ARBITRAL AWARD

(BAT 0501/14)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Ms. Anke De Mondt

- Claimant 1 -

Mr. Patrick Stainier

- Claimant 2 -

both represented by Mr. Sébastien Ledure, attorney at law,
Lorenz International Lawyers, Boulevard du Régent 37-40, Brussels, Belgium

vs.

Kayseri Kaski Spor Kulübü
Zümrüt Mah., Mustafa Kemal Pasa Bulvari 186, 38090 Kayseri, Turkey

- Respondent -

represented by Ms. Nihal Yildirim, attorney at law,
Beyaz Karanfil Sokak No. 39, 34330 Levent, İstanbul, Turkey

BASKETBALL
ARBITRAL TRIBUNAL

1. The Parties

1.1 The Claimants

1. Claimant 1, Ms. Anke De Mondt (“Player”) is a professional basketball player of Belgian nationality. Claimant 2, Mr. Patrick Stainier (“Agent”), is a FIBA licensed agent of Belgian nationality.

1.2 The Respondent

2. Kayseri Kaski Spor Kulübü (“Respondent”) is a professional basketball club in Kayseri, Turkey.

2. The Arbitrator

3. On 7 February 2014, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert SC as arbitrator (“Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal ("BAT Rules").

4. 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

5. By an agreement dated 12 July 2013 (“the Agreement”) Player was engaged by Respondent to play the 2013-14 season. Agent co-signed the Agreement.

6. Player went to Turkey and seems to have played in some matches. However, Player did not spend the whole 2013-14 season in Turkey, but left in November 2013. The parties do not appear to be in dispute as to the fact that the Agreement came to a premature end, but rather the dispute, and this arbitration, centres on whether Player or Respondent bear responsibility for termination. Responsibility for termination is determinative of whether Respondent owes Player any money.

3.2 The Proceedings before the BAT

7. On 7 January 2014, Claimants filed a Request for Arbitration dated that day in accordance with the BAT Rules.

8. The non-reimbursable handling fee in the amount of EUR 2,000.00 was paid on 24 December 2013.

9. On 10 February 2014, the BAT informed the parties that Mr. Klaus Reichert, SC had been appointed as the Arbitrator in this matter. The BAT fixed the advance on costs to be paid by the parties as follows:

> *"Claimant 1 (Ms. Anke De Mondt) EUR 3,500*
>
> *Claimant 2 (Mr. Patrick Stainier) EUR 1,000*
>
> *Respondent (Kayersi Kaski Spor Kulübü) EUR 4,500"*

The foregoing sums were paid as follows: 12 February 2014, EUR 3,500.00 by Player; 20 February 2014, EUR 1,000.00 on behalf of Agent; and 20 February 2014, EUR 4,465.00 by Respondent.

10. Respondent filed its Answer on 13 March 2014 (following an agreed extension of time).

11. By Procedural Order dated 18 March 2014 the Arbitrator gave Claimant the right to

comment on the Answer. On 1 April 2014 Claimants filed their comments; thereafter, Respondent filed its comments on 21 April 2014.

12. On 29 April 2014 the Arbitrator directed Player to state whether she was under a new contract for the 2013-14 season and, if so, to provide a copy; if she was not under contract, she was directed to provide evidence of steps taken to find new employment. On 9 May 2014 Player stated that she had found employment with BC Kangoeroes Boom and that her net earnings were EUR 1,370.55. She also drew attention to Article 3 of the Agreement which states:

> *"If the Club unilaterally terminates the present contract without justification and if the Basketball Arbitral Tribunal finds the Club guilty of such termination without a just and valid cause, then the Club agrees that, to compensate the Player's career and psychological damage, any amount earned by the Player subsequently will be to her own and exclusive benefit."*

13. On 12 May 2014 Respondent was afforded an opportunity to comment on Player's submission of 9 May 2014. Respondent did not avail itself of that opportunity within the time allowed.

14. On 21 May 2014, the parties were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules. The parties were invited to submit their claims for costs.

15. On 28 May 2014 the parties filed their claims for costs.

16. Comments were made by the parties on the claims for costs (28 May 2014, by Claimants; 4 June 2014, by Respondent).

4. The Positions of the Parties

17. Claimants' claim for relief, as articulated in the Request for Arbitration, is as follows:

- For Player, EUR 66,351.99 in respect of unpaid salaries and other expenses

- For Agent, EUR 7,500.00 in respect of unpaid agency fees

- For both Claimants, interest at 5%

- For Player, a tax certificate

- Costs, fees and expenses

18. Respondent seeks a dismissal of the claims and seeks its expenses from Claimants.

5. The Jurisdiction of the BAT

19. 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).

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

21. 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]

22. The jurisdiction of the BAT results from Article 8 of the Agreement, which reads as follows:

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

> *"Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be in Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono. In case of any conflict between a local law, a federation rule and any clause of this agreement, the latter will prevail."*

23. This arbitration clause is in written form and thus it fulfils the formal requirements of Article 178(1) PILA.

24. 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 clause under Swiss law (referred to by Article 178(2) PILA).

25. The parties have joined issue fully in this arbitration and at no stage has either side called into the question the Arbitrator's jurisdiction to determine all claims made herein. In addition, on page 4 of its Answer the Respondent stated that it "has no objection against the jurisdiction of BAT, validity of the arbitration clause and arbitrability of the dispute."

26. For the above reasons, the Arbitrator has jurisdiction to adjudicate upon the claims.

6. Discussion

6.1 Applicable Law – ex aequo et bono

27. 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".

28. 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."*

29. In Article 8 of the Agreement the parties have expressly conferred the power to rule *ex aequo et bono* on the Arbitrator.

30. Therefore, the Arbitrator will decide the dispute at hand ex aequo et bono.

31. 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]

32. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives *"a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case."*[5]

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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).

5 Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717. pp.625-626.

33. 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*."

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

6.2 Findings

35. 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 guiding basic principle by which the Arbitrator will examine the merits of the claims.

36. First, the Arbitrator notes the following provisions of the Agreement:

a. Article 3 places an explicit obligation on Respondent to honour the Agreement in full under all circumstances. It further provides that the Agreement is a no cut, guaranteed contract with no impact on Player's right to receive payments in the event of diminished skill, injury, illness or indeed death.

b. Article 3 also describes the circumstances by which Respondent can terminate, without further liability, the Agreement, including: (a) health problems found at the annual physical examination at the start of the season; (b) criminal conduct; (c) drug taking; (c) participating in illegal activities or dangerous sports; (d) pregnancy; and (e) non-arrival in Turkey on appointed dates.

c. Article 5 sets out the payments, all of which are net, to Player. Her salary, payable in monthly instalments from September 2013 to April 2014, amounts in total to EUR 75,000.00. In addition Article 5 provides for various benefits such as travel, accommodation and medical care.

d. Article 7 provides for agency fees of EUR 7,500.00 to be paid to Agent.

37. Secondly, there appears to be little dispute between the parties about the early stages of Player's time with Respondent. She arrived in Turkey, seemingly did pass the physical examination and joined in the training of the team. However, it is after that point in time that the parties diverge in their respective views and appreciation of the facts.

38. Respondent says that her lack of performance and skill became an issue for its management and technical staff. Respondent says that it decided to continue her training with the "Young Team" and, subject to her improving, she might later be brought back into the "A Team". Player suggests that Respondent hired too many foreign players therefore its roster became crowded.

39. The contemporaneous correspondence in November 2013 is of assistance in ascertaining what was going on between the parties at the material time. On 8 November 2013 Ibrahim Ibar of Respondent wrote to Agent as follows:

> *"Subject: Anke de Mondt termination of contract*
>
> *……*
>
> *After our long conversations, as I said before there is no problem about Anke's personality, but she is not a player our team system, and this effect our team and Anker very bad for her career and our team system.*
>
> *Please think about her performance in preparation games and First eurleague game. We gave her chance until now but there is nothing different, and its really expensive for us to pay 75.000 euro for her performance in our team.*
>
> *Because of our financial problems and because of players performans in our team we want to terminate her contract. For the termination our offer is pay 5.000 euro for agent and 2.000 euro to Anker after her october full salary." (sic)*

40. Some hours after this email, Ibrahim Bar of Respondent wrote to Agent and stated that Player was out of the team roster and would not be with the “A Team” anymore.

41. Player countered, again on 8 November 2013, with a letter from her lawyers to Respondent demanding her re-integration with the “A Team” and that unless this was acceded to within 24 hours, the Agreement would stand terminated (such termination was described as unilateral termination by Respondent). Her lawyers wrote again on 12 November 2013 to Respondent granting an extra 24 hours for compliance with the demand that she be re-integrated into the “A Team”.

42. Player was not re-integrated into the “A Team” and left Turkey. On 14 November 2013 her lawyers wrote to Respondent stating that the Agreement was considered to have been terminated.

43. Respondent’s defence is that Player did not play at her highest level and had serious performance problems, thus violating her primary obligation. It says that it is entitled to take technical, sporting and administrative measure for the success of its team. It also says that the Agreement provides no guarantee for Player’s participation in “A Team” practice. It says that by leaving the country without permission or notifying anyone, Player committed a breach of internal regulations.

44. The Arbitrator finds that the following matters emerge from the parties’ submissions:

    a. Player was cut from the “A Team” by Respondent.

    b. While there was an offer, albeit in fairly small terms, to terminate the Agreement, there does not appear at any stage to have been a refusal by Respondent to pay Player her agreed salary.

45. The dispute, and the outcome of the arbitration as far as Player is concerned, revolves

around the issue as to whether or not Player was justified in considering the Agreement to have been terminated when Respondent cut her from the "A Team".

46. Respondent points out that there is no express provision in the Agreement which guarantees Player participation in the "A Team". This is correct, and Player's response admits of that when she suggests that her participation in the "A Team" is implied by: (i) the bonus payments in the Agreement can only be triggered by playing for the "A Team" and (ii) the termination date of the Agreement is subject to the date of last game of the season – presumably the last game of the "A Team".

47. The Arbitrator does not find that Player's arguments are well made as regards her interpretation of the "no cut" provision in the Agreement. The Agreement does not condition her being paid bonuses on her participation in the "A Team" of Respondent; rather Article 6.B specifically refers to "team achievement". Her second point also does not assist her as the temporal boundaries of the Agreement are objectively set by the last game of the season, not that she is to participate in such games.

48. The Arbitrator does have sympathy for Player and the position in which she found herself. Respondent was telling her Agent that they wanted to get rid of her – but stopped short of actually and explicitly terminating the Agreement. Simultaneously in November 2013 she was cut from the "A Team" and demoted to training with another team within Respondent. The question which arises is whether those circumstances, taken together, trigger a right to treat the Agreement as having been terminated by Respondent.

49. The answer lies in the Agreement and whether it can be discerned that the parties intended that the "no cut" provision and the language of their contract was to have the effect that Player could not be lawfully demoted. In passing, the Arbitrator notes the argument posed by Respondent that Player violated her primary obligation by not playing to her highest level. The Arbitrator does not agree with Respondent in this

assertion. Respondent signed Player and entered into the Agreement which, through its Article 3, explicitly stated that diminished skill was no reason to withhold payments. Put another way, Respondent took Player at its risk of her not performing. It cannot, based on the contractual language of the Agreement, plausibly assert a "primary" obligation of skill and performance, when, in fact, the contract says exactly the opposite.

50. The Arbitrator does not see any language in the Agreement which could support Player's position that the "no cut" provision insulated her from demotion from the "A Team" in the event that Respondent's management exercised their sporting discretion to move her downwards in the hope that training with another of its teams would assist. The Arbitrator does not see it as his function, save in the circumstances of explicit contractual language to the contrary, to impugn a sporting decision of management to move players for training purposes within the structures of a club.

51. In the circumstances, the Arbitrator holds that Respondent's actions in moving Player downwards for training purposes out of the "A Team" does not constitute a breach of contract, and further does not justify Player's position to the effect that she treated the Agreement as being terminated. At no stage did Respondent say to her that she was not going to be paid her monthly salary, and therefore when she walked out on Respondent and left Turkey, it was her action which led to the termination of the Agreement. Thus, she is not entitled to any further relief as and from that moment from Respondent.

52. The Arbitrator finds, as a necessary consequence that Player is entitled to her salary up to the moment she departed, and, further, the Arbitrator accepts the calculation submitted by Claimants, namely, that up to including 14 November 2013 her salary totalled EUR 21,333.33. As she was paid EUR 9,086.00 by Respondent, the remaining sum due to her is EUR 12,247.33, net.

53. Turning to Agent's claim, in accordance with Article 7 of the Agreement, this is payable on 1 October 2013 in the amount of EUR 7,500.00 net. This has not been paid. The subsequent termination of the Agreement by Player's walking out on Respondent in November 2013 does not extinguish the accrued right of Agent to its fee – this is made explicit by the final sentence of the second paragraph of Article 7. Respondent is therefore held liable to Agent for EUR 7,500.00.

54. As regards the claims for interest, the Arbitrator finds that a rate of 5% per annum is appropriate, and that Respondent is liable for such interest on Agent's due amount of EUR 7,500.00 from 19 October 2013, as sought by Agent. There was no reason not to have paid Agent's fee. As regards Player's claim for interest, the Arbitrator holds that as she was the person responsible for terminating the Agreement, it would not be just and equitable for interest to be levied as against Respondent from October or November 2013. However, the Arbitrator does award interest at 5% on Player's claim in the event that Respondent does not pay Player in accordance with this Award within 30 days.

55. Finally, Player is entitled to a tax certificate from Respondent in accordance with Article 5 of the Agreement.

7. Costs

56. 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.

57. On 7 August 2014 – 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 7,560.00.

58. Considering that Player only partially succeeded in her claim, and was found responsible for the termination of the Agreement, and also that Agent succeeded in its claim, the Arbitrator has decided that Claimants will be awarded a proportion of the claim for costs which they made. The Arbitrator holds and determines that EUR 5,000.00 represents a fair and just amount for their legal fees and expenses. Respondent shall bear its own legal fees and expenses.

59. As regards the arbitration costs, the Arbitrator finds that it would not be just or fair for Respondent to bear the entire burden. Claimants did not prevail fully in this arbitration and it was Player who terminated the Agreement by her conduct. The Arbitrator has come to the conclusion that Respondent should be responsible for 25% of the arbitration costs.

60. The Arbitrator decides that in application of article 17.3 of the BAT Rules:

    (i) BAT shall reimburse EUR 1,405.00 to Respondent, being the difference between the costs advanced by the parties and the arbitration costs fixed by the BAT President;

    (ii) Claimants shall jointly pay to Respondent EUR 1,170.00, being the difference between the arbitration costs advanced by it and the amount it will receive as reimbursement from the BAT, as adjusted to reflect 25% of the overall arbitration

costs.

(iii) Respondent shall pay EUR 5,000.00 to Claimants, representing a contribution to their legal fees and expenses.

8. AWARD

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

1. **Kayseri Kaski Spor Kulübü shall pay Ms. Anke De Mondt EUR 12,247.33, net for unpaid salary. In the event that this sum is not paid within 30 days of the date hereof, interest at 5% per annum shall be payable by Kayseri Kaski Spor Kulübü as of the following day.**

2. **Kayseri Kaski Spor Kulübü shall forthwith furnish Ms. Anke De Mondt a tax certificate in respect of monies paid to her.**

3. **Kayseri Kaski Spor Kulübü shall pay Mr. Patrick Stainier EUR 7,500.00, net for unpaid agency fees together with interest at 5% per annum from 19 October 2013.**

4. **Kayseri Kaski Spor Kulübü shall pay jointly to Ms. Anke De Mondt and Mr. Patrick Stainier EUR 5,000.00 in respect of their legal fees and expenses.**

5. **Ms. Anke De Mondt and Mr. Patrick Stainier shall jointly pay to Kayseri Kaski Spor Kulübü EUR 1,170.00 in respect of arbitration costs.**

6. **Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 14 August 2014

Klaus Reichert

(Arbitrator)