

ARBITRAL AWARD

(BAT 0268/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Dimitris A. Haritopoulos

- Claimant 1 -

Mr. Iossif S. Kallergis

- Claimant 2 -

Both represented by Mr. Pantelis Dedes, attorney-at-law,
Dedes-Makroglou and Associates, 2 Xanthou str., 10673 Athens, Greece

vs.

Panionios BC K.A.E.

1 Hrisostomou str., 17123 Nea Smyrni, Athens, Greece

- Respondent 1 -

Mr. George N. Koutelakis

- Respondent 2 -

1. The Parties

1.1 The Claimants

1. Mr. Dimitris Haritopoulos (hereinafter the “Player”) is a professional basketball player of Greek nationality. He is represented by Mr. Pantelis Dedes, attorney-at-law in Athens, Greece.
2. Mr. Iossif Kallergis (hereinafter the “Agent”) is a certified FIBA agent of Greek nationality. He is also represented by Mr. Pantelis Dedes.

1.2 The Respondents

3. Panionios BC K.A.E. (hereinafter the “Club”) is a professional basketball club located in Nea Smyrni, Athens, Greece. The Club is not represented in this arbitration.
4. Mr. George Koutelakis (hereinafter the “Guarantor”) is the former mayor of Nea Smyrni, Athens. He has signed an agreement by which he guaranteed certain payments due by the Club to the Claimants. The Guarantor is not represented in this arbitration.

2. The Arbitrator

5. On 19 April 2012, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren, appointed Dr. Stephan Netzle 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 Dispute

6. On 7 September 2011, the BAT issued the arbitral award BAT 0170/11 according to which the Club was ordered to pay EUR 53,120.56 to the Player, and EUR 4,000.00 to the Agent, both amounts plus interest of 5% p.a. since 1 January 2011. The Club was also ordered to pay jointly to the Player and the Agent the amount of EUR 15,400.00 consisting of a reimbursement of the advance on arbitration costs and a contribution towards the Player's and the Agent's legal fees and expenses.

7. On 29 September 2011, the Parties signed a "private agreement" by which they reduced the amounts determined by the arbitral award BAT 0170/11 to EUR 72,500.00 (hereinafter the "Private Agreement"). In Clause 3 of the Private Agreement the Parties arranged that this amount would be paid as follows:

"a) amount of twenty five thousand (25,000) Euros through the delivery of a bank check of equal amount issued by Proton Bank, which serves as delivery and receipt of the security of this amount,

b) the remaining amount of forty seven thousand five hundred (47,500.00) Euros in five (5) successive, monthly equal instalments of eight thousand (8,000.00) euros, to be paid on 31.10.2011 by transactional acceptance of KAE PANIONIOS, Mr. Koutelakis Georgios being the third party guarantor, on 30.11.2011 (...), on 30.12.2011 (...), on 31.1.2012 (...) and on 29.2.2012 (...) and a last one, amounting to seven thousand five hundred (EUR 7,500.00), to be paid on 30.3.12 (...). It should be understood that if one of the aforesaid instalments is not paid, then the basketball player is entitled to immediately claim both Panionis KAE and the third party guarantor the amount due till then."

8. Upon signature of the Private Agreement, the amount of EUR 25,000.00 was paid to the Claimants. The Private Agreement was deposited with the Committee of Professional Sports in Greece. As a consequence, the Club was granted permission to participate in the Greek Basketball Championship 2011-2012.

9. On 26 January 2012, the Claimants served each of the Respondents with an extrajudicial invitation as a notice of default. By that date, none of the remaining instalments had been paid, neither by the Club nor by the Guarantor.
10. To date, only the amount of EUR 25,000.00 has been paid to the Claimants. The remaining amount of EUR 47,500.00 is still outstanding. It is this amount which is now requested by the Claimants.

3.2 The Proceedings before the BAT

11. On 17 February 2012, the BAT Secretariat received the Claimants' Request for Arbitration dated 15 February 2012 and several exhibits. The non-reimbursable handling fee of EUR 2,000.00 was received in the BAT bank account on 21 February 2012.
12. By letters of 26 April 2012 and 23 May 2012, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Club to file its answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 6 June 2012. The BAT Secretariat also requested the Parties pay the following amount as an Advance on Costs by no later than 7 May 2012:

<i>"Claimant 1 (Mr. Dimitris Haritopoulos)</i>	<i>EUR 2,000</i>
<i>Claimant 2 (Mr. Iossif Kallergis)</i>	<i>EUR 2,000</i>
<i>Respondent 1 (BC Panionios)</i>	<i>EUR 2,000</i>
<i>Respondent 2 (Mr. George Koutelakis)</i>	<i>EUR 2,000"</i>

13. By letters of 8 and 11 June 2012, the BAT Secretariat informed the Parties that it had received the full amount of the Advance on Costs and that the proceedings would continue. Furthermore, the Parties were informed that the Respondents had failed to

submit an answer and were granted a final opportunity to file it by no later than 20 June 2012.

14. By letter of 5 July 2012, the BAT Secretariat informed the parties that the Arbitrator had decided to declare the exchange of documents complete. The Parties were therefore invited to submit a detailed account of their costs by 16 July 2012.
15. On 16 July 2012, the Claimants submitted an account of costs as follows:

“A) Claimants Expenses for BAT

<i>Non reimbursable handling fees</i>	<i>2,000</i>
<i>Advance on costs – Claimants</i>	<i>4,000</i>
<i>Advance on costs – Respondents</i>	<i>4,000</i>
<i>Total</i>	<i>10,000 €</i>

B) Legal Expenses and Fees (including the non reimbursable handling fees) of the Claimants 7,500 €”

16. The Respondents did not submit any account of costs.
17. By letter of 17 July 2012, the BAT Secretariat forwarded the Claimants’ account of costs to the Respondents and invited the Respondents to submit their comments, if any, on the Claimants’ costs by no later than 24 July 2012. The Respondents did not file any comments.
18. The Parties did not request the BAT hold 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 written submissions available.

4. The Positions of the Parties

4.1 The Claimants' Position

19. The Claimants submit the following in substance:

- Based on the arbitral award BAT 0170/2011, the Parties signed the Private Agreement by which they regulated the payment of the awarded funds. The Guarantor agreed to guarantee the payment of the instalments stipulated in the Private Agreement as a third party guarantor. To date, the Claimants received an amount of EUR 25,000.00 only. The remaining amount of EUR 47,500.00 is still outstanding.
- According to Greek Law, the legal interest rate for default is 8.75% p.a. and thus the Respondents are obliged to pay interest at this rate. Alternatively, an interest rate of 5% p.a. should be applied as stipulated in Article 104 of the Swiss Code of Obligations.

4.2 The Claimants' Request for Relief

20. In its Request for Arbitration, the Claimants request the following relief:

*"[...] Hold that the Respondents owe to the Claimants the total amount of **forty five (sic) thousand five hundred Euros (47,500)** plus interest from the due date of each instalments till the final payment i.e for the instalments of October, November, December and January and from the date of the notice of termination (26 / 1 / 2012) till the payment for the remaining instalments.*

*[...] Order the Respondents to pay to the Claimants the remaining amount of **forty seven thousand five hundred Euros (47,500)** with interest rate of 8,75% per annum or in the alternative with the interest rate decided by the BAT Arbitrator ex aequo et bono,*

[...] Hold that the costs of the present arbitration be borne by the Respondents alone.

*[...] **Hold and order** the Respondents to pay to the Claimants the arbitration fees as well as their legal fees and other expenses, as will be ascertained by the Arbitrator in time, plus interest.” (emphasis in the original)*

4.3 The Respondents’ Position and Request for Relief

21. Despite several invitations by the BAT, neither the Club nor the Guarantor engaged in the arbitration proceedings at hand. They also did not make any submissions within the time limits set by the Arbitrator in accordance with the BAT Rules.

5. The Jurisdiction of the BAT

22. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondents did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.
23. 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).
24. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
25. 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.
26. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Clause 5 of the Private Agreement, which reads as follows:

“5. In addition to this contract, as regards any dispute that may arise during the performance of this contract, the two contraction parties reserve the right to request the arbitration of FIBA, with possible appeal to the Court of Arbitration For

Sports (CAS), Lausanne, Switzerland. The arbitration shall be ruled by Article 12 of the Swiss Law about the Private International Law, regardless of the origin of this agreement's parties. The language of the arbitration shall be English. Both parties expressly accept that they have no right to appeal against the Judgment that shall be delivered by the arbitration of FIBA and CAS at the Swiss or other Courts. Once the arbitration and the CAS receive the request they will decide on the dispute ex aequo et bono." (sic)

27. The Private Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
28. The fact that the arbitration agreement does not explicitly mention the BAT but refers to *"the arbitration of FIBA"* does not affect the competence of the BAT to decide this dispute since the BAT is the only arbitration body created by FIBA and dealing with such disputes. The Parties' express statement that they *"reserve the right to request the arbitration of FIBA"* must be understood as the right of all Parties to file a request to the BAT. Moreover, any further reference to an appeal to the CAS does not impact the BAT's jurisdiction. Finally, the extrajudicial notices of 26 January 2012 served to the Club and the Guarantor did not establish jurisdiction of a state court, but were a mere debt collection measure which did not bar the Claimants from filing their Request for Arbitration with the BAT.
29. The wording of the arbitration clause still raises a question about the scope of that clause. The clause refers to *"the two contract[ing] parties"* whereas the private agreement was concluded by four parties. In addition, there are no indications that the arbitration clause was meant to apply only on two of the four parties in which case it would be impossible to determine which of the Parties were subject to the arbitration clause. The Arbitrator interprets the arbitration clause pursuant to the principle *"in favor validitatis"*. Accordingly, *"the two contracting parties"* must be understood as a reference to the two sides of the Private Agreement, namely the Player and the Agent as the obligors *"on the one hand"* as provided on page 1 of the Private Agreement, and the Club and the Guarantor as the debtors *"on the other hand"*. The arbitration

agreement applies therefore to any dispute between the contractual parties to the extent such dispute relates to the Private Agreement.

30. 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 agreements under Swiss law (referred to by Article 178(2) PILA). In particular, the wording “*any dispute that may arise during the performance of this contract*” in Clause 5 of the Private Agreement covers the present dispute. In addition, the jurisdiction of BAT has not been disputed by the Respondents.
31. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Claimants’ claim.

6. Respondents’ failure to submit an Answer

32. Article 14.2 of the BAT Rules, which the Parties have declared applicable in the arbitration agreement, 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 BAT¹. However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
33. This requirement is met in the current case. The Respondents were informed of the initiation of the proceedings and of the appointment of the Arbitrator according to the

¹ 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*.

relevant rules. Indeed, on 6 July 2012, the Club replied through its main email address (info@panioniosbc.gr) to an email message of the BAT Secretariat as follows:

"Dear Madam, we confirm that Mr koutelakis has received all documents. Please note that if you have any other documents, for Mr Koutelakis you can send in the same e-mail address. Thank you, Irimi Sarri" (sic)

34. Further, the Respondents were also given opportunity to respond to the Claimants' Request for Arbitration and to the Claimants' account on costs. Still, the Respondents have chosen not to respond within the time limits set by the Arbitrator according to the BAT Rules.

7. Applicable Law – *ex aequo et bono*

35. 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".

36. 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."

37. In the arbitration agreement in Clause 5 of the Private Agreement, the parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* (see para. 26 above).

38. The concept of “*équité*” (or *ex aequo et bono*) used in Article 187(2) PILA has been 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.*”

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

8. Findings

40. The Claimants request: (1) the outstanding amount of EUR 47,500.00 remaining from the agreed payment of EUR 72,500.00; and (2) interest on this amount of 8.75% p.a. or alternatively of a rate determined by the Arbitrator *ex aequo et bono*.

8.1 Outstanding amount of EUR 47,500.00

41. By virtue of the Private Agreement, the Respondents agreed on a payment of EUR 72,500.00 to the Claimants. A down payment of EUR 25,000.00 was made upon execution of the Agreement. The remaining amount of EUR 47,500.00, payable in five monthly instalments of EUR 8,000.00 and one instalment of EUR 7,500.00, is still outstanding.

42. Clause 3 (last sentence) of the Private Agreement says:

“It should be understood that if one aforesaid instalments is not paid, then the basketball player is entitled to immediately claim from both Panionios KAE and the third party guarantor the amount due till then.”

43. This raises two questions, namely whether only the *Player* (but not the Agent who is not mentioned in this sentence) is entitled to claim payments and whether only “*the amount due till then*” (which could be understood as the claims due on the date of the Request for Arbitration, i.e. 15 February 2012) can be claimed in this arbitration.

44. The Arbitrator finds that the last sentence of Clause 3 of the Private Agreement does not restrict the Agent's right to claim payment nor does it exclude claiming the amounts which became due after the date of the Request for Arbitration but before the date of this arbitral award.
45. All other provisions in the Private Agreement explicitly provide that *both* Claimants shall be entitled to the agreed total amount of EUR 72,500.00. On the other hand, there is no explanation in the Private Agreement which would give raise to the assumption that the right to claim outstanding instalments was limited to the Player but did not apply to the Agent. Since also the arbitration clause includes the Agent, the Arbitrator finds that both parties are entitled to claim the amounts agreed by the Private Agreement, at least when it comes to the entire unpaid amount instead of a single instalment.
46. It is yet true that, at the time of the Request of Arbitration, only four of six instalments were due. However, the Claimants requested payment of the *entire* unpaid amount including the instalments which became due only *after* the Request for Arbitration. The Arbitrator is nevertheless ready to decide on the full amount instead of restricting the award to four unpaid instalments and to invite the Claimants to file new claims for the instalments due on 29 February and 30 March 2012 which would anyway be based on the same facts and legal grounds. The reasons for the Arbitrator's decision are as follows:
- (i) the last instalment became due on 30 March 2012 (i.e. before the date of this arbitral award);
 - (ii) there is no evidence whatsoever that any of the instalments have been paid meanwhile;
 - (iii) the Request for Relief refers to the entire unpaid amount of EUR 47,500.00; and

(iv) the arbitral award must be based on the circumstances at the time when the award is issued.

47. The last sentence of Clause 3 of the Private Agreement does not restrict the Agent's right to claim payment. The Arbitrator understands that this provision rather addresses the question whether and by whom also monthly instalments can be claimed before the entire amount becomes due. This is not the case at hand because all instalments have become due to date.
48. The Arbitrator further understands that the Club and the Guarantor agreed to be jointly and severally liable for the payment of the agreed amount. The Private Agreement does not require the Claimants to make any attempts to enforce its claim against the Club before it can approach the Guarantor.
49. There might be a question whether the obligation of the Guarantor is subject to additional formal requirements as provided by certain national laws. The Arbitrator finds however that the "guarantee" is not an independent undertaking to pay but constitutes a cumulative assumption of the Club's debt by the Guarantor without releasing the main obligor from its obligation. Such an assumption is usually not subject to additional formal requirements but constitutes a valid and enforceable obligation of both, the Club and the Guarantor. The Arbitrator therefore finds, deciding *ex aequo et bono*, that the Private Agreement is a materially and formally sufficient acceptance by the Club and the Guarantor to pay the outstanding amounts listed in the Private Agreement to the Player and the Agent.
50. When it comes to the merits of the claim, the Arbitrator has no doubts about the validity of the Private Agreement and the acceptance of the debt by the Club and the Guarantor. There are also no indications that either the Club or the Guarantor made further payments in excess of the initial amount of EUR 25,000.00. The Arbitrator finds therefore that the Club and the Guarantor are jointly and severally obliged to pay the amount of EUR 47,500.00 to the Player and the Agent.

8.2 Interest

51. The Claimants also request interest of 8.75% p.a. according to Greek law or alternatively of a rate determined by the Arbitrator *ex aequo et bono* while referring to Article 104 of the Swiss Code of Obligation stating a rate of 5% p.a.
52. The Private Agreement does not provide for the payment of default interest. Furthermore, in the Claimants' extrajudicial invitations of 26 January 2012, no interest was claimed by the Claimants.
53. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest.² This is a generally accepted principle which is embodied in most legal systems. However, it is also generally accepted that the obligee has to request payment of interest from the obligor. The Claimants have claimed interest only in their Request for Arbitration.
54. The Arbitrator, deciding *ex aequo et bono* and taking into consideration that the Claimants have not claimed interest before filing the Request for Arbitration with the BAT, finds that the starting date for the calculation of the default interest shall be the day of receipt of the Request of Arbitration by the BAT, i.e. 17 February 2012.
55. Regarding the interest rate, the Arbitrator holds that the parties explicitly agreed in the arbitration agreement to have their dispute decided *ex aequo et bono* and therefore any interest rate according to national law is not applicable. This applies for the rate of 8.75% p.a. according to Greek law as well as any interest rate according to Swiss law. However, still deciding *ex aequo et bono* and in line with BAT jurisprudence, the

² 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*.

Arbitrator considers interest in the rate of 5% p.a. to be fair and equitable in the present case.

56. Consequently, the Arbitrator finds that the Claimants are entitled to interest of 5% p.a. on the amount of EUR 47,500.00 since 17 February 2012.

9. Costs

57. 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. As a general rule, the Arbitrator shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
58. On 31 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 “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 6,800.00.
59. Considering the outcome and the circumstances of the present case, the Arbitrator finds it fair that the fees and costs of the arbitration shall be borne jointly by the Club and the Guarantor.

60. Given that the Player paid the totality of the advance on the arbitration costs of EUR 8,000.00, the Arbitrator decides that:

- (i) the BAT shall reimburse EUR 1,200.00 to the Claimants;
- (ii) The Respondents shall pay to the Player EUR 6,800.00, being the difference between the costs advanced by them and the amount which is going to be reimbursed to them by the BAT.

61. Furthermore, the Arbitrator considers it adequate that the Claimants are jointly entitled to a contribution towards their legal fees and other expenses (Article 17.3. of the BAT Rules). However, the Arbitrator notes divergences between the amounts stated by the Claimants in their account of costs (which indicates as legal expenses and fees of both Claimants the amount of EUR 7,500.00) and the agreement on legal fees in the Claimants' power of attorney which states as a reasonable compensation the acceptance of "10% of any money collected plus legal expenses not exceeding 3,500€". Taking into consideration the circumstances and the complexity of the case as well as the fact that the Claimants' counsel filed only one submission, the Arbitrator deems it appropriate to take into account an amount of EUR 5,500.00 as a reasonable compensation (including the non-reimbursable handling fee of EUR 2,000.00) when assessing the expenses incurred by the Claimants in connection with these proceedings and to hold that the Respondents shall reimburse the amount of EUR 5,500.00 to the Claimants.

10. AWARD

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

- 1. Panionis BC K.A.E. and Mr. George N. Koutelakis are ordered to jointly pay to Mr. Dimitris A. Haritopoulos and Mr. Iossif S. Kallergis the amount of EUR 47,500.00 plus interest of 5% p.a. since 17 February 2012.**
- 2. Panionis BC K.A.E. and Mr. George N. Koutelakis are ordered to jointly pay to Mr. Dimitris A. Haritopoulos and Mr. Iossif S. Kallergis the amount of EUR 6,800.00 as a reimbursement of their advance on arbitration costs.**
- 3. Panionis BC K.A.E. and Mr. George N. Koutelakis are ordered to jointly pay to Mr. Dimitris A. Haritopoulos and Mr. Iossif S. Kallergis the amount of EUR 5,500.00 as a contribution towards their legal fees and expenses.**
- 4. Any other or further-reaching prayers for relief are dismissed.**

Geneva, seat of the arbitration, 6 September 2012



Stephan Netzle
(Arbitrator)