ARBITRAL AWARD

(BAT 1914/23)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert

in the arbitration proceedings between

Wasserman Media Group, LLC
10900 Wilshire Blvd., Suite 1200
Los Angeles, CA 90024, USA

- Claimant -

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

vs.

Mr. Darrun Hilliard

- Respondent –

represented by Mr. Miodrag Ražnatović, attorney at law,

BASKETBALL
ARBITRAL TRIBUNAL

1. The Parties

1.1 The Claimant

1. Wasserman Media Group, LLC (“Agency”) is an American professional sports agency.

1.2 The Respondent

2. Mr. Darrun Hilliard (“Player”) is an American professional basketball player.

2. The Arbitrator

3. On 9 February 2023, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Klaus Reichert as arbitrator (“Arbitrator”) pursuant to Articles 0.4 and 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. Agency was, in the past, the professional representative of Player. Their relationship was governed by a representation agreement (the “Contract”) dated 6 May 2019 with a term of two years. The Contract contained a renewal clause which operated to automatically extend its duration for a further two years unless either Party served a notice of non-renewal no less than sixty days prior to the end of such term. Neither Party served such a notice in or around March 2021 and, therefore, the Contract continued in its operation for a further two years (to May 2023). Player served a written termination notice on Agency on 14 August 2021 and moved to a different agency.

5. Player joined Maccabi Tel Aviv as a professional player in or around June 2022 which was within the putative two-year period of the Contract's term following the automatic extension in May 2021. Agency did not mediate or assist with Player's joining Maccabi Tel Aviv, rather this was undertaken by Player's new agency. In those circumstances, Agency seeks a fee of 10% of the Maccabi Tel Aviv contract amount.

6. As is discussed below, there is very little by way of disputed issues between the Parties. Player accepts he must pay Agency 10%, and in fact has (by the date of this Award) made substantial payments to the latter. What remains in dispute, and to be decided by this Award, are a number of related issues including the value of the Maccabi Tel Aviv contract, whether the 10% fee for Agency is based on gross or net amounts and when such agency fees were payable.

3.2 The Proceedings before the BAT

7. On 26 January 2023, Agency filed a Request for Arbitration (of the same date) in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 4,000.00 was received in the BAT bank account on 20 June 2022 (EUR 500.00) and 27 January 2023 (EUR 3,500.00).

8. On 9 February 2023, 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 (Wasserman Media Group LLC) EUR 4,000.00*
> *Respondent (Mr. Darrun Hilliard) EUR 4,000.00"*

9. Agency paid the advance on costs in full (EUR 4,000.00 on 17 February 2023 and EUR 4,000.00 on 2 March 2023).

10. Player filed his Answer on 21 February 2023.

11. By Procedural Order dated 6 March 2023, the Arbitrator sent the following communication to the Parties:

> *"The Arbitrator notes that Respondent has suggested that the arbitration be suspended until the conclusion of the 2022/23 season with a view to ascertaining at that time the full amount received by him from Maccabi Tel Aviv. The Arbitrator further notes that the Respondent says, in that regard, that if he receives the full salary amount for the season he will pay Claimant USD 70,000 but without liability for costs.*
>
> *The Arbitrator wishes to first gauge Claimant's reaction to that procedural suggestion but with the caveat that he would hold over for further consideration the Parties' claims for costs as against each other and also Claimant's claim for interest."*

12. By reply dated 17 March 2023, Agency rejected Player's suggestion (as noted in the quoted text just above).

13. By his submission dated 21 March 2023, Player took issue with Agency's submission of 17 March 2023.

14. By Procedural Order of 22 March 2023, the Arbitrator sent the following communication to the Parties:

> *"The Arbitrator has considered the positions of the Parties on the procedural suggestion made by the Respondent that the arbitration be suspended until the end of the 2022/23 season. He has come to the conclusion that the arbitration will proceed though wants to emphasise that neither side should read into this decision or infer any "success" or advantage on the merits of the issues which currently divide the Parties.*
>
> *Before issuing further instructions for conduct of this arbitration, the Arbitrator recalls Article 12.3 of the BAT Rules ("The Arbitrator is authorized to attempt to bring about a settlement to the dispute"). That power can, in the Arbitrator's view, be exercised to not just to attempt to settle a dispute in full, but also to bring about a narrowing of a case. With that in mind, the Arbitrator has noted that the Respondent has specifically stated the following in the Answer:*
>
> > *'12. In the case that the Arbitrator decides that part of the Claimant's request for*

payment is due, which in this case in moment of writing this answer would be 42.000 USD (6 monthy salaries September 15 to February 15, 70.000 USD each, total 420.000 USD of which 10% commision is 42.000 USD), then the Respondent wishes to state that he is ready to pay that part immedially….'. [sic]

The Arbitrator notes that as of now the likely salary milestone in Israel of 15 March for Respondent has passed and, therefore, a further amount of USD 70,000 has probably accrued. Thus, if USD 490,000 has been paid to Respondent as of now the amount he would be willing to pay immediately to Claimant is USD 49,000 (consistent with the wish he expressed at para. 12 of the Answer). The Arbitrator also notes that Respondent makes his willingness to pay immediately conditional (as set out in para. 12 of his Answer).

The Arbitrator, in attempting to bring about at least a partial settlement of this arbitration, suggests that Respondent pays Claimant USD 49,000 immediately upon Claimant furnishing an invoice in this amount. Such payment should not, in any manner howsoever, be interpreted by the Parties as a concession on their respective parts as to the remaining merits of the case. Thus, by way of example, the Arbitrator would not take such payment by Respondent as a confirmation by the Claimant that Respondent's argued-for interpretation of the Representation Agreement payment obligation is correct (i.e. as set out in para. 11 of the Answer). Put differently, a prompt payment now of USD 49,000 by Respondent to Claimant would not be held against either side insofar as their arguments on the merits are concerned (including disputes about interest and costs). Each side would still have their respective arguments on the merits fully open to them. Payment would, of course, narrow the case and leave a significantly reduced sum "in play" (whatever that sum might ultimately prove to be).

The Arbitrator invites the Parties to consider the foregoing and report back to the Arbitrator ***by Wednesday, 29 March 2023*** *one of two things only: (a) the Parties have agreed that Respondent will immediately pay Claimant USD 49,000 on presentation of an invoice by Claimant; or (b) the Parties have not agreed on immediate payment. Under no circumstances whatsoever should the Parties involve or circulate the Arbitrator or the BAT with correspondence discussing as between themselves these two options. Further, in the event that the Parties do not agree on immediate payment, the Arbitrator and the BAT must not be informed, even inferentially, as to why they did not so agree. The only matter to be neutrally and objectively reported is either option (a) or (b).*

As soon as possible after the Parties report back on ***by Wednesday, 29 March 2023*** *the Arbitrator will issue further instructions for the arbitration."*

15. The Parties agreed to the Arbitrator's proposal as recorded just above. On 13 April 2023, the Arbitrator sent the following communication to the Parties by way of Procedural Order:

"The Arbitrator has received confirmation that USD 49,000.00 has been paid by the

Respondent to the Claimant. Thus, insofar as that amount of the Claimant's claim is concerned, that aspect of the arbitration is completed. For the avoidance of doubt, the Parties' implementation of the Arbitrator's suggestion made pursuant to Article 12(3) of the BAT Rules does not bring the arbitration to an end and the balance of the matters in dispute now fall to be decided.

Further, as already made clear, the Parties' implementation of the Arbitrator's suggestion also does not mean their acceptance of the other's position in respect of the merits or arguments.

The Arbitrator considers that a second round of submissions will be necessary but under certain conditions.

First, the Arbitrator notes the Claimant's request that the Respondent's present contract with Maccabi Tel Aviv be produced in full. Certain details have been provided already (detailing essentially the salary of USD 700,000, net, medical matters and bonuses). Paras. 15 and 22 of the Request for Arbitration appear to suggest that the Claimant wishes to see the agency fee provisions in the contract as between the Respondent and Maccabi Tel Aviv. The Claimant also wishes to have produced the Respondent's bank statements in order to verify that which he has received from Maccabi Tel Aviv. The Respondent resists such production. Before the second round of submissions commences the Arbitrator considers it necessary to resolve this document production issue as follows.

The Arbitrator does not consider that production of the Maccabi Tel Aviv contract in full is necessary for the fair resolution of the dispute between the Parties. In particular, the Arbitrator sees no satisfactory reason, and none is articulated by the Claimant, based on the Agreement that whatever agency fee is applicable to the Respondent's contract with Tel Aviv could have a material bearing on the issues in this case. That agency fee does not concern the Claimant. The Arbitrator is equally unpersuaded that production of bank statements will efficiently assist with the resolution of the case.

However, the Arbitrator does require the Respondent to formally and personally verify, in writing, and in a manner which if found to be untrue would expose him to legal peril, the Gross Value (clause 6.d of the Agreement) of his contract with Maccabi Tel Aviv, namely, "all pre-tax gross compensation (whether securities, royalties, base and/or incentive/bonus consideration of any kind) due, earned or received, directly or indirectly by [him] or by any person, corporation or other entity on [his] behalf". Such verification can be in the form of an affidavit, sworn statement, or other analogous type of document, and duly sworn or confirmed before a notary or other such person empowered to formalise statements. This written verification should be filed with the BAT and the Claimant ***by no later than Monday, 24 April 2023.***

Following receipt of the Respondent's written verification, the Claimant is to file its Reply by ***Tuesday, 2 May 2023.*** *In that Reply the Claimant should set out exactly the prayers for relief it is now seeking as against the Respondent. Thereafter, the Respondent will have the opportunity to file a Rejoinder."*

16. Player sought an extension of time to file the formal verification of the "Gross Value" of his contract with Maccabi Tel Aviv due to playing commitments at that time in Israel. The Arbitrator granted such an extension until 22 May 2023.

17. One 22 May 2023, Player filed a submission which: (a) represented, via his Counsel, that he did not file the formal verification of the "Gross Value" of his contract with Maccabi Tel Aviv; and (b) informed the Arbitrator that he had made a further payment to Agency of USD 14,000.00 in addition to the USD 49,000.00 paid earlier (as noted in the first paragraph of the quotation in para. 15 above).

18. As justification for Player not filing a verification of the "Gross Value" of his contract with Maccabi Tel Aviv, the Arbitrator was presented with a WhatsApp conversation which indicates the following:

> *"You know your my guy but I am tired of this and for this I fight with my team manager for the moment.. I cant go anywhere to sign something and its even more difficult for me because I have kids .. Why I need to do this shit? I did what you say & paid them. Despite it not being fair and they dont deserve this money that my family can use! They didnt do anything for me and they lied, but I will pay because you told me that I mus't pay. I'm done with these people, I did everything they ask .. So you find a way to finish this with me and I will talk with James about this! I really dont understand".*

19. On 31 May 2023, Agency filed its Reply and, in particular, amended its prayers for relief in light of the aforementioned payments received from Player.

20. On 8 June 2023, Player filed his Rejoinder taking multiple objections to the content of Agency's Reply.

21. On 12 June 2023, the Parties were invited to set out (by no later than 19 June 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.

22. Player filed his costs submission on 12 June 2023. Club. Agency filed its costs submission on 19 June 2023.

4. The Positions of the Parties

4.1 Agency's Position

23. Agency's requests for relief as initially formulated in the Request for Arbitration were as follows:

> *"28. The Claimant requests as follows:*
>
> *a) The amount of 10 % (estimated at USD 70.000,00) from the total value of the Respondent's Contract entered into with Maccabi Tel Aviv on 26 June 2022 alongside Interests of 5% per annum running from 27 June 2022 (the day after the Contract was signed) until payment amounting to USD 2.032,88 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."*

24. Following the payments made, as aforesaid, by Player to Agency during the pendency of this arbitration, Agency amended its prayers for relief with its Reply to the following:

> *"36. Based on all mentioned so far in Wasserman's submissions the latter amends its prayer for relief as follows:*
>
> *I. The amount of USD 23.380 alongside interests of 5 % per annum running from 27 June 2022 until payment.*
>
> *II. The Interests of 5 % per annum from the amount of USD 93.380, reduced in accordance with the partial payments in the amount of USD 49.000 made on 30 March 2023 and USD*

21.000 made on 22 May 2023, amount to USD 3.858,93 on 31 May 2023.

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

IV. Legal fees and expenses in relation to BAT proceedings."

25. Agency's claim for USD 23,380.00 represents what it says represents the balance owed to it by Player based on a 10% fee of the gross, pre-tax value of Player's remuneration with Maccabi Tel Aviv. It relies on the following provisions of the Contract:

"6. Compensation.

As compensation for Wasserman's services described herein, Client agrees to pay Wasserman the following commissions on the Gross Value (as defined below) received by Client and/or any of Client's affiliates attributable to all Marketing Contracts, Basketball Contracts and Commercial Opportunities that are developed, negotiated and/or entered into during the Term, including any amendments, modifications, renewals and/or extensions thereto executed after the termination of this Agreement (the "Commissions"):

[…]

b. Ten percent (10%) of the Gross Value received by Client pursuant to any Basketball Contracts that are entered into during the Term; provided however, Client and Wasserman acknowledge and agree that Wasserman may be paid such Commissions directly by the contracting team, league, or club and Client shall not be liable for such Commissions in the event Wasserman receives it directly from the contracting team, league, or club. Client acknowledges and agrees that Wasserman may partner with foreign agents to secure Basketball Contracts.

[…]

d. For the purpose of this Agreement, "Gross Value" shall mean all pre-tax gross compensation (whether securities, royalties, base and/or incentive/bonus consideration of any kind) due, earned or received, directly or indirectly, by Client or by any person, corporation or other entity on Client's behalf (regardless of whether such income is paid during the Term of this Agreement or thereafter). All apparel and/or products provided for Client's professional use shall be excluded from Gross Value. Further, Wasserman shall not be entitled to any Commissions on any award earned by Client as a purse or prize pursuant to Client's performance in an event. and/or paid by an event promoter, which is not otherwise negotiated by Wasserman."

26. Agency submits (para. 31 of its Reply) that the gross value of Player's salary with Maccabi Tel Aviv was USD 933,800.00 based on a net salary of USD 700,000 (as represented to it by Player). In such circumstances Agency's overall fee due to it from Player is USD 93,380.00 and gives credit for the USD 70,000.00 already paid (as recorded above). Agency also says that its Request for Arbitration was not premature (as argued by Player) and seeks interest and costs.

4.2 Player's Position

27. Player denies any further liability to Agency over and above the sums he has paid as aforementioned. Insofar as Agency says he must pay a fee based on pre-tax gross amounts, such was not actually "received" from Maccabi Tel Aviv (an interpretation issue). Secondly, if Agency's interpretation of the Contract is correct then the Player seeks attenuation of its consequence as being intrinsically unfair and unjust. Thirdly, Player says that the arbitration was commenced prematurely as the amounts were only due to Agency once the corresponding salary instalment was received from Maccabi Tel Aviv.

5. The jurisdiction of the BAT

28. First, 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.

29. 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).

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

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

32. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in clause 12 of the Player Contract, which reads as follows (in relevant part):

> *"[…] any disputes between Wasserman and Client related to fees owed by Client to Wasserman pursuant to any Basketball Contracts shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved ln 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. The prevailing party shall be entitled to recover all costs, fees, and attorneys' fees from the other party in any such dispute."*

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

34. 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). Further, Player participated fully in this arbitration without reservation.

35. For the above reasons, the Arbitrator has jurisdiction to adjudicate Agency's claim.

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

6. Other Procedural Issues

36. The Arbitrator considers it necessary to specifically address the objections made by Player in his Rejoinder to certain of the contents of Agency's Reply.

37. The gravamen of Player's objection is he believes that when affording Agency an opportunity for a Reply on 13 April 2023, the Arbitrator confined that submission to "*Claimant should set out exactly the prayers for relief it is now seeking as against the Respondent*". Player also complains that Agency advanced a new interpretation of the Contract in the Reply seeking a fee based on pre-tax gross amounts, and made a new claim in that regard.

38. All of Player's such complaints are, at best, misplaced. The Arbitrator's direction on 13 April 2023 could not, on any reading, possibly or conceivably be taken to restrict Agency to simply stating the prayers for relief it wished to advance in light of payments received. The opportunity was granted for a Reply, and not simply a Reply with "only" a statement of such prayers for relief now being advanced. Player's attempt to read the direction in the manner sought neither persuades nor impresses.

39. Player also overlooks the unambiguous reservation of rights in para. 25 of the Request for Arbitration whereby Agency made clear that it intended to advance a claim based on Player's gross earnings once it obtained further information.

40. Finally, in this regard, Player makes the serious allegation of bad faith against Agency (para. 17 of the Rejoinder) arising from the latter's revised prayers for relief. Given para. 25 of the Request for Arbitration and the undoubted breadth of the Arbitrator's direction dated 13 April 2023, it is specifically noted, and determined that Agency has not behaved in bad faith in the manner alleged.

7. Discussion

7.1 Applicable Law – ex aequo et bono

41. 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".*

42. 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."*

43. As already noted above, clause 12 of the Contract stipulates that: "[*T*]*he arbitrator shall decide the dispute ex aequo and bono.*"

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

45. The concept of "équité" (or *ex aequo et bono*) used in Article 187(2) PILA originates from

Article 31(3) of the Concordat intercantonal sur l'arbitrage[2] (Concordat)[3], under which Swiss courts have held that arbitration "en équité" is fundamentally different from arbitration "en droit":

> *"When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[4]

46. 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*".

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

7.2 Findings

48. 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 reason, in and of itself, to simply discard the ordinary meaning of contractual language

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[2] That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).
[3] P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.
[4] JdT 1981 III, p. 93 (free translation).

merely because it is perceived to be inimical or presently inconvenient to one side or the other. Thirdly, 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. 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 (e.g. by reference to the primary or substantive obligations in a contract), may be refused enforcement, or moderated in its application. Whether or not a BAT arbitrator might refuse enforcement of such a penalty, or moderate its application to some extent, is usually left to their discretion depending on the individual circumstances of a case. This is a highly fact-sensitive exercise, and the discretion in that regard is not to be taken to be unfettered.

49. Bearing the foregoing in mind, the Arbitrator turns to the case at hand.

50. Turning to the first key of substance, namely, the correct interpretation of the Contract, it is particularly noteworthy that the Parties went to the trouble of defining in detail what “Gross Value” means (clause 6.d). The definition is widely drawn: “*all pre-tax gross compensation (whether securities, royalties, base and/or incentive/bonus consideration of any kind) due, earned or received, directly or indirectly, by Client or by any person, corporation or other entity on Client's behalf (regardless of whether such income is paid during the Term of this Agreement or thereafter).”* Player does not, following very careful review by the Arbitrator of all of the submissions made on his behalf, discuss or mention clause 6.d of the Contract. Indeed, in the Rejoinder there is a submission at para. 15 thereof which suggests that 10% of the Gross Value does not reflect the Parties’ intentions, yet if one reads clause 6.d of the Contract one can see just such an intention. Player spends considerable time in the Rejoinder discussing practice and custom, and while that is well understood by the Arbitrator, it is always open to contracting parties to arrange their affairs in the manner they choose with specific clauses which may not necessarily align with such practice and custom.

51. Drawing upon the long-established approach to contract interpretation noted above at para. 48, the Arbitrator considers that it is clear that clause 6.d of the Contract defines "Gross Value" (for the purpose of clause 6.b, the agency fee clause which the Arbitrator discusses below) very widely and encompasses not just the net amount received, but also the pre-tax amount. It would be very difficult, perhaps impossible, to read clause 6.d of the Contract in any other way given the express nature of the language used.

52. Player's argument that he never receives the taxed portion of his salary and only ever receives the net portion is not accepted by the Arbitrator. While he might only ever see the net amount in his bank account, for the purposes of local fiscal rules (which are likely to be common throughout the world) the tax authorities would obviously treat Player as having received the pre-tax gross amount as it is only by receipt that one becomes liable to tax. The arrangement, for obvious convenience, which ensures that any monies actually paid to Player are treated as net do not wipe out the fact that Player has also received, even if he considers this to be theoretical and notional, a gross salary.

53. The main focus, however, of the Parties' debate on interpretation centres on the use of the word "received" in clause 6.b of the Contract, namely, "*Ten percent (10%) of the Gross Value* <u>*received*</u> *by Client pursuant to any Basketball Contracts".* Player says that this word means only when money is actually paid does the obligation to pay Agency become engaged. However, that approach would read clause 6.b of the Contract in isolation and not take into account the cross-reference to the definition of Gross Value found in clause 6.d. That definition includes the phrase "*due, earned or received".* The Arbitrator considers that the word "received" in clause 6.b of the Contract must be interpreted in light of the definition of Gross Value in clause 6.d, thereby bringing in the words "due" and "earned" in addition to "received". This is because the Parties specifically applied their minds to articulating a precise definition of Gross Value, and, therefore, the more general parts of clause 6 (whether the introduction or sub-clause a) must all be read with such definition in mind.

54. The Arbitrator notes exhibit C-9, being extracts from Player's contract with Maccabi Tel Aviv, which provides in relevant part:

> *"Team shall pay the Player the following amounts: 6.1 Salary a. For the 2022/2023 game season: the sum of 3.222,000 NIS (gross), equal. On the signing date of the Agreement, to US $ 700.000 (net of all Israeli taxes) (US $ 933,800 (gross); The above salary per each relevant season will be paid in 10 (Ten) equal, consecutive monthly payments, starting on /September 15th, of each season. First salary will be paid September 15, 2022 or 8 days after successful medical examination as written in clause 8.3."*

55. The language used by Player and Maccabi Tel Aviv indicates to the Arbitrator that the full salary of USD 700,000.00, net, USD 933,800.00, gross, was earned on signing. Of course, as between Player and Maccabi Tel Aviv, payment of the salary was contingent upon Player providing the agreed services. However, as between Player and Agency, any failure by Player to perform such services could not undermine the claim for agency fees. In any case, there is no suggestion by either Party that Player failed to perform under his contract with Maccabi Tel Aviv. In addition, the Arbitrator notes that payment by monthly instalment is a separate matter to that club's overall obligation and Player's entitlement.

56. Player's contract with Maccabi Tel Aviv has a further provision which triggered debate between the Parties, namely:

> *"6.1.A Medical exception _________*
>
> *(i) " The Player represents that he got injured in _________ (the "_________ Condition") which, on the date of the execution of this agreement, does not impair his physical fitness and/or the Player's ability to play as a professional basketball for the Club. It is agreed that if the following three conditions are met: (a) the _________ Condition is aggravated or changed in such a manner as to impair the physical fitness of the Player and/or his ability to train and play for the Club under the physical loads and level of fitness expected from a professional basketball player, and (b) the Player, as determined by the Club's doctor or another expert appointed by the Club. is prevented or advised to refrain from playing and/or training due to _________ Condition for a period exceeding 14 consecutive days; (c) the insurance company will except his _________ and will not insure it. then, starting from the end of the said period, the monthly payment due to the Player from the Club will be reduced to NIS 40,000 gross, until the complete return of the Player to full activity as a player of the team (i.e full participation in all the Club's games, trainings and activities)"*

57. Player says that this clause means that there was a risk throughout the season that his salary could be reduced. Only at the end of the season, if no such _________ issue arose would there be certainty as to his received salary. The Arbitrator is not persuaded that such a hypothesis is sufficient reason, in and of itself, to essentially toll the obligation in the Contract of Player to pay the agency fee for an entire season. Were such a circumstance to arise, for the sake of hypothesis, it would be a matter of debate and argument as to whether Player could then seek reimbursement from Agency. That does not detract from the fact that the salary clause in Player's contract with Maccabi Tel Aviv sets the whole salary on the signing date. That is the figure upon which the agency fee is based.

58. Thus, taking all of the interpretative conclusions together, the Arbitrator's provisional view is that the moment Player signed with Maccabi Tel Aviv, he was obligated to pay 10% of the stated gross amount (USD 933,800.00) to Agency. That is the consequence of the combination of clauses 6.b and 6.d of the Contract. It is neither here nor there that the pre-arbitration correspondence (exhibit C7) (which appears to be efforts to strike a negotiated compromise) might suggest that Agency was willing to accept a fee based on the net salary. That correspondence did not result in a settlement, and cannot now be used to fetter express contractual rights. Clause 16 of the Contract includes language to reinforce that point (a non-waiver clause).

59. The Arbitrator says 'provisional view' as Player raises the argument that if the foregoing interpretation is correct then this is unfair. He says that agency fees are never based on pre-tax amounts, always post-tax. In essence, the Arbitrator considers Player to be submitting that the Gross Value definition is a penalty and thereby subject to very close scrutiny and attenuation if the circumstances demand.

60. Player relies on a quotation from BAT award 535/14 (para. 16 of the Rejoinder). The Arbitrator is very familiar with that award, which discussed contractual clauses restricting the obligation to mitigate, as he was the arbitrator in the prior case (421/13) referenced

in 535/14 dealing with the same issue. However, the quotation relied upon by Player from 535/14 is inaccurate when one carefully examines that award. Nonetheless, the point made is that 535/14 is advanced for the proposition, found in one paragraph, namely, "*in this case the parties to the Agreement expressly agreed that any dispute in front of the BAT must be decided "ex aequo et bono", which means that even if the wording of a contractual provision is clear, its content may nevertheless in certain circumstances be deemed intrinsically unfair and unjust."* There is no elaboration in that award as to what such circumstances might be, and also the boundaries of such a doctrine. Thus, without further specificity and analysis as to why a clause is both unfair and unjust, simply referring to a curated line from 535/14 does not persuade.

61. In any event, the evolution of BAT awards over the almost ten years since 535/14 was rendered, particularly when it comes to both interpretation and penalty clauses, require a compelling argument to be substantiated in order to vitiate the operation of apparently unfavourable contractual terms. The mere fact that a contractual arrangement, if interpreted according to its ordinary and natural language as described above, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from that language. It is not the function of an arbitrator when interpreting an agreement to relieve a party from the consequences of his or her imprudence or poor advice. Accordingly, when interpreting a contract, *ex aequo et bono*, an arbitrator avoids re-writing it in an attempt to assist an unwise party or to penalise an astute party. Also, parties should not seize on a literal translation of the phrase *ex aequo et bono* and consider that "justice" and "equity" provide them with a route to unprincipled and unmoored indulgence for poor contractual choices.

62. Attenuating the effect of contractual terms is the narrow exception, and not easily achieved. The necessary level of intrinsic unfairness and unjustness must rise to a high level to demonstrate such truly exceptional circumstances. If it were otherwise, the cornerstone of BAT awards, namely, *pacta sunt servanda* would descend into a lottery of *ad misericordiam* pleas susceptible to random varying levels of indulgence or

sympathy of whoever might happen to be the BAT arbitrator on any one case. That is not a state of affairs conducive to the stability of contractual arrangements in professional basketball.

63. The Arbitrator sees no particular unfairness or unjustness with clauses 6.b and 6.d as properly interpreted according to their terms. It is not for the Arbitrator to now rewrite and significantly help Player's apparently poor contractual choice in agreeing to these clauses. In reality, had Player agreed with Agency that 10% fees in the event of his early termination would be pegged to net amounts rather than gross amounts, his liability would be reduced by some 25% or thereabouts. Even if the Arbitrator were to consider the definition of Gross Value as a penalty then that percentage is not out of all proportion.

64. However, clauses 6.b and 6.d of the Contract do not easily or readily appear to be penalty clauses but simply operate to protect Agency from Player walking out early and denying them of fees. Nothing about these clauses of the Contract rise to the high level of unfairness and unjustness which might possibly attenuate their full force and effect. Hypothesising about what might have been the case had Player found a contract in a high-tax country (Spain or Germany being the examples given by Player) does not detract from the case at hand. Those circumstances did not arise in this arbitration and such hypotheses do not trump the facts.

65. Bearing the foregoing in mind, the Arbitrator has not changed his provisional view as to the operation and effectiveness of clauses 6.b and 6.d of the Contract. Player must pay, therefore, USD 23,380.00 to Agency being the balance of the agency fees owed.

66. The foregoing analysis also disposes of Player's objection to the claim, namely, that it was brought prematurely and only arose as and when payments were actually received. The definition of Gross Value, discussed above, presents an insurmountable block to Player's argument in that regard.

67. Further, Player criticises Agency for not supplying him with bank details in order to make payment and also unduly waiting to make contact. These arguments do not persuade the Arbitrator to view Agency's claim with disfavour. Player must have known that he was under an obligation to pay Agency the moment he signed with Maccabi Tel Aviv. As a debtor acting in good faith it was incumbent upon him to seek out his creditor, Agency, and not the other way around.

68. Turning to interest, Agency's Reply contains the following table of calculations based on a 5% rate:

DEBT (USD 93.380)						PAYMENTS		
	Interests		Amount of interests at the date of partial payment	OUTSTANDING AMOUNT AT THE DATE OF THE PARTIAL PAYMENT		Amount	Date of payment	Principal after partial payment
	From	To						
26.6.2022	27.6.2022	30.3.2023	3.517,74					
				96.897,74		49.000	30.3.2023	
				Principal: USD 93.380	Interests: USD 3.517,74			
								47.897,47
	31.3.2023	22.5.2023	341,19					
				48.238,93		21.000	22.5.2023	
				Principal: USD 47.897,47	Interests: USD 341,19			
								27.238,93

69. The Arbitrator considers that the commencement date, namely the day after Player signed with Maccabi Tel Aviv, is correct. Further, each of the calculations, taking into account payments made, are correct. Thus, taking into account the payments made, as of 22 May 2023, Player owes Agency USD 27,238.93 by way of remaining principal (USD 23,380.00) and accumulated interest (USD 3,858.93). Interest at 5% continues to run on that remaining principal amount until payment in full.

8. Costs

70. 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).* […]*"*

71. On 4 August 2023, the BAT Vice-President determined the arbitration costs in the present matter to be EUR 7,850.00.

72. 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."*

73. Further, the arbitration agreement in Contract provides as follows:

> "*The prevailing party shall be entitled to recover all costs, fees, and attorneys' fees from the other party in any such dispute."*

74. Considering that Agency 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 Player alone. Given that Agency paid the entire Advance on Costs in the amount of EUR 8,000.00 (of which EUR 150.00 will be reimbursed to Agency by the BAT), Player shall pay EUR 7,850.00 to Agency.

75. 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."

76. 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.

77. Agency claims legal fees in the amount of EUR 5,000.00. It also claims for the expense of the non-reimbursable handling fee in the amount of EUR 4,000.00.

78. 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 7,500.00), 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 9,000.00 (including the non-reimbursable handling fee) represents a fair and equitable contribution by Player to Agency in this regard.

79. 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 150.00 to Agency, being the difference between the costs advanced by it and the arbitration costs fixed by the BAT Vice-President;

(ii) Player shall pay EUR 7,850.00 to Agency, being the difference between the costs advanced by it and the amount it is going to receive in reimbursement from the BAT; and

(iii) Player shall pay Agency EUR 9,000.00 (EUR 4,000.00 for the non-reimbursable fee plus EUR 5,000.00 for legal fees), representing a contribution by him to its legal fees and other expenses.

BASKETBALL
ARBITRAL TRIBUNAL

9. AWARD

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

1. **Mr. Darrun Hilliard is ordered to pay Wasserman Media Group, LLC, USD 23,380.00, by way of unpaid agency fees, together with accumulated interest of USD 3,858.93, and further interest at 5% per annum on USD 23,380.00 on any outstanding balance (as may be the case from time to time) thereof from 22 May 2022 until payment in full.**

2. **Mr. Darrun Hilliard is ordered to pay Wasserman Media Group, LLC, EUR 7,850.00 as reimbursement for its arbitration costs.**

3. **Mr. Darrun Hilliard is ordered to pay Wasserman Media Group, LLC, EUR 9,000.00 by way of contribution to its legal fees and expenses.**

4. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 7 August 2023

Klaus Reichert
(Arbitrator)