BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0121/10)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Lawrence E. Roberts III

- Claimant -

vs.

KAE Olympiacos S.F.P.

Mr. Konstantinos Papadakis

- Respondents -

1. The Parties

1.1. The Claimant

1. Mr. Lawrence E. Roberts III (“Claimant” or "the Player") is a professional basketball player. He is represented in this Arbitration by Mr. Craig W. Budner and Mr. Casey P. Kaplan of K&L Gates LLP, 1717 Main Street, Suite 2800, Dallas, Texas 75208, USA.

1.2. The Respondents

2. KAE Olympiacos S.F.P. (“Respondent 1”) is a professional basketball club. It is represented in this Arbitration by Prof. Massimo Coccia and Mr. Mario Vigna of Coccia De Angelis & Associati, Piazza Adriana 15, I-00193 Rome, Italy. It is also represented in this Arbitration by the lawyers Dimitris Prassos and George Prassos in Greece.

3. Mr. Konstantinos Papadakis (“Respondent 2”) is a basketball agent. He is represented in this Arbitration by Mr. Sofoklis P. Pilavios, 29 Irodotou str., Athens 10673, Greece.

2. The Arbitrator

4. On 20 September 2010, the President of the Basketball Arbitral Tribunal (the "BAT") appointed Mr. Klaus Reichert SC 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. The Proceedings before the BAT – Background Facts

5. This summary of the Proceedings before the BAT will not record every single item of procedural correspondence between the Parties as regards extensions of time for the filing of documents or pleadings.

6. Claimant filed a Request for Arbitration dated 25 August 2010 in accordance with the BAT Rules and paid the non-reimbursable handling fee of EUR 6,983.50. The Request for Arbitration named, in addition to the Respondents, a further respondent, namely First Class Management (or "FCM") which was stated to be an entity formed under the laws of Greece. By letter dated 9 November 2010 Claimant stated that he "dismisses without prejudice" all claims against First Class Management on foot of a representation in an email dated 20 October 2010 from Mr. Pilavios that it was "a non-existent entity". No further consideration will be given to First Class Management in this Award save when recording the payments of the Advance on Costs below.

7. The Request for Arbitration sought (section VII) the following relief as against the Respondents (without distinction as between them both):

- Remaining Salary Due for the 2007/2008 Season: USD 990,000.00;

- Entire Salary Due for the 2008/2009 Season: USD 1,750,000.00;

- The cash value of all amenities and benefits listed in Clause 3 of the Agreement to be determined by the Arbitrator, including: four business class and 3 economy class airline tickets between Athens and the United States; the use of a large, luxurious automobile not older than two years, in excellent condition for the full term of the Agreement; the use of a fully furnished, high level, luxurious house or apartment for the full term of the Agreement; and health and dental insurance for the full term of the Agreement;

- Pre- and post-award interest at a rate of five percent (5%) per annum, on the entire salary amount due (USD2,740,000.00);

- Reasonable attorney's fees, an amount of which to be determined at or near the time of decision by the Arbitrator; and

- All costs of the arbitration, including advance on costs for filing the arbitration and expenses incurred in preparing for and attending the hearing.

8. The Request for Arbitration also requested a hearing (section VIII) though at a later time the Parties all, following an enquiry from the Arbitrator, expressly decided not to have a hearing.

9. Accompanying the Request for Arbitration were the following documents:

- An Affidavit of Claimant;

- An Affidavit of Eric Fleisher (a person stated to be the Agent of Claimant);

- The "Standard Player's Contract" dated 4 July 2007 ("the Agreement");

- Power of Attorney/Authorization dated 5 October 2007;

- Agreement of Termination of Contract for the Provision of Athletic Services dated 8 October 2007; and

- A print-out of a news item from Euroleague Basketball dated 4 October 2007.

10. On 23 September 2010, the BAT informed the Parties that Mr. Klaus Reichert SC 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. Roberts)	*EUR 12,000*
Respondent 1 (Olympiacos BC)	*EUR 4,000*
Respondent 2 (FCM)	*EUR 4,000*
Respondent 3 (Mr. Papadakis)	*EUR 4,000"*

11. In light of the letter from Claimant dated 9 November 2010 concerning First Class Management, the sums above were varied and ultimately the following amounts were paid:

- Claimant – EUR 12,000.00 on 4 october 2010;

- Respondent 1 – EUR 6,000.00 on 15 October (4,000) and 18 November (2,000) 2010; and

- Respondent 2 – EUR 6,000.00 on 22 October (2,000) and 25 November (4,000) 2010.

12. On 6 December 2010, Respondent 1 submitted its Answer. In addition to various other matters by way of defence, the Answer raised two preliminary issues: (a) inadmissibility due to the "Verwirkung" principle; and (b) jurisdiction.

13. Accompanying the Answer of Respondent 1 were the following documents:

- HEBA Contract no. 0032 of 1 September 2007;

- Addendum Financial Terms;

- A document showing a conversion rate from Euro to USD;

- Email dated 4 October 2007 from Respondent 1 to Respondent 2;
- Power of Attorney/Authorization (which had already been exhibited by Claimant);
- Three print-outs of internet pages concerning Claimant and his engagement by other clubs;
- A document, in the Greek language, stated to be an interview with Claimant dated 27 January 2010;
- Ministerial Decision 144w/2001 (in Greek and English); and
- An Affidavit of Mr. Christos Stavropoulos – the General Manager of Respondent 1.

14. On 3 December 2010, Respondent 2 submitted his Answer. In addition to various other matters by way of defence, the Answer raised a preliminary issue, namely jurisdiction.

15. Accompanying the Answer of Respondent 2 were the following documents:

- The "Standard Player's Contract" dated 4 July 2007;
- HEBA Contract no. 0032 of 1 September 2007;
- Power of Attorney/Authorization (which had already been exhibited by Claimant);
- SWIFT document confirming payment of USD 110,000.00 to Claimant;
- Agreement of Termination of Contract for the Provision of Athletic Services dated 8 October 2007;
- Interview of Claimant by a Greek journalist published on 28 January 2010;

- Table of NBA Salaries;
- Agreement between Respondent 1, Mr. Fleisher and Respondent 2;
- Articles of the Greek Civil Code;
- Witness Statement of Mr. Politis; and
- Witness Statement of Respondent 2.

16. By Procedural Order of 22 December 2010, the Parties were informed that Claimant had a right to comment on the Answer by no later than 21 January 2011. Claimant did so on 3 February 2011. His Reply to the Answers of the Respondents was accompanied by the following documents:

- Supplemental Affidavit of Eric Fleisher;
- Email from Eric Fleisher to Respondent 2 dated 3 October 2007;
- Contract between Claimant and Red Star Belgrade;
- FAT decision 77/10; and
- FAT decision 57/09.

17. On 14 February 2011 Respondents were informed that they had the right to comment on Claimant's Reply by no later than 25 February 2011.

18. Respondent 1 delivered its Rejoinder on 15 March 2011. Accompanying that Rejoinder were the following documents:

- Emails from/to Mr. Fleisher and Mr. Stavropoulos; and

- Affidavit of Mr. Stavropoulos.

19. Respondent 2 delivered his Comments on 15 March 2011. Accompanying that document were the following :

- Witness Statement of Respondent 2;

- Email of 3 October 2007 and forwarding emails thereof; and

- Article 6, paragraph 2 of Law 3198/1955.

20. 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.

21. By letter dated 12 April 2011, the Parties were asked as follows:

> *"Having reviewed the Parties' submissions to date, the Arbitrator requests the Parties to inform BAT by no later than **Monday, 18 April 2011** whether a hearing is still desired or if they are content for the Arbitrator to render an award on the evidence as it now stands. If none of the Parties replies within the said time limit, the Arbitrator will assume that no hearing is desired."*

By email of 15 April 2011, Respondent 2 confirmed that he did not request a hearing. By letter of 18 April 2011, Claimant confirmed that he did not request a hearing and withdrew such earlier request as was articulated in the Request for Arbitration. By email dated 18 April 2011, Respondent 1 confirmed that it believed that a hearing "is not strictly necessary".

22. By Procedural Order of 18 April 2011 the Parties were informed that the exchange of documents was completed (as per Article 12.1 of the BAT Rules) and asked for a detailed account of their respective costs by 27 April 2011.

23. Claimant filed an account of costs on 27 April 2011. Respondent 1 filed an account of costs on 27 April 2011. Respondent 2 filed an account of costs on 28 April 2011.

24. The Parties were afforded the opportunity to comment on the costs of the others.

25. By email dated 3 May 2011, Claimant stated as follows:

> *"Claimant maintains that he has been financially damaged by the actions of Respondents and that they are not entitled to any fees, whether a partial or full recovery is awarded to Claimant. However, it does appear that the amounts requested by Respondents accurately reflect both the work done by their attorneys and the costs incurred by each party. Therefore, Claimant does not challenge the reasonableness of the amounts requested but does, again, assert that neither Respondent is entitled to any fees based on the facts of the case currently before the Basketball Arbitral Tribunal."*

26. By email dated 5 May 2011, Respondent 1 stated as follows:

> *"We usually do not comment on the legal costs requested by the other party's counsel but, in this case, we cannot help noting that the Claimant's counsel's legal costs (i.e. both fees and expenses) appear to be excessive and disproportionate in relation to a relatively simple case, where each party only provided two briefs, no hearing was held and Claimant exhibited written testimony of only one witness (Mr Fleischer). The comparison with the much lower amounts requested by both Respondents' attorneys is striking.*
>
> *Art. 17.3 of the BAT Rules provides as follows in the relevant part: "As a general rule, the award shall grant the prevailing party a contribution towards its reasonable legal fees and other expenses incurred in connection with the proceedings". Therefore, the fees and costs must be "reasonable"; in our opinion, with all due respect for our esteemed US colleagues, from a Swiss perspective – Switzerland being the country where BAT arbitrations are legally held (art. 2.1 of the BAT rules) – the fees and costs set forth by the Claimant's counsel do not comply with the requirement of reasonableness.*
>
> *In any event, we leave it to the discretion of the Arbitrator to evaluate whether the legal costs requested by each party are reasonable. Should he determine (quod non!) that Olympiacos must contribute in some way to the Claimant's legal costs, we ask that the Arbitrator considerably reduce such costs in accordance with the quoted art. 17.3 of the BAT Rules, which only provides that a "contribution towards" (and not the totality of)*

reasonable legal fees and other expenses incurred are to be be (sic) granted.

27. Respondent 2 made no comment as regards the costs of the others.

28. The basic background facts to this dispute are relatively straightforward. Claimant joined Respondent 1 as a professional player by means of the Agreement of 4 July 2007. Respondent 2 and Eric Fleisher (already referred to in this Award) were Claimant's Agents. The engagement of Claimant was for two seasons. Claimant's net salary for the first season was USD 1,500,000.00. Claimant's net salary for the second season was USD 1,750,000.00. In early October 2007 Respondent 1 decided that Claimant was not to continue as part of its team. Respondent 2 visited Claimant on 5 October 2007. On that date Claimant signed a Power of Attorney in favour to Respondent 2 to act on his behalf in relation to Respondent 1. By an agreement of 8 October 2007 headed "Agreement of Termination of Contract for the Provision of Athletic Services", signed by Respondent 1 and Respondent 2 (stated to be on behalf of Claimant), Claimant and Respondent 1 parted company.

4. The jurisdiction of the BAT

29. 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).

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

31. 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]. The financial nature of the dispute is clear from the relief claimed by Claimant as set out in paragraph 7 of this Award.

32. The jurisdiction of the BAT, as invoked by Claimant, over the dispute results from the arbitration clause contained in Article 12 of the Agreement, which reads as follows:

> *"This Agreement will be executed under the official rules of the law in Greece. Any disputes arising with respect to or in connection with this Agreement shall be submitted to the Committee for Financial Disputes of the Greek League in A and B degree. The relevant award shall be final and binding for both parties without recourse or appeal to any Court. The party which will fail to prevail in such a legal action shall pay all costs, expenses, and reasonable fees of the attorneys of the prevailing party.*
>
> *Any dispute arising [sic] or related to the present contract can also 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 International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

33. The reference to FAT is the name by which BAT was formerly known until the nomenclature was changed with effect from 1 April 2011.

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

35. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).

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

36. The arbitration clause affords a choice: either a dispute can be submitted to the Committee for Financial Disputes of the Greek League, or it can be submitted to BAT. Borrowing language from another sphere of arbitration, the arbitration clause in this matter appears to present a "fork in the road" to a claimant. When a dispute arises a claimant could decide to take one route or the other in order to have it adjudicated upon and the presence of two alternatives does not appear to the Arbitrator to present any difficulties in the sense of one trumping the other prior to an election being made as to which route to take.

37. In this matter, Claimant has elected to bring his dispute to BAT and therefore has elected to take the second route for dispute resolution articulated in Article 12 of the Agreement. It follows from that election that Claimant has foregone any right to go back to the fork in the road and take the matter down the first route, namely to the Committee for Financial Disputes of the Greek League.

38. For the above reasons, the Arbitrator has jurisdiction to adjudicate upon Claimant's claims subject to the discussion which takes place below given that certain objections were raised by the Respondents. Those objections are analysed below.

5. Discussion

5.1 Applicable Law – *ex aequo et bono*

39. 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".*

40. 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."*

41. Article 12 of the Agreement, as set out in paragraph 32 above provides that the Arbitrator shall decide the dispute *ex aequo et bono*. However, Article 13 of the Agreement provides that the "Agreement shall be governed by the law of Greece and the internal regulations of FIBA and ULEB." It further provides that "Agreement shall be interpreted and enforced in accordance with the Laws of Greece."

42. The resolution of how these clauses interact with one another is a matter of interpretation. First, Claimant has elected to take the BAT route which triggers an unambiguous mandate to the Arbitrator to decide the dispute *ex aequo et bono*. The alternative, found in Article 13 of the Agreement, set of governing principles (namely the Laws of Greece and the internal regulations of both FIBA and ULEB) is unclear as to how it could practically function. When confronted with an express and unambiguous mandate to decide a dispute *ex aequo et bono*, the Arbitrator finds it clear as a matter of interpretation that such mandate cannot be displaced by an unclear alternative.

43. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this Arbitration, again subject to the discussion which takes place below.

44. 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[2] (Concordat)[3], 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."*[4]

45. This is confirmed by Article 15.1 of the BAT Rules according to which the Arbitrator applies "general considerations of justice and fairness without reference to any particular national or international law".

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

5.2 Preliminary Issue raised by Respondent 2

47. It is necessary and appropriate to consider the jurisdiction and scope (as stated in such terms) issues raised by Respondent 2 at this stage. If Respondent 2's arguments are successful then these will dispose of the case as between Claimant and Respondent 2. Two points are advanced; first, that the Agreement has been replaced by a subsequent contract on 1 September 2007 and therefore the arbitration agreement is no longer in force; and, secondly, the scope of the arbitration agreement in the Agreement does not extend to Respondent 2, he was not a contracting party to the Agreement, and he never assumed any financial obligations to Claimant.

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2 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).

3 P.A. KARRER, Basler Kommentar, No. 289 ad Art. 187 PILA.

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

48. For present purposes, the Arbitrator will not address at first the objection raised that the Agreement has been supplanted by a subsequent agreement. It appears to the Arbitrator necessary to examine, in the first instance, the objections raised in relation to the Agreement. If any of those succeed then further consideration of the matter falls away.

49. As already set out in paragraph 7 of this Award, the relief sought by Claimant is articulated against both Respondents equally and without distinction. For the purposes of the objections raised by Respondent 2, it is necessary to state the following explicitly: Claimant seeks payment from Respondent 2 of all the unpaid salary and related benefits which were to be paid by Respondent 1 in return for his playing services.

50. Claimant states as follows (page 14 *et seq* of the Reply): "Jurisdiction of the FAT is also proper over [Respondent 2], individually, as a Party and signatory to the Player's Contract. [Respondent 2] argues that the Player's Contract 'does not extend to him, as he is not a contracting party to this agreement....'....[Respondent 2 Answer at 11]. However, Article 15 of the Player's Contract specifically read, 'This contract sets forth the entire agreement between Club and Player ***and the Agent*** of the Player'."

51. Claimant also says that the Agreement provided for monetary benefits by way of agency fees to be conferred upon Respondent 2. The Agreement also refers to "obligations and responsibilities of the Agents" regarding modifications thereto.

52. Claimant refers to the breadth of the arbitration agreement, namely "[A]ny dispute arising or related to the present contract…" and says that its broad and inclusive language covers the dispute as between Claimant and Respondent 2.

53. Respondent 2 counters again with a scope argument. He says that he only signed the Agreement in his capacity as an agent and that he never assumed any financial

obligation towards Claimant. This articulation of the position by Respondent 2 is important. It advances a merits argument which requires careful attention.

54. The Preamble to the Agreement states that it is between Respondent 1 and Claimant. Respondent 2 is referred to in the Preamble but only to the extent that Claimant's address is stated to be "c/o" both Mr. Fleisher and Respondent 2.

55. Article 2 of the Agreement provides for the payments to Claimant and these are plainly and unambiguously assumed by Respondent 1. There is no mention of Respondent 2 anywhere in Article 2. This is important as Claimant's principal (in terms of monetary value) claim for relief arises directly from this Article. This resonates with the argument on merits advanced by Respondent 2.

56. Article 3 of the Agreement sets out the amenities which Claimant was to enjoy (apartment, automobile *etc*). All of these were to be provided by Respondent 1 and no obligation as regards Respondent 2 can be found anywhere in the text of this Article.

57. Article 6 of the Agreement places a prohibition on any assignment, sale, resolution, breach or transfer without the express written consent of Claimant and Claimant's agents. This indicates that there is a right reposing with Respondent 2 to provide written consent as a prerequisite to an assignment *etc* of the Agreement.

58. Article 9 of the Agreement prohibits Respondent 1 from discussing a renewal in the future with Claimant without the express permission of Claimant's agents. Claimant also agreed to notify his agents (Mr. Fleisher and Respondent 2) in the event of an attempt by Respondent 1 to discuss future contract renewal. This Article indicates a right reposing in Respondent 2 to ensure that any future contractual discussions are conducted through him and Mr. Fleisher, and Claimant also takes on an obligation to notify them.

59. Article 15, which is headed "Entire Agreement", provides that the Agreement "sets forth the entire agreement between [Respondent 1] and [Claimant] and the Agent[s] of the Player and cannot be assigned, altered, sold, modified, breached or transferred to any other basketball club, except by an agreement in writing signed by [Respondent 1], [Claimant] and the Agents of [Claimant]. No oral or written inducements, promises or agreements are valid except as contained herein."

60. Finally, Article 17 of the Agreement provides that Respondent 1 shall pay agent's fees set at 10% of the salary of Claimant and expressly refers to a separate Agent Fee agreement.

61. The question may arise as to whether Respondent 2 is a party to the Agreement (and the arbitration agreement) for any purpose whatsoever, but it appears to the Arbitrator that such a question misses the mark. The issue is whether the arbitration agreement contained in the Agreement permits an adjudication by the Arbitrator of Claimant's claim as against Respondent 2. The foregoing paragraphs, which set out the salient features of the Agreement in this respect, lead the Arbitrator to the conclusion, in the specific circumstances of the Agreement, that Respondent 2 is a party to the arbitration agreement. Certain rights have been conferred upon Respondent 2 in the Agreement and to hold that he was not a party to the arbitration agreement for <u>any</u> purpose whatsoever would defeat the stated intentions of the Parties.

62. With the foregoing in mind, the Arbitrator moves to the objection on scope. This appears to be a merits argument which has the indicia of scope. However, if the argument is well-founded, then it will dispose, substantively of Claimant's claims as against Respondent 2.

63. Claimant's substantive claim against Respondent 2 is for sums which are stated to be payable by reason of Articles 2 and 3 of the Agreement. Of that there can be no doubt and no reading of the Agreement could lead to any other conclusion. No other part of

the Agreement triggers the payment obligations.

64. Respondent 2 takes on no burden or obligation pursuant to Articles 2 and 3 of the Agreement and these repose entirely upon Respondent 1. This conclusion is buttressed by the provisions of the Entire Agreement Article which makes it clear that "[N]o oral or written inducements, promises or agreements are valid except as contained herein." It is very clear that Claimant's entitlement to be paid the very sums he is claiming as against Respondent 2 was specifically agreed to be as against Respondent 1 only.

65. The inevitable conclusion to be drawn is that Claimant's substantive claim as against Respondent 2 cannot be supported by the terms of the Agreement. Claimant did not bargain with Respondent 2 to be paid these sums pursuant to the Agreement.

66. The Agreement does not make provision for what would be a quite separate arrangement, namely the rights and obligations as between Claimant and his Agents. The Agreement is what it is, namely a contract between a club and a player with the related provision for payment of agents' fees by the club. Claimant seeks to elevate the Entire Agreement Article as follows: "This contract sets forth the entire agreement between Club and Player ***and the Agent*** of the Player." This seems to suggest that any claim as between Claimant and his Agents is captured by the Agreement, however that is a misreading. The Agreement sets forth the entire agreement as regards the obligations: (a) as between Respondent 1 and Claimant; and (b) Respondent 1 and the Agents. The Arbitrator finds that this is a proper and just reading of the Article.

67. The conclusion which the Arbitrator has reached, therefore, is that Respondent 2 did not take on any obligation to pay Claimant salary or other benefits. That is a conclusion on the interpretation of the Agreement which comes within the Arbitrator's jurisdiction. Claimant's claims as against Respondent 2 are therefore dismissed.

68. By way of completeness it is necessary to examine one other aspect of Claimant's case as against Respondent 2. Claimant has asserted an allegation of fraud as against Respondent 2. Pages 16-17 of the Request for Arbitration set out the case in fraud, namely that Respondent 2 obtained a power of attorney under "false and fraudulent pretences." The critical argument made is that "[Respondent 2] never revealed to [Claimant] that his intention was to execute a unilateral and consideration-free release of all of [Respondent 1]'s financial obligations to [Claimant]. Instead, [Respondent 2] falsely represented to [Claimant] that he would seek to secure payment from [Respondent 1] of the remaining salary amounts due under the Agreement."

69. Claimant also alleged that Respondent 2 visited Claimant on 5 October 2007 at the behest of Respondent 1. This was the day when Claimant gave Respondent 2 a Power of Attorney. The foundation for the allegation that the visit of Respondent 2 to Claimant is stated to be "upon information and belief".

70. These are very serious allegations, particularly in the light of the sums claimed.

71. Try as one might to find any across the many pages of the Request and Reply, not a shred of proof is presented by Claimant to substantiate the phrase "upon information and belief". If such a phrase is used to support an allegation that a professional basketball club would seek to influence a player's agent, then the exact information and support for the belief should be articulated in detail.

72. In reality, the entirety of Claimant's fraud allegations rest on the flimsiest of foundations, namely speculation and conjecture. Fraud requires specific proof of each ingredient as otherwise it could be thrown around with abandon. Just and equitable principles or *ex aequo et bono* do not ease the standard of proof when it comes to an allegation of the seriousness of fraud. To do so would be the very antithesis of justice and equity.

73. No proof is presented of Respondent 2 visiting Claimant at the behest of Respondent 1 – on its face, this allegation is purely speculative.

74. No proof is presented of Respondent 2's nefarious intention when obtaining a power of attorney – thus, as far as the Arbitrator is concerned, this allegation too appears to be pure speculation.

75. The inadequacy of the allegation is plain to see and it should not have been made. Fraud is difficult to prove, and rightly so given its consequences for those involved. Speculation is not a substitute for the proper proof of an allegation of fraud.

5.3 Preliminary Issue raised by Respondent 1

76. Respondent 1 raises a preliminary issue namely "Verwirkung" or *venire contra factum proprium*. If successful, this preliminary issue could lead to the dismissal of Claimant's claim as against Respondent 1.

77. For the purposes of this issue, the Arbitrator is assuming that the first time which Claimant and Mr. Fleisher became aware of the "Agreement of Termination of Contract for the Provision of Athletic Services dated 8 October 2007" ("Termination Agreement") was August 2008. The Arbitrator will not, for the purposes of this preliminary issue, consider anything prior to that date. This affords the maximum fairness to Claimant when considering an issue which has the potential to dismiss, *in limine*, his claim.

78. The next matter which the Arbitrator has investigated from the materials put before him by the Parties is what steps Claimant took after August 2008 to prosecute his claim and notify Respondents of his intentions.

79. Claimant states the following in his Reply: "After Claimant discovered the existence of

the Termination Agreement, he realized he would need to pursue further legal avenues to secure his unpaid salary. Securing counsel, gathering facts and other evidence, researching the relevant issues and international law, tracking down potential witnesses, and formulating claims does not occur over night. Claimant was engaged throughout this short two-year period in pursuing his legal rights under the Player's Contract – not an extensive period of time to prepare for substantial litigation efforts."

80. Claimant also says that the principle of *venire contra factum proprium* does not apply in the sense that the ingredients which would lead to a successful invocation of such a rule are not present in this case.

81. Upon a careful review of the materials put before him, the Arbitrator cannot find any email or other correspondence between August 2008 and August 2010 when Claimant intimated his claim to Respondents. Specifically, Claimant or anyone on his behalf did not write to Respondent 2 after August 2008 and challenge the Termination Agreement. Similarly, Claimant or anyone on his behalf did not write to Respondent 1 after August 2008 and demand payment of money under the Agreement.

82. The Affidavits of Eric Fleisher are important in this regard. In his first Affidavit Mr Fleisher's testimony goes no further than Summer 2008 with the discovery of the Termination Agreement. In his second Affidavit, with the issue of *venire contra factum proprium* in play, he makes no reference to any demands made by him subsequent to the discovery of the Termination Agreement.

83. It appears clear from the submissions and exhibits that the Request for Arbitration is the first time that Claimant articulated his claim against Respondents.

84. Claimant recognized the significance of the Termination Agreement. That is clear from his Reply as he states "he realized he would need to pursue further legal avenues to secure his unpaid salary." There can be no doubt from this that as of August 2008

Claimant knew that he would have to bring an arbitration in order to secure any redress.

85. Claimant's reasons for a two-year period between the discovery of the Termination Agreement and the Request for Arbitration are as follows:

- Securing counsel;
- Gathering facts and other evidence;
- Researching the relevant issues and international law;
- Tracking down potential witnesses; and
- Formulating claims.

86. Taking each in turn, in the circumstances of this case:

- The Arbitrator does not accept that securing counsel could have delayed the prompt prosecution of Claimant's case. He and Mr. Fleisher were able, in summer 2008, to find a lawyer in Athens to investigate the file held with the Hellenic Basketball Clubs Association. No explanation is given as to why counsel was not thereafter promptly retained.
- The Arbitrator does not accept that gathering facts and other evidence could have delayed the prompt prosecution of Claimant's case. The Request for Arbitration does not exhibit any documentary exhibit which was not readily available to Claimant in August 2008. The Request for Arbitration does not articulate any fact which was not immediately known to Claimant in August 2008.

- The Arbitrator does not accept that researching the relevant issues and international law posed any impediment to the prompt bringing of a case. It is unclear what element of international law is meant, but as is apparent from the Request for Arbitration and the BAT arbitration system in general, the principles applicable are clear and readily accessible.

- The Arbitrator also does not accept that tracking down potential witnesses is a sustainable argument in the circumstances of this case. As is clear from the Request for Arbitration, only two witnesses are presented, namely Claimant and Mr. Fleisher who did not need to be tracked down. It is unclear whether Claimant was advised to find other witnesses or whether such other witnesses would be necessary from an evidential point of view. In any event, the record shows that this reason is not supportable.

- The Arbitrator does not accept that formulating claims could have delayed matters for two years, as the claim in this case is not particularly difficult to articulate.

87. In summary, the Arbitrator finds that Claimant's explanations for why he did not bring his case until August 2010 are lacking in substance. The Arbitrator accepts Respondent 1's views in this regard. However, whether that is sufficient for the purposes of *venire contra factum proprium* remains to be developed.

88. Claimant argues that he is within limitation periods prescribed by, for example, the laws of Greece (five years), Texas (four years), New York (six years), England (six years) or Switzerland (ten years). He then argues that these statutory periods provide guidance and demonstrate that Claimant was acting reasonably in bringing his claim within approximately two years of discovering the existence of the Termination Agreement.

89. Respondent 1 argues that limitation periods and the doctrine of *venire contra factum proprium* are two different concepts, not to be confused with one another. It also refers

to emails from Mr. Fleisher to Respondent 1 in August 2009 and December 2009 exploring possibilities for two of his players as a possible PG (presumably Point Guard). Respondent 1 points to the fact that no reference is made in those emails to Claimant and suggests that this is inexplicable, particularly as it seems Mr. Fleisher was seeking to have Respondent 1 hire a client of his against the background of allegedly unpaid sums due to another client.

90. Respondent 1 also refers to a press interview with Claimant held in Greece on 27 January 2010 and which was published the following day. Claimant is reported as stating that "[B]esides I received a big part of the fees that were agreed for the first year."

91. The Arbitrator has to decide, as a matter of principle, whether the doctrine of *venire contra factum proprium* applies at all to a contract of this nature. It appears from the submissions of the Parties that there is some measure of agreement as to this point of principle, however it is necessary to explore the issue in more depth.

92. The principle of *venire contra factum proprium* is widely recognized in many civil law systems. It has a close relative in the common law world, namely estoppel. While there are differences, the general principle remains essentially the same, namely that one's conduct or statements of intent concerning existing contractual rights can lead to a prohibition on the invocation of such rights. Given the widespread acceptance of this general principle, it would appear just and equitable to the Arbitrator that such a doctrine be given force by means of *ex aequo et bono* in the context of BAT Arbitration.

93. Ex *aequo et bono* requires the Arbitrator to take into account the context of professional basketball when exploring the specific operation of such a doctrine. Plainly different industries or subject-matters will have different drivers when it comes to what is appropriate for the operation of such a doctrine. In professional basketball contractual arrangements revolve around seasons running from early September to

late May (subject to variations). There appears to be considerable movement of players during the off-season each year and frequently a team's make-up can vary from one season to the next. Some contracts are for one year; others for two years (as in this case) and others for three years. It is obviously a matter of considerable commercial importance to a professional basketball team that its financial affairs from prior seasons do not overhang unduly into subsequent seasons. This is a factor which the Arbitrator believes is also well-known amongst Agents whose interaction with professional clubs lies at the heart of the make-up of teams.

94. The Arbitrator therefore is of the view that it is just and equitable that the doctrine of *venire contra factum proprium*, when applied to professional basketball contracts, takes careful account of the matters set out in paragraph 93 of this Award and also the specific circumstances of the contract involved.

95. Turning to the specific circumstances of this case, the Agreement's term ran to June 2009 had it been fulfilled by the Parties. Thus, at the very latest in time, Claimant's contractual association (and one cannot make any assumption as to renewal) with Respondent 1 would have come to an end in June 2009. His Request for Arbitration was more than one year later in August 2010. While that is a hypothetical analysis, it does convey the delay in this matter.

96. Perhaps of more particular importance for the operation of the doctrine of *venire contra factum proprium* is the fact that Claimant took no action, even a simple notification of claim, throughout the entirety of the 2008-2009 season and during the off-season in 2009. Respondent 1 arranged its affairs and its team for the 2009-2010 season (at a point when on any analysis of the Agreement it would no longer have applied) upon the assumption that it had drawn a line under its dealings with Claimant pursuant to the Termination Agreement.

97. As regards this latter point, the disposal of the fraud allegation above is of some

importance. As far as Respondent 1 was concerned, it dealt with Claimant's agent, Respondent 2, and drew a line under its association with Claimant. The precise terms and effect of the Termination Agreement is not directly germane to this point but its overall thrust does have some importance. Its terms signify that Claimant (through his agent, Respondent 2) and Respondent 1 have decided to retain no rights or obligations vis a vis the other. It must be assumed, therefore, that Respondent 1 arranged its affairs (financial and sporting) with the Termination Agreement in mind during the course of, at the latest, the off-season in 2009.

98. Claimant plainly knew the terms and import of the Termination Agreement as and from August 2008. Taking into account the nature of professional basketball and the matters set out in paragraphs 93-97 of this Award and the specific circumstances of this case, Claimant's inaction in even intimating a claim from August 2008 to August 2010 is a heavy factor in favour of holding that the doctrine of *venire contra factum proprium* applies to his claim as against Respondent 1. By not even intimating a claim, he and certainly his Agent, Mr. Fleisher, must have known that Respondent 1 would continue in its belief that the Termination Agreement drew a line under its arrangements with Claimant and that it would be engaging players upon an assumption that its finances were not going to be called upon to satisfy a claim in respect of such arrangements.

99. Claimant's statement during the course of an interview is also of some importance. It was, apparently, not a court-side interview directly during or after a match when off-the-cuff remarks in the heat of battle do not always reflect a considered view. It seems inconceivable that Claimant would have made such conciliatory remarks about Respondent 1 in January 2010 were arbitration proceedings in preparation. By that time he had long known about the Termination Agreement.

100. Mr. Fleisher's emails to Respondent 1 touting the services of a Point Guard are of less significance but do possess an inherently odd factor; by August and December 2009, he plainly knew about the Termination Agreement. It does appear strange that an

agent would pursue an engagement for clients with a club which was apparently guilty of the conduct articulated in the Request for Arbitration.

101. In summary, the Arbitrator finds that it is just and equitable in the circumstances of this case to apply the principle of *venire contra factum proprium* to halt Claimant's case as against Respondent 1. Further, taking this finding together with the finding as regards Claimant's claim as against Respondent 2, the Arbitrator holds and determines that all claims made by Claimant in this Arbitration are dismissed *in toto*.

6. Costs

102. 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.

103. On 26 June 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 13,250.00.

104. Considering that Claimant has failed in his claims on the grounds set out above, it is fair that the fees and costs of this Arbitration be borne by him and that he (Claimant) be required to cover his own legal fees and expenses as well as those of the

Respondents, the latter being reasonable in amount (EUR 16,875.00 for Respondent 1 and EUR 13,000.00 for Respondent 2).

105. Given that Respondents each paid advances on costs of EUR 6,000.00, the Arbitrator decides that in application of article 17.3 of the BAT Rules:

(i) BAT shall reimburse EUR 5,375.00 to Respondent 1 and EUR 5,375.00 to Respondent 2, being the difference between the costs advanced by the Parties and the arbitration costs fixed by the BAT President;

(ii) Claimant shall pay EUR 625.00 to Respondent 1 and EUR 625.00 to Respondent 2, being the difference between the costs advanced by them and the amount they are going to receive in reimbursement from the BAT;

(iii) Claimant shall pay EUR 16,875.00 to Respondent 1 and EUR 13,000.00 to Respondent 2 representing the amount of their respective legal fees and other expenses.

7. AWARD

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

1. **The claims of Mr. Lawrence E. Roberts III made in this Arbitration are dismissed *in toto*.**

2. **Mr. Lawrence E. Roberts III shall pay KAE Olympiacos S.F.P. an amount of EUR 625.00 as reimbursement for its share of the arbitration costs.**

3. **Mr. Lawrence E. Roberts III shall pay Mr. Konstantinos Papadakis an amount of EUR 625.00 as reimbursement for his share of the arbitration costs.**

4. **Mr. Lawrence E. Roberts III shall pay KAE Olympiacos S.F.P. an amount of EUR 16,875.00 as reimbursement for its legal costs.**

5. **Mr. Lawrence E. Roberts III shall pay Mr. Konstantinos Papadakis an amount of EUR 13,000.00 as reimbursement for his legal costs.**

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

Geneva, seat of the Arbitration, 29 June 2011.

Klaus Reichert SC

(Arbitrator)