

ARBITRAL AWARD

(BAT 0257/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Sandro Orlando

- Claimant 1 -

DoubleB Management s.a.s.
Via Bengasi 1, 20033 Desio (MI), Italy

- Claimant 2 -

both represented by Mr. Enrico Zorzi, attorney-at-law,
Studio Legale Zorzi – Corneli – Ruggieri, Via Nicola Palma 12, 64100 Teramo, Italy

vs.

Besiktas Jimnastik Kulubu Dernegi
Suleyman Seba Caddesi, No. 48 BJK Plaza, 34357 Besiktas / Istanbul, Turkey

- Respondent -

represented by Ms. Basak Akbas, attorney-at-law, Istanbul, Turkey

1. The Parties

1.1 The Claimants

1. Mr. Sandro Orlando (hereinafter the “Coach”) is a professional basketball coach of Italian nationality. He is represented by Mr. Enrico Zorzi, attorney-at-law in Teramo, Italy.
2. DoubleB Management s.a.s. (hereinafter the “Agency”) is an agency providing consulting and representation services in basketball. It is located in Desio, Italy, and is also represented by Mr. Enrico Zorzi.

1.2 The Respondent

3. Besiktas Jimnastik Kulubu Dernegi (hereinafter the “Club”) is a professional basketball club located in Istanbul, Turkey. The Club is represented by Ms. Basak Akbas, attorney-at-law in Istanbul, Turkey.

2. The Arbitrator

4. On 13 March 2012, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren, appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). None 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

5. On 30 July 2011, the Coach and the Club entered into an employment agreement (hereinafter the “Coaching Agreement”) for the 2011-2012 basketball season. The Coach was employed as the head coach of the Club’s female basketball team. The starting date of the employment was 15 August 2011. When concluding the Coaching Agreement, the Coach was assisted and represented by the Agency and a further agency namely “BeoBasket Limited”, as stated in the Preamble of the Coaching Agreement.
6. The Coaching Agreement was defined in its Article 9 as a “*NON CUT – FULLY GUARANTEED contract*”. According to Article 3 of the Coaching Agreement, the Club agreed to pay to the Coach a net amount of EUR 90,000.00 payable in ten instalments of EUR 9,000.00 due on the 30th day of the months August 2011 to May 2012. In addition, Article 10 of the Coaching Agreement stipulated the payment of agent fees (hereinafter the “Agent Fee” or “Agent Fees”) as follows:

“Article 10: Agents fee

The club will pay agents fee to the Coach’s agent, Agency BeoBasket Limited and Agency Double Management to share on equal parts, according to the following schedule (upon getting the invoice issued by the agent):

a) an amount of 9.000 € by 30 September 2011 the latest (BeoBasket Limited 4.5000(sic) Euros, Agency Double Management 4.500 Euros) [...]”

7. On 15 August 2011, the Coach started his assignment and began coaching the Club’s female team.
8. On 21 December 2011, the Club’s female team lost a game against “TED Ankara Koleji”. The Claimants submit that, as a consequence, the Club verbally dismissed the

Coach on the next day. On 23 December 2011, the Coach left Istanbul for the Christmas holidays but returned to Istanbul on 26 December 2011.

9. On 26 and 27 December 2011, the media reported about the Club's (alleged) decision to dismiss the Coach and that all details of contract termination would be worked out within the coming days.
10. By email of 2 January 2012, the Club's Manager, Mr. Can Köken, sent a document titled *"Deed of Reciprocal Termination"*, which was dated 22 December 2011, to the Coach (hereinafter the "Draft Settlement"). According to this document the Club proposed a reduced payment of EUR 49,500.00 to the Coach. The Coach rejected the proposal and did not sign the Draft Settlement. A similar document was presented to the Agency and "BeoBasket Limited." It contained a proposal for a substantial reduction of the Agent Fee to EUR 2,500.00 in total. Also this document was not signed.
11. On 4 January 2012, the Coach left Turkey and returned to his family in Italy.
12. By email and fax of 20 January 2012, the Coach's counsel sent a letter dated 19 January 2012 to the Club (hereinafter the "Payment and Termination Notice"). This letter was signed by both the Coach and his counsel. It seems that it was received by the Club only on 2 February 2012. The Payment and Termination Notice's relevant parts read as follows:

"Object: *Sandro Orlando – formal notice of payment – termination of the contract signed July 30th 2011*

[...]

In fact, the club has made payments for only € 18,000.00 and Mr. Orlando is creditor of € 27,000.00.

Therefore, in accordance with the provisions in "Art. 8 - Contract", Mr. Orlando's obligations cease and receipt of this notice begins to run from the 7 working days for the payment of amounts due.

In the absence of timely fulfilment the contract will be terminated and my client will act in the appropriate locations to to(sic) obtain payment of all amounts due.

I would also point out that you must also provide for the payment of commission agents of Mr. Orlando in the event of your failure to comply will be forced to advance personal."

13. On 31 January 2012, the media reported that Mr. Mehmet Can Öztürk was appointed as the new head coach of the Club's female team.
14. On 31 January 2012 as well as on 1, 3, 5 and 6 February 2012, Mr. Hasmet Atahan, deputy for the 25th notary public of Besiktas, Istanbul, Turkey, issued certain documents titled *"Record of Determination of Facts drawn up by Notary Public"*. In these documents Mr Atahan confirmed that on the above mentioned days, the Coach had not been present at the training sessions and competition.
15. On 7 February 2012, the Club's counsel asked the 2nd notary public of Besiktas, Istanbul, Turkey, to serve a letter of protest to the Coach and a copy to the Turkish Basketball Federation (hereinafter the "TBF"). The letter of protest referred to the Coach's absences from training sessions and competition and, inter alia, invited him to perform and fulfil the requirements of his "TBFA Coach Type Contract" with registration date of 4 October 2011 (hereinafter the "TBF Contract").
16. On 14 February 2012, the Club's counsel asked the 2nd notary public of Besiktas, Istanbul, Turkey, to serve a termination notice to the Coach and a copy to the TBF. This notice reads in its relevant parts as follows:

"[...] RECEIVER: SANDRO ORLANDO [...]"

SUBJECT: *Subject to the reservation of our right to refer to further remedies and make further claims, we hereby inform you that the TBFA Coach Type Contract 04.10.2011 as well as the other contract executed by and between the client company and you have been terminated with cause."*

17. On 16 February 2012, the TBF sent a letter to the Coach informing him about the Club's termination notice. However, the TBF's letter could not be served to the Coach.

18. On 7 March 2012, the TBF Board of Directors confirmed that the TBF Contract had been terminated by the Club's notice of 14 February 2012. This "*TBF Board of Directors decree dd. 07.03.2012 and no. 524*" was forwarded to the Club on the next day.

3.2 The Proceedings before the BAT

19. On 15 February 2012, the Claimants' counsel filed the Request for Arbitration received by the BAT Secretariat on the same date. The non-reimbursable handling fee of EUR 2,000.00 was received in the BAT bank account on 15 February 2012.
20. By letters of 15 and 16 March 2012, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Club to file its answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 5 April 2012. The BAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs by no later than 26 March 2012:

| | |
|---|-------------------|
| <i>"Claimant 1 (Mr. Sandro Orlando)</i> | <i>EUR 3,500</i> |
| <i>Claimant 2 (DoubleB Management)</i> | <i>EUR 500</i> |
| <i>Respondent (Besiktas JK)</i> | <i>EUR 4,000"</i> |

21. On 5 April 2012, the BAT Secretariat acknowledged receipt of the Club's Answer and of the Claimants' shares of the Advance on Costs. Furthermore, the Parties were informed that the Club had failed to pay its share of the Advance on Costs. In accordance with Article 9.3 of the BAT Rules, the Claimants were invited to substitute for the missing payment of the Club by no later than 20 April 2012 to ensure that the arbitration would proceed.

22. By letter of 8 May 2012, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs. Furthermore, the Arbitrator requested the Parties to reply to certain questions by no later than 18 May 2012. The Claimants' counsel submitted the Claimants' response on 17 May 2012 while the Club's reply was received by the BAT Secretariat on 18 May 2012.
23. By letter of 23 May 2012, the Arbitrator declared the exchange of documents complete and invited the parties to submit a detailed account of their costs until 30 May 2012.
24. On 30 May 2012, the Club submitted an account of costs as follows:
- *Legal Representation costs 2.000,00 Euro*
 - *Miscellaneous expenses cost 100,00 Euro*
25. The Claimants did not submit any account of costs.
26. On 5 June 2012, the BAT Secretariat acknowledged receipt of the Club's account of costs and the Claimants were invited to submit their comments, if any, on the Club's account of costs by no later than 11 June 2012. No comment was received by the BAT Secretariat.
27. The Parties did not request the BAT to hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the BAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions of the Parties.

4. The Positions of the Parties

4.1 The Claimants' Position

28. The Claimants submit the following in substance:
- The Coach was verbally dismissed on 22 December 2011. The dismissal was

communicated to the Coach by the coach of the Club's male team, Mr. Ergin Ataman, on behalf of the Club's President. The Coach was then contacted by the Club's Manager, Mr. Can Köken, in order to reach a settlement agreement.

- On 26 December 2011, after spending the Christmas holidays in Italy, the Coach returned to Istanbul to "define his position" with the Club. After Mr. Köken had presented the Draft Settlement to the Coach, the latter left Istanbul on advice of his agents but remained available for the Club. The Draft Settlement was drafted by the Club alone which tried to reach a settlement agreement on the basis of a substantial reduction of the Coach's salary (EUR 67,500.00 instead of EUR 90,000.00). The Club also tried to obtain the consent of the Agency to reduce the Agent Fee.
- On 26 December 2011, the managers of the Club informed the players that the Coach had been dismissed. Although the Coach was immediately replaced by his assistant, Mr. Omer Petorak, he still attended the training sessions and a match on 31 December 2011. This was confirmed by witness statements of two players, namely Ms. Ilona Korstine and Ms. Daliborka Jokic.
- The Coach was never asked to sign a termination of the TBF Contract. Furthermore, the Coach never received any complaints about how he had carried out his job.
- When the Coach received the Draft Settlement, the Club had only paid salaries in the amount of EUR 18,000.00 and was late in salary payments of EUR 27,000.00. According to Article 8 of the Coaching Agreement, the Coach was no longer obliged to perform his duties. The Club did not reply to the Coach's payment notice of 19 January 2012 and failed to settle the outstanding salaries. Therefore, the Coaching Agreement was terminated in application of Article 8 and the Coach is entitled to a compensation of EUR 72,000.00.

- Mr. Virginio Bernardi, FIBA-licensed agent of the Agency, assisted and represented the Coach during the conclusion of the Coaching Agreement. According to Article 10 of the Coaching Agreement, the Club is obliged to pay an Agent Fee of EUR 4,500.00 to the Agency. Mr. Bernardi sent an invoice to the Club and repeatedly requested payment but the Club failed to pay. Consequently, the Agency is entitled to claim the amount of EUR 4,500.00.

4.2 The Claimants' Request for Relief

29. In their Request for Arbitration, the Claimants request the following relief:

"Concerning claimant 1 – Mr. Sandro Orlando (COACH):

The Coach requests the court to award the Coach with the following due payments from the Club Besiktas Jimnastik Kulubu:

- *To pay to the Coach the remaining sum of € 72.000,00 net of guaranteed salary for 2011/2012 season;*
- *To pay to the Coach interest at the applicable Swiss statutory rate for the delayed payments;*
- *To pay to the Coach all arbitration proceeding costs;*
- *To pay to the Coach all legal fees and expenses of accrued to the Player from these arbitration proceedings;*

"Concerning claimant 2 – Mr. Virginio Bernadi of "DoubleBManagement s.a.s." (AGENT)

The Agency DoubleB Management requests the court to award the Agent with the following due payments from the Club Besiktas Jimnastik Kulubu:

- *To pay to the Agent the fee of € 4.500,00 net for 2011/2012 season;*
- *To pay to the Agent interest at the applicable Swiss statutory rate for the delayed payments from 30th September 2011;*
- *To pay to the Agent all arbitration proceeding costs;*
- *To pay to the Agent all legal fees and expenses of accrued to the Player from these arbitration proceedings;"*

4.3 The Respondent's Position

30. The Club submits the following in substance:

- In December 2011, the Coach informed the Club about his “demand” to terminate the Coaching Agreement before the contractual expiration date and the Club agreed. As a result, the Draft Settlement was drawn up and submitted to the Coach. However, the Coach declined to sign the Draft Settlement but left Turkey and did not return to participate in training sessions or competitions.
- The amounts claimed in the Coach’s Payment and Termination Notice of 19 January 2012 are not justified because of his early departure. The Club “suspended” any payments to the Coach because he did not sign the Draft Settlement but rather returned to Italy.
- Furthermore, the Coach failed to terminate the TBF Contract which was registered with the TBF. He was therefore still considered to be the Club’s official head coach. According to the TBF rules, a club is not allowed to contract a new coach while the prior coaching contract is still in force. Therefore the Club was unable to contract a new head coach before the TBF Contract was terminated. The Club had no head coach between the date when the Coach left the Club’s team, until 7 March 2012 (i.e. during 11 matches). Only after the TBF Board of Directors allowed the Club to terminate the Coaching Agreement, was the Club able to appoint a new head coach. Thus, it was the Coach himself who “inflicted damage” to the Club by violating the TBF rules and breaching his contractual relationship with the Club.
- The Agency has not signed the Coaching Agreement and not performed any services regarding that agreement. In addition, the Claimants failed to prove that an invoice was sent to the Club as alleged by the Claimants.

4.4 The Respondent's Request for Relief

31. In its Answer, the Club requests the following relief:

"[...] Therefore, his [the Coach's] claim for contract price is also unject(sic) and needs to be denied. [...] Therefore, the claims of DoubleB Management need to be denied."

5. The Jurisdiction of the BAT

32. 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).

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

34. 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.

35. Article 12 of the Coaching Agreement contains an arbitration agreement which reads as follows:

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

The seat of the arbitration shall be Geneva, Switzerland.

The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of parties' domicile.

The language of the arbitration shall be English.

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

36. The Coaching Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

37. With respect to substantive validity, the Arbitrator considers that the Coaching Agreement was concluded between the Club and the Coach and that the Agency is not

a party to this contract. Therefore, the question arises whether the arbitration agreement can also be binding upon third parties such as the Agency.

38. The Swiss Federal Tribunal has held in a decision dated 16 October 2003 (BGE 129 III 727) that while the validity of the arbitration agreement between the initial parties was subject to the formal requirements of Article 178 (1) PILA, the validity of its extension to third parties was not.¹ Therefore, once an arbitration agreement complies with the formal requirements with respect to its initial signatories, the extension of that arbitration agreement to other parties does not need to satisfy such requirements.²
39. However, an extension of the arbitration agreement requires a legal relationship between the third party and the initial parties to the arbitration agreement, which must be of a certain intensity to justify the extension. The Arbitrator finds that the Coaching Agreement itself refers to a sufficiently strong legal relationship between the Club, the Coach and the Agency, which justifies an extension of the arbitration agreement to the Agency. The Preamble and Article 7 of the Coaching Agreement expressly state that the Agency is considered as one of the Coach's agents and Article 10 of the Coaching Agreement stipulates the Club's obligation to pay an agent fee to the Agency. Moreover, the Arbitrator finds that at least Article 10 of the Coaching Agreement must be considered as an agreement in favour of a third party, namely the Agency (and the agency BeoBasket Limited). Under Swiss arbitration law, the conclusion of an agreement in favour of a third party implies the application of the arbitration agreement, by analogy with Article 112 of the Swiss Code of Obligations³.

¹ Decision of the Swiss Federal Tribunal dated 16 October 2003, BGE 129 III 727, 735, cons. 5.3.1.

² PHILIPP FISCHER: When can an arbitration clause be binding upon non-signatories under Swiss law?, in: Jusletter of 4 January 2010.

³ Article 112 of the Swiss Code of Obligations says: "¹ A person who, acting in his own name, has entered into a contract whereby performance is due to a third party is entitled to compel performance for the benefit of said third party. ² The third party or his legal successors have the right to compel performance

40. The Arbitrator also considers that there is no other indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” in Article 12 of the Coaching Agreement covers the present dispute.
41. The Arbitrator finds therefore that the arbitration agreement in the Coaching Agreement applies also to disputes between the Club and the Agency insofar as such disputes relate to the payment of the Agent Fee.
42. Furthermore, the jurisdiction of the BAT has not been disputed by the Club.
43. For the above reasons, the Arbitrator finds that he has jurisdiction to decide the present dispute and to adjudicate the Claimants’ claims.

6. Applicable Law – *ex aequo et bono*

44. 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”.

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

*where that was the intention of the contracting parties or is the customary practice.*³ *In this case the obligee may no longer release the obligor from his obligations once the third party has notified the obligor of his intention to exercise that right.”* (see English translation on the website of the Federal Authorities of the Swiss Confederation under <http://www.admin.ch/ch/e/rs/c220.html>); BERGER/KELLERHALS, op. cit., N 514.

“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.”

46. In the arbitration agreement in Article 12 of the Coaching Agreement, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.
47. The concept of *équité* (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l’arbitrage of 1969⁴ (Concordat),⁵ under which Swiss courts have held that “arbitrage en équité” is fundamentally different from “arbitrage 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.”⁶

48. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

“the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand.”⁷

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

⁴ 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).

⁵ KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 187 PILA N 289.

⁶ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

⁷ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

7. Findings

50. The Coach requests the amount of EUR 72,000.00 net plus interest for outstanding salary and compensation while the Agency claims an Agent Fee in the amount of EUR 4,500.00 net plus interest.

7.1 Is the Coach entitled to the amount of EUR 72,000.00?

51. The Coach claims (1) the amount of EUR 27,000.00 as outstanding salaries due on 19 January 2012 and (2) the amount of EUR 45,000.00 as compensation equal to the Coach's salaries for the remaining 2011/2012 season. The crucial question is when and by whom the Coaching Agreement was terminated and whether the terminating party was entitled to do so.

7.1.1 Was the Coach "fired" on 22 December 2011?

52. The Coach submits that he was verbally dismissed by the Club's manager on 22 December 2011 after the lost game against TED Ankara Koleji.

53. The verbal dismissal is not confirmed by the Club and there is no evidence on record which would support a verbal dismissal of the Coach on 22 December 2011. In addition, if the Coach had been dismissed on 22 December 2011, it would be difficult to understand why he returned to the Club on 26 December 2011 and attended the team's practice and match of 31 December 2011, as submitted by him and supported by the witness statements of two players of the team. It would also be difficult to understand why the Coach then felt obliged to initiate the termination procedure according to Article 8 of the Coaching Agreement.

7.1.2 Was the Coaching Agreement terminated by mutual consent?

54. The Club alleges that it was the Coach who asked to be released from his assignment and that the Club accepted the Coach's resignation. This led to the Draft Settlement dated 22 December 2011. The Coach then returned home to Italy and did not come back.
55. There is no evidence on record which would support the Club's version. The Draft Settlement speaks of a "reciprocal termination" of the Coaching Agreement. However, the Coach denies that there was an agreement on the early termination of the Coaching Agreement and the Draft Settlement was never signed. It seems that the Coach received a copy of the Draft Settlement only on 2 January 2012. However, whether it was submitted to the Coach on 22 December 2011 or on a later date, the Club had already been in default with the salary payments for October and November 2011. It is therefore difficult to comprehend why the Coach should have accepted a substantial reduction of the already due salary payments.
56. The Arbitrator therefore finds that it is indeed possible or even likely that the parties spoke about the termination of the Coaching Agreement and that a termination of the Coaching Agreement was even communicated to the media. However, there was neither a unilateral dismissal of the Coach nor dissolution of the Coaching Agreement by mutual consent. The Coaching Agreement therefore remained valid for the time being.

7.1.3 Termination of the Coaching Agreement by the Coach's Payment and Termination Notice?

57. The Coach submits that he did not receive his contractually agreed salary since 30 October 2011. In case of non-payment of salaries within 30 days upon the agreed due date, the Coach was entitled to stop working for the Club and to terminate the

Coaching Agreement upon a further 7-day notice period (Article 8 of the Coaching Agreement):

"[...] If any scheduled payment is not received by Coach's bank within 30 days of the date due, the coach's(sic) duty obligations shall cease. In such case, the coach or his Agents notice to void this Contract in writing any Club official, 7 business days of limited notice period starts. If the situation is not cured by the Club within 7 business days, the coach(sic) shall have the right to terminate this agreement. The duties and liabilities of Club under this Agreement shall continue in full force and effect."

58. According to Article 3 of the Coaching Agreement, the Coach was entitled to monthly payments of EUR 9,000.00, payable on the 30th day of each month. In fact, the Coach received only EUR 18,000.00 (i.e. the installments for August and September 2011). The payment due on 30 October 2011 was never paid, which was also confirmed in the Draft Settlement. No payment was received also during the additional 30-day payment period which ended on 29 November 2011. The Coach was therefore entitled to stop his activities for the Club and to terminate the Coaching Agreement based on Article 8.
59. The Coach notified the Club by the Payment and Termination Notice of 19 January 2012 that the Coaching Agreement was deemed terminated from the 7th business day following receipt of that notice. This additional period expired on 31 January 2012 and the Coaching Agreement ended automatically on the same day without a further notice of termination, since no payment was received also during this additional time period. This was obviously the Parties' understanding of Clause 8 of the Coaching Agreement since the Club did not submit that a second notification of termination would have been required to terminate the Coaching Agreement.
60. Consequently, the Coach's Payment and Termination Notice led to the termination of the Coaching Agreement with effect of 31 January 2012.

7.1.4 Termination of the TBF Contract?

61. The Club submits that the Coach's Payment and Termination Notice did not terminate the TBF Contract as well. Because the TBF considered the Coach still to be the Club's official head coach, the Club was not allowed to contract a new coach until 7 March 2012, i.e. the date of the notification of the TBF Board of Directors. The Coach therefore "inflicted damage" to the Club by violating the TBF rules and breaching his contractual relationship with the Club.
62. Indeed, the Coach neither cancelled the TBF Contract nor notified the TBF about the termination of his employment with the Club. However, the Club has failed to prove that the Coach was obliged to expressly terminate the TBF Contract or to inform the TBF about the termination of the Coaching Agreement. The TBF contracts are forwarded to the TBF by the clubs and it was the obligation of the Club (and not the Coach) to inform the TBF when the Coaching Agreement as the underlying employment contract was terminated. In addition, the Coaching Agreement does not mention the communication with the TBF as an obligation of the Coach.
63. The Club informed the TBF on the termination of the Coach's employment only on 14 February 2012. Two days later, the TBF made an (unsuccessful) attempt to inform the Coach accordingly. However, this information did not constitute the termination of the Coaching Agreement but rather confirmed it. It is therefore not relevant for the determination of the contractual rights following the termination of the Coaching Agreement whether the TBF informed any of the parties on 16 February 2012 or on a later date.
64. The fact that also the Club considered the Coaching Agreement to be terminated well before the 14 February 2012 is also supported by the media reports that the Club hired a new coach (Mr. Mehmet Can Öztürk) for its women's team already on 31 January

2012, i.e. the day when the Coaching Agreement expired as a consequence of the Coach's Payment and Termination Notice.

65. As held above, the Coaching Agreement was terminated seven business days after the Club had received the Coach's Payment and Termination Notice, i.e. on 31 January 2012. However, the Coach's obligation to provide his services to the Club had already ceased to exist when the Coach sent the Payment and Termination Notice to the Club, i.e. on 20 January 2012. It was therefore redundant for the Club to invite public notaries to ascertain that the Coach was no longer present in the Club's activities on 1, 3, 5 and 6 February 2012.
66. Again, it was the Payment and Termination Notification which led to the termination of the Coaching Agreement and not the notification of the TBF requested by the Club, and the Coach did not violate his contractual duties when he failed to communicate the termination of his employment to the TBF.

7.1.5 The outstanding salary of EUR 27,000.00

67. At the time when the Payment and Termination Notice was received by the Club, the Coach was entitled to at least three monthly salary payments of EUR 9,000.00 each (i.e. EUR 27,000.00). It can be left open whether the January 2012 salary had also become due because the Coaching Agreement expired on 31 January 2012. The salary for January 2012 is included in the Coach's claim for compensation for the remaining salaries of the Coaching Agreement and will be addressed in the next section.
68. There is no evidence on record (and no such submission has been made by the Club) that the Coach was able to earn a salary from an alternative source before 31 January 2012 which must be deducted from the Coach's salary claim.

7.2 The compensation of EUR 45,000.00

69. According to Article 8 of the Coaching Agreement, the Coach is entitled to “all future payments required under this Agreement.” The Coach requests payment of compensation in the amount of the remaining salaries which amounts to EUR 45,000.00, consisting of the monthly salaries for January – May 2012 of EUR 9,000.00 each.
70. When it comes to the calculation of the compensation, the Arbitrator must take all circumstances into account. The Coach complied with his contractual obligations at least until 21 December 2011 which was even beyond the date when he would have been entitled to stop his activities according to Clause 8 of the Coaching Agreement. Thus, no deductions must be made from his salaries which were due at the time of his Payment and Termination Notice.
71. However, and according to the consistent jurisprudence of BAT, a player or a coach whose contract has been prematurely terminated has an obligation to mitigate the damage of the Club. They must actively look out for a new source of income and may not remain passive. The Coach has not provided any evidence for his endeavors to find a new employment. Although the Arbitrator understands that it is difficult for a coach to find a new assignment in the middle of a season, he also notes that no efforts to find a new employment have been demonstrated. That is why he cuts the Coach’s compensation of EUR 45,000.00 by one monthly salary of EUR 9,000.00 to EUR 36,000.00.

7.3 Summary

72. The Arbitrator finds that the Coach was entitled to terminate the Coaching Agreement because of the Club’s default to pay his salary. The Coaching Agreement ended on 31 January 2012. The Coach is entitled to outstanding salaries and compensation

amounting to EUR 63,000.00 in total, consisting of EUR 27,000.00 until the Payment and Termination Notice, and a compensation of 36,000.00 for the remaining term of the Coaching Agreement.

7.4 Is the Agency entitled to an Agent Fee of EUR 4,500.00?

73. The Agency claims Agent Fee in the amount of EUR 4,500.00. The Agent Fee is regulated by Article 10 of the Coaching Agreement. The Agent Fee became due on 30 September 2011.
74. The Club submits that the Agent Fee was not due because (a) the Agency had not signed the Coaching Agreement where the Agent Fee was stipulated, (b) that the Agency had not provided any services and (c) that the Agency had not invoiced the Agent Fee.
75. As to (a): the Arbitrator finds that it was not necessary for the Agency to sign the Coaching Agreement. The Agency is a beneficiary of the Agent Fee which was agreed between the Club and the Coach. The wording of the Coaching Agreement also indicated that it was the understanding of the signatories that the Agency was entitled to claim the Agent Fee in its own name and on its own behalf. As to (b): whether or not the Agency provided any services is irrelevant in this context. The Coaching Agreement does not require the Agency to document its activities. As to (c): it is true that the Agent Fee became payable upon invoice. There is no evidence that the Agency ever presented an invoice to the Club. However, even if it did not, the initiation of an arbitration procedure must be considered as an equivalent to an invoice. The Arbitrator therefore sees no reason why the Club should be entitled to withhold or keep the Agent Fee.
76. The Arbitrator finds that the Club is obliged to pay the claimed Agent Fee of EUR 4,500.00 to the Agency.

8. Interest

77. The Coaching Agreement does not provide for the payment of default interest.
78. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest.⁸ This is a generally accepted principle which is embodied in most legal systems. However, it is also generally accepted that the obligee has to request payment of interest from the obligor if not agreed in the underlying agreement in advance.
79. In his letter dated 19 January 2012 to the Club, the Coach did not request the Club pay interest, but only stated that he was “creditor of € 27,000.00”. The Parties’ submissions did not contain any evidence about a claim of interest by the Coach or the Agency. In the Request for Arbitration, the Claimants have requested interest for the first time.
80. The Claimants request interest “*at the applicable Swiss statutory rate*”. However, in their arbitration agreement in Article 12 of the Coaching Agreement, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. This applies also to the request for interest. Consequently, the Arbitrator will decide the applicable interest rate *ex aequo et bono*. In line with BAT jurisprudence, the Arbitrator considers interest in the rate of 5% p.a. to be fair and equitable in the present case.
81. The Arbitrator, still deciding *ex aequo et bono* and taking into consideration that the Claimants have not claimed interest before filing the Request for Arbitration, finds that

⁸ See, *ex multis*, the following BAT awards: 0258/12, *Entersport vs. Men’s Basketball Club Dynamo Moscow*, 0092/10, *Ronci, Coelho vs. WBC Mizo Pecs 2010*; 0056/09, *Branzova vs. Basketball Club Nadezhda*.

the starting date for the calculation of the default interest shall be the day of receipt of the Request of Arbitration by the BAT, i.e. 15 February 2012.

9. Costs

82. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT 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 reasonable legal fees and expenses incurred in connection with the proceedings.
83. On 24 July 2012 - considering that pursuant to Article 17.2 of the BAT Rules “the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT 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 BAT 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 BAT President determined the arbitration costs in the present matter to be EUR 8,000.00.
84. Considering the circumstances of the present case, especially when balancing the fact that the Coach provided his services well beyond the 30-day grace period for late payment of his salary against the reduction of his compensation by one monthly salary, the Arbitrator finds it fair that the fees and costs of the arbitration shall be borne by the Club alone and that it shall be required to cover the Claimants’ legal fees and other expenses while it has to fully bear its own legal fees and expenses.
85. Given that the Claimants paid the totality of the advance on the arbitration costs of EUR 8,000.00 and in application of article 17.3 of the BAT Rules, the Arbitrator decides that the Club shall pay to the Claimants the amount of EUR 8,000.00.

86. Furthermore, the Arbitrator considers it adequate that the Claimants are entitled to a contribution towards their legal fees and other expenses (Article 17.3. of the BAT Rules). Considering that the Club has to fully bear its own legal fees and expenses and that the Claimants did not submit any account of costs, the Arbitrator deems it appropriate to take into account only the non-reimbursable handling fee of EUR 2,000.00 totally paid by the Claimants when assessing the expenses incurred by the Parties in connection with these proceedings. After having reviewed and assessed all the circumstances of the case at hand, the Arbitrator fixes the contribution towards Claimants' legal costs at EUR 2,000.00.

10. AWARD

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

- 1. Besiktas Jimnastik Kulubu Dernegi is ordered to pay to Mr. Sandro Orlando the amount of EUR 63,000.00 net plus interest of 5% p.a. on this amount from 15 February 2012.**
- 2. Besiktas Jimnastik Kulubu Dernegi is ordered to pay to DoubleB Management s.a.s. the amount of EUR 4,500.00 net plus interest of 5% p.a. on this amount from 15 February 2012.**
- 3. Besiktas Jimnastik Kulubu Dernegi is ordered to pay jointly to Mr. Sandro Orlando and DoubleB Management s.a.s. the amount of EUR 8,000.00 as a reimbursement of their advance on arbitration costs.**
- 4. Besiktas Jimnastik Kulubu Dernegi is ordered to pay jointly to Mr. Sandro Orlando and DoubleB Management s.a.s. the amount of EUR 2,000.00 as a contribution towards their legal fees and expenses.**
- 5. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 3 August 2012

Stephan Netzle
(Arbitrator)