



**BASKETBALL**  
ARBITRAL TRIBUNAL

**ARBITRAL AWARD**

**(BAT 0490/13)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Ulrich Haas**

in the arbitration proceedings between

**Ms. Christi Michelle Thomas**

- Claimant 1 -

**The Cound Group LLC**

- Claimant 2 -

**Ms. Ceren Ateş**

- Claimant 3 -

all represented by Mr. Ersel Aldabak, attorney at law,  
İnönü Cad. No:3 D:13, Sahrayıcedid, Kadıköy, 34734 Istanbul, Turkey

vs.

**Botaş Spor Kulübü**

Cemalpaşa Mah. Gazipasa Blv.,  
Gen Plaza No: 45 Kat:1 D.2, 01120 Adana, Turkey

- Respondent -

represented by Mr. Abdullah Kutlu, General Manager

## **1. The Parties**

### **1.1 The Claimants**

1. Ms. Christi Michelle Thomas (hereinafter the “Player” or “Claimant 1”) is a professional basketball player of US nationality.
2. The Cound Group LLC (hereinafter “Claimant 2”) is a sports management agency located in Tennessee, USA, which represents professional basketball players, among others Claimant 1.
3. Ms. Ceren Ateş (hereinafter “Claimant 3”) is a FIBA-licensed agent located in Istanbul, Turkey. Among other players, she represents Claimant 1 in Turkey.
4. Claimant 1, 2 and 3 are jointly referred to as “Claimants”. In the present arbitration, Claimants are represented by Mr. Ersel Aldabak, attorney-at-law in Istanbul, Turkey.

### **1.2 The Respondent**

5. Botaş Spor Kulübü (hereinafter the “Club” or “Respondent”) is a basketball club located in Adana, Turkey. The Club is represented by its General Manager, Mr. Abdullah Kutlu (hereinafter the “Club’s General Manager”).

## **2. The Arbitrator**

6. On 21 January 2014, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren, appointed Prof. Ulrich Haas as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). None of the Parties has raised any

objections to the appointment of the Arbitrator or to his declaration of independence.

### **3. Facts and Proceedings**

#### **3.1 Summary of the Dispute**

7. On 30 May 2012, the Player and the Club entered into an employment agreement according to which the Player was engaged as a professional basketball player for the 2012-2013 season (hereinafter the "Player Contract"). Further parties of the Player Contract were Claimants 2 and 3 as the Player's representatives.
8. According to Clause THIRD of the Player Contract, the base salary agreed was USD 80,000.00 net to be paid to the Player in different instalments (paragraph A). In addition, several "bonuses" were agreed for the 2012-2013 season (paragraph B) and under the title "Late Payments" (paragraph C) the Club agreed to pay late payment fees. According to Clause NINTH of the Player Contract, the Club agreed to pay to Claimants 2 and 3 the total amount of USD 11,850.00 net in different instalments.
9. The Player played the full 2012-2013 season for the Club's team, in particular, in two games against Besiktaş JK on 9 December 2012 and 2 March 2013. According to Claimants' submissions, the Club did not pay the full salary to Claimant and failed to make any payments to Claimants 2 and 3.
10. On 17 July 2013, the Player made an application to the Turkish Basketball Federation (hereinafter the "TBF") to declare her "*free to sign any Club in Turkey without paying 'bonservis' to the Respondent*". On 16 September 2013, the TBF Board of Directors issued a "Resolution" (hereinafter the "TBF Resolution") which

reads in its main relevant parts (English translation provided by Claimants) as follows:

*"We examined the request, dated 17.07.2013, of the attorney of Christi Michelle Thomas, sportsman of Adana Botas Sports Club [...].*

*It was understood as a result of the examination that the sportsman executed a TBF Type Contract with Adana Botas Sports Club for the season of 2012-2013 to play in the status of a foreigner and that the Club did not make the payments despite the notice given as per this contract nor did it submitted (sic) any document to this end." [...]*

*In this scope it is understood that the payments were not made in the periods stipulated in the regulation despite such notice [...]."*

11. By letter dated 1 October 2013, the Club's General Manager informed Mr. Mike Cound of Claimant 2 that *"the club pledges to pay the outstanding payments of Ms. Christi Thomas according to the Contractual Agreement dated May 30, 2012 also of her agents Ms. Ceren Ates and Cound Group LLC no later than October 15, 2013"*.
12. By letter dated 7 October 2013, Claimants' counsel requested outstanding payments from the Club (USD 25,700.00 to Claimant 1, USD 5,925.00 to Claimant 2 and USD 5,925.00 to Claimant 3). He also informed the Club that the agreed late payment fees amounted to USD 29,700.00 for Claimant 1 and USD 18,550.00 for Claimants 2 and 3, but these late payment penalties would not be claimed if the Club made a payment of USD 39,400.00 within seven days of receipt of the letter. However, if this amount were not received by 21 October 2013, Claimants would file a claim with the BAT.
13. According to the Claimants' submissions, the Club did not make any payments.

### 3.2 The Proceedings before the BAT

14. On 16 December 2013, the BAT received the Claimants' Request for Arbitration of the same date and filed by Claimants' counsel on their behalf. The non-reimbursable fee of EUR 1,958.00 was received on 27 December 2013.
15. By letter dated 31 January 2014, the BAT Secretariat confirmed receipt of the Request for Arbitration, informed the Parties of the appointment of the Arbitrator and requested Claimants provide an English translation of one of their exhibits. Furthermore, a time limit was fixed for Respondent to file its answer in accordance with Article 11.2 of the BAT Rules (hereinafter the "Answer") by no later than 21 February 2014. The BAT Secretariat also requested the Parties to pay the following amount as an Advance on Costs by no later than 14 February 2014:

<i>"Claimant (Ms Christi Michelle Thomas)</i>	<i>EUR 3,042</i>
<i>Claimant 2 (The Cound Group LLC)</i>	<i>EUR 750</i>
<i>Claimant 3 (Ms Ceren Ates)</i>	<i>EUR 750</i>
<i>Respondent (Botas Spor Kulübü)</i>	<i>EUR 4,500"</i>

16. By email of 14 February 2014, Claimants' counsel submitted an English translation of the Claimants' exhibits as requested by the BAT Secretariat.
17. By letter dated 25 February 2014, the BAT Secretariat confirmed receipt of the total amount of EUR 4,500.00 as the Claimants' share of the Advance of Costs. It 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 the Respondent's share of the Advance on Costs by no later than 10 March 2014. Finally, Respondent was granted a final opportunity to file an Answer to the Request for Arbitration by no later than 10 March 2014.

18. By letter dated 17 March 2014, the BAT Secretariat acknowledged receipt of an additional amount of EUR 4,500.00 paid by Claimants for the Respondent's share of the Advance on Costs. Furthermore, the BAT Secretariat informed the Parties that Respondent had still failed to submit an Answer and 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 25 March 2014.

19. On 24 March 2014, Claimants' counsel submitted an account of costs as follows:

<i>"Non-reimbursable handling fee:</i>	<i>2,000.00 Euro</i>	
<i>Advance on costs:</i>		
<i>Claimant's Share</i>	<i>4,500.00 Euro</i>	
<i>Respondent's Share</i>	<i>4,500.00 Euro</i>	
<i>Translation cost (for Annex-3 of the RFA):</i>	<i>15.00 Euro (45.00-TL)</i>	
<i>Legal fees:</i>		
<i>(According to the Article 17.4 of the BAT Arbitration Rules, legal fees are calculated separately for each claimant)</i>		
<i>Christi Thomas</i>	<i>3,887.00 Euro</i>	<i>(5,355.00 USD)</i>
<i>The Cound Group LLC</i>	<i>1,290.00 Euro</i>	<i>(1,777.00 USD)</i>
<i>Ceren Ateş</i>	<i>1,290.00 Euro</i>	<i>(1,777.00 USD)</i>
	<b><i>TOTAL</i></b>	<b><i>17,482.00 Euro"</i></b>

20. On 26 March 2014, the Club's General Manager submitted an account of costs as follows:

<i>"Attorneys fee</i>	<i>= 7.000 Euros</i>
<i>Mileage</i>	<i>= 2.000 Euro</i>
<i>Accommodation expenses</i>	<i>= 1500 Euro</i>
<i>Other costs</i>	<i>= 1.000 Euro</i>
<i>Total expenses</i>	<i>= 11,500 Euro"</i>

21. By email of 26 March 2014, the BAT Secretariat acknowledged receipt of the Parties' account of costs and invited the Parties to submit their comments, if any, on the opposite party's account of costs by no later than 1 April 2014.

22. On 1 April 2014, Claimants' counsel submitted comments on the Respondent's account of costs. Respondent did not file any comments.
23. The Parties did not request the BAT to hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the award on the basis of the written submissions available.

#### **4. The Positions of the Parties**

##### **4.1 Claimants' Position**

24. Claimants submit the following in substance:
  - The Player fulfilled all of her obligations arising out of the Player Contract but the Club failed to pay the last three instalments due by 25 February 2013, by 25 March 2013 and by 10 April 2013 (or within 48 hours of the Club's last official game, whichever comes first). Therefore, the Player is entitled to the total amount of USD 25,000.00.
  - The Player participated in two games in which the Club's team defeated Besiktaş JK (on 9 December 2012 and 2 March 2013). According to Clause THIRD paragraph B of the Player Contract, the Player is entitled to a bonus of USD 350.00 net for each win against, among other teams, Besiktaş. Therefore, the Player is also entitled to the amount of USD 700.00 which the Club has not yet paid.
  - According to Clause NINTH of the Player Contract, the Club agreed to pay agent commission of USD 4,000.00 each to Claimants 2 and 3 in relation to the Player Contract. In addition, the Club agreed to pay outstanding amounts of USD 1,925.00 each to Claimants 2 and 3. The Club has not yet paid any of

these amounts and, therefore, Claimants 2 and 3 are entitled to the amount of USD 5,925.00 each.

- According to Clause THIRD paragraph C of the Player Contract, the Club agreed to pay a late payment fee in the amount of USD 50.00 for each day it is late with any payments agreed in the Player Contract. This section of the Player Contract refers to payments to both the Player and to Claimants 2 and 3, and therefore all Claimants are entitled to claim late payment fees. The accrued late payment fees amount to USD 40,500.00 regarding Claimant 1 and USD 22,250.00 in total to Claimants 2 and 3. As those amounts will be deemed to be excessive, Claimants only claim late payment fees of USD 10,000.00 for Claimant 1, USD 5,925.00 to Claimant 2 and USD 5,925.00 to Claimant 3. Those amounts are – according to Claimants – proportionate in relation to the basic obligations and not excessive.
- Claimants made several attempts, orally and in writing, to solve the dispute amicably, however, the Club *“detained the Claimants during the whole summer with payment commitments”*. By letter of 1 November 2013, the Club undertook to effect payment on 15 November 2013 but again failed to pay. Finally, Claimants were forced to make the application with the TBF and later to file the present claim with the BAT.
- With regard to the Club’s account of costs, Claimants submit that the *“costs declared by the Respondent Club are totally unacceptable”*. The Club did not make any submissions except the account of costs and has not been represented by any attorney-at-law. Thus, the costs stated by the Club are *“baseless, excessive and therefore unacceptable”*.

## **4.2 Claimants' Request for Relief**

25. In their Request for Arbitration, Claimants requested the following reliefs:

*"Claimant 1 hereby requests:*

- 1- *\$25,700.00-US Dollars for the unpaid salary and an interest payment at the applicable Swiss statutory rate from the due date of each payment*
- 2- *\$10,000.00-US Dollars as the late payment penalty,*
- 3- *Compensation of arbitration fees and costs,*
- 4- *A contribution towards her legal fees and expenses.*

*Claimant 2 hereby requests:*

- 1- *\$5,925.00-US Dollars for the unpaid agent fee and an interest payment at the applicable Swiss statutory rate from the due date of each payment*
- 2- *\$5,925.00-US Dollars as the late payment penalty,*
- 3- *Compensation of arbitration fees and costs,*
- 4- *A contribution towards his [sic] legal fees and expenses.*

*Claimant 3 hereby requests:*

- 1- *\$5,925.00-US Dollars for the unpaid agent fee and an interest payment at the applicable Swiss statutory rate from the due date of each payment*
- 2- *\$5,925.00-US Dollars as the late payment penalty,*
- 3- *Compensation of arbitration fees and costs,*
- 4- *A contribution towards her legal fees and expenses."*

## **4.3 Respondent's Position and Request for Relief**

26. Despite several invitations by the BAT, Respondent failed to make comments on the facts and arguments provided by Claimants. The only submission made by Respondent was its account of costs. Thus, Respondent did not submit any Request for Relief.

## 5. The Jurisdiction of the BAT

27. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Club did not participate in the arbitration except submitting its account of costs, the Arbitrator will examine his jurisdiction *ex officio*, on the basis of the record as it stands.
28. 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 (hereinafter “PILA”).
29. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
30. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.
31. The jurisdiction of the BAT with respect to all parties of the present dispute results from the arbitration clause in Clause THIRTEENTH of the Player Contract, since all Claimants and the Respondent are parties to the latter. Clause THIRTEENTH of the Player Contract reads as follows:

*“Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be in Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of parties’ domicile. The language of the arbitration shall in(sic) English. The arbitrator upon appeal shall decide the dispute ex aequo et bono. All parties to this agreement accept the present English version of this contractual agreement as fully binding under both Turkish and FIBA laws and guidelines.”*

32. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
33. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast any 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 Clause THIRTEENTH of the Player Contract clearly covers the present dispute. In addition, the Club did not object to the jurisdiction of the BAT.
34. For the above reasons, the Arbitrator finds that he has jurisdiction to decide the present dispute and to adjudicate the Claimants’ claims.

## **6. Other procedural issues**

35. Article 14.2 of the BAT Rules 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 the parties is in accordance with Swiss arbitration law and the practice of the BAT. However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.
36. This requirement is met in the present case. Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator according to the relevant rules and the Arbitrator ensured that Respondent had received all communications from the BAT in conformity with the BAT Rules. The fact that the Respondent received all communication follows also from Respondent’s submissions as to costs. In particular, in its submissions as to costs incurred, the Respondent did not complain that it did not receive any of the previous BAT communications.

37. By letter of the BAT Secretariat dated 31 January 2014, Respondent was informed that the Arbitrator may proceed with the arbitration even if Respondent failed to submit an Answer. Hence, Respondent was well advised as to the consequences of not submitting an Answer, i.e. of the possibility of a judgement by default. Furthermore, by letter dated 25 February 2014, the Arbitrator granted Respondent a further grace period in order to comment on the case. However, the Respondent's only engagement in the present proceedings was submitting an account of costs.

## **7. Applicable Law – *ex aequo et bono***

38. 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".*

39. 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."*

40. 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

1969<sup>1</sup> (Concordat),<sup>2</sup> 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.”<sup>3</sup>*

41. This is confirmed by Article 15.1 of the BAT Rules in fine, according to which the Arbitrator applies “*general considerations of justice and fairness without reference to any particular national or international law*”.
42. In Clause THIRTEENTH of the Player Contract, the Parties have explicitly decided and empowered the Arbitrator to decide the dispute *ex aequo et bono*. The fact that the arbitration agreement refers also to the “Turkish and FIBA laws and guidelines” does not affect the competence of the Arbitrator to decide this dispute *ex aequo et bono*. The Parties did not agree on a different law to be applied on the merits of the present dispute. Consequently, the Arbitrator will decide the present matter *ex aequo et bono*.
43. In light of the foregoing considerations, the Arbitrator makes the findings below.

## 8. Findings

44. Claimant 1 requests payment of outstanding salary (8.1 below) and bonuses (8.2 below) plus default interest (8.5 below) as well as late payment fees (8.4 below).

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<sup>1</sup> This Swiss statute governed international and domestic arbitration prior to the enactment of the PILA (governing international arbitration) and the Swiss Code of Civil Procedure (governing domestic arbitration).

<sup>2</sup> KARRER, in: Basel Commentary to the PILA, 2<sup>nd</sup> ed., Basel 2007, Article 187 PILA N 289.

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

Claimants 2 and 3 request payment of outstanding agent fees (8.3 below) plus default interest (8.5 below) as well as late payment fees (8.4 below).

### **8.1 Outstanding salaries (Claimant 1)**

45. Based on the Player Contract, the Player claims outstanding salaries in the total amount of USD 25,000.00 for the 2012-2013 season.
46. The Player and the Club are parties to the Player Contract, which provides in Clause THIRD for the payment of salaries in favour of the Player. Claimants submit that the Club did not pay the last three instalments. According to Clause THIRD paragraph A of the Player Contract, these three payments became due on 25 February 2013 (USD 11,000.00), 25 March 2013 (USD 11,000.00) and on 10 April 2013 or within 48 hours after the Club's last official game whichever came first (USD 3,000.00). The last official game took place on 31 March 2013<sup>4</sup>, thus, on 3 April 2013 the total amount of USD 25,000.00 was due. The Arbitrator has taken note that the first line of Clause THIRD paragraph A of the Player Contract refers to the "2011-2012 season", however, the Arbitrator understands this to be clerical mistake because all other dates in the Player Contract, in particular the due dates for payment of the different instalments, refer to the 2012-2013 season.
47. The Arbitrator has not found any indication on file that the Player did not fulfil her obligations arising out of the Player Contract. Therefore, she is entitled to the full salary for the 2012-2013 season.

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<sup>4</sup> Last official game against Fenerbahce on 31 March 2013 (publicly available source: [www.eurobasket.com](http://www.eurobasket.com)).

48. The Claimants' submission that part of the Player's salary is outstanding is evidenced by the letter dated 1 October 2013 (and not 1 November 2013 as submitted by Claimants) of the Club's General Manager to Claimant 2. In said letter, which is written on the Club's letter head, the *"club pledges to pay the outstanding payments"* in relation to the Player and the Player Contract. The Claimants' submission of non-payment is also evidenced by the TBF Resolution, in which the TBF declares that *"the Club did not make the payments"* and *"the payments were not made in the periods stipulated in the regulation despite such notice"*.
49. Although the Arbitrator is not bound by the TBF Resolution, he considers this declaration of 16 September 2013 in connection with the Club's letter dated 1 October 2013 as a strong indication that Respondent did not pay the claimed amounts at that time. The Club has not adduced any evidence in these proceedings that the outstanding salaries have been paid in the meantime. Based on the above and in the absence of any information to the contrary, the Arbitrator finds that the Club is still under an obligation to pay to the Player outstanding salary in the total amount of USD 25,000.00.

## **8.2 Outstanding bonuses (Claimant 1)**

50. The Player also claims outstanding bonuses in the total amount of USD 700.00 with regards to the 2012-2013 season.
51. Clause THIRD paragraph B of the Player Contract stipulates several bonuses for the 2012-2013 season, inter alia, as follows:

*"[...] Per win against Galatasaray, Fenerbahce, Besiktas and Kayseri - \$350 NET; and*

*The above bonuses are not accumulative and payable in the month in which they were earned."*

52. The Arbitrator understands the wording “*not accumulative*” in the sense that in one tournament (Turkish League, Turkish Cup, EuroCup) only the final ranking entitles to a bonus. In other words, if the Club’s team, for example, won the Turkish League, the Player was entitled for the Championship bonus but not cumulatively to the bonus for winning the semi-final and the quarter-final. However, the bonus claimed by the Player in this proceeding is different because the Club explicitly agreed to pay a bonus of USD 350.00 net “*Per win*”. The Player actually participated in the Club’s two wins against Beşiktaş JK on 9 December 2012 (80:69) and 2 March 2013 (80:73)<sup>5</sup> and, thus, she is entitled to a bonus for each win amounting to USD 700.00. According to Clause THIRD paragraph B of the Player Contract, these two bonuses had to be paid “*in the month in which they were earned*”, i.e. in December 2012 and March 2013. Therefore, the total amount of USD 700.00 is already due and was claimed correctly by Claimants’ counsel in his letter dated 7 October 2013. Based on the above and in the absence any evidence provided by the Club or any other information for payment of this amount in the meantime, the Arbitrator finds that the Club is still under an obligation to pay to the Player outstanding bonuses in the total amount of USD 700.00.

### 8.3 Outstanding agent fees (Claimants 2 and 3)

53. Claimants 2 and 3 request payment of USD 5,925.00 each. Their claims are based on Clause NINTH of the Player Contract, which reads as follows:

*“The Club agrees to pay a commission fee to the Player’s representative, **The Ground Group, Inc.**, the amount of **\$8,000.00 US Dollars Net** for the 2012-2013 season related to Ms. Christi Thomas’ contractual agreement. **The Club** agrees to pay this amount by wire transfer. **The Club** will receive an official invoice for all commission due.*”

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<sup>5</sup> See publicly available source: [www.eurobasket.com](http://www.eurobasket.com).

***The Cound Group will receive \$4,000.00 USD net, on or before September 28<sup>th</sup>, 2011***

***Ceren Ates will receive \$4,000.00 USD net, on or before September 28<sup>th</sup>, 2011***

*In addition, Club shall pay the following outstanding amounts from the 2010-11 season no later than July 15, 2012 ("2010-11 Outstanding Payments"):*

*To Cound Group LLC and Ceren Ates ("Agents") \$3,850.00 USD net of taxes, fees and/or any costs.*

*The The(sic) Cound Group will receive \$1,925.00 USD net, on or before July 15th, 2012*

*Ceren Ates will receive \$1,925.00 USD net, on or before July 15th, 2012*

*[...]*

***The agent's commission shall be subject to the exact same contractual rules as player salary, pursuant to the Third Clause, Part C. The agent's commissions shall be considered part of the Player's salary and contractually guaranteed in the same manner as another salary payment.***

*[...]"*

(Emphasis in the original)

54. Both, Claimants 2 and 3 are parties to the Player Contract. In the first paragraph of Clause NINTH of the Player Contract, the Club agreed to pay “a commission fee to the Player’s representative, *The Cound Group, Inc.*”. However, in accordance with the Claimants’ Request for Arbitration, Claimant 2 in the present proceedings is “*The Cound Group, LLC*”. The Arbitrator has taken note that, in the Player Contract and even in its Clause NINTH, the Parties used different names for Claimant 2, namely “*The Cound Group, Inc.*”, “*The Cound Group LLC*” or simply “*The Cound Group*”. The Arbitrator is not aware of a second agency or company named The Cound Group, Inc. and given that the preamble of the Player Contract clearly states the Cound Group, LLC as party of the agreement and that Clause NINTH refers to the representative of the Player, which Claimant 2 actually is, the Arbitrator finds that the payment is due to Claimant 2. This finding is also supported by the letter dated 1 October 2013 of the Club’s General Manager, in which the Club assured to pay “*outstanding payments [...] also of her agents Ms. Ceren Ates and Cound Group LLC*”, namely Claimants 3 and 2.

55. According to Clause NINTH of the Player Contract, the Club agreed to pay an agent fee of USD 8,000.00 net in relation to the Player's contractual agreement (hereinafter the "Agent Fee"). This provision also stipulates that the "*Club will receive an official invoice for all commissions due*". In the present proceedings, Claimants have not submitted such an invoice. However, considering the wording of the provision ("*invoice for all commissions due*"), the Arbitrator finds that providing an invoice to the Club is not a condition precedent for the Agent Fee to become due. Instead, the Arbitrator finds that the parties intended this to be rather an administrative issue.
56. Clause NINTH also stipulates that half of the Agent Fee should be paid to Claimant 2 (USD 4,000.00) and the other half to Claimant 3 (USD 4,000.00) "*on or before September 28<sup>th</sup>, 2011*". As the Player Contract was concluded only on 30 May 2012, the stated due date for the Agent Fee seems to be another typo. Thus, the Arbitrator has to determine the due date for the Agent Fees based on the facts presented to him. As Claimants have not submitted any invoice, the Arbitrator must determine the due date. In doing so the Arbitrator takes into consideration the letter dated 1 October 2013 of the Club's General Manager, in which the Club ensured to pay the outstanding amounts "*by October 15, 2013*". At least by that date, the two shares of the Agent Fee of USD 4,000.00 each became due. Deciding *ex aequo et bono*, the Arbitrator holds that 15 October 2013 has to be considered as the due date for the Agent Fee.
57. According to Clause NINTH of the Player Contract, the Club also agreed to pay to Claimants 2 and 3 outstanding payments related to the 2010-2011 season in the total amount of USD 3,850.00 net (hereinafter the "Outstanding Payments"). The Parties agreed that half of this amount should be paid to Claimant 2 (USD 1,925.00) and half of it to Claimant 3 (USD 1,925.00) by 15 July 2012 each. Consequently, also the Outstanding Payments are already due and were

requested by the letter dated 7 October 2013 of Claimants' counsel to the Club's General Manager.

58. Again, based on the above and in the absence of any evidence to the contrary, the Arbitrator finds that the Club is still under an obligation to pay the amount of USD 5,925.00 to Claimant 2 and further USD 5,925.00 to Claimant 3.

#### 8.4 Late payment fees (Claimants 1, 2 and 3)

59. All claimants request late payment fees, namely Claimant 1 in the amount of USD 10,000.00 and Claimants 2 and 3 of USD 5,925.00 each.
60. The Player Contract expressly provides for specific consequences in case of late payment. Clause THIRD paragraph C of the Player Contract provides in this regards as follows:

***“C) Late Payments: If the **Club** is more than ten (10) days late in the payment of any of the amounts detailed in this contract or in the payment of the Agent's fee, the **Player** may choose to refrain from participating in team practice sessions and/or games until the total amount owed to **Player** is remitted in full to **Player**. If the **Player** chooses to take any of this action, there shall be no sanction levied against **Player** and the **Club** cannot consider this action as a breach of the agreements set forth in this contract. In addition, if the **Club** is more than twenty (20) work days late in the payment of any of the amounts stipulated in this Agreement, the **Player** has the right to unilaterally rescind the Agreement while the Club remains obligated to pay all economic amounts stipulated in the Agreement. The Club agrees to pay 50 USD NET for each day they are late in payments.”***

(Emphasis in the original)

61. 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.

62. Firstly, as regards the scope of applicability, penalty payment 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<sup>6</sup>. An exception is only made in cases where there is an explicit agreement between the parties that stipulates otherwise and orders late payment fees 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 fees until the filing of the Request for Arbitration<sup>7</sup>, provided the creditor has pursued his claim in a diligent and timely manner.

63. Secondly, BAT Arbitrators have repeatedly held that late payment clauses are subject to judicial review. For instance, in BAT 0036/09<sup>8</sup> 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.”*

64. If one applies the above principles to the particular circumstances of the case at hand, Claimants would (at maximum) only be entitled to late payment fees 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

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<sup>6</sup> See the following BAT awards: 0100/10, para 47 et seq.; 0109/10, para 55 et seq.; 0460/13, para 58.

<sup>7</sup> See, *inter alia*, BAT award 0185/11, para 65 et seq.

<sup>8</sup> See BAT award 0036/09, para 53 et seq.

Clause THIRD paragraph C of the Player Contract, in case any payment agreed in the Player Contract was overdue for more than 10 days, the Player could *“refrain from participating in team practice sessions and/or games”*, and in case any payment was overdue for more than 20 business days, the Player had the right to *“unilaterally rescind”* the Player Contract. Consequently, the Player could ask for late payment fees for a maximum period covered by 20 business days.

65. The same applies to Claimants 2 and 3 and their requests for late payment fees. According to Clause NINTH of the Player Contract, the *“agent’s commission shall be subject to the exact same contractual rules as player salary, pursuant to the Third Clause, Part C”*. Consequently, late payment fees regarding the Agent Fee of USD 8,000.00 and/or the Outstanding Payments of USD 3,850.00 can be awarded only in the same manner as stipulated above for the Player’s salary and bonuses.
66. The wording of the last sentence of Clause THIRD paragraph C of the Player Contract (*“50 USD NET for each day they are late in payments.”*) does not provide for a cumulative calculation of late payment fees but rather provides for the general requirement that the Club failed to pay on time with any of the payments agreed. Thus, the Arbitrator finds that Claimants cannot claim late payment fees for each outstanding payment (salary instalments, bonuses, agent fee and outstanding amounts) but rather only once per party.
67. According to Clause THIRD paragraph C of the Player Contract, the consequences of late payment by the Club should come into force concerning *“any of the amounts detailed in this contract or [...] the Agent’s fee”* (10-day period) and *“any of the amounts stipulated in this Agreement”* (20-business day period). The first payments due but not made by the Club were the Outstanding Payments of USD 1,925.00 each to be paid to Claimants 2 and 3. These amounts

became due by Sunday, 15 July 2012 and the 20-business day period ended on Friday, 10 August 2012, i.e. 26 calendar days later.

68. Therefore, the maximum amount each claimant can ask in late payment fees is USD 1,300.00 (26 days x USD 50.00). 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.

#### **8.5 Default interest (Claimants 1, 2 and 3)**

69. Claimants also request default interest on the outstanding amounts (Claimant 1 on USD 25,700.00 and Claimants 2 and 3 on USD 5,925.00 each) but not on the claimed late payment fees or other amounts.

70. The Player Contract does not provide for any interest payments. However, it is a generally accepted principle embodied in most legal systems and reflected in the BAT jurisprudence<sup>9</sup> that default interest can be awarded even if the underlying agreement does not explicitly provide for a respective obligation.

71. Claimants request interest payments "*at the applicable Swiss statutory rate*". The Arbitrator finds that the issue of (default) interest is one that is governed by the same substantive law applicable to Claimants' principal claims. As the Parties expressly agreed to have their disputes decided *ex aequo et bono*, the interest rate will not be determined according to Swiss law or any other national law but must be decided in accordance with the principles of *ex aequo et bono*. In line with constant BAT jurisprudence, the Arbitrator deems an interest rate of 5% p.a.,

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<sup>9</sup> See, *ex multis*, the following BAT awards: 0056/09; 0069/09; 0092/10; 0237/11.

appropriate and proper to prevent the Club from deriving any profit out of the non-fulfillment of its obligations.

72. However, to avoid any sort of “double recovery”, which would be deemed unfair, the Arbitrator, deciding *ex aequo et bono* and in accordance with BAT jurisprudence<sup>10</sup>, finds that for the period of time for which Claimants are entitled to late payment fees, no additional default interest has to be paid. Therefore, the 26-day period for which Claimants are entitled for late payment fees will be considered when determining the commencement date for default interest.

73. Deciding *ex aequo et bono*, the Arbitrator finds that the Club is obliged to pay interest of 5% p.a. as follows:

- To Claimant 1:

- o On the amount of USD 350.00 (bonus for win on 9 December 2012 due by 31 December 2012<sup>11</sup> but deduction of 26 days concerning late payments fees<sup>12</sup>) since 27 January 2013;
- o On the amount of USD 11,000.00 (salary due by 25 February 2013) since 26 February 2013;
- o On the amount of USD 11,000.00 (salary due by 25 March 2013) since 26 March 2013;
- o On the amount of USD 350.00 (bonus for win on 2 March 2013 due by 31 March<sup>13</sup>) since 1 April 2013;

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<sup>10</sup> See, *inter alia*, the following BAT awards: 0155/11; 0168/11.

<sup>11</sup> To be paid in the month in which the bonus was earned (see para 51 et seq. above).

<sup>12</sup> See para 67 et seq. above.

<sup>13</sup> To be paid in the month in which the bonus was earned (see para 51 et seq. above).

- On the amount of USD 3,000.00 (salary due by 2 April 2013<sup>14</sup>) since 3 April 2013.
- To Claimant 2:
  - On the amount of USD 1,925.00 (Outstanding Payments due by 15 July 2012, but deduction of 26 days because of late payments fees<sup>15</sup>) since 11 August 2012;
  - On the amount of USD 4,000.00 (Agent Fee due by 15 October 2013<sup>16</sup>) since 16 October 2013.
- To Claimant 3:
  - On the amount of USD 1,925.00 (Outstanding Payments due by 15 July 2012 but deduction of 26 days because of late payments fees<sup>17</sup>) since 11 August 2012;
  - On the amount of USD 4,000.00 (Agent Fee due by 15 October 2013<sup>18</sup>) since 16 October 2013.

## 8.6 Summary

74. Claimant 1 is entitled to the amount of USD 25,700.00 net (outstanding salaries of USD 25,000.00 net and bonuses of USD 700.00 net) plus default interest of 5% p.a. as well as late payment fees of USD 1,300.00 net.

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<sup>14</sup> To be paid within 48 hours after last official game on 31 March 2013 (see para 46 above).

<sup>15</sup> See para 67 et seq. above.

<sup>16</sup> See para 55 et seq. above.

<sup>17</sup> See para 67 et seq. above.

<sup>18</sup> See para 55 et seq. above.

75. Claimant 2 is entitled to the amount of USD 5,925.00 net (outstanding agent fee of USD 4,000.00 net and further Outstanding Payments of USD 1,925.00 net) plus default interest of 5% p.a. as well as late payment fees of USD 1,300.00 net.
76. Claimant 3 is entitled to the amount of USD 5,925.00 net (outstanding agent fee of USD 4,000.00 net and further Outstanding Payments of USD 1,925.00 net) plus default interest of 5% p.a. as well as late payment fees of USD 1,300.00 net.

## 9. Costs

77. 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.
78. On 13 April 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 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 9,040.00..
79. When determining which party shall bear the arbitration costs and in which proportion (Article 17.3 of the BAT Rules), the Arbitrator takes into consideration Clause TENTH of the Player Contract, which reads as follows:

*“The failure by the Club to comply with the clauses in this contract may result in the election of the Player or Player’s representatives to take legal action against the Club in order to receive the full salary amounts stipulated in the contract. The Club understands that it will be responsible for any and all legal costs which may be necessary should the Player have to obtain the assistance of an attorney in Turkey.”*

80. Considering the outcome and the circumstances of the present case, in particular the Club’s agreement in the Player Contract to take over legal costs arising from the Club’s failure to make payments on time, the Arbitrator finds it fair that the costs of the arbitration shall be borne by the Club alone. Given that Claimants paid the totality of the advance on the arbitration costs of EUR 9,040.00, in application of Article 17.3 of the BAT Rules the Arbitrator decides that Respondent shall pay EUR 9,040.00 jointly to Claimants, being the costs advanced by them.
  
81. Furthermore, the Arbitrator considers it adequate, in particular with regard to Clause TENTH of the Player Contract, that Claimants are jointly entitled to a contribution towards their legal fees and other expenses while Respondent has to bear its own legal costs. Consequently, any discussion about the Respondent’s account of costs is moot. The Claimants’ account of costs – which was not contested by Respondent – indicates legal fees of their Turkish counsel as well as further expenses amounting to EUR 6,482.00. Considering this amount and the non-reimbursable handling fee paid by Claimants (EUR 1,958.00 received in the BAT bank account), the Arbitrator deems it appropriate to take into account such amounts when assessing the reasonable legal fees and expenses incurred by Claimants in connection with these proceedings (Articles 17.3 and 17.4 of the BAT Rules). Therefore, the Arbitrator finds that the Club shall reimburse the total amount of EUR 8,440.00 to Claimants.

## **10. AWARD**

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

- 1. Botaş Spor Kulübü is ordered to pay to Ms. Christi Michelle Thomas the total amount of USD 27,000.00 net and interest as follows:**
  - a. 5% p.a. on USD 350.00 since 27 January 2013;**
  - b. 5% p.a. on USD 11,000.00 since 26 February 2013;**
  - c. 5% p.a. on USD 11,000.00 since 26 March 2013;**
  - d. 5% p.a. on USD 350.00 since 1 April 2013;**
  - e. 5% p.a. on USD 3,000.00 since 3 April 2013.**
- 2. Botaş Spor Kulübü is ordered to pay to The Cound Group LLC the total amount of USD 7,225.00 net and interest as follows:**
  - a. 5% p.a. on USD 1,925.00 since 11 August 2012;**
  - b. 5% p.a. on USD 4,000.00 since 16 October 2013.**
- 3. Botaş Spor Kulübü is ordered to pay to Ms. Ceren Ateş the total amount of USD 7,225.00 net and interest as follows:**
  - a. 5% p.a. on USD 1,925.00 since 11 August 2012;**
  - b. 5% p.a. on USD 4,000.00 since 16 October 2013.**
- 4. Botaş Spor Kulübü is ordered to pay jointly to Ms. Christi Michelle Thomas, The Cound Group LLC and Ms. Ceren Ateş the amount of EUR 9,040.00 as a reimbursement of the advance on arbitration costs.**
- 5. Botaş Spor Kulübü is ordered to pay jointly to Ms. Christi Michelle Thomas, The Cound Group LLC and Ms. Ceren Ates the amount of EUR 8,440.00 as a contribution towards their legal fees and expenses. Botaş Spor Kulübü shall bear its own legal costs.**
- 6. Any other or further-reaching requests for relief are dismissed.**



**BASKETBALL**  
ARBITRAL TRIBUNAL

Geneva, seat of the arbitration, 17 April 2014

Ulrich Haas  
(Arbitrator)