

ARBITRAL AWARD

(BAT 0216/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Ms. Iziane Castro Marques

Ms. Kelly Da Silva Santos

- Claimant 1 -

- Claimant 2 -

both represented by Mr. Josep Martin Ruiz,
58 Boulevard Aristide Briand, 66100 Perpignan, France

vs.

Besiktas Jimnastik Kulubu Dernegi

Suleyman Seba Caddesi, No. 48 BJK Plaza, 34357 Besiktas / Istanbul, Turkey

- Respondent -

represented by Mrs. Basak Akbas, Attorney-at-Law in Istanbul, Turkey

1. The Parties

1.1 The Claimants

1. Ms. Iziane Castro Marques (hereinafter referred to as "Claimant 1") and Ms. Kelly Da Silva Santos (hereinafter referred to as "Claimant 2") are professional basketball players, who were retained by the Respondent, Besiktas Jimnastik Kulubu Dernegi, for the 2010-2011 season.

1.2 The Respondent

2. Besiktas Jimnastik Kulubu Dernegi (hereinafter referred to as "the Respondent") is a professional basketball club in Istanbul, Turkey.

2. The Arbitrator

3. On 8 November 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 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 Background and the Dispute

4. On 13 August 2010, Claimant 1 and the Respondent entered into an agreement whereby the latter engaged the former to play basketball for the 2010-2011 season (the "Claimant 1 Agreement"). Her salary was agreed at USD 121,000.00 net payable in unequal monthly instalments. Of that sum, she was paid USD 79,500.00 by the

Respondent, leaving an amount of USD 41,500.00 unpaid.

5. On 12 September 2010, Claimant 2 and the Respondent entered into an agreement whereby the latter engaged the former to play basketball for the 2010-2011 season (the "Claimant 2 Agreement"). Her salary was agreed at EUR 88,000.00 net, payable in unequal monthly instalments. Of that sum, she was paid EUR 57,500.00 by the Respondent, leaving an amount of EUR 30,500.00 unpaid.
6. The foregoing unpaid amounts are what has triggered the Claimants' Request for Arbitration.

3.2 The Proceedings before the BAT

7. The Claimants filed a Request for Arbitration dated 27 August 2011 in accordance with the BAT Rules. There was an additional claimant named in the Request for Arbitration. By letter dated 26 October 2011 from the BAT, the following was communicated to the representative of the Claimants:

"Dear Mr. Martin,

The President of the BAT has carefully reviewed the Request for Arbitration dated 27 August 2011 (received by the BAT on 1 September 2011) and has decided as follows:

1. In view of the large number of Claimants and multiple contracts mentioned in the Request for Arbitration, the cases shall be disjoined. Considering the factual background of each claim as it results from a preliminary analysis of the case, the proceedings shall proceed as follows:

(a) Castro Marques, Da Silva Santos vs Besiktas JK.

Applicable non-reimbursable fee: EUR 2,000

(b) Salkauske vs Besiktas JK.

Applicable non-reimbursable fee: EUR 1,500

2. Both cases will be assigned to the same Arbitrator for the sake of cost- and time

efficiency.

3. This decision is without prejudice to the Arbitrator's power to order that the proceedings shall be further disjoined if the circumstances so require.

*4. The above decision shall come into effect unless the Claimants decide to withdraw their joint Request for Arbitration and file three separate Requests for each of the aforementioned Claimants, **within 5 days from receipt** of this communication.*

***Within 5 days from receipt** of this communication, Mr. Martin is also requested to inform the BAT to which case the -already received- EUR 2,070 should be attributed."*

8. The non-reimbursable handling fee in the amount of EUR 2,000.00 was paid in four instalments on 31 August, 29 September, 3 November and 7 November 2011.
9. On 14 November 2011, the BAT informed the Parties that Mr. Klaus Reichert SC had been appointed as the Arbitrator in this matter. Further, the BAT fixed the advance on costs to be paid by the Parties as follows:

" Claimant 1 (Ms. Iziane Castro Marques) EUR 1,750

Claimant 2 (Ms. Kelly Da Silva Santos) EUR 1,750

Respondent (Besiktas Jimnastik Kulubu Dernegi) EUR 3,500"

The foregoing sums were paid as follows: 18 November 2011, EUR 1,750.00 (Respondent's share) paid by Claimant 1; 8 December 2011, EUR 875.00 paid by Claimant 1; 20 December 2011, EUR 875.00 paid by Claimant 2; 6 January 2012, EUR 1,750.00 by Claimant 1; 10 January 2012, EUR 875.00 by Claimant 2; and 19 January 2012, EUR 875.00 by Claimant 2.

10. On 2 December 2011, the Respondent submitted its Answer to the Request for Arbitration. The Respondent, in the Answer, objected to having two claimants bringing claims under two contracts in the same arbitration.

11. By procedural order of 29 December 2011, the BAT informed the Parties that a second exchange of briefs was required. In addition the Arbitrator ruled as follows:

“The Arbitrator has considered the Respondent's submissions arising from the fact that there are two claimants in this case. The Arbitrator refers to the decision of the President of BAT dated 26 October 2011 regarding the deconsolidation of the cases involving three claimants into this case and case 0221/11. The Arbitrator has decided, after review of the Respondent's Answer, that the President's decision of 26 October 2011 will not be changed and this case will continue with two claimants as case 0216/11.”

12. On 29 December 2011, the Claimants filed their comments on the Answer of the Respondent. The Respondent did not file a reply within the time allowed.
13. On 3 February 2012, the Parties were invited to submit their statements of costs and were notified that the exchange of documentation was closed.
14. By letter dated 3 February 2012, the Claimants set out their statement of costs. The Respondent set out its statement of costs by letter of 15 February 2012. The Parties were afforded an opportunity to comment by 22 February 2012. No comments were submitted.

4. The Positions of the Parties

15. The Claimants' position is quite simple. They entered into their respective agreements with the Respondent but they were not paid in full. They wish to have the whole of their agreed salaries paid to them.
16. The Respondent's position is also simple. It invokes the current economic crisis, but also says that *“the remaining portion of the contract prices shall be paid to the Players in the shortest period of time”*. In respect of interest, it refutes the rate sought by the Claimants (5%).

5. The Jurisdiction of the BAT

17. 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).
18. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
19. 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.
20. The jurisdiction of the BAT over Claimant 1’s dispute results from the arbitration clause contained under “ARTICLE 7 - DISPUTE” of the Claimant 1 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 the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.”

21. The jurisdiction of the BAT over Claimant 2’s dispute results from the arbitration clause contained under “ARTICLE 7 - DISPUTE” of the Claimant 2 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

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

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."

22. Both agreements are in written form and thus the arbitration agreements fulfil the formal requirements of Article 178(1) PILA.
23. 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 agreements under Swiss law (referred to by Article 178(2) PILA).
24. The jurisdiction of BAT over Claimants' claims arises from both agreements. The wording "[a]ny dispute arising from or related to the present Agreement ..." clearly covers the present disputes. In addition, the jurisdiction of BAT has not been disputed by the Respondent.
25. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimants' claims.

6. Discussion

6.1 Applicable Law – ex aequo et bono

26. 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".

27. 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."

28. As stated above, the agreements clearly stipulate that: "[t]he arbitrator shall decide the dispute ex aequo et bono".

29. 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'arbitrage² (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

30. This is confirmed by Article 15.1 of the BAT Rules *in fine*, according to which the Arbitrator applies "*general considerations of justice and fairness without reference to any particular national or international law.*"

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

6.2 Findings

32. The doctrine of *pacta sunt servanda* (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the principle by

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).

which the Arbitrator will examine the positions of the parties.

33. It is plain to the Arbitrator that the Claimants entered into their respective agreements with the Respondent in the full and legitimate expectation that the obligations owed to them by the Respondent would be duly performed. They were paid, in part, for their services, but not in the full amounts agreed.
34. The Respondent admits that it did not pay the agreed amounts and invokes the economic crisis in its defence. It also expresses its intention that the outstanding sums will be paid as soon as possible. As of the date of this Award, this has not occurred.
35. The Arbitrator does not find that the economic crisis is a factor which can hold over the right of the Claimants to the monies due to them. They are therefore entitled to succeed in their claims for unpaid salaries.
36. The Claimants are also requesting the payment of interest on the outstanding sums at a rate of 5% from 1 May 2011. In both cases, the last payment of salary was due to be paid by the Respondent on 30 April 2011.
37. It is a generally recognized principle embodied in most legal systems, which is underpinned by motives of equity, that late payments give rise to interest – in order that the creditor be placed in the financial position she/he would have been in had payments been made on time. It is normal and fair that interest is due on the late payments. An interest rate of 5%, which in this case seems fair and reasonable and is in line with BAT jurisprudence, will be awarded.
38. It is an established principle that interest runs from the day after the date on which the principal amounts are due. The relevant amounts and dates are: (a) USD 41,500.00 from 1 May 2011 in respect of Claimant 1; and (b) EUR 30,500.00 from 1 May 2011 in respect of Claimant 2.

7. Costs

39. 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.
40. On 2 April 2012 - 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 2,900.00.
41. Considering that the Claimants prevailed in their claims, it is fair that the fees and costs of the arbitration be borne by the Respondent and that it be required to cover its own legal fees and expenses as well as those of the Claimants.
42. The Arbitrator finds that the legal costs claimed by the Claimants (EUR 1,700.00 each – which figure does not include the non-reimbursable handling fee) are reasonable in the circumstances of this case. Legal costs of EUR 3,400.00 (EUR 1,700.00 for each Claimant) together with a figure reflecting the non-reimbursable handling fee of EUR 2,000.00 are to be borne by the Respondent.
43. Given that the Claimants paid an advance on costs of EUR 7,000.00 as well as a non-reimbursable handling fee of EUR 2,000.00 (which will be taken into account when determining the Claimants’ legal fees and expenses), the Arbitrator decides that in

application of article 17.3 of the BAT Rules:

- (i) BAT shall reimburse EUR 4,100.00 to the Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the BAT President;
- (ii) The Respondent shall pay EUR 2,900.00 to the Claimants, being the difference between the costs advanced by them and the amount they are going to receive in reimbursement from the BAT;
- (iii) The Club shall pay to the Claimants EUR 5,400.00 (for both the non-reimbursable handling fee and legal fees) representing the amount of their legal fees and other expenses.



BASKETBALL
ARBITRAL TRIBUNAL

8. AWARD

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

1. **Besiktas Jimnastik Kulubu Dernegi shall pay Ms. Iziene Castro Marques USD 41,500.00 in respect of unpaid salary with interest at 5% on that sum from 1 May 2011.**
2. **Besiktas Jimnastik Kulubu Dernegi shall pay Ms. Kelly Da Silva Santos EUR 30,500.00 in respect of unpaid salary with interest at 5% on that sum from 1 May 2011.**
3. **Besiktas Jimnastik Kulubu Dernegi shall pay Ms. Iziene Castro Marques and Ms. Kelly Da Silva Santos an amount of EUR 2,900.00 as reimbursement for their arbitration costs.**
4. **Besiktas Jimnastik Kulubu Dernegi shall pay Ms. Iziene Castro Marques and Ms. Kelly Da Silva Santos an amount of EUR 5,400.00 as reimbursement for their legal fees and expenses.**
5. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 4 April 2012

Klaus Reichert SC
(Arbitrator)