



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0344/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Ms. Courtney Vandersloot

- Claimant -

represented by Mr. Howard L. Jacobs, attorney-at-law,
2815 Townsgate Rd., Suite 200, Westlake Village, CA 91361, USA

vs.

Besiktas Jimnastik Kulübü

Suleyman Seba Caddesi, No. 48 BJK Plaza, Akaretler,
Besiktas, 34357 Istanbul, Turkey

- Respondent -

represented by Mr. Emin Özkurt, attorney-at-law,
Inönü Caddesi, Gözcu Apartmanı, No: 35,
Kat: 2, Gümüssuyu-Beyoglu, Istanbul, Turkey

1. The Parties

1.1. The Claimant

1. Ms. Courtney Vandersloot (hereinafter the “Player”) is a professional basketball player of US nationality. She is represented by Mr. Howard L. Jacobs, attorney-at-law in California, USA.

1.2. The Respondent

2. Besiktas Jimnastik Kulübü (hereinafter the “Club”) is a professional sport club with several sports departments, including basketball, located in Istanbul, Turkey. The Club is represented by Mr. Emin Özkurt, attorney-at-law in Istanbul, Turkey.

2. The Arbitrator

3. On 21 October 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 Arbitration Rules of the BAT (hereinafter the “BAT Rules”). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

4. On 13 May 2011, the Player and the Club entered into an employment agreement for one competition season, namely the 2011/2012 season (hereinafter the “Player Contract”). According to Article II of the Player Contract, the Club agreed to pay to the Player a guaranteed compensation of USD 225,000.00 net as follows:

“Upon Passing Standard Physical Exam \$35,000 USD net of any taxes

PLAYER’s remaining compensation shall be paid in accordance with the following schedule:

<i>November 15, 2011</i>	<i>\$35,000 USD net of any taxes</i>
<i>December 15, 2011</i>	<i>\$35,000 USD net of any taxes</i>
<i>January 15, 2012</i>	<i>\$35,000 USD net of any taxes</i>
<i>February 15, 2012</i>	<i>\$35,000 USD net of any taxes</i>
<i>March 15, 2012</i>	<i>\$30,000 USD net of any taxes</i>
<i>The earlier of April 15, 2012 or within 48 hours of CLUB’s last official game</i>	<i>\$20,000 USD net of any taxes</i>
<i>TOTAL for season 2011/2011(sic)</i>	<i>\$225,000 USD net of any taxes”</i>

5. Furthermore, the Player Contract provides for additional benefits for the Player such as flight costs or medical care during the term of the Player Contract (Article III para. B and C of the Player Contract). Article XI of the Player Contract stipulates the Player’s right to terminate the Player Contract in case of late payment by more than 30 days and/or any other breach of the Player Contract by the Club that the Club failed to cure within 7 days after being provided with notice of such breach.
6. On or before 21 October 2011, the Parties signed a standard league contract titled *“Turkish Basketball Federation Contractual Agreement for the Turkish Basketball Leagues”* with the same compensation as agreed in the Player Contract. This standard league contract was confirmed by and registered with the Turkish Basketball Federation on 21 October 2011.
7. The Player then started training and playing with the Club’s team for the 2011/2012 season.
8. By email of 4 November 2011, the Player requested payment of the first instalment of USD 35,000.00 due *“Upon Passing Standard Physical Exam”* (Article II of the Player Contract). The Club made this payment in November 2011.

9. During the Club's game of 17 December 2011, the Player suffered a broken nose. By email of 18 December 2011, the Club (through Mr. Can Köken) informed the Player's agency about the Player's plan to fly back to the United States for nose surgery and confirmed that the Club would bear the flight change fees of USD 250.00 if the Player would present the receipt to the Club.
10. By letter of 21 December 2011 referring to "Courtney Vandersloot Late Payments and Car", the Player's agency reminded the Club to pay the outstanding compensation for November and December 2011 and pointed to the Player's right to terminate the Player Contract in case of late payment of more than 30 days according to Article XI of the Player Contract. In addition, all of the Player's rights were expressly reserved and a time limit was set for a "satisfactory response" of the Club by 26 December 2011.
11. On 22 December 2011, the Player underwent medical treatment for her broken nose in the United States. She returned to Istanbul on 14 January 2012 and joined Club's team until the last game of the 2011/2012 season, i.e. on 18 March 2012.
12. By email of 14 January 2012, the Club (through Mr. Murat Ülgen) informed the Player's agency concerning due payments as follows:

"Dear Ceren,

The weather conditions in Istanbul is terrible and getting worse, we will not be able to send a stamped and signed letter, but please accept my mail as a commitment for the below payments for Courtney and Lindsay for Wednesday.

Please convey our appreciation to Lindsay Kagawa as well, we will definitely pay as total sum of 50.0000 \$ on Wednesday, as a part of 35.000 \$ for Courtney Vandersloot & 15.000 \$ for Lindsay Kagawa as a portion of the Manager payments.

We have not handed over the car to Courtney today due to the icy and snowy weather in Istanbul today, after she returns from the away game we will hand over her car as well. We will complete the payment of Lindsay Kagawa until mid of Feb.

We commit ourselves as the Club for these payments and let Courtney Vandersloot to play on Sunday game. I believe the goodwill shown by all parties will result in a good result on Sunday game...

King Regards and thanks for your cooperation

Have a nice weekend,

Murat Ülgen" (sic)

13. By another email of the same day, the Club (Mr. Can Köken) agreed to payments as follows:

“Dear Ceren,

According to our last conversation with Board Members; We confirm to pay penalty of 5.000USD to both sides if we can not make the total amount of 50,000USD payment on Wednesday. Also we confirm to pay the missing amount of agent fee by mid of February. As soon as you confirm this payment schedule and penalties we will organise Courtney’s travel plan to Mersin and take her to the airport immediately. We have a very important game tomorrow and we need Courtney to help her team. We are looking forward to hear good news from you

Best regards

Can Köken

Basketball Branch

International Relations & Administrative Manager”

14. According to the Player, the Club paid only some portions of the agreed compensation but failed to pay the total amount of USD 80,000.00 due under the Player Contract for the 2011/2012 season. Allegedly, the Club also blocked the Player’s release and as a result, she was unable to sign a new contract for the 2012/2013 season with any other Turkish club.
15. On 27 September 2012, the Player filed a claim against the Club with the Turkish Basketball Federation (hereinafter “TBF”) *“for granting free transfer right to the Client Player in Turkey and payment of balance transfer receivable of the Player”*. To date the TBF has not replied to this claim.
16. On 3 October 2012, the Player entered into an agreement with Novi Zagreb, a professional basketball club located in Zagreb for one month, i.e. from 3 October to 5 November 2012, based on a fully guaranteed salary of USD 10,000.00 in total.
17. From 27 November to 20 December 2012, i.e. after filing the Request for Arbitration with the BAT, the Player’s counsel and the Player’s agency contacted FIBA and requested its assistance with respect to the Player’s release.

18. On 15 February 2013, the Player entered into an agreement with the Slovakian club MBK Ruzomberok for the remaining 2012/2013 season, i.e. until 5 May 2013. A guaranteed salary of EUR 10,000.00 was agreed.

3.2. The Proceedings before the BAT

19. On 30 October 2012, the BAT Secretariat received the Player's Request for Arbitration dated 28 May 2012. The non-reimbursable handling fee of EUR 2,000.00 was received in the BAT bank account on 1 November 2012.

20. By letter of 26 November 2012, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties of 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 17 December 2012. The BAT Secretariat also requested the Parties pay the following amount as an Advance on Costs by no later than 6 December 2012:

"Claimant (Mr(sic) Courtney Vandersloot) EUR 4,000

Respondent (Besiktas Jimnastik Kulubu) EUR 4,000"

21. By letter of 12 December 2012, the BAT Secretariat confirmed receipt of the Player's share of the Advance on Costs and informed the Parties that the Arbitrator had decided to extend the time limits for the Answer until 2 January 2013 and for the payment of its share of the Advance on Costs until 21 December 2012. The Club submitted its Answer with exhibits on 2 January 2013.
22. By letter of 3 January 2013, the BAT Secretariat confirmed receipt of the Answer and informed the Parties of the Club's failure to pay its share of the Advance on Costs and that the arbitration would not proceed until receipt of the full amount of the Advance on Costs. Therefore, the BAT Secretariat invited the Player to pay the Club's share of the Advance of Costs by 14 January 2013.

23. By letter of 7 January 2013, the Player's counsel requested leave to respond to the Club's Answer and to amend the Player's Request for Relief.
24. By letter of 9 January 2013, the BAT Secretariat reminded the Parties that the arbitration would not proceed until the remaining share of the Advance of Costs was received. In addition, the Player was asked to inform the BAT Secretariat within the same time limit whether she intended to amend her Request for Relief, and if so, to file the amendment of her Request for Arbitration as soon as possible. The Player's submission would then be forwarded to the Club, giving it the opportunity to reply within a time limit similar to the one for an answer according to Article 11.2 BAT Rules. Only thereafter, would the Arbitrator decide on the Player's request to respond to the Club's Answer.
25. By letter of 14 January 2013, the Player's counsel confirmed that the Player would amend the Request for Relief to include additional claims for damages. By letter dated 19 January 2013, the Player filed a submission titled "Amended Prayer for Relief of Claimant Courtney Vandersloot; Supplemental Facts and Legal Argument".
26. By letter of 24 January 2013, the BAT Secretariat acknowledged receipt of the Player's submission dated 14 January 2013. Due to the Player's amended prayers for relief, she was requested to pay an additional non-reimbursable handling fee of EUR 1,000.00 by no later than 30 January 2013. Also, in view of the increased value of the dispute and in accordance with Article 9.3 of the BAT Rules, the Advance on Costs was adjusted to EUR 10,000.00. The Parties were asked to pay an additional amount of EUR 2,000.00 by no later than 30 January 2013 as follows:
- | | |
|--|-------------------|
| <i>"Claimant (Mr(sic) Courtney Vanderlsloot)</i> | <i>EUR 1,000</i> |
| <i>Respondent (Besiktas Jimnastik Kulubu)</i> | <i>EUR 1,000"</i> |
27. By letter of 5 February 2013, the BAT Secretariat acknowledged receipt of the amount of EUR 3,000.00 for the additional non-reimbursable handling fee and the additional Advance on Costs which was paid entirely by the Player. By the same letter, the Club

was invited to comment on the Player's amended Request for Relief by 25 February 2013. The Club did not submit any comments.

28. By letter of 19 March 2013, the Arbitrator asked the Parties additional questions to be answered by 29 March 2013. The Club submitted a response dated 27 March 2013, and the Player submitted a response dated 29 March 2013 together with several exhibits.
29. By letter of 5 April 2013, the BAT Secretariat acknowledged receipt of the Parties' replies and the Player was asked to indicate by 10 April 2013 whether she maintained her requests regarding a Letter of Clearance. Moreover, the Parties were informed that the Arbitrator had decided to declare the exchange of documents complete. The Parties were therefore invited to submit a detailed account of their costs by 12 April 2013.
30. On 8 April 2013, the Club submitted an account of costs as follows:

"Pursuant to the procedural order issued on 5 April 2013 in the above referenced matter, Respondents(sic) account of costs is submitted below:

<i>Attorney's fees (17 hours at an hourly rate of € 375) :</i>	<i>€ 6.375,-</i>
<i>Other expenses :</i>	<i>€ 50,-</i>
<i>Total :</i>	<i>€ 6.435,-</i>

31. By letter of 10 April 2013, the Player confirmed that she no longer maintained her requests regarding a Letter of Clearance.
32. By letter of 11 April 2013, the Player submitted an account of costs stating:

"In response to your 5 April 2013 letter in the above-referenced matter, Claimant encloses herewith her detailed statement of legal fees, totaling US \$12,985.00. Additionally, Claimant has advanced filing and arbitration costs in the amount of €13,000, as follows:

<i>€2,000</i>	<i>BAT filing fee</i>
<i>€4,000</i>	<i>Claimant's advance of arbitration costs</i>

€4,000	<i>Claimant's advance of Respondent's share of arbitration costs</i>
€1,000	<i>Additional BAT filing fee</i>
€1,000	<i>Claimant's advance of arbitration costs</i>
€1,000	<i>Claimant's advance of Respondent's share of arbitration costs</i>

Claimant objects to Respondent's 8 April 2013 "Account of Costs," as it does not comply with the BAT request to submit a detailed account of costs."

33. By email of 12 April 2013, the BAT Secretariat acknowledged receipt of the Parties' accounts of costs and informed the Parties that the Arbitrator had taken note of the Player's comment on the Club's account of costs which she had already provided together with her account of costs. Furthermore, the Club was invited to submit its comments, if any, on the Player's account of costs by no later than 18 April 2013. The Club did not file any comments.
34. The Parties did not request the BAT 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 available.

4. The Positions of the Parties

4.1. The Claimant's Position

35. The Player submits the following in substance:
- The Club failed to pay the Player the agreed and guaranteed compensation in the amount of USD 80,000.00, consisting of USD 35,000.00 due on 15 January 2012, USD 35,000.00 due on 15 February 2012 and the final payment of USD 10,000.00. Moreover, the Club agreed to a "penalty provision" of additional USD 5,000.00 if it did not pay the Player's January 2012 salary (USD 35,000.00) by 18 January 2012.

- The Club must also pay the costs for medical care of the Player's nose injury (USD 4,732.59) and an airline change fee of USD 250.00.
- Despite several requests by the Player, the Club blocked her release from the Club and "effectively prevented her from consummating a contract" with another Turkish basketball club for the 2012/2013 season. The Club would release her and "give her letter of clearance" only if she "delete[d] all the monies" owed to her by the Club. Because of the Club's refusal, the Player could not accept on an offer of TED Ankara Kolejliler for a salary of USD 110,000.00 for the 2012/2013 season. Instead she had to accept an offer from a club outside of Turkey, i.e. a one-month contract for USD 10,000.00 with Novi Zagreb. The difference of USD 100,000.00 is claimed as lost compensation.
- The Player's agency made extensive inquiries and efforts to find new employment for the Player for the 2012/2013 season.

4.2. The Claimant's Request for Relief

36. In her Request for Arbitration, the Player requested the following relief:

<i>"Guaranteed Compensation:</i>	<i>US \$80,000.00</i>
<i>Additional Benefits and contract costs:</i>	<i>US \$4,982.59</i>
<i>Penalty Fee:</i>	<i>US \$5,000.00</i>
<i>Costs [FIBA BAT filing fee]</i>	<i>US \$2,728.40</i>
<i>Attorney's fees</i>	<i>US \$5,925.00</i>
TOTAL	US \$98,635.99 [plus arbitrator costs and legal interest at 5% per annum]

Claimants request an award against Besiktas CT Istanbul in the amount of US \$98,635.99, plus arbitrator costs and legal interest at 5% per annum. In the alternative, Claimants request an award against Besiktas CT Istanbul 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."

37. In her submission of 19 January 2013, she amended her Request for Relief as follows:

<i>“Guaranteed Compensation:</i>	<i>US \$80,000.00</i>
<i>Additional Benefits and contract costs:</i>	<i>US \$4,982.59</i>
<i>Penalty Fee:</i>	<i>US \$5,000.00</i>
<i>Costs [FIBA BAT filing fee]</i>	<i>US \$2,728.40</i>
<i>Attorney’s fees</i>	<i>US \$5,925.00</i>
<i>Lost Compensation for 2012-2013 season:</i>	<i>US \$100,000.00</i>
TOTAL	US \$198,635.99 [plus arbitrator costs and legal interest at 5% per annum]

Claimants request an award against Besiktas CT Istanbul in the amount of US \$198,635.99, plus arbitrator costs and legal interest at 5% per annum. In the alternative, Claimant requests an award against Besiktas CT Istanbul 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.”

4.3. The Respondent's Position

38. The Club submits the following in substance:

- The penalty fee of USD 5,000.00 has to be considered invalid. Such a penalty is held out “to secure the due performance, not to take advantage of the financial difficulties” of the Club. There is “an extravagant disproportion between the amount of sum stipulated in the contract and the true amount of damages likely to be suffered” and “the penalty clause should be deemed excessive and be declared invalid”. Moreover, the contractual penalty and interest shall not be requested concurrently. Also, the Player should mitigate her damages and any amount paid to her in the same period by another club should be deducted from any compensation payable. Finally, Mr. Murat Ülgen had no power to represent and legally bind the Club in regards to the acceptance of any penalty.
- The Player’s attorney fees are excessive and BAT should determine a reasonable fee in this regard.

4.4. The Respondent's Request for Relief

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

"In light of the above mentioned facts and legal considerations, Besiktas respectfully requests from BAT to:

REJECTING the claims of the Player and dismissing the Appeal;

ORDERING the Player to pay all costs and legal fees incurred by Besiktas in these arbitration proceedings on a full-indemnity basis;

AWARDING any such other relief as the BAT may deem necessary or appropriate."

5. The Jurisdiction of the BAT

40. 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).

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

42. The Arbitrator finds that the dispute is of a financial nature and arbitrable within the meaning of Article 177(1) PILA.

43. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Article IX of the Player Contract, 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 an 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. [...]"

44. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA. The Arbitrator also considers that there is no 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 IX of the Player Contract covers the present dispute.
45. The Club did not object to the BAT jurisdiction.
46. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Player’s claims.

6. Other Procedural Issues

6.1. The Claimant's request for provisional relief

47. In Appendix 2 of her Request for Arbitration received by the BAT Secretariat on 30 October 2012, the Player referred to Art. 10.1 of the BAT Rules and filed the following “request for provisional relief”:

“For all of the foregoing reasons, it is respectfully requested that the Arbitrator, as a matter of preliminary relief, order that Respondent Besiktas immediately provide a Letter of Clearance to Claimant Courtney Vandersloot.”

48. Given the facts submitted by the Player in reply to the Arbitrator’s questions, i.e. that she was under contract with Novi Zagreb in fall 2012 and with MBK Ruzomberok until the end of the 2012/2013 season, the Arbitrator requested the Player indicate whether she maintained her request that the Club be ordered to provide a Letter of Clearance. The Player confirmed that she no longer maintained this request.
49. Consequently, the Arbitrator will not rule on the Player’s “request for provisional relief”.

6.2. The Claimant's amendment of her Request for Relief

50. The Player amended her Request for Relief by filing a submission titled “Amended Prayer for Relief of Claimant Courtney Vandersloot; Supplemental Facts and Legal Argument” on 19 January 2013. She requested an additional amount of USD 100,000.00 for lost compensation during the 2012/2013 season.
51. As a result of amending the amount claimed, the Player paid an additional non-reimbursable handling fee and made additional payments regarding the Advance on Costs. The Club was given the right to comment on the amended Request for Relief. The Club did not provide such comments and did not object to the amendment of the Player’s Request for Relief.
52. Thus, the Arbitrator finds that the amended Request for Relief is admissible.

6.3. The Claimant's request for further written submissions

53. Before filing its amended Request for Relief, the Player requested leave to respond to the Club’s Answer. The Arbitrator informed the Parties that he would decide on the Player’s request only upon receipt of her amended Request for Relief.
54. In her submission titled “Amended Prayer for Relief of Claimant Courtney Vandersloot; Supplemental Facts and Legal Argument” of 19 January 2013, the Player also provided comments on the Club’s Answer, e.g. at the end of page 3 (“*Furthermore, Claimant notes that the allegation at paragraph 15 of Besiktas’ Answer [...] is simply false*”). Considering the Preamble of the BAT Rules, in particular that the BAT Rules are designed to provide for “simple, quick and inexpensive means” to resolve disputes (as a rule one submission per party) and in accordance with Article 12.1 of the BAT Rules, the Arbitrator decided not to grant the Player’s request for a full written response, but rather to proceed with specific questions to both Parties. The Player answered those

questions on 29 March 2013 and the Club on 27 March 2013. The Parties' right to be heard was therefore granted in a sufficient way.

55. After review of all documents submitted by the Parties, the Arbitrator deemed himself sufficiently well informed to issue an award without a further round of written submissions and thus declared that the exchange of documents was completed. None of the Parties objected to his decision.

6.4. The Claimant's claim with the TBF (Turkish Basketball Federation)

56. About one month before filing her Request for Relief with the BAT, the Player had filed a claim against the Club with the TBF *"for granting free transfer right to the Client Player in Turkey and payment of balance transfer receivable of the Player"*.
57. According to Art. 186^{bis} PILA, the arbitral tribunal is competent to decide on its own jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless noteworthy grounds require a suspension of the proceedings.
58. The arbitration agreement in Article IX of the Player Contract is unambiguous and provides for the BAT as the competent dispute resolution body. It does not contain any reservation in favour of the TBF. The Club has not raised any objection of lack of jurisdiction of the BAT. The TBF has not replied to the Player's claim. The Arbitrator thus considers himself competent to decide the dispute between the Parties.

7. Applicable Law – ex aequo et bono

59. 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”.

60. 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.”

61. In the arbitration agreement in Article IX of the Player Contract, 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 *ex aequo et bono*.

62. 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 1969¹ (Concordat),² 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.”³

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

¹ 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).

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

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

*“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”.*⁴

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

8. Findings

65. The Player claims outstanding compensation for the 2011/2012 season, additional benefits, a penalty fee and lost compensation for the 2012/2013 season.

8.1. Is the Player entitled to outstanding compensation for the 2011/2012 season in the amount of USD 80,000.00?

66. The Player submits that after the Player Contract expired at the end of the 2011/2012 season, USD 80,000.00 of the guaranteed annual compensation of USD 225,000.00 remained unpaid. The outstanding amount consists of three installments, namely USD 35,000.00 which became due on 15 January 2012, USD 35,000.00 which became due on 15 February 2012 and half of the last instalment of USD 20,000.00 (i.e. USD 10,000.00), which became due on 20 March 2012. These amounts are not contested by the Club.

67. The Arbitrator notes that the Player played with the Club’s team during the entire 2011/2012 season. Her performance of services was interrupted only between 18 December 2012 and 14 January 2013 due to the surgery for her broken nose in the USA. The Player Contract does not provide for any deductions of the salary due to illness or injury but explicitly says that the compensation is “fully guaranteed”. The Player is therefore entitled to the full agreed salary. Given the Club has paid only USD 145,000.00, the Player is entitled to the outstanding compensation of USD 80,000.00.

⁴ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

8.2. Is the Player entitled to “additional benefits” in the amount of USD 4,982.59 in total?

68. The Player claims the reimbursement of the costs for the change of her flight ticket to the USA and for medical treatment, based on Article III B and C of the Player Contract (“Additional Benefits”).
69. Flight change fee in the amount of USD 250.00: According to Clause III B of the Player Contract the Club must pay 4 round trip tickets to the USA. Because of the nose surgery, the Player travelled to the USA earlier than initially planned, namely before Christmas 2011. This made it necessary to change a flight which had been previously booked. The change costs allegedly amount to USD 250.00. By e-mail of 18 December 2011 (Claimant Exhibit E) the Club agreed that it would reimburse these costs upon submission of a receipt. Whether or not such a receipt has been submitted is unknown. Nor has direct evidence of these costs been submitted in this arbitration. The Arbitrator finds therefore that the claim for reimbursement of these costs must be rejected.
70. Medical expenses in the amount of USD 4,732.59: The Player submits three invoices related to her nose surgery and amounting to USD 4,427.08 only (USD 3,698.59 + USD 258.00 + USD 470.49). The Club does not comment on these invoices. According to Article III C of the Player Contract, the Club must cover all medical expenses of the Player, irrespective of the reason for the medical treatment. So far, the Club has not made any such payments and it has not contested the Player’s claim. The Arbitrator therefore finds that the Player is entitled to the reimbursement of the documented medical costs of USD 4,427.08.

8.3. Is the Player entitled to penalty fee in the amount of USD 5,000.00?

71. The Player then claims payment of a penalty fee of USD 5,000.00. The Player Contract does not provide for such a late payment penalty. However, in an e-mail of 14 January 2012, the Club expressly agreed to a penalty fee if it would not pay an amount of USD

50,000.00 until 18 January 2012. This amount included a payment to the Player of USD 35,000.00 and another USD 15,000.00 to the Player's agency "as a portion of the Manager payments". The Player now submits that the penalty became due after the promised payment was not made.

72. The Club does not question that an amount of USD 35,000.00 was due on 18 January 2012. Nor does it contest that the promised payment was not made in time. Rather, the Club objects to the penalty fee on the grounds that: a) it was not provided by the Player Contract; b) it is deemed to be excessive, because it collides with the claim for late payment interest; and c) the sender of the e-mails in which the commitment to pay a penalty fee was made was not authorized to represent and bind the Club.
73. The Arbitrator finds these arguments unconvincing. The promise to pay a penalty fee if the Club was late with the payment of USD 50,000.00 does not need to be included in the Player Contract but can be given by any provable instrument. The Arbitrator does not consider the penalty fee excessive. Rather, it reflects a strong and credible commitment by the Club to make the due payments, in particular after they had been late, and there is no reason to reduce or even eliminate the penalty fee. The Arbitrator agrees that the Player cannot claim both, the penalty fee and late payment interest. He finds however, that the penalty fee included or replaced the claim for late payment penalty due on the date when the penalty fee was payable. This has to be taken into consideration when the late payment penalty will be calculated but it does not void the penalty fee. Finally, the penalty fee was promised by Mr. Can Köken who was designated as "Basketball Branch, International Relations & Administrative Manager". Mr. Köken represented the Club in prior negotiations with the Player. The domain-name of Mr. Köken's email address ("can.koken@bjk.com.tr") refers to the Club, and several other representatives of the Club, including Mr. Köken with whom further communication was exchanged, had been served with copies of this e-mail. The Club never protested against Mr. Köken's communication prior to this arbitral proceedings

and it must therefore accept that the Player trusted in Mr. Köken's power to validly represent the Club.⁵

74. There is however a certain ambiguity as to who is entitled to the penalty fee and whether the penalty fee must be reduced since it was promised for an amount which also included a payment to another player. The Arbitrator finds that although the payment was promised to the Player's agency, it referred to a payment due to the Player which can be claimed either by the agency in favor of the Player or by the Player herself. When it comes to the amount of the penalty fee, the Arbitrator finds that the fact that it was connected to two separate payments must be taken into account. Of the promised USD 50,000.00 only USD 35,000.00 was due to the Player. Hence, the penalty fee must be split accordingly, which means that the Player is entitled to USD 3,500.00 only.

8.4. Is the Player entitled to lost compensation for the 2012/2013 season in the amount of USD 100,000.00?

75. The Player submits that the Club refused to issue the Player's release for a local transfer within Turkey, which made it impossible for her to accept an alleged offer of TED Ankara Kolejliler with an annual compensation of USD 110,000.00 for the 2012/2013 season. Instead, the Player had no other option but to join Novi Zagreb for one month and a compensation of USD 10,000.00. The Player claims the payment of the difference of USD 100,000.00.
76. As a rule, the person who claims damages must demonstrate the respective loss. The Player submits an email correspondence which took place between her agency (Ms. Lindsay Kagawa Colas from Wasserman Group) and the domestic agent in Turkey, Mr. Ceren Ates in August 2012. The email exchange indicates that there had been talks

⁵ See also BAT/FAT case 0022/08, *XL Basketball Agency v Besiktas*.

between the Player's management and TED Ankara Kolejiler but there is no direct evidence which would prove to the necessary standard that (i) there was a binding offer of USD 110,000.00 from TED Ankara Kolejiler which (ii) failed only because the Club refused to issue the Player's release. The correspondence rather shows the contractual conditions which the agents and the Player sought to negotiate with TED Ankara Kolejiler, but there is no confirmation from that club whether this was acceptable at all. Due to the lack of sufficient evidence of the loss allegedly suffered by the Player, the Arbitrator dismisses that claim. It is therefore moot to review whether or not the Club's failure to timely issue the Player's release caused the loss and to which extent the income of the Player from MBK Ruzomberok (EUR 10,000.00) and the offer of Russian club Energia Ivanova (USD 34,000.00) must be taken into calculation.

77. Consequently, the Player is not entitled to any lost compensation for the 2012/2013 season.

8.5. Is the Player entitled to interest in the rate of 5% p.a.?

78. In addition, the Player requests interest in the rate of 5% p.a. on the total amount claimed. However, as mentioned above, the total amount awarded to the Player is USD 87,927.08 (USD 80,000.00 + USD 4,427.08 + USD 3,500.00). This amount (and not the total amount claimed) is the maximum amount on which any default interest can be calculated.

79. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest.⁶ Although the Player Agreement does not provide for the payment of default interest, this is a generally accepted principle which is embodied in most legal systems. However, it is

⁶ See, *ex multis*, the following BAT awards: 0092/10, *Ronci, Coelho vs. WBC Mizo Pecs 2010*; 0069/09, *Ivezic, Draskicevic vs. Basketball Club Pecs Noi Kosariabda Kft*; 0056/09, *Branzova vs. Basketball Club Nadezhda*

also generally accepted that the obligee has to expressly request payment of interest from the obligor.

80. The Arbitrator agrees that the interest rate of 5% p.a. is acceptable and in line with the interest rate usually awarded by default if no other interest rate has been agreed by the parties. However, there is no evidence of the fact that interest has ever been claimed from the Club prior to the Request of Arbitration. Deciding *ex aequo et bono*, the Arbitrator finds therefore that that the Player is entitled to interest of 5% p.a. on the amount of USD 87,927.08 since 30 October 2012 (i.e. the date when the Request of Arbitration was received by the BAT Secretariat).

8.6. Summary

81. The Player is therefore entitled to a total amount of USD 87,927.08 consisting of unpaid salaries of USD 80,000.00, medical expenses of USD 4,427.08 and late payment penalty in the amount of USD 3,500.00, plus interest on the total amount since 30 October 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 13 June 2013 - 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 10,000.00.

84. Considering the requests for relief, the outcome and the circumstances of the present case, the Arbitrator finds it fair that the fees and costs of the arbitration shall be borne in equal shares by both Parties, i.e. EUR 5,000.00 by the Player and EUR 5,000.00 by the Club.
85. Given that the Player paid the full Advance on Costs in the amount of EUR 10,000.00, in application of Article 17.3 of the BAT Rules the Arbitrator decides that the Club must reimburse EUR 5,000.00 to the Player, i.e. the difference between the advance on costs paid by the Player and the share of the arbitration costs that the Player must actually bear.
86. Furthermore, the Arbitrator takes note that the Claimant requests reimbursement of the amounts of EUR 3,000.00 (non-reimbursable handling fee) and USD 12,985.00 (further legal costs) while the Respondent requests reimbursement of legal costs in the total amount of EUR 6,435.00. The Arbitrator also takes note of the Claimant’s objection against the Respondent’s account of costs as not being “detailed” and the Respondent’s objection against the Claimant’s account of costs as being “excessive”. Considering the circumstances of the present case (Article 17.3. of the BAT Rules), in particular the reliefs granted compared to the reliefs sought, the Arbitrator deems it appropriate that every party bears its own legal costs except for a contribution of EUR 2,000.00 towards the Claimant’s legal costs. This amount corresponds to the portion of the non-reimbursable handling fee for the initial request for relief which was almost completely granted. Consequently, the Club shall pay to the Player the amount of EUR 2,000.00.

10. AWARD

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

- 1. Besiktas Jimnastik Kulübü is ordered to pay to Ms. Courtney Vandersloot the amount of USD 87,927.08 plus interest of 5% p.a. on this amount since 30 October 2012.**
- 2. Besiktas Jimnastik Kulübü is ordered to pay to Ms. Courtney Vandersloot the amount of EUR 5,000.00 as a reimbursement of her advance on arbitration costs.**
- 3. Besiktas Jimnastik Kulübü is ordered to pay to Ms. Courtney Vandersloot the amount of EUR 2,000.00 as a contribution towards her legal fees and expenses. Besiktas Jimnastik Kulübü shall bear its own legal fees and expenses.**
- 4. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 27 June 2013

Stephan Netzle
(Arbitrator)