

ARBITRAL AWARD

(BAT 0284/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Raj Parker

in the arbitration proceedings between

Ms Jayne Appel

- First Claimant -

Wasserman Media Group

Lindsay Kagawa Colas, 10960 Wilshire Blvd., Suite 2200,
Los Angeles, CA 90024, USA

- Second Claimant -

both represented by Mr. Howard L. Jacobs,
Law Offices of Howard L. Jacobs, 2815 Townsgate Rd.,
Suite 200, Westlake Village, CA 91361, USA

vs.

Samsun Basketbol Kulübü

Bahçelievler Mah. İstiklal Cad. Öcal Sokak K.n.k Apt. No:1 Kat:3,
55020 İlkad.m/Samsun, Turkey

- Respondent -

1. The Parties

1.1 The Claimants

1. Ms. Jayne Appel (hereinafter the “First Claimant”) is a professional basketball player of US nationality.
2. Wasserman Media Group of Lindsay Kagawa Colas, 10960 Wilshire Blvd., Suite 2200, Los Angeles, CA 90024, USA, (hereinafter the “Second Claimant”) is the First Claimant’s agent.
3. In these proceedings, the First Claimant and the Second Claimant are represented by Mr. Howard L. Jacobs of the Law Offices of Howard L. Jacobs, 2815 Townsgate Rd., Suite 200, Westlake Village, CA 91361, USA.

1.2 The Respondent

4. Samsun Basketbol Kulübü (hereinafter the “Respondent”) of Bahçelievler Mah. İstiklal Cad. Öcal Sokak K.n.k Apt. No:1 Kat:3, 55020 İlkad.m/Samsun, Turkey is a professional basketball club.

2. The Arbitrator

5. On 28 May 2012, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), appointed Mr. Raj Parker as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”).
6. None of the Parties has raised objections either to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and proceedings

3.1 Background facts

7. On 14 July 2011, the First Claimant and the Respondent entered into a contract of employment (hereinafter the "Contract"). The Contract contains, amongst others, the following provisions:

II. Compensation

A. 2011-12 Season - For the 2011-12 season, Club agrees to pay Player USD\$85,000.00 as guaranteed compensation net of all taxes, costs, fees, and other charges (the "2011-12 Guaranteed Compensation") according to the following schedule:

\$10,625 USD net on October 20, 2011 upon passing medical check

\$10,625 USD net on November 15, 2011;

\$10,625 USD net on December 15, 2011;

\$10,625 USD net on January 15, 2012;

\$10,625 USD net on February 15, 2012;

\$10,625 USD net on March 15, 2012;

\$10,625 USD net on April 15, 2012;

\$10,625 USD net on May 15, 2012, or within 24 hours after the clubs last official game whichever is first.

All payments to Player for the Term shall be fully guaranteed, and vested and owing in full upon execution of this Agreement by the Player and Club. In addition to all guaranteed salary and Per Diem Payments above, the Club shall pay to Player the following bonuses for the 2011-12 season, net of any and all taxes, fees and charges.

[...]

For purposes of this Agreement, the above bonus compensation and the 2011-12 Guaranteed Compensation shall be referred to as the "Guaranteed Compensation". All bonus amounts are cumulative and in USD and are fully



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guaranteed once achieved. In the event any payments of any kind, including but not limited to Guaranteed Compensation are more than fifteen (15) days late, Club acknowledges and agrees that it shall incur a late of fee of USD\$25.00 per day as a non exclusive remedy to Player.

[...]

III. Additional Benefits. In addition to the compensation set forth above, Club agrees to provide, throughout the Term of this Agreement, and at no cost to Player the following:

[...]

B. Three (3) roundtrip coach class tickets for Player or Player's guest from a Player designated location to Club's location in Turkey or other competition city.

[...]

IV. Agent's Commission. Club agrees to pay Agent's guaranteed total of USD\$12,750.00 net of taxes, fees, and charges for the negotiation of this Agreement (the "Agent Fee"). Club shall pay Agent Fee by October 30, 2011.

[...]

VII. Contract Guarantee. Club agrees that this Agreement is unconditionally guaranteed contractual Agreement and that Player's Guaranteed Compensation and bonuses and the Agent Fee are fully guaranteed, due and payable, including but not limited to in the event of Player's injury, illness, death, and/or lack of skill. The Club agrees that this Agreement is a no cut guaranteed agreement

[...]

IX. Governing Law, Disputes, Translation. This Agreement contains the entire agreement between the parties and there is no oral or written inducements, promises or agreement except as contained herein. Any or all prior agreements or contracts are void upon the execution of the Agreement. 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 in 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 in [sic] English. The arbitrator upon appeal shall decide the dispute ex aequo et bono. The prevailing party shall be entitled to recover all costs, fees and attorneys' fees from the other party in any such dispute."

8. The Respondent failed to make certain payments due under the Contract.

9. On 23 February 2012, the Respondent signed an addendum to the Contract (hereinafter the “Addendum”). The Addendum contains, among others, the following provisions:

“Samsun (“Club”) agrees to pay Jayne Appeal (“Player”) her full February salary and Wasserman Medial Group (“Representative”) their full Representative fee by Wednesday, February 29, 2012. If Club does not pay Players February salary and [sic] Representative Fee by February 29, 2012, Club agrees to pay Player and additional USD\$10,000.00 penalty fee along with her full February salary and Representative fee by March 1, 2012.

Club understands that they are in material breach of the Agreement with Player and that if all monies owed are not paid by March 1, 2012 that Player has the right to immediately terminate her contract and is entitled to the full contract value including all salary, bonuses, penalty money, late fees. Representative fee, BAT filing fees and legal fees. Club furthermore agrees that per Players contract with Club, that immediately upon termination Club will provide Player with a return flight to the US departing within 24 hours from date of termination.

[...]”

10. On 29 February 2012, the Second Claimant sent a letter to the Respondent stating that unless the Respondent paid the First Claimant her salary for February in full by 1 March 2012, or another payment plan was agreed between the First Claimant and the Respondent, then the First Claimant would immediately terminate the Contract and the Addendum.

3.2 The Proceedings before the BAT

11. On 26 April 2012, the First Claimant and the Second Claimant (together the “Claimants”) filed a request for arbitration in accordance with the BAT Rules. On 30 April 2012, the BAT received a non-reimbursable handling fee of EUR 2,000.00 from the Claimants.
12. By letter dated 5 June 2012, the BAT secretariat fixed a time limit until 26 June 2012 for the Respondent to file an answer to the Request for Arbitration.

13. By the same letter of 5 June 2012, and with a time limit for payment of 15 June 2012, the following amounts were fixed as the Advance on Costs:

<i>“Claimant 1 (Ms. Jayne Appel)</i>	<i>EUR 3,000</i>
<i>Claimant 2 (Wasserman Media Group)</i>	<i>EUR 1,000</i>
<i>Respondent (Samsun Basketbol Kulübü)</i>	<i>EUR 4,000”</i>

14. The Claimants paid their share of the Advance on Costs on 14 June 2012. The Respondent failed to pay its share of the Advance on Costs and the Claimants subsequently paid the Respondent’s share of the Advance on Costs (in accordance with Article 9.3 of the BAT Rules) on 12 July 2012.
15. The Respondent failed to submit an answer to the Request for Arbitration.
16. On 26 July 2012, the Arbitrator issued a Procedural Order to all of the Parties (hereinafter the “First Procedural Order”), acknowledging receipt of the full amount of the Advance on Costs. The First Procedural Order instructed: (i) the Claimants to submit further information and documentation by 3 August 2012; and (ii) the Respondent to make any submissions in relation to the Request for Arbitration that it considered appropriate.
17. The Claimants filed their reply on 31 July. The Respondent did not submit a reply.
18. By Procedural Order dated 13 August 2012, the Arbitrator declared the exchange of documents complete, and requested that the Parties submit detailed accounts of their costs by 23 August 2012. By the same Procedural Order, the Arbitrator sent the Respondent a copy of the Claimants’ response to the First Procedural Order.
19. On 23 August 2012, the Claimants submitted the following account of costs:

“Professional Services



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		Hours / Rate	Amount
03/7/12	review player agreement with Samsun and documents received from client	2.50 350.00/hr	875.00
03/12/12	review documents received from client	1.00 350.00/hr	350.00
04/25/12	draft request for arbitration	5.00 350.00/hr	1,750.00
04/26/12	draft request for arbitration	2.50 350.00/hr	857.00
06/05/12	review correspondence from BAT including procedural order	0.30 350.00/hr	105.00
07/03/12	review correspondence from BAT	0.20 350.00/hr	70.00
07/24/12	review procedural order from BAT	0.30 350.00/hr	105.00
	draft letter to BAT in response to inquiry	0.40 350.00/hr	140.00
07/26/12	draft supplemental brief to BAT	2.00 350.00/hr	700.00
07/30/12	draft supplemental brief to BAT	3.50 350.00/hr	1,225.00
08/13/12	review correspondence from BAT	0.20 350.00/hr	70.00
	<i>For professional services rendered</i>	<hr/> 17.90	<hr/> \$6,265.00
	<i>Additional Charges:</i>		
04/26/12	FIBA filing fee		2,777.60
06/12/12	Fee to BAT – advance on costs of arbitrator		4,994.80
07/11/2012	Fee to BAT – advance on costs of arbitrator (Samsun's share)		4,902.40
	<i>Total additional charges</i>		<hr/> \$12,674.80
	<i>Total amount of this bill</i>		<hr/> \$18,939.80

	<i>Hours / Rate</i>	<i>Amount</i>
<i>Accounts receivable transactions</i>		
04/26/12	<i>Payment – Thank You</i>	(\$2,624.28)
	<i>Total payments and adjustments</i>	<u>(\$2,624.28)</u>
	<i>Balance due</i>	<u>\$16,315.52</u>

”

20. The Respondent did not submit an account of its costs.
21. By email dated 24 August 2012, the BAT Secretariat invited the Respondent to submit any comments on the Claimants’ account of costs by no later than 30 August 2012. The Respondent did not submit any such comments.
22. Since none of the Parties has applied for a hearing, the Arbitrator has decided, in accordance with Article 13.1 of the BAT Rules, to deliver this Award on the basis of the Parties’ written submissions.

4. The Parties’ submissions

4.1 The Claimants’ submissions

23. The Claimants submit that the Respondent failed to make a salary payment payable under the Contract on 15 February 2012 (hereinafter the “February Payment”) and failed to pay the Second Claimant’s agent fee (hereinafter the “Agent Fee”), payable under the Contract by 30 October 2011.
24. Following the Respondent’s failure to make the February Payment, the Respondent signed the Addendum, pursuant to which the Respondent agreed, among other things, that:

- (i) it was in material breach of the Contract;
 - (ii) it would pay the February Payment and the Agent Fee by 29 February 2012;
 - (iii) if it failed to make such payments by 29 February 2012, it would pay the February Payment, the Agent Fee and a penalty payment of USD 10,000.00 by 1 March 2012; and
 - (iv) if it failed to make such payments by 1 March 2012:
 - (A) the First Claimant would have the right to terminate the Contract;
 - (B) the Respondent would pay the full value of the Contract (including all salary, penalty payments, late payment fees and the Agent Fee);
 - (C) the Respondent would pay "*BAT filing fees and legal fees*"; and
 - (D) the Respondent would provide the First Claimant with a return flight to the USA immediately upon termination of the Contract.
25. The Claimants submit that the "*express purpose*" of the Addendum was to prevent the Claimants from immediately filing a Request for Arbitration with BAT.
26. The Claimants submit that the Respondent failed to make any further payments under the Contract or the Addendum and so the Contract was terminated by the Claimants, effective 1 March 2012.
27. The First Claimant claims that the Respondent has failed to make four salary payments in relation to the 2011-2012 season, totalling USD 42,500.00. The First Claimant submits that the Respondent has also failed to pay USD 1,556.70 as reimbursement for the cost of the First Claimant's airfare from Carsamba to San Francisco on 2 March 2012; USD 345.00 as reimbursement of a baggage fee paid by

the First Claimant on that flight; and USD 54.00 as reimbursement of the taxi fare that the First Claimant paid to get to the airport.

28. The First Claimant claims that it incurred bank transfer fees totalling USD 90.00 in relation to salary payments made by the Respondent for the months: November 2011, December 2011 and January 2012. The First Claimant submits that it was the Respondent's responsibility to pay these fees and so the First Claimant claims USD 90.00 from the Respondent in relation to these fees.
29. The First Claimant submits that it is entitled to a late penalty payment of USD 10,000.00, pursuant to the Addendum, because the Respondent failed to pay the February Payment and the Agent Fee by 29 February 2012.
30. The Second Claimant claims the Agent Fee and a penalty for late payment of the Agent Fee, pursuant to the Contract, totalling USD 4,550.00.
31. In their Request for Arbitration, the Claimants made the following request for relief:

"REQUEST FOR RELIEF

<i>Agent Fee:</i>	<i>US \$12,750.00</i>
<i>Guaranteed Compensation:</i>	<i>US \$42,500.00</i>
<i>Additional Benefits and contract costs:</i>	<i>US \$2,045.00</i>
<i>Contract Addendum penalty:</i>	<i>US \$10,000.00</i>
<i>Late Fee [\$25 / day x 182 days]</i>	<i>US \$4,550.00</i>
<i>Costs [FIBA BAT filing fee]</i>	<i>US \$2,626.00</i>
<i>Attorney's fees</i>	<i><u>US \$5,925.00</u></i>
TOTAL	<i>US \$80,396.00 [plus arbitrator costs and legal interest at 5% per annum]</i>

Claimants request an award against Samsun in the amount of US \$80,396.00, plus arbitrator costs and legal interest at 5% per annum. In the alternative, Claimants request an award against Samsun in an amount which the arbitrator deems to be owed under the contract and Addendum; plus an award of costs, legal fees and interest in an amount which the arbitrator deems just and proper. "

4.2 The Respondent's submissions

32. Despite several invitations by the BAT, the Respondent neither engaged in the arbitration proceedings at hand, nor did it make any submissions within the time limits set by the Arbitrator in accordance with the BAT Rules.

5. Jurisdiction

33. Since the Respondent did not participate in the arbitration, the Arbitrator will examine his jurisdiction *ex officio*, on the basis of the record as it stands.
34. 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”).
35. The jurisdiction of the BAT over the present dispute derives from Clause IX of the Contract, which stipulates:

“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 in 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 in [sic] English. The arbitrator upon appeal shall decide the dispute ex aequo et bono. The prevailing party shall be entitled to recover all costs, fees and attorneys’ fees from the other party in any such dispute.”

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

37. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.¹

38. The existence of a valid arbitration agreement is to be examined in light of Article 178 PILA which reads as follows:

“1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

2 Furthermore, an arbitration agreement is valid if it conforms either to the law chose by the parties or to the law governing the subject-matter of the dispute, in particular the main Contract, or to Swiss law.”

39. The Contract is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) of the PILA.

40. With respect to substantive validity, the Arbitrator considers that there are no indications which cast doubt on the validity of the arbitration agreement under Swiss law (cf. Article 178(2) PILA).

41. In light of the above, the Arbitrator finds that the BAT is able to determine the present dispute.

6. Other Procedural Issues

42. Article 14.2 of the BAT Rules, which the Parties have declared to be applicable in the arbitration agreement, specifies that *“the Arbitrator may nevertheless proceed with the arbitration and deliver an award”* if *“the Respondent fails to submit an Answer.”* The Arbitrator's authority to proceed with the arbitration in case of default by one of

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

the Parties is in accordance with Swiss arbitration law and the practice of the BAT². However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

43. This requirement is met in the current case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator according to the relevant rules. It was also given opportunity to respond to the Claimants' Request for Arbitration and to their account on costs. Still, the Respondent has chosen not to respond within the time limits set by the Arbitrator according to the BAT Rules.

7. Discussion

7.1 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 such choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the Parties may authorise the arbitrators to decide "*en équité*" as opposed to a decision according to the rule of law referred to in Article 187(2). Article 187(2) PILA is generally translated into English as follows:

"the parties may authorise the arbitral tribunal to decide ex aequo et bono."

45. Clause IX of the Contract provides that the "*arbitrator upon appeal shall decide the dispute ex aequo et bono*". It appears that the use of the words "*upon appeal*" were

² See *ex multis* BAT cases 0001/07, *Ostojic and Raznatovic vs. PAOK KAE*; 0018/08, *Nicevic vs. Beeiktae*; 0093/09, *A.S.D. Pallacanestro Femminile Schio vs. Braxton*; 0170/11, *Haritopoulos and Kallergis vs. Panionios BC K.A.E. and Gallis*.

inserted into the Contract by mistake because the Contract does not provide for the appeal of BAT awards. The Arbitrator considers that the wording “*upon appeal*” was a clerical error and the Parties had in fact intended the Contract to provide that the Arbitrator should decide any disputes between the parties *ex aequo et bono*. In any event, Clause IX of the Contract stipulates that any disputes arising out of the Contract shall be resolved by the BAT “*in accordance with the BAT Arbitration Rules*”. Under the heading “Applicable Law”, Article 15.1 of the BAT 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.”

46. 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*³ (Concordat),⁴ under which Swiss courts have held that arbitration *en équité* is fundamentally different from arbitration *en droit*:

*“When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.”*⁵

47. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives “*a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case.*”⁶

3 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).

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

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

6 Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717. pp.625-626.

48. This is confirmed by Article 15.1 of the BAT Rules according to which the arbitrator shall apply *“general considerations of justice and fairness without reference to any particular national or international law.”*

49. In light of the foregoing matters, the Arbitrator makes the findings set out below.

7.2 Findings – the First Claimant

7.2.1 Unpaid salary

50. The First Claimant submits that the Respondent has failed to make the February Payment and all subsequent salary payments under the Contract. In the Addendum, the Respondent acknowledged that it had not made the February Payment. In the Addendum, the Respondent agreed to pay the February Payment and the Agent Fee. The Arbitrator has not been provided with any evidence to suggest that the February Payment, the Agent Fee, or any salary payments after January 2012 have been paid by the Respondent.

51. The Claimants submit that the Contract was terminated in accordance with the Addendum after the Respondent failed to pay the February Payment and the Agent Fee. The Addendum provides that: *“if all monies owed are not paid by March 1, 2012 that Player has the right to immediately terminate her contract and is entitled to the full contract value including all salary, bonuses, penalty money, late fees.”* The Arbitrator finds that the First Claimant therefore had the right to terminate the Contract after 1 March 2012, because the Respondent failed to make the February Payment (among other payments).

52. None of the Parties has submitted evidence showing that the Claimants took steps to terminate the Contract after 1 March 2012. Instead, the Claimants rely on a letter sent by the Second Claimant to the Respondent on 29 February 2012. The letter made

demand for payment of all outstanding sums owing to the Claimants and stated: *“Should this not be resolved by tomorrow, 1st March 2012, Ms. Appel’s Agreement with Samsun will be terminated”*. On 2 March 2012, the First Claimant left Turkey and returned to the USA.

53. In light of: (i) the Respondent’s failure to make various payments pursuant to the Addendum; (ii) the content of the letter dated 29 February; and (iii) the fact that neither the First Claimant nor the Respondent have performed their respective duties under the Contract since the end of February 2012, the Arbitrator finds that the Contract was validly terminated by the First Claimant, effective 2 March 2012. As such, the Arbitrator finds that the unpaid salary amounts due pursuant to the Contract (which include the February Payment and total USD 42,500.00) are payable by the Respondent to the First Claimant.

7.2.2 Duty to mitigate loss

54. In the First Procedural Order, the Arbitrator instructed the First Claimant to describe the steps that she took after terminating the Contract to find new employment until the end of the 2011-2012 season. The First Claimant submitted that she was unable to sign for a new club because the deadlines for clubs to register new players in various leagues were either too close to the date on which she terminated the Contract, or had already passed by the date of termination. The First Claimant submitted email correspondence to show that attempts were made to join Israeli, Turkish and Spanish clubs, but that registration deadlines either prevented or hindered such attempts.
55. The Arbitrator considers that the First Claimant had a duty to mitigate the loss she suffered when she stopped receiving salary payments from the Respondent. The Arbitrator finds that by actively looking for a new contract, the First Claimant did discharge this duty to a certain extent, despite the fact that the First Claimant failed to find employment with a new club. The Arbitrator accepts that the First Claimant’s

attempts to join a new club were hindered significantly by various registration deadlines. However, the First Claimant has not shown that it was not possible to sign for any new club. The First Claimant, who is represented by a professional agent, could have attempted to join a club in a league with different registration deadlines, even if it have meant accepting a lower salary. The Arbitrator considers that this should be reflected in the amount that the Respondent should be required to pay to the First Claimant in relation to unpaid salary for the 2011-2012 season. The Arbitrator therefore finds that the total amount that the Respondent shall pay to the First Claimant in relation to unpaid salary for the 2011-2012 season (which includes the February Payment) is USD 35,000.00.

7.2.3 Expenses

56. The First Claimant has claimed the following expenses from the Respondent: (i) USD 1,556.70 as reimbursement for the cost of the First Claimant's airfare from Carsamba to San Francisco on 2 March 2012; (ii) USD 345.00 as reimbursement of a baggage fee paid by the First Claimant on that flight; (iii) USD 54.00 as reimbursement of the taxi fare that the First Claimant paid to get to the airport; and (iv) USD 90.00 as reimbursement for bank transfer fees which the First Claimant incurred in relation to certain salary payments. The Arbitrator notes that while these expenses total USD 2,045.70, the First Claimant only claimed USD 2,045.00 in respect of these expenses in her request for relief.

57. In relation to the First Claimant's airfare, the Addendum states:

"Club furthermore agrees that per Players contract with Club, that immediately upon termination Club will provide Player with a return flight to the US departing within 24 hours from date of termination."

58. Clause III B of the Contract states:

“Club agrees to provide throughout the Term of this Agreement, and at no cost to Player... [t]hree (3) roundtrip coach class tickets for Player or Player's guest from a Player designated location to Club's location in Turkey or other competition city”

59. In light of these provisions, the Arbitrator finds that the Respondent shall pay USD 1,556.70 as reimbursement for the cost of the First Claimant's airfare from Carsamba to San Francisco.
60. The First Claimant has claimed sums from the Respondent in respect of an airline baggage fee and a taxi fare to the airport. However, neither the Contract nor the Addendum provides that the Respondent shall be responsible for such fees. Accordingly, the Arbitrator finds that the Respondent is not liable to reimburse the First Claimant for these fees.
61. The First Claimant has claimed USD 90.00 from the Respondent in respect of bank transfer fees in relation to salary payments made by the Respondent for the months: November 2011, December 2011 and January 2012. Clause II of the Contract states:

“In addition to all guaranteed salary and Per Diem Payments above, the Club shall pay to Player the following bonuses for the 2011-12 season, net of any and all taxes, fees and charges.”

62. Moreover, each salary payment set out in the Contract is stipulated to be paid “*net*”. In light of these provisions, the Arbitrator finds that it is the Respondent's responsibility to bear the cost of any fees associated with payment of the First Claimant's salary. Accordingly, the Arbitrator finds that the Respondent shall pay USD 90.00 to the First Claimant in relation to the bank transfer fees.

7.2.4 Late payment penalties

63. In considering whether to award a late payment penalty to the First Claimant, the Arbitrator considers it necessary to determine two matters. Firstly whether a penalty

payment is, *prima facie*, due under the Contract; and secondly whether, in the circumstances of the case, the penalty payment being claimed is excessive.

64. The First Claimant claims a late penalty payment of USD 10,000.00 pursuant to the Addendum. The Addendum provides:

“If Club does not pay Players February salary and Representative Fee by February 29, 2012, Club agrees to pay Player and [sic] additional USD\$10,000.00 penalty fee along with her full February salary and Representative fee by March 1, 2012.”

65. In light of the above provision, and given that the Respondent failed to pay the February Payment and the Agent Fee, the Arbitrator considers that the penalty payment is, *prima facie*, payable by the Respondent.

66. It therefore falls to the Arbitrator to determine whether such penalty is excessive in light of all the circumstances, and in light of the factors referred to in **FAT 0036/09 Petrosean v Women Basketball Club Spartak St Petersburg** and **FAT 0100/10 Taylor v KK Crvena Zvezda**.

67. The facts of each case are different and the Arbitrator must consider the individual circumstances of each case. In this case, the Arbitrator has particular regard to the following factors:

- (i) the size of the penalty payment in comparison to the outstanding salary that is owed;
- (ii) the fact that the full amount of the penalty payment was payable just fifteen days after the February Payment was due; and
- (iii) the fact that the penalty payment was contained in the Addendum. One of the primary reasons that the Addendum was entered into was to prevent the Claimants from filing a Request for Arbitration immediately. In return, the

Respondent agreed to pay a penalty payment if certain payments were not made to the Claimants. This consideration provided by the Respondent was separate from the Respondent's obligations under the Contract.

68. In the circumstances of this case, the Arbitrator considers that a penalty payment of USD 10,000.00 is excessive. However, given that the penalty payment was agreed by the Parties for consideration separate to the consideration provided in the Contract, the Arbitrator considers that it is appropriate to uphold the penalty in part. Deciding the matter *ex aequo et bono*, the Arbitrator finds that the Respondent shall pay to the Claimant USD 3,000.00.

7.3 Findings – the Second Claimant

7.3.1 Agent Fee

69. In the Addendum, the Respondent acknowledged that it had not paid the Agent Fee and agreed to pay it by 1 March 2012. On the basis of the evidence submitted, the Arbitrator finds that the Respondent has failed to pay the Agent Fee.

70. The Contract provides that the Agent Fee must be paid by 30 October 2011 and is payable for the Second Claimant's role in "*the negotiation of*" the Contract. The Arbitrator finds that the Second Claimant performed his obligations under the Contract and is entitled to the Agent Fee. Accordingly, the Arbitrator finds that the Respondent shall pay USD 12,750.00 to the Second Claimant.

7.3.2 Late payment penalties

71. The Second Claimant has claimed a late payment penalty in relation to the Agent Fee. The Second Claimant submits that Clause II of the Contract provides that a late payment penalty of USD 25.00 per day applies when payment of the Agent Fee is more than fifteen days late.

72. However, the Arbitrator considers that the penalty payment provisions cited by the Second Claimant apply only to late payments made to the First Claimant, and not to late payments made to the Second Claimant. The relevant part of Clause II states:

“For purposes of this Agreement, the above bonus compensation and the 2011-12 Guaranteed Compensation shall be referred to as the “Guaranteed Compensation”. All bonus amounts are cumulative and in USD and are fully guaranteed once achieved. In the event any payments of any kind, including but not limited to Guaranteed Compensation are more than fifteen (15) days late, Club acknowledges and agrees that it shall incur a late of fee of USD25.00 per day as a non exclusive remedy to Player.”

73. The Arbitrator notes that the penalty payment in the above clause is stated to apply to “any payments of any kind”. However, the Arbitrator finds that this refers to any payments of any kind, which are payable to the First Claimant only. The Arbitrator makes this finding for three reasons. Firstly, the wording “any payments of any kind” appears in Clause II which deals only with the First Claimant’s remuneration. Secondly, the penalty payment is expressly stated to be a “remedy to the Player”. If it was intended that the remedy be available to the First Claimant and the Second Claimant, the Contract should have stated that the penalty payment was a “remedy to the Player and the Agent”, or wording to that effect. Thirdly, Clause IV of the Contract (which deals with the Second Claimant’s remuneration) makes no provision for a penalty payment in the event that the Agent’s Fee is paid late.

74. Accordingly, the Arbitrator finds that no late payment penalty is due from the Respondent to the Second Claimant.

7.4 Interest

75. The Claimants have claimed interest at a rate of 5% per annum on all amounts awarded. The Arbitrator notes that while the Contract and the Addendum both make provision for late payment penalties, neither document states that interest shall be payable on sums payable under the Contract or the Addendum, or on any other fees

or costs. However, according to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. Indeed, payment of interest is a customary and necessary compensation for late payment.

76. The Arbitrator finds no reason why the Second Claimant should not be awarded interest on the Agent Fee. The Arbitrator considers, in line with the jurisprudence of the BAT, that 5% per annum is a reasonable rate of interest and that such rate should be applied in this case. The Arbitrator therefore finds that the Respondent shall pay the Second Claimant interest on the sum of USD 12,750.00 at a rate of 5% per annum, accruing from the date after which the Agent Fee was due (31 October 2011).

77. The Arbitrator notes that the First Claimant is already compensated for late payment of her unpaid salary and expenses because the Arbitrator has awarded late payment penalties to her. For this reason, the Arbitrator finds that no interest is payable by the Respondent to the First Claimant.

8. Costs

78. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the award or communicated to the Parties separately.

79. Furthermore, Article 17.3 of the BAT Rules provides that the award shall grant the prevailing Party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

80. On 10 October 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 at EUR 8,000.00.

81. The Arbitrator notes that the Claimants were successful in establishing the majority of their claims. The Arbitrator considers that the costs of the arbitration should be borne by the Respondent.

82. The Arbitrator notes that the Respondent did not pay its share of the Advance on Costs. The Arbitrator considers it appropriate to take into account the non-reimbursable fee when assessing the legal expenses incurred by the Claimants in connection with these proceedings. The Arbitrator considers that USD 6,500.00 would reflect a reasonable level of legal fees and expenses (including the non-reimbursable fee) for the present case, given its complexity and the volume of submissions required. Thus, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:
 - (i) the Respondent shall pay to the Claimants EUR 8,000.00, being the amount of the costs advanced by the Claimants; and
 - (ii) the Respondent shall pay to the Claimants the amount of USD 6,500.00 as a contribution towards their legal fees and expenses.

9. AWARD

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

- 1. Samsun Basketbol Kulübü is ordered to pay Ms Jayne Appel outstanding salary in the amount of USD 35,000.00.**
- 2. Samsun Basketbol Kulübü is ordered to pay Ms Jayne Appel late payment penalties in the amount of USD 3,000.00.**
- 3. Samsun Basketbol Kulübü is ordered to pay Ms Jayne Appel USD 1,646.70 as reimbursement for an airfare and bank transfer fees.**
- 4. Samsun Basketbol Kulübü is ordered to pay Wasserman Media Group outstanding agency fees in the amount of USD 12,750.00, together with interest at a rate of 5% per annum from 31 October 2011.**
- 5. Samsun Basketbol Kulübü is ordered to pay Ms Jayne Appel and Wasserman Media Group the amount of EUR 8,000.00 as reimbursement of the arbitration costs advanced by them.**
- 6. Samsun Basketbol Kulübü is ordered to pay Ms Jayne Appel and Wasserman Media Group the amount of USD 6,500.00 as a contribution towards their legal fees and expenses.**
- 7. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 15 October 2012

Raj Parker
Arbitrator