

ARBITRAL AWARD

(BAT 0491/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Ms. Courtney Paris

- Claimant 1 -

Wasserman Media Group

c/o Ms. Lindsay Kagawa Colas, 10960 Wilshire Blvd.
Suite 2200, Los Angeles, CA 90027, USA

- Claimant 2 -

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

vs.

Botas Spor Kulübü

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

- Respondent -

represented by Mr. Cengiz Kurtulus, General Secretary

1. The Parties

1.1 The Claimants

1. Ms. Courtney Paris (hereinafter the “Player” or “Claimant 1”) is a professional basketball player of US nationality.
2. Wasserman Media Group (hereinafter the “Agency” or “Claimant 2”) is a global sports, entertainment, marketing and management company located in Los Angeles, USA. The Agency represents, inter alia, professional basketball players, among others Claimant 1.
3. The Player and the Agency are jointly referred to as “Claimants”. In the present arbitration, they are represented by Mr. Howard L. Jacobs, attorney at law in Westlake Village, USA.

1.2 The Respondent

4. Botas Spor Kulübü (hereinafter the “Club” or “Respondent”) is a professional basketball club located in Adana, Turkey. The Club is represented by its General Secretary, Mr. Cengiz Kurtulus (hereinafter the “Club’s General Secretary”).

2. The Arbitrator

5. By letter of 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

6. On 26 March 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 term of 6 May 2012 to 1 May 2013 (hereinafter the “Player Contract”). Further parties of the Player Contract were Claimant 2 and the Turkish FIBA-licensed agent Ms. Ceren Ates.
7. According to Clause II of the Player Contract, the Club agreed to pay to the Player a “*guaranteed compensation net*” in the amount of USD 140,000.00 for the 2012–2013 season, payable in several instalments. Moreover, certain “*bonuses*” were agreed for the 2012–2013 season as specified in Clause II of the Player Contract. The Club also agreed to pay a “*late fee*” of USD 150.00 per day in the event it is more than 15 days late with its payment obligations. According to Clause IV of the Player Contract, the Club agreed to pay an “*agent fee*” of USD 21,000.00 which was also subject to a “*late fee*” of USD 150.00 per day. The Player Contract does not define the point in time the “*late fee*” becomes due with respect to the “*agent fee*”.
8. The Player played for the Club’s team until May 2013. The Player Contract provides in Clause II certain bonuses, in particular in case of a “*win against [...] Besiktas JK*” and “*per win in which the Player scores 18 points and 10 rebounds or more*”. The Player played in two games against Besiktas JK in which the Club won, i.e. on 9 December 2012 and 2 March 2013. Furthermore, there were five games (on 10, 22 and 25 November 2012 and on 9 February and 2 March 2013) in which she scored at least 18 points and gathered at least 10 rebounds.
9. According to Claimants’ submissions, the Club failed to pay the last three instalments of the Player’s salary, all bonuses earned and also failed to make any payments in relation to the agent fee.

10. From 30 January to 18 August 2013, Claimants and the Club exchanged several emails with regard to the delay of payments. By letter of 22 September 2013, the Agency notified the Club about its late payments related to the Player's salary and bonuses as well as the agent fee and further informed the Club that if payments were not made by 30 September 2013, Claimants would file a claim with the BAT.
11. According to the Claimants' submissions, the Club did not make any payments thereafter.

3.2 The Proceedings before the BAT

12. On 17 December 2013, the BAT received the Claimants' Request for Arbitration dated 16 December 2013, filed by Claimants' counsel. The non-reimbursable fee of EUR 3,000.00 was received in the BAT bank account on 19 December 2013.
13. By letter dated 31 January 2014, 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 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 1 (Ms Courtney Paris)</i>	<i>EUR 4,000</i>
<i>Claimant 2 (Wasserman Media Group)</i>	<i>EUR 1,000</i>
<i>Respondent (Botas Spor Kulübü)</i>	<i>EUR 5,000"</i>

14. By letter dated 25 February 2014, the BAT Secretariat confirmed receipt of the Claimants' share of the Advance on Costs in the amount of EUR 5,000.00. 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.

15. By letter dated 13 March 2014, the BAT Secretariat informed the Parties that Respondent again had failed to submit an Answer and that Claimants had failed to pay the Respondent's share of the Advance on Costs. Therefore, the BAT fixed a final time limit for Claimants to substitute for the Respondent's share of the Advance on Costs by no later than 21 March 2014.
16. By letter dated 25 March 2014, the BAT Secretariat acknowledged receipt of the full Advance on Costs. In addition, it informed the Parties that the proceedings would now continue 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 1 April 2014, which were received by the deadline.
17. By email of 31 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 4 April 2014. By letter dated 3 April 2014, Claimants' counsel objected to the Respondent's account of costs. Respondent did not file any comments.
18. The Parties did not request for a hearing to be held. 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

19. Claimants submit the following in substance:
 - According to its Clause VII, the Player Contract was a no-cut agreement and all payments under the Player Contract were fully guaranteed. Although the Claimants made repeated requests for payment, the Club failed to pay the three last instalments of the Player's salary amounting to USD 52,500.00, namely the March,

April and May 2013 instalments of USD 17,500.00 each. Furthermore, the Club failed to pay the agent fee of USD 21,000.00.

- The Player earned bonuses in the total amount of USD 2,450.00 (seven times USD 350.00) by participating in the two wins against Besiktas JK on 9 December 2012 and 2 March 2013 and scoring at least 18 points and at least 10 rebounds in five games on 10, 22 and 25 November 2012 as well as 9 February and 2 March 2013.
- The Club agreed to pay a late fee of USD 150.00 per day as a non-exclusive remedy in case any of the guaranteed payments were more than 15 days late. Considering several delayed payments until 18 February 2013 and payments still not made, the Player and the Agency claim late payment fees in the total amounts of USD 110,550.00 and USD 61,650.00, respectively.
- According to BAT jurisdiction, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. Furthermore, Claimants are entitled to recover legal costs and fees.
- With regard to the Club's account of costs, Claimants submit that the Club did not make any legal submissions and therefore the request for "attorney's fees" is "*completely unsubstantiated*". In addition, the requests for "mileage" and "accommodation expenses" are "*misplaced and likely fabricated, as there was no hearing*". Finally, the request for "other costs" is provided without explanation and documentation. For these reasons, Claimant alleges that the Club did not comply with the request to submit a detailed account of costs.

4.2 Claimants' Request for Relief

20. In Appendix 2 to their Request for Arbitration, Claimants requested the following reliefs:

<i>"Guaranteed Compensation to Paris:</i>	<i>US \$ 52,500.00</i>
<i>Earned Bonuses to Paris:</i>	<i>US \$ 2,450.00</i>
<i>Agent Fee:</i>	<i>US \$ 21,000.00</i>
<i>Late Fee to Paris [\$150 / day x 737 total days]</i>	<i>US \$110.550.00</i>

<i>Late Fee to WMG 411 days x US \$150.00](sic)</i>	US \$ 61,650.00
<i>Costs [FIBA BAT filing fee]</i>	US \$ 4,316.30
<i>Attorney's fees</i>	US \$ 10,862.50

TOTAL US \$ 263,328.80¹ [plus arbitrator costs and legal interest at 5% per annum]

Claimants request an award against Botas in the amount of US \$263,328.80, plus arbitrator costs and legal interest at 5% per annum. In the alternative, Claimants request an award against Botas 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.

[...]

¹ "Approximately 191,000 Euros"

4.3 Respondent's Position and Request for Relief

21. Despite several invitations by the BAT, Respondent failed to make any comments on the facts and arguments provided by Claimants. The only submission made by Respondent was in relation to its costs incurred in these proceedings. Thus, Respondent did not submit any Request for Relief.

5. The Jurisdiction of the BAT

22. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Club did not participate in the arbitration except by submitting its account of costs, the Arbitrator will examine his jurisdiction *ex officio*, on the basis of the record as it stands.
23. 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").
24. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

25. The Arbitrator finds that the dispute referred to him is of a financial nature and, thus, arbitrable within the meaning of Article 177(1) PILA.
26. The jurisdiction of the BAT with respect to all parties of the present dispute results from the arbitration clause in Clause X of the Player Contract, which reads as follows:

***“X. Governing Law, Disputes, Translation.** This agreement contains the entire agreement between the parties and there is no oral or written inducements, promises or agreements except as contained herein. Any or all prior agreements or contracts are void upon the execution of this Agreement. Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be in Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties’ domicile. The language of the arbitration shall in (sic) English. The arbitrator upon appeal shall decide the dispute ex aequo et bono. The prevailing party shall be entitled to recover all costs, fees, and attorneys’ fees from the other party in any such dispute. [...].”*

27. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
28. 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 X of the Player Contract clearly covers the present dispute. In addition, the Club did not object to the jurisdiction of the BAT.
29. 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

30. 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 a party’s default 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.

31. 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 received all communications from the BAT in conformity with the BAT Rules. That this was the case is also evidenced by the fact that – once the Arbitrator closed the period of submissions – the Respondent submitted its account of costs incurred in these proceedings.
32. 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 single engagement in the present proceedings consisted in submitting an account of costs.

7. Applicable Law – *ex aequo et bono*

33. 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".

34. 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."

35. 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

36. 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*”.
37. In Clause X of the Player Contract, the Parties have explicitly decided and empowered the Arbitrator to decide the dispute *ex aequo et bono* without reference to any other law and they agreed that the Player Contract is the only binding contract containing the entire agreement. Consequently, the Arbitrator will decide the present matter *ex aequo et bono*.
38. In light of the foregoing considerations, the Arbitrator makes the findings below.

8. Findings

39. The Player requests payment of outstanding salary (8.1 below) and bonuses (8.2 below). The Agency requests payment of outstanding agent fees (8.3 below). In addition, both claimants request late payment fees (8.4 below) and default interest (8.5 below).

¹ 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).

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

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

8.1 Outstanding salaries (Claimant 1)

40. Based on the Player Contract, the Player claims outstanding salaries in the total amount of USD 52,500.00 for the 2012–2013 season.
41. Both the Player and the Club are parties and signatories to the Player Contract. Clause II of the Player Contract provides for the payment of a “*guaranteed compensation*” in favour of the Player. Claimants submit that the Club did not pay the last three instalments of USD 17,500.00 each to the Player. According to Clause II of the Player Contract, these three payments became due on 15 March and 15 April 2013 and “*on the later of: May 1, 2013 or 48 hours of the Club’s last official game, whichever is earlier*”. This clause is difficult to understand: while its opening part refers to “the later” of the two points in time, the clause ends by referring to whichever point in time is “earlier”. This is obviously contradictory. Taking into account that according to Clause I the term of the Player Contract expires “two days after the Club’s last official ... game” and that from this moment on the Player “*shall be free to leave*”, the Arbitrator finds that the earlier point in time (1 May or 48 hours after the last official game) is the relevant due date, since it makes little sense to postpone the due date for the last instalments to a point in time well beyond the expiry of the Player Contract. The last official game took place on 31 March 2013⁴, thus, the last salary instalment became due 48 hours after that, i.e. by 2 April 2013.
42. The Arbitrator has not found any indication in the file that the Player did not fulfil her obligations arising out of the Player Contract. In addition, the Parties expressly agreed in Clause VII of the Player Contract, under the title “Contract Guarantee”, that “*this Agreement is unconditionally guaranteed contractual Agreement and that Player’s Guaranteed Compensation [...] and bonuses and the Agent Fee are fully guaranteed, due and payable, including but not limited to in the event of Player’s injury, illness, death, and/or lack of skill*”. Considering also that the Player played for the Club’s team until the last official game on 31 March 2013, the Arbitrator finds that the Player is entitled to the full salary for the 2012–2013 season.

⁴ Last official game against Fenerbahce on 31 March 2013 (www.eurobasket.com).

43. The Claimants' submission that part of the Player's salary is outstanding is evidenced by the email correspondence between the Player and the Club of January to August 2013. On several occasions, the Club acknowledged late payment and promised to pay by specified dates, inter alia, as follows:

- Club's email of 18 February 2013: *"BUT FEEL SURE that the club will do the february and march payments together until 15th of March."*
- Club's email of 7 April 2013: *"Pls wait few more day cnm u will be paid in this week."*
- Club's email of 13 April 2013: *"U will be paid next week for sure."*
- Club's email of 16 April 2013: *"We will not t wire it today pls wait till Friday."*
- Club's email of 14 June 2013: *"[...] it is now obvious that the club will do the outstanding payments in july since we will get the payment from Botas company then."*
- Club's email of 30 July 2013: *"AND the club will do your outstanding payment on the first week of August."*
- Club's email of 19 August 2013: *"[...] the club will do so in August ..."*

44. The Club's above-cited emails together with the Agency's letter of 22 September 2013 to the Club are strong indications of non-payment of the claimed amounts at the relevant times. Throughout these proceedings, the Club has not adduced any evidence that the outstanding salaries have been paid in the meantime. Failing any such information, the Arbitrator finds that the Club is still under an obligation to pay to the Player outstanding salary in the total amount of USD 52,500.00.

8.2 Outstanding bonuses (Claimant 1)

45. The Player also claims outstanding bonuses in the total amount of USD 2,450.00 concerning the 2012–2013 season.

46. Clause II of the Player Contract stipulates several bonuses for the 2012–2013 season, inter alia, as follows:

“[T]he Club shall pay to the Player the following bonuses for the 2012–2013 season, net of any and all taxes, fees and charges (“Net”) within fifteen days of any such bonus being applicable:

[...]

Per win against Galatasaray, Fenerbahce, Besiktas and Kayseri – \$350 Net; and

Per win that Player scores 18 points + 10 rebounds or more.

[...] All bonus amounts are cumulative and in USD and are fully guaranteed once achieved.”

47. The Player actually participated in the Club’s two wins against Besiktas JK on 9 December 2012 (80–69) and 2 March 2013 (80–73)⁵ and, thus, she is entitled to a bonus for each win, amounting to a total of USD 700.00. In addition, the Player scored at least 18 points and gathered 10 rebounds in the Club’s wins against Samsun on 10 November 2012 (67–62), against Dunav on 22 November 2012 (84–70), against Edremit on 25 November 2012 (74–61), against Samsun on 9 February 2013 (106–48) and against Besiktas JK on 2 March 2013 (80–73).⁶ From the wording of Clause II of the Player Contract (“and”), the Arbitrator understands that the same amount applies for the point-rebound bonus as for the win bonus, i.e., USD 350.00 net per match. Thus, the Player earned further bonuses of USD 1,750.00.
48. The Parties expressly agreed that all bonuses were cumulative and guaranteed once achieved. Consequently, the Arbitrator finds that the Player is entitled to bonuses in the total amount of USD 2,450.00 net. The various bonuses were already listed at the end of the Agency’s letter of 22 September 2013, in which it reminded the Club to pay outstanding amounts. In view of the above and also given the Club’s failure to produce any evidence according to which the outstanding amounts have been paid 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 2,450.00 net.

⁵ See www.eurobasket.com.

⁶ See www.eurobasket.com.

8.3 Outstanding agent fees (Claimant 2)

49. The Agency requests payment of agent fees in the amount of USD 21,000.00, basing its claim on Clause IV of the Player Contract, which reads as follows:

***“IV. Agent’s Commission.** Club agrees to pay Agent a guaranteed total of \$21,000.00 USD net of taxes, fees, and charges for the negotiation of this Agreement (the “Agent Fee”). Wasserman Media Group agrees to pay Ceren Ates \$7,000.00 USD net of taxes. Club shall pay the whole Agent Fee by October 15, 2012. All payments to Agent shall be wired to:*

[Bank account information of Claimant 2]

Agent fee is subject to a \$150.00 per day late fee.”

50. According to the above, the Club agreed to pay USD 21,000.00 to “Agent”, which is defined in the preamble of the Player Contract as the Agency together with the Turkish agent Ms. Ceren Ates. However, in the Request for Arbitration, the Agency requests the full amount to be paid only to itself. Taking into consideration the Parties’ agreement to wire “[a]ll payments to Agent” to the bank account of Claimant 2 and that Claimant 2 agreed to pay Ms. Ates the amount of USD 7,000.00, the Arbitrator finds that Claimant 2 is entitled to claim the full agent fee agreed in Clause IV of the Player Contract.
51. The Arbitrator’s finding is also supported by an email of 30 January 2013 from the Club to Ms. Lindsay Colas of Claimant 2, in which the Club, inter alia, promised to pay the amount of USD 21,000.00 to Claimant 2. The email reads as follows:

“Dear Lindsay;

We are really aware of the issue that you state in your e-mail and feel very sorry and ashamed about it recently. Since we had some problems in administration of the company this season we couldn’t fulfil our obligations on time as we had planned. Sure we want to do the payments on time but it still has been delayed seriously as you said.

Now I honestly would like to let you know that all members of administration has come to Adana this morning and there will be the meeting of the board of directors. Please kindly be informed that the club will definitely pay [...] \$21,000.00 due to Wassermann next week, latest on 8th of February.

Thank you for your kind reception.

Best regards

Selime DELIBALTA

Asst. General Manager

BOTASSPOR KULÜBÜ

52. At least at the time of this communication, the agent fee was outstanding. Failing any evidence provided by the Club or any other information indicating that the agent fee has been paid in the meantime, the Arbitrator finds that the Club is still under an obligation to pay the amount of USD 21,000.00 to the Agency.

8.4 Late payment fees (Claimants 1 and 2)

53. The Player and the Agency request late payment fees, namely the Player in the amount of USD 110,550.00 and the Agency of USD 61,650.00.

54. The Player Contract expressly provides for specific consequences in case of late payment. With regard to the Player's salary and bonuses, Clause II of the Player Contract provides that *"[i]n the event any payments of any kind [...] are more than fifteen (15) days late, Club acknowledges and agrees that it shall incur a late fee of USD\$150.00 per day as a non-exclusive remedy to Player"*. With regard to the Agency's agent fee, Clause IV of the Player Contract provides that the *"[a]gent fee is subject to a \$150.00 per day late fee"*.

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, late 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 terminated⁷. An exception is only made in cases where there is an explicit agreement between the parties that stipulates otherwise and orders late payment fees

⁷ See the following BAT awards: 0100/10, para 47 et seq.; 0109/10, para 55 et seq.; 0460/13, para 58.

also to apply once the player's obligation to render his/her services is terminated. At the utmost, BAT Arbitrators are prepared to approve accrual of late payment fees until the filing of the Request for Arbitration⁸, provided the creditor has pursued his/her claim in a diligent and timely manner.

57. Secondly, BAT Arbitrators have repeatedly held that late payment clauses are subject to judicial review. For instance, in BAT 0036/09⁹, 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."

8.4.1 Regarding Claimant 1

58. In application of the above principles the Arbitrator finds that the Player Contract does not contain a specific provision allowing for late payment penalties to accrue after the date the Player Contract may be terminated. However, the Arbitrator notes that Clause XII of the Player Contract ("Special Termination") provides that, in case any payment of salary, bonuses and/or agent fee to the Player and/or the Agency is more than 10 days overdue, the Player is entitled to *"immediately terminate and/or void"* the Player Contract. Thus, if one were to apply the above principles established by BAT jurisprudence, the Player would never be entitled to late payment fees. This, however, would not reflect the intention of the parties at the time of the conclusion of the Player Contract. On the contrary, by allowing for the possibility of termination of the Player Contract before late penalty payments begin to accrue, the parties explicitly envisaged, and provided for, the possibility that late penalty payments may also be claimed after the (earliest) date by which the contract can be terminated. Thus, the Arbitrator, deciding *ex aequo et bono*, finds that under the specific circumstances of the case, the late payment provision in Clause II of the Player Contract has to be understood as

⁸ See, *inter alia*, BAT award 0185/11, para 65 et seq.

⁹ See BAT award 0036/09, para 53 et seq.

allowing for late payment fees also once the Player's obligation to render her services is (or could be) terminated.

59. However, the Arbitrator interprets the wording of Clause II of the Player Contract (“a late fee of USD\$150.00 per day”) in the sense that it does not provide for a cumulative calculation of late payment fees in the event that the Club is late with several (distinct) payment obligations. Instead, the intention of the clause – in view of the rather high amount per day in question – is to provide for a general “penalty” in case of late payment by the Club (irrespective of how many separate payment obligations are breached). Thus, the Arbitrator finds that the Player cannot claim late payment fees cumulatively for each outstanding salary instalment. Instead she can claim the amount only for those time periods for which payments were outstanding.
60. Furthermore, in line with the above mentioned BAT jurisprudence, the Arbitrator approves accrual of the late payment fees only until the filing of the Request for Arbitration, i.e. receipt by the BAT on 17 December 2013, provided that such filing was not made unreasonably late, which is not the case in the matter at hand considering the repeated promises of the Club to pay soon.
61. When determining the amount of the Player's late payment fees, the Arbitrator takes note that the Player expressly requests late payment fees only on her salary but not on her bonuses earned. Taking into consideration the 15-day waiting period provided for in Clause II of the Player Contract, the Arbitrator's findings in respect of the Player's late payment fees are as follows:

<u>Amount (in USD)</u>	<u>Due date</u>	<u>Paid on</u>	<u>Late payment fees</u>
17,500.00	13 October 2012	12 November 2012	From 29 October to 12 November 2012: 15 days x USD 150.00 = USD 2,250.00
17,500.00	15 November 2012	10 December 2012	From 1 December to 10 December 2012: 10 days x USD 150.00 = USD 1,500.00
17,500.00	15 December 2012	18 February 2013	From 1 January to 18 February 2013: 50 days x USD 150.00 =

			USD 7,500.00
17,500.00	15 January 2013	18 February 2013	From 1 to 18 February 2013: already covered.
17,500.00	15 February 2013	no late penalty fees claimed (Appendix 1 to RfA, p. 4)	
17,500.00	15 March 2013	Not paid	From 31 March to 17 December 2013: 262 days x USD 150.00 = USD 39,300.00
17,500.00	15 April 2013	Not paid	From 1 May to 17 December 2013: already covered.
17,500.00	15 May 2013	Not paid	From 31 May to 17 December 2013: already covered.

62. Thus, the Player is entitled to late payment fees of USD 50,550.00 in total. 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 (USD 52,500.00).

8.4.2 Regarding Claimant 2

63. In line with the BAT jurisprudence mentioned above, the Agency is at maximum entitled to late payment fees until the Player Contract could have been terminated, since the Player Contract does not contain any provision that expressly stipulates otherwise.

64. The Player Contract regulates late payment fees to the Agency in a separate provision, namely in Clause IV of the Player Contract. This provision does not provide for a waiting period in order to claim late penalty payments. Instead, the Agency may claim late penalty fees as from the (first day after) the due date. Clause XII of the Player Contract provides that in case the Club is 10 days late with regard to its payment obligations towards the Agency, the Player is entitled to terminate the Player Contract. Thus, with respect to the late penalty fees owed to the Agency, the parties have neither expressly nor implicitly agreed that late penalty fees can be claimed after the date the Player Contract can be terminated. Clause II of the Player Contract does not apply to the agent fee by analogy. Clause II of the Player Contract expressly provides that the late penalty fee contained therein is a "*remedy to the Player*" (emphasis added). Thus,

there is no lacuna that could be filled by an analogous application of Clause II in favour of the Agency.

65. The Arbitrator finds that the Player Contract does not contain any provision allowing to infer that late payment fees accrue once the Player's obligation to render her services is (or could be) terminated. Consequently, the Agency is entitled to late payment fees only until the Player Contract could have been terminated, i.e. after 10 days of non-payment (Clause XII of the Player Contract).
66. Deciding *ex aequo et bono*, the Arbitrator holds that the Agency is entitled to a late payment fee for 10 days, resulting in the amount of USD 1,500.00 (10 days x USD 150.00). 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 and 2)

67. Claimants also request default interest of 5% p.a. on all amounts claimed (*"Claimants request [...] US\$ 263,328.80, plus [...] legal interest at 5% per annum."*).
68. 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 jurisprudence¹⁰ that default interest can be awarded even if the underlying agreement does not explicitly provide for a respective obligation.
69. In line with constant BAT jurisprudence, the Arbitrator deems an interest rate of 5% p.a. appropriate and proper to prevent the Club from deriving any profit out of the non-fulfillment of its obligations.

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

70. Claimants are entitled to default interest on all amounts paid late or still outstanding. 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 jurisprudence¹¹, finds that for the period of time for which Claimants are entitled to late payment fees, no additional default interest has to be paid. In addition, no default interest shall apply on the late payment fees awarded.

71. Consequently, the starting date for default interest on the Player’s outstanding salary (USD 52,500.00) is the day after the Request for Arbitration was received by the BAT, i.e. 18 December 2013. As for the agent fee (USD 21,000.00), it fell due on 15 October 2012. Taking into account the 10-day period for which the Agency can claim late penalty fees, the starting date for default interest is 26 October 2012. When determining the starting date for default interest on the Player’s outstanding bonuses (USD 2,450.00), the Arbitrator refers to Clause II of the Player Contract, according to which the Club has to pay the bonuses earned by the Player “*within fifteen days of any such bonus being applicable*”. This results in default interest for the bonuses as follows:

<u>Amount (in USD)</u>	<u>Kind of bonus</u>	<u>Due date</u>	<u>Interest</u>
350.00	Point-rebound bonus (game on 10 November 2012)	25 November 2012	since 26 November 2012
350.00	Point-rebound bonus (game on 22 November 2012)	7 December 2012	since 8 December 2012
350.00	Point-rebound bonus (game on 25 November 2012)	10 December 2012	since 11 December 2012
350.00	Win bonus (game on 9 December 2012)	24 December 2012	since 25 December 2012
350.00	Point-rebound bonus (game on 9 February 2013)	24 February 2013	since 25 February 2013
700.00	Win bonus and point-rebound bonus (game on 2 March 2013)	17 March 2013	since 18 March 2013

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

8.6 Summary

72. The Player is entitled to the amount of USD 54,950.00 (outstanding salaries of USD 52,500.00 and bonuses of USD 2,450.00) plus default interest of 5% p.a., and to late payment fees of USD 50,550.00.
73. The Agency is entitled to the amount of USD 21,000.00 (outstanding agent fee) plus default interest of 5% p.a., and to late payment fees of USD 1,500.00.

9. Costs

74. 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.
75. On May 28 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 9,540.00
76. 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 XIII of the Player Contract, which reads in its main relevant part as follows:

“XIII. Attorney’s Fees, Costs, and Damages. *Should litigation or arbitration become necessary regarding this Agreement, including but not limited to Club’s failure to make timely payment or provide the tax documents required under this*

Agreement, the prevailing party in any such litigation or arbitration shall be entitled to recover from the non-prevailing party any costs and attorney's fees. [...]"

77. 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 its 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 10,000.00, in application of Article 17.3 of the BAT Rules the Arbitrator decides that:
- (i) The BAT shall reimburse EUR 460.00 jointly to Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the BAT President;
 - (ii) Respondent shall pay EUR 9,540.00 jointly to Claimants, being the difference between the costs advanced by them and the amount to be reimbursed by the BAT.
78. Furthermore, the Arbitrator considers it adequate, in particular with regard to Clause XIII 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 counsel amounting to USD 10,981.00. Considering that his services of 2 May 2013 in the amount of USD 118.50 (*"Draft retainer agreement, email client re same"*) do not clearly relate to the present arbitration, the Arbitrator deems it appropriate to take into account the amount of USD 10,862.50 and the non-reimbursable handling fee of EUR 3,000.00 paid by Claimants, 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 amounts of USD 10,862.50 and EUR 3,000.00 to Claimants.

10. AWARD

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

- 1. Botas Spor Kulübü is ordered to pay to Ms. Courtney Paris the total amount of USD 105,500.00 (USD 52,500.00 in outstanding salary, USD 50,550.00 in late penalty fees and USD 2,450.00 in outstanding bonuses) plus default interest as follows:**
 - a. 5% p.a. on USD 350.00 since 26 November 2012;**
 - b. 5% p.a. on USD 350.00 since 8 December 2012;**
 - c. 5% p.a. on USD 350.00 since 11 December 2012;**
 - d. 5% p.a. on USD 350.00 since 25 December 2012;**
 - e. 5% p.a. on USD 350.00 since 25 February 2013;**
 - f. 5% p.a. on USD 700.00 since 18 March 2013;**
 - g. 5% p.a. on USD 52,500.00 since 18 December 2013.**
- 2. Botas Spor Kulübü is ordered to pay to Wasserman Media Group the total amount of USD 22,500.00 (USD 21,000.00 in outstanding agent fees, USD 1,500 in late payment fees) plus default interest of 5% p.a. on USD 21,000.00 since 26 October 2012.**
- 3. Botas Spor Kulübü is ordered to pay jointly to Ms. Courtney Paris and Wasserman Media Group the amount of EUR 9,540.00 as a reimbursement of the advance on arbitration costs.**
- 4. Botas Spor Kulübü is ordered to pay jointly to Ms. Courtney Paris and Wasserman Media Group the amount of USD 10,862.50 and an additional amount of EUR 3,000.00 as a contribution towards their legal fees and expenses. Botas Spor Kulübü shall bear its own legal costs.**
- 5. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 3 June 2014

Ulrich Haas
(Arbitrator)