BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0194/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Kevin Braswell

- Claimant 1 -

Priority Sports & Entertainment
c/o Mr. Brad Ames, Priority Sports, 325 N La Salle Dr #650
Chicago, IL 60654, USA

- Claimant 2 -

Yon Menejerlik ve Egetim LTD
c/o Mr. Omer Kart, 1x1 Sports, Yildiz Posta Caddesi Gonenglu Sok. Beyazoglu Apt. 16/28, 80280 Gayrettepe Istanbul,Turkey

- Claimant 3 -

vs.

Aliaga Belediyesi Spor Kulubu

Enka Spor, Tesisleri Enka Spor, Salonu Aliaga, Izmir, Turkey

- Respondent -

BASKETBALL
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1. The Parties

1.1 The Claimants

1. Mr. Kevin Braswell (hereinafter also referred to as “the Player”) is a professional basketball player, who signed a contract dated 30 June 2010 for the 2010-2011 season for the basketball club Aliaga Belediyesi Spor Kulubu.

2. Both Priority Sports & Entertainment (hereinafter also referred to as “the US Agent”) and Yon Menejerlik ve Egetim LTD (hereinafter also referred to as “the Turkish Agent”) are agents who represented the Player in relation to the contract dated 30 June 2010 referred to in paragraph 1 of this Award.

1.2 The Respondent

3. Aliaga Belediyesi Spor Kulubu (hereinafter also referred to as “the Club”) is a professional basketball club competing in the Turkish professional basketball league.

2. The Arbitrator

4. On 11 July 2011, Prof. Richard H. McLaren, 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 four Parties to this Arbitration 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

5. On 30 June 2010, the Player and the Club entered into an agreement whereby the latter engaged the Player for the season 2010-2011 (the "Agreement"). The US Agent and the Turkish Agent were signatories.

6. Article 2 of the Agreement provides for a "Base Salary" of $130,000.00. It is further provided that the payment of the "guaranteed Base Salary" is not contingent upon anything other than the Player passing the Club's physical examination.

7. According to the Player, his dispute with the Club arises from his US Agent being told on 25 July 2010 by the head coach of the Club, Mr Halil Uner, that he (the coach) had changed his mind and did not want the Player. There followed attempts on the part of the Player to have the Club bring him to Turkey so that he could stand by the Agreement. These efforts elicited no response from the Club to the Player who had no option but to terminate the Agreement by letter dated 18 August 2010. The Player then sought out alternative employment with a professional Club in Auckland. In the Player's termination letter, his US Agent specifically warned the Club that any difference in salary would be sought from it.

8. The claim also seeks the agents' fees and, further, costs.

9. The Club, in this arbitration, does not dispute the fact that it signed the Agreement. Its argument is based on the fact that the Player did not come to Turkey for the physical examination and therefore the obligations in the Agreement were not triggered. It has described the situation as a "preliminary contract".

10. The Club has also disputed the authority of Mr Halil Uner. The Club points to other persons with authority. The Arbitrator understands from paragraph 2.6 of the Answer, that it is these persons to whom the US Agent's letters in August 2010 were addressed.

11. The Club blames the Player for not coming to Turkey at his own cost and undergoing the physical examination. The Club also states that the Player unjustly terminated the Agreement.

3.2 The Proceedings before the BAT

12. On 9 June 2011, the Claimants filed a Request for Arbitration in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 1,976.50.

13. On 12 July 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.Kevin Braswell)	*EUR 3,000*
Claimant 2 (Priority Sports & Entertainment)	*EUR 1,000*
Claimant 3 (Yon Menejerlik ve Egitim LTD)	*EUR 1,000*
Respondent (Aliaga Belediyesi Spor Klubu)	*EUR 5,000"*

14. The following sums were paid: 18 July 2011, EUR 1,967.50 on behalf of the Player and the Turkish Agent; 26 July 2011, EUR 2,496.50 on behalf of the US Agent; 1 August 2011, EUR 4,990.00 on behalf of the Club; and 5 August 2011, EUR 516 on behalf of the Player and the Turkish Agent.

15. On 2 August 2011, the Club submitted its Answer to the Request for Arbitration.

16. By procedural order of 16 August 2011, the BAT informed the Parties that a second exchange of briefs was required.

17. On 23 August 2011, the Claimants filed their comments on the Answer of the Club.

18. On 12 September 2011, the Club filed its reply to the Claimants' comments.

19. On 12 September 2011, the Parties were informed that the exchange of documents was complete and the Parties were invited to submit their claims for costs by 19 September 2011. The Claimants submitted their account of costs on 19 September 2011. No account of costs was submitted by the Club.

20. On 21 September 2011, the Club was given the opportunity to file comments on the account of costs of the Claimants and to do so before 28 September 2011. The Club did not avail itself of that opportunity.

4. The Jurisdiction of the BAT

21. 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).

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

23. 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].

24. The jurisdiction of the BAT over the dispute results from the arbitration clause

contained under Article 11 of the Agreement, which reads as follows:

> *"Any dispute arising from 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.*
>
> *The arbitrator shall decide the dispute ex aequo et bono."*

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

26. 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). Furthermore, the Club expressly accepted the jurisdiction of BAT in paragraph 3.1 of its Answer.

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

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

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

5. The Positions of the Parties

5.1 The Claimants

29. The Claimants have put forward the following prayers for relief, as articulated in their submission of 23 August 2011:

> *"Claimant 1, Claimant 2 and Claimant 3 respectfully request the Basketball Arbitral Tribunal;*
> *1) to reach a conclusion that the Agreement between the parties was valid and enforceable as an employment agreement;*
> *2) as a result of the above, hold Club liable for damages to Player resulting from Club's breach of Agreement in the amount of Seventy Thousand US Dollars ($70,000.00 USD);*
> *3) likewise, hold Club liable for damages to Priority Sports resulting from Club's breach of Agreement in the amount of Six Thousand Five Hundred US Dollars ($6,500.00 USD);*
> *4) similarly, hold Club liable for damages to Yon Menejerlik resulting from Club's breach of Agreement in the amount of Six Thousand Five Hundred US Dollars ($6,500.00 USD);*
> *5) condemn Club to pay all the costs of this proceeding;*
> *6) payment from Club to Player in any amount the Arbitrator find just and equitable in light of the circumstance; and*
> *7) payment from Club to Priority Sports in any amount the Arbitrator finds just and equitable in light of the circumstance.*
> *8) payment from Club to Yon Menerjerlik in any amount the Arbitrator finds just and equitable in light of the circumstance."*

30. In addition, in their Request for Arbitration the Claimants requested:

> *"Immediate reimbursement from Club to Player, American Agent, and/or Turkish Agent for the FAT application fee, plus any additional costs of arbitration, legal fees, and/or expenses related to this FAT cases."*

5.2 The Respondent

31. The Respondent has put forward the following prayers for relief:

> *"- to reach a conclusion that the agreement between the parties is a conditional preliminary agreement and there is no valid and binding employment agreement between the parties,*

- the contract cannot be made due to faulty behaviour of claimant player,
- as a result of the above, to dismiss the application of the Claimant,
- to condemn the Claimant to pay all the costs of this proceedings (sic)"

6. Discussion

6.1 Applicable Law – ex aequo et bono

32. 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".*

33. 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."*

34. Article 11 of the Agreement provides that: "[T]he arbitrator shall decide the dispute ex aequo et bono".

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

36. The concept of "équité" (or ex aequo et bono) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage[2] (Concordat)[3], under which Swiss courts have held that arbitration "en équité" is fundamentally different from arbitration "en droit":

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

37. 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".

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

6.2 Findings

39. The dispute concerns whether or not the physical examination was a gateway to the Agreement entering into force and effect. It is accepted that the Player did not go to Turkey and did not have the physical examination.

40. The Agreement does make clear that the payment obligation is triggered by the passing of a physical examination and such a provision is both sound (for sporting and commercial reasons) and widespread (it appears in virtually every player agreement).

41. The question that the Arbitrator must decide is most important to the resolution of this

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

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

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

dispute; that is who was responsible for the Player not undergoing the physical examination.

42. The Arbitrator is satisfied that the coach told the US Agent on 25 July 2010 that he did not want the Player. The Club has not provided any statement from the coach to the contrary and presumably it was well within its abilities to procure such a statement.

43. The Arbitrator is also not willing to accept the limitation on the coach's authority as suggested by the Club. While the coach may not have the authority to make commercial decisions on the part of the Club, it appears to the Arbitrator to be a matter of some significance when he would say to the Player's US Agent that the Player's services were not going to be required even before the season started. The coach is the person who makes the key decisions for a team and, decides who plays and who does not.

44. Were the matter to stand still at 25 July 2010, perhaps the position might have been different. However, the Player's US Agent wrote to the persons in charge (Mr Metin Timurhan and Mr Birtan Saka) at the Club on 3 August 2010 and made clear that the Player considered the Agreement to be in full force and effect. The letter also requires the Club to purchase an air ticket to allow the Player to arrive in Turkey on 30 August 2010.

45. The Player's US Agent wrote again on 11 August 2010 to the same persons within the Club in more formal terms and noted that he had received no response to his letter of 3 August 2010.

46. Finally, as already noted above, the Player's US Agent wrote to the Club on 18 August 2010, formally terminating the Agreement.

47. It is striking that there was no response from the Club to these letters. This is an

important point as regards the position of the Club in this Arbitration.

48. The essence of the Club's defence appears to be that the Player should have paid for his own airfare to Turkey in order to present himself for the physical examination and by not doing so, he deprived himself of the benefit of the Agreement.

49. That argument is not accepted by the Arbitrator.

50. The conduct of the Player and his US Agent was not the cause of the Player decision not to travel to Turkey. Rather, it was the conduct of the Club. It is entirely reasonable for an agent and a player to demand clarity from a club when a coach, prior to the season, says that the player is not wanted. The US Agent's concerns were unquestionably heightened when he received no response to his letters to the Club in August 2010. Were the Club Officials of a view contrary to that of the coach, meaning that they still desired the Player, it would be reasonable to presume that they would have promptly replied to the US Agent. Similarly, had the Club Officials believed that the coach had had no such conversation, then it is more than reasonable to presume that they would have immediately put the US Agent's mind at ease. They did not do so and their silence in August 2010 is, as already noted, important.

51. In light of the foregoing, it is the Arbitrator's conclusion that the Club did not want the Player to play for it in the 2010-2011 season, notwithstanding the fact that it had signed an agreement with him. It would appear as though another player was engaged by the Club to take the place of the Player, however, consideration of the motivation behind the decision not to proceed with the Player is not germane to this dispute.

52. Next, the Arbitrator will address the Club's argument that the Player's demand in August 2010 to be furnished with an air ticket was not something they were contractually bound to accept.

53. The Agreement (Article 5(a)) is clear that the Club was to provide three adult economy class round trip tickets from a city in the United States to the Club's destination in Turkey.

54. The Club's argument that it was the Player's obligation to get himself to Turkey at the start of the Agreement is difficult to follow. The Agreement, on a good faith reading, suggests that the Club was responsible for bringing the Player to and from Turkey three times a year.

55. A critical point against the Club's argument, now advanced in this Arbitration, is that in August 2010, it did not say to the Player's US Agent (or indeed the Player's Turkish Agent) that the Player was responsible for getting himself to Turkey. The US Agent made it clear in August 2010 that the Player was expecting an air ticket to be paid for by the Club. The Club did not react to this challenge.

56. The argument now being raised appears to be one raised after-the-event. The nature of the argument, its timing, and the provisions of Article 5(a) of the Agreement, either individually or collectively, militate strongly against it being successful. The Club's argument as regards the air ticket is therefore dismissed.

57. The Arbitrator will now turn to a discussion of the just and equitable principles which he believes are appropriate in this case.

58. It is a universal principle, and one deeply rooted in the most fundamental principles of good faith that parties should adhere to the bargain they strike – *pacta sunt servanda*. Concomitant with the doctrine of *pacta sunt servanda* is an obligation on the parties to a contract to avoid taking steps to hinder its due performance. It would be unjust if a party to a contract could avoid its obligations by obstructive conduct. That is not to say that a party to a contract must perform a particular way, rather it appears entirely just and equitable that such a party is not allowed to benefit from its own wrongdoing in the

hindering of performance.

59. Turning to the facts of this Arbitration, it is patently obvious to the Arbitrator that the Club made clear that it was not going to abide by the Agreement in late July and August 2011. This was done through a combination of the express (the conversation between the US Agent and the coach) and the implied (the failure to respond to clear written demand).

60. The Club's conduct, in the Arbitrator's view, obstructed the due performance by the Player of his obligations under the Agreement. The Club cannot now, for the purposes of this Arbitration and the Claimants' claims, rely upon its own misconduct to deflect liability.

61. It therefore follows that the Player's claim prevails in its entirety. The Player is seeking the difference between what he would have earned in Turkey in the 2010-2011 season ($130,000.00) and what he did earn in Auckland ($60,000.00). That figure nets out at $70,000.00. The Club argues that the difference between the two contracts is excessive. The Arbitrator does not accept this argument, considering that the Player had to look for alternative employment late in the transfer season when – as it is commonly the case in basketball – less job opportunities were available.[5] In light of the above analysis and in application of *ex aequo et bono* principles (see para. 58), the Arbitrator finds that the Player's claim is well founded and must be accepted.

62. Turning to the Agents' claim for $6,500.00 each, on the same reasoning as led to the success of the Player's case, the US Agent and the Turkish Agent must prevail. Their fees, as reflected in the Agreement, are fixed at $6,500.00 each and on any percentage basis. The Club cannot take advantage of its own wrongdoing in hindering

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[5] See *ex multis* BAT (then FAT) 0014/08, para. 74 confirmed also by CAS 2009/A/1946 para. 88.

the performance by the Player of the Agreement and with that comes a liability to the Agents. Had the Club not hindered the performance of the Player then it inevitably and absolutely flows that the Agents' fees would have been triggered.

7. Costs

63. 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.

64. On 9 December 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 4,850.00. Given that the Claimants prevailed in their claims, it is fair that the fees and costs of the Arbitration be borne by the Club and that it be required to cover its own legal fees and expenses as well as those of the Claimants.

65. Given that the Claimants paid advances on costs of EUR 4,980.00 as well as a non-reimbursable handling fee of EUR 1,976.50 (which will be taken into account when determining the Claimants' legal fees and expenses), while the Club paid an advance on costs of EUR 4,990.00, the Arbitrator decides that in application of article 17.3 of the BAT Rules:

(i) BAT shall reimburse EUR 4,980.00 to the Claimants, being the amount of the costs advanced by the Claimants;

(ii) BAT shall reimburse EUR 140.00 to the Club, being the difference between the costs advanced by the Club and the arbitration costs fixed by the BAT President;

66. The Club shall pay to the Claimants EUR 1,976.50 representing the amount of their legal fees and other expenses.

8. AWARD

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

1. **Aliaga Belediyesi Spor Kulubu shall pay Mr. Kevin Braswell a total amount of USD 70,000.00 as compensation for unpaid salary payments.**
2. **Aliaga Belediyesi Spor Kulubu shall pay Priority Sports & Entertainment a total amount of USD 6,500.00 as compensation for unpaid agency fees.**
3. **Aliaga Belediyesi Spor Kulubu shall pay Yon Menejerlik ve Egetim LTD a total amount of USD 6,500.00 as compensation for unpaid agency fees.**
4. **Aliaga Belediyesi Spor Kulubu shall pay to the Claimants the amount of EUR 1,976.50 as a contribution towards their legal fees and expenses.**
5. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 19 December 2011

Klaus Reichert SC
(Arbitrator)