

**ARBITRAL AWARD**

(BAT 0233/11)

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Klaus Reichert SC**

in the arbitration proceedings between

**Mr. Tomas Delininkaitis**

**- Claimant -**

represented by Mr. Aristodimos Ch. Lychnaras, Attorney at Law,  
28 Ioulianou & 3<sup>rd</sup> Septemvriou, 10434 Athens, Greece

vs.

**PAOK 2004 Basketball S.A.**

11-13 Antoniou Tritsi St., 55510 Pilea, Thessaloniki, Greece

**- Respondent -**

represented by Mr. Fotios Papachristou, Attorney at Law,  
24 Mitropoleos, 54624 Thessaloniki, Greece

## **1. The Parties**

### **1.1 The Claimant**

1. Mr. Tomas Delininkaitis (hereinafter referred to as “the Claimant”) is a professional basketball player, who was retained by the Respondent, PAOK 2004 Basketball S.A., for a certain part of the 2009-2010 season.

### **1.2 The Respondent**

2. PAOK 2004 Basketball S.A. (hereinafter referred to as “the Respondent”) is a professional basketball club in Thessaloniki, Greece.

## **2. The Arbitrator**

3. On 28 December 2011, Prof. Richard H. McLaren, 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”). None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

## **3. Facts and Proceedings**

### **3.1 Summary of the Background and the Dispute**

4. On 31 March 2010, the Claimant and the Respondent entered into an agreement whereby the latter engaged the former to play basketball for the period from the date of signature to the end of the 2009-2010 season (“the Agreement”). His salary was agreed at EUR 24,000.00 net, payable in three unequal monthly instalments. In addition, there were various bonuses provided for if certain successes on court were

achieved. The Parties also agreed that in the case of late (by five days) payments, a penalty of EUR 50.00 per day would be incurred.

5. The Claimant was paid EUR 3,000.00 on 8 April 2010 by the Respondent and nothing further. The fact that the Respondent has not made any further payments is what has triggered the Claimant's Request for Arbitration.

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

6. The Claimant filed a Request for Arbitration dated 19 April 2011 in accordance with the BAT Rules.
7. The non-reimbursable handling fee in the amount of EUR 1,992.00 was paid on 17 November 2011.
8. On 11 January 2012, the BAT informed the Parties that Mr. Klaus Reichert SC had been appointed as the Arbitrator in this matter. Further, the BAT fixed the advance on costs to be paid by the Parties as follows:

*"Claimant (Mr. Tomas Delininkaitis) EUR 3,500*

*Respondent (PAOK 2004 BSA) EUR 3,500"*

The foregoing sums were paid as follows: 26 January 2012, EUR 3,500.00 (Claimant's share) paid by Claimant; and 2 February 2012, EUR 3,500.00 (Respondent's share) paid by Executive Pro Management AG (on behalf of the Claimant).

9. The Respondent asked, on 1 February 2012, for an extension of two weeks to file its Answer. By Procedural Order dated 8 February 2012, the Respondent was given until 10 February 2012 to file its Answer. The Respondent did not file its Answer by that deadline. The Respondent did make an offer, in writing, to the Claimant by letter dated

8 February 2012 to settle the matter, but this was declined.

10. On 14 February 2012, the Parties were invited to submit their statements of costs and were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.
11. By letter dated 22 February 2012, the Claimant set out his statement of costs. The Respondent did not submit a statement of costs. The Respondent was afforded an opportunity to comment by 5 March 2012 on the Claimant's statement of costs. No such comments were submitted by the Respondent.

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

12. The Claimant's position is quite simple. He entered into the Agreement with the Respondent but he was not paid in full. He wishes to have the whole of his agreed salary, bonuses and penalties (for late payment) paid to him.
13. The Respondent's position is also simple. It has not articulated a formal defence by way of an Answer, but its settlement proposal does suggest that it wanted to find a way to strike a deal with the Claimant for something less than his full entitlement due to the current financial crisis.

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

14. 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).
15. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the

existence of a valid arbitration agreement between the parties.

16. 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.<sup>1</sup>
17. The jurisdiction of the BAT over the Claimant's dispute results from the arbitration clause contained under "ARTICLE XIII. ARBITRATION" of the Agreement, which reads as follows (in relevant part):

*"[...] any dispute arising from or related to the present Contract shall be submitted to the FIBA Arbitration Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the then prevailing version of the FAT Arbitration Rules by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland or elsewhere as agreed by the parties and the arbitrator. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. All submissions and proceedings shall be in English.*

*[...]*

*The parties waive recourse to the Swiss Federal Supreme Court and Cantonal Courts, except as to apply for formal recognition and enforcement pursuant to the New York Convention of June 10, 1958.*

*The FAT arbitrator and the CAS on appeal shall decide the dispute ex aequo et bono."*

18. The agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
19. 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).
20. The jurisdiction of BAT over the Claimant's claims arises from the Agreement. The

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

wording “*any dispute arising from or related to the present Agreement ...*” clearly covers the present dispute. In addition, the jurisdiction of BAT has not been disputed by the Respondent.

21. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimant's claims.

## **6. Discussion**

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

22. 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”.*

23. 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.”*

24. As stated above, the Agreement clearly stipulates that: “[T]he FAT arbitrator and CAS on appeal shall decide the dispute ex aequo et bono”.

25. 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<sup>2</sup> (Concordat)<sup>3</sup>, 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.”<sup>4</sup>*

26. 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.*”

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

## 6.2 Findings

28. The doctrine of *pacta sunt servanda* (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the principle by which the Arbitrator will examine the positions of the parties.

29. It is plain to the Arbitrator that the Claimant entered into the Agreement with the Respondent in the full and legitimate expectation that the obligations owed to him by the Respondent would be duly performed. He was paid, in part, for his services, but not in the full amount agreed.

30. The Respondent's open offers of settlement in substance admit that it did not pay the agreed amounts.

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<sup>2</sup> 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).

<sup>3</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

<sup>4</sup> JdT 1981 III, p. 93 (free translation).

31. The Arbitrator therefore considers, upon examination of the materials before him and also the position of the Respondent, that the Claimant must succeed in his claim for unpaid salary in the following manner:
- (a) EUR 9,000.00, net, which was payable on 1 May 2010 – its non-payment by the Respondent entitles the Claimant to the relief he seeks in this regard;
  - (b) EUR 12,000.00, net, which was payable on 1 June 2010 – its non-payment by the Respondent entitles the Claimant to the relief he seeks in this regard; and
  - (c) EUR 3,000.00, net, which was payable seven days following the qualification of the Respondent's team for the 2010-2011 Euro Cup. The date of such qualification was 2 May 2010 and therefore the date of payment was to have been 9 May 2010. Its non-payment by the Respondent entitles the Claimant to the relief he seeks in this regard.
32. The Claimant is also requesting the payment of the penalty fees outlined in the Agreement of EUR 50.00 per day. This claim arises from the Agreement's provision in Article IV to the effect that payments which are received five days late are subject to a penalty of EUR 50.00 per day. The Claimant calculates the amount of the penalties as follows to the date of the Request for Arbitration (19 April 2011):
- (a) EUR 9,000.00, net, which was payable on 1 May 2010 – the Claimant says the payment was delayed by 339 days. Multiplying 339 by EUR 50.00 results in a figure of EUR 16,950.00; and
  - (b) EUR 12,000.00, net, which was payable on 1 June 2010 – the Claimant says the payment was delayed by 309 days. Multiplying 309 by EUR 50.00 results in a figure of EUR 15,450.00.

33. These penalty fees of EUR 50.00 per day, and the Claimant's calculation of them, are what the Parties agreed when they entered into the Agreement. The Respondent can have been in no doubt as to the consequences of non-payment. However the Arbitrator does note that the Claimant's calculation results in penalty fees which are higher than the principal claim for unpaid salary. The Arbitrator, in line with the jurisprudence of the BAT<sup>5</sup>, does not believe that an award for penalties which exceed the principal claim for unpaid salaries is just and equitable. Considering the position and applying what he believes is just and equitable in the present situation, the Arbitrator caps the penalty fees claim at EUR 24,000.00.
34. The Claimant also seeks interest. The Arbitrator does not believe that, as a matter of justice and equity, the Claimant's claim in this regard should succeed. In his success on the point of penalty fees of EUR 50.00 per day he is being, in the Arbitrator's view, adequately compensated for late payment.
35. In summary, the Claimant succeeds on his unpaid salary and bonus claims in the amount of EUR 24,000.00 and succeeds partly on his penalty fee claim in the amount of EUR 24,000.00. This results in a total of EUR 48,000.00, net, to be paid by the Respondent to the Claimant.

## **7. Costs**

36. 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.

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<sup>5</sup> See BAT 0184/11 Bilan vs. KK Zadar, paras. 102-106; and BAT 0190/11 Crittenton vs Zhejiang Guangsha BC, paras. 81-85 with further references to BAT jurisprudence.

37. On 29 April 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 4,400.00.
38. Considering that the Claimant prevailed in almost all of his claims, it is fair that the fees and costs of the arbitration be borne by the Respondent and that it be required to cover its own legal fees and expenses as well as those of the Claimant.
39. The Arbitrator finds that the legal costs and expenses claimed by the Claimant (EUR 2,500.00 – which figure does not include the non-reimbursable handling fee) are reasonable in the circumstances of this case. Legal costs of EUR 2,500.00 together with a figure reflecting the non-reimbursable handling fee of EUR 1,992.00 are to be borne by the Respondent.
40. Given that the Claimants paid an advance on costs of EUR 7,000.00 as well as a non-reimbursable handling fee of EUR 1,992.00 (which will be taken into account when determining the Claimant’s legal fees and expenses), the Arbitrator decides that in application of article 17.3 of the BAT Rules:
- (i) BAT shall reimburse EUR 2,600.00 to the Claimant, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President;
  - (ii) The Respondent shall pay EUR 4,400.00 to the Claimant, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT;



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- (iii) The Respondent shall pay to the Claimant EUR 4,492.00 (for both the non-reimbursable handling fee and legal fees) representing the amount of his legal fees and other expenses.

## **8. AWARD**

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

- 1. PAOK 2004 Basketball S.A. shall pay Mr. Tomas Delininkaitis EUR 48,000.00, net, in respect of unpaid salary, bonuses and penalties.**
- 2. PAOK 2004 Basketball S.A. shall pay Mr. Tomas Delininkaitis EUR 4,400.00 as reimbursement for his arbitration costs.**
- 3. PAOK 2004 Basketball S.A. shall pay Mr. Tomas Delininkaitis an amount of EUR 4,492.00 as reimbursement for his legal fees and expenses.**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 2 May 2012

Klaus Reichert SC  
(Arbitrator)