



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0210/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Aaron Miles

- Claimant -

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

vs.

GS Panionios KAE

Ioannou Chrisostomou 1, 17123 Nea Smyrni, Athens, Greece

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Aaron Miles is a professional basketball player of American citizenship (hereinafter referred to as “the Player”).

1.2 The Respondent

2. GS Panionios KAE is a Greek professional basketball club (hereinafter “the Club”)

2. The Arbitrator

3. On 7 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

4. By means of agreement indicating a date of 8 September 2007, the Player and the Club entered into a contract for the 2008-2009 season (the “Contract”). The Arbitrator notes that although this Contract indicates “8 September 2007” as its date of execution, it appears from its content and from a prior offer faxed to the Player’s agent by the Club on 13 August 2008 (filed as an exhibit by the Player), that it actually dates from 8 September 2008, i.e. that the date “2007” is likely a typographical error.

5. The preamble and the signature page of the Contract provide that one of the Player's agents was a Greek citizen named Konstantinos Papadakis.
6. Article 3 of the Contract provides that it 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.
7. The schedule of salary payments owed to the Player by the Club for the season is included in Article 3.
8. The total amount owed for the 2008-2009 season is USD 450,000, net, to be paid in ten monthly installments of USD 42,000 each (after an initial payment of USD 30,000 upon succeeding the medical test), running between 30 September 2008 and 30 June 2009.
9. According to the Player's allegations in his Request for Arbitration (and in his answer to question 1 in his subsequent submission of 17 November 2011 filed upon the request of the Arbitrator), the Club failed to pay him part of his April 2009 salary – still owing him USD 7,500 for that month – and the entire installments of USD 42,000 each due on 30 May and 30 June 2009, i.e. a total amount of USD 91,500.
10. As evidence of the non-payment of the foregoing amounts, the Player produced a signed affidavit dated 18 July 2011 by his Greek agent Konstantinos Papadakis (hereinafter the "Affidavit") and a subsequent unsigned statement by the same person (the "Statement"). The Statement was filed by the Player with his answers of 17 November 2011 to questions put by the Arbitrator.
11. In his Affidavit, the agent 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.”

12. Konstantinos Papadakis goes on to declare in the Affidavit that: “... *I can confirm that the Respondent is in debt against the Claimant of \$91,500 USD (ninety one thousand five hundred U.S. Dollars), as Claimant is still owed two full monthly salary payments (May 2008 and June 2008 salaries) of the total amount of \$84,000 USD (eighty four thousand U.S. Dollars) and one partial salary (April 2008 salary) of a total of \$7,500 USD (seven thousand five hundred U.S. Dollars)”.*
13. Concerning the attempts to recover such amounts, the agent further declares in his Affidavit that: “*As his representative in Greece, and following the Claimant’s departure from Greece after the end of the season 2007-2008, I can confirm communications and meetings between myself and the Respondent where several settlement attempts and agreements where [sic] made, the Respondent partially uphold their promise by paying a portion of the total debt during the 2008-2009 basketball season, but effectively, after the conclusion of the 2009-2010 basketball season and in spite of the continuous promises for complete payment, never followed up on such promise and as a result the above amount is still owed to the Claimant”.*
14. The Arbitrator notes that the dates in the Affidavit referring to the “2007-2008” season are in contradiction with the content of the Contract – according to which the salary payments in question became due during the 2008-2009 season – and with the Player’s allegations and claim (since the Player is claiming payment of salaries relating to the 2008-2009 season). This appears to be due to an error and oversight of the agent Konstantinos Papadakis when writing down the dates in his Affidavit, since the description of the circumstances made by him fit the Player’s allegations regarding salaries that became due during the 2008-2009 season.
15. Consequently, the Arbitrator will consider that the Affidavit refers in reality to the 2008-2009 season.

16. In the agent Konstantinos Papadakis' subsequent Statement filed by the Player in these proceedings, the agent provides a more detailed factual account of when, how and with what content the salary dispute arose between the Player and the Club during the 2008-2009 season and what discussions/agreements stemmed therefrom between the end of the season 2009 and March 2011. In that connection, the Statement includes as appendices the Greek texts and English translations of exchanges of emails (the "Emails") between the agent and the representative of the Club, Mr. Elias Lianos, during that period of time.
17. In substance, the Statement and the Emails indicate that: (i) at the end of the 2008-2009 season, the parties were in agreement that the Player was owed about USD 147,000 in outstanding salaries; ii) he agreed orally, as a compromise, to accept USD 100,000 in compensation, which was deemed, at the time, to represent about EUR 75,000; (iii) such amount was to be entirely paid by the end of the next season (2009-2010), i.e. by May 2010; (iv) during that period, the Club only paid the Player USD 55,000 despite reminders from the Player's agent regarding the outstanding amount; (v) according to the exchange rate at the time, the agent deemed the amount received (USD 55,000) to represent EUR 42,000, and considered therefore that a sum equivalent to EUR 33,000 remained due and owing, out of which the Club was to pay an installment of EUR 12,000 in May 2010 but never did.
18. The Club made no further payments to the Player, despite his agent Konstantinos Papadakis' reminders. Consequently, Mr. Papadakis wrote an email on 16 March 2011 to the Club's representative Mr. Elias Lianos, stating, among others things, that on behalf of the Player, : *"He will apply to courts for \$147,000 USD - € 42,000."*
19. The Club made no further payments to the Player; accordingly the Player filed a Request for Arbitration with the BAT.

3.2 The Proceedings before the BAT

20. On 25 August 2011, the Player filed a Request for Arbitration in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 1,985.

21. On 7 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 (Mr. Aaron Miles)</i>	<i>€ 4,000</i>
<i>Respondent (GS Panionios KAE)</i>	<i>€ 4,000”</i>

22. 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 Wednesday, 5 October 2011”***.

23. On 3 October 2011, the Club applied for an extension to pay its advance on costs stating: *“We are writing to request an extension on the money paid by Panionios BC. We have started a negotiation with Aaron Miles and his agent. We formally request an extension on the payment of € 4.000.00 till Friday, October 7th, 2011”*.

24. The BAT granted the requested extension.

25. Despite the extension being granted, the Respondent failed to pay its advance on costs or to submit an Answer within the fixed deadline or to communicate again with the BAT in any manner in that connection.

26. Consequently, and because under Article 9.3 of the BAT Arbitration Rules the Player was bound to substitute for the Club in order to ensure that the arbitration proceed, the Player paid both his advance on costs and that of the Respondent by the end of October 2011.

27. By procedural order of 2 November 2011, the BAT informed the parties that the Arbitrator was requesting further information from the Player as well as any related written evidence regarding certain aspects of his claim. The parties were further advised that the Club would be given the opportunity to comment thereon and file further written evidence. 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”*.
28. On 17 November 2011, the Player submitted his answers to the Arbitrator’s questions and filed related documents.
29. By procedural order of 22 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, 7 December 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”*.
30. Despite being given a further opportunity to file an Answer and to make submissions, the Respondent failed to do so.
31. Consequently, by procedural order of 29 December 2011 the proceedings were closed and the parties invited to submit their statements of costs.
32. On 4 January 2012, the Player submitted his statement of costs. The Club did not

submit any.

33. On 16 January 2012, the Club was given the opportunity to file comments on the Player's statement of costs but did not do so.

4. The Positions of the Parties

4.1 The Claimant's Position

34. The Player submits the following in substance:

- in failing to pay the Player the total amount of his salary due under the Contract for the 2008-2009 season, and in failing to pay the amount of the settlement agreement that was reached, the Club is in breach of its contractual duties.
- The Club is therefore liable to pay the amount originally outstanding and due under the Contract for the months of April, May and June 2009 (representing a total of USD 91,500).
- The Player is also entitled to receive interest at 5% on the late payments.

35. In his Request for Arbitration, the Player requested the following relief:

"Aaron Miles requests immediate payment of salary due to the player due on April 30th 2009, May 30th 2009 and June 30th, 2009 in the amount of \$91,500 (Ninety One Thousand Five Hundred USD). The total amount of relief that Aaron Miles is requesting is \$91,500 (Ninety One Thousand Five Hundred USD). We are also requesting a 5% yearly interest on monies owed to Aaron Miles as of June 30th, 2009, 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." (sic)

4.2 Respondent's Position

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

5. The Jurisdiction of the BAT

37. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration (except for soliciting and being granted an extension to pay its advance on costs, which it ultimately did not pay), he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.¹

38. 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).

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

40. 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

41. Article 12 of the Contract expressly provides that the parties may choose between two different forums to resolve their disputes.

42. 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*

¹ ATF 120 II 155, 162.

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

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).

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

44. The foregoing arbitration agreement is in written form and thus fulfils the formal requirements of Article 178(1) PILA.
45. 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).
46. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Player’s claims against the Club.

6. Discussion

6.1 Applicable Law – ex aequo et bono

47. 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”.

48. 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.”

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

50. 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.

51. 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”:

“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

52. 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*”.

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

6.2 Findings

54. Despite having ample opportunity to do so, the Club did not contest the Player’s allegations as to the facts of his claim or challenge the evidence he adduced in that connection.

55. Nevertheless, the Player’s allegations and related evidence (the Affidavit and the Statement) contain a certain amount of contradictions or at least unexplained events making them partly but not entirely convincing in terms of proof of the claim being made.

56. One of the apparent contradictions is the fact that the claim is based on alleged unpaid

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.

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

salaries for the months of April (partial), May and June 2009 – representing a total of USD 91,500 – whereas in his Statement the agent Konstantinos Papadakis declares that, at the end of the 2008-2009 season, the total amount owed to the Player was USD 147,000, which represents a discrepancy of USD 56,000. The Statement does not explain the contractual basis for the alleged initial debt of USD 147,000.

57. Furthermore, although the Player is claiming USD 91,500 in this arbitration, it appears from the agent's Statement and the Emails that, by means of an oral compromise, the Player agreed to accept USD 100,000 as full payment and that the Club paid part of that amount, i.e. USD 55,000 (deemed to represent EUR 42,000 at the exchange rate at the time). This means that the amount still owed by the Club to the Player at the end of the period fixed for the outstanding payment to be made (May 2009) was only USD 45,000 (deemed to represent EUR 33,000 at the exchange rate at the time).
58. It may be implicit in the Player's claim – but it is nowhere expressly argued – that he considers his initial claim of USD 147,000 against the Club should revive due to the alleged settlement amount not having been paid in total within the payment period allegedly agreed with the Club (payment of USD 100,000 by May 2009). However, there is no explanation offered in his submission in this regard and no evidence adduced that such were the terms of the agreed compromise, i.e. that the total debt would revive in the absence of full payment by the Club of the reduced sum. Neither is there any explanation regarding why the claim is now specifically tied to the alleged non payment of salaries in April, May and June 2009, whereas the settlement discussions were apparently linked to an initial claim of USD 147,000 USD.
59. For the above reasons, the Arbitrator finds that the Player has not convincingly established on what basis he would be owed USD 91,500 today by the Club. The evidence produced by the Player – combined with the absence of contestation by the Club in this arbitration – satisfies the Arbitrator that the Club owes USD 45,000 to the Player (as a result of the agreed oral compromise). Failing any indication that the

Player renounced such part of the payment, it is just and fair that he be able to claim such amount of outstanding contractual debt.

60. Thus, the Arbitrator finds that Player's claim is only proven in an amount of USD 45,000 and this amount alone will be awarded.
61. The Player is also requesting the payment of interest on the sums owed at an annual rate of 5%.
62. 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 Contract not specifying any interest rate, it is normal and fair that interest is due on the late payments. Since the Player has 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.
63. It is an established principle that interest runs from the day after the date on which the principal amounts are due.
64. Consequently, it is fair that, with respect to the unpaid debt of USD 45,000 that the Club was due to pay by the end of May 2010, interest shall run from the day after that agreed deadline, i.e. from 1 June 2010 onwards, and it will be awarded accordingly

7. Costs

65. 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.

66. On 3 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 5,450.
67. Considering that the Player prevailed in substantial portion of his claim, it is fair that the 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 70% of those of the Player, the latter being reasonable in amount.
68. Given that the Player paid advances on costs of EUR 7,985 as well as a non-reimbursable handling fee of EUR 1,985 (which will be taken into account when determining the Player’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 2,535 to the Player, being the difference between the costs advanced by the him and the arbitration costs fixed by the BAT President;
 - (ii) The Club shall pay EUR 5,450 to the Player, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT;
 - (iii) The Club shall pay to the Player EUR 3,280 representing a contribution to his legal fees and other expenses.

8. AWARD

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

- 1. GS Panionios KAE shall pay Mr. Aaron Miles an amount of USD 45,000, as compensation for unpaid salary payments, plus interest at 5% per annum on such amount from 1 June 2010 onwards.**
- 2. GS Panionios KAE shall pay Mr. Aaron Miles an amount of EUR 5,450 as reimbursement for his arbitration costs.**
- 3. GS Panionios KAE shall pay Mr. Aaron Miles an amount of EUR 3,280 as reimbursement for his legal fees and expenses.**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 8 February 2012.

Quentin Byrne-Sutton
(Arbitrator)