

ARBITRAL AWARD

(BAT 0460/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Mr. Will B. Thomas,

- Claimant 1 -

Mr. Mario Scotti,

- Claimant 2 -

vs.

Pinar Karşıyaka Spor Kulübü,

Yali Cad. 396, 35540 Izmir, Turkey

- Respondent -

represented by Mr. Mutlu Altug, President of Respondent,
and Mr. Mehmet Yaya, Attorney-at-Law, Izmir, Turkey

1. The Parties

1.1 Claimant 1

1. Mr. Will B. Thomas is a professional basketball player with US citizenship (hereinafter referred to as “Player” or “Claimant 1”).

1.2 Claimant 2

2. Mr. Mario Scotti (hereinafter referred to as “Agent” or “Claimant 2”, and together with Claimant 1, the “Claimants”), is a FIBA-licensed agent who represents professional basketball players worldwide, among others Claimant 1.

1.3 The Respondent

3. Pinar Karşıyaka Spor Kulübü (hereinafter referred to as “Club” or “Respondent”) is a basketball club located in Izmir, Turkey.

2. The Arbitrator

4. On 18 November 2013, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the “BAT”) appointed Prof. Dr. Ulrich Haas as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (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

5. On 24 July 2012, the Claimants and Respondent signed a contract (hereinafter referred to as “the Player Contract”), according to which Respondent engaged the Player as a professional basketball player for the season of 2012/2013.
6. Article 2 of the Player Contract provides as follows:

“Salary and Bonuses

The Club agrees to pay the Player a fully guaranteed net Base Salary of \$240,000 (Two Hundred and forty Thousand United States Dollars) for the 2012-2013 basketball season. All payments to Player hereunder must be made in United States Dollars in accordance with wire transfer instructions or other instructions to be provided by Player from time to time. The payment schedules is as follows; provided, however, in the event any payment or payments set forth below are scheduled to be paid after Club’s last official League game, said payment or payments shall instead be due and payable within five (5) days after Club’s last official League game:

<i>Date of payment</i>	<i>Amount</i>
<i>25th August, 2012</i>	<i>\$ 10,000</i>
<i>15th September, 2012</i>	<i>\$ 23,000</i>
<i>15th October, 2012</i>	<i>\$ 23,000</i>
<i>15th November, 2012</i>	<i>\$ 23,000</i>
<i>15th December, 2012</i>	<i>\$ 23,000</i>
<i>15th January, 2013</i>	<i>\$ 23,000</i>
<i>15th February, 2013</i>	<i>\$ 23,000</i>
<i>15th March, 2013</i>	<i>\$ 23,000</i>
<i>15th April, 2013</i>	<i>\$ 23,000</i>
<i>15th May, 2013</i>	<i>\$ 23,000</i>
<i>1 June, 2013</i>	<i>\$ 23,000</i>
TOTAL	\$ 240,000

The following bonuses shall be paid to Player:

<i>Bonus Type</i>	<i>Bonus Payment</i>
<i>Club Qualifying for the Second Round of the Eurochallenge</i>	<i>\$2,000</i>
<i>Club Qualifying for the Final 8 of the Turkish basketball Cup</i>	<i>\$2,000</i>
<i>Club Finishing the Turkish League Regular Season in the top 8</i>	<i>\$2,000</i>
<i>Club Qualifying for the Final Four of the Eurochallenge</i>	<i>\$3,000</i>
<i>Club Qualifying for the Final Four of the Turkish Cup</i>	<i>\$3,000</i>
<i>Club Qualifying for the Final Four of the Turkish Playoffs</i>	<i>\$3,000</i>
<i>Club winning the Turkish basketball Cup</i>	<i>\$2,000</i>
<i>Club winning the Eurochallenge</i>	<i>\$2,000</i>
<i>Club winning the Turkish Playoffs</i>	<i>\$2,000</i>

Bonus payments are guaranteed as part of the salary. Bonus payments will be paid together with the first scheduled salary payment after the achievement of the bonus. In case there are no salary payments due after the achievement of a bonus, the payment will be made within 15 days of the achievement of the bonus. All bonuses are cumulative and the achievement of the bonus will in no way affect Player's right and ability to achieve the others.

It is agreed that any payment to Player, including bonus payments, pursuant to the above shall be subject to an interest penalty of fifty dollars (\$50 USD) per day each day of delinquency after the indicated day. In the event that any scheduled payment is not made by Club within fifteen (15) days of the applicable payment date, Player shall be free of his obligations to perform in any practise sessions or any games until such time as all said payments have been paid.

In addition, in case of any scheduled payment not being made to the Player by the Club within thirty (30) days of the scheduled payment date, Player will have the right to initiate resolution of this Agreement by serving a written notice to Club. In case of scheduled payment not being made within the next seven (7) days after such a written notice is received by Club, Player will have the right to terminate this Agreement unilaterally by serving Club final written notice of termination. In this case, Player shall immediately be entitled to all salaries under this agreement and shall have no further obligations to the Club. Club shall retain no rights to Player except for the obligation to pay all salaries and earned bonuses under the terms of this Agreement. Upon receipt of a request from Club's national basketball federation to issue the Player's Letter of Clearance, Club must authorize the federation to do so unconditionally within twenty four (24) hours. Under these circumstances Player has the right to leave Club with this FIBA letter of clearance to play basketball anywhere else in the world but with the duties and obligations of Club still in place."

7. Article 4 b) of the Player Contract reads as follows:

“Automobile

Club will provide an automatic transmission automobile for use by Player during the time of this Agreement and the period of five (5) days thereafter. The selection of the automobile shall be subject to Player’s approval, shall be enough to safely and comfortably accommodate Player and shall provide Player with proper comfort and safety. Club shall provide Player with “full” car insurance throughout the term of this Agreement on the automobile, covering damage to himself, the car, passengers in the car as well as the person and property of others. In the event of an accident, Player shall only be responsible for the “deductible” amount of the Insurance policy, which deductible amount shall not exceed €1,000 Euros. Player shall be responsible for the purchase of gasoline for the automobile.”

8. On the same day, i.e. on 24 July 2012, the Respondent also entered into a contract with the Agent (hereinafter referred to as “the Agent Contract”). The pertinent parts of the Agent Contract read as follows:

“Pinar Karsiyaka (“Club”) agrees to pay Mario Scotti (“Agent”), for the services provided regarding the negotiation of the contract of William Benson Thomas (“Player”) signed on Tuesday, July 24, 2012, agent fees as follows:

- \$ 24,000 (Twenty Four Thousand US Dollars) to Mario Scotti, before November 20th 2012”*

9. On 28 March 2013, the Agent sent to the President of Respondent (Mr. Mutlu Altug) an email claiming bonuses in the amount of USD 7,000, a reimbursement for a car that had been promised to the Player according to the Player Contract, and outstanding agent fees. The letter reads – *inter alia* – as follows:

“[...] There are just a few issues I want to check with you to make sure that we are all on the same page.

1) Will’s bonuses

Will has earned the following bonuses which should be paid with the next salary payment after their achievement [...]

<i>Club Qualifying for the Second Round of the Eurochallenge</i>	<i>\$2,000</i>
<i>Club Qualifying for the Final 8 of the Turkish Cup</i>	<i>\$2,000</i>
<i>Club Qualifying for the Final Four of the Eurochallenge</i>	<i>\$3,000 [...]</i>

2) *Reimbursement of the car*

I did not realize until I visited that the club has not provided Will with a car as required in the contract. I talked to Selim about the issue and he told me that the club will pay Will \$250 for each month of the contract that he did not have a car to use. Please can you confirm for me that this is the club's intention and tell me when these payments will be made? I would also like to have this written and signed as an amendment of the contract as soon as possible.

3) *Agent commission*

During our earlier discussion we agreed that my commission on Will's contract which was due in November 20th, 2012 will be paid in the first week of April 2013 which is next week. Please can you confirm that this is still accurate and let me know if you have all the information that you need to make the payment. [...]"

10. On 19 April 2013, the Agent sent to the Club an invoice for the agent fee.
11. On 5 May 2013, the Agent sent another email to the President of the Respondent (Mr. Mutlu Altug) that reads – *inter alia* – as follows:

"[...] Please can you inform me when the commission payment will be made? I need the invoice that Chris sent to you to be paid immediately [...] Finally, please can you tell me when the club will pay the bonuses listed below to Will as they have all been accomplished and are now overdue. [...]"

<i>Club Qualifying for the Final 8 of the Turkish Cup</i>	<i>\$2,000</i>
<i>Club Qualifying for the Second Round of the Eurochallenge</i>	<i>\$2,000</i>
<i>Club Qualifying for the Final Four of the Eurochallenge</i>	<i>\$3,000</i>
<i>Club Finishing in the top 8 of the Turkish League Regular Season</i>	<i>\$2,000</i>
<i>Compensation for Club's failure to provide a car to Player</i>	<i>\$2,500"</i>

12. On 17 June 2013, the Agent wrote a letter to the President of the Respondent asking for the immediate payment of the outstanding bonuses and salary for the Player. In addition, the Agent requested USD 26,750 in late penalty payments as well as the payment of the agent commission in the amount of USD 24,000.
13. On 18 June 2013, Mr Selim Cinar wrote an email to Mr Mario Scotti that reads as follows:



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"[...] First of all we apologise about being late for the agent fee payment which we are late. It comes from during the season, but however 2 weeks ago we had lections in the club and at the moment we have new management and new president. As an experienced agent, you can guess how it works in the sports club. [...] Which we want to clean up debts before making moves for the next season.

On the other hand you wrote the bonuses of Will Thomas as attached with delays. But maybe you do not know, we made his bonus payments. We started to make since the third week of the regular season [...] The total amount of the bonuses that we made is 12,055.56 USD. [...] But as you wrote we will make the last salary payments all together with the team.

14. On 3 July 2013, Mr Selim Cinar sent another email to Mr. Mario Scotti which reads – *inter alia* – as follows:

"[...] Please check the payment receipts enclosed. The one on the lists marked are shows the bonus payments. 4 of them made in cash, and you can see his signatures on, and 2 made to his bank account [...]"

15. On 8 July 2013, Chris Pearson (on behalf of Claimants) responded to Mr. Selim Cinar as follows:

"[...] I have looked at the accounting document that you sent but it is very hard for me to understand which payment corresponds to which bonus. Looking at the list below please can you tell me which bonuses were paid and provide the specific accounting document for each one? [...]"

<i>Club Qualifying for the Final 8 of the Turkish Cup</i>	<i>\$2,000</i>
<i>Club Qualifying for the Second Round of the Eurochallenge</i>	<i>\$2,000</i>
<i>Club Qualifying for the Final Four of the Eurochallenge</i>	<i>\$3,000</i>
<i>Club Finishing in the top 8 of the Turkish League Regular Season</i>	<i>\$2,000</i>
<i>Compensation for Club's failure to provide a car to Player</i>	<i>\$2,500"</i>
<i>Salary June 1st 2013</i>	<i>\$23,000"</i>

16. On 20 August 2013, the Player wrote a letter to the Turkish Basketball Federation advising them that he had not been paid the bonuses and salaries due to him under the contract with Respondent. Consequently, the Player requested that he *"be granted a full release by the TBF to play for any other club in Turkey [...] with no transfer fee payable to the Pinar Karsiyaka Basketball Club"*.

17. On 26 August 2013, the Agent wrote a letter to the General Manager of the Club (Mr. Levent Turknas) requesting the payment of the outstanding bonuses, salary, agent fee as well as the payment of late penalty fees.
18. With letter dated 25 September 2013, the Turkish Basketball Federation informed the Player as follows:

"[...] Having respect to the rules, in this context; It is understood that the wages to be paid in accordance with the sportsman's contract have not been paid, in accordance with obvious provision of Contracted Sportmen License, Registration and Transfer Directive 17/1 Article, taking in consideration of sportsmans submission of his demand to the Law Board, it is decided unanimously to allow the sportsman be transferred to another club without any transfer fee being due."

3.2 The Proceedings before the BAT

19. On 17 October 2013, Claimants filed a Request for Arbitration in accordance with the BAT Rules. The non-reimbursable fee of EUR 2,035.00 was received in the BAT bank account on 2 October 2013.
20. On 26 November 2013, the BAT invited the Respondent to file its answer in accordance with Article 11.2 of the BAT Rules by no later than 17 December 2013 (the "Answer"), and fixed the amount of the Advance on Costs to be paid by the Parties by no later than 6 December 2013 as follows:

<i>Claimant 1 (Mr. Will Thomas)</i>	<i>EUR 3,000.00</i>
<i>Claimant 2 (Mr. Mario Scotti)</i>	<i>EUR 1,000.00</i>
<i>Respondent (Pinar Karsiyaka SK)</i>	<i>EUR 4,000.00</i>

21. On 18 December 2013, the BAT Secretariat confirmed receipt of Claimants' share of the Advance of Costs (EUR 3,035.00 by Mr. William B Thomas and an amount of EUR 1,000.00 by Mr. Pearson Thomas Christopher Kandeh). By letter dated 22 January 2014, Claimants clarified that the amount of EUR 1,000 was paid on behalf of Mr. Mario Scotti.

22. With letter dated 18 December 2013, the BAT also informed the Parties that Respondent had failed to submit an Answer and to pay its share of the Advance on Costs. Therefore, the BAT invited Claimants to substitute for Respondent's share of the Advance on Costs by no later than 3 January 2014. Finally, Respondent was granted a final opportunity to file an Answer to the Request for Arbitration by no later than 3 January 2013.
23. On 27 January 2014, the BAT Secretariat acknowledged receipt of Respondent's share of the Advance on Costs paid by Claimants (EUR 4,035.00). Furthermore, it informed the Parties that Respondent had failed to submit an Answer within the délai de grâce. Moreover, the Arbitrator invited the Claimants to reply to certain questions by no later than 4 February 2014.
24. Claimants submitted their answers to the above questions on 22 January 2014.
25. With letter dated 27 January 2014 the Arbitrator invited Respondent to comment on Claimants' answers by no later than 12 February 2014 and advised the Parties that once the deadline has elapsed the exchange of submission will be closed.
26. On 12 February, Respondent sent the following letter to the BAT:

"You send us a letter about the case between our club and MR. WILL THOMAS. In this letter you gave us a time limit to give our answers to this letter until 12 February 2014. But because of our financial congress of our club (which we have to do according to Turkish Lay System) we can't give our answer letter until 20 February 2014. So we request an extra time for our answers until 20 February 2014."
27. With letter dated 12 February 2014 the Arbitrator invited the Claimants to comment on Respondent's request for an extension of the time limit by no later than 14 February 2014. Absent any comments submitted by Claimants, the Arbitrator granted

Respondent an extension of the time limit to comment on Claimants' answers until 20 February 2014.

28. Respondent did not file any comments within the above deadline.

4. The Positions of the Parties

4.1 Claimants' Position

29. Claimant 1 submits the following in substance:

- Claimant 1 was employed as a professional basketball player by Respondent for the season of 2012-2013. The Player fulfilled all of his obligations arising out of the Player Contract. Player submits that the Respondent failed to honour its obligations in turn. In particular, Claimant 1 submits that the following salary/bonus payments due under the Player Contract are outstanding:

<i>"Claimant 1:</i>	
<i>-Salary</i>	<i>\$ 23,000 net</i>
<i>-Bonuses:</i>	
<i>Club Qualifying for the Final 8 of the Turkish basketball Cup</i>	<i>\$ 2,000 net</i>
<i>Club Qualifying for the Second Round of the Eurochallenge</i>	<i>\$ 2,000 net</i>
<i>Club Qualifying for the Final Four of the Eurochallenge</i>	<i>\$ 3,000 net</i>
<i>Club Finishing the Turkish League Regular Season in the top 8</i>	<i>\$ 2,000 net</i>
<i>Club Qualifying for the Final Four of the Turkish Playoffs</i>	<i>\$ 3,000 net</i>

TOTAL of 35,000 US-Dollar net"

- Claimant 1 further submits that under the Player Contract he was entitled to a car ("*automatic transmission automobile*") for the whole term of the Player Contract and a period of 5 days thereafter. The Player submits that he was not provided with the car as agreed for. The Agent, the Player and the Club (represented by its team

manager Mr. Selim Cinar) agreed verbally to compensate the Player in the amount of USD 250 per month for each month of the contract that an automobile was not provided. Even though the Agent requested from the Club a written confirmation of the verbal agreement, the Club failed to do so. Since no car was provided to the Player throughout his stay with the Club, the Player requests compensation in the amount of USD 250 per month for 10 months, i.e. USD 2,500.00 in total for not being provided with a car.

- In addition, the Player requests late payment penalties according to Article 2 of the Player Contract. According thereto, the Player is entitled to “*interest penalty of fifty dollars ... per day for each day of delinquency after the indicated payment*”. According to the Player he is entitled to the following late payment penalties:

“

Bonus/Payment Description	Amount	Due Date	Days Late	Penalty	Total
Club Qualifying for the Final 8 of the Turkish Cup	\$2,000	15-Oct-12	361	\$18,050	\$20,050
Club Qualifying for the Second Round of the Eurochallenge	\$2,000	15-Dec-12	300	\$15,000	\$17,000
Club Qualifying for the Final Four of the Eurochallenge	\$3,000	15-Apr-13	179	\$8,950	\$11,950
Club Finishing in the top 8 for the TBL Regular Season	\$2,000	1-Jun-13	132	\$6,600	\$8,600
Compensation for Club's failure to provide a car to Player	\$2,500	1-Jun-13	132	N/A	\$2,500
Club Qualifying for the Final Four of the Turkish Playoffs	\$3,000	1-Jun-13	132	\$6,600	\$9,600
Salary June 1 st 2013	\$23,000	1-Jun-13	132	\$6,600	\$29,600
Total	\$37,500			\$61,800	\$99,300

”

30. Claimant 2 submits the following in substance:

- Claimant 2 was party to the Agent Contract. According thereto Claimant 2 is entitled to an agent fee in the amount of USD 24,000.00 to be paid before 20 November 2013. Even though Claimant 2 fulfilled all of his obligations arising out of the Agent Contract, Respondent failed to honour its obligations towards Claimant 2 and to pay the amount of USD 24,000.00.
- Furthermore Claimant 2 asks for interests in the amount of 7% per annum (p.a.) compounded monthly on the outstanding amount.

4.2 Respondent's Position

31. Despite several invitations by the BAT, Respondent decided not to engage in the arbitration proceedings at hand and did not make any submissions within the time limits set by the Arbitrator in accordance with the BAT Rules. The Arbitrator ensured that Respondent had received all communications from the BAT in conformity with the BAT Rules via fax and email. This fact is also evidenced by Respondent's request for an extension of the time limit to respond to Claimants' submissions.

5. Jurisdiction

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.

5.1 Arbitrability

34. The Arbitrator finds that both matters in dispute referred to him, i.e. the claims arising out of the Player Contract and the claims arising from the Agent Contract are of a financial nature and are, thus, arbitrable within the meaning of Article 177(1) PILA¹.

5.2 Formal and substantive validity of the arbitration agreement

35. Regarding the claims arising out from the Player Contract, the arbitration clause is to be found in Article 7 of the Player Contract. This clause reads as follows:

“Jurisdiction in case of Dispute

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, irrespective of the parties’ domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.”

36. This arbitration clause, which is included in the Player Contract and is signed by both Claimants and the Respondent, fulfils the formal requirements of Article 178(1) PILA.

37. Regarding the claims arising out of the Agent Contract, the relevant arbitration clause is to be found in the last paragraph of the Agent Contract and 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

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

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, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."

38. This arbitration clause incorporated in the Agent Contract and signed by Claimant 2 and Respondent fulfils the formal requirements of Article 178(1) PILA.
39. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity of both arbitration agreements in the present matter under Swiss law (cf. Article 178(2) PILA). In particular, the wording "[a]ny dispute arising from or related to the present contract" in Article 7 of the Player Contract and also in the Agent Contract clearly covers the present disputes.² Furthermore, the validity of the arbitration agreements has not been contested by the Parties throughout the proceedings.

6. Applicable Law

40. 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 reads as follows:

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

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

² See for instance BERGER/ KELLERHALS: International and Domestic Arbitration in Switzerland, Berne 2010, N 466.

“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.”

42. Article 7 of the Player Contract and the last paragraph in the Agent Contract provide in relation to the applicable law as follows:

“[...] The arbitrator shall decide the dispute ex aequo et bono.”

43. Consequently, the Arbitrator will decide the present matter *ex aequo et bono*.

44. 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 1969³ (Concordat),⁴ 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.”⁵

45. 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.”⁶

³ This Swiss statute governed international and domestic arbitration prior to the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

⁴ KARRER, in: Basel Commentary to the PILA, 2nd ed., Basel 2007, Article 187 PILA N 289.

⁵ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

⁶ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

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

7. Findings

47. In essence, Claimant 1 requests the payment of the outstanding salary (7.1) and bonuses (7.2), payment of a penalty of fifty dollars (USD 50.00) per day for each day of delinquency after the due date (7.3) as well as a compensation for the fact that he was not provided with a car during his stay with the Club (7.4).

48. Claimant 2 requests payment of the outstanding agent fee (7.5) as well as the payment of interest in the amount of 7% per annum as from 20 November 2012 (7.6).

7.1 Outstanding salary in the amount of USD 23,000.00

49. Claimant 1 and Respondent are parties to the Player Contract, which entered into force on 24 July 2012. The Player Contract provides in Article 2 for the payment of salaries in favour of Claimant 1. Claimant submits that Respondent did not pay the salary for the month of June. The fact that this salary is outstanding is evidenced by letters by the Agent (on behalf of the Player), in which the outstanding salary has been claimed, as well as by the decision of the Turkish Basketball Federation dated 25 September 2013, which explicitly states that Respondent is in breach of the Player Contract for failure to pay the June salary. Finally, the Respondent has not adduced any evidence in these proceedings that the salary for the month of June 2013 has been paid in the meantime. The Arbitrator, thus, concludes that Respondent is under an obligation to pay to Claimant 1 the outstanding salary in the amount of USD 23,000.00.

7.2 Outstanding Bonuses in the amount of USD 12,000.00

50. Claimant 1 claims the following bonuses for the season 2012-2013:

<i>“Club Qualifying for the Final 8 of the Turkish Cup</i>	<i>USD 2,000</i>
<i>Club Qualifying for the Second Round of the Eurochallenge</i>	<i>USD 2,000</i>
<i>Club Qualifying for the Final Four of the Eurochallenge</i>	<i>USD 3,000</i>
<i>Club Finishing in the top 8 for the TBL Regular Season</i>	<i>USD 2,000</i>
<i>Club Qualifying for the Final Four of the Turkish Playoffs</i>	<i>USD 3,000”</i>

51. Article 2 of the Player Contract provides for these bonuses to be paid if the respective sporting results are achieved by the Club. Furthermore, Article 2 of the Player Contract provides that *“Bonus payments are guaranteed as part of the salary. Bonus payments will be paid together with the first scheduled salary payments after the achievement of the bonus.”*
52. The Player has claimed the above bonuses on several occasions (cf. letters dated 28 March 2013, 5 May 2013, 17 June 2013 and 12 August 2013). The Player has also submitted letters by Mr. Selim Cinar (the Sporting Manager of the Club) dated 18 June 2013 and 3 July 2013 according to which some of the bonuses were paid *“since the third week of the regular season [...] and the biggest part wright [sic] before the F4 of Euro Challenge. The total amount of the bonuses that we made is 12.055,56 USD. Some payments were made in TL so that’s why you can see grand total with extra 55,56 USD”*. The payment receipts enclosed with Mr. Selim Cinar’s letter being difficult to understand, the Arbitrator in his letter dated 27 January 2014 asked for clarifications. In response, the Player submitted that the receipts signed by him referred to cash payments that the Club made *“as additional cash bonuses for positive results based on goodwill with no relation to the club’s contractual obligations”*. Furthermore, the Player submitted that he never received any money transfers to his bank account related to the bonuses. As these submissions by the Player were not contested by the Club, the Arbitrator concludes that the Club owes to the Player outstanding bonuses in the amount of USD 12,000.00.

7.3 Penalties on late payment in the amount of USD 1,850.00

53. The Player Contract expressly provides for specific consequences in case of late salary or bonus payment (Article 2 of the Player Contract), namely that payments which are made past the prescribed dates are subject to a penalty of fifty dollars (\$50 USD) per day for each day after the due date. Article 2 provides in this regards as follows:

“It is agreed that any payment to Player, including bonus payments, pursuant to the above shall be subject to an interest penalty of fifty dollars (\$50 USD) per day each day of delinquency after the indicated day. In the event that any scheduled payment is not made by Club within fifteen (15) days of the applicable payment date, Player shall be free of his obligations to perform in any practise sessions or any games until such time as all said payments have been paid.

In addition, in case of any scheduled payment not being made to the Player by the Club within thirty (30) days of the scheduled payment date, Player will have the right to initiate resolution of this Agreement by serving a written notice to Club. In case of scheduled payment not being made within the next seven (7) days after such a written notice is received by Club, Player will have the right to terminate this Agreement unilaterally by serving Club final written notice of termination. In this case, Player shall immediately be entitled to all salaries under this agreement and shall have no further obligations to the Club. Club shall retain no rights to Player except for the obligation to pay all salaries and earned bonuses under the terms of this Agreement. Upon receipt of a request from Club’s national basketball federation to issue the Player’s Letter of Clearance, Club must authorize the federation to do so unconditionally within twenty four (24) hours. Under these circumstances Player has the right to leave Club with this FIBA letter of clearance to play basketball anywhere else in the world but with the duties and obligations of Club still in place.”

54. The Player requests the payment of penalties for the outstanding salary (as of 1 June 2013) and for the outstanding bonuses (15 October 2012, 15 December 2012, 15 April 2013 and 1 June 2013).
55. BAT Arbitrators have frequently dealt with late payment clauses (comparable to the one at hand) in the past. As a general rule, two principles can be derived from that jurisprudence.

56. Firstly, as regards the scope of applicability, penalty clauses are interpreted in a restrictive manner, so as to prevent excessive results. On several occasions, BAT Arbitrators have decided that a respective clause – absent any indications to the contrary in the contract – is intended such that the penalty payments only accrue between the date of late payment and the date by which the respective obligation is or can be terminated (BAT 0100/10 paras. 47 et seq.; 0109/10, paras. 55 seq.). An exception is only made in cases where there is an explicit agreement between the parties that stipulates otherwise and orders late payment penalty also to apply once the player’s obligation to render his services is terminated. At the utmost, BAT Arbitrators are prepared to approve accrual of late payment penalties until the filing of the Request for Arbitration (BAT 185/11, paras. 65), provided the creditor has pursued his claim in a diligent and timely manner.
57. Secondly, BAT Arbitrators have repeatedly held that penalty clauses are subject to judicial review. In BAT 0036/09 (marg. no. 53 et seq.) the Arbitrator held:
- “In most jurisdictions, contractual penalties are subject to judicial review and can be adjusted if they are excessive. Whether a contractual penalty is excessive is usually left to the discretion of the judge and depends on the individual circumstances. As a general rule, a contractual penalty is considered to be excessive if it is disproportionate to the basic obligation of the debtor.”*
58. If one applies the above principles to the case at hand, the Player would (at maximum) only be entitled to late payment penalties until the Player Contract was or could have been terminated, since the Player Contract does not contain any provision that expressly stipulates otherwise. According to Article 2 of the Player Contract, the Player – in case that any payment was overdue for 30 days – could initiate a termination procedure by sending a written notice to the Club demanding payment within the next seven days. In case the scheduled payment was not received within this deadline, Claimant 1 had the right to terminate the Player Contract unilaterally by written notice of termination. Consequently, the Player could ask for late penalty payments at maximum

for 37 days. Thus, the Arbitrator finds that the maximum amount Player can claim in late penalty payments is USD 1,850.00 (USD 50.00 times 37 days).

59. In the Arbitrator's view this amount does not need to be adjusted in the context of his ex officio judicial review. It is neither disproportionate nor excessive when viewed in the totality of the circumstances at hand, in particular the overall value of the outstanding obligation.

7.4 Compensation for failure of the Club to provide a car

60. Article 4.2 para. b) of the Player Contract states that the Club must provide "*an automatic transmission automobile for use by Player during the time of this Agreement and for a period of five (5) days after*". According to Article 1 para. (a), the term of the Player Contract commences on 24 July 2012 and finishes five days after the last official game of 2012/2013. Claimant submits that Respondent failed to provide a car for the whole duration of the Player Contract. Furthermore, the Player submits that on 12 March 2012 Player (and Agent) and Respondent entered into a verbal agreement according to which Respondent was to pay USD 250.00 for each month of the duration of the Player Contract for which the Player was not provided with a car. However, Article 9 provides as follows:

"Any modification of this Agreement must be in writing and signed by the Club and Player"

61. No written agreement was entered into between Club and Player in relation to the car even though, with letter dated 28 March 2013, the Agent (on behalf of the Player) asked Respondent for a written and signed confirmation of the verbal agreement. Respondent did not respond to his request.
62. In the case at hand it can be left open whether the verbal agreement is valid or not. Either way, Respondent would be in breach of the Player Contract for not having

provided a car and, thus, Claimant 1 would be entitled to compensation. In the Arbitrator's view it does not seem excessive to fix the amount of compensation at USD 250 for each month for which Respondent failed to provide Player with the car. To conclude, therefore, the amount of USD 2,500.00 sought by Player against Respondent seems just and equitable. This is all the more true as Respondent did not object to said claim of the Player.

7.5 Outstanding Agent fee

63. Claimant 2 and Respondent have entered into the Agent Contract which provides for an agent fee in the amount of USD 24,000.00 payable to the Agent. The Agent has repeatedly reminded Respondent in writing to pay the agent fee. In its letter dated 18 June 2013 Respondent acknowledged that the agent fee was due and outstanding. Furthermore, Respondent has not submitted in these proceedings that the agent fee has been paid in the meantime. The Arbitrator, thus, concludes that Respondent is under the obligation to pay to Claimant 2 USD 24,000.00.

7.6 Interests on Agent fee

64. Even though the Agent Contract does not provide for any interest payments in case of late payment, Claimant 2 is entitled to interests. This follows from constant BAT jurisprudence. Claimant 2 requests interest payments in the amount of 7% p.a compounded monthly. When asked to justify this interest rate, Claimant 2 submitted that according to him this represented a *"fair compensation for the delay payment"*, but that he was *"completely willing to submit to the arbitrator's judgement on this"*. The Arbitrator finds that a rate of 7% p.a. compounded monthly – absent any justification to the contrary – is excessive. In line with constant BAT jurisprudence, the Arbitrator is prepared to allow instead for an interest rate of 5% p.a. to apply, which he deems appropriate and apt to prevent the Club from deriving any profit out of the non-fulfillment of its obligations. Since – according to the Agent Contract – the agent fee

was to be paid “before November 20th 2012”, the Arbitrator accords interest payments of 5% p. a. on the amount of USD 24,000.00 as from 21 November 2012.

7.7 Conclusion

65. Claimant 1 is entitled to:

- USD 23,000.00 in outstanding salaries;
- USD 12,000.00 in outstanding bonuses;
- USD 1,850.00 in late payment penalties; and
- USD 2,500.00 in compensation for failure to provide a car.

66. Claimant 2 is entitled to:

USD 24,000.00 in outstanding agent fees plus 5% interest p.a. as of 21 November 2012.

8. Costs

67. 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 legal fees and expenses incurred in connection with the proceedings.

68. On 27 March 2014 – 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*”; 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*



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time”, and 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 8,070.00.

69. Considering that

- Claimant 1 requested a total amount of USD 99,300.00 and prevailed with USD 39,350.00 and that
- Claimant 2 prevailed with virtually all of his claims,

the Arbitrator holds it fair that 70% of the costs of this arbitration be borne by Respondent and 30% by Claimants. He holds further that Respondent is required to cover its own legal costs and expenses as well as 70% of Claimants' (reasonable) legal costs and expenses.

70. Claimants submit that their legal fees and expenses in relation to these proceedings amount to USD 10,000.00 (USD 5,000.00 in relation to the Agent and USD 5,000.00 in relation to the Player). In his letter dated 27 January 2014 the Arbitrator invited Claimants to answer the following question:

“Claimants are asking for legal fees in the amount of USD 10,000. However, it appears from the file that Claimants have not solicited the help/advice of any lawyer/attorney. Claimants are therefore invited to specify the amount of USD 10,000 for the legal fees claimed.

71. In their answer hereto Claimants responded as follows:

“Mr Scotti and Mr Thomas agreed that instead of hiring a lawyer or attorney, preparation of the case would be entrusted to Mr Scotti’s assistant Chris Pearson who is familiar with the case and able to prepare the request for arbitration to the

satisfaction of Mr Scotti and Mr Thomas. This is not however in the usual scope of Chris Pearson's responsibilities and he was required to expend considerable amounts of his free time to complete the assignment. The request for legal fees is therefore to enable Mr Scotti and Mr Thomas to compensate Chris Pearson for his work in preparing the case [...]"

72. It appears from the answer provided by Claimants that they are requesting, on the one hand, the reimbursement of internal costs, since Mr. Chris Pearson is not an external lawyer, but an assistant of the Agent. Furthermore, it appears that Mr Chris Pearson has not invoiced Claimants for his services, but that the contribution to costs and legal fees to be awarded by the Arbitrator is designed only *"to enable Mr Scotti and Mr Thomas to compensate Chris Pearson"*. In the Arbitrator's view a strict standard must apply when it comes to the reimbursement of a party's so-called internal costs. This is all the more true if the internal costs are not evidenced by any invoices or other documents. The contribution to legal fees and expenses is designed to compensate a party for actual and real expenses incurred and not to enrich the (winning) party. In view of the above, the Arbitrator holds that –apart from the non-reimbursable handling fee in the amount of EUR 2,035.00 – the internal costs for the services of Mr Chris Pearson are not reimbursable.
73. Given that Claimants paid the totality of the Advance on cost of EUR 8,070.00, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:
- (i) Respondent shall pay EUR 5,649.00 to Claimants, being 70% of the costs advanced by them.
 - (ii) The Arbitrator considers it appropriate to take into account the non-reimbursable handling fee of EUR 2,035 paid by the Claimants when calculating the latter's legal fees and expenses. Therefore, Respondent shall reimburse the Claimants for 70% of the non-reimbursable handling fee, in an amount of EUR 1,424.00.

9. AWARD

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

- 1. Pinar Karşıyaka Spor Kulübü is ordered to pay to Mr. Will B. Thomas outstanding salary and bonuses in the total amount of USD 35,000.00.**
- 2. Pinar Karşıyaka Spor Kulübü is ordered to pay to Mr. Will B. Thomas the amount of USD 2,500.00 as a compensation for the failure to provide a car for the 10 months duration of the contract.**
- 3. Pinar Karşıyaka Spor Kulübü is ordered to pay to Mr. Will B. Thomas late payment penalties in the amount of USD 1,850.00.**
- 4. Pinar Karşıyaka Spor Kulübü is ordered to pay to Mr. Mario Scotti outstanding agent fees in the amount of USD 24,000.00 plus interests of 5% p.a. as of 21 November 2012 on such amount.**
- 5. Pinar Karşıyaka Spor Kulübü is ordered to pay to Mr. Will B. Thomas and Mr. Mario Scotti jointly the amount of EUR 5,649.00 as reimbursement of 70% of their arbitration costs.**
- 6. Pinar Karşıyaka Spor Kulübü is ordered to pay to Mr. Will B. Thomas and Mr. Mario Scotti jointly the amount of EUR 1,424.00 as reimbursement of their legal fees and expenses.**
- 7. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 4 April 2014

Ulrich Haas
(Arbitrator)