BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0160/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Devon Dwayne Chism

Mr. Jared Karnes

- Claimants -

vs.

Antalya Buyuksehir Belediye

- Respondent -

BASKETBALL
ARBITRAL TRIBUNAL

1. The Parties

1.1. The Claimants

1. Mr. Devon Dwayne Chism ("Claimant 1") is a professional basketball player. Mr. Jared Karnes ("Claimant 2") of Allegiant Athletic Agency, LLC, Market Square, Suite 201, Knoxville, TN 37902, USA, is a basketball agent. They are represented in this Arbitration by Mr. T. Lynn Tarpy, Hagood, Tarpy & Cox, PLLC, 2100 Riverview Tower, 900 S. Gay Street, Knoxville, TN 37902, USA.

1.2. The Respondent

2. Antalya Buyuksehir Belediye ("Respondent") is a professional basketball club with its address at Ataturk Kapali Spor Salonu Ici-Isiklar Cd., Antalya, Turkey.

2. The Arbitrator

3. On 13 March 2011, the President of the Basketball Arbitral Tribunal (the "BAT") appointed Mr. Klaus Reichert SC as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). None 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 Agreement (relevant parts) and the Background Facts

4. On 13 July 2010, Claimant 1 and Respondent entered into an agreement whereby the latter engaged Claimant 1 for the season 2010-2011 ("the Agreement"). The Agreement was a no-cut guaranteed contract (Article 2). The Parties also used the following language: "*Once the player passes the physical test this contract shall become unconditionally guaranteed for injury, illness, death or lack of skill*."

5. Article 3 of the Agreement provided that Respondent was to pay Claimant 1 a net salary for the season in the amount of USD 120,000.00 (net of all Turkish taxes and charges). This amount was to be paid in stages starting with USD 12,000.00 upon arrival following a medical examination. Thereafter a sum of USD 12,000.00 on the 21st day of each month was to be paid up to and including 21 April 2011. The final instalment of USD 12,000.00 was to be paid on 10 May 2011 or "48 hours after the completed game" which the Arbitrator takes to mean 48 hours after the last game of the relevant season.

6. Article 3 also provided that Claimant 1 could "void this Contract" if any payment was outstanding for more than fifteen days. Further, seventy two hours after notice is given by Claimant 1 to terminate, all monies become due and he is under no obligation to mitigate his damages. In particular, Respondent "shall receive no offset".

7. Article 5 of the Agreement provided that Respondent agreed to issue to Claimant 1 a "tax letter to the Player provided Player with the official payments of Turkish taxes paid on Player's behalf. [sic]"

8. Article 9 of the Agreement provided that Respondent agreed to pay Claimant 2 and a Mr Ulas Sag 10% of the total amount of the Agreement (namely USD 12,000.00) by no later than 10 October 2010. Claimant 2 and Mr Sag were also stated to have a right to receive 20% of the release fee in case Claimant 1 signed with another team in Turkey or was traded to another team in Europe during the season.

9. Article 10 of the Agreement provided that it was to be governed by the laws of The Republic of Turkey.

10. Article 11 of the Agreement provided for arbitration as follows:

> *"Any dispute arising or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT 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. Awards of the FAT can be appealed to the Court of Arbitration for Sports (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

11. Claimant 1, Claimant 2 and Respondent signed the Agreement. Mr Ulas Sag did not.

12. Claimant 1 commenced playing for Respondent and during the season suffered a _____ injury. He went to the USA for treatment and returned on 18 November 2010 to Respondent. Claimant 1 was not paid by Respondent for the month of October.

13. In December 2010 relations between Claimant 1 and Respondent began to break down arising from what appears to be performance and discipline matters. There were negotiations regarding a potential parting of the ways, but these did not bear fruit. On 15 December 2010, according to the sworn testimony of Claimant 1, Respondent released Claimant 1.

14. Thereafter Claimant 1 signed a document (in broad terms it appears to be a release of liability) in the Turkish language proffered to him by Respondent. This signature, apparently, was not appended to the document by Claimant 1 with the benefit of his Agent's advice.

15. Shortly afterwards Claimant 2 became aware of the document which Claimant 1 had signed and initiated email correspondence with Respondent outlining various disputed issues (including the document). This email correspondence (and there is a reference to a conversation which was held between Claimant 2 and a Mr Cengiz of Respondent) articulated Claimant 1's grievances as against Respondent. In particular Claimant 1 was paid USD 36,000.00 to date but, having been released, the full balance of USD 84,000.00 was due (being the total remuneration under the Agreement less the sum paid already).

16. There is a reference to an offer by Claimant 1 to settle the dispute at USD 20,000.00 plus the full amount of the Agent's fees. There appears to have been no response to this and it was formally withdrawn on 17 December 2010.

3.2. The Proceedings before the BAT

17. On 7 February 2011 (date of receipt), Claimants filed a Request for Arbitration (dated 1 February 2011) in accordance with the BAT Rules and paid the non-reimbursable handling fee of EUR 1,986.00.

18. On 14 March 2011, the BAT informed the Parties that Mr. Klaus Reichert SC had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

"Claimant 1 (Mr. Devon Dwayne Chism)	*EUR 3,000*
Claimant 2 (Mr. Jared Karnes)	*EUR 1,000*

Respondent (Antalya Buyuksehir Belediye) *EUR 4,000"*

19. The aforementioned advances on costs were received as follows (EUR amounts):

Date	*Amount*	*Received from*	*Description*
13.04.2011	*3,986*	*Allegiant Athletic Agency*	*Advance on Costs Respondent's Share*
25.03.2011	*989*	*Allegiant Athletic Agency*	*Advance on Costs (Claimant 2's Share)*
25.03.2011	*2.986,00*	*Allegiant Athletic Agency*	*Advance on Costs (Claimant 1's Share)*

20. Respondent was afforded the opportunity, in accordance with the BAT Rules, to submit its Answer by no later than 4 April 2011. Respondent did not do so by that deadline.

21. By letter dated 4 April 2011, the BAT Secretariat informed the Parties that the FIBA Arbitral Tribunal (FAT) had been renamed into Basketball Arbitral Tribunal (BAT) and that, unless one of the Parties opposed by 11 April 2011, the new name would be applied also to the present proceedings. Neither of the Parties raised any objections within the said time limit.

22. By Procedural Order of 19 April 2011 the Parties were informed as follows:

> *" […] the Claimant is herewith requested to submit by no later than **Friday, 29 April 2011** copies of the contracts he entered into with NBADL teams or any other team/entity from 15 December 2010 until today. Once the documents are received by BAT, they will be forwarded to the Respondent, which will then have the right to file its comments within a deadline of 7 days from receipt thereof.."*

23. By email dated 19 April 2011 Claimant 2 stated as follows:

> *"Please find attached a copy of Mr. Chism's NBA Development League Contract for the 2010-11 season. You may also note that the total amount of the contract was for $25,500. The full amount of the contract has been received by Mr. Chism. We placed Mr. Chism with the Fort Wayne Mad Ants of the NBA Development League in an effort to mitigate our damages. Accordingly, please know that we stipulate that any award of damages should be offset by this amount out of principles of fairness and equity."*

24. By Procedural Order of 20 April 2011, the Parties were informed as follows:

> *"We acknowledge receipt of the Claimant's reply to the Procedural Order dated 19 April 2011, a copy of which is attached for the information of the Respondent. After review of all documents submitted by the parties and in accordance with Article 12.1 of the BAT Rules, the Arbitrator hereby declares that the exchange of documents is completed and that he will be rendering the final award as soon as possible. Since the Arbitrator must also rule on the costs in the Arbitral Award, they need to be submitted without delay. Therefore, please ensure that you submit a detailed account of your costs until Friday, 29 April 2011."*

25. By email dated 20 April 2011 Claimant 2 corrected the position as stated in his email of 19 April 2011 and the relevant figure for offset was USD 10,955.58, namely the total amount paid to Claimant 1 by the NBADL as confirmed in an email sent earlier the same day by Mr. Scott Mayo of the NBA.

26. By email dated 20 April 2011 Claimants submitted their claims for costs. Respondent submitted no claim for costs. By email dated 4 May 2011 Respondent was invited to comment by 11 May 2011 on Claimants' claims for costs and on the Claimants' submissions made with regard to the NBADL-related income of Claimant 1. No comment was made by Respondent.

4. The Positions of the Parties

4.1. Claimants' Position in the Request for Arbitration

27. Claimant 1 seeks various reliefs. First, a copy of a tax letter confirming all Turkish taxes have been properly paid by Respondent on his behalf; secondly, outstanding salary payments of USD 84,000.00 less USD 10,955.58 (being the NBA Development League amount which was paid until 15 April 2011); thirdly, interest; and, fourthly, any other relief.

28. Claimant 2 seeks the Agent's fee of USD 12,000.00 or, if not considered appropriate given that Mr Ulas Sag is stated not to be a FIBA-certified agent, half the Agent's fee. Interest at 5% and any other relief is also sought.

29. Both Claimants seek that the costs of the arbitration and reasonable attorney fees be borne by Respondent.

30. Claimants repose their claims on breach of contract. The relevant provisions of the Agreement which trigger these claims are set out at paragraphs 4-8 inclusive above.

4.2. Respondent's Position

31. Despite several invitations by the BAT so to do, Respondent has not taken part in the arbitration and it has not articulated a position in opposition to Claimants' allegations.

5. The Jurisdiction of the BAT and other Procedural Issues

32. 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).

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

34. 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) PILA1.

35. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Article 11 of the Agreement which has been set out in paragraph 10 above.

36. The reference to FAT is the name by which BAT was formerly known until the nomenclature was changed with effect from 1 April 2011. This is also confirmed by Article 18.2 of the BAT Rules which provides that "Any reference to BAT's former name "FIBA Arbitral Tribunal (FAT)" shall be understood as referring to the BAT."

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

38. 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).

39. The jurisdiction of BAT over the Claimants' claim arises from the Agreement. The wording "[a]ny dispute arising from or related to the present contract …" clearly covers the present dispute.

40. For the above reasons, the Arbitrator has jurisdiction to adjudicate upon Claimants' claims.

41. Article 14.2 of the BAT Rules, which the Parties have declared to be applicable in Article 11 of the Agreement, specifies that "the Arbitrator may nevertheless proceed with the arbitration and deliver an award" if "the Respondent fails to submit an Answer".

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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 Arbitrator's authority to proceed with the arbitration in case of default by one of the parties is in accordance with Swiss arbitration law[2] and the practice of the BAT.[3]

6. Discussion

6.1. Applicable Law – ex aequo et bono

42. 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".*

43. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

> *"Unless the parties have agreed otherwise 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."*

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2 Decision of the Swiss Federal Tribunal dated 26 November 1980, in: Semaine Judiciaire (SJ) 1982, p. 613 et seq., p. 621; KAUFMANN-KOHLER/RIGOZZI: Arbitrage international - Droit et pratique à la lumière de la LDIP, Bern 2010, N 483; LALIVE/POUDRET/REYMOND: Le droit de l'arbitrage interne et international en Suisse, Lausanne 1989, Art. 182 PILA N 8; RIGOZZI: L'Arbitrage international en matière de sport, Basel 2005, N 898; SCHNEIDER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 182 PILA N 87; VISCHER, in: Zurich Commentary to the PILA, 2nd ed., Zurich/Basel/Geneva 2004, Art. 182 PILA N 29.

3 *See* for instance FAT 0001/07, Ostojic and Raznatovic vs. PAOK KAE; FAT 0018/08, Nicevic vs. Beşiktaş; FAT 0030/09, Vujanic vs. Enterprise Men's Basketball Club "Dynamo" Moscow; FAT 0093/09, A.S.D. Pallacanestro Femminile Schio vs. Braxton.

44. Articles 10 and 11 of the Agreement seem to have an apparent conflict as between the application of Turkish law and ex aequo et bono. Claimants make no reference to Turkish law in the Request for Arbitration and Respondent has not participated in the arbitration. The agreement to arbitrate, however, makes it very clear what the obligation of the Arbitrator is as regards merits of a dispute (emphasis added): "*The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono*." As a matter of interpretation of the Agreement it appears clear to the Arbitrator that Claimants' dispute with Respondent is to be decided *ex aequo et bono*.

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[4] (Concordat)[5], under which Swiss courts have held that arbitration "en équité" is fundamentally different from arbitration "en droit":

> *"When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[6]

46. 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".

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

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

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

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

6.2. Findings

48. Respondent agreed with Claimant 1 on the timetable of payments when it signed the Agreement and it must be taken to have fully understood the consequences of that bargain. It also agreed to a no-cut guaranteed contract, and again must be taken to have fully understood exactly what it was doing.

49. When Respondent released Claimant 1 in December 2010 the consequences of the Agreement were clear. A no-cut guaranteed player contract means just that. It is guaranteed and the salary for the season becomes due if early termination takes place (save where the parties agree a mutual release or a specific provision of a particular contract for reducing the sums is engaged).

50. From the Arbitrator's analysis of the materials provided to him it is clear that at the moment in December 2010 when Respondent released Claimant 1, the balance of the payments due were triggered. The language of Article 2 of the Agreement cannot be read any other way, particularly when one sees the use of the phrase "unconditionally guaranteed". Claimant 1 had been paid USD 36,000.00 up to the moment of release, and therefore Article 2 of the Agreement meant that the remaining portion of the total of USD 120,000.00 (being USD 84,000.00) was due.

51. What followed shortly after the release is of some importance. It is Claimants' position that Claimant 1 signed a document which was proffered to him by Respondent and this was, apparently, a release of liability. It was not in English and there is no indication in the file that Claimant 1 had a command of Turkish (which was the language in which the document is written) so as to, in the first instance, comprehend the outline of what he was being asked to sign. He was therefore, in the absence of his Agent or any other advisor, entirely dependent on what he was told by Respondent as to its nature and effect. The evidence shows that Claimant 1 was not informed of its nature and effect.

52. Once, and very shortly afterwards, Claimant 2 came into possession of the document, it became apparent that it purported to release Respondent from claims. This was immediately challenged and there is testimony on the file from Claimant 1 (which was not challenged by Respondent) as to what he understood (or not as the case may be) as to the import of the document.

53. It is also significant that there was a dispute brewing at that time, particularly in light of the release which had occurred shortly beforehand. It appears to the Arbitrator that the intentions of Respondent in having Claimant 1 sign this document were unambiguous; it wanted rid of Claimant 1 and any claims he might have.

54. In the circumstances, the document in the Turkish language signed by Claimant 1 does not dissolve the responsibility of Respondent. It would be unjust and contrary to equity for Claimant 1's rights to be trumped by this document.

55. Claimant 1 therefore succeeds in his claim for salary. However, in line with BAT case law and established practice, the value of that claim has to take into account any subsequent contractual payment which Claimant 1 received during the course of the relevant season. That sum has been identified at USD 10,955.58. Subtracting that amount from USD 84,000.00 results in a due amount of USD 73,044.42. The Arbitrator notes that the Agreement provides that Respondent cannot have the benefit of an offset and Claimant 1 is under no obligation to mitigate. However, Claimant 1 very fairly has followed the established practice and abated his claim by the amount received during his time at the NBA Development League. This is to his credit.

56. As regards the claim of Claimant 1 for a tax letter, this was a right which was expressly provided for in the Agreement. Claimant 1 has sought this particular relief in the Arbitration and Respondent has not taken the simple step of providing such a letter. It is therefore clear that Claimant 1 has a right pursuant to the Agreement which he wishes to have complied with, and Respondent has, through its inaction, refused to

comply with its corresponding obligation. Claimant 1 therefore also succeeds on this particular claim.

57. Turning to Claimant 2's claim, this is simply expressed. Article 9 of the Agreement provides that he and Mr Ulas Sag (without distinction or severability) are to be paid USD 12,000.00 by way of Agent's Fee. This has not been paid by Respondent even though it expressly agreed to do so by no later than 10 October 2010.

58. It is just and equitable that parties adhere to their bargains, *pacta sunt servanda*. Respondent has not done so in this regard. The Arbitrator therefore finds that Respondent is responsible to Claimant 2 in the amount of USD 12,000.00 on foot of the obligation clearly articulated in Article 9 of the Agreement. It is an internal matter as between Claimant 2 and Mr Ulas Sag as to how they divide that sum. That is not a matter which is dealt with in the Agreement.

59. Turning to the claim for interest which both Claimants assert at 5%. In line with the jurisprudence of the BAT, the Arbitrator holds that an interest rate equal to the applicable Swiss statutory rate which is 5% per annum, is reasonable and equitable in the present case. Also what needs to be identified is from when interest will run. It appears to the Arbitrator that the appropriate time is one day after the day on which a sum became due. Thus, Respondent must pay interest at 5% per annum as follows:

- To Claimant 1 – on USD 84,000.00 from 16 December 2010 to 15 April 2011
- To Claimant 1 – on USD 73,044.42 from 16 April 2011 until payment
- To Claimant 2 – on USD 12,000.00 from 11 October 2010

7. Costs

60. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

61. On 30 June 2011 - considering that pursuant to Article 17.2 of the BAT Rules "the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator", and that "the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised - the BAT President determined the arbitration costs in the present matter to be EUR 4,540.00.

62. Considering, that Claimants prevailed in their claims, it is fair that the fees and costs of this Arbitration be borne by Respondent and that it (Respondent) be required to cover its own legal fees and expenses as well as those of the Claimants, the latter being reasonable in amount (USD 11,075.00) in proportion to the sums claimed. The Arbitrator also notes that Claimant 1 was willing to compromise his position for a sum far less (USD 20,000.00 and full Agent's Fee) than the amount he has now won. This must be taken into account when considering the fees and costs.

63. Given that Claimants paid advances on costs of EUR 7,961.00 as well as a non-reimbursable handling fee of EUR 1,986.00, the Arbitrator decides that in application of article 17.3 of the BAT Rules:

    (i) BAT shall reimburse EUR 3,421.00 to Claimants, being the difference between

the costs advanced by them and the arbitration costs fixed by the BAT President;

(ii) Respondent shall pay EUR 4,540.00 to Claimants, being the difference between the costs advanced by them and the amount they are going to receive in reimbursement from the BAT;

(iii) Respondent shall pay to Claimants EUR 1,986.00 (for the non-reimbursable fee) and USD 11,075.00 (for legal fees) representing the amount of their legal fees and other expenses.

8. AWARD

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

1. **Antalya Buyuksehir Belediye shall pay Mr. Devon Dwayne Chism USD 73,044.42, net of taxes, as compensation for unpaid salary payments.**

2. **Antalya Buyuksehir Belediye shall, simultaneously with making the payment directed at 1 above, provide Mr. Devon Dwayne Chism a tax letter setting out the official payments of Turkish taxes paid on his behalf.**

3. **Antalya Buyuksehir Belediye shall pay Mr. Devon Dwayne Chism interest at 5% p.a. as follows:**

   - **on USD 84,000.00 from 16 December 2010 to 15 April 2011**

   - **on USD 73,044.42 from 16 April 2011 until payment**

4. **Antalya Buyuksehir Belediye shall pay Mr. Jared Karnes USD 12,000.00 as compensation for unpaid agent fees.**

5. **Antalya Buyuksehir Belediye shall pay Mr. Jared Karnes interest at 5% p.a. on USD 12,000.00 from 11 October 2010 until payment.**

6. **Antalya Buyuksehir Belediye shall pay Mr. Devon Dwayne Chism and Mr Jared Karnes an amount of EUR 4,540.00 as reimbursement for their arbitration costs.**

7. **Antalya Buyuksehir Belediye shall pay Mr. Devon Dwayne Chism and Mr. Jared Karnes EUR 1,986.00 and USD 11,075.00 as reimbursement for their legal fees and expenses.**

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

Geneva, seat of the Arbitration, 7 July 2011.

Klaus Reichert SC

(Arbitrator)