BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0517/14)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Raj Parker

in the arbitration proceedings between

Ms. Sonja Kireta

- First Claimant -

Mr. François Torres

- Second Claimant -

both represented by Mr. Paolo Ronci
PR Sports srl, Via Laghi 69/6 – 48018 Faenza (RA), Italy

vs.

Tarsus Belediye Sport Kulübü
Mehmet Çelebi Spor Salonu Şehitishak Mah.3310,
Sok. 1/A Tarsus, Turkey

- Respondent -

represented by Ms. Nihal Yildirim, attorney at law,
Beyaz Karanfil Sokak No. 39, 34330 Levent, Istanbul, Turkey

1. The Parties

1.1 The Claimants

1. The First Claimant is a professional basketball player from Croatia, and the Second Claimant is a professional basketball players' agent from France.

1.2 The Respondent

2. The Respondent is a women's professional basketball club based in Tarsus, Turkey.

2. The Arbitrator

3. On 25 February 2014, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the "BAT") appointed Mr. Raj Parker 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 objections to the Arbitrator's appointment or to his declaration of independence.

3. Facts and Proceedings

3.1 Background Facts

4. On 31 May 2014 the First Claimant and the Respondent signed a contract for the First Claimant to play for the Respondent during the 2013/2014 basketball season (the "Contract"). The Contract contains, among others, the following provisions:

(i) the First Claimant's salary was to be EUR 82,000.00 net of taxes to be paid, between 15 September 2013 and 10 April 2014, in two instalments of EUR 6,500.00 and six installments of EUR 11,500.00 (clause IV.A));

(ii) the Respondent would pay the Second Claimant's agency fee in place of the First Claimant, and that fee was to be EUR 8,200.00, "corresponding to 10% of the total amount of the salary net of taxes as the agent's fee", by no later than 15 December 2013, in addition to which the Respondent agreed "to pay the [Second Claimant] a service charge of [EUR 200.00] per week late" (clause XIII);

(iii) if the Respondent was more than 20 days late in paying an instalment of salary or the Second Claimant's commission then the First Claimant could refrain from participating in practice sessions or official games until the First Claimant was paid in full, and if the First Respondent chose to do that then "there shall be no sanction levied against the [First Claimant] and the [Respondent] can not consider this action as a breach of the agreements set forth in this contract". In addition, if a payment due to the First Claimant or the Second Claimant was more than ten days late then the Respondent would pay the First Claimant or the Second Respondent, as applicable, a "service charge" of EUR 200.00 "per week late" (clause IV.A));

(iv) additional benefits owed to the First Claimant included "a suitable two bedrooms apartment no shared, along with power, heat and water. . . . Such lodging will include standard furnishings, cooking utensils, towels, linen, Digital TV, Cable, high-speed internet" (clause IV.B)1.);

(v) "[w]ith signing this contract, the [First Claimant] accept the Tarsus Municipality Rules and Regulations" (clause IV.B)5.);

(vi) the Contract is a "no cut" contract and it:

> *"will be honoured in full under all circumstances, including Player injury, except if one the following occur. in which it's within the Club's right to cut the contract with no further obligation:*
>
> *A) Player has health problems or a serious injury which prevents her from competing effectively and Club determines so within the three days following Player's arrival, and after the receipt of the results of the Player's medical check and the notification to Player, who will be able to designate a doctor who within three days will document in written format his opinion about the in diagnosed illness or injury.*
>
> *B) Player is convicted of a felonious act committed while under contract.*
>
> *C) Player is arrested for use illegal substances as well as failing an official Drug test while under contract, after it being proved by a medical report.*
>
> *D) Player engages in illegal activities, extreme sports or any other activities of similar nature such as skiing, surfing, motorcycle riding, parachuting etc.*
>
> (clause VIII);

(vii) the First Respondent was to be paid in full and the Respondent would take full responsibility for and would pay all taxes. In addition, "[a]n official tax receipt evidencing full payment of Player's tax liability will be given to Player by Club upon her request" (clause V);

(viii) if the Respondent "void[s]" the Contract, except for reasons mentioned at (vi) above, the First Claimant is entitled to the total sum of the payments due under the Contract, "regardless of the fact that certain amounts have been paid" (clause IX);

(ix) the First Claimant can "void" the Contract without compensating the Respondent if a payment under clause IV.A) of the contract (see (i) above) is more than 20 days late or if the Respondent ignores or does not perform

clause IV.B) (which relates to payments in kind) or clause VII (which relates to injury or illness). If the First Respondent exercises that right, then any unpaid balance of the salary due under the Contract (that is, the EUR 82,000.00 net due under clause IV) and any other compensation due under the Contract becomes immediately due and payable (clause X); and

(x) if the Claimants wish to void the Contract in accordance with clause X, then they must notify the Respondent in writing by registered mail, fax or email that a payment is late. If the position has not been remedied within three days, then the First Claimant can request and will automatically receive her release, and any unpaid balance of the salary due under the Contract and any other compensation due under the Contract becomes immediately due and payable (clause XI).

3.2 The Proceedings before the BAT

5. The Claimants filed the Request for Arbitration, and paid the non-reimbursable handling fee of EUR 2,000.00, on 24 January 2014.

6. The Advance on Costs was fixed at EUR 9,000.00 payable by each of the First Claimant (EUR 3,500.00), the Second Claimant (EUR 1,000.00) and the Respondent (EUR 4,500.00). The Respondent did not pay its share of the Advance on Costs and so the First Claimant and the Second Claimant paid their own shares and also paid the Respondent's share in the amounts of EUR 3,500.00 and EUR 1,000.00 respectively.

7. The Respondent filed its Answer to the Request for Arbitration, in compliance with the set deadline, on 24 March 2014.

8. In a procedural order dated 28 April 2014 the Arbitrator asked each of the Claimants

questions about matters raised in the Request for Arbitration and in the Answer. The Claimants provided their responses, in compliance with the set deadline, on 7 May 2014. On 21 May 2014 the Arbitrator gave the Respondent the opportunity to provide any responses it considered necessary to the Claimants' responses to the 28 April procedural order, and the Respondent provided such comments, in compliance with the set deadline, on 4 June 2014.

9. On 30 June 2014, the BAT Secretariat informed the parties that the exchange of documents was complete, and requested that they submit detailed accounts of their costs. The Claimants submitted an account of their costs, which was not detailed, on 1 July 2014, in compliance with the set deadline. The Respondent was given an opportunity to provide comments on the Claimants' account of costs, but did not do so.

4. The Positions of the Parties

4.1 The Claimant's Position

10. The Claimants submit that, through a series of actions, the Respondent attempted to terminate the Contract, in breach of its "no cut" provision, and subjected the First Claimant to a campaign of pressure and bullying in an effort to make her accept that termination. The most important aspects of those submissions are:

(i) the First Claimant passed all of her physical and medical examinations upon arrival in Tarsus;

(ii) the First Claimant was initially excluded from the squad for a game in Romania, and then was asked to come to the game at the last minute. The First Claimant stretched her knee in the game and drew it to the Respondent's

attention. The Respondent did not think it necessary to seek medical attention;

(iii) on 8 November 2013 the Respondent's head coach emailed the Second Claimant saying that the First Claimant is a "good person" but was not giving good enough performances. The head coach asked "[p]lease without wasting time let's terminate her contract";

(iv) on 10 November 2013 the First Claimant was called to see the Respondent's general manager, who told her that the Contract was to be cut because the Respondent was not happy with her performances. The First Claimant was asked to join the Respondent's junior team, leave her apartment, and was told that she would receive October's salary. The First Claimant refused to accept that, and the president of the Respondent yelled at her and threatened her that if she did not accept the situation then she would have problems arising from being kicked out of the team, her apartment, and so on;

(v) on 12 November 2013 the general manager told the First Claimant not to go to the senior team's practice, but she did. At that practice the general manager showed the First Respondent a document which indicated that she was suspended but did not explain why;

(vi) on 13 November 2013 the general manager told the First Claimant to leave her apartment and go to a hotel, or else the president of the Respondent would "go crazy". The First Claimant invited the general manager to contact her agent (that is, the Second Claimant) but the general manager did not;

(vii) by 14 November 2013, the First Claimant was becoming upset by the situation and sent an email to the Second Claimant explaining how she was feeling. In that email she said:

. . . [y]esterday they show me the letter that I was suspended and I don't understand what they are saying : I'm removed from line-up, what it means? and today manager told me I need to move out from my apartment tonight, and that I can't come to practices, and I told her to call you but she was delaying and avoiding to call you until I met her again after and she was making the pressure on me to leave the apartment. . . . I'm trying to hold on, but I'm really on the edge, I don't know what to do, I'm starting to be desperate. I'm here in a foreign country, in a rural town, and I don't know whom to turn to, if I need help it's impossible to communicate with anybody because nobody speaks English, I'm really starts to be afraid what to do and where to go if they kick me out of the apartment, and what if that happens in the middle of the night, I don't know what are they ready to do if I don't do what they want. . . ."

(viii) on 15 November 2013 the general manager went to First Claimant's apartment and put two young players in there to stay;

(ix) on 19 November 2013 the Respondent offered to pay the First Claimant her October salary in cash, but the First Claimant declined and asked that it be paid to her bank account;

(x) on 20 November 2013 the Second Claimant sent an email to the Respondent to notify them that the salary payment due on 30 October had not been paid;

(xi) on 21 November 2013 the First Claimant opened a bank account at a bank in Turkey, even though the Respondent had told her it was difficult for a foreigner to do so, and informed the Respondent of her bank details. The Respondent informed the First Claimant that no payment could be made because the president was out of town. However, the president was seen at the Respondent's home game that night;

(xii) on 25 November 2013 the general manager sent an email to the Second Claimant which said:

"Dear Paco

We have never had a problem like this with a player and her agent. We have no problem about her personality. She is a good person. The situation is all about her performance. We as a team could not get a good performance from her. We talked about this situation with her many times. We are really upset up this point and she is also getting upset. We are looking forward to find a way for a good solution.

So far we paid her 6.500 Euro. We would like to pay her salary for October, November and than terminate her contract mutually. We have never done this type of thing for any player.

We think you and Sonja will reach this offer positively.

Thank you

Best regards"

(xiii) on 27 November 2013 the Respondent paid the salary which had been due on 30 October 2013 and asked that contract be considered terminated with no further obligation for the Respondent;

(xiv) on 28 November 2013 the Second Claimant proposed an agreed termination of the Contract with between two and four months' salary to be paid to the First Claimant as compensation;

(xv) on 29 November 2013 a heater was removed from the First Claimant's apartment, and a few days later the internet was disconnected;

(xvi) on 20 December 2013 the Respondent's president telephoned the First Claimant, yelled at her, and said that November's salary would never be paid. He said he would contact the Turkish federation and lawyers to terminate the Contract, and he refused to deal with the Second Claimant;

(xvii) on 21 December the Second Claimant emailed the Respondent to give notice that the salary due on 30 November had not been paid;

(xiii) on 25 December 2013 the Second Claimant wrote to the Respondent stating

that the First Claimant was terminating the Contract under clauses X and XI; and

(xix) on 30 December 2013 the Respondent's lawyer wrote to the Second Claimant saying that his agency fee would be paid shortly, but that the First Claimant would not be paid because the Respondent believed she had breached the Contract; the lawyer referred to the fact that the First Claimant "was removed from the line-up due to performance problems and according to the Disciplinary Regulations the Club is entitled to suspend the payments in such a case."

11. In light of the alleged facts and matters summarised above, the Claimants decided to request this arbitration in order to obtain payment of the monies that the Claimants believe they are owed. The Claimants base their claims on the following arguments:

(i) the Contract is a "no cut" contract, even in cases of injury or poor performance;

(ii) the Contract comes into force and is not susceptible to termination by the Respondent as soon as the First Claimant passes the medical examinations, which she did;

(iii) the Respondent made clear that the reason the First Claimant was removed from the team was her "poor performances";

(iv) notwithstanding the contractual position, and having regard to the "*ex aequo et bono* concept" the Claimants did seek to agree a settlement based on two to four salary payments. However, the Respondent rejected this, leaving the Claimants with no choice but to start this arbitration;

(v) the First Claimant was subjected to a campaign of psychological pressure, was rejected from practices and games, and had "the intimity of her private apartment violated".

12. In their request for relief, the Claimants seek:

(i) (for the First Claimant) overdue salaries of EUR 64,000.00 plus EUR 200.00 per week from 30 November 2013;

(ii) (for the Second Claimant) the agency fee, being EUR 8,200.00 plus EUR 200.00 per week from 30 November 2013;

(iii) "a justification providing that the Respondent is in order with all the taxes related to the [First] Claimant's activity in terms of salaries (as stipulated in the Clause V) of the [Contract] or to other advantages mentionned in the aforesaid contract, such as accommodation";

(iv) an amount to be fixed by the Arbitrator to compensate the First Claimant for psychological damage inflicted by the Respondent; and

(v) compensation for the non-reimbursable handling fee, the Advance on Costs and legal fees and expenses.

4.2 The Respondent's Position

13. The Respondent submits that the First Claimant's performance was poor, such that she breached her obligations under the Contract. In those circumstances, the Respondent submits that it was within its rights to seek to terminate the Contract without compensating the First Claimant. These submissions are based on the following

asserted facts and matters:

(i) under the Contract, the First Claimant was required to participate in training and follow the directions of the Respondent's technicians, and must follow the Respondent's rules and regulations;

(ii) the late payment provisions in the Contract say that in certain circumstances the First Claimant can refrain from training without there being any sanction against her. This implies that although the Contract is a "no cut" contract, the Respondent can in some circumstances sanction the player for violations;

(iii) under the Contract, the First Claimant accepts the "Tarsus Municipality Rules and Regulations", under which:

(A) the Respondent can unilaterally terminate the Contract for continued failure to attend training without permission; and

(B) if a player is removed from the team for a month then during that period they shall practice with a junior team;

(iv) with regard to the Second Claimant, on 13 February 2014 the Respondent made a partial payment of EUR 2,500.00 in respect of the agency fee;

(v) the First Claimant's performance was poor and it was having a negative effect on the rest of the team;

(vi) the First Claimant was removed from the senior team roster after the game in Romania referred to at paragraph 10(ii) above. In such circumstances, the First Claimant was supposed to train with the junior team, and she was given schedules for that training but did not attend it. That non-attendance was

minuted at court by a notary public;

(vii) under the Contract, the First Claimant is entitled to a two-bedroom apartment. She had been given a four-bedroom apartment, and the placing of two young players in her apartment needs to be seen in that light. Also, the First Claimant was offered to move to a three star hotel at the Respondent's expense, but she declined;

(viii) the First Claimant was offered payment of the November 2013 salary in cash on 9 November, but she declined and insisted on a bank transfer. She had previously accepted cash, which was paid into the bank account of a member of the Respondent's staff and transferred from there to the First Claimant's account in Croatia. At the relevant time, the Respondent was unable to make a bank transfer because its authorised signatories were not available in Tarsus; and

(ix) the allegations about the heater and the internet are false. Air conditioners are used as heaters in Tarsus, "[s]o removing the heater is an impractical allegation". Similarly, the whole building is served by one modem and so "disconnecting the internet access of the claimant is, practically, not possible."

14. The Respondent argues that, in circumstances where the First Claimant has "violated her primary responsibility under the [Contract]" (by not playing at her highest level and having serious performance problems), the Respondent is entitled to take some "technical, sportive and administrative measures for the success of the team". The Respondent submits that, if there is a performance problem, a contract doesn't necessarily grant the right to the player to play/train with the senior team.

15. The Respondent submits that "a no-cut agreement does not mean the player may every time act at her/his will. In other words, having a guaranteed contract does not

allow the player to violate the internal regulations of the Club."

16. With regard to the relief sought, the Respondent asks that:

(i) the Arbitrator reject the First Claimant's claim;

(ii) if he does not reject the First Claimant's claim, the Arbitrator deduct any possible earnings (presumably for the remainder of the relevant season) from the requested amount so as to avoid unjust enrichment;

(iii) no interest be allowed, in light of the fact that the Second Claimant requests a late payment fee of EUR 200.00 per week; and

(iv) the parties be ordered to bear their own expenses.

4.3 The Parties' Further Submissions

17. The procedural order issued on 28 April 2014 asked the Claimants:

(i) to comment on the Respondent's denial of the allegations about the heater and internet in the First Claimant's apartment;

(ii) to explain why, if it is so, the First Claimant declined to play for the Respondent's junior team;

(iii) to state whether the First Claimant was employed as a professional basketball player in the remainder of the 2013/2014 season; and

(iv) to confirm whether the Second Claimant received a payment from the

Respondent on 13 February 2014.

18. The Claimants answered that:

(i) with regard to the heater, there were air conditioning machines in the bedrooms but they did not work. The windows were cracked and cold air got inside. There was a small electric heater in the apartment when the First Claimant arrived. That was removed on 29 November while the First Claimant was at practice. She was frightened about intrusion, and she bought a new one herself. With regard to the internet, there is a modem on each floor of the building, which is shared by all the apartments. It was always slow and patchy. On 2 December 2013 the team left for a trip, leaving the First Claimant behind. The modems were removed. The First Claimant asked the Respondent to replace them but she was ignored. When the team returned, the modems were returned;

(ii) the First Claimant is a professional with a long international career and she signed the Contract to play with the senior team. In those circumstances, she saw no reason to miss senior team practices to go to the junior team practices. Neither the head coach nor the assistant coach ever told the First Claimant to leave the senior team practices;

(iii) the First Claimant did not get another contract to play in the 2013/2014 season. She and the Second Claimant tried to find her work, in Croatia and elsewhere, but without success (supporting documentation was filed); and

(iv) the Second Claimant received a payment of EUR 2,470.00 on 7 February 2014.

19. The Respondent, given the opportunity to comment on the Claimants' submissions

referred to at paragraph 18 above, submitted that:

(i) the allegations about the apartment's heating are not true. Equipment is checked and delivered to players in good condition; the apartment was in good condition and the air conditioning was functioning properly; the First Claimant never complained about the non-functioning air conditioning or a broken window until the last submission; and the Respondent was never informed that the First Claimant was using a heater;

(ii) the Respondent does not keep duplicate keys to the apartments and it would not have been possible for the Respondent to have entered the apartment and remove anything;

(iii) while there may be occasional internet connectivity problems, the First Respondent never complained about that and the modems were never removed or connection stopped on purpose. Other players, the janitor and security guards could give evidence to that effect; and

(iv) it is not true that the First Claimant practiced with the senior team instead of the junior team.

5. Jurisdiction

20. 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).

21. 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

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

5.2 Formal and substantive validity of the arbitration agreement

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

> *"1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.*
>
> *2 Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.*
>
> *3 The validity of an arbitration agreement may not be contested on the grounds that the principal contract is invalid or that the arbitration agreement concerns a dispute which has not yet arisen."*

24. Clause XIV of the Contract is an arbitration clause in favour of the BAT. It 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 Geneva, Switzerland.*

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

> *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 dispue ex aequo et bono.*
>
> *The parties expressly waive recourse to the Swiss Federal Tribunal against award of the BAT as provided in Article 192 of the Swiss Act on Private International Law."*

25. The Contract is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) of the PILA). In particular, the wording "[a]*ny dispute arising from or related to the present contract*" in Article XIV of the Contract clearly covers the present dispute. In addition, the Respondent did not object to the jurisdiction of BAT.

26. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimant's claim.

6. Discussion

6.1 Applicable Law – ex aequo et bono

27. 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",* as opposed to a decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

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

28. 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."*

29. Clause XIV of the Contract states "[t]*he arbitrator… shall decide the dispute ex aequo et bono*".

30. In light of the above, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.

31. 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*[2] (Concordat),[3] under which Swiss courts have held that arbitration *en équité* is fundamentally different from arbitration *en droit* :

> *"When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[4]

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

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2 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

3 P.A. KARRER, Basler Kommentar, No. 289 *ad* Art. 187 PILA.

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

circumstances of the case".[5]

33. 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*".

34. In light of the foregoing matters, the Arbitrator makes the following findings.

6.2 Findings

6.2.1 The effect of the "no cut" provision

35. The "no cut" provision in the Contract, which is set out at paragraph 4(vi) above, is clear and relatively unequivocal. The Arbitrator finds that it means that the Respondent may not terminate the Contract before the end of its agreed term under any circumstances, unless one of the four events referred to in clause VIII occur.

36. The Respondent has not alleged that any of those events has occurred, and the Arbitrator finds that none of them have occurred.

6.2.2 The effect of the Tarsus Municipality Rules and Regulations

37. The Arbitrator finds that the effect of clause IV.B)5 of the Contract is that the Player agrees to be bound by the Tarsus Municipality Rules and Regulations (the "Regulations").

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[5] POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

38. The Contract does not stipulate whether it or the Regulations should prevail in the event of any conflict between the two.

39. The Arbitrator considers a "no cut" provision, where there is one, to be a fundamental aspect of a contract between a player and a club. It provides significant security for a player, represents an exposure for a club and is negotiated between the parties. The Arbitrator considers that it is unlikely that the parties to a negotiated contract would intend that a critical term of that contract could be over-ridden by a term of a non-negotiated set of regulations which are incorporated by reference in the contract, and that the parties did not so intend in this case.

40. Accordingly, the Arbitrator finds that, in the absence of an express provision in the Contract to the contrary, the terms of the "no cut" provision in the Contract prevail over the Regulations to the extent that there is a conflict between them.

41. In this case, there is a conflict between the Contract and the Regulations, because the Contract states clearly that the Respondent may terminate the Contract only in limited and specific circumstances, while the Regulations state that the Respondent may terminate a contract with a player for continued failure to attend training without permission or with an unacceptable excuse (which is not one of the circumstances specified in the Contract). The Arbitrator finds that, to the extent that that conflict is in issue in this case, the Contract, and in particular its "no cut" provision, prevails.

6.2.3 The Respondent's purported termination of the Contract

42. The parties have submitted conflicting evidence as to whether the First Claimant was repeatedly absent from training without permission or with an unacceptable excuse. The Arbitrator notes, however, that repeated absence without permission or excuse is not the reason that the Respondent gave in November and December 2013 for its decision to attempt to terminate the Contract. On each occasion, including in emails

sent on behalf of the club and in the notarised letter submitted as exhibit 11 to the Answer, the Respondent stated that it wanted to terminate the Contract because the First Claimant's performance was not good enough.

43. The Respondent argues in the Answer that a "no cut" contract does not mean that a player can act at his or her will: "[i]n other words, *having a guaranteed contract does not allow the player to violate the internal regulations of the Club*" (emphasis in original). The Arbitrator does not consider it necessary or appropriate to decide whether that statement is correct in relation to "no cut" contracts generally. However, in relation to the relevant facts and the relevant contractual provisions in this case, the Arbitrator finds that there has been no act of the First Claimant proven or even alleged which would have allowed the Respondent to escape the strictures of clause VIII of the Contract.

44. As stated above, the meaning of clause VIII is clear, and the risks to which it exposes the Respondent are obvious; if the First Claimant turned out to be a weak player, or a bad team member, or in fact if any undesirable situation arose other than the four situations specified in clause VIII, then the Respondent simply had to put up with the situation and pay the First Claimant her salary as owed under the Contract. That is potentially onerous for the Respondent. However, notwithstanding the security she got from clause VIII, the First Claimant would have had an incentive to play as well as she could and to obey the Respondent's rules and norms. It is to be assumed that she would want the Contract to be renewed or would want the chance to play for another reputable club after the Contract expired. In those circumstances, it would not be a realistic option for her to fail to do her best, or deliberately and consistently fall short of the Respondent's reasonable expectations, and risk being left out of the team, even if that would be on the full salary to which she was entitled.

45. In light of the above findings, the Arbitrator finds that the Respondent did not terminate the Contract and that it has not been proven that any circumstances have arisen which

would have allowed the Respondent to do so without paying the Respondent the remainder of the money due under the Contract.

6.2.4 The First Claimant's termination of the Contract

46. Under clause VIII of the Contract, the First Claimant can terminate the Contract if any payment is more than twenty days late, or if the Respondent ignores or does not perform its obligations in respect of clause IV.B) of the Contract (that is, the provision of certain benefits, including the apartment).

47. The Arbitrator finds that the salary payment which was due for payment on 30 November 2013 was more than twenty days late when on 20 December 2013 the Second Claimant sent the email submitted as exhibit 6 to the Request for Arbitration, giving notice that the payment was late. More than three days passed after that without the situation being remedied before the Second Claimant sent a further email on 25 December 2013 (submitted as exhibit 7 to the Request for Arbitration) informing the Respondent that the second Claimant was exercising her right to terminate the Contract. Accordingly, the Arbitrator finds that the First Claimant terminated the Contract validly, in accordance with its clauses X and XI, on 25 December 2013.

48. The Arbitrator notes that the words "[i]n either case, any unpaid balance remaining of the sum per IV)A) and any other compensation provided herein shall become immediately due and payable" appear in in both clause X and clause XI. The Arbitrator finds that, in each case, the time at which the money becomes due and payable is the time at which the First Claimant exercises her right under clause X to terminate the Contract, which must be done in accordance with clause XI.

49. The Arbitrator also finds that the agent's fee under the Contract, being EUR 8,200.00, is "other compensation provided herein" for the purposes of clauses X and XI.

50. In light of the above findings, the Arbitrator finds that EUR 64,000.00 (being the unpaid balance of the EUR 82,000.00 net salary due under the Contract), and also the agent's fee of 8,200.00, became due for payment on 25 December 2013 in accordance with clauses X and XI of the Contract (see paragraph 4(ix) and (x) above).

6.2.5 Calculation of compensation

51. The Arbitrator finds that the amount of salary owed to the First Claimant and unpaid on 25 December 2013, and which therefore became due and payable on that date, was EUR 64,000.00.

52. The Arbitrator notes that the Second Claimant acknowledges receipt of partial payment of the agent's fee on 7 February 2014 in the amount of EUR 2,470.00, and has provided evidence of that receipt. Accordingly, while EUR 8,200.00 became due for payment to the Second Claimant on 25 December 2013, on 7 February the amount due for payment to him was reduced to EUR 5,730.00.

53. The Arbitrator notes that the Claimants each seek payments of EUR 200.00 per week as a "service charge" in respect of late payments, pursuant to clause IV)A, and also the payment of interest at five per cent on the amounts due and payable. The "service charge" and interest both serve as compensation for late payment, and as deterrents against late payment. The Arbitrator does not consider that it would be fair, and so it would not be consistent with his *ex aequo et bono* jurisdiction, to award both the service charges and interest in respect of the same time period. In the circumstances, the Arbitrator finds, *ex aequo et bono*, that any service charge which would become due according to the terms of the Contract should be payable up until the time that the First Claimant terminated the Contract and the remaining amounts due under the Contract became due and payable.

54. When, on 25 December 2013, the First Claimant terminated the Contract, the salary

payment due to her on 30 November was more than ten days late; in fact it was three weeks and four days late. Accordingly, under clause IV)A, on that date the First Claimant was entitled to EUR 200.00 for each of the three weeks that the payment was late. That is, the First Claimant was, and remains, entitled to EUR 600.00 in respect of service charge for late payment.

55. When, on 25 December 2013, the Contract was terminated, the agent's fee due to the Second Claimant on 15 December was not "more than" ten days late; it was exactly ten days late. Accordingly, under clause IV)A, on that date the First Claimant was not entitled to any amount in respect of the service charge.

6.2.6 Mitigation of loss

56. The Claimants have each asserted that they made efforts to find the First Claimant a contract for the remainder of the 2013/2014 season, but they were unable to do so. The Claimants have provided written confirmation of these efforts from four different sources. In the circumstances, the Arbitrator finds that the Claimants did make reasonable efforts to mitigate their losses, but were unable to do so.

6.2.7 Interest

57. The Claimants have requested interest at five per cent per year on the outstanding salary and agent's fee. Although the Contract does not provide for the payment of default interest, this is a generally accepted principle embodied in most legal systems. Indeed, payment of interest is a customary and necessary compensation for late payment, and the Arbitrator considers that there is no reason why the Claimant should not be awarded interest in this case. Also, according to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. The Arbitrator further considers, in line with the jurisprudence of the BAT, that five per cent per year is a reasonable rate of interest and

that such rate should be applied from the date that the outstanding amounts became due and payable in accordance with the terms of the Contract. The Arbitrator therefore awards interest to the First Claimant on the sum of EUR 64,000.00 at five per cent per year from 26 December 2013. The Arbitrator also awards interest to the Second Claimant on the sum of EUR 8,200.00 at five per cent per year from 26 December 2013 to 7 February 2014, being EUR 49.42, and interest at the same rate on the sum of EUR 5,730.00 from 8 February 2014.

6.2.8 Tax receipt

58. The Arbitrator finds that the First Claimant is entitled, under clause V of the Contract, to receive a tax receipt from the Respondent which confirms that the Respondent has made payment in full of all of her tax liabilities in Turkey arising from payments made to her by the Respondent. The Respondent is required to provide the First Claimant with such receipt upon making payment of the amounts ordered in this Award.

7. Costs

59. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the award or communicated to the Parties separately. Furthermore, Article 17.3 of the BAT Rules provides that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

60. On 7 September 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*", and that "*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President*

from time to time", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised, the BAT President determined the arbitration costs in the present matter at EUR 9,000.00.

61. The Arbitrator notes that the Claimants were successful in almost every substantive aspect of their case. Thus, the Arbitrator decides that, in application of Article 17.3 of the BAT Rules and in light of the circumstances of the case, the Respondent shall bear the costs of the arbitration. Accordingly, the Arbitrator decides that the Respondent shall pay EUR 7,000.00 to the First Claimant as reimbursement of the arbitration costs advanced by her, and EUR 2,000.00 to the Second Claimant as reimbursement of the arbitration costs advanced by him.

62. The First Claimant has claimed EUR 7,155.00 in legal fees and expenses (including the non-reimbursable fee of EUR 2,000.00). The Second Claimant has claimed EUR 3,800.00 in legal fees and expenses. The Arbitrator considers that such fees and costs are excessive for this case, also in view of the fact that they were represented by another agent and not a lawyer. The Arbitrator also notes that no detailed account of costs was provided to justify the exact amounts requested. In the circumstances, taking into account the complexity of the matter and that counsel for the Claimants did devote certain time in their representation, the Arbitrator finds that the Respondent must pay the First Claimant EUR 5,000.00 in respect of her legal fees and expenses, including the non-reimbursable fee, and must pay the Second Claimant EUR 2,000.00 in respect of his legal fees and expenses.

8. AWARD

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

1. **Tarsus Belediye Sport Kulübü is ordered to pay to Ms. Sonja Kireta EUR 64,000.00 in respect of unpaid salary, plus interest at 5% per annum from 26 December 2013.**

2. **Tarsus Belediye Sport Kulübü is ordered to pay to Mr. François Torres EUR 5,730.00 in respect of the unpaid agent's fee, plus interest at 5% per annum from 8 February 2014.**

3. **Tarsus Belediye Sport Kulübü is ordered to pay to Mr. François Torres EUR 49.42 in respect of interest accrued on the unpaid agent's fee between 25 December 2013 and 7 February 2014.**

4. **Tarsus Belediye Sport Kulübü is ordered to pay to Ms. Sonja Kireta EUR 7,000.00 as reimbursement of the advance on BAT costs.**

5. **Tarsus Belediye Sport Kulübü is ordered to pay to Mr. François Torres 2,000.00 as reimbursement of the advance on BAT costs.**

6. **Tarsus Belediye Sport Kulübü is ordered to pay to Ms. Sonja Kireta EUR 5,000.00 in respect of her legal fees and expenses.**

7. **Tarsus Belediye Sport Kulübü is ordered to pay to Mr. François Torres EUR 2,000.00 in respect of his legal fees and expenses.**

8. **Tarsus Belediye Sport Kulübü is ordered to provide Ms. Sonja Kireta with a certificate confirming that Tarsus Belediye Sport Kulübü has made payment in full of all of Ms. Sonja Kireta's tax liabilities in Turkey arising from payments made to her by Tarsus Belediye Sport Kulübü.**

9. **Any other or further-reaching requests for relief are dismissed.**

BASKETBALL
ARBITRAL TRIBUNAL

Geneva, seat of the arbitration, 7 October 2014

Raj Parker
(Arbitrator)