

**Arbitration CAS 2002/A/388, Ülker Sport /Euroleague, award of 10 September 2002**

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Professor Pierre Lalive (Switzerland); Mr. Peter Leaver QC (United Kingdom)

*Basketball*

*Security of players*

*Refusal of a team to play in a game*

*Suitable justification for non-appearance*

- 1. Suitable justification does not equate precisely to Force Majeure. Force Majeure is concerned with impossibility of performance; suitable justification contemplates something less than that. The question of whether or not suitable justification can be shown to exist is elementarily one of degree, to be judged objectively by reference to all material circumstances. It does not, however, matter that the formula of “*suitable justification*” is not used by a team which seeks to rely upon it; what is important is whether the facts established amount to such justification.**
- 2. In a multilateral competition, there is particular importance in adhering, if at all possible, to a prearranged schedule. If teams in such competition could simply take their own decisions whether or not to appear at the time and place fixed, and compel the organizers of the competition to reschedule the match at another time and another place, the fabric of the competition would swiftly unwind to the detriment, cost and inconvenience of all involved in it.**

The appellant is Ulker Sports Club (“Ulker”) based in Istanbul, Turkey. Ulker was a first time participant in the Euro League Competition 2001/2. Maccabi Tel Aviv (“Maccabi”) based in Tel Aviv, Israel was another team participating in the same competition for the first time.

Euro League is a European basketball competition created by the professional clubs and professional leagues in Europe through the protocol of the constitution of the Euro League Basketball (“Euro League”).

On 11 April 2002 a match in to the 5<sup>th</sup> round of the Euro League Top 16 (“the game”) between the two teams was scheduled to be played in Tel Aviv.

Because of their concerns about the security situation in Israel, Ulker applied to Euro League to move their match with Maccabi to another country. Euro League declined to do so, whereupon Ulker did not attend the game.

On 10 April 2002 Ulker by a letter to Euro League expressed its concern on the pressure put by players and relatives on the club. It did not, however, declare an intention not to turn up for the game. It said only that the team now planned to arrive and to depart on 11 April 2002. However it also asked Euro League once more to reconsider their decision.

On 10 April 2002 Euro League informed Ulker that after further checks “*there was no objective circumstance*” that indicated it should change its earlier decision of 8 April 2002.

On 11 April 2002 – 7 hours before the beginning of the scheduled game – Ulker stated for the first time that, in view of the refusal of some of its players to travel to Israel, and the inability to obtain insurance cover the team would not go to Tel Aviv to play the game; and the team did not do so.

On 11 April 2002 the CEO of Euro League resolved to suspend the game Maccabi v. Ulker pursuant to the provisions of Article 28.1 of the Euro League Regulations. The Euro League statement expressed surprise at Ulker’s decision both because of its timing and because it was in breach of Euro League’s decision reached after assessment of the situation on 8 April 2002.

On 15 April 2002 the Euro League disciplinary judge accordingly deemed the match lost by Ulker by a score of 2 to 0 and imposed a penalty on Ulker of €10,000. He held that the refusal of certain players to travel to Tel Aviv could not be accepted as suitable justification for Ulker’s non appearance, not least because Euro League’s decision of 8 April 2002 to maintain the date and place of the game, was not challenged by Ulker at any time.

On the 25 April 2002 Ulker appealed to the Euro League Appeals Judge.

On 10 May 2002 the Euro League Appeal Judge dismissed Ulker’s appeal and also held that Ulker had not provided a suitable justification for their non appearance. He held that the concept of suitable justification, as an exception to a general obligation, had to be narrowly construed; that there was no force majeure stricto sensu, since it was not impossible for Ulker to attend the match; that the dangers of travel to Israel had not deterred other teams in other sports from honouring their commitments; and that Euro League had carefully considered the material circumstances and reached a reasonable conclusion.

It is against the decision of the Euro League Appeal Judge that this appeal to CAS is brought.

The Counsel for Ulker laid stress on the number of deaths and injuries in Israel since the Intifada resumed in October 2001, and the escalating nature of the conflict. He drew attention to widespread (and well known) cancellation of tourist plans to visit Israel; as well as to the refusal of Turkish insurers to insure players who attended the game, as indicating a neutral third party view of the situation at the material time.

He also drew attention to UEFA’s decision of 8 March 2002, to transfer a UEFA cup quarter final first leg match between Hapoel Tel Aviv and Milan AC from Tel Aviv to Nicosia on 14 March 2002; to the decision of the European Handball Federation on 6 May 2002 at the European play off match first leg for 2003 Men’s World Championship in Portugal between Israel and Slovenia should

be played on 1 June 2002 in Turkey and not, as the Israel Handball Association wished, in Israel; and to the decision of UEFA on 24 July 2002 that all matches of Israeli teams with European teams should not be played in Israel.

He suggested that Ulker, as a team coming from the single secular Muslim state, was a possible target for Palestinian attack. Although the Israeli authorities had promised security measures, no security measure, he argued, could guarantee safety, as the assassination of President Kennedy proved.

He said that five United States' players in the Ulker team had declined to go, and drew attention to letters from American lawyers expressing concern about the potential risk involved if players were sent to what he described as "*a war zone*" as well as letters from the concerned families of local players.

The Counsel for Ulker concluded by inviting the Panel to consider the balance of considerations involved. On the one hand all Euro League needed to do was to move the location of a match; on the other hand Ulker were being asked to expose their players to risk of loss of life – the most vital interest protected by the law.

The Counsel for Euro League said that Ulker had shown no sufficient justification - which he equated, in a context of the Euro League Regulations with Force Majeure - for their non appearance. He invited the Panel not to concern itself so much with an analysis of the situation in Israel as it existed on April 11, and rather to concentrate on the contemporary conduct of Ulker.

He argued that Euro League had, at Ulker's instigation, investigated the security measures proposed by the Israeli authorities; had informed Ulker that it was satisfied that there was no significant risk to Ulker's players, and confirmed its decision to maintain the game at its scheduled date in their letter on April 8. Ulker had declined to challenge this decision either by appeal or other mechanism. Even on 10 April, the day before the match, Ulker had indicated an intention to travel to Israel.

The internal problems that Ulker clearly had with its players did not, he submitted, provide sufficient justification.

## LAW

1. The jurisdiction of CAS results from Article 66 of the Euro League Disciplinary Regulations and from the signature by the parties to the order of procedure dated 12 July 2002.
2. The panel has to decide the dispute according to the applicable regulations and, in the absence of choice of rule of law by the parties, pursuant to the law of Spain. In the event only the applicable regulations fall to be considered.

3. The Euro League Regulations provide, so far as material :

Article 19 Calendar

*“The General Assembly will approve the Calendar before 30 May of each season”*

Article 20.7

*The impossibility of reaching the city where the match is to be held is not to be considered a case of **force majeure** that would be reason for suspension of the match if the teams travel plan does not foresee its arrival in that city before midnight of the day before the game scheduled.*

Article 33 Non appearance of a team

*When a game is suspended due to the failure of one of the teams to appear and a suitable justification for the cause or reason for the non appearance, was given in the opinion of the Disciplinary Judge in a time of forty eight hours, the Judge will have the game replayed with the club than had initially failed to appear, covering all the cost of the travel of the club that had initially appeared, the expenses associated with refereeing and other costs that the holding of the new game may cause. **If on the other hand the Disciplinary judge should fail to consider the failure to appear CAS justified, he will give the game as lost to the infringing club by the results of zero to two (0-2) and will decide any compensation and/or sanctions that might apply.***

4. In the view of the Panel, the issue is whether there was “*suitable justification*”, as envisaged by Article 33 of the Disciplinary Regulations for Ulker’s non appearance. The onus of establishing such “*suitable justification*” lies upon Ulker.
5. Suitable justification does not, in the Panel’s view, equate precisely to force Majeure. Force Majeure is concerned with impossibility of performance (BELOFF ET AL., Sports Law, para 1.21, pp. 9-10); suitable justification contemplates something less than that.
6. The question of whether or not suitable justification can be shown to exist is elementarily one of degree, to be judged objectively by reference to all material circumstances. It does not, however, matter that the formula of “*suitable justification*” is not used by a team which seeks to rely upon it; what is important is whether the facts established amount to such justification.
7. In the judgment of the Panel, in a multilateral competition, there is particular importance in adhering, if at all possible, to a prearranged schedule. If teams in such competition could simply take their own decisions whether or not to appear at the time and place fixed, and compel the organisers of the competition to reschedule the match at another time and another place, the fabric of the competition would swiftly unwind to the detriment, cost and inconvenience of all involved in it. We respectfully endorse the observations of the Euro League Appeals Judge that the obligation to appear and compete at the dates and in the venue indicated in the calendar is “*the most basic obligation in the sporting system*”.

8. It is a regrettable fact that in the modern world many places from time to time become acute trouble spots; Beirut, Belfast and the Basque region of Spain provide other examples. Terrorism is the scourge of our age. (To that extent this appeal raised a matter of general importance in the sporting world). But, if possible, sport, like life, must go on. Despite the violence in Israel, there is no example of sportsman being either targets or victims. Other teams visited Israel at the material time, and returned unscathed.

In particular the following basketball matches were played in Israel in the Euro League Competition 2001/2:

GAME	LOCATION	VISITOR	SCORE		DATE
1	MACCABI TEL AVIV	ALBA BERLIN	82	70	11/10/2001
3	MACCABI TEL AVIV	UNICAJA	82	60	25/10/2001
6	MACCABI TEL AVIV	OLYMPIAKOS PIRAEUS	78	73	15/11/2001
9	MACCABI TEL AVIV	IDEA SLASK WROCLAW	75	56	20/12/2001
11	MACCABI TEL AVIV	SPIROU CHARLEROI	94	78	17/01/2002
12	MACCABI TEL AVIV	BENETTON BASKET	80	74	31/01/2002
14	MACCABI TEL AVIV	EFES PILSEN ISTANBUL	76	78	14/02/2002
15	MACCABI TEL AVIV	CSKA	69	68	28/02/2002
16	MACCABI TEL AVIV	TAU CERAMICA	77	78	08/03/2002

Comparing the dates with the tragic Suicide Factory Schedule relied on by Ülker, it can be seen that violence in Israel persisted throughout the period described in the Schedule.

9. It is not without interest that the players show of reluctance to travel was spearheaded by members of the team from the United States of America, who are, for obvious reasons of recent history, particularly risk averse.
10. There is no sufficient evidence that Ülker could not in fact have sent a team, even if not its best team to play in the Game. The letter from Ülker dated 11 April 2002 suggests that it could have done so (see above). (There is a recent analogy in the field of football, when in October 2001 Chelsea played a UEFA cup tie against Hapoel Tel Aviv in Israel, but without many of its first team players, who refused to travel).
11. Had the team themselves received death threats, like those levelled in August 2002 Mr Neil Lennon, the Catholic appointed captain of the Northern Ireland football team, [who, in consequence, declined to play in recent match in Belfast, and indeed announced his retirement from international football], the Panel might have come to a conclusion that suitable justification was made out, even if such death threats did not make it impossible for the team to travel. But such is not this case.
12. In CAS 2001/O/341 Glasgow Rangers FC failed to obtain a order against UEFA staying a proposed match between the applicant and FC Anzi Makhachkala scheduled for 13 September 2001 in Makhachkala, Dagestan notwithstanding the fact that the UK government had advised the team not to fly to Dagestan for security reasons, and that there had been bomb incidents reported in Makhachkala in recent weeks. The determination of the deputy president of the ordinary arbitration division concludes as follows:

*“I am aware of the security concerns by the claimant. However, I cannot minimise the assurance of safety given by both UEFA and the Russian and Dagestan authorities and the need for UEFA to ensure the proper running of the competition which it organises”.*

[Subsequently on 18 September 2001 UEFA who had continued to monitor the security situation, that determined that the tie should be played as a single match at a neutral venue on 27 September 2001].

13. The Panel finds the reasoning of the Deputy President in the Rangers case instructive. Euro League equally and responsibly investigated the security measures proposed, and judged them adequate (Twenty five years earlier the British Board of Boxing Control had likewise and for similar reasons rejected a plea by the British Lightweight Champion Jim Watt to have a championship bout scheduled to take place in Londonderry in Northern Ireland moved elsewhere).
14. We should stress that we have every sympathy with Ülker and its players, and well appreciate the legitimate concerns of their families. The players are not to be criticised for their natural caution. Furthermore, had Euro League in fact decided to move the match to another venue, it could not, in the Panel’s view, have incurred any criticism. There is a band of reasonable responses to a situation, such as that which obtained in Israel at the material time, as the various decisions of various sporting authorities referred to above illustrate.
15. We repeat however, it was for Ülker to show that Euro League’s response was unreasonable and that, in the language of the relevant regulations, it had “*suitable justification*” for its team’s non appearance at the game. We find for the foregoing reasons that Ülker has failed to do so.
16. Although invited by the Panel to do so, the Counsel for Ülker did not press strongly an alternative submission that in any event the penalty was excessive. We consider that he was right to focus his attention on his main argument. The loss of the match by the stipulated score was automatic under Article 33. Only a fine was imposed and that towards the lower end of the available scale, a third of the maximum. The Euro League Appeals Judge (as did the Disciplinary Judge gave due weight to the “*special circumstances*” of the case. In this context it was not relevant to recall that Ülker left it to the last minute to announce that it would not travel and so compelled Euro League to suspend the game.

**The Court of Arbitration for Sport hereby rules :**

1. The appeal filed by Ülker Sport Club on 24 May 2002 is dismissed.
2. (...)