

ARBITRAL AWARD

(BAT 1907/23)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Beirut Club

Marfaa 1202, Uruguay Street, Beirut Central District, Lebanon

- Claimant -

represented by Mr. Alessandro Oliverio, attorney at law,
Via delle Cave 42, 00181 Rome, Italy

vs.

Mr. Frank Mason

12000 Reserve manor circle, APT 204, Chester, VA 23831, USA

- Respondent -

represented by Mr. Andrew Hoening,
250 Park Avenue, 10177 New York, USA

1. The Parties

1. Beirut Club (hereinafter referred to as the "Club" or "Claimant") is a professional basketball club participating in the Lebanese professional basketball league.
2. Mr. Frank Mason (hereinafter referred to as the "Player" or "Respondent") is a US-American basketball player.

2. The Arbitrator

3. On 7 February 2023, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (hereinafter referred to as the "BAT"), appointed Mr. Stephan Netzle as arbitrator (hereinafter referred to as the "Arbitrator") pursuant to Articles 0.4 and 8.1 of the Arbitration Rules of the Basketball Arbitral Tribunal (hereinafter referred to as the "BAT Rules"). 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

4. On 21 November 2022, the Player and the Club signed an employment agreement for the 2022/2023 season (hereinafter referred to as the "Employment Contract"). The Player was represented by agents Jad Saade and Zachary Benalloul. The Club announced the transfer on social media.

5. On the same day, the Club's President asked one of the Player's agents when the Player planned to fly to Beirut. Mr. Jad Saade answered that the Player would fly to Beirut on Saturday, 26 November 2022.
6. On the same day, the Club's General Manager sent a text message to the Player and welcomed him to the Club. The Player answered as follows:

"Hello Joe,

Thanks for having me apart [sic] of the team. I'm excited to get out there and get going. Let's win some titles"
7. In addition, the Player provided the Club's General Manager with information about the size of the uniform, and the desired number and name on the jersey.
8. Still on 21 November 2022, the Club requested FIBA to issue the Letter of Clearance and paid the respective handling fee of CHF 250.00. In addition, the Club purchased a flight ticket for 26 November 2022 from Atlanta to Beirut for the Player.
9. As the Player did not board the plane on 26 November 2022, the Club asked the two agents for an explanation. They assured the Club that the Player was ready to travel to Beirut und asked the Club to rebook the ticket to the next day, i.e. 27 November 2022.
10. Although the Club rebooked the flight ticket, the Player did not arrive in Beirut on this plane either. Upon further enquiry, the agents confirmed that the Player would come to Beirut but asked the Club to rebook the flight ticket again to the following day, i.e. 28 November 2022.
11. Although the Club rebooked the flight ticket to 28 November 2022, the Player did not board the plane again.

12. By email of 29 November 2022, the Club sent a letter of termination to the Player's agents, which reads as follows:

"Dear Mr. Mason III

Whereas

- 1- You and the Club entered into a basketball agreement for the season 2022-2023.*
- 2- You have been on multiple occasions asked to join the team and start the practices, as per your contractual obligation.*
- 3- You did not travel to Lebanon; let alone you did not join the team without justification.*
- 4-*

Your contract [sic] constitutes an intentional breach of the signed agreement and therefore, as of today November 29, 2022, the Club terminates the agreement with cause.

[...]"

13. On 30 November 2022, the Player replied as follows:

"Sorry I couldn't join you guys. I have personal problems that are a priority before basketball. My agent and I will contact fiba representative explaining the matter.

Thanks for giving me the opportunity to join the club. Hope all is well!"

14. On the same day, the Club signed an employment contract with Mr. Kenneth Hayes (hereinafter referred to as the "Employment Contract Hayes").
15. On 6 December 2022, the Club's counsel sent an e-mail to the Player asking to provide an explanation for his decision not to join the team. However, this e-mail remained unanswered.

16. On 14 December 2022, the Club's counsel offered the Player a settlement agreement which provided a payment to the Club of USD 25,000.00 by 22 December 2022 at the latest. The Player did not respond.

3.2 The Proceedings before the BAT

17. On 6 January 2023, the Club filed a Request for Arbitration against the Player in accordance with the BAT Rules (received by the BAT on the same day) and paid the non-reimbursable handling fee of EUR 4,000.00 (received in the BAT bank account on 9 January 2023).
18. On 13 February 2023, the BAT informed the Parties that Mr. Stephan Netzle had been appointed as the Arbitrator, invited the Respondent to file his Answer to the Request for Arbitration in accordance with Article 11.4 of the BAT Rules by no later than 6 March 2023 and fixed the Advance on Costs to be paid by the Parties by 23 February 2023 as follows:

<i>"Claimant (Beirut Club)</i>	<i>EUR 4,000.00</i>
<i>Respondent (Mr. Frank Mason)</i>	<i>EUR 4,000.00"</i>

19. On 8 March 2023, the BAT acknowledged receipt of the Claimant's share of the Advance on Costs, noted that the Respondent had failed to submit an Answer to the Request for Arbitration and to pay his share of the Advance on Costs and granted the Respondent a final deadline until 15 March 2023 to pay his share of the Advance on Costs and to submit an Answer to the Request for Arbitration.
20. On 18 March 2023, one of the Player's new agents, Mr. Andrew Hoening, asked the BAT whether the Player's share of the Advance on Costs had been paid.

21. By letter dated 20 March 2023, the BAT informed the Parties that the Respondent had failed to file an Answer to the Request for Arbitration and to pay his share of the Advance on Costs. Furthermore, the BAT adjusted the Advance on Costs as follows:

<i>"Claimant (Beirut Club)</i>	<i>EUR 3,500.00</i>
<i>Respondent (Mr. Frank Mason)</i>	<i>EUR 3,500.00"</i>

22. In the same Procedural Order, the Claimant was invited to pay the remaining Advance on Costs in the amount of EUR 3,000.00 by 27 March 2023.
23. On 20 March 2023, Mr. Andrew Hoening, sent an e-mail to the BAT asking whether the Player had still the right to pay his share of the Advance on Costs.
24. On 24 March 2023, the Claimant paid the outstanding Advance on Costs.
25. On 30 March 2023, the BAT informed the Parties that the Arbitrator had declared the exchange of submissions complete and that the final award would be rendered as soon as possible. Finally, the BAT granted the Parties a deadline until 6 April 2023 to provide a detailed account of their costs.
26. On 1 April 2023, the Claimant submitted its cost statement. The Respondent did not submit a cost statement.

4. The Positions of the Parties

4.1 The Claimant's position

27. By not travelling to Beirut and joining the team, the Player breached the Employment Contract. The Player's explanation as to why he did not travel to Lebanon, i.e. the alleged personal problems, is manifestly unjustified. He did not provide a substantiated

explanation, although the Club gave him the opportunity to do so and to settle the matter amicably.

28. The Club relied on the information provided by the Player's agents and gave the Player two opportunities to remedy the situation as his flight ticket was rebooked twice, first to 27 and then to 28 November 2022.
29. Therefore, the Club's termination of the Employment Contract on 29 November 2022 was justified and the Club is entitled to damage compensation.
30. First, the Club is entitled to reimbursement of the costs incurred in connection with the execution of the Employment Contract until its termination, i.e. to USD 1,100.00 for the flight ticket, which the Club purchased according to Article 10 Employment Contract, and to CHF 250.00 for the FIBA fee for the issuance of the Letter of Clearance. As the Club would not have incurred these costs if the Player had communicated his decision not to join the Club in due time, the Club is entitled to the reimbursement of these costs.
31. Second, according to Article 8 Employment Contract, the Club is entitled to penalty fees of up to 7.5% of the player's monthly salary if he misses training sessions or team meetings. As the Player did not take the flights on 26, 27 and 28 November 2022, he missed several training sessions and team meetings. Therefore, the Club is entitled to a penalty fee equal to the maximum amount of 7.5% of the Player's monthly salary, i.e. of USD 37,000.00. For this reason, the Club requests a penalty fee of USD 2,775.00.
32. Third, the Club is entitled to compensation of the damage caused to its sporting interests by the Player's non-arrival, the lack of time and opportunity to strategically plan the arrival of another foreign player and the difference in the values of the Player and Mr. Kenneth Hayes as replacement player. It was the Club's intention that the Player should play not only in the Lebanese league but also in the West Asia League, which started on 21 December 2022. Therefore, the Player's non-arrival put the Club in a compelling and

pressing situation to find and sign another foreign player. The Club was able to mitigate its damage by signing the Employment Contract Hayes. In doing so, the Club decided that it was more important to complete the roster in the shortest possible time than to find another free-agent NBA-drafted player with the same value and salary expectations as the Player. However, because Mr. Kenneth Hayes' value is lower than the Player's, the Player's non-arrival still resulted in a loss to the Club. While the Player is a 28-year-old guard and former NBA player with more than 100 NBA games, Mr. Kenneth Hayes is a guard of 35 years, who has never been drafted in the NBA. In addition, the Employment Contract provides for a total salary of USD 222,000.00, while Mr. Kenneth Hayes is entitled to a total salary of USD 150,000.00. The loss suffered by the Club as a result of the Player's absence is therefore the difference, i.e. USD 72,000.00. Since the lower salary of Mr. Kenneth Hayes gives the Club a financial advantage, the latter claims financial compensation for the damage caused to its sporting interests, totalling only USD 50,000.00.

33. Fourth, the Club is entitled to a special indemnity based on BAT jurisprudence. If the Player regretted signing the Employment Contract, he could and should have behaved differently. Instead, he decided not to travel to Beirut, while his agents assured the Club that the Player would take the next flight. Such behaviour must not be tolerated by the Arbitrator and the damaged reputation and honour of the Club must be compensated. According to BAT jurisprudence (e.g. BAT 0334/12 and BAT 1030/17), "*in determining the quantum of the special indemnity, the Arbitrator has a broad discretion based on [his/her] authority to decide ex aequo et bono*". The Club requests a special indemnity of at least USD 20,000.00.

34. In the Request for Arbitration of 6 January 2023, the Club requests the following relief:

"A) to order the Respondent to refund the expenses of 1.100 USD and 250 CHF to the Claimant;

B) to order the Respondent to pay the penalty amount of 2.275 USD to the Claimant;

C) to order the Respondent to pay 50.000 USD to the Claimant as the damage caused to its sporting interest;

D) to order the Respondent to pay an amount no less than 20.000 USD to the Claimant as indemnity;

E) to order the Respondent to pay the interest rate of 5% per annum on the amounts that the Respondent will be ordered to pay;

F) to award the Claimant all costs of this proceeding, including handling fees and arbitration expenses, as well as a reasonable sum for attorneys' fees and expenses in accordance with the BAT Arbitration Rules 17.3 and 17.4 and the practices of this Tribunal;

G) Such other and further relief that this Tribunal deems just and equitable."

4.2 The Player's Position

35. The Respondent did not make any submissions in this arbitration.

5. The jurisdiction of the BAT

36. Since the Respondent did not participate in the arbitration, the Arbitrator is obliged to examine his jurisdiction *ex officio*, on the basis of the record as it stands.¹

37. 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).

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

¹ Judgement of the Swiss Federal Tribunal, 120 II 155, 162.

39. 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.²

40. The Employment Contract contains the following dispute resolution clause:

"Article 13: BAT

Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et Bono."

41. The dispute resolution clause is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

42. With respect to the substantive validity, the Arbitrator considers that the jurisdiction of BAT over the Club's claims arises from the Employment Contract. The wording "[a]ny dispute arising from or related to the present contract [...]" clearly covers the Club's claims.

43. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Club's claims.

6. Other Procedural Issues

44. Article 14.2 of the BAT Rules specifies that "*the Arbitrator may [...] proceed with the arbitration and deliver an award*" if "*the Respondent fails to submit an Answer*". The Arbitrator's authority to proceed with the arbitration in case of default by one of the parties

² Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

is in accordance with Swiss arbitration law and the practice of the BAT.³ However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

45. This requirement is met in the present case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules. He was also given sufficient opportunity to respond to Claimant's Request for Arbitration. The BAT sent all Procedural Orders to the Player's new agents, Mr. David Hazan and Mr. Andrew Hoening. Mr. Hoening sent two e-mails to the BAT requesting information about the Account of Costs and another e-mail providing the Player's address upon request of the BAT. There is, therefore, no doubt that the Player's representatives received the correspondence from the BAT and decided not to submit an Answer.

7. Discussion

7.1 Applicable Law – *ex aequo et bono*

46. 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".

³ See *ex multis* BAT cases 0001/07; 0018/08; 0093/09; 0170/11.

47. Under the heading "Law Applicable to the Merits", Article 15 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."

48. As seen above, Article 13 Employment Contract stipulates that: "[t]he arbitrator shall decide the dispute ex aequo et bono". However, according to Article 12 Employment Contract, this contract is governed by the laws of Lebanon.

49. Pursuant to the jurisprudence of the BAT, the Parties' agreement to submit any dispute to the BAT according to the BAT Rules includes the mandate to the arbitrator to apply the *ex aequo et bono* principle. A fortiori, if the Parties have explicitly agreed on the application of the *ex aequo et bono* principle for any BAT arbitration, this specific agreement prevails over the reference to any particular national law elsewhere in the Employment Contract, according to the maxim that *lex specialis derogat legi generali*.⁴ The Arbitrator notes that this does not necessarily deprive Article 12 Employment Contract of any meaning. In particular, it may well be that Lebanese law applies in respect of, for example, rules on workplace safety, or in case a forum other than the BAT is called upon to interpret the Employment Contract, e.g. in relation to provisional measures.

⁴ See e.g. BAT 1592/20.

50. Consequently, the Arbitrator shall decide the issues submitted to him in this proceeding *ex aequo et bono*.

51. 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'arbitrage⁵ (Concordat)⁶, 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."*⁷

52. This is confirmed by Article 15.1 BAT Rules, according to which the Arbitrator applies "*general considerations of justice and fairness without reference to any particular national or international law*".

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

7.2 Findings

7.2.1 Did the Club terminate the Employment Contract with just cause?

54. First, the question is whether the Club was justified in terminating the Employment Contract on 29 November 2022.

⁵ 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).

⁶ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

⁷ JdT 1981 III, p. 93 (free translation).

55. On 26 November 2022, the Player did not take the plane to travel to Beirut as agreed. On the same day, the following messages were exchanged in a WhatsApp group chat between the Player's former agents Jad Saade and Zachary Benalloul, and the Club's General Manager:

Club's General Manager: "Zac
Any news about Mason.
Are u talking to him"

Zachary Benalloul: "Yes, I've just been giving him information on
Lebanon, trying to cool everything and get him on a
plane to beirut [sic] by Sunday... I'll keep you posted
to when everything is finished"

Club's General Manager: "Keep on pushing please
Believe me we will all look ridiculous if he doesn't
come. [...]"

Zachary Benalloul: "Yes I know this completely"

Club's General Manager: "We also need to change his ticket."

Jad Saade: "Where do we stand now?"

Club's General Manager: "Why the hell did he sign the contract if he didn't
want to come.
Does he know the damages and the consequences
of him not full filing the contract he signed.

This is ridiculous guys.
Never had this happen especially with professional
agents like you guys."

[...]

Club's General Manager: "Any news guys?"

Jad Saade: "From my side, zak told me it is solved
And he will go to atlanta to make sure the player is
on the flight sunday [sic]"

Club's General Manager: "Great news then I will change the ticket to Sunday afternoon"

56. Although the Club rebooked the flight ticket to 27 November 2022, the Player did not take this plane. The dialogue in the WhatsApp group chat that day reads as follows:

[...]

Voice message of the Club's General Manager

Jad Saade: "@ Zac Benalloul Agent Dixon do u see whats happening??????
So is he coming or no???????"

Zachary Benalloul: "Yes"

Club's General Manager: "When"

[...]

Zachary Benalloul: "Monday
There's no flight tomorrow right? [...]"

Club's General Manager: "Monday
I have booked him on the same flight for Monday"

[...]

*"I need to talk to Frank
It is important that I communicate with him now
I don't like what is going on guys.
I need a confirmation from Frank That [sic] he is coming.
This situation is not good for me."*

Zachary Benalloul: "Yes, I'm going to have him reach out
He knows what's at stake
And said he's coming to Matt, his trainer, Matt is calling him to"

[...]

Zachary Benalloul:

"Frank is aware of everything and is heading to Beirut on Monday"

57. It remained undisputed that the Player did not arrive at the Club on Monday, 28 November 2022, which led the Club to terminate the Employment Contract the next day.
58. Under the circumstances and after the Player's multiple inaccurate promises, it is understandable that the Club did not want to push back the arrival date of the Player any longer but brought the employment to an end. By not arriving at the Club on the agreed date and with his unreliable promises that he would take the next day's flight, the Player has not only destroyed trust of the Club but also violated the Employment Contract.
59. Pursuant to Article 7 Employment Contract, the Player may not, *inter alia*, be absent from a game and/or practice and/or team meeting for reasons other than medical ones. The Player has not provided a plausible explanation for his decision not to travel to Beirut and not to fulfill his obligations under the Employment Contract. His vague reference to "*personal problems*" does not justify disregarding the principle of *pacta sunt servanda*. The Player did not even find it necessary to respond to the Request for Arbitration.
60. On the other hand, the Club did everything reasonable to maintain the Employment Contract, by accepting the postponement of the arrival date and providing for a new ticket twice to ensure that the Player could actually travel to Beirut.
61. However, the Player did not seem to care about the Employment Contract and the obligations contained therein which is surprising since he had already informed the Club which number and name should be printed on his jersey. The Arbitrator finds that the Player's multiple postponement of the arrival date and the eventual non-arrival at the workplace without any plausible explanation unacceptable. The Club no longer had to be stalled and was entitled to terminate the Employment Agreement with immediate effect.

7.2.2 Financial consequences of the early termination

62. The Club claims substantial financial damages because of the Player's severe breach of the Employment Contract.
63. Pursuant to BAT jurisprudence, "*[a]ccording to the employment laws of all known legal systems, the employee who walks away without reasons must compensate the employer for all proven costs and damages which have been caused as a direct consequence of his breach. [footnote omitted] In addition, it is generally accepted – and in compliance with principles of justice and fairness – that the judge may grant the employer compensation for the damage which is either non-monetary or difficult to calculate and which may also include a punitive part. On the other hand, the Player's salary and other costs which the Club retained because of the early termination must be taken into account.*"⁸
64. The Club's claims for damage compensation is based on several grounds, which will be addressed individually below.

a) Costs related to the execution of the Employment Contract

65. The Club requests reimbursement of the costs related to the execution of the Employment Contract until its termination, i.e. USD 1,100.00 for the flight ticket, which the Club purchased according to Article 10 Employment Contract, and CHF 250.00 for the FIBA fee for the issuance of the Letter of Clearance.
66. According to Article 10 Employment Contract, the Club is obliged to provide the Player with two round trip tickets from the USA to Beirut. The Club submitted a copy of the

⁸ See e.g. BAT 0209/11, at para. 73; BAT 1172/18, at para. 124.

booking details for the flight for the Player from Atlanta via Paris to Beirut in the amount of USD 1,100.00. This expenditure was useless because the Player did not come to Beirut as agreed and the ticket costs must be refunded to the Club.

67. The Club also submitted a proof of payment of CHF 250.00 to FIBA on 21 November 2022, allegedly for the Letter of Clearance of the Player, although this is not explicitly stated in the receipt. According to para. 345 of the FIBA Internal Regulations – Book 3, the administrative fee for the issuance of the Letter of Clearance indeed amounts to CHF 250.00, and the date of payment corresponds to the signing date of the Employment Contract. The Arbitrator therefore accepts that the Club paid CHF 250.00 to the FIBA for the Player's Letter of Clearance, which again was a useless expense, which must be reimbursed by the Player.

b) Penalty fee

68. The Club claims that it is entitled to a penalty fee due to the Player's breach of contract.
69. Article 8 Employment Contract provides the following penalty rule:

"The Club has the right to penalize the Player without any verbal and/or written warning and to deduct any of the following amounts from any monthly payment due or to be due to the Player for the following situations:

1. *Missing a practice or a team meeting, without an acceptable reason, gives the Club the right to deduct the following amounts:*
 - a- *2.5% from any monthly payment due or to be due to the Player for the first occurrence.*
 - b- *5% from any monthly payment due or to be due to the Player for the second occurrence.*

c- *7.5 % from any monthly payment due or to be due to the Player for the third occurrence.*

d- *At the Fourth [sic] occurrence, the Club has the right to consider the agreement automatically terminated at the Player's responsibility without the need to refer to any court and/or to arbitration or to send any notice.*

[...]"

70. The Club argues that by not taking the flights on 26, 27 and 28 November 2022, the Player missed several training sessions and team meetings and that therefore, the Club is entitled to a penalty fee of the maximum amount of 7.5% of the Player's monthly salary of USD 37,000.00, i.e. to USD 2,775.00.

71. The Arbitrator finds that Article 8 Employment Contract is not applicable in the present case: Article 8 Employment Contract obviously serves to maintain disciplined behaviour of the team members and compliance of the players with the training schedule. It is not a general penalty clause applicable after a player has been dismissed because of a breach of contract, although, strictly speaking, the Player may have missed a few practice sessions and team meetings. It must also be considered that the Club was ready to accept a postponement of the Player's arrival until it eventually turned out that the Player did not intend to come to Beirut at all.

72. Therefore, the Club is not entitled to a penalty based on Article 8 Employment Contract.

c) Damage caused to the Club's sporting interests based on the different values of the Player and Mr. Hayes

73. The Club then requests compensation for the damage caused to its sporting interests by the Player's non-arrival, the lack of time and opportunity to plan the arrival of another

foreign player. According to the Club, this damage corresponds to the "*different player's value between the Player and his replacement player*" as reflected in their salaries.

74. The Player's agreed annual salary was USD 222,000.00, whereas Mr. Kenneth Hayes earns an annual salary of USD 150,000.00 which results in a difference in value of USD 72,000.00, which reflects the Club's loss in terms of "*sporting interest*". The Club accepts that it actually saved some money when replacing the Player by Mr. Kenneth Hayes, and reduces its damage claim to USD 50,000.00.
75. The Arbitrator cannot follow the Club's reasoning and the calculation of the damage to its "*sporting interest*". According to BAT jurisprudence, extraordinary replacement costs can be re-claimed from a player who was rightly dismissed without notice. No such costs have been claimed by the Club and the Arbitrator fails to see how salaries saved may give rise to an additional claim for damages.⁹ A player's sporting and also commercial value is reflected in his salary. While the sporting value of Mr. Hayes may have been lower, so was his salary. The Club does not argue that this was different in the present case and that hiring Mr. Hayes instead of the Player led to a loss for which the Player can be held responsible.
76. Thus, the Arbitrator does not award a compensation for damage inflicted to the Club's "*sporting interest*" as reflected in the different salaries of the Player and Mr. Kenneth Hayes.

⁹ See also e.g. BAT 1030/17, at para. 82.

d) *Special indemnity*

77. The Club finally requests a special indemnity due to the harmed reputation and honour of the Club in the amount of USD 20,000.00.
78. It has been generally accepted in employment law and in BAT case law that the employee owes a compensation to the employer because of his unjustified departure from his employment or his failure to take up the job.¹⁰ According to BAT jurisprudence, *"[t]he impossibility of determining a concrete financial detriment which a club suffered as a consequence of a player's unjustified absence should not award the Player with a 'free ticket' to walk away from his or her contractual commitments, and to leave the Club behind with a disturbed season's preparation and reduced chances of success. This is all the more important in a team sport such as basketball, where the hire of a specific player is part of an overall sporting strategy, aimed at putting together a roster of players who are expected to form a homogeneous and competitive team. A player who interferes with such planning by breaking his or her contractual promises without just cause must indemnify the Club for the complications he or she has caused [...]."*¹¹
79. The Arbitrator agrees with the Club that the behaviour of the Player, who deliberately decided not to travel to Beirut even though he had signed the Employment Contract a few days earlier and the Club was heavily relying on his services, must have disturbed the Club's participation in the ongoing season and the preparation of the West Asia League season and reduced its chances of success. After all, the Club was forced to short-term replacement and unplanned changeovers in the team, and there was hardly time to find an equivalent replacement. On the other hand, the Player was a blank slate

¹⁰ See e.g. BAT 0209/11, at para. 89.

¹¹ See e.g. BAT 1030/17, at para. 84.

for the Club and there was no guarantee that he would actually live up the playing expectations – especially since he already stumbled at the Club's doorsteps.

80. When calculating the quantum of the special indemnity, the Arbitrator has a wide range of discretion, especially when he is empowered to decide *ex aequo et bono*.¹² Considering the circumstances of the present case, where the Player did not provide any explanation for his decision not to travel to Beirut, the Lebanese professional basketball league was still ongoing and the West Asia League started on 21 December 2022 and, in the end, the Player simply showed no intention to fulfil his contractual duties, the Arbitrator finds a compensation in the amount of one monthly salary of USD 37,000.00 (see Article 4 Employment Contract) to be fair and appropriate.
81. Although this amount exceeds the amount of USD 20,000.00 claimed under the heading "special indemnity", this does not constitute an amount payable "ultra petita",¹³ since the special indemnity serves as a compensation for numerous elements of damage that are difficult or even impossible to quantify, such as futile planning costs, disappointed sporting expectations or short-term conversions in the team and the playing tactics, under whatever heads such compensation has been claimed. At the end, the special indemnity should also have a deterrent effect and remind the parties that contracts must be respected. In the present case, the amount awarded as special indemnity does not exceed the Club's overall request for monetary relief.

¹² See e.g. BAT 1030/17, at para. 85; BAT 0209/11, at para. 94.

¹³ See SFT 4A_684/2014.

7.2.3 Interest

82. The Club requests the BAT to order interest at the "*rate of 5% per annum on the amounts that the Respondent will be ordered to pay*".
83. The Employment Contract does not provide a regulation concerning interest. According to standing BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. This is a generally accepted principle, which is embodied in most legal systems. As requested by the Club and in correspondence with the standing BAT jurisprudence the default interest rate is of 5% per annum.
84. As to the date from which the interest for the outstanding amount starts to run, the Arbitrator notices that the Club fails to indicate in the Request for Arbitration the period for which interest shall be awarded. The Arbitrator interprets the wording "*on the amounts that the Respondent will be ordered to pay*" to mean that the Club requests interest only from the date of the issuance of this Award. Therefore, interest at the rate of 5% starts from the date of this Award.

8. Conclusion

85. Based on the foregoing, and after taking into due consideration all the evidence submitted and all arguments made by the Parties, the Arbitrator finds that the following payments are owed: The Player shall pay the Club USD 38,100.00 and CHF 250.00, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) from the date of the present Award until payment in full.

9. Costs

86. In respect of determining the arbitration costs, Article 17.2 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). [...]"

87. On 16 May 2023, the BAT Vice-President determined the arbitration costs in the present matter to be EUR 7,000.00.

88. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 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."

89. Considering the fact that the Claimant almost completely prevailed, the Arbitrator considers it fair under the circumstances and in application of Article 17.3 BAT Rules that the costs of the arbitration be exclusively borne by the Player.

90. In relation to the Parties' legal fees and expenses, Article 17.3 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."

91. Moreover, Article 17.4 BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses. The maximum contribution for an amount in dispute from EUR 30,001.00 to EUR 100,000.00

(in casu USD 73,375.00 plus CHF 250.00, which is approx. EUR 67,224.00) is EUR 7,500.00 (excluding the non-reimbursable handling fee).

92. The Claimant claims legal fees in the total amount of EUR 7,500.00. In the request for relief, the Club also request the Respondent to pay "*all costs of this proceeding, including handling fees and arbitration expenses*". The Player did not submit a cost statement.
93. Taking into account the factors required by Article 17.3 BAT Rules, the maximum awardable amount prescribed under Article 17.4 BAT Rules, the work done by the counsel and the specific circumstances of this case, the Arbitrator holds that it is fair and equitable that the Respondent shall pay a contribution of EUR 4,000.00 plus the non-reimbursable handling fee of EUR 4,000.00 to the Claimant. The Respondent shall bear his own legal costs and fees.

10. AWARD

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

- 1. Mr. Frank Mason shall pay Beirut Club USD 38,100.00 and CHF 250.00, plus interest of 5% per annum on any outstanding balance (as may be the case from time to time) thereof from the date of the present Award until payment in full.**
- 2. The costs of this arbitration until the present Award, which were determined by the Vice-President of the BAT to be in the amount of EUR 7,000.00, shall be borne by Mr. Frank Mason alone. Accordingly, Mr. Frank Mason shall pay EUR 7,000.00 to Beirut Club.**
- 3. Mr. Frank Mason shall pay EUR 8,000.00 to Beirut Club as a contribution to its legal fees and expenses (including the non-reimbursable handling fee).**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 24 May 2023



Stephan Netzle
(Arbitrator)