BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0314/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Raj Parker

in the arbitration proceedings between

Mr. Theodoros Papaloukas

- Claimant -

represented by Mr. Ioannis Mournianakis,
attorney at law in Athens, Greece

vs.

Olympiacos KAE Basketball Club

- Respondent -

represented by Messrs. Massimo Coccia and Mario Vigna,
attorneys at law in Rome, Italy, as well as by Messrs. Dimitris Prassos and George Prassos, attorneys at law in Piraeus, Greece

1. The Parties

1.1 The Claimant

1. Mr. Theodoros Papaloukas (hereinafter the "Claimant") is a professional basketball player from Greece.

1.2 The Respondent

2. Olympiacos KAE Basketball Club (hereinafter the "Respondent") is a professional basketball club based in Piraeus, Greece.

2. The Arbitrator

3. On 7 September 2012, the President of the Basketball Arbitral Tribunal (the "BAT"), Professor Richard H. McLaren, appointed Mr. Raj Parker as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Arbitration Rules of the BAT (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. On 27 June 2008, the Claimant and the Respondent entered into an athletic services

contract for the Claimant's services as a professional basketball player (hereinafter the "Contract"). Pursuant to Article 2.1 of the Contract, the term of the Contract was for three basketball seasons commencing on 27 June 2008 and expiring on 30 June 2011.

5. Pursuant to Article 4.2, the Respondent has the obligation to "*timely pay the [Claimant]'s remuneration*".

6. Article 5 ("*FINANCIAL TERMS"*) of the Contract refers to the Claimant's regular monthly salary and other benefits. In respect of each of these is written in manuscript "*SEE ADDENDUM*". Details of the remuneration due to the Claimant are set out in Article 5 of the addendum to the Contract (hereinafter the "Addendum"). Payment is required to be made in three categories for each season, and can be summarised as described at paragraphs 7 to 9 below.

7. In respect of the 2008-2009 season (hereinafter "Season 1"):

- A regular monthly salary (hereinafter, including in relation to amounts payable in subsequent seasons, the "Salary") of EUR 800.00, payable at the end of each month;

- A signing bonus (hereinafter, including in relation to amounts payable in subsequent seasons, the "Signing Bonus") of EUR 2,289,816.74, payable in ten equal monthly instalments at the end of each month from September 2008 to June 2009 inclusive; and

- A target bonus (hereinafter, including in relation to amounts payable in subsequent seasons, the "Target Bonus") for various target achievements by the team (being success at the Greek Championship, Euroleague and Greek Cup), payable in each case within 30 days of the occurrence of the relevant target.

8. In respect of the 2009-2010 season (hereinafter "Season 2"):

- A Salary of EUR 800.00, payable at the end of each month;
- A Signing Bonus of EUR 2,989,837.88, payable in ten equal monthly instalments payable at the end of each month from September 2009 to June 2010 inclusive; and
- Various Target Bonuses.

9. In respect of the 2010-2011 season (hereinafter "Season 3"):

- A Salary of EUR 800.00, payable at the end of each month;
- A Signing Bonus of EUR 2,989,288.38, payable in ten equal monthly instalments payable at the end of each month from September 2010 to June 2011 inclusive; and
- Various Target Bonuses.

10. Various other benefits in kind are detailed in Article 5.1.C of Addendum to Contract, and include the provision of a fully furnished house (including cost of rent, electricity, water, heating) and the use of a car.

11. The Claimant states that a total of EUR 8,542,543.00 was due under the Contract. The Claimant also states that payments were made on a regular basis pursuant to the Contract during Season 1.

12. During Seasons 2 and 3, however, the Claimant states that payments became irregular and partial. It is disputed between the Claimant and the Respondent whether

complaints were made by the Claimant to the Respondent in respect of irregular payment or non-payment under the Contract.

13. By the end of the term of the Contract, the Claimant claims to have been paid a total sum of EUR 6,916,207.57, which included payments of Salary, Signing Bonus and Target Bonus. This represents 80.96% of the amount owed under the Contract. Accordingly, the Claimant alleges that a sum of EUR 1,610,364.87 is currently outstanding under the Contract.

14. In its defence (and in addition to legal arguments relating to its alleged financial hardship which are referred to further at paragraphs 38, and 73 to 78 below), the Respondent alleges that on 22 June 2010, an oral variation of the Contract was entered into (hereinafter the "Variation") during talks held between Claimant and a representative of the Respondent. Pursuant to the Variation, the Claimant is alleged to have agreed to a 20% reduction of the Claimant's Signing Bonus (being a reduction of EUR 1,653,898.00) to be applied "retroactively across all three years of the contract".

15. The Claimant denies that any such Variation was entered into.

3.2 The Proceedings before the BAT

16. On 1 August 2012, the Claimant filed a Request for Arbitration in accordance with the BAT Rules seeking an award for payment of outstanding amounts in the sum of EUR 1,610,364.87. The non-reimbursable handling fee of EUR 7,000 was received by BAT on 7 August 2012.

17. On 12 September 2012, the BAT Secretariat informed the parties that the Arbitrator had been appointed and fixed the Advance on Costs at EUR 7,000 from each of the parties, to be paid by no later than 24 September 2012.

18. The Respondent was also requested to file its answer to the Request for Arbitration by no later than 3 October 2012 (hereinafter the "Answer").

19. On 28 September 2012, the BAT Secretariat acknowledged full payment by both parties of the Advance on Costs. The Respondent then requested an extension of time, allowing it to file the Answer by 5 November 2012. On 4 October 2012, the BAT Secretariat notified the Respondent that an extension had been granted by the Arbitrator for the Respondent to file the Answer by no later than 15 October 2012.

20. On 10 October 2012, the BAT Secretariat was informed that a further extension, for the Respondent to file the Answer by no later than 31 October 2012, had been agreed between the parties. The Arbitrator granted an extension accordingly.

21. On 31 October 2012, the Respondent, through its counsel, submitted the Answer.

22. On 7 November 2012, the Arbitrator issued a Procedural Order (hereinafter, the "First Procedural Order") requesting that the parties provide further submissions in respect of, *inter alia*: the alleged meeting on 22 June 2011 during which the Respondent argues the Variation was agreed to; complaints allegedly made by the Claimant in respect of the reduced payments; and a detailed account of payments made by the Respondent to the Claimant pursuant to the Contract. The Arbitrator requested that the parties provide responses by no later than 21 November 2012. On 20 November 2012, the BAT Secretariat was informed that an extension had been agreed to between the parties for responses to be provided by 10 December 2012. The Arbitrator granted an extension accordingly.

23. On 10 December 2012, the Claimant and the Respondent provided responses to the First Procedural Order (hereinafter the "Claimant's First Response" and the "Respondent's First Response" respectively). The Claimant's First Response was not limited to submissions in respect of the Procedural Order, but included additional

submissions in the form of approximately 24 pages of "comments" on the Answer.

24. On 12 December 2012, the Respondent's representatives sent an email to the BAT secretariat, requesting that the Arbitrator "*declare [various portions of the Claimant's First Response] of December 10, 2012 as inadmissible*", or "*to allow a reasonable time-limit (also taking into account the Christmas holidays) for the filing of new Respondent's observations in reply to the above supplementary comments of the Claimant*".

25. On 18 December 2012, the BAT Secretariat communicated to the parties the Arbitrator's decision to consider the Claimant's First Response, and indicated that the Respondent would be permitted to submit further comments if it so wished by no later than 4 January 2013. In response, the Claimant's representatives sent an email to the BAT Secretariat on 20 December 2012, stating that the Claimant wished to note that he had:

> *"deemed it necessary to comment on the [Respondent's First Response] only to respond to the new legal and factual issues that were raised [….]. for the first time, and in particular the alleged agreement of June 2010, the hardship issue and the Respondent's motions for relief. In this regard, the Claimant considers that by submitting [the Claimant's First Response], he merely exercised his right to be heard in the present proceedings, which is part of the general principle of procedural fairness".*

26. The Claimant's representative added that the Claimant:

> *"reserves the right to request the Arbitrator for permission to submit a final response on the Respondent's expected comments [...] should the Respondent raise any additional new matters in those comments".*

27. On 21 December 2012, the BAT Secretariat was informed that an extension had been agreed to between the parties for the Respondent to provide its further comments by 18 January 2013. The Arbitrator therefore granted an extension accordingly.

28. On 18 January 2013, the Respondent provided its comments in response to the Claimant's First Response (hereinafter the "Respondent's Rejoinder").

29. On 6 February 2013, the Arbitrator issued a further Procedural Order (hereinafter, the "Second Procedural Order"), requesting, *inter alia*, that the Claimant provide further submissions in respect of his contemporaneous understanding of the reduced payments received over the term of the Contract and that the Respondent provide further explanations of the reduced payments. Each party was to respond no later than 20 February 2013.

30. On 20 February 2013, the Claimant and the Respondent provided responses to the Second Procedural Order (hereinafter the "Claimant's Second Response" and the "Respondent's Second Response" respectively). The Claimant's Second Response was not limited to submissions in respect of the Procedural Order, but included additional comments on submissions made in the Respondent's Rejoinder. As mentioned below at paragraph 87, the Claimant made some submissions which were not requested. In the circumstances, the Arbitrator decided that in order for justice to be best served as between the parties, those submissions should be accepted on the file and considered. As mentioned below at paragraph 87, the unrequested submissions were not enlightening.

31. On 12 March 2013, the Arbitrator issued a further Procedural Order declaring that the exchange of documents had been completed in accordance with Article 12.1 of the BAT Rules and requesting that the parties submit a detailed account of their costs by no later than 18 March 2013.

32. On 18 March 2013, the Claimant's representative provided a statement of costs totalling EUR 34,000. On 19 March 2013, the Respondent's representatives provided a statement of costs totalling EUR 24,550. On 20 March 2013, the Arbitrator invited the parties to submit their comments, if any, on the opposite party's account of costs until 25 March 2013. No comments were submitted by the said deadline.

33. Neither of the Parties requested an oral hearing and, as such, the Arbitrator decided in

accordance with Article 13.1 of the BAT Rules not to hold a hearing and to render the award based on the written record before him.

4. The Parties' Submissions

4.1 The Claimant's Position

34. In essence, the Claimant's position is that (a) the Respondent failed to pay to the Claimant the full amount due under the Contract, and (b) the Variation was not entered into.

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

> *"1. Establish the admissibility of this Request.*
>
> *2. Establish that the Respondent Club is in default of its contractual obligations towards the Claimant under the [Contract].*
>
> *3. Accept the claim of the [Claimant] against the Respondent Club in its entirety.*
>
> *4. Order the Club as the party in breach to pay Claimant the total of 1,610,364.87 Euros.*
>
> *5. Order the payment of the requested amount with an interest rate of 5% payable upon the respective due date of each payment, or upon the expiry of the Contract on 30.06.2011.*
>
> *6. Order the Respondent to pay all expenses, costs and legal fees incurred by the Claimant in these proceedings."*

36. In the First Procedural Order, the Arbitrator requested clarification of the Claimant's position as to payments made by the Respondent to the Claimant, which the Claimant has described as "expenses", totalling EUR 15,970.56. In the Claimant's First Response, the Claimant states that:

> *"the Respondent was not obliged under the [Contract] to assume [these] expenses, which are for the Claimant to pay. This is the reason why these expenses should be deemed to be part of the Claimant's contractual salaries, since it was the obligation of the Claimant and not of the Respondent to pay for them".*

37. The Arbitrator understands the Claimant's position to be that these expenses should be deducted from the amount sought by the Claimant, in light of the Claimant's acknowledgement that such expenses were for the Claimant, not the Respondent, to pay. The Claimant therefore seeks payment of the outstanding sum of EUR 1,594,394.31.

4.2 The Respondent's Position

38. In essence, the Respondent's position is that:

- The Respondent has suffered financial hardship as a result of the global financial crisis of recent years and in particular its effect on the Greek economy, and that hardship has changed materially the Respondent's position in relation to its ability to meet its financial obligations;

- As a result of that hardship and the consequent change in position, the Respondent and the Claimant agreed in the Variation that the Claimant would accept a 20% reduction in the amount owed to it in respect of Signing Bonus over the course of the whole Contract;

- In any event, under Greek (and other) legal principles where the circumstances relied upon by parties in entering a contract have changed materially after the fact in a way which could not have reasonably been foreseen, with the result that the debtor's performance is excessively onerous, a court may at the request of the debtor adjust the debtor's performance obligations appropriately; and

- In application of such principles, the Arbitrator should essentially give effect to the alleged terms of the Variation.

39. In the Answer, the Respondent requested the following relief:

> *"(1) Adjudge and declare that the contractual equilibrium between the Club and the Player has been altered by an unforeseen situation of hardship/frustration.*
>
> *(2) Declare the agreed upon 20% reduction agreed and applied to the [Signing Bonus] as just and fair in view of the hardship situation, and implement this reduction retrospectively to the entire length of [the Contract];*
>
> *(3) As a consequence, adjudge and declare that the Player's claim […] be dismissed.*
>
> ***In any case:***
>
> *(4) Immediate reimbursement from Player for the BAT application fee, plus any additional costs of arbitration, legal fees, and/or expenses related to this BAT case and other costs or any other amount the BAT considers equitable."*

5. The Jurisdiction of the BAT

40. Pursuant to Article 2.1 of the BAT Rules, "*[t]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland*". Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law ("PILA").

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

42. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus

arbitrable within the meaning of Article 177(1) of the PILA.[1]

43. The jurisdiction of the BAT in this dispute follows from the Addendum, which the Arbitrator finds forms part of the Contract. Articles 6(ii) and (iii) of the Addendum are as follows:

> *"ii) Exclusively and only for the financial disputes that may arise out of the terms hereof between the Club and the Player, shall be competent for their resolution the bodies of HEBA, the relevant committees for the resolution of financial disputes or the bodies of FIBA (FAT) as described below:*
>
> *(iii) Any dispute arising from or related to the present contract […] shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved 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 in 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 agreement is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA. 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) of the PILA). In particular, the wording *"[a]ny dispute arising from or related to the present contract"* in Article 6 of the Contract clearly covers the present dispute. In addition, the Respondent did not object to the jurisdiction of BAT.

45. The Arbitrator notes the reference in the clause to "*the bodies of HEBA, the relevant committees for the resolution of financial disputes or the bodies of FIBA (FAT)*". The parties clearly elected to use the BAT and not the bodies of HEBA or any other forum

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

to resolve this dispute. This is clear from the facts that the Claimant filed his Request for Arbitration with the BAT, the Respondent engaged with the BAT procedure by submitting the Answer and responding to procedural orders, and neither party contested or disputed the jurisdiction of the BAT.

46. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimant's claim.

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) 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 a choice, according to the rules of law with which the case has the closest connection. Article 187(2) of the 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) of the 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 "Law Applicable to the Merits", 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. The Arbitrator notes that the Addendum, at Article 6(i) (i.e. directly above the passages

referred to at paragraph 43 above) states:

> *"This agreement shall be governed by the laws of Greece and shall be Interpreted and enforced in accordance with the Laws of Greece, the provisions of HEBA and the provisions of FIBA."*

50. Nevertheless, the Addendum at Article 6(iii) makes clear that, in case of recourse to BAT, the BAT Arbitrator must decide any dispute under the Contract ex aequo et bono, and that is how the Arbitrator will decide the matters submitted to him in these proceedings.

51. 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[2] (Concordat)[3], 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."*[4]

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.

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2 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).

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

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

6.2 Findings

54. The first question to be determined in these proceedings is whether payments made to the Claimant have fallen short of the full amount due under the Contract. If so, the second question to be determined is whether the Respondent has established that the Claimant, pursuant to the alleged Variation, agreed to a 20% reduction of the Signing Bonus due from the Respondent. If the answer to the second question is "no", the third question to be determined is whether the Respondent is entitled to rely upon the alleged material change in its position to request that the Arbitrator give an award adjusting the Respondent's obligations and whether the Arbitrator will make such an award.

55. With regard to the amount due under the Contract, as mentioned at paragraph 5 above, Article 4.2 of the Contract makes clear that the Respondent has the obligation to "*timely pay the [Claimant]'s Remuneration*". Article 5 of the Addendum states that "*the Club shall pay the Player for his services*", and sets out in detail the amounts to be paid over the term of the Contract (see paragraphs 6 to 10 above).

56. It is accepted by both parties that the payments made to the Claimant by the Respondent fell short of the amount due under the Contract.

57. The Arbitrator finds that the amounts paid to the Claimant over the term of the Contract may be summarised as follows:

	Amount due (EUR)[5]	***Amount received (EUR)[6]***	***Percentage of amount due received***
Season 1	*2,361,016.74*	*2,067,331.17*	*87.56%*
Season 2	*3,111,037.88*	*2,408,763.63*	*77.43%*
Season 3	*3,070,488.38*	*2,440,112.77*	*79.47%*
Total	***8,542,543.00***	***6,916,207.57***	***80.96%***

58. It being clear that a significant proportion of the amounts due under the Contract has not been paid, it is necessary to determine whether, as the Respondent alleges, the Claimant agreed to accept reduced payment by agreeing to the Variation.

59. To this end, the Respondent alleges that a meeting took place on 22 June 2010 between the Claimant and Mr. Georgios Skindilias, the vice-president and managing director of the Respondent Club. No agent was present at the alleged meeting. Mr. Skindilias is alleged to have proposed to reduce the Claimant's Signing Bonus "*by 20% to be applied retroactively across all three years of the contract*", which the Claimant is said to have accepted.[7] The total amount of Signing Bonus due under the Contract was EUR 8,268,943.00, 20% of which is EUR 1,653,788.60. A reduction of 20% to the Singing Bonus would therefore have amounted to a reduction in payments made over the whole term of the Contract of EUR 1,653,788.60. The Variation is said to have been entered into orally, and there is no documentary evidence of the Variation.

60. The Respondent states that in light of the agreement to the Variation on 22 June 2010, the Respondent applied a reduction to payments made to the Claimant during Season 3 to reflect the Variation. Both the affidavits of Mr. Skindilias and Mr. Christos Stavropoulos, the Respondent's general manager, state that reductions were made in

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5 Based on the Request for Arbitration.

6 Based on the Respondent's First Response.

7 Paragraph 30 of the Answer.

Season 3, following the agreement to the Variation, so that the 20% overall reduction would be realised.[8]

61. The Claimant acknowledges that a meeting took place on or around 22 June 2010. However, the Claimant states that Mr. Skindilias did not make any proposals in respect of a reduction in payments to the Claimant at that stage, and states that he (the Claimant) "*never agreed in any way, orally or in writing, to a reduction to [his] remuneration and whenever this issue was put to [him he] never accepted to go into negotiations or mutual discussions of any kind*".[9]

62. The Claimant further states that he made "*several and repeated oral inquiries and complains to the representatives of the Respondent (especially Mr Skindilias), whenever he got the chance to meet with them*".[10] The Respondent denies that complaints were made by the Claimant at the time, whether orally or in writing.[11]

63. Accordingly, whether the Variation was agreed to at all is in dispute. The Variation has been invoked by the Respondent as a defence to its failure to comply with its payment obligations under the Contract. In the circumstances, the burden of proving the existence of an agreement to the Variation falls on the Respondent. The question to be determined, therefore, is whether the Respondent has discharged that burden of proof.

64. No documentary evidence has been produced which supports the existence of the Variation. It is therefore necessary to consider the available evidence, including witness

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8 Paragraph 8 of the Affidavit of Mr. Georgios Skindilias and paragraph 6 of the Affidavit of Mr. Christos Stavropoulos, both exhibited to the Answer.

9 Paragraph 5 of Exhibit 1 to the Claimant's First Response, being a written statement made by the Claimant himself.

10 Page 3 of the Claimant's Second Response. See also page 13 of the Request for Arbitration.

11 See the Respondent's First Response under the heading "Question no. 1".

evidence and other information, in order to determine whether the existence of the Variation can be inferred from that evidence.

65. To this end, the Arbitrator notes a number of factual inconsistencies between the Respondent's account of the Variation and the agreed facts of the case. Among them, the Arbitrator believes that two particular discrepancies suggest that the Variation was not agreed to.

66. The first discrepancy is that, as illustrated at paragraph 57 above, the Respondent's payments to the Claimant fell well short of the amount due in Season 1 and also in Season 2. 87.56% of the amount owed in Season 1 was paid in that season; 77.43% of the amount owed in Season 2 was paid in that season; 79.47% of the amount owed in Season 3 was paid in that season. This pattern of underpayment over the whole term of the Contract is not consistent with payments having been made properly until June 2010 and then an agreement having been reached that there would be a reduction in payments of Signing Bonus in Season 3, the intended effect of which was to reduce the amount of Signing Bonus paid over the entire term of the Contract by 20%. If payments had been made as required until Season 3, and then reduced in Season 3 to produce a reduction of EUR 1,793,788.60 in the total amount of Signing Bonus paid over the three seasons, then the amount paid in Season 3 would have been EUR 1,276,699.78. Put another way, it would have meant that in Season 3 the Respondent paid 41.58% of the amount otherwise payable in that season, rather than the 79.47% it in fact paid. The pattern of underpayment which occurred suggests that the Respondent rarely if ever paid amounts due in full or on time, but it does not support any explanation for this which has been put forward.

67. In the Procedural Order dated 6 February 2013, the Arbitrator invited the Respondent to explain the reduced payments in Season 1 and Season 2. In the Respondent's Second Response, the Respondent submitted that:

- In respect of Season 1, there were no irregularities or deficiencies in payments; and

- In respect of Season 2, "*as per its policy, the Club applied a uniform pattern of payments to players, according to which all players including [the Claimant] were paid on or about the same dates*".

68. With regard to the first bullet point at paragraph 67 above, even on the Respondent's own evidence it is simply impossible to deny that there were irregularities and deficiencies in Season 1. Leaving aside salary (which the Respondent has indicated was paid on irregular dates and in irregular amounts), the required payments of Signing Bonus in that season should have totalled EUR 2,289,816.74. That amount should have been paid in ten equal instalments between the end of September 2008 and the end of June 2009. According to the Respondent's evidence (see the "Analysis of Payments Made by the Club to the Athlete Theodoros Papaloukas", dated 5 December 2012 and submitted with the Respondent's First Response), nine payments of Signing Bonus were made between 5 November 2008 (none before that) and 25 June 2009. These payments were, according to the Respondent, of varying amounts and they totalled EUR 2,060,836.05.

69. With regard to the second bullet point at paragraph 67 above, the Arbitrator does not consider that the Respondent's submission explains or justifies the shortfall in and irregularity of payments in Season 2.

70. The second discrepancy referred to at paragraph 65 above is that, as observed above, the Respondent alleges that the parties had agreed to a reduction of 20% of the Signing Bonus. As explained at paragraph 59 above, this would have produced a reduction of EUR 1,653,788.60 in the total amount of Signing Bonus due under the Contract. Therefore, a reduction of 20% in the Signing Bonus should have resulted in a reduction of EUR 1,653,788.60 in the total amount to be paid. In fact, however, there

was a shortfall in the total amounts paid (giving the Respondent credit for the EUR 15,970.56 paid in respect of expenses) of only EUR 1,610,364.87. The Respondent has not explained why the reduction allegedly agreed to exceeds the reduction made in fact by over EUR 43,000.00.

71. Apart from these inconsistencies, the Arbitrator considers it to be inherently unlikely that the Respondent would enter into such an important and potentially contentious agreement as the Variation without making some written record of it. That would most likely be done in the form of a written agreement signed by the parties. However, at the very least the Arbitrator would expect the Respondent to have made a contemporaneous note of the meeting. The Respondent has provided no satisfactory explanation for the complete absence of a written record of the Variation. The Arbitrator is not persuaded by the Respondent's submission that the absence of a written agreement can be explained by good relations between the Claimant and the Respondent's owners and representatives. In any event, even if the character of the parties' relationship did explain the absence of a written agreement, it would not explain why the Respondent has been unable to provide any documentary evidence at all, such as a note of a meeting or a contemporaneous document referring to the meeting, of the agreement that was allegedly made.

72. In these circumstances, the Arbitrator finds that the Respondent has not discharged its burden or proof in establishing that the Variation was ever entered into. Accordingly, the Arbitrator finds that the Respondent is liable to pay the entire amount owed under the Contract.

73. It is therefore necessary to consider the Respondent's submissions to the effect that the Arbitrator can and should make an award to the effect that the Contract is varied to adjust the Respondent's payment obligations. The Respondent relies on provisions of Greek law and also the Unidroit Principles to argue that, in the circumstances which have affected the Respondent and the Greek economy generally, the Respondent's

obligations under the contract should be adjusted (i.e. reduced).[12]

74. As regards Greek law, the Respondent submits that Article 338 of the Greek Civil Code (hereinafter the "Code") provides that:

> *"if the circumstances the Parties relied upon in concluding a bilateral contract have subsequently changed due to reasons that are extraordinary and could not have reasonably been foreseen, and if because of said change, the performance of debtor becomes excessively onerous, then the Court has, at the request of the debtor, the authority and absolute discretion to adjust the debtor's performance appropriately."*

75. The Respondent submits also that Article 200 of the Code provides that "*[C]ontracts shall be interpreted according to the requirements of good faith taking into consideration business usages*", and Article 288 provides that "*[A] debtor shall be bound to perform the undertaking in accordance with the requirements of good faith taking into consideration business usages*" (the Respondent further submits that these two provisions are mandatory and not susceptible to waiver). The Respondent submits that these requirements together oblige contracting parties (under Greek law):

> *"to act as a decent and honest person, to behave in sincerity, to set boundaries to the relentless pursuit of his individual interests and to take into consideration the lawful interests of his counterparty which are affected or can be affected by the contractual relationship"*

and that, therefore, Articles 200 and 288 of the Code provide for "*the possibility of*" mandatory readjustment of a party's contractual obligations "*even if there is no extraordinary, unforeseen change of circumstances which could not have reasonably been foreseen*". In support of this part of its argument, the Respondent refers to three decisions of the Greek courts. Two of these (exhibits numbered 15 and 16 to the Answer), which each make reference to the global financial crisis, relate to rents payable under commercial leases in circumstances where the value of the leased

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12 See paragraphs 51 *et seq* of the Answer.

property had decreased markedly since the relevant leases were entered into. The third case (exhibit numbered 17 to the Answer) relates to a contract between a football player and a football club for the football players services in circumstances where, it appears, the football player became unable to play for an extended period of time due to injury.

76. It is not necessary for the Arbitrator to make formal findings on whether these cases are analogous to the case at hand, because the Arbitrator is required to decide this dispute *ex aequo et bono* rather than by reference to any particular laws. Nevertheless, the Arbitrator notes that he is not persuaded that any of the three cases assist him: the Arbitrator is not persuaded that cases in which a lessee finds that the value of the property they are renting is substantially less than the value reflected in the originally agreed rent, or cases in which a sports club has substantial payment obligations to a player who is not playing or practising, are necessarily analogous to a case in which a sports club simply finds it more difficult to meet its obligations because economic conditions generally have worsened. With regard to the Respondent's submissions as to the application of the cited provisions of the Code in this case more generally, and again without needing to make formal findings on these points based on national law in light of his obligation to decide this dispute *ex aequo et bono*, the Arbitrator:

- is not persuaded that a global financial crisis, a national recession, or financial difficulties particular to a specific person or organisation, are necessarily extraordinary or unforeseeable; and

- is not persuaded that any requirement of good faith between a player and his club would require the player to accept reduced payments or would excuse the club for making reduced payments simply because the club's financial circumstances had changed, even if they had changed dramatically.

77. The Respondent refers also to the Unidroit Principles and submits that under those

principles if an event occurs which "*fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished*" then, provided that that event became known to the disadvantaged party after the start of the contract, was unforeseeable, was beyond the control of the disadvantaged party, and was not a risk assumed by the disadvantaged party. Again, deciding *ex aequo et bono*, the Arbitrator:

- notes that the cost of the Respondent's performance did not increase – rather its ability to perform is alleged to have diminished;
- is not persuaded that the value of the Claimant's performance diminished;
- refers to what is said above in paragraph 76 about the foreseeability of the Respondent's situation; and
- is not persuaded that the risk of a material change in general economic circumstances and in its own financial position was not a risk assumed by the Respondent when it entered the Contract.

78. It is well established in BAT jurisprudence that financial difficulties faced by a club provide no defence to a claim by a player for salary payments which are due and unpaid.[13] The Arbitrator does not find that the Respondent's submissions on this point in relation to Greek law and other principles help him to reach a conclusion in this case which departs from the BAT jurisprudence. As explained above, the Arbitrator must decide this dispute *ex aequo et bono*, and that is what he has done. The Arbitrator finds that the existing BAT jurisprudence applies in this case. In disputes before the BAT, financial hardship – even if caused by a global or national financial crisis – is not

[13] See, for example, BAT (then FAT) case 0099/10 (Perry v Besiktas Jimnastik Kulubu) at paragraph 44, and BAT case 0166/11 (Fox v Basketclub Kalev/Cramo) at paragraph 46.

a defence or answer to claims for amounts due and unpaid under contracts.

79. In light of the Arbitrator's findings set out above, the Respondent must pay the Claimant the amounts due and unpaid under the Contract, less the payments made by the Respondent to the Claimant during the term of the Contract which were attributable to expenses (which the Claimant has accepted should be deducted). The sum outstanding under the Contract (after a deduction of EUR 15,970.56 reflecting amounts paid in respect of expenses) is EUR 1,594,394.31. Accordingly, the total amount owed by the Respondent to the Claimant is EUR 1,594,394.31. The Arbitrator finds that the Respondent must pay that amount to the Claimant.

6.3 Interest

80. The Claimant has claimed an interest at a rate of 5% per annum "payable upon the respective due date of each unpaid instalment or as of the expiry of the Contract on 30 June 2011".

81. The Arbitrator notes that the Contract is silent on the availability of interest for late payment. Nevertheless, the Arbitrator finds that payment of interest is a customary compensation for late payment and there is no reason why the Claimant should not be awarded interest in relation to the amounts awarded. The Arbitrator finds that a rate of 5% per annum is a reasonable rate of interest. Furthermore, this award of interest is in line with BAT jurisprudence and should be applied to outstanding payments on which payment of interest is appropriate.

82. As noted at paragraph 35 above, the Claimant had requested an award for interest at 5% "*payable upon the respective due date of each payment, or upon the expiry of the Contract on 30.06.2011*" (emphasis added). The arbitrator has found that payments were made at irregular times and in irregular amounts. In those circumstances, it is

difficult to ascertain the amounts and durations of shortfalls in payments from time to time and to calculate the appropriate amount of interest accrued thereon. In the circumstances, the Arbitrator finds that interest must be paid from the day after the expiry of the Contract, i.e. 1 July 2011.

83. The Arbitrator therefore awards interest at a rate of 5% per annum on EUR 1,594,394.31, being the amount due but unpaid at 30 June 2011, from 1 July 2011 until the date that payment is made.

7. Costs

84. 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.

85. Article 17.2 of the BAT Rules provides that "*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. Having those provisions in mind, on 5 July 2013 the BAT President determined the arbitration costs in the present matter to be EUR 14,000.00.

86. The Arbitrator notes that the Claimant was successful in establishing his claim and therefore the costs of these proceedings shall be borne by the Respondent alone. As a

result, the Respondent shall pay to the Claimant an amount of EUR 7,000.00, which is equal to the amount of arbitration costs advanced by the Claimant in this case.

87. The Arbitrator also notes that in these proceedings both parties have made a number of long and complex submissions, which were not required in a relatively simple case in which only one matter of fact was in dispute. In particular, on two occasions the Claimant's representative provided submissions which the Arbitrator did not request and which have not been enlightening. Both parties made unnecessarily long and complicated submissions. The contribution granted towards the Claimant's legal fees and expenses must be limited to those fees and expenses which are reasonable, and that will reflect these observations.

88. The Claimant provided a breakdown of his costs on 18 March 2013 which indicated total costs of EUR 34,000.00 comprising the non-reimbursable handling fee of EUR 7,000.00, the Claimant's share of the Advance on costs (being another EUR 7,000.00) and attorneys' fees and administrative expenses totalling EUR 20,000.00. The arbitrator considers that attorneys' fees and expenses of EUR 20,000.00 were substantially more than were required in this case. In the circumstances, the Arbitrator awards the Claimant a contribution towards his reasonable legal fees and expenses in the total amount (i.e. including the non-reimbursable handling fee) of EUR 14,000.00. This amount is below the maximum amount provided for in Article 17.4 of the BAT Rules.

8. AWARD

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

1. **Olympiacos KAE Basketball Club shall pay Mr. Theodoros Papaloukas, in respect of contractual amounts due and unpaid, EUR 1,594,394.31.**

2. **Olympiacos KAE Basketball Club shall pay Mr. Theodoros Papaloukas interest at 5% per annum on the amount of EUR 1,594,394.31 from 1 July 2011 until the date that payment is made.**

3. **Olympiacos KAE Basketball Club shall pay Mr. Theodoros Papaloukas EUR 7,000.00 as reimbursement for his arbitration costs.**

4. **Olympiacos KAE Basketball Club shall pay Mr. Theodoros Papaloukas EUR 14,000.00 as reimbursement for his legal fees and expenses.**

5. **Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 15 July 2013.

Raj Parker
(Arbitrator)