

ARBITRAL AWARD

(BAT 1897/22)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert

in the arbitration proceedings between

Mr. Amath M'Baye

- Claimant -

represented by Odvetniško Pisarno Tomažin Bolcar d.o.o. / Law Office Tomažin Bolcar,

vs.

Karsiyaka Spor Kulübü Derneği
Mustafa Kemal Atatürk Spor Salonu
35530 Karsiyaka-Izmir
Turkey

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Amath M'Baye ("Player") is an American professional basketball player.

1.2 The Respondent

2. Karsiyaka Spor Kulübü Derneği ("Club") is a Turkish professional basketball club.

2. The Arbitrator

3. On 13 December 2022, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert as arbitrator ("Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal ("BAT Rules"). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence or to his conduct of these proceedings.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. By a contract dated 25 January 2020 ("Player Contract"), Player was retained by Club as a professional basketball player for the then-remaining part of the 2019-2020 season, the 2020-2021 season, and the 2021-2022 season. On 17 September 2021, the Parties amended the payment schedule for the 2021-2022 season in Player Contract to the following:

*"the payment schedule for the 2021/2022 season, as set forth in Section 2.1 of the Player Contract, shall be amended to reflect the following payment schedule:
September 25, 2021: \$60,000 USD"*

*October 25, 2021: \$60,000 USD
November 25, 2021: \$60,000 USD
December 25, 2021: \$60,000 USD
January 25, 2022: \$60,000 USD
February 25, 2022: \$60,000 USD
March 25, 2022: \$60,000 USD
April 25, 2022: \$50,000 USD
May 25, 2022: \$50,000 USD
June 25, 2022: \$49,000 USD
July 25, 2022: \$20,000 USD."*

5. Player was not paid the aforementioned final three instalments by Club. He brings this arbitration to compel payment.

3.2 The Proceedings before the BAT

6. On 6 December 2022, Player filed a Request for Arbitration (of the same date) in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 4,000 on 20 June 2022.
7. On 13 December 2022, the BAT informed the Parties that Mr. Klaus Reichert 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. Amath M'Baye) EUR 4,500.00

Respondent (Karsiyaka Spor Kulübü Derneği) EUR 4,500.00"

8. On 7 July 2022, the BAT informed the Parties that the advance on costs was adjusted in accordance with Article 9.3.1 of the BAT Rules given that Club had both failed to file and Answer and pay its share of the advance on costs. The adjusted advance on costs was as follows:

"Claimant (Mr. Amath M'Baye) EUR 3,750.00

Respondent (Karsiyaka Spor Kulübü Derneği) EUR 3,750.00"

9. Player paid the advance on costs in full (EUR 4,500.00 on 15 December 2022, and

EUR 3,500.00 on 26 January 2023).

10. Club did not submit its Answer to the Request for Arbitration by the deadline (extended by procedural order until 17 January 2023) or at all. Club did not participate in this arbitration.
11. On 27 January 2023, the Parties were invited to set out (by no later than 3 February 2023) how much of the applicable maximum contribution to costs should be awarded to them and why. The Parties were also invited to include a detailed account of their costs, including any supporting documentation in relation thereto. Finally, the Parties were also notified that the exchange of submissions was closed in accordance with Article 12.1 of the BAT Rules.
12. Player filed his costs submission on 27 January 2023. Club, as already noted above, did not participate in the arbitration and did not file any claim for costs.

4. The Positions of the Parties

4.1 Player's Position

13. Player's position is simply as follows: he was not paid the last three salary instalments from his time under contract with Club, and wishes to compel payment as is his right.
14. Player's requests for relief are as follows:

"a) The amount of

- USD 50.000,00 alongside Interests of 5% per annum running from 26 May 2022 (the day after May salary was due) until payment amounting to USD 1.328,77 at the time of filing this Request for Arbitration,

- USD 49.000,00 alongside Interests of 5% per annum running from 26 June 2022 (the day after June salary was due) until payment amounting to USD 1.094,11 at the time of filing

this Request for Arbitration,

- USD 20.000,00 alongside Interests of 5% per annum running from 26 July 2022 (the day after July salary was due) until payment amounting to USD 364,38 at the time of filing this Request for Arbitration;

b) All costs related to the BAT proceedings (non-reimbursable handling fee, advance on costs, etc.);

c) Legal fees and expenses in relation to BAT proceedings.”

4.2 Club's Position

15. Club did not participate in this arbitration so it is not possible to articulate or summarise such position.

5. The jurisdiction of the BAT

16. As a preliminary matter, the Arbitrator wishes to emphasize that, since Club did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.¹ Also, the Arbitrator notes that the BAT Vice-President has determined pursuant to Article 11.1 of the BAT Rules, *prima facie*, that the subject matter of this arbitration is arbitrable and the arbitration could thus proceed. Accordingly, according to Article 1.3 of the BAT Rules, it now falls to the Arbitrator to finally decide jurisdiction.
17. 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).

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

18. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
19. 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) PILA².
20. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in clause 11 of the Player Contract, which reads as follows (in relevant part):

“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, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.”

21. The Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA. The Arbitrator notes that not only is there a signature placed on the document on behalf of Club, such signature is also covered by a stamp or chop which appears to be that of Club.
22. 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).
23. The predicate wording, namely, “[a]ny dispute arising from or related to the present contract [...]” clearly covers the present dispute as it expressed in the widest possible terms.

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

24. For the above reasons, the Arbitrator has jurisdiction to adjudicate Player's claim.

6. Other Procedural Issues

25. 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.

26. This requirement is met in the present case. Club 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 Player's Request for Arbitration. In particular, the BAT has the following record of delivery of arbitration materials to Club (in reverse chronological order):

- Procedural Order of 27 January 2023 (close proceedings) - sent by courier and delivered on 31 January 2023
- Procedural Order of 19 January 2023 (No Answer, adjustment Advance on Costs) - sent by e-mail; read confirmation on 20 January 2023
- Procedural Order of 10 January 2023 (final reminder Advance on Costs and Answer) - sent by courier, delivered on 13 January 2023
- Procedural Order of 13 December 2022 (Confirmation Letter) - sent by courier, delivered on 19 December 2022

27. The Arbitrator is compelled to draw the obvious inference that Club chose not to

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

participate in this arbitration.

7. Discussion

7.1 Applicable Law – ex aequo et bono

28. 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”.

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

“15.1 The Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.

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

30. As already noted above, clause 11 of the Player Contract stipulates that: “[T]he arbitrator shall decide the dispute ex aequo and bono.”
31. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this arbitration.

32. 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

33. 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*”.
34. In light of the foregoing considerations, the Arbitrator makes the findings below.

7.2 Findings

35. A number of guiding principles, clearly established by well over a decade of FAT/BAT awards rendered by all of the arbitrators serving in this Tribunal, can be succinctly recalled. First, *pacta sunt servanda* is the key to the resolution of any dispute arising from a contract which has contained within it an arbitration clause stipulating the application of the BAT Rules. Secondly, interpretation of contractual language chosen by parties to such contracts is not a hostage to literalism, but rather the Arbitrator takes care to read all the terms as a whole taking into account the context (particularly the reasonable expectations of participants in the international professional basketball community). However, the phrase *ex aequo et bono*, or justice and equity, is not a

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).

reason, in and of itself, to simply discard the ordinary meaning of contractual language merely because it is perceived to be inimical or presently inconvenient to one side or the other.

36. Bearing the foregoing in mind, the Arbitrator turns to the case at hand.
37. Having reviewed the Player Contract (as amended), the Arbitrator considers that Player's case is persuasive. He and Club clearly stipulated in the Player Contract (as amended) that he would receive monthly salaries up to and including June 2022. He has asserted in this arbitration that Club has not paid the last three amounts to him and there is no indication, whatsoever, on the record of this arbitration that such payment was, in fact, made. Specifically, if Club believed it had no obligations to Player then it might well, at a minimum, be expected to indicate that fact to the Arbitrator.
38. The Arbitrator, therefore, considers that it is appropriate that the obligations Club took upon itself are upheld and enforced by requiring payment of the last three salary instalments to Player. In passing, the Arbitrator notes that the Player Contract requires such payments to be net of Turkish taxes
39. Thus, the Arbitrator awards Player his prayers for relief in respect of the missed payments. The Arbitrator has carefully compared such prayers for relief with the terms of the Player Contract (as amended) and they are consistent.
40. Turning to interest, Player seeks interest at 5% (which is the rate consistently awarded in BAT awards) as and from the day after each of the three missed instalments were due to be paid. This is the appropriate approach to interest and is awarded by the Arbitrator.
41. Thus, the Arbitrator awards interest as follows:
 - (a) the USD 50,000.00 due on 25 May 2022, interest at 5% per annum running from

26 May 2022;

(b) the USD 49,000.00 due on 25 June 2022, interest at 5% per annum running from 26 June 2022; and

(c) the USD 20,000.00 due on 25 July 2022, interest at 5% per annum running from 26 July 2022.

8. Costs

42. 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). [...]”

43. On 11 April 2023, the BAT Vice-President determined the arbitration costs in the present matter to be EUR 4,000.00.

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

“The award shall determine which party shall bear the arbitration costs and in which proportion. [...] When deciding on the arbitration costs [...], the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties.”

45. Further, clause 12 of the Player Contract provides as follows:

“12. ATTORNEYS' FEES, COSTS, AND DAMAGES

Should litigation or arbitration become necessary regarding this Agreement, including but not limited to CLUB'S failure to make timely payment or provide the ta;c documents required under this Agreement, the prevailing party in any such litigation or arbitration shall

be entitled to recover from the non-prevailing party its costs and attorneys' fees. In addition, in the event of any breach under this Agreement by CLUB, the it shall indemnify and hold PLAYER and Agent harmless from and against any and all claims, demands, damages, debts, liabilities, obligations, costs, expenses (including, but not limited to, reasonable attorneys' fees and court costs), liens, actions and/or causes of action in any way arising from or related to any such breach."

46. Considering that Player was the prevailing party in this arbitration, it is consistent with the provisions of the BAT Rules that the fees and costs of the arbitration be borne by Club alone. Given that the Player paid the entire Advance on Costs in the amount of EUR 7,500.00 (of which EUR 3,500.00 will be reimbursed to Player by the BAT), Club shall pay EUR 4,000.00 to Player.

47. 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."

48. 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.

49. Player claims legal fees in the amount of EUR 1,700.00. He also claims for the expense of the non-reimbursable handling fee in the amount of EUR 4,000.00.

50. 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 (in this case, EUR 10,000.00), 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 holds that a total of EUR 5,700.00 (including the non-reimbursable handling fee) represents a fair and equitable contribution by Club to Player in this regard.

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

- (i) The BAT shall reimburse EUR 3,500.00 to Player, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT Vice-President;
- (ii) Club shall pay EUR 4,000.00 to Player, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT;
- (iii) Club shall pay Player EUR 5,700.00 (EUR 4,000.00 for the non-reimbursable fee plus EUR 1,700.00 for legal fees), representing a contribution by it to his legal fees and other expenses.

9. AWARD

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

- 1. Karsiyaka Spor Kulübü Dernegi is ordered to pay Mr. Amath M'Baye, by way of unpaid salary:**
 - (a) USD 50,000.00, net of Turkish taxes, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 26 May 2022 until payment in full;**
 - (b) USD 49,000.00, net of Turkish taxes, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 26 June 2022 until payment in full; and**
 - (c) USD 20,000.00, net of Turkish taxes, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 26 July 2022 until payment in full.**
- 2. Karsiyaka Spor Kulübü Dernegi is ordered to pay Mr. Amath M'Baye EUR 4,000.00 as reimbursement for his arbitration costs.**
- 3. Karsiyaka Spor Kulübü Dernegi is ordered to pay Mr. Amath M'Baye EUR 5,700.00 by way of contribution to his legal fees and expenses.**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 12 April 2023

Klaus Reichert
(Arbitrator)