BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 1596/20)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Benny Lo

in the arbitration proceedings between

Mr. Dusan Sakota

- Claimant -

represented by Mr. Branko Pavlovic,

vs.

A.E.K. Athens B.C.
466 Irakleio ave. and Kuprou Herakleion Attica,
14122 Athens, Greece

- Respondent -

1. The Parties

1.1. The Claimant

1. Mr. Dusan Sakota ("Player" or "Claimant") is a Greek professional basketball player.

1.2. The Respondent

2. A.E.K. Athens B.C. ("Club" or "Respondent") is a professional basketball club competing in the Greek professional basketball league.

2. The Arbitrator

3. On 28 September 2020, Prof. Ulrich Haas, the President of the Basketball Arbitral Tribunal ("BAT"), appointed Mr. Benny Lo as arbitrator ("Arbitrator") pursuant to Article 8.1 of the Arbitration Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 ("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 19 August 2019, the Claimant, the Respondent and the Claimant's agent, Mr. Ivan Zoroski, entered into a Settlement Agreement in respect of an existing debt owed by the Respondent to the Claimant ("Settlement Agreement").

5. The Settlement Agreement provides relevantly as follows:

"*1. With this Settlement Agreement all above parties agree that there is an existing debt of the Club towards the Player described in the following amounts:*

- *71.655 euros net that correspond to bonus payments and salaries from seasons 2014-2015, 2015-2016 and 2016-2017*
- *115,000 euros net that correspond to salaries from season 2018-2019*

According the above mentioned amounts, the total amount owed to the Player is 186,600 euros.

2. In satisfaction of the CLUB's entire responsibility to the PLAYER the Club will pay to the PLAYER the following payments:

The total amount of 186,600 euros will be paid into 10 monthly installments of 18,600 euros each, as follows:

(a) The first installment will be paid until August 31st, 2019

(b) The next installments will be paid every 30th of each month, starting from September 30, 2019 and finishing on May 30, 2020 (last installment).

The Club will have 10 additional days after every scheduled installment to make a payment.

In the case that the team is in breach of said Agreement, the said Settlement will automatically be considered void, and the Player shall hold the right to enter the BAT immediately and apply for the full amount of the Contract and Previous Debt Settlement, which we´re[sic] *simultaneously signed on the 26th of July 2018, between AEK NEA KAE 2014 A.E.K ATHENS BSA(Club) and the Player, Dusan Sakota.*"

6. Under the Settlement Agreement, the Respondent was obligated to pay to the Claimant the total amount of EUR 186,600.00 in 10 equal monthly instalments, starting on

31 August 2019 and ending on 30 May 2020.

7. On the Claimant's case, the Respondent defaulted in payment after paying EUR 85,800.00 in 5 instalments.

8. By the first notice of payment dated 9 July 2020, the Claimant requested the Respondent to pay the outstanding balance of EUR 100,800.00 pursuant to the Settlement Agreement. By a text message of the same date, the general manager of the Respondent confirmed the figure of the outstanding balance.

9. By the second notice of payment dated 17 August 2020 issued by Mr. Ivan Zoroski on behalf of the Claimant, the Claimant again demanded the Respondent to pay the outstanding balance of EUR 100,800.00, but no payment was made by the Respondent.

3.2 The Proceedings before the BAT

10. On 3 September 2020, the Claimant filed his Request of Arbitration ("RfA") in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 3,000.00 on 4 September 2020.

11. On 29 September 2020, the BAT informed the Parties that Mr. Benny Lo had been appointed as the Arbitrator in this case, invited the Respondent to file an Answer to the RfA in accordance with Article 11.4 of the BAT Rules (by no later than 20 October 2020) and fixed the advance on costs to be paid by the Parties as follows:

"*Claimant (Mr. Dusan Sakota)* *EUR 4,000.00*

Respondent (AEK Athens) *EUR 4,000.00*"

12. On 7 October 2020, the BAT received an advance on costs paid by the Claimant in the total amount of EUR 4,000.00.

13. On 21 October 2020, the BAT informed the Parties that the Respondent had failed to submit its Answer to the RfA and to pay its share of the advance on costs. The Respondent was given a final opportunity until 28 October 2020 to pay its share of the advance on costs and to file an Answer to the RfA. The Respondent was informed that, in accordance with Article 14.2 of the BAT Rules, if the Respondent should fail to submit an Answer the Arbitrator may nevertheless proceed with the arbitration and deliver an award.

14. On 2 November 2020, the BAT informed the Parties that the Respondent had still failed to submit its Answer to the RfA and pay its share of the advance on costs. The BAT invited the Claimant to substitute for the Respondent's share by 12 November 2020. In accordance with Article 9.3.1 of the BAT Rules, the BAT Secretariat decided to adjust the advance on costs as follows:

"*Claimant (Mr. Dusan Sakota)*	*EUR 3,250.00*
Respondent (AEK Athens)	*EUR 3,250.00*"

15. By email dated 12 November 2020, the Claimant sought a temporary suspension of the proceedings for 10 days as he received an order from the Greek authorities to pay the tax that the Respondent was supposed to pay. The Claimant, therefore, was considering whether the tax in question should be made as an additional claim in the proceedings. By email of 17 November 2020, the Parties were informed of the Arbitrator´s decision to order that the proceedings be suspended until 23 November 2020.

16. On 13 November 2020, the BAT received a further advance on costs paid by the Claimant in the total amount of EUR 2,500.00.

17. By email dated 7 December 2020, the Claimant confirmed that they would "*not make any new requests in the proceedings*".

18. On 8 December 2020, the Arbitrator informed the Parties that the proceedings would continue and invited the Claimant to submit and serve brief legal submissions, including any legal authorities, in support of all his claims in the proceedings by 22 December 2020. On 4 January 2021, the Arbitrator extended the time for the Claimant to file the submissions and authorities to 11 January 2021.

19. On 11 January 2021, the BAT confirmed receipt of the Claimant's submissions ("C's 1st Sub") and invited the Respondent to comment on C's 1st Sub by 25 January 2021.

20. On 26 January 2021, the Parties were informed that the Respondent had failed to submit any comments and the exchange of submissions was closed in accordance with Article 12.1 of the BAT Rules. The Parties were invited to make costs submissions on how much of the applicable maximum contribution to costs should be awarded to them and why, and to include a detailed account of their costs, including any supporting documentation in relation thereto, by 2 February 2021.

21. The Claimant filed his costs submissions by email on 31 January 2021. The Respondent did not file any costs submissions.

22. On 3 February 2021, the Arbitrator reopened the exchange of submissions for the limited purpose of inviting the Parties to comment on Clauses 1 and 2 of the Settlement Agreement, in particular, on the following questions:

> *"4.* […] *(a) First, the specific meaning of* [Clause 2 of the Settlement Agreement]*, including the meaning of the phrases "the team", "breach of the said Agreement", "automatically be considered void" and "the Contract and Previous Debt Settlement" therein;*
>
> *(b) Second, the purpose of* [Clause 2 of the Settlement Agreement]*; and*
>
> *(c) Third, and significantly, whether the phrase "In the case that the team is in breach of the said Agreement, the Settlement will automatically be considered*

void" in the said clause would operate to nullify the very basis on which the Claimant's claim is based (i.e. by the phrase "the Settlement will automatically be considered void")?"

5. In view of the foregoing, the Claimant is hereby requested to file supplemental submissions to address the 3 questions stated under paragraphs 4(a), (b) and (c) above ***by 5 February 2021 at the latest****. If the Respondent wishes to respond to the Claimant's submissions, it may file reply submissions thereto* ***by 10 February 2021****."*

23. The Claimant filed his supplemental submissions on 4 February 2021 ("C's 2nd Sub"). The Respondent did not file any supplemental submissions.

24. On 10 February 2021, the Arbitrator further invited the Claimant to submit, as soon as possible and in any event within 24 hours, a copy of the "*Contract and Previous Debt Settlement… simultaneously signed on the 26th of July 2018*" mentioned in Clause 2 of the Settlement Agreement ("Contract and Previous Debt Settlement").

25. On the same date, the Claimant submitted copies of a "CONTRACT OF ATHLETICS SERVICES" dated 26 July 2018 (signed by Claimant, the Respondent and Claimant´s agent) and of a "SETTLEMENT AGREEMENT" dated 26 July 2018 (signed only by the Claimant and his agent but not by the Respondent) together with further submissions ("C's 3rd Sub"). The Claimant explained that he was not in possession of a copy of the "SETTLEMENT AGREEMENT" signed also by the Respondent.

26. In addition, the Claimant expressed concern over the (short) period of time given to him to produce the Contract and Previous Debt Settlement and the fact that the request was only addressed to the Claimant.

27. The Arbitrator issued a further procedural order on 11 February 2021 inviting also the Respondent to produce a copy of the "Contract and Previous Debt Settlement" and providing the Claimant with further time to address the Arbitrator on the Contract and

Previous Debt Settlement, both by 15 February 2021.

28. Despite this, neither the Claimant nor the Respondent had provided any response to the said procedural order by 15 February 2021.

29. On 16 February 2021, the Arbitrator further invited the Parties to comment on the following issues by no later than 19 February 2021:

> "*(1) Whether the "existing debt of the Club towards the Player" described in Clause 1 of the Settlement Agreement dated 19 August 2019 (i.e. Exhibit 1 to Request for Arbitration) was one arising from the "the Contract and Previous Debt Settlement" described in Clause 2 of the said Agreement?*
>
> *(2) If the answer to question (1) above is "yes", please provide evidence in support and submissions to explain the same.*
>
> *(3) The potential application of the principles on contractual interpretation as stated in paragraphs 58-60 of the BAT Award in case no. BAT 0756?*"

30. The Claimant filed his comments on 18 February 2021 ("C's 4th Sub") with an account of his revised costs. The Respondent did not file any submissions.

4. The Positions of the Parties

4.1. The Claimant's Position

31. The Claimant claims that the Respondent's debt arises from the obligations stipulated in Clauses 1 and 2 of the Settlement Agreement and the fact that the Respondent did not fulfil its obligation in the entirety. The Claimant submits that the Respondent is therefore liable to pay EUR 100,800.00 to the Claimant.

32. In the RfA, the Claimant seeks the following relief:

"*The Respondent is obligated to pay to the Claimant the debt compensation total amount of EUR 100.800 net of all taxes, plus interests at 5% per annum, from date of submitting RfA until final payment, costs of BAT arbitration and legal fees according to the BAT Award which will resolve this dispute.*"

4.2 The Respondent's Position

33. The Respondent has not participated in these proceedings, but has been duly notified of their existence and has received copies of all submissions of the Claimant and all communications of the BAT. The Arbitrator invited the Respondent to reply at various stages of the proceedings, but the Respondent has failed to submit any reply.

5. The jurisdiction of the BAT

34. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in this arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.[1]

35. 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, the BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).

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

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

[1] Judgement of the Swiss Federal Tribunal, 120 II 155, 162.

arbitrable within the meaning of Article 177(1) PILA.[2]

38. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under Clause 3 of the Settlement Agreement, which reads as follows:

> *"Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT 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. The arbitrator shall decide the dispute ex aequo et bono.*

39. The Settlement Agreement is in writing and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

40. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss Law (referred to by Article 178(2) PILA).

41. The predicate wording in the said Clause 3 "[a]*ny dispute arising from or related to the present contract* […]" clearly covers the present dispute.

42. For the above reasons, the Arbitrator rules and finds, pursuant to Article 1.3 of the BAT Rules, that he has jurisdiction to finally decide and rule upon the Claimant's claims.

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

6. Other Procedural Issues

43. Article 14.2 of the BAT Rules provides that "*the Arbitrator may* […] *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 BAT.[3] However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

44. This requirement is met in the present case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules. It was also given sufficient opportunity to respond to the RfA. The Respondent, however, chose not to participate in this arbitration.

45. None of the Parties requested a hearing. In accordance with Article 13.1 of the BAT Rules, the Arbitrator will decide the Claimant's claims based on the written submissions and the evidence on record.

7. Discussion

7.1 Applicable Law – *ex aequo et bono*

46. 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:

[3] See *ex multis* BAT cases 0001/07; 0018/08; 0093/09; 0170/11.

"*the parties may authorize the arbitral tribunal to decide ex aequo et bono*".

47. Under the heading "Law Applicable to the Merits", Article 15 of the BAT Rules reads as follows:

> "15.1 *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.*
>
> *15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead.*"

48. Clause 3 of the Settlement Agreement expressly provides that the Arbitrator shall decide the dispute *ex aequo et bono*.

49. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in these proceedings.

50. The concept of "*équité*" (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the *Concordat intercantonal sur l'arbitrage*[4] (Concordat),[5] 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*

[4] 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).

[5] P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

which is not inspired by the rules of law which are in force and which might even be contrary to those rules."[6]

51. 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*".

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

7.2 Findings

7.2.1. Principles on interpretation of an agreement

53. The doctrine of *pacta sunt servanda* (which provides that parties who make a bargain are expected to stick to that bargain) is the principle by which the Arbitrator will examine the merits of the Claimant's claim.

54. The proper interpretation of an agreement is of paramount importance, as "*the content of the "pacta" must be known thoroughly before one can say, with confidence, what must be performed (the "sunt servanda").*"[7]

55. Whilst the Arbitrator is not bound by any particular set of national legal rules when ruling *ex aequo et bono*, he is not free to do whatever he wants when it comes to the interpretation of an agreement. In BAT 0756/15, the principles relevant to the interpretation of an agreement in the context of a BAT arbitration (which have not been disputed by the Parties) have been summarised at paragraph 59 as follows:

"*- looking at all of the contractual language chosen by parties through the eyes*

[6] JdT 1981 III, p. 93 (free translation).

[7] BAT 0756/15 at paragraph 58.

of a reasonable reader to see what is the ordinary and natural meaning of the words used;

- the overall background context of professional basketball and general common understanding amongst such users together inform the ordinary and natural meaning of the words used;

- when it comes to considering the centrally relevant words to be interpreted in a particular case, the less clear they are, or, to put it another way, the worse their drafting, the more ready an arbitrator might be to depart from the ordinary and natural meaning. That is simply the obverse of the sensible proposition that the clearer the ordinary and natural meaning the more difficult it is to justify departing from it;

- the description or label given by the parties to something in a contract is not inflexibly determinative of its true nature;

- the mere fact that a contractual agreement, if interpreted according to its ordinary and natural language as described above, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from that language; and

- in general, it is not the function of an arbitrator when interpreting an agreement to relieve a party from the consequences of his or her imprudence or poor advice. Accordingly, when interpreting a contract, ex aequo et bono, an arbitrator avoids re-writing it in an attempt to assist an unwise party or to penalise an astute party. Also, parties should not seize on a literal translation of the phrase ex aequo et bono and consider that "justice" and "equity" provide them with a route to unprincipled and unmoored indulgence for poor contractual choices."

7.2.2. Basis of the Claimant's claim

56. The Claimant's claim is founded on the Settlement Agreement, which provides that the Respondent will pay a total amount of EUR 186,600.00 to the Claimant in accordance with a timetable under Clause 2 thereof to satisfy its entire responsibility to the Claimant.

57. The Claimant contends that, since the Respondent defaulted in payment after paying a total amount of EUR 85,800.00 in 5 instalments, he is entitled to claim against the Respondent for the outstanding balance of EUR 100,800.00.

58. However, the Arbitrator considers it important to note that the third paragraph of Clause 2 of the Settlement Agreement expressly provides that:

> "*In the case that the team is in breach of said Agreement, the said Settlement will automatically be considered void, and the Player shall hold the right to enter the BAT immediately and apply for the full amount of the Contract and Previous Debt Settlement, which we simultaneously signed on the 26th of July 2018, between AEK NEA KAE 2014 A. E. K ATHENS BSA (Club) and the Player, Dusan Sakota.*" ("the said clause")

59. In view of the phrases in the said clause such as "*said Agreement*", "*the said Settlement*", "*automatically be considered void*" and "*Contract and Previous Debt Settlement*", the legal effect of the said clause must be closely examined. In particular, the Arbitrator must determine whether the said clause would prevent the Claimant from claiming the outstanding balance based on the Settlement Agreement itself.

60. In C's 2nd Sub, the Claimant submits, *inter alia*, that:

(a) The said clause is only an option in favour of the Claimant and contains a threat to the Respondent that he can ask for more according to previous contracts.

(b) Since "*he who can do more, can do less*", the Claimant decided to seek only the unpaid amount according to the Settlement Agreement.

(c) The purpose and meaning of the said clause is not that the Settlement Agreement ceases to be invalid, but only that the Respondent cannot refer to it, in case the Claimant seeks to enforce the amount of debt payable under the previous contracts.

(d) The provision "*automatically be considered void*" means only that the option in favour of the Claimant "*does not require any additional referring or giving notice to* [Respondent]. *It does not mean automatic termination of the Settlement Agreement.*"

(e) Clause 3 of the Settlement Agreement is an arbitration clause and it is clear from that that the contractual parties did not consider the Settlement Agreement has ceased to be legally binding because that would make the submission to BAT impossible.

(f) Irrespective of the Claimant's response, the Arbitrator "*does not possess the authority to engage in their own interpretation of contractual provision which are not disputable to the participants in the proceedings.*" By submitting his RfA, "*Claimant has demonstrated that he considers the Settlement Agreement to be valid and thereby gave his interpretation of the meaning of the provisions of the Settlement Agreement. Since* [Respondent] *did not dispute the validity of the Settlement Agreement...the* [A]*rbitrator has no authority at all to engage in his own understanding of the Settlement* [A]*greement.*"

61. As regards the Claimant's contention in para. 60(f) above, the Arbitrator has no hesitation in rejecting such submissions outright. The fact that the Respondent did not dispute the validity of the Settlement Agreement is irrelevant to whether the Arbitrator possesses the power to interpret the Settlement Agreement and the clauses therein, as the Respondent's failure to participate in the proceedings may not be regarded as an acknowledgment of the facts submitted by the Claimant. The Arbitrator must satisfy himself whether the Claimant's factual assertions are accurate and supported by the

evidence. More importantly, interpretation of an agreement is not a submission of fact but more a submission on the law. The Arbitrator must apply the law correctly, no matter whether the Parties are in dispute on what the law says.

62. Proceeding on the basis that the Arbitrator does have the power to interpret the Settlement Agreement, the Arbitrator will now consider the meaning of the said clause and its effect on the Claimant's claim made pursuant to the Settlement Agreement.

7.2.3. Clause 2 is not the proper basis

63. Clause 2 of the Settlement Agreement comprises three paragraphs. It begins with a timetable setting out the Parties' agreement, which allows the Respondent to satisfy the total amount of EUR 186,600.00 in 10 monthly instalments of EUR 18,600.00 each. It then provides for a 10-day buffer period for the Respondent to pay every scheduled instalment. Finally, it contains the said clause, which deals with the Respondent's breach of "*said Agreement*" and expressly stipulates the consequence of any such breach, which is that "*the Settlement will automatically be considered void.*"

64. The Settlement Agreement does not define the meaning of "*said Agreement*" and "*the Settlement*". While it is reasonably clear that the phrase "*said Agreement*" refers to the agreed timetable for making repayments pursuant to the first and second paragraphs of Clause 2 ("Settlement Plan"), the latter phrase "*the Settlement*" is capable of bearing two possible meanings. On one hand, it could be a reference to the Settlement Plan. On the other hand, it could bear a wider meaning referring to the entire Settlement Agreement. The proper meaning of these phrases is a matter of construction.

65. Having in mind the principles set out in para. 55 above and the fact that the said clause comes immediately after the agreed timetable and the buffer-period in the first and second paragraphs of Clause 2, the Arbitrator finds that the purpose of the said clause is to deal with the Respondent's breach of its repayment obligations under Clause 2.

66. With this purpose in mind, the Arbitrator finds that the phrase "*the Settlement*", much like the phrase "*said Agreement*", also refers to the Settlement Plan and not the entire Settlement Agreement. While this would mean that two phrases in the same sentence (i.e. "*the said Agreement*" and "*the Settlement*") refer to the same subject matter, the Arbitrator is nevertheless satisfied that the phrase "*the Settlement*" goes to signify the compromise embedded in the Settlement Plan. Moreover, the Arbitrator notes that the phrase "*this Settlement Agreement*" appears throughout the Settlement Agreement where the Parties refer to the agreement as a whole. If the Parties had intended, by using the phrase "*the Settlement*" in the said clause, to refer to the entire Settlement Agreement, they would have easily used the phrase "*this Settlement Agreement*". The fact that they had chosen a different phrase "*the Settlement*" is, in the Arbitrator's view, indicative of the fact that they did not intend to refer to the entire Settlement Agreement. For all these reasons, the Arbitrator therefore finds that the said clause is not intended to apply to the entire Settlement Agreement but only to the Settlement Plan.

67. As to the phrase "*the Settlement will automatically be considered void*", it is in the Arbitrator's view clear and unambiguous. The word "*automatically*" denotes that the result is independent from the choice of the Parties. What follows is that the Settlement Plan is automatically rendered ineffective and unenforceable as soon as the Respondent breaches the Settlement Plan in any manner.

68. Under the said clause, the Claimant and the Respondent expressly agreed that in case of such a breach, the Claimant can go back to the Contract and Previous Debt Settlement and claim for the full amount therein. This is the only remedy stipulated under the said clause if a claim is to be laid against the Respondent for its breach of the Settlement Plan. It does not provide that the Claimant may simply claim for the outstanding balance payable by the Respondent under the Settlement Plan.

69. In this connection, the Arbitrator rejects the Claimant's submission that the said clause provides an "*option*" in favour of Claimant and contains a "*threat*" to the Respondent (see para. 60(a) above). While such a construction of the clause appears to be most

favourable to the Claimant, this construction is plainly not supported by the ordinary and natural meaning of the express words within the said clause.

70. Since the Arbitrator has found that the said clause would only render void the Settlement Plan, but not the entire Settlement Agreement, it is not strictly necessary to deal with the Claimant's submissions set out in para. 60(e) above. Suffice to say, the Arbitrator considers that the arbitration clause in Clause 3 of the Settlement Agreement remains fully enforceable when Clause 2 is properly construed as aforesaid.

71. Regarding the Respondent's breach of the Settlement Plan, there is no evidence before the Arbitrator showing that Respondent had ever denied its default in payment after paying 5 instalments. Moreover, the Respondent has not participated in this arbitration or put up any defence. On the contrary, the Claimant's case is also supported by documentary evidence, being the text message from the Respondent's general manager dated 9 July 2020 and Mr. Ivan Zoroski's notice of payment dated 17 August 2020 (see paras. 8-9 above). Based on the available evidence, the Arbitrator is satisfied and finds that the Respondent was in breach of the timetable under the Settlement Plan in making its repayment as the Claimant alleges.

72. In view of the Respondent's breach, there is no question that the Settlement Plan has automatically been rendered void. Accordingly, pursuant to the said clause, the Claimant can only enter the BAT immediately and apply for the full amount of the Contract and Previous Debt Settlement. In other words, to the extent that the Claimant's claim is made based on the outstanding balance under the Settlement Plan within Clause 2 itself, it is unsustainable as that plan had already become void.

7.2.4. Claim under Clause 1

73. Notwithstanding the above analysis, the Arbitrator notes that the amount of the debt has been acknowledged by the Claimant and the Respondent under Clause 1 of the

Settlement Agreement. In the Arbitrator's view, it is open to the Claimant to base his claim under Clause 1 if the amounts referred to therein embody the amounts owed by the Respondent to the Claimant under the Contract and Previous Debt Settlement.

74. According to Clause 1, the total amount owed by the Respondent to the Claimant is stated to be EUR 186,000.00. This comprises an amount of EUR 71,655.00 for bonus payments and salaries from seasons 2014-2015, 2015-2016 and 2016-2017, and an amount of EUR 115,000.00 for salaries from season 2018-2019. The aggregate amount should therefore be EUR 186,655.00. In the Arbitrator's view, the Parties apparently rounded off the total sum and agreed to the figure of EUR 186,600.00.

75. The Claimant has provided copies of the Contract and Previous Debt Settlement and given explanations for the figures contained therein.

76. According to Clause 2 of the Previous Debt Settlement dated 26 July 2018,[8] the Claimant and the Respondent acknowledged that the Respondent owed the Claimant a total amount of EUR 36,155.00 for bonus payments from season 2014-2015, 2015-2016 and 2016-2017, and an amount of EUR 67,500.00 for salaries from season 2017-2018. The aggregate amount therefore comes to EUR 103,655.00.

77. The Claimant also submits that the Respondent remains obligated to pay an amount of EUR 115,000.00 for season 2018-2019 in accordance with the Contract dated 26 July 2018.[9] According to Clause 6(a) of the Contract dated 26 July 2018,[10] the total amount payable by the Respondent to the Claimant for season 2018-2019 is EUR 185,000.00. In other words, the amount of EUR 115,000.00 does not exceed the contractual sum.

78. The Claimant then submits that in the period prior to the signing of the Settlement Agreement on 19 August 2019, the Respondent paid a total amount of EUR 32,000.00

[8] The title of the document is "Settlement Agreement".

[9] C's 4th Sub at paragraph 2.

[10] The title of the document is "Contract of Athletic Services".

to the Claimant and therefore, the total amount owed by the Respondent to the Claimant under the Previous Debt Settlement was reduced to EUR 71,655.00.[11] This corresponds to the amount agreed by the Parties under Clause 1 of the Settlement Agreement.

79. In view of the documentary evidence and the Claimant's submissions, and absent contrary submissions from the Respondent, the Arbitrator is satisfied and finds that the said amounts of EUR 71,655.00 and EUR 115,000.00 represent the full amount of the debt under the Contract and Previous Debt Settlement as of 19 August 2019.

80. Since the Respondent had already paid a total amount of EUR 85,800.00 to the Claimant pursuant to the Settlement Plan, credit must be given to the same. This further reduced the total amount owed by the Respondent to the Claimant to the net sum of EUR 100.800.00. This is also the figure acknowledged by the Respondent's general manager in the text message dated 9 July 2020.

81. As a matter of fact, even if the Claimant were to sue for the full amount under the Contract and Previous Debt Settlement pursuant to the only remedy provided by the said clause, credit would still be given to the total amount of EUR 85,800.00 and the Claimant would not recover more than EUR 100,800.00. In other words, the Claimant's entitlement under Clause 1 of the Settlement Agreement and the Contract and Previous Debt Settlement will just be the same.

82. For all these reasons, the Arbitrator is satisfied and finds that it is open to the Claimant to base his present claim under Clause 1 of the Settlement Agreement. Accordingly, and deciding *ex aequo et bono*, the Arbitrator finds that the Respondent is liable to pay the Claimant the said outstanding sum of EUR 100,800.00 net.

[11] C's 4th Sub at paragraph 2.

7.2.5. Interest

83. The Claimant has requested "*interest at 5% per annum, from the date of submitting RfA until final payment*".

84. Not having participated in the proceeding, the Respondent has not disputed the Claimant's request for interest.

85. In accordance with consistent BAT jurisprudence, and deciding *ex aequo et bono*, the Arbitrator considers it fair and reasonable to award interest at the rate of 5% per annum from the date of submitting the RfA until complete payment.

8. Costs

86. In respect of determining the arbitration costs, Article 17.2 of the BAT Rules provides as follows:

> "*At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4).* […]"

87. On 31 March 2021, the BAT President determined the arbitration costs in the present matter to be EUR 6,500.00.

88. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 of the BAT Rules provides as follows:

> "*The award shall determine which party shall bear the arbitration costs and in which proportion.* […] *When deciding on the arbitration costs* […]*, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s)*

sought and, secondarily, the conduct and the financial resources of the parties."

89. Considering that the Claimant is wholly successful in this arbitration, it is consistent with the said provisions that costs of the arbitration be borne by the Respondent alone. Given that the Claimant paid the entire advance on costs in the amount of EUR 6,500.00, the Respondent shall reimburse EUR 6,500.00 to the Claimant.

90. In relation to the Parties' legal fees and expenses, Article 17.3 of the BAT Rules provides:

> "*as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding* […] *on the amount of any contribution to the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties.*"

91. Moreover, Article 17.4 of the BAT Rules provides for the maximum amounts a party can receive as a contribution towards its reasonable legal fees and other expenses. In this case, the maximum amount is up to EUR 10,000.00.

92. The Claimant claims legal fees in the total amount of EUR 2,400.00 and non-reimbursable handling fee in the total amount of EUR 3,000.00.

93. Taking into account that the Claimant has wholly succeeded with his prayers for relief, that the Respondent has not participated in these proceedings, that the Claimant's costs submission is detailed and prudent, and that the amount of EUR 2,400.00 as legal fees is at the lower end of the cap under Article 17.4 of the BAT Rules, the Arbitrator considers it fair and reasonable to award the amount of EUR 2,400.00 as legal fees, as well as the payment of the non-reimbursable handling fee in the amount of EUR 3,000.00.

94. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:

(i) The Respondent shall bear and pay the costs of this arbitration in the sum of EUR 6,500.00;

(ii) The Respondent shall pay the Claimant the total sum of EUR 5,400.00 representing a contribution towards the Claimant's legal fees in the amount of EUR 2,400.00 and the non-reimbursable handling fee of EUR 3,000.00 previously paid by the Claimant.

9. AWARD

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

1. **A.E.K. Athens B.C. shall pay Mr. Dusan Sakota the sum of EUR 100,800.00, net, plus interest thereon at 5% per annum from 3 September 2020 until full payment.**

2. **A.E.K. Athens B.C. shall pay Mr. Dusan Sakota the sum of EUR 6,500.00 as reimbursement for his arbitration costs.**

3. **A.E.K. Athens B.C. shall pay Mr. Dusan Sakota the sum of EUR 5,400.00 as a contribution towards his legal fees and expenses.**

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

Geneva, seat of the arbitration, 1 April 2021

Benny Lo
(Arbitrator)