



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0202/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Aaron Miles

- Claimant 1 -

Octagon, Inc.

1751 Pinnacle Drive Suite 1500, McLean, VA 22102, USA

- Claimant 2 -

both represented by Mr. Alexandros C. Saratsis,
1751 Pinnacle Drive Suite 1500, McLean, VA 22102, USA

vs.

Aris KAE Basketball Club

Grigoriou Lambraki Str. 2, 54636 Thessaloniki, Greece

- Respondent -

1. The Parties

1.1 The Claimants 1 and 2

1. Mr. Aaron Miles is a professional basketball player of American citizenship (hereinafter referred to as “the Player” or “Claimant 1”).
2. Octagon, Inc. was an agent of the Player (hereinafter “the Agent” or “Claimant 2”).
3. Claimants 1 and 2 are referred to jointly as “the Claimants”.

1.2 The Respondent

4. Aris KAE Basketball Club (hereinafter “the Club”) is a Greek professional basketball club.

2. The Arbitrator

5. On 12 September 2011, Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). Neither of the parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

6. On 20 October 2009, the Player and the Club entered into a contract for the 2009-2010 season (the “Contract”).

7. The preamble and the signature page of the Contract indicate that the Agent was one of two agents of the Player. The other agent was a Greek citizen named Konstantinos Papadakis.
8. On the same date, in accordance with Article 10 of the Contract, the Club entered into an “Agreement of Representation” with the Player’s agents (hereinafter the “Representation Agreement”).
9. Article 3 of the Contract provides that the Contract is a “... *no-cut guaranteed contract.*” Article 3 further provides that the Player may terminate the Contract and claim all outstanding salaries if the Club is more than 30 days late with any payment.
10. The schedule of salary payments owed to the Player by the Club for the season is included in Article 3.
11. The total amount owed for the 2009-2010 season is USD 250,000, net, to be paid in eight monthly installments of USD 30,000 each (after an initial payment of USD 10,000 upon succeeding the medical test), running between 30 November 2009 and 30 June 2010.
12. Article 10 of the Contract provides that the agents will receive 10% of the Player’s total net salary for the season as confirmed in the Representation Agreement, i.e. an amount of USD 25,000.
13. Article 1 of the Representation Agreement stipulates that such amount will be paid in two installments – the first on 30 November 2009 and the second on 28 February 2010 – and that “*Payment will be made to Octagon...*” at its U.S. bank account.
14. Article 1 of the Representation Agreement also provides that “*The Club accepts that in case any payments, inclusive of Agency Fees, described in this contract will be delayed for more than thirty (30) days the Player or his Agents may present written notice to the President of the Club by fax or mail at the Club’s address and/or to the*

Federation and to the League” and that upon such notice, the Player shall be entitled to leave the Club and collect all outstanding payments.

15. According to the Player, the Club failed to pay him part of his April 2010 salary – still owing him USD 12,000 for that month – and the entire installments of USD 30,000 each due on 30 May and 30 June 2010, i.e. a total amount of USD 72,000.
16. As evidence of the non-payment of the foregoing amounts, the Player produced an affidavit sworn by his Greek agent, Konstantinos Papadakis, wherein the latter explains that he acted as the Player’s “... *representative in Greece for the duration of his cooperation with the Respondent and I was present and conducted all negotiations and services required from his contract with the Respondent.*”
17. Konstantinos Papadakis declares that “... *I can confirm that the Respondent is in debt against the Claimant of \$72,000 USD (seventy two thousand U.S. Dollars), as Claimant is still owed two full monthly salary payments (May 2010 and June 2010 salaries) of the total amount of \$60,000 USD (sixty thousand U.S. Dollars) and one partial salary (April 2010 salary) of a total of \$12,000 USD (twelve thousand U.S. Dollars).*”
18. According to the Agent, the Club failed to pay it USD 7,500 out of the amount of USD 12,500 owed to it for the second installment (contractual due date of 28 February 2010) under the Representation Agreement. As evidence of this alleged shortfall in payment, the Agent produced a copy of an invoice for US 12,500 it issued to the club in December 2009 (indicating a due date of 28 February 2010) and a bank statement (“*Remittance information report*”) indicating that the Agent received a payment of USD 5,000 from the Club on 8 March 2010, i.e. an amount which is USD 7,500 inferior to the sum owed on 28 February 2010.
19. Concerning the Agent’s attempt to recover the foregoing amount allegedly owed by the Club, the Agent contends that: “*The majority of our communications regarding fee collection was done via telephone through our Greek partner Kostas Papadakis. The preferred method of communication of Aris Kae was through the telephone as per their*

president'.

20. With respect to the amounts owed to the Player, it is alleged that "... *Through numerous phone conversations, Aris KAE related to Aaron that their club was facing financial difficulties and was unable to pay the outstanding amounts*" and that "*Aaron Miles preferred to have his agents handle the pursuing of outstanding payments with Aris KAE*".
21. In his affidavit, Konstantinos Papadakis declares in that connection that "*As his representative in Greece, and following the Claimant's departure from Greece after the end of the season 2009-2010, I can confirm communications and meetings between myself and the Respondent where several settlement attempts were made, the Respondent always promised full payment either in portions or in full but never followed up on such promises and as a result the above amount is still owed to the Claimant*".
22. The Club having made no further payments to the Player or his Agent as demanded, they filed a Request for Arbitration with the BAT.

3.2 The Proceedings before the BAT

23. On 2 March 2011, the Claimants filed a Request for Arbitration in accordance with the BAT Rules and on 15 July 2011 they duly paid the non-reimbursable handling fee of EUR 1,985.
24. On 12 September 2011, the BAT informed the parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the Advance on Costs to be paid by the parties as follows:

<i>"Claimant 1 (Mr. Aaron Miles)</i>	<i>€ 3,500</i>
<i>Claimant 2 (Octagon, Inc)</i>	<i>€ 1,000</i>
<i>Respondent (Aris KAE)</i>	<i>€ 4,500"</i>

25. In the foregoing letter, the BAT also underlined that: "*The Answer shall be filed by the*

Respondent in accordance with Art. 11.2 of the BAT Rules by no later than Monday, 10 October 2011".

26. However, the Respondent failed to submit an Answer within the fixed deadline or to communicate with the BAT in any manner in that connection.
27. Between 22 September and 28 October 2011, the Claimants paid their advances on costs and those of the Respondent since the latter failed to pay its advance and under Article 9.3 of the BAT Arbitration Rules the Claimants were bound to substitute for the Respondent in order to ensure that the arbitration proceed.
28. By procedural order of 2 November 2011, the BAT informed the parties that the Arbitrator was requesting additional information and any related written evidence regarding certain aspects of the Player's claim. The BAT further advised that the Club would be given the opportunity to comment thereon and file further written evidence.
29. In that connection, the procedural order provided that: "*Once the Claimants have replied to the foregoing questions and filed any related documents, the Respondent will be given a final opportunity to file an Answer and is hereby given notice of the fact that, in accordance with article 14.2 of the BAT Rules, if the Respondent fails to submit an Answer the Arbitrator may nevertheless proceed with the arbitration and deliver an award*".
30. On 10 November 2011, the Player submitted his answers to the Arbitrator's questions and filed related documents.
31. By procedural order of 16 November 2011, the Respondent was given a further opportunity to file an Answer, as follows: "*...the Respondent is herewith given a final opportunity to file an Answer to the Request for Arbitration and to comment on the Claimant's reply to the Procedural Order by no later than Wednesday, 30 November 2011. As has already been indicated in the aforementioned Procedural Order, if the Respondent fails to make any submissions the Arbitrator may nevertheless proceed*

with the arbitration and deliver an award in accordance with article 14.2 of the BAT Rules”.

32. Despite being given a further opportunity to file an Answer and to make submissions, the Respondent failed to do so.
33. Consequently, by procedural order of 28 December 2011 the proceedings were closed and the parties invited to submit their statements of costs.
34. On 4 January 2012, the Claimants submitted their statement of costs. The Respondent did not submit any such statement.
35. On 16 January 2012, the Respondent was given the opportunity to file comments on the Claimants’ statement of costs but did not do so.

4. The Positions of the Parties

4.1 The Claimants’ Position

36. The Claimants submits the following in substance:
 - In failing to pay the Player the total amount of his salary due under the Contract; and further in failing to pay the Agent’s fees for the 2009-2010 season, the Club is in breach of its contractual duties.
 - The Club is therefore liable for the entire amount that remains outstanding in respect of the Player’s salary (USD 72,000). The Club is further liable to pay the Agent’s fees (USD 7,500).
 - The Club is liable to pay interest at 5% on the late payments.
37. In their Request for Arbitration dated 2 March 2011, the Claimants requested the

following relief:

“Aaron Miles requests immediate payment of salary due to the player due on April 30th 2010, May 30th 2010 and June 30th, 2010 in the amount of \$72,000 (Seventy Two Thousand USD). The total amount of relief that Aaron Miles is requesting is \$72,000 (Seventy Two Thousand USD). Aaron is also requesting a 5% yearly interest on monies owed to Aaron Miles as of April 30th, 2010, as well as the total cost of the arbitration upon determination of such costs by the FIBA Arbitrary (sic) Tribunal. These costs include, but are not limited to, non-reimbursable filing fees, arbitration costs and legal fees.

Octagon Inc. Requests immediate payment of the agent fee in the amount of \$7,500 (Seven Thousand Five Hundred USD). Octagon Inc., is also requesting a 5% yearly interest on monies owed to Octagon Inc., as of February 28th, 2010 as well as the total cost of the arbitration upon determination of such costs by the FIBA Arbitrary Tribunal. These costs include, but are not limited to, non-reimbursable filing fees, arbitration costs and legal fees.”

4.2 Respondent's Position

38. As previously stated, despite several invitations to do so, the Club has not made any submissions in these proceedings.

5. The Jurisdiction of the BAT

39. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands¹.
40. 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).
41. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the

¹ ATF 120 II 155, 162.

existence of a valid arbitration agreement between the parties.

42. 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.²
43. Article 12 of the Contract of 20 October 2009 between the Club and the Player expressly provides that the parties may choose between two different forums to resolve their disputes.
44. Indeed, after providing that *“Any disputes arising with respect to or in connection with this Agreement shall be submitted to the relevant Greek League Committee for Financial Disputes”*, article 12 of the Contract goes on to stipulate that *“Any dispute arising from 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 ...”* (emphasis added).
45. Consequently and because in accordance with article 12 of the Contract the Player chose to file his claims in front of the BAT (formerly entitled “FAT”, see also Article 18.2 of the BAT Rules), the jurisdiction of the BAT over the Player’s dispute with the Club results from the BAT arbitration clause contained therein which, in its entirety, reads as follows:

“Any dispute arising from 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

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

Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.”

46. As for the dispute between the Agent and the Club, the final clause of the Representation Agreement of 20 October 2009 provides as follows for the jurisdiction of the BAT:

“Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved definitely in accordance with the FAT Arbitration Rules. The arbitrator shall decide the dispute ex aequo et bono. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. To the extent legally possible under Swiss law recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal shall be excluded. The party that fails to prevail shall pay the costs, expenses and reasonable attorneys’ fees of the opposing party”.

47. Both the foregoing arbitration agreements are in written form and thus they fulfil the formal requirements of Article 178(1) PILA.
48. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of either of the arbitration agreements under Swiss law (referred to by Article 178(2) PILA).
49. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Player’s and the Agent’s claims against the Club.

6. Discussion

6.1 Applicable Law – ex aequo et bono

50. 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”.

51. 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.”

52. Article 12 of the Contract refers to Greek law in relation to the option of submitting disputes to the Greek League Committee however, the second paragraph provides that if the dispute is submitted to the BAT: *“The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono”.*

53. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Player against the Club in this arbitration in front of the BAT.

54. The Representation Agreement between the Club and the Agent makes reference to Swiss law and the regulations of FIBA and the CAS but also provides that in case of an arbitration in front of the BAT *“The arbitrator shall decide the dispute ex aequo et bono”.*

55. Accordingly, the Agent’s claim will also be decided *ex aequo et bono*.

56. 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’arbitrage³ (Concordat)⁴, under which Swiss courts have held that arbitration “en équité” is fundamentally different from arbitration “en droit”:

³ 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).

⁴ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

“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.”⁵

57. This is confirmed by Article 15.1 of the BAT Rules in fine, according to which the Arbitrator applies “*general considerations of justice and fairness without reference to any particular national or international law*”.

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

6.2 Findings

59. Despite having ample opportunity to make submissions, the Respondent did not contest the Claimants’ allegations as to the facts of their claims, nor did it challenge the evidence adduced in that connection.

60. Furthermore, the affidavit of Konstantinos Papadakis; the invoice and bank statement filed by the Player and the Agent respectively, confirm the reality of their allegations. Further, there is no indication or evidence on record that would lead the Arbitrator to conclude that the Claimants are being untruthful. There is no logical reason for which they would be limiting their claims to this particular portion of the amounts contractually stipulated if their intention was to deceive.

61. For the above reasons, the Arbitrator finds the debts claimed by the Claimants are proven, and that there is no established contractual motive or any reason of fairness or justice for which they should not be entitled to claim the outstanding payments due to them under their respective contracts with the Club, i.e. an amount of USD 72,000 for the Player under the Contract of 20 October 2009 and a sum of USD 7,500 for the Agent under the Representation Agreement of the same date. Those amounts being claimed will therefore be awarded.

⁵ JdT 1981 III, p. 93 (free translation).

62. The Player and the Agent are also requesting the payment of interest on the sums owed at an annual rate of 5%.
63. Although neither the Contract nor the Representation Agreement of the same date expressly regulate interest for late payments, it is a generally recognized principle embodied in most legal systems, which is underpinned by motives of equity, that late payments give rise to interest – in order that the creditor be placed in the financial position she/he would have been in had payments been made on time. Consequently, and despite the contracts not specifying an interest rate, it is normal and fair that interest is due on the late payments. Since the Player and the Agent have invoked an interest rate of 5%, which in this case seems fair and reasonable and is in line with BAT jurisprudence, interest will be awarded at that rate.
64. It is an established principle that interest runs from the day after the date on which the principal amounts are due.
65. Consequently, it is fair that, with respect to the unpaid contractual monthly instalments making up the total of USD 72,000 owed to the Player, interest on each salary instalment provided in the schedule of payments under article 3 of the Contract of 20 October 2009 be deemed to run from the day after the due date contractually stipulated for each instalment; and that, similarly, the amount of USD 7,500 owed to the Agent bear interest from the day after the due date of that outstanding fee payment under the Representation Agreement.

7. Costs

66. 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.

67. On 2 February 2012 - 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 5,750.00.
68. Considering, that the Claimants entirely prevailed in their claims, it is fair that the fees and costs of the arbitration be borne by the Club and that it be required to cover its own legal fees and expenses as well as those of the Claimants, the latter being reasonable in amount.
69. Given that the Claimants paid advances on costs of EUR 8,938.09 as well as a non-reimbursable handling fee of EUR 1,985.00 (which will be taken into account when determining the Claimant's legal fees and expenses), while the Club failed to pay any advance on costs, the Arbitrator decides that in application of article 17.3 of the BAT Rules:
- (i) BAT shall reimburse EUR 3,188.09 to the Claimants, being the difference between the costs advanced by the them and the arbitration costs fixed by the BAT President;
 - (ii) The Club shall pay EUR 5,750.00 to the Claimants, being the difference between the costs advanced by the Claimants and the amount they are going to receive in reimbursement from the BAT;
 - (iii) The Club shall pay to the Claimants EUR 4,985.00 (1,985.00 for the non-reimbursable fee + 3,000.00 for legal fees) representing the amount of their legal fees and other expenses.

8. AWARD

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

- 1. Aris KAE BC shall pay Mr. Aaron Miles, as follows, a total amount of USD 72,000 as compensation for unpaid salary payments:**
 - **USD 12,000, plus interest at 5% per annum on such amount from 1 May 2010 onwards.**
 - **USD 30,000, plus interest at 5% per annum on such amount from 31 May 2010 onwards.**
 - **USD 30,000, plus interest at 5% per annum on such amount from 1 July 2010 onwards.**
- 2. Aris KAE BC shall pay Octagon, Inc. a total amount of USD 7,500, as compensation for unpaid agency fees, plus interest at 5% per annum on such amount from 1 March 2010 onwards.**
- 3. Aris KAE BC shall pay the Claimants an amount of EUR 5,750 as reimbursement for their arbitration costs.**
- 4. Aris KAE BC shall pay the Claimants an amount of EUR 4,985 as reimbursement for their legal fees and expenses.**
- 5. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 6 February 2012.

Quentin Byrne-Sutton
(Arbitrator)