ARBITRAL AWARD

(BAT 1627/20)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Amani Khalifa

in the arbitration proceedings between

Mr. Jason A. Rich

- Claimant -

represented by Mr. Giovanni Allegro, attorney at law,

vs.

Gaziantep Basketbol ve Spor A. S.
Karatas Mahallesi 103410 Nolu Cadde No: 3,
Sahinbey Spor Salonu, Sahinbey/Gaziantep, Turkey

- Respondent -

represented by Ms. Damla Su Erbas, attorney at law,

1. The Parties

1.1 The Claimant

1. The Claimant is Mr. Jason A. Rich, an American professional basketball player (the "Claimant" or the "Player").

1.2 The Respondent

2. The Respondent is Gaziantep Basketbol ve Spor A. S., a professional basketball club located in Turkey (the "Respondent" or the "Club" and together with the Claimant the "Parties").

2. The Arbitrator

3. On 7 December 2020, Prof. Ulrich Haas, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Ms. Amani Khalifa as arbitrator (the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 (the "BAT Rules").

4. Neither 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 Dispute

5. On 23 October 2019, the Claimant entered into a contract with the Respondent, in which

he agreed to play for it in the 2019-2020 season, from 25 November 2019 to 25 April 2020 (the "Employment Agreement"). Under Clause 4 of the Employment Agreement the Respondent agreed to pay the Claimant a monthly salary of USD 30,000.00 net, for a total of USD 180,000.00 net for the season as follows:

> *"4. The total guaranteed net value of the base salary in this Agreement shall be One Hundred Eighty Thousand Dollars (US$ 180,000.00 USD NET)* ***plus daily pro rate for service beyond April 25 through the last regular season or playoff game for the 2019-2020 season****. The term of the Agreement shall end on the last official game of the League. During the term of this Agreement, the CLUB agrees to pay the PLAYER as follows.*
>
> *A. Payments*
>
> | | |
> |---|---|
> | *November 25, 2019* | *US$ 30,000.00 NET* |
> | *December 25, 2019* | *US$ 30,000.00 NET* |
> | *January 25, 2020* | *US$ 30,000.00 NET* |
> | *February 25, 2020* | *US$ 30,000.00 NET* |
> | *March 25, 2020* | *US$ 30,000.00 NET* |
> | *April 25, 2020* | *US$ 30,000.00 NET* |
>
> ***Beginning April 25, 2020 the Player will be paid a daily pro rate of $1,000.00 per day concluding on the first day after the last regular season or playoff game that the Club plays in during the 2019-20 season***
>
> | | |
> |---|---|
> | *TOTAL:* | *US$ 180,000.00 plus pro rate NET* |
>
> ***B. Bonuses***
>
> *TURKISH BASKETBALL SUPER LEAGUE*
>
> | | |
> |---|---|
> | *If The Club advances to Play-Off* | *US$ 5,000.00. NET* |
> | *If The Club advances to Play-Off Semi-Final* | *US$ 10,000.00 NET* |
> | *If The Club advances to Play-Off Final* | *US$ 20,000.00. NET* |
> | *If The Club wins the Play-Off Championship* | *US$ 30,000.00 NET* |
>
> *TURKISH CUP*
>
> | | |
> |---|---|
> | *If The Club advances to Final 8* | *US$ 2,500.00. NET* |
> | *If The Club advances to Semi Final* | *US$ 5,000.00 NET* |
> | *If The Club Advances to Final* | *US$ 10,000.00. NET* |
> | *If The Club wins Championship* | *US$ 15,000.00 NET* |
>
> *EUROPEAN COMPETITIONS*
>
> | | |
> |---|---|
> | *If The Club reaches to Top 16* | *US$ 2,500.00 NET* |

If The Club reaches to Final Four	*US$ 5,000.00. NET*
If The Club reaches to Final	*US$ 7,500.00. NET*
If The Club wins the Competition	*US$ 10,000.00. NET*

The Club further reserves its rights for issuing other special bonuses. The abovementioned bonuses are non-cumulative and the Player will only be entitled to the highest achieved bonus in each Championship. The bonuses shall be paid on the last day of the month in which they are earned.

The Club will pay the bonus in full to the player, even if he is not in the roster because of technical decision or injury (injury of the Player from to his activities outside of his services to the Club that occur due to his fault or negligence is excluded).

The CLUB shall be responsible for all appropriate Turkish taxes, customs, duties, and other withholdings.

In the case of scheduled payments not being made to the Player by the Club within Thirty (30) days of the scheduled payment date, The Agent´s [sic] *will send a warning letter to The Club. If The Club fails to pay the outstanding amount within 5 (five) days upon receiving the warning letter, The Player will have right to terminating the contract unilaterally by a written notice to the Club (The Club's official email address of boraydai@gmail.com on correspondence is accepted as the valid communication point in such case). The Player shall then be free to sign with the team of his choice and all salary payments shall be due to Player immediately. Club shall be required to release Player immediately to any team that the Player desires and Club shall have no right to ask for any transfer fee."*

6. On 19 March 2020, the basketball leagues in Turkey were postponed indefinitely due to the COVID-19 pandemic. The Claimant's agent sent an email to the Respondent stating that the Claimant wanted to find a "mutual resolution" to terminate the Employment Agreement because of the pandemic.

> *"I am writing to you as I am informed of the postponement of the Turkish BSL league per developments with the evolving COVID-19 crisis. I am sure we all understand at this point the health and safety of the players and their families, team officials, and all those that work for the club will be the focus of our collective efforts. I am hoping you will return the texts I have sent and my to you calls today Thursday March 19 as I would work diligently to find a mutual resolution for my client Jason Rich and the Club in face of this emerging world emergency. Please understand we are doing everything reasonably possible today to speak with you,"*

7. On the same day, the parties signed a settlement agreement (the "Settlement Agreement") in which the Respondent undertook to pay USD 30,000.00 net on or before 8 April 2020. In exchange, the Claimant agreed to forgo his remaining salary if the Club

made full payment on time. The Settlement Agreement provides as follows:

> *"In consideration of the mutual promises hereinafter contained, the parties hereto promise and agree as follows:*
>
> 1*. The Player wishes to unilaterally terminate the agreement with the CLUB dated October 23, 2019 (hereinafter called "the Original Agreement").*
>
> *2. The CLUB agrees to provide the following to the PLAYER:*
> - *Two (2) one-way plane ticket from Turkey to USA. The ticket shall be at the CLUB'S expense.*
> - *The CLUB shall pay to the PLAYER, in US Dollars on or before the dates stated below, the following net of taxes amounts, each of which shall be proven by a copy of a wire transmission receipt presented to the PLAYER and the AGENTS:*
>   *i. April 8, 2020 $30,000.00 USD net*
> - *If such amount is not received seven (7) days of the due date (an official bank wire transmission receipt is acceptable proof), the full amount of the salary due to the PLAYER under the Original Agreement shall become due and payable to the PLAYER and the CLUB shall have to pay those amounts in full. Should the aforementioned occur, the Club also agrees to waive any and all rights to having the full payment of the salary to the player offset by any sums of money that the player earns in a new professional basketball employment contract subsequent to this agreement going into effect. Should it be necessary, and simply stated, the Club agrees to pay the Player his full salary and to have no claim for relief as a result of the Player entering into a new contract with a professional basketball club subsequent to this agreement.*
> - *Prior to the PLAYER's departure, the CLUB shall provide the PLAYER with a certificate documenting that the correct amount of taxes have been paid. to the Turkish Tax Office in the name of the PLAYER. This certificate shall be in such form so as to assure that the PLAYER receives a United States tax credit for all payments received. The CLUB shall have no responsibility to pay any tax obligation for the PLAYER in the United States."*

8. On 14 April 2021, the Respondent paid USD 21,000.00 of the USD 30,000.00 settlement amount.

9. The Claimant claims that he sent reminders by WhatsApp claiming the outstanding sum, but these messages have not been submitted on the record.

10. On 14 July 2020, the Claimant emailed the Respondent requesting payment of the

outstanding amount under the Settlement Agreement. The email (subject "Final Notice") indicated the Claimant's intention to commence BAT proceedings as follows:

> *"I am reaching out to you in an official capacity about the remaining portion owed from the agreed upon settlement. Partial payment does not conclude the settlement. It's been over 11 weeks since the agreed upon payment was due. Therefore I'm giving the club five days to pay the remaining balance due. If not I will be forced to take my legal right per the settlement agreement to impose a BAT lawsuit for the entirety of the the* [sic] *contract."*

11. The Respondent has not paid the amounts specified in the 14 July 2020 letter by the deadline or at all.

3.2 The Proceedings before the BAT

12. On 19 November 2020, the Claimant submitted a Request for Arbitration dated 9 October 2020 in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 3,000.00 was received in the BAT bank account on 16 October 2020.

13. By letter dated 8 December 2020, the BAT Secretariat (a) notified the Parties of the Arbitrator's appointment, (b) invited the Respondent to file its Answer to the Request for Arbitration in accordance with Article 11.4 of the BAT Rules by no later than 5 January 2021, and (c) fixed the amount of the Advance on Costs to be paid by the Parties by no later than 21 December 2020 as follows:

> *"Claimant (Mr Jason A. Rich)* *EUR 4,000.00*
> *Respondent (Gaziantep Basketbol ve Spor A.S.)* *EUR 4,000.00"*

14. On 30 December 2020, by email, the Respondent requested an extension of the time limit to provide a signed Answer until 20 January 2020. The Respondent stated that it could provide an unsigned Answer by the 5 January 2021 deadline.

15. On the same day, by email, the BAT invited the Respondent to submit an unsigned Answer by 5 January 2021 and a signed Answer by 20 January 2021.

16. The Respondent submitted an unsigned Answer on 4 January 2021 and a signed Answer on 20 January 2021.

17. By letter dated 21 January 2021, the BAT Secretariat (a) acknowledged receipt of the Claimant's share of the Advance on Costs; (b) acknowledged receipt of the Respondent's Answer; and (c) invited the Claimant to substitute for the Respondent's share of the Advance on Costs by 1 February 2021.

18. By letter dated 17 March 2021, the BAT Secretariat (a) acknowledged receipt of the full Advance on Costs, the Respondent's share having been paid by the Claimant; and (b) invited the Claimant to comment on the Answer and provide information about mitigation efforts by 31 March 2021.

19. On 30 March 2021, the Claimant provided comments on the Respondent's Answer.

20. On the same day, by email, the BAT Secretariat invited the Respondent to comment on the Claimant's reply by 7 April 2021. The Respondent provided its rejoinder on 6 April 2021.

21. By letter on 26 April 2021, the BAT Secretariat (a) acknowledged receipt of the Respondent's rejoinder; (b) declared the exchange of submissions complete; and (c) invited the parties to provide detailed cost submissions by 3 May 2021. The Respondent provided cost submissions on 28 April 2021. The Claimant provided cost submissions on 1 May 2021.

4. The Positions of the Parties

4.1 The Claimant's Position

22. The Claimant claims USD 90,000.00 net of all taxes in unpaid salaries (for February, March and April 2021) under Clause 4 of the Employment Agreement, interest of 5% per annum from 14 July 2020 (the date of the final notice) until the date of full payment, arbitration costs and legal fees.

23. The Claimant also claims unspecified and unquantified "*bonus payments*" and "*late payment fees*". It is not apparent which, if any, of the provisions of the Employment or Settlement Agreements could form the basis of an entitlement to the claim for late payment fees.

24. The Claimant confirms that his claim is net of Turkish taxes. Clause 4 of the Employment Agreement provides: "*The CLUB shall be responsible for all appropriate Turkish taxes, customs, duties, and other withholdings*."

25. The Claimant claims the Respondent agreed to pay USD 30,000.00 net under Clause 2 of the Settlement Agreement as consideration for the termination of the Employment Agreement. He asserts that the Respondent failed to pay the full amount by the due date (8 April 2020) leaving a shortfall of USD 9,000.00 despite multiple requests for payment by WhatsApp and email.

26. The Claimant claims that, under the clear terms of the Settlement Agreement, because the Respondent missed the deadline in the 14 July 2020 letter and still has not paid the outstanding amount, he is entitled to the full sum that he would have received under the Employment Agreement had it remained in force i.e. USD 90,000.00 net of taxes.

27. The Claimant avers that the BAT COVID-19 Guidelines (the "BAT Guidelines") do not

apply to this dispute, as the Settlement Agreement was concluded when the Parties were already aware that the pandemic had led to the suspension of the Turkish basketball league. The Claimant notes that the BAT Guidelines are intended to regulate pre-pandemic agreements and that they are "*certainly not relevant to parties that had entered settlements as a result of the pandemic*".

28. The Claimant claims that the Respondent was already in default with payments prior to lockdown that would not be subject to a reduction under Paragraph 16 of the BAT Guidelines.

29. The Claimant refers to Paragraph 10 of the BAT Guidelines as justifying the contention that the Employment Agreement, having been terminated before the Lockdown Period, should be presumed to have not been terminated due to the Covid-19 crisis. On that basis, the Claimant argues that the adjustment mechanism provided by the BAT Guidelines should not apply.

30. The Claimant claims that he used his best efforts to mitigate his losses following the termination, but unfortunately it was impossible to find new employment because of the pandemic.

31. In his Request for Arbitration dated 9 October 2020, the Claimant requested the following relief:

> *"*[…] *The claimant requests in particular that the honourable Arbitrator:*
>
> *- declares the right of the Player Mr. Jason A Rich to receive from the Respondent Gaziantep Basketbol ve Spor A.S the amount of USD* ***90.000,00*** *net of all taxes as salaries, plus 5% interests from the date of the final notice (14th July) at the date of the present (16 october) , for USD €* [sic] *1.158,90, plus further interest until the final payment*
>
> *- Forces the club to pay all costs involved as legal expanses [sic], BAT fee etc"*

32. In the body of the Request for Arbitration, the Claimant also claims bonuses and late

payment penalties in passing as follows:

> *"*[…] *For the above reasons the Claimants ask that the Honourable Arbitrator to impose to the Club to honour the full amount of the contract, for a total of USD 90.000 plus interest plus bonuses plus the 50 delays penalty fees included in that contract."*

33. The Claimant has not quantified these claims for bonuses and late payment penalties.

4.2 Respondent's Position

34. The Respondent concedes it has not paid the full amount specified in the Settlement Agreement. The Respondent disagrees that the result should be that the Claimant can claim the full USD 90,000.00 under the Employment Agreement.

35. The Respondent emphasises that the termination of the Employment Agreement was "*unilateral*".

36. The Respondent agrees that under the Employment Agreement it paid the November and December 2019 and January 2020 payments but the February, March and April 2020 payments were outstanding when the Employment Agreement was terminated.

37. The Respondent characterises the payment referred to in the Settlement Agreement as corresponding to the February 2020 payment under the Employment Agreement. The Respondent acknowledges that the payment made under the Settlement Agreement was short by USD 9,000.00 but emphasises that the USD 21,000.00 paid was more than two thirds of the total USD 30,000.00 owed. On that basis, it argues that it is disproportionate for the Claimant to claim the full amount under the Employment Agreement. The Respondent claims that this would be contrary to the principle of *ex aequo et bono* and that the Claimant would be unjustly enriched if paid the full amount of his remaining salaries under the Employment Agreement.

38. The Respondent also emphasises that there has been a change in circumstances that has rendered performance of the Settlement Agreement excessively burdensome due to the social, political and economic circumstances in Turkey which, combined with the pandemic, have resulted in significant financial difficulties for the Respondent. The Respondent refers to BAT 1336/19 as demonstrating the application of change in circumstances as justifying a modification of contractual responsibilities. Moreover, the Respondent refers to a judgment of the 4th Civil Chamber of Bursa Regional Court of Justice applying the hardship doctrine in the Turkish Code of Obligations to a claim for rent adjustment in light of the COVID-19 pandemic.

39. The Respondent claims that it acted in good faith by paying more than 70% of the amount owed under the Settlement Agreement and that the Claimant's claim for the higher amount under the Employment Contract is in bad faith.

40. The Respondent disagrees that it is liable to pay the March and April 2020 salaries because cancellation of the league meant the Claimant would not have been playing during this period even if the Employment Agreement had remained in force. The Respondent refers to BAT 0529/14 as demonstrating this would be contrary to *ex aequo et bono*.

41. In the alternative, if the Respondent is found liable for amounts under the Employment Agreement, it avers that the amounts should be reduced under the BAT Guidelines. The Respondent refers to the email of 19 March 2020 as demonstrating that the termination of the Employment Agreement and entry into the Settlement Agreement were prompted by the pandemic. Therefore, the BAT Guidelines apply to the dispute and the Employment Agreement cannot be considered to have been terminated before the COVID-19 crisis (which would be caught by Paragraph 10 of the BAT Guidelines and prevent its application).

42. The Respondent states that if the Employment Agreement had not been terminated, the

Claimant's March and April 2020 salaries would have been reduced by 50% according to the BAT Guidelines. Therefore, the Respondent should be able to reduce the amount requested for March and April salaries by 50%.

43. As regards the Claimants claim for bonuses, the Respondent avers that these were not provided for in the Settlement Agreement and are therefore not due. It further claims that, in any event, pursuant to Clause 4.B. of the Employment Agreement the conditions for payment of bonuses were not satisfied. In particular, the Respondent did not participate in the Turkish Cup, was eliminated from FIBA Basketball Champions League at the group stages and the Turkish Basketball Super League Play-Offs were cancelled.

44. The Respondent denies the Claimant's allegation that it paid salaries late before the Lockdown period. It asserts the Claimant was always paid his salary within 30 days of the due date and that this allegation is unsubstantiated.

45. In its rejoinder dated 6 April 2021, the Respondent requested the following relief:

> *"I. The Honorable Arbitrator is asked to deny all claims and require the Claimant to compensate the legal fees and expenses of the Respondent.*
>
> *II. Without prejudice to the abovementioned, in the rejection scenario of the first clause of the conclusion, the Honorable Arbitrator is therefore asked to deny the surplus claims that do not meet the claimed non-paid salaries, i.e. USD 81.000 and require the Claimant to compensate the legal fees and expenses of the Respondent.*
>
> *III. Without prejudice to the abovementioned, in the rejection scenario of the first and second clause of the conclusion, the Honorable Arbitrator is asked to apply the BAT Covid-19 Guidelines on this specific case and to decide on payment of an amount between USD 9.000 and USD 39.000 at most and require the Claimant to compensate the legal fees and expenses of the Respondent."*

5. The jurisdiction of the BAT

46. 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).

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

48. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA[1].

49. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Clause 4 of the Settlement Agreement which provides:

> *"4. Any dispute arising from or related to this Agreement 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*."

50. Clause 10 of the Employment Agreement also contains a modified BAT arbitration clause which reads as follows:

> *"10. Any dispute arising from or related to the present contract shall be submitted to the FIBA 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 (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono. The Arbitrator shall bring award following principle pact sun* [sic] *servanda and shall not mitigate or modify any numbers and amounts stipulated in the contract and mutually agreed by parties. The award brought by BAT Arbitrator shall be obligatory for all parties with immediate effect and with no right to for* [sic] *appeal."*

---

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

51. Both the Settlement Agreement and the Employment Agreement are in written form and thus the arbitration agreements fulfil the formal requirements of Article 178(1) PILA.

52. With respect to substantive validity, the Arbitrator considers that there is no indication on the record that could cast doubt on the validity of the arbitration agreements under Swiss law (referred to by Article 178(2) PILA).

53. The wording "[a]*ny dispute arising from or related to* […]" in both the Settlement Agreement and the Employment Agreement clearly cover the present dispute.

54. The Respondent has not contested the jurisdiction of the Arbitrator.

55. For these reasons, the Arbitrator has jurisdiction to decide the Claimant's claim.

6. Discussion

6.1 Applicable Law – ex aequo et bono

56. 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".*

57. Under the heading "*Law Applicable to the Merits* ", Article 15 of the BAT Rules reads as follows:

> *"15.1 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.*
>
> *15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead."*

58. Both Clause 4 of the Settlement Agreement and Clause 10 of the Employment Agreement provide that the Arbitrator shall decide the dispute *ex aequo et bono*. However, Clause 10 of the Settlement Agreement goes on to say:

> *"The Arbitrator shall bring award following principle pact sun* [sic] *servanda and shall not mitigate or modify any numbers and amounts stipulated in the contract and mutually agreed by parties."*

59. Although the clause states that the Arbitrator must decide the matter in accordance with the principle of *pacta sunt servanda*, arbitrators in prior BAT cases have held that such clauses do not alter or superseded the parties' choice that the arbitrator should decide the dispute *ex aequo et bono*.

60. In BAT 1158/18, the arbitration clause provided that, in respect of payment and financial matters, the arbitrator should decide "*respecting principle pacta sunt servanda and shall not have the right to decide ex aequo et bono".* In that case, the arbitrator held that since the reference to the principle of *pacta sunt servanda* was not a choice of a particular national law or set of rules but rather a reference to a single legal principle that applies under many different laws, the validity of this choice was "*questionable*" under Swiss law and the BAT Rules. However, the issue was moot in that case, because the Arbitrator´s findings could be based both on the principle of *ex aequo et bono* and in the principle of *pacta sunt servanda*.

61. In BAT 1097/17, the arbitrator held that, although the clause provided that he should

have regard to the principle of *pacta sunt servanda,* this was entirely consistent with the parties' choice for the arbitrator to decide the dispute *ex aequo et bono* because the principle featured prominently in BAT case law.

62. Similarly, in BAT 1516/20, the arbitrator considered a clause that provided that "[t]*he arbitrator shall decide the dispute ex pacta sunt servanda, based on the provisions of this contract without the power to moderate them or to decline their enforcement*". The arbitration clause further provided that the dispute "*shall be resolved in accordance with the BAT Arbitration Rules*". The arbitrator concluded "[w]*hile the Agreements do not expressly provide that the Arbitrator shall decide the dispute ex aequo et bono, the reference to the BAT Rules -including Article 15.1- in the arbitration clause, and the fact that the Parties have not chosen any other particular national or international law, can be regarded as an implicit agreement of the Parties to have their dispute decided ex aequo et bono. Additionally, the principle of pacta sunt servanda, which is expressly mentioned in the arbitration clause, is consistent with justice and equity*."

63. In the present case, the Arbitrator notes that the Parties have similarly referred to the application of *ex aequo et bono* to decide the issues in disputes. Therefore, the Arbitrator finds that the Claimant's claims should be decided *ex aequo et bono*.

64. 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*

---

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.

> *not inspired by the rules of law which are in force and which might even be contrary to those rules."*[4]

65. 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*".

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

6.2 Findings

67. The Claimant's principal claim is for USD 90,000.00 net of Turkish taxes in unpaid salaries for February, March and April 2020 under Clause 4 of the Employment Agreement and Clause 2 of the Settlement Agreement, which sets out the consequences of the Respondent's failure to pay the settlement amount of USD 30,000.00 net by 15 April 2020. The Claimant also claims interest of 5% per annum from 14 July 2020 (the date of the final notice) until the date of full payment.

68. The Settlement Agreement provides that '*the Player wishes to unilaterally terminate the agreement with the Club*'. By this, the Arbitrator understands the Parties to be confirming that the Claimant initiated the agreed termination of the Employment Agreement.

69. Clause 2 of the Settlement Agreement is clearly drafted in a manner that revives the Claimant's claim under the Employment Agreement in the event of the Respondent's default. It provides that:

> *"If such amount is not received seven (7) days of the due date (an official bank wire transmission receipt is acceptable proof), the full amount of the salary due to the PLAYER*

---

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

under the Original Agreement shall become due and payable to the PLAYER and the CLUB shall have to pay those amounts in full."

70. The intent to refer to the Employment Agreement is clear.

71. The Respondent does not contest that it breached the Settlement Agreement by not paying the full amount (USD 30,000.00) by 8 April 2020 or at all. The Respondent paid only USD 21,000.00 of this sum on 14 April 2020, leaving a shortfall of USD 9,000.00. This satisfies the condition in Clause 2 of the Settlement Agreement for the Claimant's claim under the Employment Agreement to be revived.

72. Clause 4 of the Employment Agreement sets out the Claimant's monthly salary of USD 30,000.00 net as follows:

Month	**Amount**	**Due date**
November 2019	USD 30,000.00 net	25 November 2019
December 2019	USD 30,000.00 net	25 December 2019
January 2020	USD 30,000.00 net	25 January 2020
February 2020	USD 30,000.00 net	25 February 2020
March 2020	USD 30,000.00 net	25 March 2020
April 2020	USD 30,000.00 net	25 April 2020

73. The parties agree that the payments for November and December 2019 and January 2020 have been made in full, while the payments for February, March and April 2020 are outstanding. The Respondent considers the payment of USD 21,000.00 made under the

Settlement Agreement must be credited towards the February 2020 payment.

74. The Respondent contests the amount owed on three grounds: change of circumstances causing hardship, the application of the BAT Guidelines and excessive recovery/unjust enrichment.

6.2.1 Change in circumstances

75. The Respondent argues that since signing the Settlement Agreement, there has been a change in circumstances that has rendered the performance of its obligations excessively burdensome so as to justify a modification of the agreed terms of the contract. The Respondent refers to the social, political and economic circumstances in Turkey and the Covid-19 pandemic.

76. Previous BAT cases have emphasised the importance of the principle of *pacta sunt servanda* when parties have put forward a *clausula rebus sic stantibus* argument.[5]

77. Similarly, the Settlement Agreement was a short-term contract, and there is no evidence that the Respondent attempted to discuss its inability to pay the full settlement amount with the Claimant before the BAT proceedings commenced and the Respondent has not put forward any evidence of its financial situation. Further, while the Respondent argues that being held to its payment obligations would cause hardship, BAT Arbitrators have consistently held that financial hardship is not a valid defence.[6] The Respondent has cited Turkish jurisprudence on this topic, however, Turkish law is not applicable in the present case.

---

5 See, e.g., BAT 1187/18, para. 37; BAT 1336/19, para. 41.

6 See, for instance, BAT 1187/18, para. 37.

78. In any event, to establish a defence of hardship or *imprévision*, the Respondent would be required to demonstrate that the circumstances affecting its ability to perform its obligations were unforeseeable. However, the Settlement Agreement was concluded on 19 March 2020. At that time, the Parties were aware of the suspension of the Turkish league which is demonstrated by the email from Mr. Tobin to the Respondent on the same date which states in the relevant part that *"I am writing to you as I am informed of the postponement of the Turkish BSL league per developments with the evolving COVID-19 crisis*." This email precipitated the conclusion of the Settlement Agreement.

79. Whilst it may be correct that the Respondent could not have foreseen the full scale of the impact that COVID-19 would have when it concluded the Settlement Agreement, it was already aware that the league had been suspended and therefore, at that point, it was foreseeable that the pandemic would have a financial impact on the Respondent.

80. For these reasons, the Arbitrator considers that the Respondent has failed to establish a defence to the Claimant's claim based on change in circumstances.

6.2.2 BAT Guidelines

81. The parties disagree as to whether the BAT Guidelines apply. The BAT Guidelines are not binding rules, and the Arbitrator does not propose to apply them in this way. However, the Respondent has cited them and, based on the circumstances of the case, the Arbitrator considers it fair and appropriate to consider them. The termination of the Employment Agreement and entry into the Settlement Agreement were clearly prompted by the pandemic, as the email of 19 March 2020 makes clear.

82. The Arbitrator accepts the Claimant's argument that the BAT Guidelines do not themselves apply to reduce the sums otherwise payable to the Claimant because the parties knew that the league had been suspended when they concluded the Settlement Agreement. In this regard, Paragraph 4 of the BAT Guidelines provides:

> *"Absent any general grounds for invalidity, amicable settlements entered into with a view to addressing the consequences of the COVID-19 crisis will be respected by the arbitrator. This is irrespective of whether the contents of the settlement are consistent with the further principles set out below."*

83. Given the clear language of this provision and the absence of any general grounds for invalidity, the Arbitrator accepts the Claimant's submission that the BAT Guidelines do not apply to reduce the Claimant's claim.

6.2.3 Unjust enrichment/excessive recovery

84. The Respondent's final defence to the claim is that the Claimant would be unjustly enriched by a disproportionate penalty if the full amount of his outstanding salary were awarded.

85. In BAT 1560/20, the arbitrator considered whether a clause in a settlement agreement reviving a claim under the original contract was enforceable. In that case, consistently with established BAT case law, he held that the purpose of a similar clause was, essentially, to penalise the respondent breaching its contractual commitments under the termination agreement and concluded that the clause was therefore a penalty that was reviewable in accordance with well-established BAT case law. The arbitrator further held that:

> *"95. Contractual penalty clauses are permissible in principle, pursuant to BAT jurisprudence. They are, however, subject to careful judicial scrutiny. A clause which imposes a detriment on the breaching party which is out of all proportion to any legitimate interest of the innocent party may be found to be unenforceable, or moderated in its application.*
>
> *96. Whether a penalty clause is excessive has to be determined on a case-by-case basis. BAT jurisprudence has identified a number of factors that need to be considered in this context, including: (i) the damage suffered by the creditor as a result of the contractual breach; (ii) the severity of the breach and the conduct of the debtor; (iii) the economic situation of the debtor; and (iv) the creditor's opportunities to mitigate the (incurred or prospective) damage (see, for example, BAT 0826/16)."*

86. The Arbitrator considers that this reasoning is equally applicable in the present case. Clause 2, third bullet point of the Settlement Agreement revives the Claimant's claim under the Employment Agreement in case of breach with the result that the Claimant can recover three times the agreed settlement figure. It therefore functions as a contractual penalty intended to incentivise strict performance with the terms of the Settlement Agreement. Although these clauses are upheld, applying *ex aequo et bono* principles, they must be carefully scrutinised to prevent excessive recovery.

87. Taking the factors set out above in turn, the actual harm suffered by the Claimant due to the Respondent's partial performance of its obligation to pay the full settlement sum is relatively low. The Claimant received USD 21,000.00 out of a total of USD 30,000.00 leaving only USD 9,000.00 unpaid which is a mere 10% of the sum claimed by way of penalty. For the same reason, the severity of the Respondent's breach is also relatively low, and the Arbitrator accepts that its payment of more than two thirds of the settlement amount is evidence of its attempt to comply with its obligations in good faith. As to the third factor, the Respondent claims that its financial situation has been impacted adversely by COVID-19 following suspension and cancelation of leagues and because of the need to play matches without spectators. This is undoubtedly correct. Finally, the Arbitrator also accepts that the Claimant had little opportunity to mitigate his losses due to the pandemic.

88. In light of the above, the Arbitrator considers the Claimant's claim for USD 90,000.00 to be excessive in the particular circumstances of this case. In particular, this claim does not account for USD 21,000.00 actually received by the Claimant under the Settlement Agreement (which the Claimant did not properly disclose in its Request for Arbitration) and to that extent, includes an element of double-counting.

89. Stating the Claimant's possible claim at its highest under the Employment Agreement and the Settlement Agreement, the potential penalty that the Respondent could be liable for is USD 69,000.00 before any reduction to prevent excessive recovery is applied in

accordance with the principles outlined above.

90. Applying these principles, the Arbitrator considers that a claim for the balance of unpaid salaries under the Employment Agreement would be disproportionate and excessive. Deciding *ex aequo et bono*, the Arbitrator finds that the sum of USD 69,000.00 should be reduced by 25% to take account of the small sum outstanding under the Settlement Agreement and the Respondent's financial situation, yielding an overall claim value of USD 51,750.00. The Arbitrator notes this is roughly 12% higher than the USD 46,200.00 that would have become due to the Claimant if the BAT Guidelines had been applied to the remaining sums owed under the Employment Agreement (assuming a 10% reduction on the first USD 3,000 and a 50% reduction thereafter) in the absence of the Settlement Agreement. This is a fair outcome considering the Respondent freely agreed to pay the "full" salary owing under the Employment Agreement in the event of its default and because it did not, at least on the face of the record, attempt to agree payment of the outstanding USD 9,000.00 within a reasonable time or at all. Because penalties, if proportionate, should generally be upheld and applying the principle of *pacta sunt servanda,* it is right and proper that the Respondent should be worse off than if it had simply negotiated with the Claimant to reduce its liability on the basis of the BAT Guidelines. This is because it could have achieved a significant cost saving based on the deal negotiated according to which it would have paid one month's salary instead of three and because the Claimant accepted this, reduced sum in exchange for prompt payment and did not receive the benefit of the bargain it struck.

91. The Claimant claims this sum "*net of all taxes*" in his request for relief but has also confirmed in his submissions by reference to Clause 4 of the Employment Agreement ("*The CLUB shall be responsible for all appropriate Turkish taxes, customs, duties, and other withholdings*.") that his claim is net of Turkish taxes. The Arbitrator notes in this regard that the late payment clause in the Settlement Agreement (Clause 2, third bullet point) does not specify whether the Claimant is entitled to "*the full amount of the salary due to the PLAYER under the Original Agreement*" gross or net of taxes, although the

settlement sum and the salaries under the Employment Agreement are both net. Reading this in context, this should be interpreted as net of taxes. For completeness, the Arbitrator notes that the Clause 4.B. of the Employment Agreement provides that "*The CLUB shall be responsible for all appropriate Turkish taxes, customs, duties, and other withholdings*" and Clause 2 of the Settlement Agreement (last sentence of the fourth bullet point) reads "[t]*he CLUB shall have no responsibility to pay any tax obligation for the Player in the United States*". The Arbitrator therefore finds that the USD 51,750.00 in unpaid salaries due under the Employment Agreement is owed net of Turkish taxes.

6.2.4 Bonuses and late payment fees

92. In the body of the Request for Arbitration, the Claimant also claims unspecified bonuses and late payment fees. He has not included these claims in his prayers for relief or quantified either claim.

93. It is a settled principle of BAT case law that the Claimant bears the burden of proof. The Claimant has not identified the facts underlying his bonus claim. Moreover, neither the provisions of the Employment Agreement nor the Settlement Agreement appear to support a claim for late payment penalties. In the absence of proper substantiation and considering the burden of proving these claims lies with the Claimant, the Arbitrator dismisses both claims.

7. Interest

94. The Claimant claims interest at 5% per annum from 14 July 2020 (the date of the final notice) to the date of payment.

95. It has been consistently held in previous BAT cases that interest on unpaid sums at a rate of 5% per annum can be imposed starting from the day following the day the relevant

payment fell due if the Claimant has pursued their claim diligently. Otherwise, interest at this rate can be imposed from the date of the Request for Arbitration.

96. In this case the Claimant diligently pursued his claim by sending a formal notice of his intention to commence BAT proceedings on 14 July 2020. The Claimant provided a further opportunity for the Respondent to avoid BAT proceedings by meeting an alternative deadline of 19 July 2020 (as set out in the 14 July 2020 letter).

97. The Claimant commenced proceedings on 19 November 2020, less than one year after the payments became due and only four months after the deadline stated in the 14 July 2020 notice.

98. The Arbitrator therefore finds the Respondent liable to pay the Claimant interest on the unpaid amounts at a rate of 5% per annum from 15 July 2020 until the date of full payment.

8. Costs

8.1 Costs Claimed

99. The Claimant claims the following costs:

Cost	Amount (EUR)
Attorney's Fees	7,500.00
Non-Reimbursable Handling Fee	3,000.00
Total	**10,500.00**

100. The claimed attorney's fees are supported by an invoice from external counsel with separate lump sums payable for different activities.

101. The Claimant also claims reimbursement of the costs of the proceedings in its prayers for relief and the Arbitrator notes in this regard that it has paid the full advance on costs of EUR 8,000.00, including the Respondent's share.

102. The Respondent claims the following costs:

Cost	Amount (USD)
Attorney's Fees	15,930.00
Total	**15,930.00**

103. This claim is unsupported by invoices but only explained to be "*15% of the total sum in dispute + VAT at the ratio of 18%*".

8.2 Findings on Costs

104. In respect of determining the arbitration costs, Article 17.2 of the BAT Rules provides as follows:

> *"At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4).* […]*"*

105. On 25 July 2021, the BAT President determined the arbitration costs in the present matter to be EUR 6,612.50.

106. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 of the BAT Rules provides as follows:

> *"The award shall determine which party shall bear the arbitration costs and in which proportion.* […] *When deciding on the arbitration costs* […]*, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties."*

107. Considering that the Claimant has prevailed with approximately 60% of its claim, it is consistent with the provisions of the BAT Rules that the fees and costs of the arbitration be borne by 60% by the Respondent and 40% by the Claimant. Given that the Claimant paid the entire Advance on Costs in the amount of EUR 8,000.00 (of which EUR 1,387.50 will be reimbursed to the Claimant by the BAT), the Respondent shall pay EUR 3,967.50 to the Claimant (= 60% of EUR 6,612.50).

108. In relation to the Parties' legal fees and expenses, Article 17.3 of the BAT Rules provides that

> *"as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding* […] *on the amount of any contribution to the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties."*

109. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses. Based on this scale, the maximum recoverable contribution to each party's legal fees and other expenses is EUR 7,500.00

110. The Claimant claims the maximum legal fees of EUR 7,500.00 and also claims for the expense of the non-reimbursable handling fee. The Respondent claims USD 15,930.00 in legal fees.

111. Taking into account the factors required by Article 17.3 of the BAT Rules, the maximum awardable amount prescribed under Article 17.4 of the BAT Rules (in this case, EUR 7,500.00), the fact that the non-reimbursable handling fee in this case was EUR 3,000.00, and the specific circumstances of this case, the Arbitrator holds that a

total of EUR 5,500.00 (including the non-reimbursable handling fee) represents a fair and equitable contribution by the Respondent to the Claimant in this regard.

112. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:

(i) The BAT shall reimburse EUR 1,387.50 to the Claimant, being the difference between the costs advanced by the Claimant and the arbitration costs fixed by the BAT President;

(ii) The Respondent shall pay EUR 3,967.50 to the Claimant, being 60% of the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT;

(iii) The Respondent shall pay the Claimant EUR 5,500.00 (EUR 3,000.00 for the non-reimbursable fee plus EUR 2,500.00 for legal fees), for his legal fees and expenses.

9. AWARD

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

1. **Gaziantep Basketbol ve Spor A. S. shall pay Mr. Jason A. Rich a total amount of USD 51,750.00, net of Turkish taxes, as compensation for unpaid salary payments plus interest at 5% per annum on such amount from 15 July 2020 until the date of full payment.**

2. **Gaziantep Basketbol ve Spor A. S. shall pay Mr. Jason A. Rich an amount of EUR 3,967.50 as reimbursement for his arbitration costs.**

3. **Gaziantep Basketbol ve Spor A. S. shall pay Mr. Jason A. Rich an amount of EUR 5,500.00 as reimbursement for his legal fees and expenses.**

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

Geneva, seat of the arbitration, 23 August 2021

Amani Khalifa
(Arbitrator)