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FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0062/09 FAT)

by the

FIBA ARBITRAL TRIBUNAL (FAT)

Mr Quentin Byrne-Sutton

in the arbitration proceedings between

Ms. Laura Ashley Harper, c/o Sports International Group Inc., 267 Kentlands Blvd. Suite 105, Gaithersburg, MD 20878, USA

Mr Mehmet Ali Tinay

Kemalpaşa Mah. Selimpaşa Sok. 1/2 Laleli, Eminönü, Istanbul
c/o Sports International Group Inc.

Mr Boris Lelchitski

c/o Sports International Group Inc.

Sports International Group Inc., 267 Kentlands Blvd. Suite 105, Gaithersburg, MD 20878, USA

all represented by Mr. Ersu Oktay Huduti, Attorney-at-Law, Huzur Mahallesi Oyak Sitesi Blok No: 27 Daire No: 29, Sisli Istanbul, Turkey

- Claimants -

vs.

Beşiktaş Jimnastik Kulübü, Süleyman Seba Caddesi, No: 48
BJK Plaza Akaretler, Beşiktaş 34357, Istanbul, Turkey

- Respondent -



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1. The Parties

1.1. The Claimants

1. Ms. Laura Ashley Harper (the "Player") is a professional basketball player, who at the time of the dispute was playing for the basketball club Beşiktaş Jimnastik Kulübü.
2. Mr. Boris Lelchitski and Mr. Mehmet Ali Tinay are agents (hereinafter referred to collectively as the "Agents"), who at the time of the dispute were working for Sports International Group Inc. (hereinafter referred to as "SIG"), which is a company specialized in career-management of professional women basketball players.

1.2. The Respondent

3. Beşiktaş Jimnastik Kulübü (hereinafter referred to as the "Club") is a professional basketball club in Turkey.

2. The Arbitrator

4. On 26 October 2009, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules"). None of the parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.



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3. Facts and Proceedings

3.1. Summary of the Dispute

5. The Player and the Club entered into an agreement on 25 June 2008 whereby the latter engaged the Player for the season 2008-2009 (the "Agreement n° 1").
6. The Agreement n° 1 listed the Player and the Agents as signatories and stipulated under article 2 that their remuneration would be fixed in Exhibits 1 and 2 of the Agreement. Article 3 of the Agreement n°1 also stipulated that:

"During the term of the present Agreement the Club will provide the Player with two (2) round trip economy class tickets from the Player's city of choice in the USA to Istanbul, Turkey in each season of the contract".

7. Exhibit 1 of the Agreement n° 1, entitled "*Base salary and bonuses*", includes a payment schedule for the Player providing that:

"Payments mentioned above which are received ten (10) days later than the dates noted shall be subject to a penalty of \$25.00 per day of delay. In the case of payment not being made by the Club within fifteen (15) days to the Player (or Player's representatives) the Player shall not have to perform in practice sessions or games until all scheduled payments have been made, plus appropriate penalties. In case of failure of payment after thirty (30) days the player will have a right to terminate this agreement, but the Club will still [be] obligated to pay the full amount of the base salary and the Agents fees"

8. Exhibit 2 of the Agreement n° 1, entitled "*Representative's fee*" and listing the Agents as signatories, stipulates that a total amount of USD 13,000 will be paid in agency fees; USD 6,500 of which are to be paid to SIG "... *by the day player passes the medical examination ...*" and the remaining USD 6,500 to Mr. Mehmet Ali Tinay by 15 October 2008. Exhibit 2 also stipulates that:

"The Club will provide one round trip business class ticket for Player's Agent Boris Lelchitski from USA to Istanbul (or any other city upon an agreement with the Club), in each season of the contract for the purpose of meeting with the Player, and Club management".



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9. At the same point in time, the Agents negotiated an agreement (the “Agreement n° 2”) with the Club for another player named Shay Doron. Agreement n° 2, which also listed the Agents as signatories, included an Exhibit 2 providing for the payment of agency fees on the same dates, in the same amounts and in the same manner as under the Agreement n° 1.
10. Thus, the total amount of agency fees stipulated in Agreements n° 1 and 2 combined was USD 26,000.
11. It is uncontested that out of the foregoing total amount of USD 26,000 in agency fees, the Club paid USD 13,000 onto the account of SIG on 2 January 2009 and USD 5,000 to Mr. Mehmet Ali Tinay on 26 February 2009.
12. Article 6 of the Agreement n°1 provides that:

“Player understands and agrees that she will abide by the Rules of the Turkish Basketball Federation and the Rules of the Federation of International Basketball Amateur (FIBA), provided that these rules are not inconsistent with any terms and conditions set forth in this Agreement. Player also agrees to observe and comply with all reasonable rules of behavior and By-Laws of the Club regarding sportsmanlike conduct of its players and employees at all times during the terms (sic) of this Agreement, both on and off basketball court. Club agrees to provide Player with an “English Translation” of Club By-Laws and Rules of Turkish Basketball Federation and penalty provisions thereof, prior to start of season.”
13. In relation to the contractual payment schedule concerning the Player (in Exhibit 1 of Agreement n° 1), it is uncontested that the payments were made late by the Club as follows: the first payment (USD 20,000) due on 30 September 2008 (or upon the Player passing the medical test) was made on 24 October 2008, the second payment (USD 20,000) due on 31 October 2008 was paid instead in two installments respectively on 31 October 2008 and 28 November 2008, the third payment (USD 15,000) due on 30 November 2008 was paid on 18 December 2008, the fourth payment (USD 15,000) due on 31 December 2008 was paid instead in two installments on 6 January 2009 and 20 January 2009, and the fifth payment (USD 15,000) due on 31 January 2009 was paid



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on 26 February 2009. The payments due in February and March 2009 were never made.

14. On 20 December 2008, the Player and Agents' lawyer put the Club on notice by means of a fax letter stating the following:

"[...] My client Mr. Lechitski has served an official notice dated December 16, 2008 via facsimile and e-mail and informed your respective party briefly about the payment problems that have occurred from the beginning of the season and stated that Ms. Harper and Ms. Doron shall not perform in any games or practices if all remaining debts to the players and himself were not paid until December 20, 2008. [...] After the notice was served, your respective party has paid Ms. Harpers and Ms. Dorons base salary but none of the other debts were paid [...] I would like to inform you that although your respective party has not fulfilled all its obligations, my clients decided to show their good will so Ms. Harer (sic) and Ms. Doron are going to perform in the rivalry game against Fenerbahçe [...] I would like to emphasize that Ms. Harper and Ms. Doron are performing only to show their and Mr. Lechitski's good will and this shall not mean that any of my clients accept breaches of contracts. We preserve all our legal and contractual rights and notify your respective party that Ms. Harper and Ms. Doron are going to return from their Christmas breaks only if all your respective parties' obligations are fulfilled including the agents fees"

15. On 2 January 2009, the Player and Agents' lawyer sent the Club a second notice by fax letter stating the following:

"Although we, my client Mr. Lechitski and I, have served notices to your respective party and informed you that Ms. Harper and Ms. Doron would not return from their Christmas breaks if all your respective clubs obligations were not fulfilled, your respective party decided not to take any action until this day of January 2, 2009, the day M. Harper and Ms. Doron were supposed to return [...] Today my client Mr. Lechitski received half of the agent's fees for services rendered on behalf of Ms. Harper and Ms. Doron, a total amount of \$13.000. Although I have informed your respective party that Ms. Harper and Ms. Doron were not returning unless their installments which were due on December 31, 2008 were made, your respective party decided to arrange flights for Ms. Harper and Ms. Doron. [...] I would like to inform your respective party, by preserving all my clients' legal and contractual rights, my clients Ms. Harper and Ms. Doron will return immediately if half of their installments that were due on December 31, 2008 are made. I would also like to notify your respective party that we will unilaterally terminate the employment contracts with just cause by serving another notice if all your respective clubs obligations are not fulfilled by January 15, 2009 and we will take the case to FIBA Arbitral Tribunal".

16. On 3 January 2009, a member of the Board of the Club, Mr. Yalçın, declared the



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following in a fax letter:

"I, Seref Yalçin, member of Beşiktaş Jimnastik Kulübü Derneği board of directors and responsible of the club's Basketball Branch, would like to inform you that [...] We, Beşiktaş Jimnastik Kulübü Derneği, accept, declare and guarantee that half of the remaining salaries of our players, Ms. Harper and Ms. Doron which were due on December 31, 2008 shall be paid on January 6, 2009 and all of our remaining obligations arising from their contracts, including agency fees, penalties and plane ticket fee for Ms. Harper shall be fulfilled (sic) by January 15, 2009 [...] We hereby declare and accept that further breaches of contracts shall constitute grave breaches which shall entitle your respective party to unilaterally terminate the employment contracts with just cause [...] This declaration is only valid if Ms Doron takes the flight reserved by the club, arrives in Turkey on January 3, 2009 and Ms. Harper takes the flight reserved by the club and arrives in Turkey on January 5, 2009".

17. The Player did return to Turkey in January 2009 to continue playing with the Club.
18. However, the Club alleges she returned several days late and that she subsequently committed a number of acts of misconduct in breach of her duties under the applicable disciplinary regulations of the Club and of the Turkish Basketball Federation.
19. More specifically, the Club contends that the Player returned from her Christmas holiday three days late – which prevented her from participating in a two-day practice session *"which resulted in failure to perform preliminary tactical exercises and preparations of our team for the match versus Female Basketball Team of Galatasaray Sports Club held on 07.01.2009"* – that she failed to attend team practice on 7 February 2009 without warning or being excused and that she was absent from her domicile at 11:30pm on the 16th, 17th, 18th, 19th and 21st of March 2009.
20. As proof of its allegations, the Club filed a series of eight written declarations entitled "Minutes" – all signed by various team managers and coaches and carrying dates between 3 January 2009 and 21 March 2009 corresponding to the dates on which the Player allegedly committed each act of misconduct.
21. The Player contests the Respondent's above declaration concerning the game against



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Galatasaray by stating that it actually took place on 22 March and that on such date the salary payment owed to her on 28 February 2009 (due date according to the Agreement n°1) was still outstanding, meaning that she was perfectly entitled not to attend the pre-match practices and the game in question and more generally to take time off when she did.

22. Furthermore, the Player contests the evidentiary value of the minutes in question, by stating:

“The Player shall also claim that the Club’s records (the minutes) cannot prove the alleged breaches as these are one sided documents and there is no proof of them being communicated to the Player. The Player was never warned for any misbehaviour and thus most of the fines were imposed for either expressly or tacitly accepted circumstances”.

23. Matters came to a head a second time on 27 March 2009 when the Club sent the Player a notarized “Notification of disciplinary actions” communicating the fact that, on 23 March 2009, the Club’s board had decided to impose disciplinary fines on the Player as follows:

“a. A fine of US\$ 1.780 as per Article VIII.b.i of the Beşiktaş Jimnastik Kulübü Derneği Basketball Branch Discipline And Punishment Regulations since, although the yearend leave you might enjoy expired on January 02, 2009, you returned to Turkey on January 05, 2009, i.e. three days later than the date allowed, and consequently you have breached Article V.20 of the said bylaws;

b. A fine of US\$ 3.561 as per Article VIII.b.ii of the Beşiktaş Jimnastik Kulübü Derneği Basketball Branch Discipline And Punishment Regulations since, although you were allowed to be absent until February 07, 2009 to attend the award ceremony to be organized for you in USA, you returned Turkey on February 08, 2009, i.e. on day later than the date allowed, and consequently you have breached Article V.20 of the said bylaws for the second time;

c. A fine of US\$ 17.452 as per Article VIII.a.i, VIII.a.ii, VIII.a.iii VIII.a.iv, and VIII.a.i of the Beşiktaş Jimnastik Kulübü Derneği Basketball Branch Discipline And Punishment Regulations since you were found at your home (domicile) after 23:30 p.m. on March 16, 2009, March 17, 2009, March 18, 2009, March 19, 2009 and March 21, 2009, and consequently you have breached Article V.19 of the said bylaws for five times;



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d. to deduct the aggregate amount of aforementioned fines, i.e. USD 22.793, from your wages payable for February 2009 and March 2009

[...]”

24. Shortly, thereafter, on 31 March 2009, the Player served upon the Club a notarized notice of termination with the following content and requesting the Club to make all outstanding payments under the Agreement n°1 by 7 April 2009:

“1. A Player-Club agreement dated 25.06.2008 and a Turkish Basketball Federation (TBF) Mandatory Standard Contract was concluded between my client and your party. In Exhibit – 1 of the Player – Club Agreement it is agreed that my client shall have a right to unilaterally terminate the contract if any of the contracted payments are not received within 30 days and that your club shall still be liable for all the contracted payments towards my client and her representatives.

2. None of the payment obligations, which constitute your parties main obligation, were fulfilled in respect to the contract terms.

3. The alleged fine, which has no legal grounds arising from the contracts concluded between my client and your party, BJK Basketball Branch Discipline and Punishment Regulations or generally accepted rules (sic) of law which was imposed whilst your party has not fulfilled any obligations in respect of the contracts, constitute an effort to find an excuse for none payment which has led to a major loss of my clients confidence in the future performance of the contracts.

4. None payment of my clients contracted installments within 30 days without an acceptable reason constitutes a just cause for the contract termination according to Exhibit 1 of the Player-Club Agreement dated 25.06.2008.

5. Due to the above mentioned reasons I on behalf of my client notify your party that; the Player – Club Agreement and the TF Mandatory Standard Contract concluded between my client and your party are unilaterally terminated with just cause and my client will invoke FIBA Arbitral Tribunal and all costs and attorney fees will be borne on your party if my clients outstanding installments, contracted future payments are not fulfilled by April 7, 2009.”

25. The Club having made no further payments to the Player or her Agents as demanded, they filed a joint Request for Arbitration with the FIBA Arbitral Tribunal (the “FAT”).



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3.2. The Proceedings before the FAT

26. On 9 October 2009, the Claimants filed a Request for Arbitration dated 5 September 2009 in accordance with the FAT Rules and subsequently duly paid the non-reimbursable fee of EUR 2,980.
27. On 26 October 2009, the FAT informed the parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter.
28. On 10 November 2009, the Claimants paid their advance on costs in a total amount of EUR 4,500.00.
29. On 17 November 2009, the Club filed its Answer to the Request for Arbitration.
30. On 18 November 2009, the FAT Secretariat informed the Claimants that they would have to substitute for the Club with respect to the Advance on Costs because the latter had not paid its portion thereof.
31. On 4 December 2009, the Claimants made the substitute payment in an amount of EUR 4,488.00.
32. On 4 January 2010, the Claimants submitted a Reply to the Club's Answer.
33. On 22 January 2010, the Club submitted a second Answer.
34. Since none of the parties requested a hearing, the Arbitrator decided in accordance with Article 13.1 of the FAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions of the parties.
35. On 8 February 2010, subject to the Claimants filing specific additional documents and information related to their Exhibits 5 and 9, the Arbitrator closed the proceedings and requested the parties to submit their accounts of costs



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36. On 15 February 2010, the Claimants responded to the request for additional documents.
37. On 15 February 2010, the Claimants and the Respondent submitted their accounts of costs.

4. The Positions of the Parties

4.1. The Claimants' Position

38. The Claimants submit the following in substance:
 - By paying all the salaries late from October 2008 to March 2009, the Club was in breach of its contractual duties.
 - Moreover, since the Club was late in its payments, the Player was contractually entitled to withhold from practice sessions and to feel free to organize her life without regard for normal training constraints during the periods when her salary was outstanding beyond the due date, notably in March 2009. In any event, it is also factually contested that the Player arrived back late after the Christmas 2008 break since she took the flight of 5 January 2009 as proposed by the Club, and on 7 February 2009 she had been given leave to take part in a ceremony and had only arrived back the next day due to a delayed flight caused by a storm.
 - Consequently, the Club's reproaches regarding the Player's absences during such periods are misguided, and all the fines decided on 23 March 2009 and notified to her on 27 March 2009 were mere pretexts designed after the fact to try and justify late payments and prevent the termination for cause of the Agreement n° 1 by the Player.



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- It follows that the fines imposed are illegitimate.
- At the same time there are a number of causes which justify the Player's unilateral termination, including the Club's failure to pay within thirty days her salary contractually due on 28 February 2010, the Club's failure to pay the contractual penalties stemming from the delays in salary payments and the Club's breaches of its offer made via its Board member Mr. Yalçın, in which the latter stated that "... *any further breaches of contracts shall constitute grave breaches which shall entitle your respective party to unilaterally terminate the employment contracts for just cause*" – all of the foregoing leading to a loss in confidence of the Player in the Club's willingness to pay her upon the contractual terms.
- Since the unilateral termination is justified, the damages being claimed by the Club are not.
- With respect to the outstanding agency fees, the Club has not contested they are partially unpaid and has offered no valid reasons for withholding their payment.
- As a result of the Club's breaches and unkept promises and because the termination was justified, the Player is entitled to the outstanding salary payments together with the sum of contractual penalties applicable to the late payments and interest at 5% per annum on the total amount as well as to the reimbursement of the plane ticket she purchased to return home due to the breaches.
- Finally, as there was no reason for the Club to withhold part of the agency fees the outstanding amount of such fees must be paid, together with interest at 5%



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per annum. In addition because the Agents advanced the Club the cost of the Player's January 2009 flight to Turkey, that amount must be reimbursed by the Club.

39. In their Reply of 4 January 2010, the Claimants requested the following relief:

- "1. *The Claimants request the honorable Tribunal to dismiss all claims of Beşiktaş Jimnastik Kulübü Derneği.*
2. *The Player requests the honorable Tribunal to award the Player; an amount of \$ 45.000 for her base salary, an amount of \$ 3.600 for the penalties, an amount of \$ 685 for the plane ticket fee and interests at a rate of % 5 per annum.*
3. *SIG Sports request the honorable Tribunal to award; an amount of \$ 8.000 for the agency fee, an amount of \$ 825 for the plane ticket fee and interests at a rate of % 5 per annum.*
4. *The Claimants request the honorable Tribunal to award that all the Arbitration costs and their legal fees shall be reimbursed by the Club."*

4.2. Respondent's Position

40. The Club submits the following in substance:

- The FAT should not have proceeded with the arbitration because the Claimants failed to substitute within the fixed deadline for the Respondent's non-payment of its portion of the advance on arbitration costs.
- The Player failed to meet her duties as a professional athlete during the months of January, February and March 2009; and in doing so repeatedly breached the requirements of her contract and of the underlying disciplinary rules.
- The breaches in question are established by the Minutes signed by persons who witnessed the events.



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- Consequently, in March 2009 the Club was justified in imposing disciplinary sanctions on the Player in the form of fines, and she is not entitled to invoke delays in payment as a cause for termination of Agreement n°1; her undisciplined behaviour being the initial cause of the breakdown in the contractual relations.
- In addition, the Player's unilateral termination of the Agreement n°1, which occurred only a few days after being fined, was an act of retaliation in bad faith.
- For the foregoing reasons, the Player's unilateral termination was unjustified and constituted a breach of contract entitling the Club to withhold the outstanding salaries and claim damages.
- Entitlement to the agency fees was subject to the Player fulfilling her contractual duties; thus her breaches thereof also bar the Agents from claiming the outstanding part of their fees.

41. In its second Answer of 22 January 2010, the Respondent submits the following prayer for relief:

"Under light of the reasons explained above, we hereby ask you to reject the unfair action initiated by the Claimant, impose court charges and attorney fees on the Claimant, and make an award for compensation of our Club for its material and other damages and losses suffered as a result of a unilateral and unfair termination of the Player."

5. The jurisdiction of the FAT

42. Pursuant to Article 2.1 of the FAT Rules, "[t]he seat of the FAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland". Hence, this FAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA). The jurisdiction of the FAT presupposes the arbitrability of the dispute and the



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existence of a valid arbitration agreement between the parties.

43. 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) PILA¹.
44. The jurisdiction of the FAT over the dispute results from the arbitration clauses in articles 7 of the Agreements n° 1 & 2. The two arbitration clauses in question are identical and read as follows:

“Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT 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.

Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT and against decisions of the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law.

The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono.”

45. The agreements to arbitrate are in written form and thus fulfill the formal requirements of Article 178(1) PILA.
46. With respect to their substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreements under Swiss law (referred to by Article 178(2) PILA).
47. Although the claims by the Agents stem in part from two contracts containing separate



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arbitration agreements, the arbitration agreements in question are identical and the Respondent has defended itself against the Agents' entire claim within this proceeding without raising any jurisdictional objections relating to the contractual source of the claim.

48. Under Article 9.3 of the FAT Rules, the fact that the Claimants did not substitute within the fixed deadline for the Respondent's non-payment of its portion of the advance on arbitration costs did not prevent the FAT from proceeding, since the above-mentioned provision enables the FAT to refuse to proceed if the substitution is not made at all but does not prevent it from accepting a late payment; the rationale of the provision being simply to reserve the FAT the right not to organize an arbitration if it appears that the costs thereof will not be covered.
49. For the above reasons, the Arbitrator has jurisdiction.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

50. 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".

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



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51. Under the heading "Applicable Law", Article 15.1 of the FAT Rules reads as follows:

"Unless the parties have agreed otherwise 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."

52. Articles 5 of the Agreements n° 1 & 2 provide that they shall be subject to the laws of Turkey, i.e. the laws of the country in which the player is residing and playing. However, articles 7 of both Agreements stipulate that any disputes under the agreements shall be decided by the Arbitrator "*ex aequo et bono*". It is therefore a matter of interpretation of the Agreements to determine how deciding the case *ex aequo et bono* fits with the reference to the laws of Turkey.

53. The Arbitrator finds that in the present case the parties' common intention was to account for the mandatory rules of local labour law (in this case Turkey) to regulate matters such as working hours, safety, insurances, etc. as long as they did not become contentious, but that any disputes deriving from the performance of the parties' obligations under the contract would be decided *ex aequo et bono* if submitted to the FAT.

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

55. 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

² That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA. Today, the Concordat governs exclusively domestic arbitration.



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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

56. This is confirmed by Article 15.1 of the FAT Rules *in fine*, according to which the Arbitrator applies

“general considerations of justice and fairness without reference to any particular national or international law”.

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

6.2. Findings

58. Certain important facts are uncontested in this proceeding, among others the fact that the Club was late in all its salary payments due to the Player under the Agreement n° 1 from November 2008 onwards, and the fact that the salary payment of USD 15,000 contractually due to the Player on 28 February 2009 according to Exhibit 1 of the Agreement n° 1 remained unpaid 30 days beyond that date.

59. At the same time, Exhibit 1 of the Agreement n° 1 unambiguously provides that:

“In case of failure of payment after thirty (30) days the Player will have a right to terminate this agreement, but the Club will still [be] obligated to pay the full amount of the base salary and the Agents fees”.

60. Thus, under the terms of the Agreement n° 1 alone, the Player’s unilateral termination was justified and valid.

³ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

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



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61. Therefore the main question to resolve is whether in the circumstances in which the unilateral termination occurred, it can be deemed to have been unfair and therefore unjustified despite the terms of the Agreement n°1.
62. In light of the circumstances leading up to and surrounding the unilateral termination of the Agreement n°1 by the Player as evidenced in the present proceedings, the Arbitrator finds that it cannot be deemed to be unfair.
63. The Arbitrator's finding is based on a combination of the following factors:
 - In any employment contract, timely payment of the salary is one of the key obligations. The importance of this duty is emphasized in Exhibit 1 to the Agreement n° 1, since in addition to the ultimate right of being able to unilaterally terminate the Agreement in case of 30 days delay in payment, it is also provided that the Player can claim a penalty after 10 days of delay and refrain from participating in practices and games after 15 days of delay.
 - The Club has not alleged that the Player misbehaved or committed any disciplinary offenses between the beginning of her employment in October 2008 and her return to Turkey early in January 2009 after the Christmas break.
 - On the contrary, the evidence on record would tend to demonstrate that the Club considered itself to be the party in breach of its duties during the first three months of contract, since in negotiating the return of the Player to Turkey after the Christmas break and after receiving warning notices from the Player regarding late payments, the Club's board member Mr. Yalçın declared in a signed document that:
“[...] *We hereby declare and accept that further breaches of contracts shall constitute grave breaches which shall entitle your respective party to unilaterally terminate the employment contracts with just cause [...]* This declaration is only



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valid if Ms Doron takes the flight reserved by the club, arrives in Turkey on January 3, 2009 and Ms. Harper takes the flight reserved by the club and arrives in Turkey on January 5, 2009'.

- It is therefore credible and reasonable that, at that point in time, i.e. at the turn of the year and three months into the working relationship, the Player's confidence in the Club meeting its payment duties was already somewhat shaken.
- Thereafter, in January and February 2009, the Club continued paying the Player late and failed to entirely meet the schedule it had fixed itself and the promise it had made to catch up its delay in paying the Player's December 2008 salary. Consequently, it is credible and reasonable that the Player's confidence in the Club's willingness to meet its financial obligations was further eroded.
- Despite the Minutes recording the alleged acts of misconduct by the Player, there is no evidence on record that at the time of the alleged facts – i.e. around 3-7 January 2009 (alleged late return to Turkey), around 7 February 2009 (alleged unjustified absence) or between the 16th and 21 of March 2009 (alleged absence from training/games and arrival at home after permitted evening hours) – the Player was ever reprimanded or notified by the Club that it considered the Player to be in breach of her contractual duties.
- In fact, although the first two alleged acts of misconduct occurred in early January and early February 2009, the sanctions came two months later on 27 March 2009 when the Player was apparently notified for the first time that she was being fined for the conduct in question.
- In other words, to a large extent the fines came very much after-the-fact and at time



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when the Club was again very late in its payment duties.

- Furthermore, when notifying the fines on 27 March 2009 the Club declared it would be setting them off against the aggregate salaries of USD 22,793 owed to the Player for February and March 2009, making it look as if the fines were being used, at least in part, as a pretext not to pay the salaries.
- Also the evidence on record tends to give the impression that, at least in part, the reasons for fining the Player were unfounded. Indeed, whereas the Club based the fine for January (decided and notified only in March) on the reproach that the Player had only returned to Turkey on 5 January 2009 subsequent to the Christmas break, the above-quoted declaration by Mr. Yalçın says: *“This declaration is only valid if ... Ms Harper takes the flight reserved by the club and arrives in Turkey on January 5, 2009”*. In a similar type of contradiction, the Club affirms in its submissions to the FAT that the Player *“... did not attend the exercises of our team on 07.02.2009 at 17:00 p.m. without permission, notification, and excuse...”* and the signed Minutes purporting to prove the existence of that alleged act of misconduct record that the Player *“... has not attended, without a valid excuse, the training held ... on 07.02.2009 at 15:00 to 17:00”*, whereas in the decision of 27 March 2009 notifying the fines to the Player, the Club stated that *“... you were allowed to be absent until February 07, 2009 to attend the award ceremony to be organized for you in USA, you returned Turkey on February 08, 2009...”*.
- In addition, even if the foregoing contradictions are ignored, being fined 6 weeks after having arrived back one day late can have contributed to the Player’s impression that the disciplinary sanctions (fines) were simply being used as a pretext to justify not paying her salary.



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- The Player's alleged [absences from practices/games and] late home-comings between 16-21 March 2009 were justifiable under the term of her contract providing that after 15 days of delay in salary payment the Player is entitled to cease performing.
64. For the above reasons, the Arbitrator considers that upon receiving notification of the disciplinary sanction (the fines) on 27 March 2009 the Player can legitimately have felt that the process was abusive and have lost faith in the Club's willingness to pay her salaries as contractually provided. Consequently, in addition to her notice of termination of 31 March 2009 being in keeping with the terms of her contract, it cannot be deemed unfair.
65. It follows that the Club cannot claim any right to compensation from the Player for her unilateral termination of her contract and that, in accordance with Exhibit 1 of the Agreement n° 1, "*... the Club will still be obligated to pay the full amount of the base salary and the Agents fees*".
66. In that respect, the evidence on record establishes and it is uncontested by the Club that the amount of contractual base salary which remains outstanding is USD 45,000 (representing the Player's full salaries for February, March and April 2009). Since according to article 3 of the Agreement n°1 the Player was entitled to two-round trip plane tickets during the course of her engagement and the evidence on record establishes that the cost of her final return fare home after her justified termination of the Agreement was paid by the Player, she is also entitled, contractually and for reasons of fairness, to the reimbursement of that amount, representing USD 685.
67. The only reason invoked by the Club in its submissions for not paying the outstanding agency fees is that "*... the remaining portion thereof became null and void as a result of the unfair termination by the Player of her contract*".



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68. Since the Player's termination is deemed justified and fair, the only reason relied on by the Club for refusing to pay the Agents' fees is inapplicable and the remaining portion of the agency fees owed under the Agreements n°1 and 2 must therefore be honoured by the Club.
69. In that relation, the Club has furthermore not contested the Agents' allegation that the outstanding amount represents USD 8,000.
70. It being established by the evidence on record that the Agents advanced the cost of the Player's air ticket to Turkey after the Christmas break, which according to the Agreement n° 1 and the confirmation provided by Mr. Yalçın in his declaration was to be covered by the Club, it is also fair, and in keeping with the contract, that the Agents be reimbursed for such amount, i.e. USD 825.
71. Remain the questions of whether the Player is entitled to claim contractual penalties for all the late payments made by the Club from the beginning of her contract and whether interest at 5% can be claimed on all amounts owed.
72. Exhibit 1 of the Agreement n° 1 encompasses a clear mechanism to protect the Player against the risk of the Club paying salaries late or defaulting. It defines three successive steps that the Player may take, at specified intervals, to safeguard her rights. After 10 days of delay in payment, the Player may claim a daily penalty of USD 25, beyond 15 days the Player may cease playing (thereby putting additional pressure on the Club) and, finally, upon more than 30 days of delay, the Player may terminate the contract without further notice and claim all the salaries provided under the contract.
73. However, it is also clear from the wording and rationale of Exhibit 1 in that relation that the Player's right to invoke the daily penalty in question was to serve as a means to pressure the Club into paying each successive monthly salary in a timely fashion – a



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measure which after a second deadline had lapsed could be combined with the Player's refusal to play – whereas the right to terminate the Agreement represented a different and new step that the Player could take if she considered the sanctions were not functioning and she preferred to put an end to the relationship.

74. Thus and since there is no evidence that the Player formally insisted on the payment of penalties by the Club each time it was late in paying her base salary from month to month since October 2008, it would be unfair and against the rationale of the contract to allow her to claim an accumulation of penalties upon terminating the Agreement in March 2009; i.e. to retrospectively claim penalties for six months of late payments which were not previously insisted upon.
75. Consequently, the Club shall not be required to pay any penalties.
76. Finally, although the Agreements n° 1 and 2 do not regulate interest for late payments, it is a generally recognized principle embodied in most legal systems, which is underpinned by motives of equity, that late payments give rise to interest – in order that the creditor be placed in the financial position she/he would have been in had payments been made on time.
77. Therefore and despite the Agreements not specifying an interest rate, it is normal and fair that interest is due on the late payments. Since the interest rate of 5% per annum being requested by the Claimants is fair and reasonable in the circumstances of this case, interest will be awarded at that rate.
78. It is an established principle that interest runs from the day after the date on which the principal amounts are due. Consequently, interest at 5% will be applied from the day after the due date of each outstanding amount, in accordance with the schedule of payments for the Player's base salary provided in Exhibit 1 of the Agreement n° 1 (i.e. February 28, March 31 and April 30 2009) and in accordance with the final due date of



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15 October 2008 provided in Exhibit 2 of Agreements n° 1 and 2 for the Agents' fees. The amounts owned for the airfare shall bear interest from the day after the payments were made in substitution for the Club.

7. Costs

79. Article 19 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its legal fees and expenses incurred in connection with the proceedings.
80. On 18 March 2010 - considering that pursuant to Article 19.2 of the FAT Rules "*the FAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of FAT and the fees and costs of the FAT President and the Arbitrator*", and that "*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the FAT President from time to time*", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised - the FAT President determined the arbitration costs in the present matter to be EUR 7,950.
81. Considering the Player prevailed in her main claim that the Agreement was validly terminated by her with the consequence that all unpaid salaries for the 2008-2009 season became due, and that the Agents also prevailed in their claim, it is fair that the fees and costs of the arbitration be borne by the Club and that the latter be required to cover the Claimants' legal fees and other expenses, those having been submitted being reasonable in amount.



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82. Given that the Claimants paid the totality of the advance on costs of EUR 8,988.00 as well as a non-reimbursable handling fee of EUR 2,980.00, the Arbitrator decides that in application of article 19.3 of the FAT Rules:
- (i) FAT shall reimburse EUR 1,038.00 to the Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the FAT President;
 - (ii) The Club shall pay EUR 7,950.00 to the Claimants, being the difference between the costs advanced by them and the amount they are going to receive in reimbursement from the FAT;
 - (iii) The Club shall pay to the Claimants EUR 9,554.00 representing the amount of their legal fees and other expenses.



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8. AWARD

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

1. Beşiktaş Jimnastik Kulübü shall pay Ms Laura Ashley Harper the following amounts as compensation for the salaries and costs still owed to her under their Agreement of 25 June 2008:
 - USD 15,000.00, plus interest at 5% per annum on such amount from 1 March 2009 onwards, as compensation for the February 2009 salary.
 - USD 15,000.00, plus interest at 5% per annum on such amount from 1 April 2009 onwards, as compensation for the March 2009 salary.
 - USD 15,000.00, plus interest at 5% per annum on such amount from 1 May 2009 onwards, as compensation for the April 2009 salary.
 - USD 685.00, plus interest at 5% per annum on such amount from 5 April 2009 onwards, as reimbursement for the cost of airfare.
2. Beşiktaş Jimnastik Kulübü shall pay Sports International Group Inc. the following amounts
 - USD 8,000.00, plus interest at 5% per annum on such amount from 16 October 2008 onwards, as compensation for outstanding contractual agent fees.
 - USD 825.00, plus interest at 5% per annum on such amount from 5 January 2009 onwards, as reimbursement for the cost of airfare.
3. Beşiktaş Jimnastik Kulübü shall pay to the Claimants an amount of EUR 7,950 as reimbursement for the advance on arbitration costs paid by them.



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4. Beşiktaş Jimnastik Kulübü shall pay to the Claimants an amount of EUR 9,554.00 as reimbursement for their legal fees and expenses.
5. Any other or further requests for relief are dismissed.

Geneva, seat of the arbitration, 26 March 2010

Quentin Byrne-Sutton
(Arbitrator)



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Notice about Appeals Procedure

cf. Article 17 of the FAT Rules

which reads as follows:

"17. Appeal

Awards of the FAT can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland and any such appeal must be lodged with CAS within 21 days from the communication of the award. The CAS shall decide the appeal *ex aequo et bono* and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure."