31 July 2009 also contained an "option" that the Club would – under certain conditions, i.e. depending on the results of further medical examinations – engage the Player even though he failed to pass the (initial) medical examination. The exercising of this option was, however, at the Club's discretion. Nevertheless, in view of the legal relationship the Parties entered into by negotiations, the Club had a duty to act in good faith when exercising its option and, in particular, to take due care of the Player's interests. It follows from this that the Club had to exercise the option in due time and inform the Player as soon as it had taken its final decision to contract him or not. The Club informed the Player of its decision not to exercise the option in an email dated 12 August 2009. The fact that the Club waited until 12 August 2009 in order to inform the Player of its definitive decision not to contract him does not constitute a breach of good faith. The Club had objective reasons to wait with a definitive declaration whether or not to exercise the option and did not act arbitrarily. In particular, the Arbitrator finds that a period of less than two weeks to decide whether or not to exercise such option is reasonable. This is all the more true in view of the important financial consequences of the decision. Furthermore, the Claimant did not urge the Club to exercise the option at an earlier point in time. Only in his email dated 12 August 2009 the Player (or Agent) requested the Club to clarify the issue of the Contract *("[…] but if you do not intend on him being on the roster, then please inform us without further delay.")*. About four hours later the Club sent its email with the definitive

statement not to contract the Player.

85. Consequently, the Arbitrator finds that the Club did not breach principles of good faith or a duty of care and that the Player, therefore, is not entitled to damages or other payments by the Club.

7.3 Is Claimant 2 entitled to agent fees in the amount of USD 68,000?

86. Claimant 2 requests payment of USD 68,000 as outstanding agent fees according to Clause 11 of the Contract. Clause 11 reads in this respect as follows:

> *"11. AGENT FEE. Club agrees that as a material term of this Contract it shall pay the Player's agent, David Maravilla and Josef Kalergis, a fee in compensation for negotiating the Contract between the Player and the Club which fee shall be in United States Dollars and be net of all Greek taxes. The 2009-2010 season's fee shall be eighty thousand USD (80.000) and shall be paid by October 15th, 2009. Only in the event that the Player continue to play for the Club for the 2010-2011 season, the 2010-2011 service fee shall be one hundred thousand USD (100.000) and shall be paid by October 15th, 2010. The fee shall be wire transferred to the bank account by Mr. David Maravilla."*

87. Clause 11 of the Contract states that the agent fee is a compensation for negotiating the Contract. However, the invalidity of the Contract due to the Player's failure to successfully pass the medical examination is a condition precedent not only to the obligations of the Club and the Player, but for the Contract as such. Therefore, the failure to pass the medical examination affects also the Club's obligation to pay an agent fee. The first sentence of Clause 11 clearly states that the payment of the agent fee is a material term of the Contract. If, however, the Contract has not become binding upon the Parties pursuant to Clause 6 of the Contract, no obligation of the Club could arise from the Contract in relation to Claimant 2. Thus, the Arbitrator finds that Claimant 2 is not entitled to the payment of USD 68,000.

7.4 Summary

88. The Claimants are not barred by the "Verwirkung" principle from filing a claim with BAT. However, their claims must be dismissed in the case at hand, because Clause 6 of the Contract is a "condition precedent", the Player failed to pass the medical examination and was advised of the medical findings in due time. Since the Contract never became binding upon the Parties, neither Claimant 1 nor Claimant 2 are entitled to any payments under the Contract.

8. Costs

89. 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 legal fees and expenses incurred in connection with the proceedings.

90. On 4 April 2011 – 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 10,000.00

91. Considering that the Claimants' claims were dismissed and that the financial situation of the Parties does not compel otherwise, the Arbitrator holds that the fees and costs of

this arbitration be borne by the Claimants and that they be required to cover their own legal costs as well as those of the Respondent, the latter being reasonable in amount and not disputed by the Claimants.

92. Given that the Parties each paid their shares of the advance on costs for a total amount of EUR 10,000.00, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

a. The Claimants shall jointly reimburse EUR 5,000.00 to the Respondent as a reimbursement of the advance on costs paid by it to the BAT.

b. The Claimants shall pay EUR 15,000.00 to the Respondent, representing the amount of its legal fees and other expenses.

9. AWARD

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

1. **The claims of Mr. Thomas Kelati and Mr. David Maravilla against Olympiacos Piraeus B.C. are dismissed in their entirety.**

2. **Mr. Thomas Kelati and Mr. David Maravilla shall jointly pay to Olympiacos Piraeus B.C. an amount of EUR 5,000.00 as a reimbursement of the advance on costs paid by it to the BAT.**

3. **Mr. Thomas Kelati and Mr. David Maravilla shall jointly pay to Olympiacos Piraeus B.C. an amount of EUR 15,000.00 as a reimbursement of its legal fees and expenses.**

4. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 12 April 2011

Ulrich Haas
(Arbitrator)