

CORRECTED ARBITRAL AWARD

(BAT 1666/21)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert

in the arbitration proceedings between

Mr. Devin Rydale Booker

- Claimant -

represented by Mr. Guillermo López Arana,
Mr. Antonio Garcia-Aranda Stai & Mr. Javier Resa Ramos

vs.

Association Basketball Club “Khimki”

Khimki, Moscow region, 141400, Kirova str. Build. 27, floor 3, office 39, Russia

- Respondent -

represented by Mr. Astakhov Pavel & Ms. Liudmila Zakharova

1. The Parties

1.1 The Claimant

1. Mr. Devin Rydale Booker ("Player") is an American professional basketball player.

1.2 The Respondent

2. Association Basketball Club "Khimki" ("Club") is a Russian professional basketball club located in Khimki, Moscow Oblast.

2. The Arbitrator

3. On 19 March 2021, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert as arbitrator ("Arbitrator") pursuant to Articles 0.4 and 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 ("BAT Rules"). Neither of the Parties has raised any objection to the appointment of the Arbitrator, to his declaration of independence and impartiality, or to his conduct of this arbitration.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. On 25 June 2020, Player and Club signed a contract ("Player Contract") whereby the latter retained the former as a professional basketball player for the 2020-2021 season. Player's agreed net salary was set at USD 1,250,000.00, payable in 10 monthly instalments of USD 125,000.00 starting on 15 September 2020 and concluding on 15 June 2021. None of the foregoing is factually in dispute between the Parties.

5. What is also not factually in dispute between the Parties is that from the outset of the Player Contract Club was generally late in payment of the agreed monthly salary to Player. This was the subject of various complaints from Player's representatives and culminated in the following communication sent to Club on 29 January 2021:

"This communication is to officially inform you, on behalf of our client Mr. Devin Booker, that he is making use of his contractual right to terminate the agreement signed between your Club and Mr. Booker on June 25, 2020, which, as of today, is no longer in force. Specifically and as established in paragraph 2.5 of the Agreement he is terminating due to the fact that his salary payment, scheduled for December 15th, 2020, is late by 45 days. We have received no reply to our previous communications (see below). We have tried repeatedly to resolve this issue and have given your club more than enough time and opportunities to comply with its contractual obligations and pay Mr. Booker his salary. The complete lack of action by Khimki has left Mr. Booker no other option but to send the present termination notice. Again, as of today the contract signed between Khimki and Mr. Booker on June 25, 2020 is no longer in force. Be advised that Mr. Booker reserves all legal and contractual rights regarding this issue."

6. It is not factually in dispute between the Parties that Player terminated the Player Agreement as described just above. Club states that financial difficulties were the cause of the late payments, but does not seek to rely upon those problems to exonerate it from liability.
7. By the time these proceedings were closed, the Parties had effectively stipulated as to the net amount due to Player (i.e. the original full contracted-for salary amount less the amounts actually paid by Club) at USD 837,424.74. The Club made a later payment of USD 125,000.00 (on 15 June 2021), which reduced the overall due amount to USD 712,424.74.
8. In essence, there is nothing in dispute between the Parties for the Arbitrator to resolve by way of contested fact. Rather, the position is that Player seeks an award to ensure payment of the admitted and stipulated amounts, along with interest and costs.

3.2 The Proceedings before the BAT

9. On 23 February 2021, the BAT received a Request for Arbitration (dated the same day) filed by Player in accordance with the BAT Rules and the non-reimbursable handling fee of EUR 7,000.00 was duly paid (received by the BAT on 24 February 2021).
10. On 22 March 2021, the BAT informed the Parties that Mr. Klaus Reichert had been appointed as the Arbitrator in this matter, invited Club to file an Answer to the Request for Arbitration in accordance with Article 11.4 of the BAT Rules (by no later than 12 April 2021) and fixed the Advance on Costs to be paid by the Parties as follows:

*“Claimant (Mr. Devin Rydale Booker) EUR 6,000.00
Respondent (BC Khimki) EUR 6,000.00”*
11. The Advance on Costs was received by BAT as follows: 1 April 2021, EUR 6,000.00 from Player; and 1 April 2021, EUR 6,005.00 by Club.
12. Club's Answer to the Request for Arbitration was filed on 12 April 2021.
13. Player filed his Reply on 19 April 2021.
14. By Procedural Order dated 20 April 2021, the Parties were invited to set out (by no later than 27 April 2021) 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 submissions was completed in accordance with Article 12.1 of the BAT Rules.
15. Player's costs submissions were dated 20 April 2021 setting out a claim in the amount of EUR 9,500.00 (apart from sums paid to the BAT). On 12 May 2021, Club made a submission commenting on Player's claim for costs, which the Arbitrator admitted to the

file of the case.

16. On 21 June 2021, Club informed the BAT that it had (on 15 June 2021) paid USD 125,000.00 to Player. Player confirmed the fact of that matter to the BAT on 28 June 2021.

4. The Positions of the Parties

4.1 Player's Position

17. In his Reply, Player seeks the following relief:

“a) To award Claimant with the full amounts accrued and owed (as listed above) on the date of issuance of an Award in favor of the Claimant in this BAT procedure, plus interest at the applicable Swiss statutory rate.

b) To expressly declare Claimant's right to receive and the Respondent's obligation to pay the remainder of the payments on the dates established in the agreement signed between the parties in the event any of the scheduled payments have not accrued as of the date of issuance of the Award in this BAT procedure.

c) To award the Claimant with the full costs of this arbitration as well as submitted legal costs.”

4.2 Club's Position

18. As already noted in Section 3.1 above, the substance of the matters is not disputed by Club.

5. The jurisdiction of the BAT

19. First, the BAT Vice-President has determined pursuant to Article 11.1 of the BAT Rules, *prima facie*, that the subject matter of this arbitration is arbitrable and the arbitration could thus proceed. Secondly, according to Article 1.3 of the BAT Rules, it now falls to the

Arbitrator to finally decide jurisdiction.

20. 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).
21. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
22. 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
23. The jurisdiction of the BAT over the dispute is said by Player to result from Article 6 of the Player Contract:

6. DISPUTES

6.1. 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 (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute *ex aequo et bono*.

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

6.2. At this, the Parties have agreed to observe the prejudicial order of settlement of dispute(s).

Prior to submitting a complaint to the FIBA Basketball Arbitral Tribunal (BAT), the Player must submit his motivated claim to the Club in writing.

The Player's submission shall outline his claim, but does not need to be the full claim to be submitted to BAT, and the Club acknowledges that it will not be prejudiced in this respect.

Such claim shall be reviewed by the Club within 10 (ten) calendar days from the moment it is received, after which the Club shall present to the Player a written motivated response.

The Player shall have the right to apply to the FIBA Basketball Arbitral Tribunal (BAT) after the designated term for the review of the claim/complaint by the Club, if the Player does not receive the written motivated response or if such response fails to satisfy the Player.

Player is not obligated to accept any proposal submitted by the Club.

6.3. Should the Player fail to submit a written claim to the Club before submitting this claim to the BAT, as foreseen in point 6.2. of the Agreement, or should the Player submit his claim to BAT before the lapse of the 10 (ten) calendar day period for the review of the claim by the Club, allowed by the conditions of point 6.2. of the Agreement, or should the Player, in his claim, state a matter of claim, which is not stated or featured in any way in the written claim submitted to the Club, then all the expenses of the parties, those of the Club and the Player, connected to the submission of the relevant material and the review of the claim to the BAT, shall be compensated by the Player himself, irrespective of the outcome of the dispute.

Thus, in such case, the Club shall be free of any obligations to compensate the Player any expenses the latter shall have incurred in connection with the submission to and review of the claim by the BAT, while the Player, in his turn, shall be obligated to compensate the Club all the expenses incurred by the Club in connection with the submission and the review of the claim by the BAT.

Such expenses include the procedural fee(s) payable to the BAT by each of the Parties, the expenses for the services of legal advisers, attorneys and other rightful representatives, the services of translators and other persons, as well as the postal expenses incurred by the Parties, and other expenses deemed by BAT as necessary.

24. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

25. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).
26. The predicate wording “[a]ny dispute arising from or related to [...]” clearly covers the present dispute.
27. Club participated fully in this arbitration without reservation. No issue was taken as regards any of the prescribed predicate steps in Articles 6.2 and 6.3 of the Player Contract.
28. For the above reasons, the Arbitrator finally holds, pursuant to Article 1.3 of the BAT Rules, that he has jurisdiction to decide and rule upon Player’s claims.

6. Discussion

6.1 Applicable Law – ex aequo et bono

29. 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”.

30. 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.”

31. Article 6.1 of the Player Contract provides, expressly, that the Arbitrator shall decide the dispute *ex aequo et bono*. Consequently, the Arbitrator shall proceed accordingly.
32. The concept of “*équité*” (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage² (Concordat)³, under which Swiss courts have held that arbitration “*en équité*” is fundamentally different from arbitration “*en droit*”:

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

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.

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).

6.2 Findings

35. As has already been set out above, Player's claims are admitted by Club. The amount of USD 712,424.74, net, is stipulated. All the contractual milestone dates have passed. Effectively, what this means is the following:

(a) Player's salary instalment due on 15 December 2020 in the amount of USD 125,000.00, net, was left short by USD 87,424.74⁵ until the payment of USD 125,000.00 on 15 June 2021;

(b) Player's salary instalment due on 15 January 2021 in the amount of USD 125,000.00, net, has been part-paid on 15 June 2021 by USD 37,575.26 (i.e. the USD 125,000.00 payment on 15 June 2021 minus the USD 87,424.74 owed for the salary instalment due on 15 December 2020). Thus, USD 87,424.74 remains due to Player in respect of his salary instalment due on 15 January 2021; and

(c) The 15th each of February, March, April, May and June 2021, salary installments each in the amount of USD 125,000.00, net, remain unpaid.

36. Player is, therefore, entitled to an award of USD 712,424.74, net, with interest (at the well-established rate consistently awarded by BAT arbitrators of 5% per annum) as follows:

(a) on USD 98,216.59 from 16 December 2020 to 30 December 2020, on USD 96,858.94 from 31 December 2020 to 15 January 2021; on USD 94,677.26 from 16 January 2021

⁵ Taking into account an overpayment on the previous installment of USD 2,754.90 as well as partial payments of USD 24,028.51 on 15 December 2021, USD 1,357.65 on 30 December 2020, USD 2,181.68 on 15 January 2021 [while the Parties referred to USD 2,181.69, this seems to be due to rounding when converting the RUB amount into USD, because otherwise the stipulated outstanding amount on 15 January 2021 would be 1 cent too high], USD 328.15 on 29 January 2021, USD 3,714.60 on 15 February 2021 and USD 3,209.77 on 15 March 2021.

to 29 January 2021; on USD 94,349.11 from 30 January 2021 to 15 February 2021; on USD 90,634.51 from 16 February 2021 to 15 March 2021, and then on USD 87,424.74 from 16 March 2021 to 15 June 2021;

(b) on USD 125,000.00 from 16 January 2021 to 15 June 2021, and then on USD 87,424.74 from 16 June 2021;

(c) on USD 125,000.00 from 16 February 2021;

(d) on USD 125,000.00 from 16 March 2021;

(e) on USD 125,000.00 from 16 April 2021;

(f) on USD 125,000.00 from 16 May 2021; and

(g) on USD 125,000.00 from 16 June 2021.

7. Costs

37. 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). [...]”

38. On 12 July 2021, the BAT Vice-President determined the arbitration costs in the present matter to be EUR 4,950.00.

39. As regards the allocation of these 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.”

40. Player prevailed in this arbitration, though it must also be borne in mind that Club did not dispute the matter and was frank in its admissions. Club also paid its share of the Advance on Costs in a timely manner. Nevertheless, considering the outcome of this arbitration, the Respondent shall bear the full arbitration costs in the amount of EUR 4,950.00. Accordingly, the BAT will reimburse EUR 6,005.00 to Player (representing the advance on costs paid by him) and EUR 1,050.00 to Club (representing the difference between the arbitration costs and the advance on costs paid by it).

41. 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.”

42. 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.

43. Player claims legal fees in the total amount of EUR 9,500.00. This amount falls below the maximum awardable amount of EUR 20,000.00 (not including the non-reimbursable handling fee) as prescribed by Article 17.4 of the BAT Rules. This amount is divided up as follows by Player: (a) “legal report”, EUR 2,000.00; (b) “legal advising during the procedure”, EUR 3,500.00; and (c) “claim and response drafting”, EUR 4,000.00.

44. The Arbitrator can appreciate that the first element of Player's claim is something for which costs may be awarded against Club, as this indicates, or appears to indicate his obtaining of legal advice prior to initiation of the arbitration. The amount sought is

reasonable in the context of the size of the case.

45. The Arbitrator is less convinced by the amount sought for legal advice during the procedure as there were two documents filed by Player in this arbitration. No other procedure appears to have been engaged, but the Arbitrator does appreciate that advice may well be reasonably sought and obtained during the pendency of a case outside of the formal filings. However, the amount sought (insofar as it is to be awarded against Club) is tempered by the approach taken by Club in frankly admitting its position. The Arbitrator awards EUR 1,000.00.
46. Finally, the Arbitrator considers that the amount sought for the claim and response drafting, in light of Club's position, and also the inherent straightforward nature of the case, is to be reduced to EUR 3,000.00.
47. In sum, the amount Club is ordered to pay Player for legal fees is EUR 6,000.00. For the avoidance of doubt, this finding has no bearing whatsoever on amounts which might be incurred as between Player and his Counsel, and this finding is solely confined to the issue as to how much Club is ordered to contribute to Player by way of compensation for legal fees.
48. The expense of EUR 7,000.00 for the non-reimbursable handling fee is awarded to Player. He brought the case to vindicate and ensure his rights to unpaid salary amounts. That is sufficient basis to award him this amount.
49. 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, and the specific circumstances of this case (which includes all the matters discussed above), the Arbitrator holds that EUR 13,000.00 for Player's legal fees (i.e. EUR 6,000.00) and expenses (i.e. EUR 7,000.00) represent a fair and equitable contribution by Club in this regard.

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

- (i) Club shall pay to Player EUR 13,000.00 representing a contribution to the amount of the latter's legal fees and other expenses;
- (ii) Club shall bear its own legal fees and other expenses.

8. AWARD

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

- 1. Association Basketball Club “Khimki” is ordered to pay Mr. Devin Rydale Booker USD 712,424.74, net, by way of unpaid salary, together with interest at 5% per annum as follows (until payment in full):**
 - (a) on USD 98,216.59 from 16 December 2020 to 30 December 2020, on USD 96,858.94 from 31 December 2020 to 15 January 2021; on USD 94,677.26 from 16 January 2021 to 29 January 2021; on USD 94,349.11 from 30 January 2021 to 15 February 2021; on USD 90,634.51 from 16 February 2021 to 15 March 2021, and then on USD 87,424.74 from 16 March 2021 to 15 June 2021;**
 - (b) on USD 125,000.00 from 16 January 2021 to 15 June 2021, and then on USD 87,424.74 from 16 June 2021;**
 - (c) on USD 125,000.00 from 16 February 2021;**
 - (d) on USD 125,000.00 from 16 March 2021;**
 - (e) on USD 125,000.00 from 16 April 2021;**
 - (f) on USD 125,000.00 from 16 May 2021; and**
 - (g) on USD 125,000.00 from 16 June 2021.**
- 2. The costs of this arbitration shall be borne by Association Basketball Club “Khimki” alone.**
- 3. Association Basketball Club “Khimki” is ordered to pay Mr. Devin Rydale Booker EUR 13,000.00 in respect of his legal fees and expenses.**

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

Geneva, seat of the arbitration, 19 July 2021 (date of the initial Award: 12 July 2021)

Klaus Reichert
(Arbitrator)