

**ARBITRAL AWARD**

(BAT 1422/19)

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Klaus Reichert SC**

in the arbitration proceedings between

**Mr. Phillip Michael Pressey**

- Claimant 1 -

**CAA Sports LLC**

405 Lexington Avenue, 19th floor, New York, NY 10174, USA

- Claimant 2 -

both represented by Mr. Ergun Benan Arseven and Mr. Metin Abut,  
attorneys at law, Abdi Ipekci Caddesi No. 19-1, Nisantasi 34367,  
Istanbul, Turkey

vs.

**Besiktas Basketbol Yatirimlari Sanayi ve Ticaret A.S.**

Visnezade Mah. Kadrgalar Cad. No. 1

Vodafone Park Otopark Girişi K: 1

34357 Istanbul, Turkey

- Respondent -

## **1. The Parties**

### **1.1 The Claimants**

1. Claimant 1, Mr. Phillip Michael Pressey (“Player”) is an American professional basketball player.
2. Claimant 2, CAA Sports LLC (“Agency”) is an American professional sports agency.

### **1.2 The Respondent**

3. Besiktas Basketbol Yatirimlari Sanayi ve Ticaret A.S. (“Club”) is a professional basketball club in Istanbul, Turkey.

## **2. The Arbitrator**

4. On 20 September 2019, Prof. Dr. Ulrich Haas, the then Vice-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, his declaration of independence, or his conduct of the proceedings.

## **3. Facts and Proceedings**

### **3.1 Summary of the Dispute**

5. The Parties entered into a contract on 9 September 2018 (“the Agreement”) whereby Player agreed to play professional basketball for Club for the 2018-2019 Turkish basketball season.

6. Claimants say that Club still owes them the following amounts:
- a) USD 133,501.00, net, due to Player as salary notwithstanding his having provided his playing services for the 2018-2019 season; and
  - b) USD 20,000.00, net, due to Agency as fees notwithstanding clause 11 of the Agreement which provided that such sum was to be paid not later than 30 November 2018.
7. The failure by Club to make the payments is what has brought about this arbitration.

### **3.2 The Proceedings before the BAT**

8. On 20 August 2019, Claimants filed a Request for Arbitration of that date in accordance with the BAT Rules. The non-reimbursable handling fee in the amount of EUR 2,940.43 was received in the BAT bank account on 5 September 2019.
9. On 23 September 2019, the BAT informed the Parties that Mr. Klaus Reichert SC had been appointed as the Arbitrator in this matter and invited the Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 14 October 2019 (the "Answer"). Further, the BAT fixed the advance on costs to be paid by the Parties by no later than 4 October 2019 as follows:

<i>"Claimant 1 (Mr. Phillip Michael Pressey)</i>	<i>EUR 3,559.57</i>
<i>Claimant 2 (CAA Sports LLC)</i>	<i>EUR 500.00</i>
<i>Respondent (Besiktas Basketbol)</i>	<i>EUR 4,000.00"</i>

10. The foregoing sums were received by the BAT (a shortfall of EUR 130.35 arose), as follows: on 25 September 2019, the amount of EUR 3,500.00 by Player; on 2 October 2019, the amount of EUR 500.00 by Agency; on 21 October 2019, the amount of EUR

3,444.22 by Player; and on 23 October 2019, the amount of EUR 485.00 by Agency.

11. On 16 October 2019, the BAT, *inter alia*, noted Respondent's failure to submit its Answer and granted it a final opportunity to file an Answer by 23 October 2019. Club did not file an Answer, and did not participate in this arbitration.
12. On 5 November 2019, the Parties were invited to set out (by no later than 12 November 2019) how much of the applicable maximum contribution to costs should be awarded to them and why. The Parties were also invited to include a detailed account of their costs, including any supporting documentation in relation thereto. Finally, the Parties were also notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.
13. On 5 November 2019, Claimants submitted their statement of costs. Club did not submit any statement.

#### 4. The Positions of the Parties

14. Claimants' position is as sought in their claims for relief in the Request for Arbitration:

*“(a) the Respondent be ordered to immediately pay to the Claimant 1 net USD 133.501,00 and the interest accruing from such amount until the payment;*

*(b) the Respondent be ordered to immediately pay to the Claimant 2 net USD 20.000,00 and the interest accruing from such amount until the payment;*

*(c) the Respondent be ordered to pay all BAT application fee plus costs of arbitration, legal fees and/or expenses related to this BAT case.”*

15. Club did not participate in this arbitration.

## 5. The Jurisdiction of the BAT

16. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in this arbitration, he will examine his jurisdiction *ex officio* on the basis of the record as it stands.
17. First, the Arbitrator notes that prior to his appointment, the Vice-President of the BAT has made a *prima facie* determination (as per Article 11.1 of the BAT Rules) that this arbitration could proceed following his examination of whether an arbitration exists providing for the dispute to be adjudicated under the BAT Rules. Once such a *prima facie* determination has been made the issue of jurisdiction passes to the Arbitrator for final determination as discussed in the next paragraph.
18. Secondly, the Arbitrator notes that, in accordance with Article 1.3 of the BAT Rules, he has the power to rule on his own jurisdiction, including on any objection with respect of the existence, scope or validity of the arbitration agreement. The Arbitrator, therefore, has the power to determine, finally, his jurisdiction.
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.<sup>1</sup>

22. The jurisdiction of the BAT over Claimants' claims is stated to result from the arbitration clause in the Agreement (clause 7), which reads as follows:

*"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 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."*

23. The arbitration clause is in written form and thus 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 clauses under Swiss law (referred to by Article 178(2) PILA).
25. The language of the arbitration clause is quite clear, namely, the Parties have opted for BAT arbitration.
26. The Arbitrator also notes that clause 11 of the Agreement expressly provides that "*club will pay agent's fee to the players agents*". This is a substantive obligation undertaken by Club, closely interrelated with the obligations undertaken in respect of Player. This is an important factor for the Arbitrator to take into account when considering his jurisdiction regarding the Agency although the Agreement is signed by Club and Player only.
27. For the above reasons, the Arbitrator decides, finally, that pursuant to Article 1.3 of the

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

BAT Rules he has jurisdiction to adjudicate the claims of both Claimants as against Club.

## 6. Other Procedural Issues

28. Article 14.2 of the BAT Rules specifies that “*the Arbitrator may [...] proceed with the arbitration and deliver an award*” if “*the Respondent fails to submit an Answer.*” 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 and the practice of the BAT.<sup>2</sup> However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
29. This requirement is met in the present case. Club was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules. It was also given sufficient opportunity to respond to Claimants’ Request for Arbitration. Club, however, and presumably, chose not to participate in this Arbitration.

## 7. Discussion

### 7.1 Applicable Law – *ex aequo et bono*

30. 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”.*

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<sup>2</sup> See *ex multis* BAT 0001/07; BAT 0018/08; BAT 0093/09; BAT 0170/11.

31. 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."*

32. As noted in paragraph 22 above, the arbitration clause in the Agreement expressly provides that the Arbitrator shall decide any dispute *ex aequo et bono*.

33. 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<sup>3</sup> (Concordat)<sup>4</sup>, 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."<sup>5</sup>*

34. 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."<sup>6</sup>

35. 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

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<sup>3</sup> 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).

<sup>4</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

<sup>5</sup> JdT 1981 III, p. 93 (free translation).

<sup>6</sup> Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717. pp.625-626.



*particular national or international law.”*

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

## **7.2 Findings**

37. 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 which the Arbitrator will examine the merits of the claims. This is a fundamental principle consistently found in BAT awards.

38. As regards the claims of Player, as already noted above he was retained by Club for the 2018-2019 season. The Agreement provides, at clause 2, for a base salary of USD 430,000.00, net of all Turkish taxes and charges, to be paid in ten equal monthly instalments of USD 43,000.00 running from September 2018 to June 2019. Clause 5 provides that the Agreement is fully guaranteed from the moment of its entry into force (as per clause 1, the passing of an initial medical test). Player duly provided his playing services for Club. Thus, in application of the doctrine of *pacta sunt servanda* Club is obliged to pay Player’s salary in full.

39. Player says that Club did not pay any part of the last three monthly instalments of USD 43,000.00 covering April to June 2019. Player also says that he was left short by USD 4,501.00 in respect of a previous instalment. These unpaid amounts total USD 133,501.00. There is no indication in the file that could cast any doubt on this assertion by Player. Club is, therefore, ordered to pay that amount to Player. The Player in the Request for Arbitration requests the payments “net”. Such request is construed – in light of the express wording of the Agreement – to mean net of all Turkish taxes and charges.

40. As regards the claims of Agency, as already noted above the Agreement provides, at

clause 11, for its agency fee of USD 20,000.00, net of all Turkish taxes and charges, to be paid by not later than 30 November 2018. The Arbitrator has no reason to doubt Agency's contention that the fee was not paid, and, therefore, Club is ordered to pay that amount to Agency. The Agency in the Request for Arbitration demands the payments "net". Such request is construed – in light of the express wording of the Agreement – to mean net of all Turkish taxes and charges.

41. Turning to interest, which Claimants claim on their respective unpaid amounts; as has been consistently found in BAT awards, interest at a rate of 5% per annum is generally awarded on unpaid sums of money and the Arbitrator sees no reason to depart from that approach in this matter. The only question is from when will such interest run.
42. As regards the claim of Agency, its fee was due to be paid to it on 30 November 2018, it was not paid, so in principle interest runs from the following day, namely, 1 December 2018. However, according to clause 5 of the Agreement, a "*delay of 30 days in payments to the Player and his agent will not be considered as the delay*". Therefore, interest actually runs from 31 December 2018, The Arbitrator sees no reason, in the circumstances of this case, to further defer the running of interest to a later date. The arbitration was commenced reasonably promptly after the end of the 2018-2019 season which is, in the Arbitrator's opinion, a relevant factor when considering the question of the commencement of the running of interest.
43. As regards the claim of Player, shortly after Club's delinquency in payments to him started, a warning letter dated 17 May 2019 was sent demanding a cure within five days. At that point in time, USD 47,501.00 was owed to Player. The payment was not forthcoming and, therefore, the Arbitrator considers that interest on USD 47,501.00 runs from 22 May 2019 (being five days after the warning letter). Player's salary instalment of May 2019 in the amount of USD 43,000.00 fell due on 15 May 2019. However, when determining the starting point for the interest the Arbitrator must also take clause 5 of the Agreement into account ("*The delay of 30 days in payments to the Player and his agent*

*will not be considered as the delay*”). Thus, the interests commence on 15 June 2018. Finally, Player’s last salary instalment was due on 15 June 2019. Again, taking into consideration clause 5 of the Agreement (“*The delay of 30 days in payments to the Player and his agent will not be considered as the delay*”), interest is ordered to run on that amount of USD 43,000.00 from 16 July 2019.

## 8. Costs

44. 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.
45. On 18 December 2019 – 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 5,950.00.
46. Considering that Claimants were the prevailing parties in this arbitration, it is consistent with the provisions of the BAT Rules that the fees and costs of the arbitration, as well as their reasonable costs and expenses, be borne by Club.
47. Claimants seek USD 27,169.68 for attorney’s fees, and the non-reimbursable handling fee of EUR 3,000.00. Claimants do not make a distinction as between the amount of attorney’s fees sought by reference to their respective individual claims.

48. The Arbitrator notes that, according to Article 17.4 of the BAT Rules, the maximum contribution he can award to Player in respect of his legal costs and expenses is EUR 10,000.00, and the maximum contribution he can award to Agency in respect of its legal costs and expenses is EUR 5,000.00. This results in a maximum total of EUR 15,000.00, which is considerably less than the amount sought by Claimants (USD 27,169.68). As a matter of the BAT Rules, therefore, the Arbitrator cannot award Claimants the amount they seek.
49. The question arises as to how much Claimants should be awarded as against Club in respect of their legal costs and expenses. Of particular importance for the Arbitrator is the fact that Claimants were only required to make one substantive filing in this arbitration, being the Request for Arbitration. The claims were straightforward and not defended by Club.
50. Taking into account the factors required by Article 17.3 of the BAT Rules, the maximum amount prescribed under Article 17.4 of the BAT Rules, and the specific circumstances of this case, the Arbitrator holds that EUR 7,000.00 represents a fair and equitable contribution by Club to Claimants' legal costs and expenses, including the non-reimbursable handling fee. In coming to this conclusion the Arbitrator also takes into account that in the letter dated 5 November 2019, the BAT Secretariat advised the parties to submit a "detailed account of their costs", which the Claimants failed to do. For the avoidance of doubt, this ruling operates as between Claimants and Club, and in no way gives rise to any determination as between Claimants and their Counsel.
51. The Arbitrator decides that in application of Article 17.3 of the BAT Rules:
- (i) BAT shall reimburse EUR 1,979.22 to Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the BAT President;
  - (ii) Club shall pay EUR 5,950.00 to Claimants, being the difference between the costs



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advanced by them and the amount they are going to receive in reimbursement from the BAT; and

- (iii) Club shall pay EUR 7,000.00 to Claimants, representing a contribution by it to their legal fees and expenses.

## **9. AWARD**

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

- 1. Besiktas Basketbol Yatirimlari Sanayi ve Ticaret A.S. shall pay Mr. Phillip Michael Pressey USD 133,501.00, net of all Turkish taxes and charges, as outstanding salary together with interest at 5% per annum**
  - a. on USD 47,501.00 from 22 May 2019 until payment in full,**
  - b. on USD 43,000.00 from 15 June 2019 until payment in full, and**
  - c. on USD 43,000.00 from 16 July 2019 until payment in full.**
- 2. Besiktas Basketbol Yatirimlari Sanayi ve Ticaret A.S. shall pay CAA Sports LLC USD 20,000.00, net of all Turkish taxes and charges, as outstanding agency fees together with interest at 5% per annum from 31 December 2018 until payment in full.**
- 3. Besiktas Basketbol Yatirimlari Sanayi ve Ticaret A.S. shall pay Mr. Phillip Michael Pressey and CAA Sports LLC jointly EUR 5,950.00 as reimbursement for their arbitration costs.**
- 4. Besiktas Basketbol Yatirimlari Sanayi ve Ticaret A.S. shall pay Mr. Phillip Michael Pressey and CAA Sports LLC jointly EUR 7,000.00 as a contribution to their legal fees and expenses.**
- 5. Any other or further-reaching requests for relief are dismissed.**



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Geneva, seat of the arbitration, 19 December 2019

Klaus Reichert  
(Arbitrator)