

ARBITRAL AWARD

(BAT 1925/23)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Annett Rombach

in the arbitration proceedings between

Ms. Shante Marie Evans

- Claimant -

represented by Mr. Sergiu Valentin Gherdan, attorney at law,

vs.

Galatasaray Spor Kulübü Derneği

Hasnun Galip Sok 7-11, Beyoglu, Istanbul, Turkey

- Respondent -

represented by Mr. Süleyman Ami Özgüc, Mr. Tuncer Özgür Kilic and Ms. Asli Özer Arslan

1. The Parties

1.1 The Claimant

1. Ms. Shante Marie Evans (the **“Player”** or **“Claimant”**) is a professional basketball player of US/Slovenian nationality.

1.2 The Respondent

2. Galatasaray Spor Kulübü Dernegi (hereinafter the **“Club”** or the **“Respondent”**) is a professional basketball club competing in the Turkish Women’s Super League.

2. The Arbitrator

3. On 7 March 2023, Mr. Raj Parker, Vice-President of the Basketball Arbitral Tribunal (the **“BAT”**), appointed Ms. Annett Rombach as arbitrator (the **“Arbitrator”**) pursuant to Articles 0.4 and 8.1 of the Rules of the Basketball Arbitral Tribunal (the **“BAT Rules”**). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. On 30 December 2021, the Player and the Club entered into an employment agreement pursuant to which the Club engaged the Player as a professional basketball player for the remainder of the 2021-22 season (the **“Player Contract”**).

5. Pursuant to Clause 3.A of the Player Contract, the Player was to receive a total net base salary of EUR 100,000.00, payable in five instalments as follows:

2021/22 SEASON

Within four (4) days of Player passing the physical examination	12.500	EUR
MARCH 5, 2022	12.500	EUR
APRIL 5, 2022	25.000	EUR
MAY 5, 2022	25.000	EUR
MAY 31, 2022	25.000	EUR
TOTAL	100.000	EUR

6. With regard to the taxation of the Player's remuneration, Clause 5 of the Player Contract stated the following:

"Any withholding tax, stamp duty, social security institution premium payments, costs and expenses related to the prices and payments set out under this agreement, shall be paid by the Club. The Club, at the time prior to the departure of the Player after the expiry of the agreement, shall provide the player a tax receipt certified by the respective tax authorities, stating that all respective taxes have been paid by the Club."

7. The Club duly paid the first three instalments (2x EUR 12,500.00, 1x EUR 25,000.00). The Player finished the 2021-22 season with the Club, and it is undisputed that she fulfilled her contractual obligations under the Player Contract without receiving either of the two outstanding salary instalments.
8. By e-mail of 17 June 2022, the Player's agent requested the payment of the remaining two instalments under Clause 3.A. of the Player Contract by no later than 24 June 2022.
9. The e-mail remained unanswered, and no further payments were made by the Club.

3.2 The Proceedings before the BAT

10. On 9 November 2022, the BAT received a Request for Arbitration together with several exhibits filed by the Claimant in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 4,000.00 was received in the BAT bank account on 14 February 2023.

11. On 9 March 2023, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited the Respondent to file its Answer in accordance with Article 11.4 of the BAT Rules by no later than 30 March 2023 (the “**Answer**”), and fixed the amount of the Advance on Costs to be paid by the Parties by 20 March 2023 as follows:

<i>“Claimant (Shante Marie Evans)”</i>	<i>EUR 3,500.00</i>
<i>Respondent (Galatasaray Spor Kulübü Derneği)</i>	<i>EUR 3,500.00”</i>

12. On 30 March 2023, the Respondent filed its Answer.

13. On 31 March 2023, the BAT acknowledged receipt of the Respondent’s Answer and of the full amount of the Advance on Costs, paid by the Claimant. The BAT invited the Claimant to comment on the Respondent’s Answer by no later than 21 April 2023 (“**Reply**”).

14. On 22 April 2023, at 1:35 am, the Claimant filed her Reply.

15. On 4 May 2023, BAT acknowledged receipt of the Reply and invited the Respondent to comment on the Reply by no later than 15 May 2023 (“**Rejoinder**”).

16. On 15 May 2023, the Respondent filed its Rejoinder.

17. By procedural order of 19 May 2023, the Arbitrator (in accordance with Article 12.1 of the BAT Rules) declared that the exchange of submissions was completed and requested the Parties to submit their detailed cost accounts by 26 May 2023.
18. Respondent submitted its cost account on 24 May 2023. Claimant submitted her cost account on 26 May 2023.
19. Neither of the Parties requested to hold a hearing. The Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to render the award based on the written record before her.

4. The Position of the Parties

4.1 Claimant's Position and Request for Relief

20. Claimant submits the following in substance:
 - Although the Player fulfilled her contractual obligations under the Player Contract, the Respondent failed to pay the fourth (EUR 25,000.00) and fifth (EUR 25,000.00) instalment of the Player's salary under Clause 3.A. of the Player Contract in the total amount of EUR 50,000.00;
 - The Player is entitled to a tax certificate stating that all respective taxes have been paid by the Club in accordance with Clause 5 of the Player Contract;
 - In her Reply, in the interest of simplifying the proceedings, the Player accepts the deduction of EUR 87.73 claimed by the Respondent and withdraws her initial request for inflation rate adjustment in light of BAT 1867/22.
 - As the Respondent abstains from contesting the residual claims in dispute, the Claimant is entitled to be awarded such outstanding amounts plus interest.
21. With the Request for Arbitration dated 8 November 2022 the Claimant initially

requested the following relief:

“1. To pay towards the Claimant the amount of 50.000 EUR net representing unpaid salary, alongside default legal interest in amount of 5% per annum (Swiss statutory rate) on such amounts, respectively:

a) from the date of 5th of May 2022 regarding the amount of 25.000 EUR (in total of 640,41 EUR at the date of filing this request for arbitration) until full payment;

b) from the date of 31st of May 2022 regarding the amount of 25.000 EUR (in total of 551,37 EUR at the date of filing this request for arbitration) until full payment;

2. To update all of the amounts awarded with the inflation rate index for the European Union as established by the EU Commission EuroStat directorate, respectively on amount of 25.000 EUR and it's interest from the date of 5th of May 2022 until full payment (in total of ~1.300 EUR at the date of filing this request for arbitration) and on the amount of 25.000 EUR and it's interest from the date of 31st of May 2022 until full payment (in total of ~1.100 EUR at the date of filing this request for arbitration)

3. To pay the Claimant all arbitration proceedings costs

4. To pay the Claimant all legal fees and expenses incurred in these proceedings”

22. In a section of her Request for Arbitration that is separate from her prayer for relief, the Claimant explained the following:

“As the CLUB has not provided yet the PLAYER with such tax certificate, the PLAYER is entitled to claim that the CLUB be obliged to provide her with a tax certificate, issued by the competent Turkish fiscal authority, which shall prove that all the applicable taxes had been paid in relation to the salary payments performed by the CLUB to the PLAYER (and also to state all the applicable taxes, in amounts paid), for any fiscal year in which payments to the PLAYER had been made.

We respectfully insist for the BAT to include such wording in the operative part of the award as requested above, as unless such tax certificate is provided by the Turkish fiscal authorities, it would have no whatsoever value for the PLAYER. Furthermore, the topic of

taxes is of extreme importance for the PLAYER (and in general as well) since otherwise, should the PLAYER would be unable to prove that the amounts that she obtained were properly taxed, she would be required to pay herself the applicable tax in her country/countries of residence and would have the result that ultimately the PLAYER would benefit from amounts much inferior to the amounts that the CLUB owes her which are contractually defined as net amounts.”

23. The Arbitrator will address below at 6.2 how these statements are to be interpreted.
24. In her Reply dated 31 March 2023, the Claimant withdrew her request for inflation compensation and slightly adjusted her request for relief as follows:

“1. To pay towards the Claimant the amount of 49.912,27 EUR net representing unpaid salary, alongside default legal interest in amount of 5% per annum (Swiss statutory rate) on such amounts, respectively:

a) from the date of 5th of May 2022 regarding the amount of 24.912,27 EUR (in total of 638,16 EUR at the date of filing this request for arbitration) until full payment;

b) from the date of 31st of May 2022 regarding the amount of 25.000 EUR (in total of 551,37 EUR at the date of filing this request for arbitration) until full payment;

[Request no. 2 was deleted]

3. To pay the Claimant all arbitration proceedings costs

4. To pay the Claimant all legal fees and expenses incurred in these proceedings”

4.2 Respondent’s Position and Request for Relief

25. Respondent submits the following in substance:
- The Respondent principally acknowledges that it has not yet made the requested salary payments;
 - Due to the economic crisis in Turkey, the Turkish Lira has depreciated

significantly against the EUR, which forms an unexpected development. Consequently, the Club was unable to make the contracted payments in EUR. It would, therefore, be unfair to award default interest to the Claimant;

- The Respondent provided the Claimant with a car. In Turkey, all highway and bridge tolls are subject to an automatic toll system. Therefore, all cars are equipped with an electronic sticker or toll transponder which records the car's passages and imposes the toll charge on the car's account. The Claimant's total toll debt was TL 1,544.25 (approx. EUR 87.73). This amount has to be deducted from the Claimant's fourth salary instalment. Therefore, the Claimant shall demand only EUR 24.912,27 (EUR 25,000.00 - EUR 87.73) for the fourth salary instalment due on 5 May 2022.

26. Respondent request the following relief:

"12. The Respondent respectfully requests the BAT to order that:

Due to the economic fluctuations, The Claimant does not have the right to claim default interest and inflation rate and 50.000 Euro in total.

OR ALTERNATIVELY:

13. In the unlikely event that if this Tribunal decides that The Claimant is entitled to claim the outstanding amount of 49.912,27 EUR with the HGS debt, The Respondent respectfully request from the BAT to order 49.912,27 EUR and only default interest but not inflation rate.

14. In any event, the Respondent respectfully requests the BAT to order that the Claimant shall cover the legal and other costs of the Respondent in the present proceedings."

5. The Jurisdiction of the BAT

27. Pursuant to Art. 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”).

28. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
29. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Art. 177(1) PILA.
30. The Player Contract (Clause 12) contains the following dispute resolution clause in favour of BAT:

“Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland.

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

The prevailing party shall be entitled to recover all costs, fees, and attorneys' fees from the other party in any such dispute. This agreement may be translated into any language by the Club (at the Club's expense) for any purpose. However, it is agreed that in the case of any controversy the English form will prevail.”

31. The arbitration agreement is in written form and thus fulfils the formal requirements of Article 178(1) PILA.
32. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity of the arbitration agreement in the present matter under Swiss law (cf. Article 178(2) PILA). In addition, the Arbitrator notes that the Respondent participated in these proceedings without objecting to BAT's jurisdiction for the present dispute.

33. Hence, the Arbitrator has jurisdiction to decide the present dispute.

6. Other Procedural Issues

6.1 Admissibility of the Claimant's Reply

34. The Claimant filed her Reply on 22 April 2022, while the respective time limit expired on 21 April 2022. The Arbitrator finds that the slight delay of less than 2 hours (given that the Reply was filed at 1:35 am in the night) has evidently not caused any delay to the proceedings. The Respondent has also not objected against the admissibility of the Reply. Therefore, the Arbitrator decided to admit the Reply to the record.

6.2 The Claimant's statements in the RfA regarding the tax certificate

35. Whereas the Claimant has not made any request for the issuance of a tax certificate in its official prayers for relief, she expressly mentions this topic in the Request for Arbitration (see above at para. 22), where she *"respectfully insist[s] for the BAT to include such wording in the operative part of the award."*

36. According to the jurisprudence of the Swiss Federal Tribunal (see, e.g., SFT 4A_440/2010), a party's request for relief must not necessarily be contained in the prayer for relief-section, as long as that party's submissions, duly construed in light of its full brief, expresses (at least implicitly and easily identifiable) the party's intent to claim such relief. In these cases, an arbitral tribunal does not act *ultra petita* when it awards the party a relief that is unequivocally requested in a part of the written brief outside of the prayer for relief-section.

37. The Arbitrator finds that the Claimant, in the present case, clearly seeks an award for the issuance of a tax certificate. Therefore, it is irrelevant that the respective request *"to include such wording in the operative part of the award"* is not contained in the

official request for relief section.

7. Applicable Law – ex aequo et bono

38. 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 reads as follows:

“the parties may authorize the arbitral tribunal to decide ex aequo et bono”.

39. Under the heading “Applicable Law to the Merits”, Article 15.1 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.”

40. In the arbitration agreement quoted above at para. 30, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to her in this proceeding *ex aequo et bono*.

41. 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'arbitrage¹ (Concordat)², 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.”³

42. This is confirmed by Article 15.1 of the BAT Rules, according to which the Arbitrator applies *“general considerations of justice and fairness without reference to any particular national or international law”*.
43. In light of the foregoing considerations, the Arbitrator makes the findings below.

8. Findings

8.1 Outstanding Salary

44. As a starting point, the Arbitrator notes that it is undisputed that the Player’s fourth and fifth salary instalment have not been paid by the Club. Having reviewed the Player Contract, the Arbitrator has no reason to doubt that the Parties indeed entered into a valid and legally binding agreement, and that the Player is principally entitled to the salary instalments stipulated thereunder.

¹ 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). .

² P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

³ JdT 1981 III, p. 93 (free translation).

45. Furthermore, the Arbitrator notes that the Claimant accepted the set-off of EUR 87.73 relating to her toll debts. The Claimant adjusted her request for relief in these proceedings accordingly.
46. Respondent's only defense against the Claimant's payment claim is that it is suffering from financial difficulties because of the decrease of the local currency, the Turkish Lira, in relation to the currency in which the Player is to be paid under the Player Contract. This defense is, however, not substantiated in any manner. The Respondent and other Turkish clubs have been repeatedly trying to rely on this argument for many years in BAT arbitrations. As such, the Respondent maintains that the economic crisis is an "unexpected" event, however, without offering any evidence for this allegation. It would have been mandatory for the Respondent to demonstrate how the contract at issue in this arbitration was affected by certain "unexpected" currency developments, specifically at the time when the Respondent stopped making any payments (considering that the Respondent indeed paid the Claimant in the beginning).
47. In accordance with constant BAT jurisprudence (e.g. BAT 1187/18), the Arbitrator finds that the alleged currency developments (assumed they are true) do not affect Respondent's obligation to adhere to its payment duties under the Player Contract. Absent any agreement to the contrary, the debtor principally bears the risk of a detrimental development of exchange rates when it agrees to pay the creditor in a foreign currency. Furthermore, in the present case, while the decrease of value of the Turkish currency against the EUR within one year is certainly not insignificant, this development was not completely unexpected or unforeseeable in December 2021 (when the Player Contract was signed), because the decline of the Turkish Lira against other currencies was already long in progress at the time. Respondent's argument, which is – in essence – a *clausula rebus sic stantibus* argument has no merit absent any proof that the currency devaluation amounts to a fundamental change in circumstances, which would call for the Arbitrator to divert from the doctrine of *pacta sunt servanda*.

48. In accordance with Clauses 3.A and 5 of the Player Contract, the salary payable to the Player is a “net” salary. Respondent does not dispute the net nature of the payments owed by it.
49. Hence, absent any other defences raised against the alleged claims, the Arbitrator fully grants Claimant’s claims and finds that the Respondent must pay to the Claimant a total of EUR 49,912.27 net (EUR 24,912.27 net plus EUR 25,000.00 net), according to Clause 3.A of the Player Contract.

8.2 Interest

50. For the same reasons as explained in para. 46 et seq., the Respondent’s currency argument is also irrelevant in respect of the default interest it has to pay. In view of the Claimant’s withdrawal of the request for an inflation rate adjustment, the Claimant only requests the payment of interest in the amount of 5% per annum from the respective due date of the fourth (5 May 2022) and the fifth (31 May 2022) salary instalment.
51. The Player Contract does not provide for any provision concerning interest. According to constant BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. As requested by the Claimant, and in line with BAT’s jurisprudence, the applicable interest rate is 5% per annum.
52. With respect to the starting date, the Arbitrator finds that the Club must pay interest from 6 May 2022 (on the amount of EUR 24,912.27) and from 1 June 2022 (on the amount of EUR 25,000.00), i.e. the day after the respective salary instalment fell due.

8.3 Tax certificate

53. Clause 5 of the Player Contract provides the following:

"[...] Club, at the time prior to the departure of the Player after the expiry of the agreement, shall provide the player a tax receipt certified by the respective tax authorities, stating that all respective taxes have been paid by the Club."

54. In accordance with this provision, the Player is entitled to receive a tax certificate from the Club, which was also not disputed by the Respondent.

8.4 Summary

55. The Player is entitled to receive EUR 49,912.27 net in outstanding salaries, together with interest of 5 % per annum

- from 6 May 2022 on the amount of EUR 24,912.27;
- from 1 June 2022 on the amount of EUR 25,000.00.

56. All further reaching requests are dismissed.

9. Costs

57. 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). [...]"

58. On 17 July 2023, the Vice-President of the BAT determined the arbitration costs in the present matter to be EUR 7,000.00.

59. 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.”

60. Considering that it was the Claimant who prevailed in this arbitration (but for a non-significant part of her claim for default interest), it is consistent with the provisions of the BAT Rules that 100% of the costs of the arbitration, as well as 100% of the Claimant’s reasonable costs and expenses, be borne by the Respondent. Accordingly, the Respondent shall pay the Claimant EUR 7,000 as reimbursement of her advance on costs.

61. 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.”

62. 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. The maximum contribution for the amount in dispute in the present case (approx. EUR 50,000.00) according to Article 17.4 of the BAT Rules is EUR 7,500.00.

63. Both Parties claim reimbursement of legal fees and expenses in the amount of EUR 5,000.00, respectively.

64. Since it is the Claimant who prevailed in this arbitration, the Arbitrator finds that only

the Claimant shall receive a contribution towards her legal fees and expenses. The amount requested by the Claimant is below the maximum contribution foreseen under Article 17.4 of the BAT Rules for the present case, i.e. EUR 7,500.00. However, under the circumstances of this relatively straight-forward case, the Arbitrator finds that the requested contribution of EUR 5,000 (a fixed remuneration agreed between the Claimant and her counsel) is excessive. The case was arbitrated through two rounds of (short) written submissions without an oral hearing taking place. Furthermore, in contrast to the Claimant's submission, the Arbitrator cannot take into consideration for the cost decision in this BAT arbitration that the Claimant may have to incur further costs relating to potential enforcement measures. Deciding *ex aequo et bono*, the Arbitrator finds that an appropriate contribution towards the Claimant's legal fees and expenses is EUR 3,000.00 (excluding the non-reimbursable handling fee).

65. Finally, as prevailing party, the Claimant is also entitled to a reimbursement of the non-reimbursable handling fee in the amount of EUR 4,000.00.

10. Award

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

- 1. Galatasaray Spor Kulübü Derneği is ordered to pay Ms. Shante Marie Evans the amount of EUR 49,912.27 net in outstanding salaries, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) until complete payment**
 - from 6 May 2022 on the amount of EUR 24,912.27; and
 - from 1 June 2022 on the amount of EUR 25,000.00.
- 2. Galatasaray Spor Kulübü Derneği is ordered to provide Ms. Shante Marie Evans with tax receipts certified by the respective tax authorities, stating that all respective taxes have been paid by Galatasaray Spor Kulübü Derneği.**
- 3. Galatasaray Spor Kulübü Derneği is ordered to pay Ms. Shante Marie Evans EUR 7,000.00 as reimbursement for her arbitration costs.**
- 4. Galatasaray Spor Kulübü Derneği is ordered to pay Ms. Shante Marie Evans EUR 7,000.00 as a contribution towards her legal fees and expenses (including the non-reimbursable handling fee).**
- 5. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 19 July 2023

Annett Rombach
(Arbitrator)