

ARBITRAL AWARD

(BAT 0259/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Raj Parker

in the arbitration proceedings between

Mr. Ivan Zoroski

- Claimant -

represented by Mr. Sofoklis P. Pilavios, lawyer,

vs.

GS Panionios KAE

1 Hrisostomou Street, 17123 Nea Smyrni, Athens, Greece

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Ivan Zoroski (hereinafter the "Claimant") is a Serbian professional basketball player.
2. In these proceedings, the Claimant is represented by Mr. Sofoklis P. Pilavios, lawyer, Greece.

1.2 The Respondent

3. GS Panionios KAE (hereinafter the "Respondent" or the "Club") is a Greek professional basketball club. It is domiciled at 1 Hrisostomou Street, 17123 Nea Smyrni, Athens, Greece.

2. The Arbitrator

4. On 19 March 2012, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), appointed Mr. Raj Parker as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules").
5. Neither of the Parties has raised objections to the appointment of the Arbitrator or to the declaration of independence issued by him.

3. Facts and Proceedings

3.1 Background Facts

6. On 19 October 2009, the Player and the Club entered into a "Standard Player's

Contract” in respect of the 2009-2010 season (hereinafter the “SPC”). The SPC contains, among others, the following provisions:

“ARTICLE 3.A

The Club agrees to pay the Player for rendering services to the Club for the 2008-2009 [sic] season, a fully guaranteed net of taxes salary of €140,000.00 (One Hundred Forty Thousand Euros) to be paid in ten (10) equal instalments of €14,000.00 (Fourteen Thousand Euros) net each, payable on the last day of each month commencing with September, 2009 and concluding with June, 2010.”

(Emphasis in original.)

“ARTICLE 15

***Valid Contract:** This agreement contains the entire agreement between the parties and there are no oral or written inducements, promises or agreements except as contained herein and any bilateral Standby letter of credit if executed in conjunction with this agreement. It is however agreed that both parties shall sign an official contract of the Greek League upon Player’s arrival in Greece, based on the terms agreed herein.”*

(Emphasis in original.)

7. Also on 19 October 2009, the Parties entered into an “Athletic Services Contract” in respect of the 2009-2010 season (hereinafter the “ASC”). The ASC contains, among others, the following provisions (as set out in an Addendum thereto):

“ARTICLE 5.1.A

*It is agreed that the regular monthly salary of the Basketball Player for the period between 19/10/09 and 30/06/2010 is fixed to the sum of **Eight Hundred and twenty Euros (€820.00)**[net]¹ and shall be paid to him at the end of each month*

¹ Added in manuscript within the typed text.

corresponding to the above-mentioned period of time.

The Basketball Player shall also receive Christmas Bonus and Easter Bonus and allowances according to current legislation.”

(Emphasis in original.)

“ARTICLE 5.1.B

*As a signing bonus for the 2009-2010 season, it is agreed that the Player shall be paid the net of taxes amount of **Euros fifty two thousand six hundred and twenty three and seventy nine cents (€52.623,79)**, payable in nine (9) equal monthly instalments of Euros five thousand eight hundred and forty seven and nine cents (€5.847,09) net each, payable on the last day of each month commencing with October 2009 and concluding on June 2010.”*

(Emphasis in original.)

ARTICLE 11.2

The parties acknowledge, state and commit themselves to the fact that their relationship is regulated solely by the provisions hereof, and any prior written or oral agreement shall be null and void.

The Player asserts that he performed all of his contractual obligations during the 2009-2010 season but that the Club has paid him only EUR 64,000.00 of the salary of EUR 140,000.00 due to him pursuant to Article 3.A of the SPC.”

8. The Player asserts that he was provided with a cheque from the Club in the amount of EUR 66,000 as a guarantee for payments due under the SPC, but did not seek to cash the cheque because: (i) the Club had insufficient funds in the relevant bank account; and (ii) the cheque did not cover the full amount owed to the Player under the SPC.

3.2 The Proceedings before the BAT

9. On 17 February 2012, the Claimant filed a Request for Arbitration in accordance with the BAT Rules. The BAT received the non-reimbursable handling fee of EUR 2,000.00 from the Claimant on 23 February 2012.

10. By letter dated 19 March 2012, the BAT informed the Parties that Mr. Raj Parker 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. Ivan Zoroski)</i>	<i>EUR 4,000</i>
<i>Respondent (GS Panionios KAE)</i>	<i>EUR 4,000”</i>

11. By the same letter dated 19 March 2012, the BAT Secretariat fixed a time limit until 9 April 2012, for the Respondent to file its Answer to the Request for Arbitration.

12. On 29 March 2012, the Claimant paid his share of the Advance on Costs.

13. The Respondent failed to submit an Answer to the Request for Arbitration by 9 April 2012 and failed to pay its share of the Advance on Costs.

14. By letter dated 12 April 2012, the BAT Secretariat gave the Respondent a further opportunity to file an Answer to the Request for Arbitration by no later than 18 April 2012. In addition, the BAT noted that, pursuant to Article 9.3 of the BAT Rules, the arbitration would not proceed unless the BAT received the full amount of the Advance on Costs, and invited the Claimant to pay the Respondent's share of the Advance on Costs by no later than 23 April 2012.

15. The Respondent failed to submit an Answer to the Request for Arbitration by the extended deadline of 18 April 2012.

16. On 20 April 2012, the Claimant paid the Respondent's share of the Advance on Costs.
17. On 24 May 2012, the Arbitrator issued a Procedural Order (hereinafter the "First Procedural Order") requesting that the Claimant:
- (i) explain how, in his view, the SPC and the ASC are intended to interrelate and why he considers that the SPC, and not the ASC, sets out the operative provisions of the parties' agreement with respect to the financial aspects of their employment relationship; and
 - (ii) provide evidence showing the payments that the Respondent has made to him to date in respect of the 2009-2010 season.
18. The Claimant filed his reply to the Arbitrator's Procedural Order on 31 May 2012.
19. By Procedural Order dated 4 June 2012, the Arbitrator declared the exchange of documents complete, and requested that the Parties submit detailed accounts of their costs by 13 June 2012.
20. On 13 June 2012, the Claimant submitted the following statement of costs:

<i>"- Handling Fee to the FIBA BAT:</i>	<i>2,000.00 Euros</i>
<i>- Claimant's share on the advance on costs:</i>	<i>4,000.00 Euros</i>
<i>- Respondent's share on the advance on costs:</i>	<i>4,000.00 Euros</i>
<i>[paid by Claimant']</i>	
<i>- Attorneys fees and administrative expenses:</i>	<i>1,500.00 Euros</i>
<i>[drafting Request for Arbitration, preparing exhibits, correspondence]</i>	
TOTAL OF COSTS:	11,500.00 Euros"

21. The Respondent did not submit a statement of costs.

22. By email dated 15 June 2012, the BAT Secretariat invited the Respondent to submit any comments on the Claimant's Statement of Costs by no later than 20 June 2012. The Respondent did not submit any such comments.
23. Neither of the Parties requested a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the BAT Rules not to hold a hearing and to deliver the award on the basis of the Claimant's written submissions and evidence.

4. The Parties' Submissions

4.1 The Claimant's Submissions

24. The Player submits the following in substance:

(i) The SPC is the operative agreement between the Player and the Club with respect to "*the economic terms and benefits and all other aspects of their employment relationship*";²

(ii) The Club has paid to the Player only EUR 64,000 of the salary of EUR 140,000 due to him pursuant to Article 3.A of the SPC;

(iii) Accordingly, the Club is liable to the Player in the amount of EUR 76,000.

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

"[The] Claimant hereby respectfully requests Your Arbitral Tribunal to:

- 1. Establish the admissibility of this Request.*

² In his response to the First Procedural Order.

2. *Establish that the Respondent Club is in default of its contractual obligations on the basis of the “Standard Players Contract” of 19.10.2009 between Claimant and Respondent*
3. *Accept the claim of the Player against the Respondent Club in its entirety.*
4. *Order the Club as the party in breach to pay Claimant the total amount of € 76.000,00 (Seventy Six Thousand Euros)*
5. *Order the payment of the requested amount with an interest rate of 5% payable upon the respective due date of payment i.e. upon 30.06.2010*
6. *Order the Respondent to pay all expenses, costs and legal fees incurred by the Claimant in connection with these proceedings.”*

4.2 The Respondent’s Submissions

26. Despite several invitations by the BAT, the Club neither engaged in the arbitration proceedings at hand, nor did it make any submissions within the time limits set by the Arbitrator in accordance with the BAT Rules.

5. Jurisdiction

27. Since the Respondent did not participate in the arbitration, the Arbitrator will examine his jurisdiction *ex officio*, on the basis of the record as it stands.³
28. 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”. Accordingly, this arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (hereinafter the “PILA”).
29. The jurisdiction of the BAT over the present dispute derives from the dispute resolution

³ ATF 120 II 155, 162

clause contained in Article 12 of the SPC, which reads as follows:

“Jurisdiction in Case of Dispute: *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 relevant Greek League Committee for Financial Disputes.*

*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.”

(Emphasis added.)

30. The Arbitrator notes that the FIBA Arbitral Tribunal was renamed the Basketball Arbitral Tribunal on 1 April 2011 (see also article 18.2 of the BAT Rules).
31. Article 12 of the SPC expressly provides that the Parties may choose between two different forums to resolve their disputes: the Greek League Committee for Financial Disputes and the BAT. In accordance with Article 12 of the SPC, the Claimant chose to submit the present dispute to the BAT.

5.1 Arbitrability

32. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
33. The Arbitrator finds that the dispute in question is of a financial nature and is thus arbitrable within the meaning of Article 177(1) of the PILA.⁴

5.2 Formal and substantive validity of the arbitration agreements

34. The existence of a valid arbitration agreement is to be examined in light of Article 178 PILA, which reads as follows:

"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law."

35. The SPC is in written form and therefore fulfils the formal requirements of Article 178(1) of the PILA.
36. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that might cast doubt on the validity of the arbitration agreement under Swiss law (referenced in Article 178(2) of the PILA). The words "[a]ny dispute arising from or related to the present contract ..." in Article 12 of the SPC clearly cover the present dispute.

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

37. For the above reasons, the Arbitrator finds that the BAT has jurisdiction to determine the present dispute.

6. Other Procedural Issues

38. Article 14.2 of the BAT Rules, which the Parties have declared to be applicable in the arbitration agreements, specifies that “*the Arbitrator may nevertheless proceed with the arbitration and deliver an award*” if “*the Respondent fails to submit an Answer.*” The Arbitrator’s authority to proceed with the arbitration in case of default by one of the Parties is in accordance with Swiss arbitration law and the practice of the BAT⁵. However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
39. This requirement is met in the current case. The Club was duly informed of the initiation of the proceedings and of the appointment of the Arbitrator according to the relevant rules. It was also given opportunity to respond to Claimants’ Request for Arbitration and to Claimants’ account on costs. Still, the Club has chosen not to respond within the time limits set by the Arbitrator according to the BAT Rules.

7. Discussion

7.1 Applicable Law – *ex aequo et bono*

40. With respect to the law governing the merits of the dispute, Article 187(1) of the 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 choice, according to the rules of law with

⁵ See *ex multis* BAT cases 0001/07, *Ostojic and Raznatovic vs. PAOK KAE*; 0018/08, *Nicevic vs. Beşiktaş*; 0093/09, *A.S.D. Pallacanestro Femminile Schio vs. Braxton*; 0170/11, *Haritopoulos and Kallergis vs. Panionios BC K.A.E. and Gallis*.

which the dispute has its closest connection.

41. Article 187(2) of the PILA adds that the parties may authorize the Arbitrators to decide “*en équité*” as opposed to a decision according to the rule of law referred to in Article 187(1). Article 187(2) of the PILA is generally translated into English as follows:

“[T]he parties may authorize the arbitral tribunal to decide ex aequo et bono[.]”

42. As set out in paragraph 29 above, the SPC stipulates that any disputes arising out of the SPC shall be resolved by the BAT “in accordance with the FAT Arbitration Rules”. 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.”

43. Article 12 of the SPC provides that where a dispute is submitted to the BAT, “[t]he arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.”
44. Consequently, the Arbitrator shall decide the issues submitted to him in these proceedings *ex aequo et bono*.
45. The concept of “*équité*” (or *ex aequo et bono*) used in Article 187(2) of the PILA originates from Article 31(3) of the *Concordat intercantonal sur l'arbitrage*⁶ (Concordat),⁷ under which Swiss courts have held that arbitration “*en équité*” is fundamentally different from arbitration “*en droit*”:

⁶ This 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).

⁷ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 of the 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.”⁸

46. In substance, it is generally considered that an arbitral tribunal deciding a dispute *ex aequo et bono* has “a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case.”⁹
47. This is confirmed by Article 15.1 of the BAT Rules *in fine*, according to which the Arbitrator should apply “*general considerations of justice and fairness without reference to any particular national or international law.*”
48. In light of the foregoing considerations, the Arbitrator makes the following findings:

7.2 Findings

7.2.1 Outstanding salary due in respect of the 2009-2010 season

49. The amount of salary due to the Player for the 2009-2010 season according to the SPC is EUR 140,000.00. However, the ASC provides that the Player will be paid: a signing bonus of EUR 53,623.79; plus monthly salary payments of EUR 820 (making a total of EUR 60,183.79) for the 2009-2010 season.
50. The Player submits that he has already been paid EUR 64,000.00 for the 2009-2010 season and claims the remaining outstanding salary payments. In order to determine how much salary is outstanding, it must first be determined whether the Player’s salary

⁸ JdT 1981 III, p. 93 (free translation).

⁹ POUURET/BESSION, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

is in fact governed by the SPC or the ASC.

51. In his response to the First Procedural Order, the Claimant asserted that the SPC *“incorporates [the parties’] full and all-encompassing agreement and understanding with respect to the economic terms and benefits and all other aspects of their employment relationship”*, whilst the ASC is merely an *“official contract”* that was *“concluded for registration purposes only”* pursuant to applicable Greek law. The Club did not make any submissions challenging this assertion.
52. The Player enclosed with his response to the First Procedural Order, a letter from the Club dated 28 March 2012 (i.e. after the Player’s Request for Arbitration had been filed). In that letter, the Club acknowledged that it owes a debt to the Player in the amount of EUR 76,000.00. This sum is exactly the difference between the amount that the Player has received in relation to the 2009-2010 season (EUR 64,000.00) and the amount payable under the SPC (EUR 140,000.00).
53. For these reasons, the Arbitrator finds that the SPC was the operative agreement between the Player and the Club with respect to the Player’s remuneration for the 2009-2010 season.
54. Given that the Club has (i) acknowledged a debt of EUR 76,000.00 in correspondence; and (ii) not contested the Player’s assertions as to the facts of his claim or challenged the evidence provided in support of those assertions (notwithstanding that it has been given several opportunities to do so); the Arbitrator is satisfied that the Club is in default of its payment obligations in respect of the 2009-2010 season pursuant to Article 3.A of the SPC in the amount of EUR 76,000.00. The Arbitrator therefore finds that the Club shall pay the Player EUR 76,000.00 in respect of unpaid salary for the 2009-2010 season.

7.2.2 Interest

55. The Player claims interest on his claim in the amount of EUR 76,000 at a rate of 5% per annum from 30 June 2010. The Arbitrator notes that, pursuant to the terms of the SPC, all of the Player's salary for the 2009-2010 season had fallen due by 30 June 2010.
56. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest¹⁰. Although the SPC does not provide for the payment of default interest, this is a generally accepted principle which is embodied in most legal systems. Indeed, payment of interest is a customary and necessary compensation for late payment, and the Arbitrator considers that there is no reason why the Player should not be awarded interest in this case. The Arbitrator further considers, in line with the jurisprudence of the BAT, that 5% per annum is a reasonable rate of interest and that such rate should be applied in this case, accruing from the date requested by the Player, viz. 30 June 2012.

7.2.3 Costs

57. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the award or communicated to the parties separately. Furthermore, Article 17.3 of the BAT Rules provides that, as a general rule, the award shall grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings. When deciding on such a contribution, the Arbitrator shall take into account, the outcome of the proceedings, as well as the conduct and the financial

¹⁰ See, *ex multis*, the following BAT awards: 0092/10, *Ronci, Coelho vs. WBC Mizo Pecs 2010*; 0069/09, *Ivezic, Draskicevic vs. Basketball Club Pecs Noi Kosariabda Kft*; 0056/09, *Branzova vs. Basketball Club Nadezhda*

resources of the parties.

58. On 21 August 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 “[t]he 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 of 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 this matter to be EUR 8,000.00.
59. The Arbitrator notes that the Respondent did not pay its share of the Advance on Costs and that the Claimant paid the Advance on Costs of EUR 8,000 in its entirety, as well as a non-reimbursable handling fee of EUR 2,000.00.
60. The Arbitrator further notes that the Claimant has been successful in establishing his claim. The Arbitrator considers it appropriate to take into account the non-reimbursable fee when assessing the legal expenses incurred by the Claimant in connection with these proceedings. Thus, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:
- (i) The Respondent shall pay to the Claimant EUR 8,000.00, being the amount of the Advance on Costs paid by the Claimant.
 - (ii) The Respondent shall pay to the Claimant the amount of EUR 3,500.00 (2,000 + 1,500) in reimbursement of the legal fees and expenses incurred by the Claimant.

8. AWARD

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

- 1. GS Panionios KAE is ordered to pay Mr. Ivan Zoroski EUR 76,000.00 as compensation for unpaid salary for the 2009-2010 season, together with interest at a rate of 5% per annum from 30 June 2010.**
- 2. GS Panionios KAE is ordered to pay Mr. Ivan Zoroski EUR 8,000.00 as reimbursement of the advance on BAT costs.**
- 3. GS Panionios KAE is ordered pay Mr. Ivan Zoroski EUR 3,500.00 as reimbursement of his legal fees and expenses.**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 23 August 2012.

Raj Parker
(Arbitrator)