ARBITRAL AWARD

(BAT 1955/23)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. John Casey Owens

- Claimant -

represented by Ms. Ntimi Papadopoulou, attorney at law,

vs.

Kazma Sports Club
P.O. Box 5333 Safat Code No. 13054, Kuwait

- Respondent -

represented by Mr. Tarek Lahmaier, attorney at law,

1. The Parties

1. Mr. John Casey Owens (hereinafter referred to as the "Coach" or "Claimant") is a US-American basketball coach.

2. Kazma Sports Club (hereinafter referred to as the "Club" or "Respondent") is a professional basketball club participating in the Kuwait professional basketball league.

2. The Arbitrator

3. On 25 April 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 Article 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. On 1 August 2021, the Coach and the Club signed an employment agreement for the 2021/2022 and the 2022/2023 seasons (hereinafter referred to as the "Employment Contract").

5. According to Article 3 Employment Contract, the Club was obliged to pay the Coach a salary of USD 100,000.00 for the 2021/2022 season, and a salary of USD 110,000.00 for the 2022/2023 season.

6. By the end of June 2022, before the summer break, the Coach asked the Club for permission to visit his [family member] for a few days in Amsterdam to assist her in starting her studies in August 2022.

7. After the summer break, the Coach returned to the Club on 12 August 2022 but had to stay in isolation until 18 August 2022 because of a Covid-19 infection. However, when he intended to join the team on 20 August 2022, the team manager informed him that no training would take place because he might still infect others.

8. On 21 August 2022, the Coach departed for Amsterdam. On 24 August 2022, he informed the [Team Manager] that he would return on 27 August 2022 and asked for the visa. On 26 August 2022, the [Club's General Manager] wrote the Coach that his Employment Contract had been terminated because of the Coach's unauthorized absence from the Club since 12 August 2022 (hereinafter referred to as the "Termination Notice").

9. On 1 September 2022, the Club sent the Coach an official letter of termination (hereinafter referred to as the "Termination Letter "). The following attempts of the Parties to reach a settlement regarding the financial consequences of the termination failed.

10. The Coach claims the entire salary of USD 110,000.00 for the upcoming season and the costs for his flight to Amsterdam and to the USA plus the accommodation costs during the Covid-19 quarantine of total USD 4,740.00.

11. The Club objects to the jurisdiction of BAT and demands that in case the Arbitrator still accepts jurisdiction, the Coach's claims be dismissed.

3.2 The Proceedings before the BAT

12. On 28 March 2023, the Coach filed a Request for Arbitration against the Club in accordance with the BAT Rules (received by the BAT on 5 April 2023) and paid the non-reimbursable handling fee of EUR 4,000.00 (received in the BAT bank account on 23 March 2023).

13. On 27 April 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 22 May 2023 and fixed the Advance on Costs to be paid by the Parties by 8 May 2023 as follows:

"Claimant (Mr. John Casey Owens)	*EUR 4,500.00*
Respondent (Kazma Sports Club)	*EUR 4,500.00"*

14. On 10 May 2023, the BAT provided the Parties with an updated procedural schedule because the delivery of the initial information letter had faced some difficulties and was delayed.

15. On 29 May 2023, the Respondent submitted its Answer.

16. On 9 June 2023, the BAT acknowledged receipt of the Respondent's Answer and the Claimant's share of the Advance on Costs. It noted that the Respondent had failed to pay its share of the Advance on Costs and invited the Claimant to pay the remaining Advance on Costs in the amount of EUR 4,500.00 until 16 June 2023.

17. On 12 June 2023, the Claimant paid the outstanding Advance on Costs.

18. By letter dated 30 June 2023, the BAT invited the Claimant to comment on Respondent's objection to the jurisdiction of BAT and the Respondent's Answer in general until 10 July 2023.

19. On 7 July 2023, the Claimant provided his comments, whereupon the BAT invited the Respondent to respond to Claimant's comments until 17 July 2023.

20. On 17 July 2023, the Respondent submitted its reply to Claimant's comments.

21. On 18 July 2023, the BAT forwarded Respondent's reply to the Claimant and 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 25 July 2023 to provide a detailed account of their costs.

22. On 24 or 25 July 2023, respectively, the Parties submitted their accounts of costs.

4. The Positions of the Parties

4.1 The Claimant's position

4.1.1 Jurisdiction of BAT

23. The Claimant initiated this arbitration with BAT based on Article 8 of the Employment Contract, which offers a choice of two dispute resolution institutions, namely the National Sport Arbitration Tribunal (hereinafter referred to as the "NSAT") and the BAT.

24. In response to the Respondent's objection to the jurisdiction of the BAT, the Claimant disputes that Article 8 of the Employment Contract provides that the NSAT has exclusive jurisdiction on disputes between the Parties, or contains a priority order according to which the NSAT must be addressed first. Arbitration with the BAT does not require a specific consent by both Parties but leaves the choice among the two arbitration institutions to the party initiating the arbitration.

25. Furthermore, the NSAT has been established for domestic sport disputes within the state of Kuwait in Arabic language and based on the law of Kuwait with which the Claimant is not familiar, whereas the BAT has been created with the aim to resolve international disputes in basketball.

26. It was not necessary for the Parties to integrate the arbitration clause recommended by BAT in their contract, as long as there was a sufficient reference to the BAT in the arbitration clause. It is true that the arbitration clause in the Employment Contract does not explicitly refer to the BAT but to the "*Dispute Resolution Cham*[b]*ers at the FIBA*". However, the FIBA does not have any other tribunal connected to it than the BAT, which is the second option for the claiming party to choose.

27. Finally, during the settlement talks, the Claimant repeatedly referred to arbitration with BAT and the Respondent never raised an issue in regards to the Claimant's decision to choose BAT instead of NSAT. On the contrary, the Respondent willingly agreed for a dispute to be resolved through BAT arbitration when negotiations for a settlement failed.

4.1.2 To the merits of the claim

28. During the 2021/2022 season, the Claimant had an overall successful season with the Club with no issues apart from the Club being late in some of the salary payments but not to the extent that such late payments would cause a detriment to the Parties' overall relationship and/or collaboration.

29. At the end of June 2022 and prior to the summer break, the Claimant discussed several times with the [Club's General Manager] the need for him to travel to Amsterdam for a few days as to help with his [family member]'s University enrolment process and the Club never expressed any objection to his request, neither either orally or in writing.

30. Before the summer break, the Parties agreed for the Claimant to return and report back to the Club on 12 August 2022 as to begin preparation for the 2022/2023 season. The Claimant returned from the summer break to Kuwait on that date and was picked up at the airport by the [Team Manager]. [Team Manager] took the Claimant directly to the apartment the Club had arranged for the Claimant. Upon arrival, the Claimant was shocked to witness that the condition of the apartment was horrendous. The apartment was described by the Claimant as follows: "*it had been smoked in, was filthy with dust and muck on the floors and windows, had a bathtub that was cracked and disgusting. There were no linens, towels, soap, shower curtains, or any basic amenities in addition to its general filth. There was no Internet, which is also part of my contract. The bedrooms had used blankets and pillow cases which were yellow with age and dirt. Blankets were used and stained. Mattresses were filthy and used. Couches in the living room were stained and disgusting. All kitchen utensils were used and dirty. Floors were chipped and filthy."* This was quite different from the apartment that had been made available to the Claimant in the past season. The Claimant decided to check-in into a hotel affiliated and/or owned by [Club's General Manager] as to get rest and figure out a solution the morning after.

31. On the next morning, the Claimant felt ill. He became suspicious of his symptoms and so used an FDA approved (US Federal Agency of Drug and Food Administration) Covid-19 self-test which showed that the Claimant was indeed Covid-positive. He immediately informed [Team Manager] and [Club's General Manager] of this outcome by sending pictures of the positive test. The Claimant was told to simply self-isolate until 18 August as per the country protocols.

32. In the meantime, the Claimant and [Team Manager] were discussing about training sessions of the team as well as the technicalities related to the Claimant's upcoming trip to Amsterdam (i.e. return visa, ride to the airport). The Claimant requested for the team to begin practises on 18 August when his quarantine period was to be over but was informed by [Team Manager] later that no practices would take place on the 18 and the

19 August due to rest. It was therefore agreed that the first meeting with the team would take place on 20 August.

33. On 20 August 2022, [Team Manager] called the Claimant and informed him that the team meeting was cancelled with the excuse that the Claimant may still be contagious although his quarantine had already ended, and that it was best to begin practices upon his return from Amsterdam. The Claimant flew to Amsterdam on 21 August 2022, while awaiting confirmation from the Club for the status of his visa required for his return to Kuwait. [Team Manager] had informed the Claimant that someone from the Club's administration would reach out to him regarding his visa.

34. On 24 August 2022, the Claimant texted [Team Manager] informing him that he would be back on 27 August 2022 and requesting details regarding his visa to re-entry Kuwait. He received no reply. On 25 and 26 August 2022, he texted [Team Manager] again that no one from the Club reached out to him, contrary to what [Team Manager] had told him, and that he was getting anxious about facing issues at the airport upon his return to Kuwait.

35. Later that day (26 August 2022), the Claimant received a text from the [Club's General Manager] (who had not responded to the Claimant ever since 15 August 2022), informing him that his Employment Contract would be terminated on the grounds of the Claimant's breach of Article 7.2 of the Employment Contract. The Termination Notice reads as follows:

> *"Dear Mr. John Casey Owens,*
>
> *Since your arrival to Kuwait on August 12th you have not reported to work at the club and have left the accommodation that was provided to you. You have claimed that you have Corona virus in that period however no official PCR from a kuwaiti government or private laboratory have been provided to us. We also have come to know that you have left the country on August 20th on a personal matter without the club written consent. This seems odd to us when you claim that you have the corona virus. This clearly violates your contract agreement with Kazma Sporting Club. On these grounds you have violated clause 7.2 of your contract where you have not*

reported to work for 7 consecutive days. This gives us the right to terminate the contract immediately without any financial compensation. Therefore this letter serves as your termination as the head coach of our basketball team
Regards,
Kazma Sporting Club.

You will get this letter officially from the club in 48 hours.

No need to come back from your trip you are no longer our basketball coach."

36. Upon receiving such news, the Claimant reached out to the [Club's General Secretary] in an attempt to understand what was happening since he was left confused as to the status of his employment with the Club. The messages sent to [Club's General Secretary] did not change the situation. Given the lack of visa for his return and the Club's failure to provide him with a clear answer, he was forced to book a ticket from Amsterdam back to the USA at his own expense.

37. Following the above, the Claimant made countless attempts to communicate with the Club and was even willing to return to Kuwait to find an amicable solution to the dispute. The Club did not wish to find an amicable solution but sent him an official termination letter on 1 September 2022, which reads as follows:

"Dear Mr. Owens,

From the day you arrived in Kuwait on 12/08/2022, you have not reported to work by signing the work commencing form at the club administration.

You had refused the accommodation allocated to you by the club, in spite of changing the apartment at the moment when you didn't like it by showing you another apartment by the [basketball official], but you decided to choose the stay at a hotel.

Next day You [sic] *have claimed that you were infected with Corona virus by testing yourself with home testing kit which is not accurate 100% while you should had seeked* [sic] *an official laboratory to ensure whether you are positive or negative.*

knowing that you had received 3 vaccinations, the quarantine period will be 5 days according to the Ministry of Health's guide, yet[.] *You still have not reported to work*

even after the quarantine period, where we expected and assumed you would show up on 19 or 20 of August, also ignored to take an official PCR test from any official government or private laboratory to prove recovery.

We also realized that you have left the country on August 21st on a personal matter without obtaining the club's written consent.

This seems to be odd to us when you claim that you were infected with corona virus, at the same time you decided to travel without looking after your personal health or the passenger's as well, by taking a PCR test for the safety of everyone.

All these actions clearly violate your contract with Kazma Sporting Club. On these grounds you have violated clause 7.2 of your contract where you have not reported to work for 7 consecutive days, which gives us the right to terminate the contract immediately without any financial compensation forcing clause 7.1 of the contract. Therefore, this letter serves and is considered as a termination of your contract as the head coach of our basketball team.

Regards,

[Club's General Secretary]"

38. The Claimant retained legal counsel to try and settle the dispute. On 23 September 2022, a formal notice was addressed to the Club in which the Claimant rejected all of the Club's arguments in the termination letter and requested compensation in the amount of USD 77,000 as settlement for wrongful termination.

39. During a call on 27 September 2022, [Club's General Manager] expressed his opinion that the Club would offer one to two months' salary as compensation as the Club did not wish to engage into BAT arbitration proceedings and that the Club's attorneys would send an official reply to the Claimant's formal notice of 23 September 2022.

40. On 18 October 2022, a conference call between the Parties' counsels took place to discuss the case. On behalf of the Club, an offer of one month salary as compensation in the amount of USD 11,000.00 was made but rejected by the Claimant. On 10 November 2022, the Club increased the offer to USD 22,000.00, which the Claimant

did not accept. On 18 January 2023, the Claimant informed the Club's attorneys of the Claimant's decision and given the failure of settlement negotiations the case would take its course through BAT. Further attempts to find an amicable solution failed.

41. The Employment Contract does not provide for any early termination option at any given time apart from the Club's option to terminate for breach only under specific circumstances, which do not apply in this case. In addition, it is disproportionally drafted to be in favour of the Club as it does not contain any language in the event that the Club should be in breach of its own obligations such as late salary payments etc.

42. The Employment Contract contains only one Article which the Club may use as unilateral termination and that is Article 7. The Club insists that it rightfully terminated the agreement due to the Claimant's breach in being absent from work for seven consecutive days pursuant to Article 7.2, which reads as follows:

> *"Should the Second Party be absent from work for seven consecutive days or Twenty separate days without acceptable excuse, the contract is considered terminated by the second party"*

43. The purpose of Article 7.2 is to be applied in circumstances under which the other party does not report when called upon and/or disappears without warning and or just fails to show up without a reason and/or is absent deliberately for seven consecutive days. In the case at hand, the Claimant was not absent from work without acceptable excuse. On the contrary, he arrived in Kuwait on the agreed date (note that the ticket was booked directly by the Club) and was ready to begin work. Acceptable excuse may be defined as a legitimate and most importantly reasonable excuse for not being able to attend work such as the requirement to self-isolate due to Covid-19.

44. Covid-19: The Claimant arrived in Kuwait on 12 August 2022 and the day after he was tested positive to Covid-19. To be false positive is a very rare scenario and there is no need for further argument whether the test was legitimate or not as per the Club's

suggestions in its Termination Letter. The Claimant therefore did have an acceptable excuse for not being able to attend work physically. He was ready to do zoom calls remotely, which still counts as work. It is not the Claimant's fault that he was infected with Covid-19 nor did he tested positive because of his own negligence (such as not following protection protocols etc.). He most probably got infected while traveling from the USA to Kuwait with airports being high risk places for spreading the virus.

45. The Claimant was never asked by anyone from the Club to take a PCR test as to confirm the results and he rejects the Club's arguments in the Termination Letter. He took the self-test precisely because he had symptoms, and it was positive. The Claimant asked to visit a doctor on his own initiative. In addition, the Claimant was ready and eager too to begin practices following the five days of quarantine. The fact that no trainings or meetings were to take place on the 18 and 19 August was not a decision made by the Claimant but by the Club.

46. Trip to Amsterdam: The Claimant informed the Club about his upcoming trip before his departure for the summer break in June 2022. It would be inhumane for anyone to deny to a person asking to escort his child for a first-time enrolment at University in a foreign country the chance to do so, and the Club never denied him of this request nor did they refuse at any given time either verbally or in writing the Claimant's request to travel to Amsterdam. Had his request been denied, the Claimant would have cancelled any travel plans. This trip could certainly not count as being absent from work without acceptable excuse pursuant to Article 7.2. The Claimant is a professional coach of high integrity and moral standards. He has had a long career in the basketball industry and has worked for various NBA organisations as well as academic institutions for over 20 years. He has always been a very respectful and trustworthy professional and had an excellent relationship with his players. Any reasonable person could not expect from the Claimant to be so ignorant or to exhibit such an improper behaviour as to simply leave for a trip without notice and permission from the Club, to the point of putting his work, salaries and reputation in jeopardy.

47. Furthermore, Article 7.2 does not require the Claimant to receive consent from the Club in writing. In any way, the Claimant did not violate Article 7.2, which means that Article 7.1 cannot be triggered as a result of a violation that never happened. The Club's termination was unjustified and wrongful and the Club is liable to pay compensation of the entire salary due for the 2022/2023 season.

48. The Claimant incurred unexpected costs when he was notified through the [Club's General Manager] about his termination while he was in Amsterdam. The Claimant had booked his tickets to travel from Kuwait to Amsterdam and back to Kuwait. Upon receiving the text and due to the fact that no one from the Club would officially inform him on the status of his employment as well as the ambiguous situation with his visa, he was forced to book a ticket and return from Amsterdam to the USA. The Club should therefore compensate the Claimant for these unexpected expenses as well as for the hotel expenses made during his stay in Kuwait, in addition to his salaries.

49. As per consistent BAT jurisprudence, an early termination of a contract must be the last resort. In principle therefore, the Employment Contract could have been prematurely terminated based solely on a particularly serious breach, i.e. for "just cause" (see BAT 0383/13). In this case, there is no just cause which would allow for the Club to terminate. Even if the Arbitrator decides that the Claimant's trip to Amsterdam constitutes a breach, this was not a fundamental breach and indicating an intention of the Claimant not to perform his obligations under the Employment Contract. BAT case law is rather clear in that an agreement may be justifiably terminated when there are grounds for early termination for just cause if the terminating party can no longer be reasonably expected to continue the employment relationship (see BAT 1280/18). The Parties had already been through an entire sport season with successful results and the players where happy with the Claimant and trusted him as a Coach. If the Club had a different opinion and/or understanding of the situation with the Claimant's trip to Amsterdam, it could have easily said so before the trip or at least deduct a certain amount from his salary for the days he was away. Even in cases of 'just cause' the defaulting party must be given a notice and

a chance to remedy its breach prior to termination. In the case at hand, there was no violation, no breach and the Club still decided to proceed with an extreme solution and terminate the Employment Contract with immediate effect.

50. The Club's termination had a negative impact on both the players, who were expecting him to be their Coach for the 2022/2023 season (both prior and new recruits), and especially the Claimant himself who was forced to return to the USA jobless. By the time the Club decided to terminate the agreement with the Claimant, it was already too late for the Claimant to pursue other basketball coaching positions as all Clubs already had a Coach. A coaching position is certainly very different and much more fragile from that of a player. Every summer there are countless openings for players but very little openings for a Head Coach. The Claimant and his agent did of course try to seek employment elsewhere but to no avail. Just recently, the University of New Mexico (following suspension of their men's basketball programme for the rest of the season due to a hazing incident) has requested for the Claimant along with other alumni to help keep the programme alive for the future. This is not regarded as a full time job and the Claimant's overall remuneration will be simply a symbolic amount.

51. In the Request for Arbitration of 28 March 2023, Claimant requests the following relief:

> *"1. The Respondent shall pay the Claimant **$110,000 NET** as compensation for wrongful termination of the Agreement;*
>
> *2. The Respondent shall pay the Claimant **$4,740 NET** as reimbursement for traveling expenses incurred due to the Club's wrongful termination of the Agreement;*
>
> *3. The Respondent shall pay the Claimant late payment interest of minimum 5% per annum on the sum of **$110,000 from September 1st 2022** until the date of payment and 5% per annum on the sum of **$4,740 from September 1st 2022** until the date of payment. (The interest calculated until 1st of April 2023 is $3,667 and $158 respectively)*
>
> *3.* [sic] *The Respondent shall reimburse the Claimant for all BAT expenses and Advance on Costs as these will be calculated by the Arbitrator as well as the non-reimbursable handling fee of **EUR 4,000** already paid by the Claimant;*

4. [sic] *The Respondent shall reimburse the Claimant for incurred legal expenses with the final amount depending on the submissions to be determined in the course of the proceedings.*

Total amount in dispute: ***$118,565***

4.2 The Club's Position

4.2.1 Objection to the jurisdiction of BAT

52. In the first place, the Club objects to the jurisdiction of the BAT, based on Article 8 of the Employment Contract, which it quotes as follows:

> *"Any dispute arising between the Parties shall be settled by the following ways:*
>
> *1- The National Sport Arbitration Tribunal (NSAT) as per law 87 for the year 2017.*
>
> *2- Dispute Resolution Champers* [sic] *at the FIBA.*
>
> *The decision issued by NSAT could be appealed before CAS only".*

53. Article 8 does not contain an arbitration clause in favour of the BAT as recommended by Article 0.3 of the BAT Rules. In addition, the arbitration agreement should unequivocally state the seat of arbitration selected and agreed upon by both parties in mutual and free will.

54. Article 8 of the Employment Contract offers a choice for the Parties to refer their disputes to either the BAT or the NSAT. There is no exclusivity for the BAT as dispute resolution institution. Nor is there a discretionary right of the party initiating a dispute resolution procedure to select the arbitral institution. A valid arbitration agreement must specify a single seat of arbitration, which must be accepted by both parties. The Respondent never agreed to the Claimant's choice of BAT. Hence, the present arbitration is flawed and therefore unenforceable.

55. In addition, it would be abusive and unfair when the Claimant disregards the Respondent's preference for the local seat of arbitration, i.e. NSAT.

56. Article 8 of the Employment Contract also provides for an order of precedence in the choice of the arbitration institutions, which results from the numbering, namely that the NSAT is the first choice, before the "*Dispute Resolution Cham*[b]*ers at the FIBA*". Selecting the BAT first requires specific consent from the other party.

57. The Claimant seems to suggest that the BAT is automatically competent and ignores the Respondent's right and willingness to choose the NSAT as the competent arbitration tribunal. NSAT is an independent entity established according to Chapter Nine of the Law No. 87 of 2017 of Sport, which has jurisdiction to resolve all sports-related disputes through arbitration or mediation. The Respondent denies the Claimant's allegation that the NSAT is a national arbitral organization dealing exclusively with domestic sports disputes in Kuwait.

58. The Respondent also denies that the Club had been in agreement with the Claimant *"that in case the parties fail to reach an amicable settlement, the dispute would be submitted to BAT."*

4.2.2 To the merits of the claim

59. In case the Arbitrator accepts jurisdiction of the BAT, the Respondent submits the following:

60. Article 7.1 of the Employment Contract provides that *"In the event that the second Party, Coach Owens, violates any clause contained herein, the first Party (Kazma Club) shall have the right to terminate this contract, without the second Party being entitled to any financial or moral compensation."*

61. After the end of the first season, the Claimant went on vacation. He returned back to Kuwait on 12 August 2022 and ignored to sign the "*work commencement form*". Since 12 August 2022, the Claimant did not report to work for more than 7 consecutive days alleging contamination with Corona virus. The Claimant did not provide any official PCR report from any government or private laboratory to justify his absence and officially substantiate his alleged contamination. The Claimant asserted having taken the test himself with special kit. The Club had no means to verify the truthfulness of the Claimant's allegation.

62. The Claimant's justification with regards to his unauthorized trip to Amsterdam is flawed and bound to fail. On 21 August 2022, the Club found out that the Claimant had left Kuwait to Amsterdam for a personal matter, without the Club's permission, which constitutes a violation of Article 7.2 of the Employment Contract, which clearly states that *"*[s]*hould the Second Party be absent from work for seven consecutive days or Twenty separate days without acceptable excuse, the contract is considered terminated by the Second Party".*

63. On 1 September 2022, the Club notified the Claimant of its decision to terminate the employment in application of Article 7.2 of the Employment Contract.

64. The Respondent requests an award from the BAT with respect to the Claimant' s claims:

> *"7.1 Dismissing the claims (and the relief sought) in its entirety.*
>
> *7.2 Ordering the claimant to reimburse the Respondent's legal costs and disbursements.*
>
> *7.3 Any other relief the BAT considers the Respondent is entitled to and should therefore be awarded."*

5. The jurisdiction of the BAT

65. 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).

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

67. 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]

68. The Employment Contract contains the following dispute resolution clause:

> *"**8. Dispute settlement and governing rules***
> *Any dispute arising between the parties shall be solely settled by the following ways:*
>
> *1. The National Sport Arbitration Tribunal NSAT as per law 87 for the year 2017.*
>
> *2. Dispute Resolution Champers* [sic] *at the FIBA.*
>
> *3. The decision issued by NSAT could be appealed before the CAS only."*

69. The dispute resolution clause is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

70. The Respondent disputes that this clause entitles the Claimant to initiate arbitration with the BAT without its explicit consent. According to the Respondent, the arbitration clause contains a priority order whereby the NSAT is the arbitration tribunal which must be applied first, before a case may be brought before the *" Dispute Resolution Cham*[b]*ers at*

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

the FIBA". In the Respondent's view, applying directly to BAT would have required the Respondent's consent.

71. The arbitration clause in Article 8 is not an example of clarity and does not correspond to the recommended text for a BAT clause in Article 0.3 of the BAT Rules. However, this does neither make the arbitration invalid nor does it exclude the jurisdiction of the BAT from the outset. The true meaning of the arbitration clause needs to be determined based on Article 178 PILA.

72. According to the Swiss Federal Tribunal, a valid arbitration clause must meet three salient features: (1.) The clause must reflect the clear will of both parties to submit their dispute to arbitration, thereby excluding the jurisdiction of the ordinary courts.[2] (2.) The arbitration tribunal agreed by the parties must be identified or at least identifiable.[3] (3.) The clause must define the scope of the matter subject to arbitration.[4]

73. In the present case, there is no doubt that the Parties decided to settle their disputes by way of arbitration thereby excluding the jurisdiction of ordinary courts ("Any dispute arising between the Parties shall be solely settled by [1. NSAT, 2. FIBA Dispute Resolution Chambers]"). The third option (CAS) applies only if a party wishes to file an appeal against a decision of the NSAT. It does not offer a third alternative for an arbitration tribunal of first instance and does not apply if the dispute has been settled by the "*Dispute Resolution Cham*[b]*ers at the FIBA*".

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2 See, e.g. SFT 130 III 66, consid.3.1 and SFT 138 III 29, consid. 2.2.3.

3 See SFT 129 III 675, consid. 2.3, p. 681.

4 See BERNHARD BERGER/FRANZ KELLERHALS, International and Domestic Arbitration in Switzerland, 4th ed., N 299 – 303.

74. Next, the competent arbitration tribunal needs to be determined. The Swiss Federal Tribunal has often been confronted with unclear designations of arbitral tribunals, which requires the identification of an arbitral tribunal by way of interpretation. The Swiss Federal Tribunal applies the principle "in favorem validitatis" ("in favor of the validity of an arbitration agreement.") It said:

> *"An unclear or erroneous designation of the arbitral tribunal does not render the arbitration agreement invalid if it can be determined by interpretation which arbitral tribunal the parties intended."*[5]

75. *In casu*, the Parties opted for an arbitration institution, and not an *ad hoc* arbitration panel. While the NSAT is clearly identified, there is no arbitration tribunal named "*Dispute Resolution Cham*[b]*ers at the FIBA*". There is, however, no doubt that "FIBA" refers to the *Fédération Internationale de Basketball* . FIBA has no "own" dispute resolution chamber for financial disputes such as the present one, but created and promotes the Basketball Arbitration Tribunal, with the following purpose, as stated in the BAT Rules:

> *"0.1 The Basketball Arbitral Tribunal (hereinafter the 'BAT') has been created by Fédération Internationale de Basketball (hereinafter 'FIBA') with a view to provide parties involved in disputes arising in the world of basketball with an efficient and effective means of resolving these disputes."*[6]

76. It is obvious that the BAT corresponds to the will of the parties to bring the dispute before a specialised arbitration endorsed by FIBA,[7] especially since there is no other institution which would even remotely fulfil a similar purpose. After all, the Respondent does not dispute that the BAT is in fact the "*Dispute Resolution Cham*[b]*ers at the FIBA*". Hence, the Arbitrator concludes that Article 8 of the Employment Contract offers the Parties to

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5 SFT 129 III 675, consid. 2.3, p. 681.

6 See Article 0.1 BAT Rules.

7 See also BAT 1396/19.

choose one of two arbitration tribunals for the settlement of disputes related to their agreement, namely the NSAT or the BAT.

77. Remains the question of the preference. The CAS falls out of the race because it is competent to hear appeals against a prior decision only. Thus, the numbering of the three options cannot be understood as a sequence or priority order. Both NSAT and BAT are comparable arbitral tribunals of first instance, and only decisions of NSAT may be appealed before the CAS while decisions of the BAT may not. Nor can the numbering be understood as an order of preference, according to which NSAT must be chosen first while invoking the BAT requires the consent of both parties. Such proposal is not supported by the arbitration clause nor any other provision in the Employment Contract.

78. Hence, Article 8 of the Employment Contract offers the Parties two equal options to choose where to initiate an arbitration procedure, either with NSAT or with BAT. In such cases, it is the claimant who may decide where to lodge its complaint, and no further agreement of the parties is needed, as constantly confirmed by BAT jurisprudence.[8] By signing the Employment Contract including the arbitration clause, both Parties accepted to be called as a respondent before either tribunal.

79. The scope of arbitration seems to be unlimited ("*Any dispute between the Parties* [...]") which may raise the question whether the clause contains an overly broad commitment of the parties and may therefore violate Article 27(2) Swiss Civil Code ("*No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public moral.*"). However, it is obvious that the clause relates to the Employment Contract in which the arbitration clause has been embedded. Furthermore, the two arbitration tribunals are available for sport-related disputes only. No concerns regarding the scope of arbitration have been raised by either party. The Arbitrator therefore finds that the

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8 See e.g. BAT 0704/15; BAT 1305/18.

scope of the arbitration is not unlimited but relates to disputes related to the Employment Contract, which is about a sports-related matter.

80. For these reasons, the Arbitrator accepts jurisdiction to adjudicate the Coach's claims.

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

81. 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".*

82. 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."*

83. The Employment Contract does not provide a choice of law clause. However, the Claimant's choice to submit the dispute to BAT leads to the application of the BAT Rules.

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

84. 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[9] (Concordat)[10], 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."*[11]

85. 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*".

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

6.2 Findings

6.2.1 Early termination of the Employment Contract

87. The Respondent terminated the Employment Contract by the Termination Notice of 26 August 2022 as confirmed by the Termination Letter of 1 September 2022, based on Article 7.2 of the Employment Contract, because the Claimant had allegedly not reported

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9 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and the Swiss Code of Civil Procedure (governing domestic arbitration).

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

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

to work for 7 consecutive days without acceptable excuse. In particular, the Respondent accuses the Claimant of (i) not having reported to work by signing the work commencing form at the club administration, (ii) having refused the accommodation provided to him by the Club, (iii) having claimed a Covid-19 infection based on a self-test instead of a PCR-test and not having reported back to work after the quarantine period of five days, and (iv) having left the country on 21 August 2022 for a personal matter without the Club's written consent. The Respondent claims that overall, the Claimant was absent from work since 12 October 2022, i.e. for seven consecutive days without acceptable excuse. That is why his Employment Contract was considered terminated.

88. The Arbitrator notes that the Respondent accuses the Claimant not only of having been absent for more than seven days but also of further misconduct, such as not having signed the work commencing form, refusing the offered flat and going into quarantine of five days based on the result of a self-test instead of a PCR test. He addresses these allegations first before he turns to the alleged absence from work for seven consecutive working days without acceptable excuse.

89. The Respondent fails to indicate which provision in the Employment Contract the Claimant violated by the alleged misconduct as required by Article 7.1, and why this entitled the Respondent to terminate the Employment Contract.

1) In fact, the Claimant undisputedly arrived at the Respondent's on the agreed date, namely on 12 August 2022. Whether he signed a work commencing form or not may be a formal issue but does not justify an early termination of the Employment Contract. It can be remedied without any problems, since the date of Claimant's return to the Club is not disputed. In addition, the Claimant has disputed ever having been provided with a work commencing form, and the Respondent failed to provide any evidence thereof in response to the Claimant’s denial.

2) The Claimant's refusal to move into the offered apartment, which was in bad condition as documented by pictures, is understandable. Also, the Respondent understood the Claimant's concerns and eventually came up with a better offer. The Respondent cannot, therefore, return to the Claimant's initial refusal as a ground for early termination of the Employment Contract.

3) Remains the Respondent's reference to the Claimant's Covid-19-quarantine based on a self-test instead of a PCR test. This allegation is not sufficient as a ground for termination of the Employment Contract either. It would be strange and contrary to all life experience to imply that the Claimant had gone into quarantine without a compelling reason. On the other side, it would have been up to the Respondent to request further testing if it had had any doubts about the Respondent's Covid-19-infection. No such demands have been made.

90. The Arbitrator concludes that the three cases of alleged misconduct (failure to sign a work commencing form, refusal of the offered flat and quarantine based on self-test instead of a PCR test) are not suitable for justifying the early termination of the Employment Contract under Article 7.1, neither individually nor taken together.

91. The question remains whether the Claimant actually stayed away from work for seven consecutive days without sufficient justification. The Respondent claims that *"since August 12th, the Claimant did not report to work for more than 7 consecutive days alleging contamination with Corona virus"* and therefore violated Article 7.2 of the Employment Contract.

92. The counting of the days of absence does not start before the end of the Claimant's quarantine, which was not called into question at the time by the Respondent. The Club's representatives repeatedly requested the Claimant to resume the training sessions after the end of the Covid-19-quarantine. More specifically, the Respondent and the Claimant agreed that the latter would meet the team immediately after the end of the five days

quarantine, namely on 18 August 2022. On 17 August 2022 (i.e. on the last of the five quarantine days), [Team Manager] informed the Claimant by WhatsApp that there was no practice on the 18 August. When the Claimant asked: "*Tomorrow, we sit down? - What time?*" [Team Manager] responded: "*I will arrange it and inform you*". The Claimant replied "*Perfect – Let's do it before practice tomorrow*". [Team Manager] replied: "*No, tomorrow is a rest, there is no training – we sit Saturday* [20 August] *before practice*".

93. The Claimant submits that on 20 August, the team manager called him and informed him that the training session of that day was cancelled on short notice, as well. In its written submissions, the Respondent did not dispute this allegation. Nor does it claim that the Claimant had to show up at the Club even if there was no training. Thus, there was an acceptable excuse for the Claimant to be absent from work after the Covid-19-quarantine, namely during the training-free period from 18 to 20 August 2022, as ordered by the Club.

94. Even if the period of the Claimant's quarantine would be considered as days of absence from work without acceptable excuse, this period lasted less than seven days and ended on 18 August. The Claimant's absence from work between 18 and 20 August was not unexcused but a result of the Respondent's decision not to hold training sessions. Thus, the counting of the "*seven consecutive days without acceptable excuse*" did not start before 21 August 2022.

95. On 21 August 2022, the Claimant flew to Amsterdam to help his [family member]. He had booked a return flight to Kuwait on 27 August. The Claimant submits that the Respondent did not object to this trip in advance. The Respondent now claims, however, that it just found out about the Claimant's leave on 21 August and that his absence had not been accepted before.

96. On 26 August 2022, the Claimant received a text message from the Club's General Manager informing him that his Employment Contract was terminated and that he would

get *"this letter officially from the club in next 48 hours".* The text message also said: *"No need to come back from your trip you are no longer our basketball coach".* Based on the Respondent's message, the Claimant decided not to return to Kuwait as planned on the following day, but to book a flight back to the USA.

97. On 26 August 2022, i.e. the date of receipt of the Termination Notice by WhatsApp, the Claimant had been absent from work only for six (and not seven) consecutive days. This raises the question whether the termination of 26 August had been valid at all, and – if not – whether the employment was terminated only by the Termination Letter of 1 September 2023, after the Claimant had been absent from work for 12 consecutive days.

98. Termination of the Employment Contract is not subject to specific formal requirements. The Termination Notice by WhatsApp was clear and not subject to any condition. Its content was consistent with the Termination Letter of 1 September 2022. It was followed by the message to the Claimant that there was *"*[n]*o need to come back from your trip you are no longer our basketball coach".* The Termination Notice was sent by the Respondent's General Manager who appeared to be entitled to represent the Respondent towards the Claimant. The Termination Notice was effective, whether or not the grounds mentioned therein justified early termination.

99. As noted above, on 26 August 2022, the Claimant had been absent only for six and not seven consecutive days. This deficiency was not healed by the Termination Letter of 1 September 2022 because of the Respondent's clear order of 26 August not to come back to the Club. Hence, the termination of 26 August was effective, but must be considered unjustified because the Claimant had not been absent from work for seven consecutive days.

100. Remains the question whether the Claimant's absence from work because of his private trip to Amsterdam would count as absence from work "*without acceptable excuse*" as

required by Article 7.2 of the Employment Contract in the first place. The Parties hold different views on this: While the Claimant submits that he had raised his travel plan with the Club's General Manager already in June 2022, the Respondent pretends to have learned of Respondent's departure only on 21 August.

101. There is no evidence that the Respondent agreed to the Claimant's plan to fly to Amsterdam, neither in writing nor orally. However, the WhatsApp communication between the Claimant and his contact persons at the Club indicates that Claimant's plan had at least been discussed before and that the Club had been aware of the Claimant's intention. There is no evidence that the Respondent refused the Claimant's private trip. Considering the fact that the termination of the Employment Contract was effective but unjustified because the Claimant had not been absent from work for seven consecutive days, the question whether his trip to Amsterdam was an "acceptable" excuse is no longer relevant for the assessment of the validity of the termination. It can however not be ignored when it comes to the determination of the financial consequences of the termination.[12]

6.2.2 Financial Consequences of the Unjustified Termination

102. The unjustified termination of the Claimant's Employment Contract by the Respondent does not only lead to the immediate maturity of all outstanding salaries, bonus payments and other payments due to the Claimant under the Employment Contract, but also entitles the Claimant to a compensation for the agreed salaries and bonus payments that he would have earned if the Employment Contract had been continued as agreed. On the other hand, the Claimant has a duty to mitigate the loss and must accept a deduction

[12] See para.104. below

of any amount that he earned or could reasonably have earned elsewhere during the initial term of the Employment Contract.

103. The Claimant does not claim any outstanding salaries or other payments under the Employment Contract until the termination date of 26 August 2022 but confirms that there are no such payments outstanding. He requests, however, a compensation of USD 110,000.00 corresponding to the contract value agreed for the second season in Article 3, second bullet point, of the Employment Contract, plus a reimbursement of the expenses "*incurred due to the Club's wrongful termination of the Agreement*". These costs consist of the costs of the Best Western Salmia hotel in Kuwait during his Covid-quarantine from 13 to 20 August (total USD 1,096.82) and the flight costs from Kuwait to Amsterdam (round trip) (USD 1,503.50) and from Amsterdam to El Paso (USD 2,140.59).

104. With respect to the compensation for the lost salaries, the Arbitrator cannot disregard that it had been an unfortunate and less than sensitive decision of the Claimant to travel to Amsterdam, a few days after his return from the summer break and immediately after the end of his Covid-19 quarantine. The Claimant thereby accepted that the team had to begin preparation for the next season without its head coach. While it is understandable that a father wishes to support his [family member] in starting her studies in a foreign country, he should have realised that at that time he also had a special responsibility towards the team that was entrusted to him, particularly after his unexpected absence because of the quarantine. This circumstance was exacerbated by the fact that the Claimant had not secured himself with a proof of consent from the Club but rather relied on the absence of any objection to the trip he mentioned in a conversation with a Club official back in June 2022. The Arbitrator considers this as contributory negligence of the Coach to the discord between the Parties, which must be taken into account when determining the amount of the compensation. In application of the principle *ex aequo et bono*, the Arbitrator therefore reduces the otherwise due compensation by 30% to

USD 77,000.00, which also corresponds to the amount offered by the Coach by letter to the Club of 23 September 2023 as a settlement.

105. When it comes to the reimbursement of costs caused by the unjustified termination of the Employment Contract, the Arbitrator accepts that the claimed hotel costs of USD 917.02 must be borne by the Respondent. The Claimant had good reasons to spend the first night after his return to Kuwait in a hotel due to the bad condition of the offered apartment. It also made sense to stay in that hotel room for the Covid-19-quarantine. In any event, it would have been the burden of the Club that the Coach had turned down cheaper alternatives to serve his quarantine. The Club has not specified such alternatives.

106. Regarding the travel costs, the Arbitrator agrees that the Claimant is entitled to the travel costs for his flight back home from Kuwait to the USA. These travel costs to the USA (but not the costs of the trip to Amsterdam) have been a consequence of the early termination of the Employment Contract. The cost statements of the Claimant do not exactly reflect the costs which the Arbitrator finds shall be paid by the Club, given the Claimant's contributory negligence. The Arbitrator therefore sets the amount for reimbursement of travel costs at USD 3,000.00.

107. Taken all the factors described in paras. 105 to 106 together, the Arbitrator, deciding *ex aequo et bono*, sets the compensation due by the Respondent to the Claimant at USD 80,917.02.00.

6.2.3 Interest

108. The Respondent requests the BAT to order late payment interest of minimum 5% p.a. on the awarded amount from 1 September 2022 until the date of payment.

109. The Employment Contract does not provide a regulation concerning interest. 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 the Agent and in correspondence with the standing BAT jurisprudence the default interest rate is of 5% per annum.

110. As to the date from which the interest for the outstanding amount starts to run, the Arbitrator respects the date indicated by the Claimant. While the Sole Arbitrator has found that 26 August 2022 was the date when the termination of the Employment Contract became effective, he cannot grant interest from an earlier point in time is sought by the Claimant (*ne ultra petita*). Therefore, the starting date for the interest compensation due to the Claimant is 1 September 2022.

7. Conclusion

111. 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 Respondent shall pay the Claimant USD 80,917.02 net, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) from 1 September 2022 until payment in full.

8. Costs

112. 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).* […]"

113. On 30 August 2023, the BAT President determined the arbitration costs in the present matter to be EUR 8,550.00.

114. 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."*

115. Considering the requests for relief and the outcome of the case, it turns out that the Coach prevailed by about 70% of the claimed amount. The Arbitrator therefore concludes that 70% of the arbitration costs (i.e. EUR 5,985.00) shall be borne by the Respondent and 30% (i.e. EUR 2,565.00) shall be borne by the Claimant. Given that the Claimant paid the entire Advance on Costs in the amount of EUR 9,000.00, the Respondent shall reimburse EUR 5,985.00 to the Claimant. EUR 450.00 shall be reimbursed to the Claimant by the BAT.

116. 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."*

117. 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 from EUR 100,001.00 to

EUR 200,000.00 (*in casu* USD 118,000.00, which is approx. EUR 105,000.00) on the date when the Request for Arbitration was filed) is EUR 10,000.00.

118. The Claimant claims legal fees in the total amount of EUR 4,700.00. He also claims for the expense of the non-reimbursable handling fee in the amount of EUR 4,000.00. The Respondent claims legal fees in the total amount of EUR 10,000.00.

119. Taking into account the factors required by Article 17.3 BAT Rules, the maximum awardable amount prescribed under Article 17.4 BAT Rules, the amount of 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 contribution of EUR 3,000.00 plus the non-reimbursable handling fee of EUR 4,000.00 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. **Kazma Sports Club shall pay Mr. John Casey Owens a compensation of USD 80,917.02 net, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 1 September 2022 until payment in full.**

2. **Kazma Sports Club shall pay Mr. John Casey Owens an amount of EUR 5,985.00 as reimbursement for his arbitration costs.**

3. **Kazma Sports Club shall pay Mr. John Casey Owens an amount of EUR 7,000.00. as a contribution towards his legal fees and expenses.**

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

Geneva, seat of the arbitration, 31 August 2023

Stephan Netzle
(Arbitrator)