

ARBITRAL AWARD

(BAT 1800/22)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Marcus Slaughter

represented by Mr. Ivan Todorovic, attorney at law

vs.

Basketball club AEK NEA KAE 2014

455 Irakleiou Avenue, 14122 Athens, Greece

- Claimant -

- Respondent -

1. The Parties

1. Mr. Marcus Slaughter (hereinafter referred to as the "Player" or "Claimant") is an American basketball player, who signed an employment contract with the Basketball club AEK NEA KAE 2014 for the 2019/2020 and 2020/2021 seasons.
2. Basketball club AEK NEA KAE 2014 (hereinafter referred to as the "Club" or "Respondent") is a professional basketball club participating in the Greek professional basketball league.

2. The Arbitrator

3. On 31 March January 2022, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (hereinafter referred to as the "BAT"), appointed Mr. Stephan Netzle as arbitrator (hereinafter referred to as the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter referred to as 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 2 August 2019, the Player and the Club signed an employment agreement for the 2019/2020 season.
5. On 18 June 2020, the Parties entered into a new agreement by which the Club engaged the Player for the following season 2020/2021.

6. On 20 October 2021, the Player and the Club concluded a settlement agreement on outstanding debts owed by the Club to the Player under the 2019/2020 and 2020/2021 employment agreements (hereinafter referred to as the "Settlement Agreement"). In essence, the Parties agreed on the following:

"[...]

2. *Parties agree that the remaining debt of the Club towards the Player for the season 2019/2020 in the total amount of 40.000 USD (forty thousand) net, which consists of one salary in the amount of 20.000 USD, Bonus for the Greek cup in the amount of 10.000 USD and Bonus for BCL Final 4 in the amount of 10.000 USD, was supposed to be paid by the Club not later than 15th of November 2020, but was never paid.*
3. *Parties agree that the remaining debt of the Club towards the Player for the season 2020/2021 in the total amount of 39.000 USD (thirty nine thousand) net, which consists of two salaries in the amount of 15.000 USD and 9 months of rent for the apartment in the amount of 1.000 USD monthly, was supposed to be paid by the Club not later than 30th of June 2021, but was never paid.*
4. *The Parties agree that the Club shall be bound to pay to the Player remaining debt from the articles 2 and 3 of this Settlement agreement in the total amount of 79.000 USD (seventy nine thousand) net, not later than 15th of February 2022.*

[...]"

7. By email of 21 February 2022, the Player's agent reminded the Club of the outstanding payment which had become due by 15 February 2022. Further e-mails and phone calls were exchanged between the Player's agent and the Club's representatives.
8. On 7 March 2022, the Player's counsel sent an official warning to the Club and pointed out that *"we have remind you that Mr. Slaughter showed huge patience with your club, first by signing Settlement agreement on the 20th of October 2021, with which he agreed that the debt should be paid not later than 15th of February 2022, even considering that some parts of the debt are from the season 2019/2020"*. The Player's counsel demanded payment of USD 79,000.00 by 10 March 2022, combined with the warning that in case of non-payment, the Player would initiate legal proceedings with the BAT. The Club did not pay the overdue amount by 10 March 2022 or at any later date.

3.2 The Proceedings before the BAT

9. On 15 March 2022, the Player filed a Request for Arbitration against the Club in accordance with the BAT Rules (received by the BAT on the same day) and duly paid the non-reimbursable handling fee of EUR 4,000.00.
10. On 5 April 2022, the BAT informed the Parties that Mr. Stephan Netze had been appointed as the Arbitrator and fixed the Advance on Costs to be paid by the Parties by 15 April 2022 as follows:

*"Claimant (Mr. Marcus Slaughter) EUR 4,000.00
Respondent (AEK NEA KAE 2014) EUR 4,000.00"*

11. On 29 April 2022, the BAT Secretariat acknowledged receipt of the Claimant's share of the Advance on Costs and granted the Respondent a final deadline until 6 May 2022 to pay its share of the Advance on Costs and to submit an Answer to the Request for Arbitration.
12. By letter dated 17 May 2022, the BAT Secretariat informed the Parties that the Respondent had failed to file an Answer to the Request for Arbitration and to pay its share of the Advance on Costs. Furthermore, the BAT Secretariat adjusted the Advance on Costs as follows:

*"Claimant (Mr. Marcus Slaughter) EUR 3,000.00
Respondent (AEK NEA KAE 2014) EUR 3,000.00"*

13. In the same Procedural Order, the Claimant was invited to pay the remaining Advance on Costs in the amount of EUR 2,000.00 by 24 May 2022.
14. On 19 May 2022, the Claimant paid the outstanding Advance on Costs.
15. By letter dated 10 June 2022, the BAT Secretariat informed the Parties that the Arbitrator had declared the exchange of submissions complete and that the final award would be

rendered as soon as possible. Finally, the BAT Secretariat granted the Parties a deadline until 17 June 2022 to provide a detailed account of their costs.

16. On the same day, the Claimant submitted his cost statement. The Respondent failed to submit a detailed account of its costs.

4. The Positions of the Parties

4.1 The Player's position

17. According to Para. 4 Settlement Agreement, the remaining debt for the 2019/2020 and 2020/2021 seasons in the amount of USD 79,000.00 net became due for payment on 15 February 2022.
18. Although the Player, his agent and/or his counsel sent numerous reminders to the Club and tried to settle the matter in several phone calls with the Club's representatives, the Club never paid the outstanding amount of USD 79,000.00.
19. Shortly before the Settlement Agreement was signed, i.e. on 13 October 2021, the Club's representative confirmed that *"we can consider an assignment of our projected income from greek (sic) state coming until January 15th. This is a law-voted agreement between greek (sic) basketball teams and the ministry of sports so it's 100% receivable"*. Still, the Club did not pay the agreed settlement amount.
20. In the Request for Arbitration of 15 March 2022, the Player requests the following relief:

*"a) To award claimant **Marcus Slaughter** with amount of 79.000 USD (seventy-nine thousand US Dollars) and additionally to award claimant's interest at the applicable Swiss statutory rate, starting from 16th of February 2022, which equals to 308 USD (three hundred eight US dollars), at the time the present Request for Arbitration was filed.*

b) To award claimants with the full covered costs of this Arbitration and Legal fees and expenses. Having in mind that in case of dispute the agreements set the authority of Basketball Arbitration Tribunal (BAT), therefore, the claimant demand arbitrage of BAT.

Total amount in dispute: 79.308 USD (seventy-nine thousand three hundred eight US Dollars)"

4.2 The Club's Position

21. The Respondent did not make any submissions in this arbitration.

5. The jurisdiction of the BAT

22. Pursuant to Article 2.1 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 PILA.
23. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
24. The Arbitrator finds that the dispute referred to him is of a financial nature and thus arbitrable within the meaning of Article 177(1) PILA¹.
25. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under Para. 7 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

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

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."

26. The Settlement Agreement is in written form and thus the arbitration agreements fulfil the formal requirements of Article 178(1) PILA.
27. 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). In particular, the Respondent has not raised any objection to jurisdiction.
28. The jurisdiction of BAT over the Player's claims arises from the Settlement Agreement. The wording "[a]ny dispute arising from or related to the present contract" clearly covers the present dispute.
29. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Player's claims.

6. Discussion

6.1 Applicable Law – ex aequo et bono

30. 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".

31. Under the heading "Applicable Law", Article 15 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."

32. As seen above, Para. 7 Settlement Agreement stipulates that: *"[t]he arbitrator shall decide the dispute ex aequo et bono".*

33. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

34. 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'arbitrage² (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

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).

35. This is confirmed by Article 15.1 BAT Rules, according to which the Arbitrator applies *"general considerations of justice and fairness without reference to any particular national or international law"*.
36. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2 Findings

6.2.1 Player's claims based on the Settlement Agreement

37. According to Para. 2 Settlement Agreement, the Player is entitled to a total amount of USD 40,000.00 net for the 2019/2020 season, which consists of one monthly salary of USD 20,000.00, a bonus for winning the Greek cup in the amount of USD 10,000.00 and a bonus for reaching the BCL Final 4 in the amount of USD 10,000.00. Pursuant to the Settlement Agreement, the Club would have been obliged to pay this amount by 15 November 2020, but failed to do so.
38. Pursuant to Para. 3 Settlement Agreement, the Player is entitled to a total amount of USD 39,000.00 net for the 2020/2021 season, which consists of two monthly salaries of each USD 15,000.00 and nine monthly apartment rent of USD 1,000.00 each. Pursuant to the Settlement Agreement, the Club would have been obliged to pay this amount by no later than 30 June 2021, but failed to do so.
39. According to Para. 4 Settlement Agreement, the Parties agreed that the Club should pay the Player the outstanding debt from the 2019/2020 and 2020/2021 seasons in the total net amount of USD 79,000.00 by no later than 15 February 2022.
40. According to the Claimant's submissions, several attempts to settle this matter amicably failed and did not lead to the Club paying its debts debt in the amount of USD 79,000.00

to the Player. There is no evidence in the submitted documents that would cast any doubt on the veracity of the Player's claim. The Club failed to submit an Answer to the Request for Arbitration and did not contest that it owed the claimed amount to the Player. Nor did the Club provide any explanation for the non-payment of the debt. On the other hand, the Player showed great patience in the enforcement of his balance.

41. Therefore, the Arbitrator confirms that the Player is entitled against the Club to payment of an amount of USD 79,000.00 net.

6.2.2 Interest

42. The Player requests the BAT to order

"interest at the applicable Swiss statutory rate, starting from 16th of February 2022"

43. The Settlement Agreement does not provide a regulation concerning interest. According to standing BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. This is a generally accepted principle, which is embodied in most legal systems. As requested by the Player and in correspondence with the standing BAT jurisprudence the default interest rate is of 5% per annum.
44. As to the date from which the interest for the outstanding amount starts to run, the Settlement Agreement foresees that the payment shall be made until 15 February 2022. By email of 7 March 2022, however, the Player's counsel invited the Club to make the payment until 10 March 2022 without adding any interest. Since the Club failed to accept this offer, the original due date remains the same, namely 15 February 2022, and the starting date for the interest on the outstanding amount started on 16 February 2022.

7. Conclusion

45. Based on the foregoing, and after taking into due consideration all the evidence submitted and all arguments made by the Parties, the Arbitrator finds that the following payment is owed:
46. The Club shall pay the Player USD 79,000.00 net, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) from 16 February 2022 until payment in full.

8. Costs

47. In respect of determining the arbitration costs, Article 17.2 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). [...]"

48. On 16 August 2022, the BAT President determined the arbitration costs in the present matter to be EUR 3,200.00.
49. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 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."

50. Considering the fact that the Claimant was the prevailing party in all reliefs in this arbitration, it is consistent with the provisions of the BAT Rules that the arbitration costs

be borne by the Club alone. Given that the Claimant paid the entire Advance on Costs in the amount of EUR 6,000.00 (of which EUR 2,800.00 will be reimbursed to the Claimant by the BAT), the Club shall reimburse EUR 3,200.00 to the Player.

51. In relation to the Parties' legal fees and expenses, Article 17.3 BAT Rules provides that

"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."

52. Moreover, Article 17.4 BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses. The maximum contribution for an amount in dispute between EUR 30,001.00 and EUR 100,000.00 (in casu USD 79,000.00, which is approx. EUR 72,177.80 on the date when the Request for Arbitration was filed) is EUR 7,500.00.
53. The Player claims legal fees in the total amount of EUR 6,500.00. He also claims for the expense of the non-reimbursable handling fee in the amount of EUR 4,000.00. The Club did not submit a cost statement.
54. Taking into account the factors required by Article 17.3 BAT Rules, the clear factual and legal background of this case, the maximum awardable amount prescribed under Article 17.4 BAT Rules and the specific circumstances of this case, the Arbitrator holds that it is fair and equitable that the Respondent shall pay a reduced contribution of EUR 3,500.00 to the Claimant, plus the non-reimbursable handling fee of EUR 4,000.00. The Respondent shall bear its own legal costs and fees.

9. AWARD

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

- 1. Basketball club AEK NEA KAE 2014 shall pay Mr. Marcus Slaughter the outstanding amount due under the Settlement Agreement of USD 79,000.00 net, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) from 16 February 2022 until payment in full.**
- 2. The costs of this arbitration until the present Award, which were determined by the President of the BAT to be in the amount of EUR 3,200.00 shall be borne by Basketball club AEK NEA KAE 2014 alone. Accordingly, Basketball club AEK NEA KAE 2014 shall pay EUR 3,200.00 to Mr. Marcus Slaughter. The balance of the Advance on Costs, in the amount of EUR 2,800.00, will be reimbursed to Mr. Marcus Slaughter by the BAT.**
- 3. Basketball club AEK NEA KAE 2014 shall pay Mr. Marcus Slaughter an amount of EUR 7,500.00 as a contribution to his legal fees and expenses (including the non-reimbursable handling fee).**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 19 August 2022

Stephan Netze
(Arbitrator)