

ARBITRAL AWARD

(BAT 1929/23)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Darius Myron Washington Jr.

- Claimant -

represented by Mr. Arda Güney, attorney at law,

vs.

KB Peja

Palestra Karagaci n/n, 30000 Peje, Kosovo

- Respondent -

represented by Mr. Blaz T. Bolcar, attorney at law,

1. The Parties

1. Mr. Darius Myron Washington Jr. (hereinafter referred to as the "Player" or "Claimant") is an American-North Macedonian professional basketball player.
2. KB Peja (hereinafter referred to as the "Club" or "Respondent") is a professional basketball club participating in the Kosovo Basketball Superleague.

2. The Arbitrator

3. On 7 March 2023, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (hereinafter referred to as the "BAT"), appointed Mr. Stephan Netzle as arbitrator (hereinafter referred to as the "Arbitrator") pursuant to Articles 0.4 and 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter referred to as the "BAT Rules"). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. The Player and the Club negotiated an employment agreement, according to which the Player would provide his services to the Club from the date of signing (i.e. from 10 March 2022) until the end of the 2021/2022 season. Only in the afternoon of 10 March 2022, i.e. on the last day of the registration period for new players, the Parties drafted the written contract.

5. Before drafting the employment contract, oral negotiations took place between the Club's President, i.e. _____ [Club's President], and the Player's agent, i.e. _____ (hereinafter referred to as the "Agent").
6. On 10 March 2022 at 2:19 pm local time, the Club's President sent a draft contract in word-format to the Agent containing the following terms:

"V. SALARY & BONUSES COMPENSATION"

a) *The Club agrees to pay the Player for rendering his services to the Club the following NET amounts:*

\$5.000 (USD FIVE thousand dollars) net of Kosovo taxes, paid as follows:

\$15.000 (USD FIFTEEN thousand dollars) paid into three (3) equal installments of \$15.000 (USD FIFTEEN thousand) on the fifteenth day of each month, commencing with april [sic] 15th, 2022 and ending with June 5th, 2022

BONUSES: Winning the Cup \$1,500 USD; winning unique-league.
Winning Kosovo superleague title \$2,000 USD.

Payments installment [sic]

16th march [sic] 3500\$ - Prepaid Salary

15th april [sic] 3500\$

15th may [sic] 7000\$

Should the Club's official obligations extend further than 15/05/2022, then the Player shall be compensated with the net of all taxes daily remuneration of \$234 (USD TWO hundred thirty four), paid within 8 (eight) days from the Club's last official game." (emphasis as in the original)

7. On 10 March 2022, at 5:43 pm local time, the Agent in turn sent a draft contract to the Club without further comments. This draft was formatted as pdf-file and contained a salary provision which was different from the Club's proposal. In particular, it contained the following terms:

"V. SALARY & BONUSES COMPENSATION"

a) *The Club agrees to pay the Player for rendering his services to the Club the following NET amounts:*

\$7.000 (USD seven thousand dollars) net of Kosovo taxes, paid as follows:

\$21.000 (USD twenty one thousand dollars) paid into three (3) equal installments of \$21.000 (USD twenty one thousand) on the fifteenth day of each month, commencing with

april [sic] 15th, 2022 and ending with June 5th, 2022.

BONUSES;;

winning unique-league title \$ 3.000,- USD

Winning Kosovo superleague title \$3,000 USD

Payments installment

15th march [sic] 3500\$ - Prepaid Salary after his arrive

15th april [sic] 3500\$

15th may [sic] 7000\$

15th June 7000\$ or 1 day after last Game" (emphasis as in the original)

8. Approximately one hour later, the following text message exchange between a Club's representative and the Agent took place:

Agent: "Stamp and sign it and return it to me so that I send him [Player] to sign"

Club: "[Club's President] is in Prizren, he has the stamp, he will sign, and as soon as Gazi returns, we'll send it"

Agent: "Let the player sign first then so we don't have to wait"

Club: "Yes"

Agent: "Just right"

Right then, check to see tomorrow that I get paid my commission... I surely need it"

9. Still on 10 March 2022, the Agent sent the final page signed by the Player to the Club. It remained undisputed that the Club signed this last page as well. While the Player is of the view that the contract in the version sent by the Agent on 10 March 2022 at 5:43 pm is the relevant one, the Club assumes that the terms mentioned in the version sent to the Agent on 10 March 2022 at 2:19 pm apply.
10. It remained undisputed that the Club paid USD 3,500.00 in cash to the Player after his arrival but no further payments were executed until the end of April 2022. As the Club did not pay the April-salary on time, the Player and the Club's Vice-President exchanged the following WhatsApp messages at the end of April 2022:

Vice-President: "Do u [sic] need anything urgent"

Player: "Umm I just want to discuss this payment situation"

Vice-President: "How much it is.

Im [sic] not in to payment a lot

So i [sic] dont [sic] know

But i [sic] will check

How much it is?"

Player: "\$3.5 USD April 15th with \$3K USD Championship Bonus

Then I have two more months

\$7k USD May 15th

\$7k USD June 15th

If they don't have money to pay me I can leave after Saturdays game but they must pay the \$6.5K I earned and a ticket back home

I don't come to play for free, I'm professional, I don't cause any problems I don't [sic] my job but I'm not goin [sic] to be treated like a kid"

Vice-President: "You will leave only when we win championship :-)

Thats [sic] for sure

You will get the money brother

Dont [sic] worry, and i [sic] know u don't distruct ur self cuz i know u [sic]

In same time i [sic] understand ur [sic] situation and you will not play for free i [sic] can asure [sic] you

When i [sic] get back i [sic] will check whats [sic] the situation brother

We will pay you beleive [sic] me

And thank you for ur [sic] patience bro"

11. It remained undisputed that the Club paid the April-instalment of USD 3,500.00 after this WhatsApp message exchange.
12. The last game of the 2021/2022 season took place on 19 May 2022.¹ Around that time, the Club's General Manager and the Player exchanged the following WhatsApp messages:

Player: "Wow I'm very disappointed in everything bro I haven't given the club any problems like some players and this is [sic] what I get done to me in the end when I gave the city my heart. Never missed practices or threaten [sic] to sit out games when money was late or when something didn't go my way. I signed for \$21k and earned a 3k bonus and I will go back home with 7k in my pocket how fair is that to me??"

General Manager: "Bro you don't need to be disappointed. Peja will paid [sic] you another 7k. About the third payment, maybe they didn't tell you but when season is over the club pay only days you have played, until 18th may [sic]. You never missed practice you were an example, and this is the reason exactly why only you will come next season here.

Peja will send the second salary and bonuses [sic] for unique league

If you don't trust us stay here and wait no problem

But I promise [sic] you we will send it to you

Everything is written there will be complete for your

Now we don't [sic] have these [sic] money. I swear in God. If I have it now I was running to give to you"

13. After this text message exchange, the Club paid a further amount to the Player. While the latter argues that he received USD 2,000.00, the Club alleges that it paid an amount of USD 2,120.00 on 1 June 2022.

¹ <https://basketball.eurobasket.com/team/KB-Peja/22341?Page=2&Stats=2022#>

14. On 19 August 2022, the Player's counsel requested the payment of the outstanding salaries of USD 12,000.00 and the bonus for winning the "unique league title" of USD 3,000.00. The Club's General Manager answered as follows:

"[...]"

We acknowledge the obligation from contract for one salary, from which the player took 2,000\$, so 5,000\$ left from the salary and 3,000\$ bonus.

From the verbal deal we made, the player has expressed the desire to help the club and bring the total obligation to 5,000\$ more.

We will send those 5,000\$ by 6th September, in which time we will have operations running.

But, your mail, message was more of a threat with fake information like adding another salary which isnt [sic] signed or agreed and shows us a lot about your intentions. [...]"

15. The Club's General Manager attached an undated document titled "Termination Agreement between the Player Darius Washington and BC Peja" with the following content:

"To whom it may concern,

Through this letter we confirm the fulfilment of the contract prior to expiration due to failing to reach the PlayOff Finals.

We acknowledge and accept to pay the amount of 10,000\$ (five thousand four hundred dollars) due to the days the player has played and other obligation which derives from the contract between us and the player, Darius Washington. The total sum will be paid on the dates:

2.120 \$ by 01 June

2.880 \$ by 30th June

5.000 \$ by 30th July"

16. The document bears the stamp of the Club and the signature of the Club's President, but not the Player's signature. The Club's General Manager then announced that since the first amount of USD 2,120.00 had already been paid (on 1 June 2022), the Club would

pay the remaining amount of USD 7,880.00 to the Player. However, no further payments have been made.

3.2 The Proceedings before the BAT

17. On 10 February 2023, the Player filed a Request for Arbitration against the Club in accordance with the BAT Rules (received by the BAT on the same day) and paid the non-reimbursable handling fee of EUR 1,000.00 (received in the BAT bank account on 7 February 2023).
18. On 9 March 2023, the BAT informed the Parties that Mr. Stephan Netzle had been appointed as the Arbitrator, invited the Respondent to file its Answer to the Request for Arbitration in accordance with Article 11.4 of the BAT Rules by no later than 30 March 2023 and fixed the Advance on Costs to be paid by the Parties by 20 March 2023 as follows:

<i>"Claimant (Mr. Darius Myron Washington Jr.)</i>	<i>EUR 2,500.00</i>
<i>Respondent (KB Peja Basketball Club of Kosovo)</i>	<i>EUR 2,500.00"</i>
19. On 3 April 2023, the BAT acknowledged receipt of the Claimant's share of the Advance on Costs, noted that the Respondent failed to submit an Answer to the Request for Arbitration or pay its share of the Advance on Costs and granted the Respondent a final deadline until 11 April 2023 to pay its share of the Advance on Costs and to submit an Answer to the Request for Arbitration.
20. On 9 April 2023, the Club requested a deadline extension to submit its Answer until 14 April 2023 due to settlement discussions between the Parties.
21. By e-mail dated 11 April 2023, the BAT granted the deadline extension and invited the Club to file its Answer and to pay its share of the Advance on Costs by no later than 14 April 2023.

22. On 13 April 2023, the Club's counsel requested a deadline extension to submit the Answer until 21 April 2023 as the Club had only mandated him on the same day.
23. By e-mail dated 18 April 2023, the BAT granted the deadline extension and invited the Club to file its Answer until 21 April 2023.
24. On 18 April 2023, the Respondent paid its share of the Advance on Costs
25. On 21 April 2023, the Club submitted its Answer.
26. By letter dated 26 April 2023, the BAT invited the Claimant to comment on the Respondent's Answer by no later than 8 May 2023.
27. On 8 May 2023, the Claimant submitted his Reply.
28. On the same day, the BAT invited the Respondent to comment on the Claimant's submission by no later than 18 May 2023.
29. On 18 May 2023, the Respondent's counsel sent the Rejoinder per e-mail. On 19 May 2023, the BAT received the Rejoinder. By e-mail dated 22 May 2023, the BAT asked the Respondent's counsel to provide an explanation for this delay. On the same date, the Respondent's counsel answered that his law firm had encountered some issues with the servers the previous week.
30. On 24 May 2023, the BAT informed the Parties that the Arbitrator had declared the exchange of submissions complete and that the final award would be rendered as soon as possible. Finally, the BAT granted the Parties a deadline until 31 May 2023 to provide a detailed account of their costs.
31. On 25 May 2023, the Respondent submitted its accounts of costs.

32. On 31 May 2023, the Claimant provided a detailed account of his costs.
33. Still on the same day, the BAT informed the Parties that additional information was required in order to issue a final award and that the proceedings had to be re-opened for that purpose. The BAT invited the Parties to submit the original e-mails exchanged on 10 March 2022 at 2:19 pm and 5:43 pm from both Parties by no later than 9 June 2023.
34. Between 7 and 9 June 2023, the Parties submitted the requested documents.
35. While the amount in dispute in this proceeding falls below the threshold of EUR 50,000.00 established in Article 16.2 of the BAT Rules for the issuance of an award with reasons, the BAT President has determined, pursuant to the discretion afforded to him by Article 16.3 (b) of the BAT Rules, that given the circumstances, certain of the issues that the case raises and the interest of the basketball community in having a sufficient body of publicly-available awards with reasons, a reasoned award is appropriate in this case.

4. The Positions of the Parties

4.1 The Claimant's position

36. According to Article V of the employment contract, the Player is entitled to a total salary of USD 21,000.00 and a bonus for winning the "*unique-league title*" of USD 3,000.00, payable as follows:

- 15 March 2022: USD 3,500.00 (after Player's arrival)
- 15 April 2022: USD 3,500.00
- 15 May 2022: USD 7,000.00
- 15 June 2022: USD 7,000.00

37. The Player received USD 3,500.00 in cash after his arrival at the Club but no further payments until the end of April 2022. The Player requested the April-instalment of USD 3,500.00 and the bonus for winning the "*unique-league title*" of USD 3,000.00 at the end of April 2022. Only on 29 April 2022, the Club paid the April-instalment of USD 3,500.00.
38. Although the Club did not pay the salaries and bonus on time and in full, the Player continued to provide his services to the Club.
39. Until the end of the season, the Club paid the Player only USD 7,000.00. Salaries in the total amount of USD 14,000.00 and a bonus for winning the "*unique-league title*" of USD 3,000.00 remained outstanding.
40. On 1 June 2022, the Club paid the Player USD 2,000.00 in cash. As no further payments have been made, the Club still owes the Player an amount of USD 15,000.00 (salaries of USD 12,000.00 and a bonus of USD 3,000.00).
41. On 19 August 2022, the Player's counsel requested the payment of the outstanding amount of USD 15,000.00. On the same day, a Club's representative answered that the Club only owed an amount of USD 5,000.00. Later that day, the Club's representative acknowledged that it owed the Player an amount of USD 7,880.00 and promised the payment. In addition, the Club sent a document to the Claimant's counsel by WhatsApp in which the Player agreed to receive only USD 7,880.00. However, the Player had not signed this document and the Club did not make further payments. In this communication, the Club referred to an unknown contract and claimed that this was the relevant contract. However, as the figures and the dates mentioned therein were not correct, the only relevant agreement is the employment contract submitted as Annex 1 of the Request for Arbitration.

42. Upon the Club's argument in its Answer that it had not reviewed the final contract provided by the Player's agent on 10 March 2023 before signing, the Player submits that it was the Club's responsibility to review the contract before signing. The Club admitted having received the entire employment contract on 10 March 2022. After reception of the contract, the Club asked for the final page, which had already been signed by the Player, for signature.
43. When the Player contacted the Club's Vice-President in April 2022 requesting the April instalment, he clearly referred to the financial terms of the employment contract as submitted in Annex 1 of the Request for Arbitration, including the last two lump sum instalments due on 15 May and 15 June 2022. The Club's Vice-President confirmed that the Club would make these payments. It was only later when the Player learned that he would only receive a daily salary in May.
44. In its Answer, the Club acknowledges that it owes the Player an amount of USD 7,880.00. The Club argues that it only agreed to pay a total salary of USD 14,000.00 and a bonus for winning the "unique-league title" of USD 1,500.00, i.e. in total USD 15,500.00. Considering the fact that the Club paid only USD 9,000.00 to the Player, the latter would be entitled to USD 6,500.00 under the contract which Club considers applicable (and not USD 7,880.00 as now acknowledged by the Club). The Club is acting in bad faith and contradictory by claiming that the Parties agreed on other terms than those set out in the employment contract as submitted as Annex 1 of the Request for Arbitration.
45. The witness statement of the Club's President is not objective and unbiased and shall not be taken into account.
46. Considering the principles of *pacta sunt servanda* and *ex aequo et bono*, the Player is entitled to the outstanding salary and bonus payments of total USD 15,000.00 net.

47. In the Request for Arbitration of 10 February 2023 (and identical in his Reply of 8 May 2023), the Player requests the following relief:

"that the Respondent to be obliged to pay:

- a. To pay towards the Claimant unpaid salaries and bonus in the amount of 15,000 USD.**
- b. All arbitration costs of the Claimant**
- c. All legal fees and expenses incurred in these proceedings."** (emphasis as in the original)

4.2 The Club's Position

48. During the 2021/2022 season, the Club paid the Player a total of USD 9,100.00 and acknowledges that it owes the Player an amount of USD 7,880.00.

49. During the negotiation of the employment contract, the Player was represented by the Agent. The Player and the Club agreed orally on the following financial terms:

- Base salary in the amount of USD 15,000, payable in three instalments, namely
 - First instalment of USD 3,500.00 as down payment
 - Second instalment of USD 3,500.00 payable on 15 April 2022
 - Third instalment of USD 7,000.00 payable on 15 May 2022
 - Should the season be extended beyond 15 May 2022, the Player was entitled to a payment of USD 234.00 per day.
- The Club and the Agent also agreed that the Club should pay the Player a bonus of USD 1,500.00 for winning the "*unique-league title*".

50. On 10 March 2022, the Club sent the Agent a draft contract (in word-format) with the above-mentioned conditions. The Word file was titled: "DARIUS WASHINGTON CONTRACT KB PEJA 21-22.docx".
51. The Club would never have agreed to pay the Player a salary in June, i.e. one month after the end of the season, and to a lump sum salary in May, as the season normally ends around 15 May. After the end of the season, the Club has no significant income from sponsors, donors, state or federation.
52. It was never agreed that the Player would receive a base salary of USD 21,000.00 with the last instalment due on 15 June 2022 or one day after the last game. It was agreed that the Club would pay a daily salary of USD 234.00 after 15 May 2022 if the season is still ongoing. This is confirmed by a witness statement of the Club's President.
53. Still on 10 March 2022, the Agent returned a pdf-version of a contract titled with the "DARIUS WASHINGTON CONTRACT KB PEJA 21-22.pdf" by email to the Club. As the Agent's email did not contain any comments or any references to the changes in the contract, the Club reasonably assumed that the contract contained the terms agreed by the Parties before (as mentioned above). As the Club's President does not speak English, he assumed that the terms had remained unchanged.
54. Due to the expiring deadline to register new players (the window closed on the same day), the Club signed the contract in good faith on the same day.
55. The Club believed in good faith that the Agent had sent the same contract, only converted into pdf. The Club cannot reasonably expect the other party to provide a pdf-document which includes amendments, as it is well known that a pdf-document cannot be modified and should be considered the final version. The Club has worked with and trusted the Agent since 2019.

56. The Club would never have agreed to an increase of about 1/3 of the salary and bonus payments. The changes made in the contract were not minor adjustments. Therefore, the Agent should have drawn the Club's attention to such detrimental amendments.
57. It was not the Club that asked to receive only the last page signed by the Player, but the Agent proposed to sign only the last page. The Agent did not present the entire contract to the Club.
58. On 1 June 2022, the Club paid the Player a cash amount of USD 2,120 (not only USD 2,000.00 as argued by the Player), and acknowledged a remaining debt of USD 7,880.
59. The Club always communicated to the Player that post-season payments are only made on a daily basis and not as a lump sum. It only learned about the financial conditions in the contract submitted as Annex 1 of the Request for Arbitration in a meeting with the Player on 22 May 2022.
60. In the Answer of 21 April 2023 (and identical in its Rejoinder of 18 May 2023), the Club requests the following relief:

"31. The Club owes to the Player the amount of USD 7.880 with all applicable interests.

32. The Club is willing to settle the above obligation straight away. It also regrets that it has not settled it earlier.

33. Any further claims of the Player shall be dismissed as legally unfounded.

34. The costs of the present proceedings shall be borne by both Parties in relation to their success in this case."

5. The jurisdiction of the BAT

61. 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).
62. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
63. 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.²
64. The employment contract submitted as Annex 1 of the Request for Arbitration contains the following dispute resolution clause:

"XVI ARBITRATION

Any dispute arising from or related to the present Contract shall be submitted to the FIBA 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

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

governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of the arbitration of FIBA shall be English. The arbitrator shall decide the dispute ex aequo et bono." (emphasis as in the original)

65. The dispute resolution clause is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
66. With respect to the substantive validity, the Arbitrator considers that the jurisdiction of BAT over the Player's claims arises from the employment contract as submitted as Annex 1 of the Request for Arbitration. The wording "[a]ny dispute arising from or related to the present Contract [...]" clearly covers the Player's claim.
67. Finally, the procedure before the BAT was initiated by the Player without any jurisdictional reservation and the Club did not object to the jurisdiction of the BAT. In particular, the Club does not argue that the Parties agreed on another dispute resolution mechanism.
68. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Player's claims.

6. Discussion

6.1 Applicable Law – ex aequo et bono

69. 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".

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

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

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

71. As seen above, Article XVI employment contract stipulates that: "[t]he arbitrator shall decide the dispute ex aequo et bono".

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

73. 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'arbitrage³ (Concordat)⁴, 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."*⁵

³ 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).

⁴ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

⁵ JdT 1981 III, p. 93 (free translation).

74. This is confirmed by Article 15.1 BAT Rules, according to which the Arbitrator applies "general considerations of justice and fairness without reference to any particular national or international law".

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

6.2 Findings

6.2.1 Admissibility of the Respondent's Rejoinder

76. On 8 May 2023, the BAT granted the Respondent a deadline to comment on the Claimant's Reply until 18 May 2023.

77. The Rejoinder was sent on 18 May 2023, but received by the BAT Secretariat only on 19 May 2023. The Respondent's counsel explained that the delay was due to his law firm's server problems.

78. Article 7 BAT Rules reads as follows:

"7.1 Time limits for the filing of written submissions or other procedural acts shall be determined by the Arbitrator by reference to a specific date.

7.2 The Arbitrator may, in his/her sole discretion, extend time limits or grant new time limits. Unless admitted otherwise by the Arbitrator in his/her sole discretion, any requests for extension shall be filed before the last day of the relevant deadline, and shall set out the reasons for which the request is made."

79. According to Article 3.1 BAT Rules, *"the Arbitrator shall determine in his/her sole discretion the procedure in the proceedings before him/her"*.

80. The Arbitrator decides to admit the Respondent's Rejoinder for the following reasons: First, the e-mail sent to the BAT by the Respondent's counsel indicates that it was sent

on 18 May 2023, i.e. on the last day of the time-limit, and not on 19 May 2023. Second, the Respondent's counsel provided a plausible explanation (server problems) for the fact that the BAT has received the e-mail only on 19 May 2023, as well as for the fact that he did not file a request for extension prior to expiry of the deadline. Third, at the same time, the BAT received another e-mail of the same counsel (concerning another proceeding), which was also received a day later than it was sent. Finally, the Player did not object to the Respondent's late Rejoinder.

6.2.2 *Relevant facts*

81. While the Club is of the view that the Parties agreed to a salary of USD 15,000.00 and a bonus for winning the "*unique-league title*" of USD 1,500.00 according to the draft sent to the Agent on 10 March 2022 at 2:19 pm, the Player argues that he is entitled to a salary of USD 21,000.00 and a bonus of USD 3,000.00 based on the employment contract returned by the Agent to the Club on 5:43 pm and submitted as Annex 1 of the Request for Arbitration.
82. Undisputedly, the Player and the Club negotiated the unique-league title of USD 1,500.00 instead of USD 3,000.00.
83. Only on 10 March 2022 at 2:19 pm, the Club's President sent a draft contract as word-file to the Agent, according to which the Player is entitled to a salary of USD 15,000.00 and a bonus for winning the "*unique-league title*" of USD 1,500.00. This draft contains certain inconsistencies since it first stipulates that the salary of USD 15,000.00 should be paid in three equal instalments of USD 5,000.00 on the 15th of each month, commencing on 15th April and ending on June 5th, 2022. However, in the next paragraph, the payment instalments should be as follows:
 - a. 16th March: USD 3,500.00 (prepaid Salary)
 - b. 15th April: USD 3,500.00

- c. 15th May: USD 7,000.00
- d. Bonus: winning unique-league title: USD 1,500.00

This would lead to a total salary of USD 14,000.00, plus the payments of USD 234.00 per day paid after 15th May. The Club does not explain this difference in its submissions, nor does it address the discrepancy between the two paragraphs of its own draft regarding the instalments.

84. At 5:43 pm of the same day, the Agent sent an amended draft contract as pdf-file to the Club's President. The latter did not double-check but assumed that the pdf-file contained the Club's draft sent to the Agent earlier. This version differs from the Club's version in the following underlined points:

- a. The overall salary was USD 21,000.00.
- b. The salary was to be paid in the following instalments:
 - i. 16th March: USD 3,500.00 (prepaid Salary)
 - ii. 15th April: USD 3,500.00
 - iii. 15th May: USD 7,000.00
 - iv. 15th June: USD 7,000 or 1 day after the last game.
- c. Bonus: winning unique-league title: USD 3,000.00

85. Hence, the overall salary differed by USD 6,000.00 and the bonus by USD 1,500.00, while the two contract versions provide for the same instalments, except the June-payment.

86. Around 6:45 pm of the same day, the Agent proposed to the Club that the Parties should sign the last page of the contract, beginning with the Player. The Club agreed and signed the last page, which was sent by the Agent by separate email.
87. There were no discussions between the Parties about the content of the employment contract until the end of the season when the Player claimed the outstanding salaries of USD 14,000.00 (2 x USD 7,000.00) and a bonus payment of USD 3,000.00 (i.e. USD 17,000.00).
88. On 1 June 2022, the Club paid another amount to the Player in cash. While the Club is arguing having paid USD 2,120.00, the Player states having received USD 2,000.00. The difference is not subject to further arguments, and there is no specific evidence on the record.
89. On 19 August 2022, the Player's counsel reminded the Club of the then outstanding salary and bonus of USD 15,000.00 (i.e. the salary payments for May and June of USD 7,000.00 each, plus the bonus of USD 3,000.00 minus the cash payment of USD 2,000.00).
90. The Club replied that the outstanding amount was only USD 5,000.00 and presented the termination agreement as cited in para. 15 above. The document bears the stamp of the Club and the signature of the Club's President, but not the Player's signature. The Club's General Manager then announced that since the first amount of USD 2,120.00 had already been paid on 1 June 2022, the Club would pay the remaining amount of USD 7,880.00 to the Player.
91. Also in its Answer, the Club accepts that it still owed USD 7,880.00 to the Player but did not pay this amount until today. There is no further information about how and when this document was drafted, whether the Parties discussed an early termination of the employment contract and why it did not bear the Player's signature.

92. It would be the burden of the Club to prove payment of USD 2,120.00 on 1 June 2022 instead of USD 2,000.00 as acknowledged by the Player. However, as there is no information about the creation of this document and how the Player was involved, the Arbitrator must assume a payment of USD 2,000.00. The fact that the Club refers to a seemingly random number that also occurs in the alleged termination agreement is no proof of its being correct.
93. As a consequence, the Player received totally USD 9,000.00 and the Club acknowledged a debt of further USD 7,880.00, whereas the Player requests a further payment of USD 15,000.00 consisting of two open monthly salaries of USD 7,000.00 and a bonus of USD 3,000.00, minus the cash payment of 1 June 2022, which the Arbitrator values at USD 2,000.00.

1.1.3 Legal considerations

94. The relevant document in this arbitration is the employment contract as reflected in Annex 1 of the Request for Arbitration. The signature page of both, the Club's and the Agent's version are identical, but the Club signed the signature page which had already been signed by the Player and sent to the Club by the Agent. The Arbitrator therefore assumes that the signed page belonged to the version of the employment agreement sent by the Agent to the Club just before, and not the Club's initial version before it was amended by the Agent. The signed version of the employment contract binds all signatories, whether or not they have read the document which bears their signatures.
95. It is therefore moot to investigate whether the Club's prior proposal of the employment agreement was, on its own, clear and consistent with respect to the salary instalments (see para. 83 above). However, the Arbitrator accepts that the Club wrongly assumed it was signing a contract for a total salary of USD 15,000.00 (plus a daily fee of USD 234.00) and not USD 21,000.00. Likewise, the Club expected a bonus for the winning of the unique-league title of USD 1,500.00 instead of USD 3,000.00.

96. A signatory may contest the validity of a signed contract on the grounds of substantial error or deception. The party in error may claim nullity of the signed contract. However, the party in error must plead the error in due time after discovery, or the time when it should have realized its error. While it is understandable that there was some time pressure to have the employment contract signed before the end of the transfer period, there is no indication that the Club ever read the signed contract before the end of the season. Under the circumstances, the Arbitrator finds that such plea of error should have been raised at the latest when the Player asked about the open salary payments under the contract, i.e. in April 2022.
97. In the present case, the Club failed to notify the Player of its error and it did not claim that it was not willing to be bound by the signed employment agreement. Such arguments were only raised as a defense in the present arbitration which was commenced on 10 February 2023 and in which the Respondent filed its answer on 21 April 2023.
98. When contesting its duty to pay the Player's overdue salaries and bonus, the Club initially relied primarily on the termination agreement (see para. 15 above), which also explains the reason why it acknowledged a payment obligation of USD 7,880.00, which could not be linked to the employment agreement in neither of the two versions. The Arbitrator has however held above that the termination agreement cannot be considered as a valid new agreement which replaced the signed employment agreement, as set out in Annex 1 of the Request for Arbitration.
99. However, the arguments of the Respondent may be understood as a claim that the Claimant violated his pre-contractual duty to negotiate in good faith when it returned the amended employment contract for signature without drawing the Respondent's attention to the fact that substantial adjustments as set out in para. 85 above had been made.
100. While the duty to inform the other party of possible amendments of the contract during the negotiation does not replace the duty to exercise due diligence before signing a

contract (especially under common law), there may be extraordinary circumstances in which the party that has adapted the contract has a special duty to inform the other party, such as time pressure, lack of knowledge of the contractual language or unexpected or surprising adjustments of the contract.

101. Such exceptional circumstances exist in the present case:

- When the Agent returned the employment contract as a pdf-file without any comments just hours before the registration deadline, it is understandable that the Club assumed that the content of this document corresponded to the proposal that it had sent to the Player just 2.5 hours before and was not to be understood as a counter-proposal.
- It is accepted that the written proposal of the Club reflected the Club's understanding of the result of the oral negotiations of the Parties, although the Club's version contained certain inconsistencies with regards to the amounts of the instalments. The negotiations had been concluded and the Parties hurried to sign a written contract in good time before the registration deadline. While this does not exclude last-minute amendments, the returned version of the contract provided for a substantially higher salary and bonus, which was unexpected for the Club.
- In addition, the Claimant's version of the employment contract provided for a lump sum salary due in June, despite the fact that the regular season ended in May. This is unusual and also came as a surprise to the Club.

102. Under these specific circumstances, it would have been the duty of the Player to pay the Club's attention to the fact that the pdf-document contained some significant amendments of the Club's first proposal. Failing such notice, the Player must be held liable for the Club's damage resulting from such omission.

6.2.4 Calculation of damages

103. As a consequence of the principle *pacta sunt servanda*, the Club is liable for the payments as provided in the signed employment contract, i.e. USD 24,000.00 (salary of USD 21,000.00 and bonus of USD 3,000.00). Any damages resulting from the Player's breach of his duty to negotiate in good faith shall be set off against the Club's liability for salaries and bonus.
104. The starting point for the damage calculation is the difference of costs to the Club resulting from the two contract versions. However, the Club must accept that it neglected its duty of due diligence, which is to be imputed as its own fault and which must be taken into account when calculating the damages.
105. The difference of the values of the two versions of the employment contract amounts to USD 7,500.00 (i.e. salaries and bonus due under the Club's version of the employment contract = USD 16,500.00 vs. salaries and bonus due under the Player's version of the employment contract = USD 24,000.00).
106. Based on the specific circumstances and in application of the principle *ex aequo et bono*, the Club's own fault (i.e. its failure to review the pdf-version of the employment contract before signing) the Arbitrator determines the Club's damage attributable to the Player's failure to draw the Club's attention to the amendments in the document to be signed at USD 4,000.00.
107. The Arbitrator accepts that the Club has paid USD 9,000.00 of the contractually agreed salary and bonus of USD 24,000.00 to date, which results in unpaid salaries and a bonus of USD 15,000.00 in total, against which the Club's damages of USD 4,000.00 shall be set off, leading to a final claim of USD 11,000.00 of the Player against the Club.

108. The Player requests the amount "net".⁶ According to Article VII employment contract, the salary and bonus payments are net amounts. Therefore, the Player is entitled to an outstanding amount of USD 11,000.00 net.

6.2.5 Interest

109. While the Player did not include in his formal requests for relief a request for interest, the Arbitrator considers that the Player does seek interest, based on his submission that "[i]t is a generally accepted principle embodied in most legal systems and reflected in the BAT jurisprudence that default interest default interest at a rate of **5% per annum** can be awarded even if the underlying agreement does not explicitly provide for a respective obligation" (emphasis as in the original).

110. The Employment Contract does not provide a regulation concerning interest. However, as rightly noted by the Player, according to standing BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. This is a generally accepted principle, which is embodied in most legal systems. As requested by the Player and in correspondence with the standing BAT jurisprudence the default interest rate is of 5% per annum.

111. As to the date from which the interest for the outstanding amount starts to run, the Arbitrator notices that the employment contract had provided a maturity date for the May-salary on 15 May 2022 and for the June-salary on 15 June 2022. As to the date from which the interest for the bonus for winning the "*unique-league title*" starts to run, the employment contract does not contain any provision on when the payment is due. The

⁶ At N 16 of the Request for Arbitration (not in the Requests for Relief).

Arbitrator decides that the interest for the bonus payment starts to run one day after the last game of the season, i.e. on 20 May 2022.

112. Thus, the interest on the May instalment of USD 5,000.00 started on 16 May 2022, the interest on the bonus of USD 3,000.00 started on 21 May 2022 and the interest on the remaining debt of USD 3,000.00 started on 16 June 2022.

7. Conclusion

113. Based on the foregoing, and after taking into due consideration all the evidence submitted and all arguments made by the Parties, the Arbitrator finds that the following payment is owed:

114. The Club shall pay the Player USD 11,000.00 net, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) of USD 5,000.00 from 16 May 2022, of USD 3,000.00 from 21 May 2022 and on USD 3,000.00 from 16 June 2022 until payment in full.

8. Costs

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

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

116. On 16 June 2023, the BAT Vice-President determined the arbitration costs in the present matter to be EUR 7,990.00.

117. Moreover, in accordance with Article 18.2 of the BAT Rules, a contribution has been determined to be paid from the BAT Fund towards the arbitration costs in this case. As per the Information Notice accompanying the 2019 edition of the BAT Rules, this amount is EUR 3,000.

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

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

119. Considering the outcome of the proceedings and the fact that the Claimant prevailed by approx. 2/3 of his claim, 2/3 of the arbitration fees and costs after deduction of the contribution from the BAT fund (i.e. EUR 3,325.00) shall be borne by the Respondent and 1/3 by the Claimant (i.e. EUR 1,665.00).

120. Given that both Parties paid their shares of the Advance on Costs (EUR 2,493.00 paid by the Claimant and EUR 2,500.00 paid by the Respondent), the Respondent shall reimburse EUR 828.00 to the Claimant.

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

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

122. Moreover, Article 17.4 BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses. The maximum contribution for an amount in dispute up to EUR 30,000.00 is EUR 5,000.00.

123. The Claimant claims legal fees in the total amount of EUR 4,500.00. He also claims for the expense of the non-reimbursable handling fee in the amount of EUR 1,000.00. The Club requests a contribution to its legal fees of EUR 2,300.00 and the reimbursement of the translation costs of EUR 54.90.
124. Taking into account the factors required by Article 17.3 BAT Rules, the maximum awardable amount prescribed under Article 17.4 BAT Rules, the work done by the counsel and the specific circumstances of this case, the Arbitrator holds that it is fair and equitable that the Respondent shall pay a reduced contribution of EUR 2,000.00 plus the non-reimbursable handling fee of EUR 1,000.00 to the Claimant. The Respondent shall bear its own legal costs and fees.

9. AWARD

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

- 1. KB Peja Basketball Club of Kosovo shall pay Mr. Darius Myron Washington Jr. outstanding salaries and bonus in the amount of USD 11,000.00 net, plus interest of 5% per annum on any outstanding balance (as may be the case from time to time) of USD 5,000.00 from 16 May 2022, of USD 3,000.00 from 21 May 2022 and of USD 3,000.00 from 16 June 2022 until payment in full.**
- 2. KB Peja Basketball Club of Kosovo shall pay EUR 828.00 to Mr. Darius Myron Washington Jr. as reimbursement of his arbitration costs.**
- 3. KB Peja Basketball Club of Kosovo shall pay EUR 3,000.00 to Mr. Darius Myron Washington Jr. as a contribution to his legal fees and expenses (including the non-reimbursable handling fee).**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 21 June 2023

Stephan Netzle
(Arbitrator)