

## **ARBITRAL AWARD**

**(BAT 1784/22)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Klaus Reichert**

in the arbitration proceedings between

**U1st Sports Atlanta LLC**  
1275 Peachtree Street NE, Suite 525  
Atlanta, GA 30309, USA

- Claimant 1 -

**Mr. Terrance Orlando Campbell Jr.**

- Claimant 2 -

both represented by Messrs. Guillermo López Arana, Javier Resa Ramos,  
Antonio Garcia-Aranda Stai

vs.

**Afyon Belediyesi Gençlik ve Spor Kulubu Dernegi**  
Dortyol Mahallesi 2150  
Sokak Mustafa, Abi Spor Salonu  
03100 Afyonkarahisar, Turkey

- Respondent -

represented by Mr. Arda Güney, attorney at law

## **1. The Parties**

### **1.1 The Claimants**

1. U1st Sports Atlanta LLC is an American professional sports agency (“Agency”). Mr. Terrance Orlando Campbell Jr. is an American professional basketball player (“Player”).

### **1.2 The Respondent**

2. Afyon Belediyesi Genclik ve Spor Kulubu Dernegi is a Turkish professional basketball club (“Club”).

## **2. The Arbitrator**

3. On 25 February 2022, 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”). The Parties have not 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. The background to this arbitration arises, principally, from a contract between Club and Player (“Player Contract”) dated 18 August 2021 whereby the former engaged the latter for the 2021-22 season. The agreed salary for the season was USD 130,000.00 net of Turkish taxes. Following Player’s arrival at Club, and his passing the relevant medical

examination (as is the norm at the outset of professional basketball contracts), there were, unfortunately, salary payment defaults. This ultimately led to Player terminating the Player Contract by email dated 14 December 2021. These matters of fact are not in dispute between the Parties.

5. On the same day in August 2018, Agency and Club signed a commission agreement ("Agency Contract") whereby the latter agreed to pay the former agency fees in connection with the arrangement of the Player Contract the following amounts, USD 3,250.00 on 15 November 2021 and USD 3,250.00 on 15 December 2021. These payments have not been made by Club. These matters of fact are not in dispute between the Parties.
6. Having left Club, Player then moved to a French professional club, Cholet Basket, for the remainder of the 2021-22 season. His salary for that time in France was USD 95,000.00, net. Agency received EUR 4,200.00 by way of agency fees from that French club. These matters of fact are established, to the Arbitrator's satisfaction, based on the specific representation of Claimants' Counsel.
7. The consequences of the foregoing facts are disputed by the Parties. Player seeks the full remaining amount of his salary for the full 2021-22 season (USD 117,000.00) and Agency seeks its full agency fee (USD 6,500.00). Club says that any salary received by Player in France should be deducted from his claim. Club says, in a similar vein, that Agency's claim should be duly reduced.

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

8. On 3 February 2022, the BAT received a Request for Arbitration (of the same date) filed by Claimants in accordance with the BAT Rules and the non-reimbursable handling fee of EUR 4,000.00 was duly paid (received by the BAT on 3 and 18 February 2022).

9. On 28 February 2022, 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 21 March 2022) and fixed the Advance on Costs to be paid by the Parties as follows:

*“Claimant 1 (U1st Sports Atlanta LLC) EUR 1,000.00*

*Claimant 2 (Mr. Campbell Jr.) EUR 4,000.00*

*Respondent (Afyon Belediyesi Genclik EUR 5,000.00”*

10. The Advance on Costs was received by BAT as follows: 7 March 2022, EUR 1,000.00 from Agency; 8 March 2022, EUR 3,882.43 from 44 Properties LLC; 1 April 2022, EUR 1,000.00 from Agency; and 4 April 2022, EUR 4,117.57 from 44 Properties LLC.
11. Club’s Answer to the Request for Arbitration was filed on 21 March 2022.
12. Claimants filed their Reply on 25 April 2022.
13. Club filed its Rejoinder on 16 May 2022.
14. On 17 May 2022, the BAT communicated the following message of the Arbitrator to the Parties:

*“The Arbitrator has reviewed the two rounds of submissions filed by the Parties. Having considered the positions taken by each side, the Arbitrator directs that Claimants furnish the following items of information by Tuesday, 24 May 2022.*

*(a) What was the net, contracted-for salary amount due to Claimant 2 from Cholet Basket for the time he spent at that club during the 2021-22 season. Bonus amounts and expense/accommodation items are not to be included.*

*(b) What was the net, contracted-for agency fee amount due to Claimant 1 from Cholet Basket in respect of the time spent by Claimant 2 at that club during the 2021-22 season.*

*The Claimants are directed to furnish these two items of information without any elaboration whatsoever; namely, the only matters to be conveyed to the BAT are the two figures. The Claimants are to note that the Arbitrator will strictly consider the answers to be given to be formal representations by their Counsel as to veracity of such figures."*

15. Claimants replied to the Arbitrator's questions (as set out just above) on 24 May 2022 as follows:

*[Answer to (a)] "Claimant 2's net, contracted-for salary amount from Cholet Basket for the time he spent at that club during the 2021-22 season is 95,000 USD net."*

*[Answer to (b)] "The net, contracted-for agency fee amount due to Claimant 1 from Cholet Basket in respect of the time spent by Claimant 2 at that club during the 2021-22 season is 4,200 € net, as the contractual fee is split 50/50 between Claimant 1 and the Agent intervening on behalf of Chloet Basket, Mr. Guillaume Althoffer."*

16. By Procedural Order dated 25 May 2022, the Parties were invited to set out (by no later than 1 June 2022) 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.

17. The Parties filed their costs submission on 1 June 2022.

#### **4. The Positions of the Parties**

##### **4.1 Claimants' Position**

18. Starting with the prayers for relief, these are claimed in the Request for Arbitration as follows:

*"Claimant(s) request(s):*

*a) To award Claimant 1 with the amount of SIX THOUSAND FIVE HUNDRED US DOLLARS (6,500 USD), plus interest at the applicable Swiss statutory rate, starting from the date of November 15th, 2021.*

*b) To award Claimant 2 with the amount of ONE HUNDRED AND SEVENTEEN THOUSAND US DOLLARS NET (117,000 USD net) plus interest at the applicable Swiss statutory rate, starting from the date of November 7th, 2021.*

*d) To award the Claimants with the full covered the costs of this arbitration.*

*Total amount in dispute: 124,982 € (123,500 € plus interest at the applicable Swiss Statutory rate (= 72 USD for Claimant 1, 1,410 USD for Claimant 2), from date of scheduled payment until date of filing Request for Arbitration)"*

19. The Arbitrator has already noted in the section above on the summary of the dispute a broad outline of the Parties' positions. To the extent strictly relevant and necessary for the disposition of this case the Arbitrator will discuss and analyse those positions in detail below.

#### **4.2 Club's Position**

22. Club's Answer requests as follows:

*"The honorable arbitrator is asked to deny all claims and require the Claimants to compensate;*

- All arbitration proceeding costs of the Respondent*
- All legal fees and expenses incurred in these proceedings."*

23. Put more clearly and succinctly, the Arbitrator considers Club's defence to be one of mitigation in line with long-established BAT awards.

#### **5. The jurisdiction of the BAT**

24. 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.

25. 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).
26. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
27. 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>
28. As regards Player’s claim, the jurisdiction of the BAT over the dispute is said to result from Art. 11 of the Player Contract:

*“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 (PIL), irrespective of the parties’ domicile. The language of the arbitration shall be in ‘English. The arbitrator shall decide the dispute ex aequo et bono.”*

29. As regards Agency’s claim, the jurisdiction of the BAT over the dispute is said to result from Art. 3 of the Agency Contract:

*“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*

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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.

*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."*

30. Both the Player Contract and the Agency Contract are in written form and thus the arbitration agreements fulfil the formal requirements of Article 178(1) PILA. In particular, the written form requirement of Article 178(1) PILA does not require the arbitration agreement to be signed, as long as it is concluded in a way that "*allow[s] proof of the agreement by text*".<sup>2</sup> This is undisputedly the case here.
31. Moreover, the predicate wording "[a]ny disputes arising [...]" clearly covers the present dispute.
32. Club did not dispute the existence of the arbitration agreements and participated fully in the case without reservation.
33. Thus, 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).
34. 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 Claimants' claims against Club.

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<sup>2</sup> English translation of Article 178(1) PILA. See also Decision of the Federal Tribunal 4P.124/2001 of 7 August 2001, para. 2c.

## 6. Discussion

### 6.1 Applicable Law – ex aequo et bono

35. 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”.*

36. 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.”*

37. Art. 11 of the Player Contract and Art. 3 of the Agency Contract both expressly authorise the Arbitrator to rule *ex aequo et bono*. Consequently, the Arbitrator shall proceed accordingly.
38. 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>*

39. 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*”.
40. In light of the foregoing considerations, the Arbitrator makes the findings below.

## 6.2 Findings

41. A number of guiding principles, clearly established by well over a decade of FAT/BAT awards rendered by all of the arbitrators serving in this Tribunal, can be succinctly recalled. First, *pacta sunt servanda* is the key to the resolution of any dispute arising from a contract which has contained within it an arbitration clause stipulating the application of the BAT Rules. Secondly, interpretation of contractual language chosen by parties to such contracts is not a hostage to literalism, but rather the Arbitrator takes care to read all the terms as a whole taking into account the context (particularly the reasonable expectations of participants in the international professional basketball community). However, the phrase *ex aequo et bono*, or justice and equity, is not a reason, in and of itself, to simply discard the ordinary meaning of contractual language

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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).

merely because it is perceived to be inimical or presently inconvenient to one side or the other. Thirdly, mitigation of loss is generally expected with the ultimate aim of ensuring that the innocent party should not be put into a better position than they would have been had all gone according to plan with full and complete performance of the obligations. This means that monies earned elsewhere during a season might well be deducted from a claim. This is not an inflexible rule, but is one which is of considerable importance as recognised by multiple awards rendered by the Tribunal.

42. Starting with Player's claim, it is advanced on the basis that no mitigation or deduction should be made to the amount he is claiming in this arbitration. Player did not tender his subsequent contract with the French club with the Request for Arbitration, notwithstanding the unambiguous language of the BAT template concerning mitigation. Further, even when confronted with the point being made by Club in the Answer, Player did not tender that subsequent contract (much less the basic information as to his salary in France) with the Reply. It was only on a specific direction from the Arbitrator that the information was forthcoming. This approach of Player to an undoubted matter of relevance, the information concerning which solely was in his hands, was regrettable, and will have a direct bearing on the disposition of costs.
43. Notwithstanding Player's less-than-forthcoming approach to mitigation, the Arbitrator will still carefully examine the arguments made which seek to defeat or negate any deduction.
44. In the Reply the following points are made by Player in this regard:
  - (a) there is surprise at the long silence of Club, which he says never sought to pay him his due salary;
  - (b) it is Club's fault that Player has initiated the arbitration as it ignored his claims until such time as he brought them to BAT;

(c) Club cannot invoke good faith when it is the party to blame for things going awry (“laughable”, “disrespectful”, and “shockingly” are used in the Reply); and

(d) quoting a key submission in full: “In the present procedure, as can be clearly seen in both the labor contract signed with Claimant 2 and the Commission contract signed with Claimant 1, the wording is crystal clear, there is no contractual provision that establishes either of the Claimants should mitigate the losses of the Respondent in the event the Respondent is the breaching party. There is no “offset clause”. Both contracts clearly establish the consequences of contractual breach by the Respondent.”

45. Club’s position is simply expressed as an invocation of the principle of mitigation. However, Club does appear to wish to deny Player all relief.
46. The Arbitrator does not accept Player’s submissions. The principle of mitigation is very well established in BAT awards over many years and the examples are far too numerous to list out. The Arbitrator does not condone, in any way, Club’s initial breach of contract and the basic premise of all professional basketball contracts is that they should be observed according to their terms. However, life is never quite as simple as that and disputes, breaches, defaults, misfortunes, and so on, occur. The guilty party to a breach is entitled to expect the observation by the innocent party of certain basic matters to mitigate the latter’s loss, regardless of how distasteful that concept might be to the innocent party. A cascade of opprobrium does not result in a deviation from the usual approach to mitigation. Most particularly, Player’s argument that merely because there is no contractual provision requiring mitigation then no obligation to mitigate arises manages to combine little merit with much harm. Club’s Rejoinder, para. 4, makes the counter argument succinctly and persuasively.
47. In summary, Player’s salary in France must be deducted from his claim. This was an amount he earned in the same season, and were he to be awarded the full amount of his claim along with the money he earned in Paris, this would be a paradigm example of

the mischief which the mitigation rule seeks to abate. Thus, the Arbitrator deducts USD 95,000.00 (money earned in France) from USD 117,000.00 (total salary owed at the time of termination), resulting in an amount due to Player of USD 22,000.00. The amount is awarded “net” to be consistent with the Player Agreement.

48. Turning to Agency’s claim of USD 6,500.00, the same issue is raised by Club as with Player, namely, it argues that the amount due should be reduced by any agency fee amount received from the French club.
49. Agency’s argument is a different one to that of Player against mitigation, and arises from the specific contractual language used:

*“Club acknowledges that upon execution of this contract, the Agent’s duties have been completed in full for the entirety of this agreement. As such, should Club and Player either independently or mutually, decide to terminate the contract, the Agent fee due to the Agent will be due in its totality, unless any modifications are mutually agreed in writing by Agent and Club”*

50. This contractual language is expressly described as a covenant. Applying the same approach to interpretation as discussed above, the Arbitrator sees that this clause expressly provides that upon the moment of signature, regardless of any later termination, the full fee is thereupon due.
51. Club’s argument is that Agency should not be overcompensated, however that mistakenly conflates the obligation of Player to mitigate so that overall he would not be in a better financial position in respect of his playing services for the season with the efforts of Agency to place Player with clubs. Each placement is a task in and of itself and involves time and effort by Agency for which it is entitled to be paid. No deduction is warranted and the full amount of USD 6,500.00 is awarded.
52. Turning to interest, the Arbitrator upholds Claimants’ claim for interest at 5% per annum, being the rate consistently applied in prior BAT awards, on any outstanding balance (as

may be the case from time to time) thereof from until payment in full as follows:

- On the amount awarded to Player of USD 22,000.00 running from 14 December 2021 – the commencement date is the termination date and that is when the amount was fully crystallised; and
- On the amount awarded to Agency of USD 6,500.00: (a) on USD 3,250.00 from 16 November 2021; and (b) on USD 3,250.00 from 16 December 2021. These dates are the days immediately after the due dates for payment by Club to Agency.

## **7. Costs**

53. 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). [...]”*

54. On 10 August 2022, the BAT Vice-President determined the arbitration costs in the present matter to be EUR 6,350.00.

55. 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.”*

56. As Claimants prevailed, Club bears responsibility, in principle, for the arbitration costs, with the only question as to the percentage thereof. As discussed above, Player’s claim

of USD 117,000.00 was significantly reduced on the mitigation principle which, had such information been duly put forward at the earliest opportunity would have properly resulted in advances on costs being much lower than those initially directed. It would not be fair for Club to bear the full consequence of Player being unforthcoming as regards the salary he earned in France and the likely application of the mitigation principle. Thus, the Arbitrator considers that Club should be responsible for 50% of the arbitration costs, namely, EUR 3,175.00.

57. 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."*

58. 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.
59. Claimants claim legal fees in the amount of EUR 6,500.00 (not including the non-reimbursable handling fee). No delineation is made as between Player's costs and Agency's costs. This amount falls below the maximum awardable amount (not including the non-reimbursable handling fee) as prescribed by Article 17.4 of the BAT Rules.
60. The Arbitrator considers that a similar reduction (50%) should be made, namely EUR 3,250.00 along with a reduced contribution towards the expense of the non-reimbursable handling fee (which was itself inflated by the magnitude of Player's initial claim) of EUR 1,500.00. The total amount is therefore EUR 4,750.00.
61. 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 3,250.00 for Claimants legal fees and EUR 1,500.00 expenses (for the non-reimbursable handling fee) represent a fair and equitable contribution by Club in this regard.

62. 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 Claimants EUR 3,175.00 in respect of the costs of arbitration;
- (ii) The BAT will reimburse the balance of the advance on costs in the amount of EUR 3,650.00 to Claimants.
- (iii) Club shall pay to Claimants EUR 4,750.00 representing a contribution to the amount of the latter's legal fees and other expenses; and
- (iv) Club shall bear its own legal fees and expenses.

## **8. AWARD**

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

- 1. Afyon Belediyesi Genclik ve Spor Kulubu Dernegi is ordered to pay U1st Sports Atlanta LLC USD 6,500.00 by way of unpaid agency fees together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) from until payment in full on: (a) USD 3,250.00 from 16 November 2021; and (b) on USD 3,250.00 from 16 December 2021.**
- 2. Afyon Belediyesi Genclik ve Spor Kulubu Dernegi is ordered to pay Mr. Terrance Orlando Campbell Jr. USD 22,000.00, net, by way of unpaid salary together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereon from until 14 December 2021 payment in full.**
- 3. Afyon Belediyesi Genclik ve Spor Kulubu Dernegi is ordered to pay U1st Sports Atlanta LLC and Mr. Terrance Orlando Campbell Jr. EUR 3,175.00 in respect of the costs of arbitration.**
- 4. Afyon Belediyesi Genclik ve Spor Kulubu Dernegi is ordered to pay U1st Sports Atlanta LLC and Mr. Terrance Orlando Campbell Jr. EUR 4,750.00 in respect of the latter's legal fees and expenses.**
- 5. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 11 August 2022

Klaus Reichert  
(Arbitrator)