

ARBITRAL AWARD

(BAT 1864/22)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Brianna Quinn

in the arbitration proceedings between

Mr. Tony Taylor

- Claimant -

represented by Av. Ergun Benan Arseven and Av. Metin Abut, attorneys at law,

vs.

Karşıyaka Spor Kulübü Derneği

Selçuk Yaşar Spor Tesisleri Ataşehir, Mah. Zeni Havaalanı Yolu, No :13,
Cigli/Izmir, Turkey

- Respondent -

1 The Parties

1.1 The Claimant

1. Mr. Tony Taylor (hereinafter also referred to as “the Player”) is an American professional basketball player.

1.2 The Respondent

2. Karşıyaka Spor Kulübü Derneği (hereinafter also referred to as “the Club”, together with the Player, “the Parties”) is a basketball club competing in the Turkish professional basketball league.

2 The Arbitrator

3. On 27 October 2022, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the “BAT”), appointed Ms. Brianna Quinn as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

3 Facts and Proceedings

4. The relevant facts and allegations presented in the Parties’ written submissions and evidence are summarised below. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows.

5. Although the Arbitrator has considered all the facts, allegations and evidence submitted by the Parties in the present proceedings, she refers in this Award only to those necessary to explain its reasoning.

3.1 Summary of the Dispute

3.1.1 The Agreement

6. On 1 July 2020, the Player and the Club entered into an agreement whereby the Club engaged the Player for the 2020/21 and 2021/22 Turkish basketball seasons (the “Agreement”).
7. Article 3 of the Agreement governed the Player’s salary and bonuses entitlements and, relevantly to this arbitration, provided for: (i) a salary of USD 500,000 for the 2021-22 season, payable in ten instalments of USD 50,000 each; and (ii) a bonus in the amount of USD 15,000 for winning a minimum of 15 games during the regular season.
8. Article 3 further provided as follows:

“All bonuses will be non-cumulative and shall be paid with the next salary in which they are earned. [...]”

All amounts described in Sections [3A and 3B] shall be paid as net in U.S. Dollars to an account(s) of the Player’s choice. The Club shall be responsible for all appropriate Turkish taxes, customs, duties and other withholdings. [...]”

Bonus payments are guaranteed as part of Salary. Any delay from the scheduled payment day of salary and bonuses will result in a \$100 USD (one hundred dollars) per day payment starting on the 30th day from the date of delinquency. The Club accepts that in the case any payments described in this contract including agent fees will be delayed for more than (30) days the Player or his Agents may present written notice to the President of the Club by electronic mail, fax or regular mail at the Club’s address; after this notice, if the Club does not make the payment in next five (5) working days, the Player or his agents may send a final notice to the Club’s address upon presentation of this notice Club agrees here-

in to grant the Player his release and makes him a unrestricted free-agent world-wide. In addition, all salaries and/or bonuses, including the 2020-2021 season under this agreement are due and payable upon this 30th day of non-performance (including payment of agent fee) by way of acceleration. The \$100 USD (one hundred dollars) per day penalty as described here-in shall continue to accrue daily, as a penalty. In addition, all other benefits granted to Player here-in shall remain in the Player's possession until Club meets and pays its debt [...]

3.1.2 Outstanding payments and the Player's requests for payment

9. It is undisputed that the Player performed his duties under the Agreement throughout the 2020-21 and 2021-22 seasons but that the Club did not pay the final two instalments of the Player's 2021-22 salary, specifically: (i) USD 50,000 due on 23 May 2022; and (ii) USD 50,000 due on 25 June 2022.
10. It is further undisputed that the Club won its 15th game in the regular Turkish basketball season on 20 March 2022, however the applicable bonus of USD 15,000 was not paid by the Club.
11. Following the end of the season, on 5 July 2022, the Player (via WhatsApp) requested an update from one of the Club's representatives on when he would be receiving payment for the 2021-22 season.
12. The Player followed up again on 12 July 2022, and received a message from the Club's representative stating that "*before July ends, I believe I will be able to share a plan with your agent*".
13. Between 22 July 2022 and 16 August 2022, the Player followed up with the Club's representative on more than 10 occasions. The Club's representative indicated that he was working for everyone to get their money and at no stage disputed the Player's entitlement to outstanding amounts.

14. On 18 August 2022, the Player's representative wrote to the Club claiming USD 115,000 net in outstanding salaries and bonuses and indicating that *"30 days have passed since the due date of the receivables in question, and therefore, a penalty of 100 USD per day for each receivable item has started to accrue separately and will continue until full payment"*. The Player requested payment by 25 August 2022 at the latest, and noted that if such payment were not made, he would proceed with BAT arbitration.
15. According to the Player, he did not receive any response, nor any payment, from the Club following this correspondence.

3.2 The Proceedings before the BAT

16. On 11 October 2022, the BAT received the Player's Request for Arbitration (dated the same day), which was filed in accordance with the BAT Rules.
17. On 12 October 2022, the non-reimbursable handling fee of EUR 4,000 was received by the BAT.
18. On 27 October 2022, the BAT informed the parties that Ms. Brianna Quinn had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

Claimant (Mr. Tony Taylor) EUR 5,000.00

Respondent (Karsiyaka Spor Kulübü Derneği) EUR 5,000.00

19. In the same letter, the Club was invited to file its Answer by no later than 17 November 2022, and informed that *"according to Article 14.2 of the BAT Rules, the Arbitrator may proceed with the Arbitration even if the Respondent fails to submit an Answer or fails to submit its Answer in accordance with Article 11.4 of the BAT Rules"*.

20. On 4 November 2022, the Player informed the BAT that he would not be in a position to pay his share of the advance of costs within the deadline provided and requested an extension of the time limit until 21 November 2022.
21. On 5 November 2022, the Arbitrator granted the requested extension, and noted that all other information contained in BAT's correspondence of 27 October 2022 remained unchanged.
22. On 17 November 2022, the Player informed the BAT that he and the Club were discussing a possible settlement of the proceedings and requested an extension to pay his share of the advance on costs until 5 December 2022.
23. On 22 November 2022, following confirmation that the Club had no objection, the Arbitrator granted the requested extension.
24. On 6 December 2022, the Player informed the BAT that the Parties had not reached a settlement and that he had paid his share of the advance on costs.
25. Also on 6 December 2022, the BAT: (i) confirmed that the Player had paid his share of the advance on costs in the amount of EUR 5,000 on 5 December 2022; (ii) confirmed that the Club had failed to file its Answer, or to pay its share of the advance on costs, within the previously communicated deadlines; and (iii) granted the Club a final opportunity until 13 December 2022 to pay its share of the advance on costs and file an Answer to the Request for Arbitration. The Club was further reminded that if it failed to submit an Answer, the Arbitrator could nevertheless proceed with the arbitration and deliver an award.
26. On 15 December 2022, the BAT informed the Parties that the Club had failed to file its Answer or pay its share of the advance on costs within the time limit. The Player was therefore invited to substitute for the Club's share of the – adjusted – advance on costs

of EUR 7,500 and requested to pay the remaining amount of EUR 2,500.

27. Also on 15 December 2022, the Club wrote to the BAT requesting an additional 15 days to file its Answer *“due to some internal conditions”*. The BAT acknowledged receipt of such request, and forwarded it to the Arbitrator, however noted that the final time limit for the Answer had already expired prior to the Club’s request.
28. On 16 December 2022, the Arbitrator requested the Player’s position on the Club’s request to file its Answer after the time limit. On the same day, the Player confirmed that he had no objection to the Club’s request, on the condition that the Club paid its share of the advance on costs in full in order to avoid the advance on costs being increased again.
29. On 17 December 2022, the Arbitrator requested the Club’s position on the Player’s proposal by no later than 19 December 2022.
30. Having received no response, on 21 December 2022, the Arbitrator granted the Club a final deadline until 28 December 2022 to respond to the Player’s proposal or, in the event that it disagreed with same, to set out in specific details the reasons for its failure to file an Answer and for its request for an extension.
31. On 29 December 2022, the BAT confirmed that the Club had failed to respond to the Arbitrator’s procedural order, and invited the Player to pay the adjusted Advance on Costs by no later than 9 January 2023.
32. On 18 January 2023, the BAT confirmed that the Player had paid the Respondent’s share of the – adjusted – advance of costs (i.e. EUR 2,500). In the same correspondence: (i) the Parties were advised that the proceedings would continue; and (ii) the Player was requested to answer specific questions from the Arbitrator and provide further supporting documents in relation to his claim by no later than 31 January 2023.

33. On 31 January 2023, the Player filed his response to the Arbitrator's procedural order.
34. On 1 February 2023, the Arbitrator invited the Club to file its comments on the Player's submission by no later than 15 February 2023.
35. On 2 March 2023, the BAT confirmed that the Club failed to reply to the Arbitrator's Procedural Order of 1 February 2023. In the same letter, and considering that neither party had requested a hearing, the Arbitrator declared the exchange of submissions complete, and granted the Player a deadline until 9 March 2023 to file a detailed submission on costs.
36. On 7 March 2023, the Player filed his costs submission, which was circulated to the Club on the same day. No further correspondence was received from the Club in these proceedings.

4 The Positions of the Parties

37. The following sections of the Award do not contain an exhaustive list of the Parties' contentions, its aim being to summarise the Parties' main arguments.
38. In considering and deciding upon the Parties' claims, the Arbitrator has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award or in the findings below.

4.1 The Claimant's Position

39. The Player submits that: (i) the Club breached Article 3 of the Agreement by failing to

pay two instalments of his salary as well as a bonus for winning more than 15 games in the regular season; and (ii) as a result, he is entitled to payment of all outstanding amounts as well as late penalty payments and interest.

40. With specific respect to the bonus claimed, and as the Club won its 15th game on 20 March 2022, the Player relies on Article 3.B of the Agreement to submit that the bonus became payable on 25 April 2022.
41. With specific respect to late payment penalties, the Player submits that:
 - i) the Club must pay USD 100 per day, starting from the 30th day following the date of non-performance until full completion of payment “for each salary and bonus payments” as per Article 3B of the Agreement;
 - ii) the Player expects to be awarded with an amount of USD 33,000 in late payment penalties (i.e. the penalties that had allegedly accrued as at the date of filing of the Request for Arbitration), but that in any event the principle of *ex aequo et bono* requires payment of a penalty not less than 10% of net USD 115,000 (with reference to BAT 1734/21).
42. In response to the Arbitrator’s questions on late payment penalties, the Player submitted that he was contractually entitled to claim the entire amount of USD 33,000 (i.e. penalties for each overdue payment, accruing separately, at a rate of USD 100 per day) and that, according to the principle of *pacta sunt servanda*, he should be awarded such amount in full.
43. However, the Player also submitted that in the event the Arbitrator considered such amount to be excessive, and in order to avoid bearing an unnecessary part of the advance on costs, he claimed such payments in the alternative amount of at least USD 11,500 (i.e. 10% of the principal amount of USD 115,000).

44. Finally, with respect to interest, the Player claims 5% interest accruing from unpaid salary and bonuses “according to standing BAT jurisprudence”.
45. In response to the Arbitrator’s questions on interest, the Player submitted that: (i) pursuant to Turkish tax law, interest payments are also subject to withholding tax; and (ii) as the Player’s payment demands were net of taxes according to the Agreement, the Player’s interest claim was net of taxes as well.
46. In his Request for Arbitration dated 11 October 2022, the Player requested the following relief:

“a. The Respondent be ordered to immediately pay to the Claimant:

- *Remaining part of fully guaranteed salary of 2021/2022 season amounting to **net USD 100.000**,*
- *Bonus of 2021/2022 season amounting to **net USD 15.000**,*
- *5% interest, amounting to **net USD 965**, accruing over net USD 50.000 as from 25 May 2022 until filing of this Request for Arbitration,*
- *5% interest, amounting to **net USD 750**, accruing over net USD 50.000 as from 25 June 2022 until filing of this Request for Arbitration,*
- *5% interest, amounting to **net USD 328**, accruing over net USD 15.000 as from 25 April 2022 until filing of this Request for Arbitration,*
- *5% interest continuing to be accrued over net USD 100.000 as from filing this Request for Arbitration until full completion of this payment.*
- *5% interest continuing to be accrued over net USD 15.000 as from filing this Request for Arbitration until full completion of this payment.*
- *Penalty amounting to USD 100.00 per day for the delay period starting from the 30th day following the date of non-performance, separately, for each salary and bonus payments until the full payment.*

b. The Respondent shall be ordered to pay all BAT application fee plus additional costs of arbitration, legal fees, and/or expenses related to this BAT case.

*Total amount in dispute: **net USD 128.543** (USD 115.000 + 5% interest accrued prior to*

the date of filing of the Request for Arbitration + penalty of USD 11.500, less than accrued total penalty amount before filing date of this Request for Arbitration, reserving Claimant's right to be entitled to be awarded more penalty amount, but at least required to be paid according to the principle of ex aequo et bono)."

47. In the Player's submission of 31 January 2023, he clarified his request for relief as follows:

"In the light of foregoing and referring to BAT jurisprudence rendered in BAT 1734/21 – Henry vs Karsiyaka Spor Kulübü Dernegi, the Claimant respectfully requests, without affecting the Arbitrator's liberty of decision on a higher amount according to principles of pacta sunt servanda and ex aequo et bono, the Arbitrator to order the Respondent to pay at least USD 11.500 as penalty. [...]"

The Claimant confirms that his request for "net" payments for salary and bonuses means net of "Turkish taxes, customs, duties, and other withholdings" as per Article 3 of the Agreement."

48. In the Player's submission on costs of 7 March 2023, he claimed the following specific costs:

<i>"Handling fee</i>	<i>EUR 4.000,00</i>
<i>Advance on costs (Claimant's share)</i>	<i>EUR 5.000,00</i>
<i>Advance on costs (Respondent's share)</i>	<i>EUR 2.500,00</i>
<i>Attorney's fee (15% of the Amount in Dispute + VAT)</i>	<i>EUR 22.752,11 (including VAT)"</i>

4.2 The Respondent's Position

49. The Club participated only in a limited manner in this arbitration, responding on procedural matters and requesting an extension to file its Answer.
50. The Club did not, however, file any further position following its request for an extension, and did not respond to the Arbitrator's requests to file an Answer nor respond to the Claimant's second submission.

5 The Jurisdiction of the BAT

51. As a preliminary matter, since the Club did not fully participate in the arbitration, the Arbitrator will examine her jurisdiction *ex officio*, on the basis of the record as it stands.¹
52. 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”).
53. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
54. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.²
55. The jurisdiction of the BAT in the present case results from the arbitration clause contained under Article 9 of the 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.”

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

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

56. The Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
57. With respect to substantive validity, 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).
58. The jurisdiction of BAT over the Claimant's claims arises from the Agreement as the wording "[a]ny dispute arising from or related to the present contract [...]" clearly covers the present dispute.
59. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimant's claims.

6 Other Procedural Issues

60. 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.³ However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
61. This requirement is met in the present case. The Club was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules. The Club was given sufficient opportunity to respond to the Player's Request for

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

Arbitration and subsequent submission. The Club, however, chose not to respond to the Arbitrator's request to substantiate its request to file its Answer after the relevant time limited had expired, not did it file any other submissions in these proceedings.

7 Discussion

7.1 Applicable Law – ex aequo et bono

62. 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 authorise the Arbitrator 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”.

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

“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”.

64. The Agreement expressly provides that the Arbitrator shall decide the dispute *ex aequo et bono*.
65. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to her in these proceedings.
66. 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'arbitrage⁴ (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 which is not inspired by the rules of law which are in force and which might even be contrary to those rules”.*⁶

67. 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*”.

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

7.2 Findings

7.2.1 Salary instalments

69. As set out above, the Player submits that the Club owes him two salary instalments of USD 50,000.00 (net) each, for a total amount of USD 100,000.00 (net).

70. According to the documents on file, the Club paid the Player the first eight instalments

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.

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

provided for under the Agreement in the 2021-22 season.

71. However, according to the Player, the Club did not pay the two final instalments, which were due on 25 May 2022 and 25 June 2022 respectively.
72. The Arbitrator has no reason to doubt the correctness of this information. To the contrary, the Player has provided bank records indicating that he only received a total of USD 400,000 from the Club in the 2021-22 season, and the Club did not dispute (either in this arbitration or in the correspondence exchanged between the Parties prior to same) that it failed to pay the Player the final two instalments specified in the Agreement.
73. As such, the Arbitrator finds that the Club is liable to pay the amount of USD 100,000 to the Player.
74. The Arbitrator further notes that Article 3 of the Agreement expressly provides that the relevant salary instalments are to be paid “*as net in U.S. Dollars [and] the Club shall be responsible for all appropriate Turkish taxes, customs, duties, and other withholdings*”. The Player has confirmed that his request for net payment means net of “*Turkish taxes, customs, duties, and other withholdings*”.
75. In view of the above, the Arbitrator finds that the Club owes the Player the amount of USD 100,000.00, net of Turkish taxes, customs, duties, and other withholdings, in unpaid salary instalments for the 2021-22 season.

7.2.3 Bonus payment

76. The Player also requests payment of a USD 15,000.00 (net) bonus, as a result of the Club having won 15 matches in the regular 2021-22 Turkish basketball season.
77. Such claim is, on its face, consistent with the terms of the Agreement (specifically Article 3B which provides for a bonus if the Club wins “*a minimum of 15 games during the regular season*”) and the Player submitted documents during the course of the

arbitration to establish that this condition was met.

78. Moreover, the Arbitrator accepts the Player's claim that such bonus was payable on 25 April 2022, considering that: (i) Article 3B of the Agreement expressly states that "[all] bonuses [...] shall be paid with the next salary in which they are earned"; and (ii) the Player established that the Club won its 15th match on 20 March 2022.
79. Finally, as with the Player's salary instalments, Article 7 of the Agreement confirms that all bonuses are to be paid net.
80. In view of the above, the Arbitrator finds that the Club owes the Player an amount of USD 15,000.00, net of Turkish taxes, customs, duties, and other withholdings, in unpaid bonus payments for the 2021-22 season.

7.2.4 Late payment penalties

81. In addition to the principal amounts set out above, the Player also claims late payment penalties on the basis of Article 3 of the Agreement, which reads in its relevant part as follows:

Any delay from the scheduled payment day of salary and bonuses will result in a \$100 USD (one hundred dollars) per day payment starting on the 30th day from the date of delinquency. [...]

82. As noted above, the Player submits that the Club is liable to pay such penalties "for each salary and bonus payments" (i.e. that each penalty accrues separately), for a total amount of USD 33,000 accrued between the date 30 days after non-payment until the filing of the Request for Arbitration.
83. However, the Player also appears to recognise that late payment penalties have consistently been interpreted in a restrictive manner by BAT arbitrators (in order to

prevent excessive recovery)⁷ and has accordingly framed his request for relief as follows:

“In the light of foregoing and referring to BAT jurisprudence rendered in BAT 1734/21 – Henry vs Karsiyaka Spor Kulübü Dernegi, the Claimant respectfully requests, without affecting the Arbitrator’s liberty of decision on a higher amount according to principles of pacta sunt servanda and ex aequo et bono, the Arbitrator to order the Respondent to pay at least USD 11.500 as penalty. [...]”

84. The general approach taken to contractual penalties in BAT arbitration, which the Arbitrator endorses, has been described as follows:

“First, penalty clauses are interpreted in respect to their applicability as to time in a restrictive way in order not lead to excessive results. On several occasions, BAT Arbitrators have decided that such clause – absent any indications to the contrary in the contract – is intended such that the penalty payments only accrue between the date of late payment and the date that the respective obligation is or can be terminated (BAT 0100/10 marg. no. 47 et seq.; 0109/10, marg. no. 55 seq.). [...] The latest point in time, however, BAT Arbitrators are prepared to accept late payment penalties to accrue is the filing of the request of arbitration (BAT 185/11, marg. no. 65). The latter, however, only applies if the creditor has pursued his claim in a diligent timely manner.

Second, BAT Arbitrators have repeatedly held that penalty clauses are subject to judicial review. In BAT 0036/09 (marg. no. 53 et seq.) the Arbitrator held: “In most jurisdictions, contractual penalties are subject to judicial review and can be adjusted if they are excessive. Whether a contractual penalty is excessive is usually left to the discretion of the judge and depends on the individual circumstances. As a general rule, a contractual penalty is considered to be excessive if it is disproportionate to the basic obligation of the debtor.”⁸

85. The Arbitrator has carefully considered the terms of the Agreement, the abovementioned jurisprudence and the specific circumstances of the case at hand, and considers that it

⁷ See, *inter alia*, BAT 0036/09; BAT 0635/14; BAT 1291/18; BAT 1521/20; BAT 1336/19; BAT 1313/18; and BAT 1380/19. In BAT 1291/18, para. 76, quoting BAT 0756/15, para. 62, it was noted by an Arbitrator that “[...] 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”.

⁸ See BAT 0238/11 at para. 45-46.

is fair and equitable to award the (lower) amount of USD 11,500.00 in penalties that the Player has claimed in these proceedings.

86. In limiting the late payment penalties to this amount, the Arbitrator has taken into account in particular:
- (i) the relevant contractual provision, which expressly provides that the Player is entitled to late payment penalties for both salaries and bonuses, but does not clearly specify whether such penalties cumulatively apply to each outstanding payment;
 - (ii) the date the earliest outstanding payment became due – i.e. 25 April 2022 when the bonus became payable – and the fact that the Agreement provided for late payment penalties “*starting on the 30th day from the date of delinquency*” (i.e. in the case of that particular bonus, starting on 26 May 2022 for a total of 138 days until the filing of the Request for Arbitration);
 - (iii) the fact that it would not have been reasonable to expect the Player to refrain from training or playing, let alone terminate the Agreement, with only a couple of months remaining on his contract; and
 - (iv) the fact that whilst the Player diligently pursued his claims against the Club at the end of the season, there was a slight delay between sending his final notice to the Club and filing his Request for Arbitration.
87. In all the circumstances, deciding *ex aequo et bono*, the Arbitrator finds that: (i) the Player should be granted non-cumulative late penalty payments from the date 30 days after the bonus was due until the date the Request for Arbitration was filed (a total of 138 days); but (ii) that this should be reduced to the alternative amount of USD 11,500.00 that the Player has claimed in the circumstances and in view of the slight delay in filing the Request for Arbitration.

88. The Arbitrator considers that the final amount of USD 11,500.00 in late payment penalties (i.e. 10% of the principal claimed) is neither disproportionate nor excessive when viewed in the context of the overall value of the outstanding obligations and the circumstances of the case.
89. As such, the Arbitrator finds that the Club owes the Player an amount of USD 11,500.00 in late payment penalties for the 2021-22 season.

7.2.6 Interest

90. Finally, the Player has claimed: (i) “*net*” interest, at a rate of 5% per annum, from the date each outstanding payment became due until the filing of his Request for Arbitration; and (ii) 5% interest continuing to be accrued over the total claim (salary and bonus) of USD 115,000 as from filing the Request for Arbitration until payment.
91. The Arbitrator notes that payment of interest is a customary and necessary compensation for late payment and there is no reason why it should not be awarded in this case. Moreover, the Arbitrator considers that a rate of 5% per annum is in accordance with well-established BAT jurisprudence and an *ex aequo et bono* assessment.
92. With that said, the Arbitrator notes that:
- i) even assuming it could be appropriate to award “*net*” interest payments, the Player has not provided any evidence to support or substantiate his position that interest payments are indeed subject to withholding tax in Turkey; and
 - ii) BAT arbitrators have consistently held that interest and late payment penalties

cannot accrue for the same period.⁹

93. As such, the Arbitrator considers it appropriate, on an *ex aequo et bono* assessment, to order that interest commences from the date the Player filed his Request for Arbitration in these proceedings and dismisses the Player's request to have such interest awarded on a "net" basis.
94. Thus, the Arbitrator awards the Player interest on the total amount of USD 115,000.00, at a rate of 5% per annum, from the date of 11 October 2022 until the date of payment.

8 Costs

95. 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). [...]"

96. On 20 April 2023, the BAT Vice-President determined the arbitration costs in the present matter to be EUR 5,575.00.
97. As regards the allocation of the arbitration costs 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,

⁹ See, for example, BAT 0811/16 and BAT 1365/19.

the conduct and the financial resources of the parties.”

98. Considering that the Player prevailed in this arbitration other than with respect to his claims for interest and late payment penalties, which were marginal (and in the case of late payment penalties, tempered by the alternative request for a lower amount), it is consistent with the provisions of the BAT Rules and prior jurisprudence that the fees and costs of the arbitration be borne by the Club alone.
99. Accordingly, the Arbitrator finds that the Club shall bear the entirety of the costs of the arbitration. Given that the Player paid the entire Advance on Costs in the amount of EUR 7,500.00, the Club shall reimburse EUR 5,575.00 to the Player, with the remaining amount of EUR 1,925.00 to be reimbursed to the Player by the BAT.
100. In relation to the Parties’ legal fees and expenses, Article 17.3 of the 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.”*
101. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses, in this case EUR 10,000.00 excluding the non-reimbursable handling fee.
102. The Player expressly requested payment of the non-reimbursable handling fee of EUR 4,000.00 in his Request for Arbitration and in his submission on costs.
103. The Player also claimed legal fees in the amount of EUR 22,752.11 (including VAT), which appears to be calculated on the basis of 15% of the amount in dispute plus VAT. The Player did not provide any detailed breakdown of the actual costs he incurred in these proceedings.

104. Taking into account the factors required by Article 17.3 of the BAT Rules, the maximum awardable amount prescribed under Article 17.4 of the BAT Rules, the fact that the non-reimbursable handling fee in this case was EUR 4,000.00, and the specific circumstances of this case, the Arbitrator considers the Player's request for costs to be excessive.
105. As an initial matter, the Arbitrator is not satisfied that attorneys' fees in the amount of EUR 22,752.11 were actually incurred by the Player. The fee itself appears to have been simply calculated as 15% of the amount in dispute plus the applicable VAT. Although it is clear that the Claimant has retained external counsel for this case, no supporting invoices or fee notes in support of this sum were provided.
106. Moreover, the sum claimed by far exceeds the maximum allowable contribution and, given the relative simplicity of the case, the fees claimed are disproportionate.
107. Deciding *ex aequo et bono*, the Arbitrator therefore finds the Club liable to pay the Player EUR 8,000.00 in legal fees and expenses, including EUR 4,000.00 on account of the non-reimbursable handling fee.
108. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:
- (i) The BAT will reimburse EUR 1,925.00 to the Player, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President.
 - (ii) The Club shall pay EUR 5,575.00 to the Player, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT.
 - (iii) The Club shall pay to the Player EUR 4,000.00 for the Non-Reimbursable Handling Fee, plus EUR 4,000 in legal fees and expenses.

9 AWARD

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

- 1. Karşıyaka Spor Kulübü Derneği shall pay Mr. Tony Taylor USD 100,000.00, net of Turkish taxes, customs, duties, and other withholdings, in unpaid salary instalments for the 2021-22 season, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 11 October 2022 until payment in full.**
- 2. Karşıyaka Spor Kulübü Derneği shall pay Mr. Tony Taylor USD 15,000.00, net of Turkish taxes, customs, duties, and other withholdings, in unpaid bonuses for the 2021-22 season, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 11 October 2022 until payment in full.**
- 3. Karşıyaka Spor Kulübü Derneği shall pay Mr. Tony Taylor USD 11,500.00 in late payment penalties.**
- 4. Karşıyaka Spor Kulübü Derneği shall pay Mr. Tony Taylor an amount of EUR 5,575.00 as reimbursement for his arbitration costs. The balance of the advance on costs, in the amount of EUR 1,925.00 will be reimbursed to Mr. Tony Taylor by the BAT.**
- 5. Karşıyaka Spor Kulübü Derneği shall pay Mr. Tony Taylor an amount of EUR 8,000.00 as a reimbursement for his legal fees and expenses.**
- 6. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 26 April 2023

Brianna Quinn
(Arbitrator)