BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 1019/17)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Vasileios Kavvadas

- Claimant 1 -

Starvision Enterprise Ltd.

- Claimant 2 -

both represented by Mr. Alexandros Vagiatas, attorney at law,
20 Homer Avenue, 1097 Nicosia, Cyprus

vs.

Aris B.C. 2003
2 Grigoriou Lambraki st., 54636 Thessaloniki, Greece

- Respondent -

1. The Parties

1.1 The Claimants

1. Mr. Vasileios Kavvadas (“Player”) is a Greek professional basketball player.

2. Starvision Enterprise Ltd. (“Agent”) is a company registered in Cyprus providing agency services through Mr. Nick Lotsos, a FIBA-licensed players’ agent.

1.2 The Respondent

3. Aris B.C. 2003 (“Respondent”) is a professional basketball club in Thessaloniki, Greece.

2. The Arbitrator

4. On 7 July 2017, Prof. Richard H. McLaren, O.C., President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert SC, as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. On 27 July 2016, Player and Respondent entered into an agreement (“the Agreement”) whereby the latter engaged the former to play basketball for the 2016-2017 season and the 2017-2018 season. The salary of Player was agreed at a sum of EUR 150,000.00 for each of these seasons, net of tax. Payment by Respondent was to be made in a

number of instalments throughout each season. For the 2016-2017 season, payment was to be made in ten instalments of EUR 12,000.00 and then two instalments of EUR 15,000.00. For the 2017-2018 season, payment was to be made in ten instalments of EUR 15,000.00.

6. Respondent also agreed to pay Agent EUR 15,000.00, net, fees for each of the 2016-2017 season and the 2017-2018 season. Both amounts were to be paid by Respondent to Agent by no later than 1 November of the respective years.

7. Player says that he received EUR 65,000.00 from Respondent during the course of the 2016-2017 season, with the last part of that sum (EUR 15,000.00) being paid on 17 February 2017. Agent says that it received EUR 3,500.00 in part-payment of the fee due to it by no later than 1 November 2016.

8. On 4 May 2017, Agent wrote to Respondent demanding payment of the outstanding amounts then due to it and to Player.

9. On 12 May 2017, Respondent wrote to Agent stating:

> *"At the end of May there will be a full payment of the amounts owed to the Company as well as the Player."*

10. No payment was made by Respondent, and now Player and Agent seek the monies due to them pursuant to the Agreement. Respondent's non-payment is the reason for this arbitration.

11. Respondent has not participated in this arbitration.

3.2 The Proceedings before the BAT

12. On 19 June 2017, Claimants filed a Request for Arbitration of the same date in

accordance with the BAT Rules.

13. The non-reimbursable handling fee in the amount of EUR 5,000.00 was paid on 19 June 2017.

14. On 26 July 2017, the BAT informed the Parties that Mr. Klaus Reichert, SC had been appointed as the Arbitrator in this matter. Further, the BAT fixed the advance on costs to be paid by the Parties as follows:

> *"Claimant 1(Mr. Vasileios Kavvadas) EUR 4,500.00*
>
> *Claimant 2(Starvision Enterprise Ltd.) EUR 1,000.00*
>
> *Respondent (Aris B.C. 2003) EUR 5,500.00"*

The foregoing sums were paid as follows (all paid by Agent): 8 August 2017, EUR 5,500.00; and 25 August 2017, EUR 5,500.00.

15. Respondent did not participate in the arbitration and did not file an Answer, despite several invitations by the BAT to do so.

16. On 30 August 2017, the Arbitrator stated as follows, amongst other matters, by way of Procedural Order:

> *"The Arbitrator notes that the Claimants are seeking a declaration that the contract is terminated.*
>
> *In light of the fact that the Player is seeking the full salary for the forthcoming season, and taking into account the longstanding BAT jurisprudence on mitigation, the Arbitrator invites the Claimants to set out in detail what is happening for 2017/2018 including efforts made to find a new club, and potential salaries."*

17. On 7 September 2017, Claimants replied to the Arbitrator as follows:

"As Claimant #1, Player Mr. Kavvadas is waiting from FIBA BAT a declaration that his contract is terminated there was not much that he could do. The Hellenic Basketball Federation would not issue a letter of clearance until a BAT Award was issued.

Therefore there was no proposal or offer from any Club to employ the player due to the pending procedure to BAT.

By the time the Arbitral Award will be issued, the majority of the Clubs will have a complete roster and will not need to employ any other players. We therefore estimate that it will take a couple of months in order to find a Club who would probably want to replace and injured player in order to propose a contract to Mr. Kavvadas. Even in such a case, however, in the middle of the season, Clubs will not spend a huge budget, so we don't expect to find an offer equal to Aris' employment Contract."

18. On 7 September 2017, the Parties were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules. Further, the Parties were granted a deadline until 14 September 2017 to set out how much of the applicable maximum contribution in respect of costs should be awarded to them and why. Any such submission was directed by the Arbitrator to include a detailed account of their costs, including any supporting documentation in relation thereto.

19. On 11 September 2017, Claimants made their submissions on costs. Respondent did not make any submissions.

4. The Positions of the Parties

20. Player's position is as sought in his claim for relief in the Request for Arbitration (in summary):

(a) Termination of, and release from the Agreement for just cause;

(b) EUR 85,000.00 net for unpaid salary due from the 2016-2017 season;

(c) EUR 3,000.00 for bonuses due to certain on-court successes during the 2016-2107 season;

(d) EUR 150,000.00, net, for the whole of the 2017-2018 season; and

(e) Interest.

21. Agent's position is as sought in its claim for relief in the Request for Arbitration (in summary):

(a) EUR 11,500.00 for the unpaid commission from the 2016-2017 season;

(b) EUR 15,000.00 for commission for the 2017-2018 season; and

(c) Interest.

22. Claimant also seek costs, legal fees, and expenses.

23. As already noted, despite several invitations by the BAT, Respondent did not participate in this arbitration.

5. The Jurisdiction of the BAT

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

25. 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).

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

27. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.[1]

28. The jurisdiction of the BAT over Claimants' claims is stated to result from the arbitration clause in clause 8 of the Agreement, which reads as follows:

> *"This Agreement shall be governed by the laws and the provisions of FIBA. The parties agree as competent authority for the resolution of any dispute that might arise between the CLUB and the Player from the interpretation or application of this present agreement, including financial disputes the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland 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, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

29. The arbitration clause is in written form and thus fulfils the formal requirements of Article 178(1) PILA.

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

31. The language of the arbitration clause is quite clear, namely, Player and Respondent have agreed to BAT arbitration in the event of a dispute. What, however, is not clear

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

from the Agreement is whether or not Respondent and Agent agreed to BAT arbitration in the event of a dispute.

32. The Swiss Federal Tribunal has held in a decision dated 16 October 2003 that while the validity of the arbitration agreement between the initial parties was subject to the formal requirements of Article 178 (1) PILA, the validity of its extension to third parties was not.[2] Therefore, once an arbitration agreement complies with the formal requirements with respect to its initial signatories, the extension of that arbitration agreement to other parties does not need to satisfy such requirements.[3]

33. However, an extension of the arbitration agreement requires a legal relationship between the third party and the initial parties to the arbitration agreement, which must be of a certain intensity to justify the extension.

34. The named parties in the opening paragraph to the Agreement are Player and Respondent only. Further, the Agreement's signature clause clearly records only Player and Respondent to be "[T]he Contracting Parties". Often in such contracts one sees a signature of an agent at the end, even if such agent's name is not included in the list of parties at the outset. Such a signature of Agent is not present in the Agreement.

35. What, factually, can be discerned from the Agreement itself as regards obligations owed by Respondent to Agent? The answer is found at clause 9 whereby Respondent agreed to pay Agent "for its services in the securing the Player and negotiating this Agreement" certain defined amounts of money as already discussed above.

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2 Decision of the Swiss Federal Tribunal dated 16 October 2003, BGE 129 III 727, 735, cons. 5.3.1.

3 PHILIPP FISCHER: When can an arbitration clause be binding upon non-signatories under Swiss law?, in: Jusletter of 4 January 2010.

36. On its own, and isolated from the text of the Agreement as a whole, clause 9 appears to be a superfluous curiosity as the agency fees do not flow as between the expressly-named parties to the contract. However, reading the language of professional basketball contracts in such a fashion is not consistent with BAT jurisprudence and, in particular, case 0756 at paragraph 59:

> "*Taking the first aspect, namely, proper interpretation of an agreement, it is abundantly clear that an arbitrator, sitting in Switzerland and mandated to rule ex aequo et bono, is not bound by any particular set of national legal rules. However, it is also the case that such an arbitrator is not free to do whatever it is they want and, for example, completely disregard the words used by parties in their contractual documentation. The sort of principles which might inform the exercise of interpretation in the context of a BAT arbitration include:*
>
> *- looking at all of the contractual language chosen by parties through the eyes 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 parties to something in a contract is not inflexibly determinative of its true nature;*
>
> *- the mere fact that a contractual arrangement, 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."

37. The background context of professional basketball contracts invariably involves players being assisted by agents, and indeed clubs being assisted by agents, in the conclusion of contracts for playing services. That background context also includes the fact that agents get paid commissions, usually a percentage, for that assistance from clubs. The obligation to pay commissions is usually embedded in the same contract as the one which obligates a player to play for a club, and club to pay such player.

38. Bearing in mind the background context to professional basketball contracts just described, the Arbitrator's interpretation of the Agreement, and of clause 9 thereof in particular, is that Respondent did promise to pay Agent as part of the overall set of rights and obligations. This interpretation of the Agreement is also consistent with the close and inextricably involved role of Agent in bringing Player to Respondent, and then its attempts thereafter to get him paid in full.

39. Dissecting Agent from the Agreement, both as a matter of the substantive obligations and jurisdiction would be misplaced pedantry. While this particular Agreement does not, as already noted above, record Agent in any way as a party or signatory (and, therefore, is closer to the line on jurisdiction than other BAT decisions), its language also does not operate to expressly exclude Agent from its ambit.

40. In light of the above, the Arbitrator finds that the Agreement provides for a sufficiently strong legal relationship between Respondent and Agent, justifying an extension of the arbitration agreement to Agent. Moreover, the Arbitrator finds that at least clause 9 of the Agreement must be considered as an agreement in favour of a third party, namely the Agent. Under Swiss arbitration law, the conclusion of an agreement in favour of a third party implies the application of the arbitration agreement, by analogy with Article

112 of the Swiss Code of Obligations[4].

41. Thus, having considered the question of jurisdiction in light of past BAT jurisprudence[5], and the interpretation of the Agreement set out above, the Arbitrator holds that he has jurisdiction to adjudicate both Player's and Agent's claims.

6. Other Procedural Issues

42. Article 14.2 of the BAT Rules specifies 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.[6] However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

43. This requirement is met in the present case. 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 Claimants' Request for Arbitration. Respondent, however, chose not to participate in this arbitration.

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4 Article 112 of the Swiss Code of Obligations says: "[1] *A person who, acting in his own name, has entered into a contract whereby performance is due to a third party is entitled to compel performance for the benefit of said third party.* [2] *The third party or his legal successors have the right to compel performance where that was the intention of the contracting parties or is the customary practice.* [3] *In this case the obligee may no longer release the obligor from his obligations once the third party has notified the obligor of his intention to exercise that right*." (see English translation on the website of the Federal Authorities of the Swiss Confederation under http://www.admin.ch/ch/e/rs/c220.html); BERGER/KELLERHALS, op. cit., N 514.

5 See, e.g., BAT 257/12; BAT 0328/12; BAT 0515/14.

6 See *ex multis* BAT 0001/07; BAT 0018/08; BAT 0093/09; BAT 0170/11.

7. Discussion

7.1 Applicable Law – ex aequo et bono

44. 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".*

45. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

> *"Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law."*

46. As noted in paragraph 28 above, the arbitration clause in the Agreement expressly provides that the Arbitrator shall decide any dispute *ex aequo et bono*.

47. 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[7] (Concordat)[8], under which Swiss courts have held that arbitration "en équité" is fundamentally different from arbitration "en droit":

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7 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).

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

> *"When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[9]

48. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives *"a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case."*[10]

49. 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*."

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

7.2 Findings

51. The doctrine of *pacta sunt servanda* (which is consistent with justice and equity – 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 claims.

52. First, the Arbitrator will examine Player's claim for unpaid salary payments.

53. As described in section 3.1 above, *Summary of the Dispute*, Respondent expressly told Agent on 12 May 2017 the following in writing:

> *"At the end of May there will be a full payment of the amounts owed to the Company as well as the Player."*

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

10 Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717. pp.625-626.

54. There is no doubt, therefore, whatsoever that Respondent represented to Player and to Agent on 12 May 2017 that the amounts owed would be paid. Respondent did not follow through on that representation. It must follow, therefore, that Respondent is liable to both Player and to Agent for the sums owed in respect of the 2016-2017 season. These amounts are set out at paragraphs 20(b), 20(c), and 21(a) above (respectively, EUR 85,000.00, EUR 3,000.00, and EUR 11,500.00). Respondent is, hereby, ordered to pay those amounts. Quite apart, indeed, from the admission made on 12 May 2017, the Arbitrator notes that clause 7.1 of the Agreement includes an unconditional acceptance by Respondent that the contract was fully guaranteed. Respondent, plainly, was obligated to pay Player his salary and bonuses (which the Arbitrator accepts are established) and Agent the commission fee.

55. Turning to the other matters in dispute, the more difficult issue in the Arbitrator's mind for the claims made in this arbitration is the fact that the Claimants seek payment in full for the entirety of the 2017-2018 season without mitigation. Player's rationale for this position is twofold, namely: (a) the Agreement says, at clause 7.3 that Player is under no obligation to mitigate and "CLUB shall receive no offset"; and (b) his reply to the Arbitrator (recorded at paragraph 17 above, and now repeated):

> *"As Claimant #1, Player Mr. Kavvadas is waiting from FIBA BAT a declaration that his contract is terminated there was not much that he could do. The Hellenic Basketball Federation would not issue a letter of clearance until a BAT Award was issued.*
>
> *Therefore there was no proposal or offer from any Club to employ the player due to the pending procedure to BAT.*
>
> *By the time the Arbitral Award will be issued, the majority of the Clubs will have a complete roster and will not need to employ any other players. We therefore estimate that it will take a couple of months in order to find a Club who would probably want to replace and injured player in order to propose a contract to Mr. Kavvadas. Even in such a case, however, in the middle of the season, Clubs will not spend a huge budget, so we don't expect to find an offer equal to Aris' employment Contract."*

56. In summary, Player says that until he gets an award from the Arbitrator declaring the Agreement to be terminated, he is effectively the liegeman of Respondent and cannot go elsewhere. The Arbitrator will now test that proposition as against the language of the Agreement.

57. Clause 7.3 of the Agreement is relied upon by Player and its terms are as follows:

> *"In order to exercise his rights under this present clause is a case mentioned in 7.1.1*[11] *and/or 7.1.2 occurs, PLAYER is obliged to make a request in writing to the CLUB requesting the CLUB to comply with its obligations within a time-limit of fifteen (15) working days. If the CLUB does not comply with such request within the said time-limit, PLAYER will be entitled to request: a) his unconditional release and free agency and CLUB shall take all necessary steps to issue a Letter of Clearance immediately, and b) Payment of all monies due during the entire term of his agreement, which shall become immediately due and payable. PLAYER is under no obligation to mitigate his damages and CLUB shall receive no offset."*

58. It is immediately apparent to the Arbitrator that the language of clause 7.3 does not support the position of Player that he needs a BAT award declaring the Agreement terminated. There is an unambiguous two-stage process whereby Player demands payment within a specific time-limit (15 working days), and in the event of non-payment, he can then request his unconditional release. That request for a release engages an obligation on the part of Respondent to take all necessary steps to *issue a Letter of Clearance immediately*. Of course, the Arbitrator realises and knows that it is not within the power of procurement of a club to obtain a letter of clearance, as that is a matter which rests with the relevant federation. However, the Parties have clearly

[11] This is a typographical error in the Agreement, as there is no clause 7.1.1., but it is an obvious reference to clause 7.2.1 which provides, in conjunction with clause 7.2, that Player can "avoid" the contract in the event of a delay of 45 days in making a due payment.

placed an obligation on Respondent to take steps to have one issued in the event of the mechanisms in clause 7.3 being duly operated by Player.

59. One might, also, hypothetically see a scenario whereby Player would have operated clause 7.3 and Respondent then not fulfilling its obligations to take the steps necessary to procure the Letter of Clearance. However, that is not what happened in this case as there is no evidence at all that Player has operated the contractual mechanism in clause 7.3 of the Agreement. He did not give Respondent 15 working days to pay, and did not then demand his unconditional release. Whether he was right or wrong in his proposition to the Arbitrator that "*[T]he Hellenic Basketball Federation would not issue a letter of clearance until a BAT Award was issued*" is neither here nor there as a matter of the contractual obligations in the Agreement. The Parties agreed that a particular procedure would be followed so as to trigger an obligation on the part of Respondent to seek the Letter of Clearance. It may be, but this is purely speculation, that even if Player had operated those provisions in the Agreement he would still have needed, as a matter of practical reality, a BAT award in order to extricate himself and go to another club. The Arbitrator also notes that disputes pertaining to the granting (or refusal thereto) of a Letter of Clearance by a federation fall, as per BAT jurisprudence, within the exclusive remit of FIBA and not of BAT. In any event, the Player still should have at least sought to operate the provisions of the Agreement.

60. As Player did not expressly require Respondent to seek a Letter of Clearance in the manner provided for in the Agreement, it is difficult to understand how he can simultaneously obtain the benefit of the final sentence of clause 7.3, namely, that *PLAYER is under no obligation to mitigate his damages and CLUB shall receive no offset.* If Player did not operate the mechanism of clause 7.3, as a threshold matter, then in the precise circumstances of this case it appears to the Arbitrator that the provision aforesaid simply has not been engaged to his benefit. For completeness, the Arbitrator notes that even if the provision aforesaid was engaged and Player had

operated the mechanism in clause 7.3, it would still have to be closely scrutinised in the manner discussed at paragraphs 60-62 of BAT award 0756 (emphasis added):

> *"60. As regards the second aspect of the question, namely, when ruling ex aequo et bono, under what circumstances might the effect of contractual terms (once properly interpreted) be attenuated or moderated. Again, as already noted, under ex aequo et bono, in principle, an arbitrator gives effect to all contractual terms used by parties once properly interpreted.*
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> *61. The starting point is that parties enter into contracts with the presumed intent that they will abide by their terms, and see them out to a conclusion. Alteration or moderation of a contract's terms would not usually arise in such circumstances, save by the parties' own subsequent agreement.*
>
> *62. One comes to a point of departure from the usual contractual performance (i.e. in full according to agreed terms) when there has been a breach and an arbitrator is looking at the remedies sought by the innocent party seeking compensation. There are a number of particular factors which inform such an exercise:*
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> *- a claimant may often look for compensation for the loss of the benefit of the contract which they have lost, or, putting it another way, what would they have earned had the contract been performed in the usual and agreed manner to the end of its life;*
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> *- in the professional basketball context, there are specific circumstances which colour the foregoing factor in an important manner, namely, a player, or a coach, can only be at one club at a time during a season, and they cannot have multiple parallel contracts (as might be the case for a commercial company undertaking multiple deals and lines of business). Thus, for example, if a player agrees to a two year contract at a particular salary, it is known from the outset exactly the extent (save for items like bonuses, which are tied to sporting success) of the monetary compensation for that agreement's lifetime, and also for those two years of that player's professional playing time;*
>
> *- in the context of a breach of contract, or termination for cause, the innocent party should not be put into a better position than they would have been had all gone according to plan with full and complete performance of the obligations;*
>
> ***- contractual clauses which apply in the context of a breach, or termination for cause, such as penalties, or liquidated damages (this is not a closed list), are subject to careful scrutiny when ruling ex aequo et bono. In particular, such a clause which imposes a detriment on the contract-***

breaker out of all proportion to any legitimate interest of the innocent party, may be refused enforcement, or moderated in its application*;*

- the innocent party is normally expected to mitigate their position by, for example, seeking alternative employment if possible; and

- there is a time-value to money payable now, rather than at a point in the future, and such time-value normally attracts a discount factor."

61. The Arbitrator, therefore, finds in his interpretation of clause 7.3 of the Agreement that the provision which relieves from Player the obligation to mitigate does not arise in this case. Thus, further, Player was under an obligation to mitigate his position as regards the 2017-2018 season, and he has not done so. His position that he awaits the outcome of this case does not comport with the provisions of the Agreement, and the Arbitrator will, in further application of the long-standing and well-established BAT jurisprudence, impose a mitigation in respect of the 2017-2018 season.

62. Player has not demonstrated to the Arbitrator that he made any effort to extricate himself from the Agreement and from Respondent notwithstanding the fact that he had not received any payment after 17 February 2017. It simply is not credible, in the Arbitrator's view, that a professional player would effectively do nothing to secure himself a new club for the 2017-2018 season and await the outcome of a BAT arbitration filed after the end of the first season. This is all the more so when one considers the clear provisions of clause 7.3 as discussed above.

63. When considering the matter *ex aequo et bono*, and bearing in mind the provisions of the Agreement, the Arbitrator is compelled to disallow the fruits of a strategy of lethargy. In these circumstances, the Arbitrator applies a mitigation factor of 75% to Player's (and Agent's concomitant claim) claim for the 2017-2018 season. This results in an amount awarded to Player of EUR 37,500.00 for the 2017-2018 season by way of compensation for breach of contract, and EUR 3,750.00 to Agent. The reason for not applying a larger percentage in mitigation as against Player was that Respondent itself

made no effort, upon receipt of the Request for Arbitration to protect its position and immediately procure a Letter of Clearance.

64. In summary, so far, Player is awarded: (a) EUR 85,000.00 for outstanding salary due from the 2016-2017 season; (b) EUR 3,000.00 for bonus payments from the 2016-2017 season; and (c) EUR 37,500.00 for the 2017-2018 season. Similarly, Agent is awarded (a) 11,500.00 for outstanding commission for the 2016-2017 season; and (b) EUR 3,750.00 commission for the 2017-2018 season.

65. The Arbitrator now turns to the declaratory relief sought by Player to terminate the Agreement. While there was no demand made pursuant to clause 7.3 (as discussed already), it does appear to the Arbitrator that the filing of the Request for Arbitration does in of itself indicate a desire to terminate. In such circumstances, the Arbitrator grants the declaratory relief as sought.

66. Finally, as regards to interest, Claimants claim interest at 5% from the next day that each amount became due and outstanding.

67. It is well established in BAT jurisprudence that the appropriate interest rate on unpaid amounts of money is 5% per annum, and the Arbitrator finds no reason to depart from that established approach.

68. Taking into account the circumstances of this case, particularly the manner by which clause 7.3 was not operated in a timely fashion, the Arbitrator is content to hold that interest at 5% per annum should accrue on all sums due to Claimants from Respondent as and from 1 June 2017. On 12 May 2017, Respondent promised full payment to Claimants by the end of May. It did not fulfil that promise, and therefore as and from 1 June 2017, it was in clear and unambiguous default of its stated position. With respect to the amounts arising from the 2017-18 season, interest shall accrue as

of the date following the filing of the Request for Arbitration, by which the Player expressed his desire to terminate the Agreement.

8. Costs

69. 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.

70. On 20 October 2017 – considering that pursuant to Article 17.2 of the BAT Rules "*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*", and that "*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time*", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 10,000.00.

71. Considering that Claimants succeeded with their claim on the first season but failed in large part with respect to the second season, and considering also that it was Respondent who breached the Agreement and, thus, made it necessary for the Claimant to resort to arbitration, the Arbitrator finds it fair and consistent with the provisions of the BAT Rules that the fees and costs of the arbitration, as well as their reasonable costs and expenses, be borne 75% by Respondent and 25% by Claimant. Of specific relevance in this regard is an aspect of Article 17.3 of the BAT Rules ("*[W]hen deciding on the arbitration costs and on 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"). Additionally, the Arbitrator notes the provisions of Article 17.4 of the BAT Rules as follows:

> *"The maximum contribution to a party's reasonable legal fees and other expenses (excluding the non-reimbursable handling fee) shall be as follows:*
>
> | Sum in Dispute
(in Euros) | Maximum contribution
(in Euros) |
> |---|---|
> | up to 30,000 | 5,000 |
> | from 30,001 to 100,000 | 7,500 |
> | from 100,001 to 200,000 | 10,000 |
> | from 200,001 to 500,000 | 15,000 |
> | from 500,001 to 1,000,000 | 20,000 |
> | over 1,000,000 | 40,000 |
>
> "
>
> *In case of multiple Claimants and/or Respondents, the maximum contribution is determined separately for each party according to the foregoing table on the basis of the relief sought by/against this party.*

72. Player's claim against Respondent amounted to EUR 238,000.00. Thus, as Player's claim fell in the range of 200,001 to 500,000, the maximum possible amount which could be awarded by the Arbitrator as a contribution to his reasonable legal fees and other expenses is EUR 15,000.00.

73. Agent's claim against Respondent amounted to EUR 26,500.00. Thus, as Agent's claim fell in the range of up to EUR 30,000, the maximum possible amount which could be awarded by the Arbitrator as a contribution to its reasonable legal fees and other expenses is EUR 5,000.00.

74. Claimants' claim for legal fees and expenses is EUR 9,760.00. That amount is not

divided into separate amounts for each Claimant, but is advanced as a global figure. However, the invoice presented by Claimants as proof is only made out to Agent, and not to Player. Had the invoice been made out jointly to Player and to Agent, then the situation might be different.

75. This manner of invoicing presents the Arbitrator with a conundrum as he is constrained to award a maximum of EUR 5,000.00 to Agent. As the only proof of accrual of legal fees and expenses is connected with Agent, and not with Player in any way, the Arbitrator is constrained to award legal fees only to that Claimant. The maximum amount awardable is EUR 5,000.00. Thus, taking into account the factors required by Article 17.3 of the BAT Rules, the maximum amount prescribed under Article 17.4 of the BAT Rules, and the specific circumstances of this case, the Arbitrator holds that EUR 5,000.00 represents a fair and equitable contribution by Respondent to the as-claimed legal costs and expenses of Claimants, including 75% of the non-reimbursable handling fee of EUR 5,000.

76. The Arbitrator decides that in application of Article 17.3 of the BAT Rules:

(i) BAT shall reimburse EUR 1,000.00 to Agent, being the difference between the costs advanced by it and the arbitration costs fixed by the BAT President;

(ii) Respondent shall pay EUR 7,500.00 to Agent as reimbursement of the costs advanced by it; and

(iii) Respondent shall pay EUR 5,000.00 to Agent, representing a contribution by it to its legal fees and expenses.

9. AWARD

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

1. **Aris B.C. 2003 shall pay Mr. Vasileios Kavvadas EUR 85,000.00, net, as outstanding salary together with interest at 5% per annum from 1 June 2017 until payment.**

2. **Aris B.C. 2003 shall pay Mr. Vasileios Kavvadas EUR 37,500.00, net, as compensation for breach of contract together with interest at 5% per annum from 20 June 2017 until payment.**

3. **Aris B.C. 2003 shall pay Mr. Vasileios Kavvadas EUR 3,000.00, net, as an outstanding bonus payment together with interest at 5% per annum from 1 June 2017 until payment.**

4. **Aris B.C. 2003 shall pay Starvision Enterprise Ltd. EUR 15,250.00 for unpaid commission together with interest at 5% per annum from**

    a. **1 June 2017 until payment, on the amount of EUR 11,500; and**

    b. **20 June 2017 until payment, on the amount of EUR 3,750.**

5. **The Agreement made between Mr. Vasileios Kavvadas and Aris B.C. 2003 on 27 July 2016 is declared to be terminated.**

6. **Aris B.C. 2003 shall pay Starvision Enterprise Ltd. EUR 7,500.00 as reimbursement for its arbitration costs.**

7. **Aris B.C. 2003 shall pay Starvision Enterprise Ltd. EUR 5,000.00 as a contribution to its legal fees and expenses.**

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

BASKETBALL
ARBITRAL TRIBUNAL

Geneva, seat of the arbitration, 23 October 2017

Klaus Reichert, SC
Arbitrator