

ARBITRAL AWARD

(BAT 730/15)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Ms. Astou Barro Ndour Gueye

- Claimant 1 -

Mr. Nicolas San Jose Garcia

Av. Angel Saavedra 27, P4, 28521 Rivas Vaciamadrid, Spain

- Claimant 2 -

Mr. Murat Kurdoglu

1x1 Sports Management, Yildiz Posta caddesi, Fahri Gizden Sokak,
Beyazoglu apt. No: 25/28, Gayrettepe 34349 Istanbul, Turkey

- Claimant 3 -

represented by Mr. Antonio Martin Molina

10 Carrer del Parnal – (5-2), AD700 Escaldes-Engordany, Andorra

vs.

Fenerbahce Spor Kulübü

Fenerbahce Sükrü Saracoglu Stadyumu, 34725 Kiziltoprak Kadiköy,
Istanbul, Turkey

- Respondent -

represented by Ms. Özge Tokarli, attorney at law

1. The Parties

1.1. The Claimant

1. Ms. Astou Barro Ndour Gueye (hereinafter the “Player”) is a professional basketball player of Senegalese-Spanish nationality.
2. Mr. Nicolas San Jose Garcia (hereinafter “Agent 1”) is a FIBA-licensed agent domiciled in Rivas Vaciamadrid, Spain.
3. Mr. Murat Kurdoglu (hereinafter “Agent 2”) is also a FIBA-licensed agent domiciled in Istanbul, Turkey.

1.2. The Respondent

4. Fenerbahce Spor Kulübü (hereinafter the “Club”) is a professional basketball club located in Istanbul, Turkey.

2. The Arbitrator

5. On 9 August 2015, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren, appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

6. On 5 May 2014, the Parties entered into a player contract (hereinafter “the Player Contract”) for the seasons 2014-2015, 2015-2016 and 2016-2017. For the season 2014-2015 the salary of the Player was agreed at EUR 250,000 net, payable in one

instalment of EUR 50,000 due upon Player's arrival and 8 monthly instalments of EUR 25,000 due on the 15th day of each month, starting on 15 October 2014. For the season 2015-2016 the salary of the Player was agreed at EUR 300,000 net, payable in one instalment of EUR 60,000 due upon Player's arrival and 8 monthly instalments of EUR 30,000 due on the 15th day of each month, starting on 15 October 2015. For the season 2016-2017, the salary of the Player was agreed at EUR 350,000 net, payable in one instalment of EUR 70,000 due upon Player's arrival and 8 monthly instalments of EUR 35,000 due on the 15th day of each month, starting on 15 October 2016. The Player was also entitled to specific bonuses payable if the Club's team would have reached certain defined goals. In addition, the Parties agreed on certain benefits for the Player including the Club's obligation to pay for transportation expenses. The Player Contract contains an opt-out clause for the third season.

7. In the Player Contract, the Club also agreed to pay Agent Fees of EUR 25,000 net for the season 2014-15, of EUR 30,000 net for the season 2015-16 and of EUR 35,000 net for the 2016-17 season to both Agents.
8. On 30 August 2014, the Player and the Club signed another agreement on the letterhead of the Turkish Basketball Federation/TBF (hereinafter referred to the "TBF Contract"), which included "Special Terms and Conditions".
9. On 14 April 2015, Agent 1 sent an email to the Club by which he enquired about the outstanding Player's salaries and requested the payment of the due salaries. On the same day, Agent 2 sent a separate letter to the Club by which he also enquired about the outstanding Player's salaries and requested the payment of the due salaries, as well.
10. On 5 May 2015, the Club sent an email to the Agents in which it stated, inter alia, that

"so for next year she [the Player] has a guaranteed contract as well. However, our club and management think that for both sides [...] it will be better to separate ways now. [...] Our club is thinking of giving her loan to another club or playing with her in our Fenerbahce 2nd League team, but she is not fitting in our main plans for this

season. [...] Please understand the situation from our perspective and try to help both us and Astou at the same time.”

11. On 27 May 2015, the Claimants terminated the Player Contract by written notice to the Club.
12. On 30 June 2015, the Player entered into a contract with Club Baloncesto Avenida, Salamanca. The parties agreed on a salary of EUR 100,000 for the season 2015-2016.
13. On 13 July 2015, the Claimants requested from the Club the payment of the outstanding salaries, Agent Fees etc. There is no response of the Club to this letter on record.
14. On 22 July 2015, the Spanish Basketball Federation applied to the TBF for the Player's letter of clearance.
15. On 24 July 2015, the TBF stated that the Player is “under contract with club until 30.06.2017”.
16. On 26 July 2015, the Claimants applied to FIBA for the Player's letter of clearance.
17. On 6 August 2015, FIBA authorized the transfer of the Player to her new club, Club Baloncesto Avenida.

3.2. The Proceedings before the BAT

18. On 10 August 2015, the Claimants filed a Request for Arbitration in accordance with the BAT Rules. A non-reimbursable handling fee of EUR 4,000 was received in the BAT bank account on 30 July 2015.
19. By Procedural Order of 18 August 2015, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Club to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 14 September 2015.

The BAT Secretariat also requested that the Parties pay the following amounts as Advance on Costs by no later than 9 September 2015:

| | |
|---|----------------------|
| <i>“Claimant 1 (Ms Astou Barro Ndour Gueye)</i> | <i>EUR 5,000.00</i> |
| <i>Claimant 2 (Mr Nicolas San Jose Garcia)</i> | <i>EUR 1,000.00</i> |
| <i>Claimant 3 (Mr Murat Kurdoglu)</i> | <i>EUR 1,000.00</i> |
| <i>Respondent (Fenerbahce Spor Kulübü)</i> | <i>EUR 7,000.00”</i> |

20. The BAT secretariat received EUR 6,000 paid for the Player and Agent 1 on 7 September 2015, EUR 1,000 paid for the Agent 2 on 8 September 2015 and EUR 6,957.30 paid by the Club on 10 September 2015.
21. On 21 September 2015 the BAT Secretariat acknowledged receipt of the Respondent's Answer of 17 September 2015. On the same day, the BAT Secretariat acknowledged receipt of the Claimants' complement letter of 21 September 2015.
22. On 28 October 2015 the BAT Secretariat acknowledged receipt of the Respondent's comments to the Claimants' complement letter.
23. On 16 December 2015 the BAT Secretariat invited the Parties to submit their accounts of costs, which were submitted on 21 December 2015 (Claimants) and 23 December 2015 (Respondent). On 4 January 2016, Respondent filed its comments on Claimants' account of costs, stating that it objects *“considering the highly charged and undetailed legal fees”*.

4. The Positions of the Parties

4.1. The Claimants' Position

24. The Claimants submit the following in substance:
 - a) The Club has always been in default with its obligations towards the Player. On 14 April 2015 it was in default with four salary instalments (instalments no. 4 to

7). Since none of these payments had been made within 45 days of their due dates, the Player was entitled to terminate the Player Contract with immediate effect. That is what she did by her termination letter of 27 May 2015.

- b) The Player received only a part of her salary for the season 2014-2015. A salary amount of EUR 50,000.00 and the bonus of EUR 5,000.00 because the Club's team reached the final four of the Euroleague remained unpaid.
- c) The Agents did not receive the Agent Fees for the three seasons covered by the Player Contract. Therefore, their claims of the Agent Fees and a penalty for late payment of the Agent Fees are justified.
- d) Despite the termination of the Player Contract, the Club remained fully liable for the payment of the contractually agreed salaries for the seasons 2015-2016 and 2016-2017. Although the Player signed a new contract with Club Baloncesto Avenida with an agreed salary of EUR 100,000.00 for the season 2015-2016, the new salary must not be deducted, as set out in Article 9 of the Player Contract.
- e) The Player spent EUR 615,74 for a flight to Istanbul to visit her bank in Istanbul because the Club had ignored her instructions to pay the salary to a bank in Spain. Article 3 (f) of the Player Contract is not applicable as the Player Contract was already terminated when the Player gave the payment instructions.
- f) The Respondent refused to issue the letter of clearance in violation of Article 3 (c) and Article 9 (d) of the Player Contract. Therefore, according to Article 3 (c) and Article 9 (d) of the Player Contract the Club is obliged to pay penalties for late delivery of the letter of clearance. The TBF Directive for license, registration and transfers of contract players is not relevant for the case at hand.
- g) The Player is entitled to the tax receipts for the taxes paid by the Respondent on her behalf.

- h) The TBF Contract is not relevant for the contractual relations between the Player and the Club as the Player Contract states that

"[i]f the Club signs additional agreements with the Player for the seasons 2014-15, 2015-16 and 2016-17, it is understood by all parties that the only document legally binding in this agreement is the present contract between the Club, the Agents and the Player. Those additional agreements shall not cancel or change the amount and/or date of any (net) payment provided by this contract. Those additional agreements shall not cancel or change any clause provided by this contract. More specifically, Turkish Basketball Federation mono-type contract which is signed between the Club and the Player due to the licensing regulations of the Turkish Basketball Federation shall not modify any of the clauses of this present agreement. For avoidance of doubt, in each case of controversy, this contractual agreement's terms and conditions shall prevail."

Therefore, the TBF Contract is only a formal document to satisfy the Turkish licensing regulations.

- i) The Claimants have never acted in bad faith. The Respondent did not send any letter to the Claimants asking, for instance, to modify the payments deadline. The Respondent did not answer any of the warning letters. Therefore, the Respondent simply ignored its duties towards the Claimants.

4.2. The Claimants' Request for Relief

25. The Request for Arbitration of 10 August 2015 contains the following Request for Relief:

"a) Salaries, bonuses, compensations and interest owed to Claimant 1

*** Season 2014-15**

- interest of 208,90 euros for late payment scheduled 15-10-2014
- interest of 345,89 euros for late payment scheduled 15-11-2014
- interest of 455,47 euros for late payment scheduled 15-12-2014
- interest of 356,16 euros for late payment scheduled 15-01-2015
- interest of 352,73 euros for late payment scheduled 15-02-2015
- interest of 256,84 euros for late payment scheduled 15-03-2015
- 25 000 euros + 5% legal interest from April 16th 2015
- 25 000 euros + 5% legal interests from May 16th 2015
- 5 000 euros + 5% legal interests from May 16th 2015
- 615,74 euros for flight ticket compensation
- 3000 euros penalty fee of 12 days for late Letter of Clearance delivery

- Year 2014 and year 2015 tax receipt

*** Season 2015-16**

- compensation from 200 000 euros to 300 000 euros
- Year 2016 tax receipt (at the legal date)

*** Season 2016-17**

- compensation of 75 000 euros
- Year 2017 tax receipt (at the legal date)

b) Agency fee, compensations and daily penalties owed to Claimants 2 and 3

*** Season 2014-15**

- Agency fee of 15 000 euros + 12 500 euros late penalty to Claimant 2
- Agency fee of 10 000 euros + 12 500 euros late penalty to Claimant 3

*** Season 2015-16**

- Agency fee between 8 000 to 18 000 euros to Claimant 2
- Agency fee of 12 000 euros to Claimant 3

*** Season 2016-17**

- Compensation of 2 500 euros to Claimant 2
- Compensation of 2 500 euros to Claimant 3

c) Handling fee

- 4000 euros paid by Claimant 2 on behalf of all three claimants

d) Legal fees and expenses

- Will be determined by the Arbitrator later and the Claimants will submit to BAT an Account of Costs as soon as the total of legal fees and expenses is final'

4.3. The Club's Position

26. With regard to the merits of the claim, the Club submits the following:

- a) The Club's payments may not be deemed late. Delays up to 45-60 days are normal in European Basketball. Payments have been made to all players at the same time.
- b) The Player's earnings under her new contract for the season 2015-2016 should be deducted from her initial claim with regard to the compensation for the season 2015-2016.

- c) The Club was not obliged to wire the salaries to a bank account outside of Turkey. However, it is possible for the Player to check the accounts over the internet and any type of banking transactions can be performed online. Therefore, the Club is not obliged to pay for the flight tickets.
- d) The Club did not pay the Agent Fees because the Player Contract does not contain the Player's explicit consent to the Agent Fees.
- e) The Claimants would have been responsible to inform the TBF about the termination of the Player Contract according to the TBF Directive for license, registration and transfers of contract players.
- f) Regarding the requested tax confirmations, the Club argues that it has already sent a *"document concerning the tax receipt dated February 25, 2015"*. Therefore, by requesting the tax receipt for season 2014-2015 the Claimants act in bad faith.
- g) The Club is not obliged to pay any interests.

4.4. The Club's Request for Relief

27. The Club requests the following:

"In the light of the explanations above and based on the arbitrator's decision, we kindly request for a judgment ordering that:

- a) The unjust and baseless claims of claimants (Player and both agent) are dismissed,*
- b) All cost and legal fees are charged to the claimants related to the hereby arbitration."*

5. Jurisdiction

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 (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 over the dispute results from the arbitration clause contained in Article 13 of the Player Contract which reads as follows:

“Any dispute between the Player, the Agents and the Club, arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties’ domicile. The language of the arbitration shall be English. The parties expressly waive recourse to the Swiss Federal law. The arbitrator shall decide the dispute ex aequo et bono.”

32. The Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
33. The Player Contract was also signed by the Agents. The Arbitrator finds therefore that the arbitration clause in Article 13 of the Player Contract applies also to claims between the Agents and the Club to the extent they relate to the Player Contract.
34. The Arbitrator considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording “[a]ny dispute between the Player, the Agents and the

Club, arising from or related to the present contract” in Article 13 of the Player Contract covers the present dispute. In addition, neither party objected to the jurisdiction of BAT.

35. The Parties also signed the TBF Contract which contains the following clause

“8. The Club and the player, before all is ease, agree to subordinate themselves to the arbitration foreseen by the TBF in case of monetary and/or conceptual conflict or breach of this contract between the interpretation or execution of what is provided in this documents.”

36. On the cover page of the TBF Contract, the following provision can be found:

“..an[d] in case of monetary and[/]or conceptual conflict or breach of this contract will be analysed by Legal Council of TBF and be decided by the Board of Directors of TBF.”

37. Neither Party has referred to these dispute resolution provisions in the TBF Contract but they have accepted the jurisdiction of the BAT without any reservation and proceeded on the merits of the case.

38. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Claimants’ claims.

6. Other Procedural Matters

39. The time limit for the Respondent to file its Answer expired on 17 September 2015. The Claimants received the Answer only on 18 September 2015 and raised the question whether it was filed late. The Answer was received by the BAT Secretariat on 17 September 2015 as verified by the Arbitrator. The Answer has therefore been filed in time.

40. Upon receipt of the Answer, the Claimants filed an unsolicited “Complement to the Request for Arbitration” on 21 September 2015. That submission was forwarded to the Club for comments by no later than 29 October 2015. The Club commented on the substance of the Claimants’ submission on 28 October 2015 and did not raise any

procedural objections. The Arbitrator finds that both parties had equal opportunity to express their views and takes both additional submissions into consideration.

7. Applicable Law – *ex aequo et bono*

41. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the Parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the Parties may authorize the Arbitrators to decide “*en équité*” instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

“the Parties may authorize the arbitral tribunal to decide ex aequo et bono”.

42. 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.”

43. In Article 13 of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to him *ex aequo et bono*.
44. The concept of *équité* (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l’arbitrage of 1969¹ (Concordat),² under which Swiss courts have held that “arbitrage en *équité*” is fundamentally different from “arbitrage en droit”:

¹ That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic).

² KARRER, in: Basel commentary to the PILA, 3rd ed., Basel 2013, Art. 187 PILA N 290.

“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

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

“the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand”.⁴

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

8. Findings

8.1. The relevant agreement between the Parties

47. The Parties signed the Player Contract on 5 May 2014. On 30 August 2014, the Player and the Club then signed the TBF Contract. The Claimants argue that the TBF Contract “is not managing the contractual relations between the Player and the Club and is exclusively a formal document to satisfy the licensing regulations.” The main purpose of the TBF Contract is undisputed, namely to allow the TBF to supervise the contractual relationships between the players and the clubs playing in the TBF, which have been regulated in more detail in the Player Contract. However, the TBF Contract is not irrelevant when it comes to the determination of the rights and duties between the parties especially when there are inconsistencies between the two agreements.
48. The provisions of the Player Contract that are relevant in this case are simply mirrored in the TBF Contract. This concerns in particular the financial terms and the option of both parties to terminate the contractual relationship before the 2016-2017 season

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

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

(Article 12 of the Player Contract, corresponding to the Special Terms and Conditions of the TBL Contract). None of the Parties argues that any provision in the TBF Contract would prevail over the Player Contract. Hence, the Arbitrator bases his decision on the Player Contract.

8.2. Justified termination of the Player Contract by the Player

49. The Claimants submit that the Player terminated the Player Contract based on Article 3 (c) of the Player Contract because the Club had failed to pay her salary. There is no evidence of the Player's consent to delayed payment on record. The Club argues "that payments may not be deemed to have been delayed as delays up to 45-60 days are deemed normal in European basketball." However, the Club fails to support its argument by any evidence of a generally accepted practice of late payments in European basketball. The Arbitrator is not aware of such a practice either. To the contrary: most player contracts in professional basketball contain provisions allowing the players to terminate the employment early if the club fails to timely pay the salary which demonstrates that the payment dates are of essential importance.

50. The Player's termination right of Article 3 (c) of the Player Contract reads as follows:

"If the Club is more than thirty (30) working days late in the payment of any monthly salary payment, the Player will have the right to request rescinding the present contract unilaterally by serving a written notice to the Club, as parallel to the relevant Turkish Basketball Federation regulations governing late payment cases, specifically for the Turkish Basketball Federation mono-type contract, which is signed between the Player and the Club due to the licensing regulations of the Turkish Basketball Federation.

In case of the scheduled payments not being made within the next fifteen (15) working days after such a written notice is received by the Club, the Player will have the right, anytime and till the execution of the full payment, to unilaterally rescind the present contract, with serving a final termination notice, while the Club remains obligated to pay all economic amounts stipulated in this contract. The Club also accepts that the Turkish Basketball Federation mono-type contract, which is signed between the Player and the Club due to the licensing regulations of the Turkish Basketball Federation, will also be accepted as terminated by the termination of this present contract."

51. The evidence submitted by the Parties indicates that all three requirements for an early termination of the Player Contract were met: (1) On 14 April 2015, the Player notified the Club of the payment delay; (2) the Respondent did not pay the outstanding salaries within 15 days upon the Player's notice; (3) by letter of 27 May 2015, the Player notified the Club of her decision to "rescind" the Player Contract.
52. On the date of the Player's first notice (i.e. 14 April 2015), the salaries for 15 December 2014, 14 January 2015 and 15 February 2015 were overdue by more than 30 working days while the salary due on 15 March 2015 was overdue by less than 30 working days. However, that does not affect the validity of the notice and the subsequent termination because the Player would have been entitled to "rescind" the Player already upon one single payment delay.
53. On 5 May 2015, the Club sent an email to Agent 1 by which it expressed its view that "(...) we think that it will be better to separate ways now" because the Player's performance did not reach the expected level. The Club also suggested that the Player might continue playing in the 2nd league team or be loaned out to another club. None of the Parties argues that this letter constituted a termination notice by the Club.
54. The Arbitrator therefore finds that the Player Contract shall be deemed having ended on 27 May 2015. The Club's partial salary payment of 29 May 2015 of EUR 50,000 was made after the termination and did not reverse the otherwise valid termination of the Player Contract.

8.3. Consequences of the termination of the Player Contract

55. The Claimants request
- (a) outstanding salaries for the season 2014-2015;
 - (b) bonus concerning the season 2014-2015;
 - (c) flight fee;

- (d) unpaid salaries for the remaining term of the Player Contract;
- (e) outstanding Agent Fees for the season 2014-2015;
- (f) unpaid Agent Fees for the seasons 2015-2016 and 2016-2017;
- (g) late payment penalty for late Agent Fees;
- (h) penalty fee for late submission of the letter of clearance;
- (i) delivery of tax receipts;
- (j) interest.

8.3.1. Outstanding salaries for the season 2014-2015

- 56. The Player's salary claim must be calculated based on the finding that the Player Contract was unilaterally terminated on 27 May 2015 which means that the Player was entitled to the salary payments due until that date.
- 57. From the total annual salary due until 27 May 2015 (i.e. EUR 250,000.00), the payments made by the Club must be deducted. The Player alleges that the amount of EUR 50,000.00 is still outstanding. The Club confirmed that it only paid EUR 200,000.00. The Arbitrator finds therefore that the Claimant is entitled to the outstanding salary for the season 2014-2015 in the amount of EUR 50,000.00.

8.3.2. Bonus 2014-2015

- 58. The Player claims an unpaid bonus for the season 2014-2015 in the amount of EUR 5,000.00. Article 3 (b) of the Player Contract provides for a net bonus of EUR 5,000.00 for *"FIBA Euro League Women Reaching the final-4"*.

59. As a matter of fact, the Club's team reached the semifinals in the FIBA EuroLeague Women 2014-2015. Accordingly, the requirements for the payment of a bonus for the season 2014-2015 are undisputedly met. The Arbitrator therefore finds that the Player is entitled to the bonus for reaching the semifinals of the FIBA EuroLeague Women 2014-2015 in the amount of EUR 5,000.00.

8.3.3. Flight tickets

60. The Player argues that the Club made two payments of EUR 25,000.00 each to the Player's Turkish bank account on 29 May 2015, i.e. at a time when the Player had already left the country. As the Turkish bank was not accepting any order by email or fax the Player was forced to travel to Istanbul to withdraw her funds and to close her Turkish bank account. The Player spent EUR 615.74 for a flight ticket because the Club ignored the Player's instructions of 27 May 2015 to make any further payments to a Spanish bank. The Club argues that it was not obliged to wire the salaries to a bank account outside of Turkey. Furthermore, it would have been possible for the Player to check and manage the bank account online.

61. Article 3 (f) of the Player Contract reads as follows:

"The Club will provide the Player three (3) round-trip Economy Class flight tickets per season from the city of Player's choice in Spain to Istanbul, Turkey, for the use of the Player or any person chosen by the Player. The Club will be responsible for a total luggage weight up to 40 kg, two times (to arrive once and to leave once) per season. The Club will also pay any transportation expense (train, bus, ship, etc.) if necessary for the Player to travel to the city of departure airports and provide the transportation between the airport and her residence in Istanbul Turkey."

62. Article 3 (a), last sentence, of the Player Contract reads as follows:

"The Club will wire all amounts to the bank of its choice in Turkey."

63. Article 3 (f) of the Player Contract limits the number of flights to three round trip tickets between Spain and Istanbul per season. The Player's flight from Dakar on or before 26 June 2015 is not covered by that provision. The Arbitrator also finds that the Club, also after the termination of the Player Contract, was not obliged to wire any amounts to a bank account outside of Turkey and that it was up to the Player to make the necessary arrangements to get access to her account in Turkey. Hence, the question whether the Player had no other option but to come back to Turkey to withdraw the funds from her account can be left open.
64. The Arbitrator therefore finds that the Player is not entitled to the reimbursement of EUR 615.74.

8.3.4. Unpaid salaries for the season 2015-2016

65. Upon justified termination of the Player Contract by the Player, the Club *"remains obligated to pay all economic amounts stipulated in this contract"* (Article 3 (c) of the Player Contract) which means that the Parties agreed that the Club remained liable for the contractual payments also after the termination of the Player Contract.
66. According to the Player Contract, the Player was entitled to salaries for the season 2015-2016 in the amount of EUR 300,000.00 and for the season 2016-2017 in the amount of EUR 350,000.00. She terminated the Player Contract before the beginning of the season 2015-2016 and contracted with the Club Baloncesto Avenida with an agreed salary for the season 2015-2016 in the amount of EUR 100,000.00. The Player concedes that this amount shall principally be deducted from her claim for the payment of unpaid salaries for the season 2015-2016. However, with reference to Article 9 (b) of the Player Contract, the Player argues that her salary for the season 2015-2016 must not be deducted from her compensation claim.
67. According to generally accepted principles of the law of damages and also of labor law, which have consistently been followed by the BAT jurisprudence, any amounts which the Player earned or might earn by exercising reasonable care during the remaining

term of the Player Contract must be deducted. However, Article 9 (b) of the Player Contract restricts the application of this principle:

“b) Additionally, if the Club unilaterally rescinds the present contract without justification and if the Basketball Arbitral Tribunal finds the Club guilty of a termination without a just and valid cause, then the Club agrees that, to compensate the Player's career and psychological damage any amount earned by the Player subsequently with a new club during the same working period covered by this current agreement will be her own and exclusive benefit.”

68. This provision constitutes a contractual penalty burdening the Club if it has dismissed the Player without just and valid cause. The wording is clear and does not include a termination by the Player, even if the Club set the reasons which entitled the Player to rescind the Player Contract. The contractual penalty is justified if the Club terminates the Player Contract because then, the Player has no influence on the date of termination but may indeed face difficulties to find a new employment which may or may not be available at the time of termination. On the other hand, if the Club was late in paying the salaries, the Player could still decide whether and when to terminate the Player Contract which allowed her to switch to another club without significant interruption.
69. The Player Contract was terminated by the Player and not the Club. The Arbitrator excludes a direct or analogous application of Article 9 (b) of the Player Contract to the facts of this case and finds that the salary which the Player earned with Club Baloncesto Avenida amounting to EUR 100,000 must be deducted from the salary compensation to be paid by the Club. There is no indication that the Player earns or could earn more than this amount (especially also considering Claimants' pieces of evidence 19a) to 19h)). The Player is therefore entitled to the difference of the salary for the 2015-2016 season as agreed in the Player Contract (EUR 300,000) which results in an amount of EUR 200,000.

8.3.5. Unpaid salaries for the season 2016-2017

70. The Player Contract was agreed until the end of the season 2016-2017. However, according to Article 12, both parties had the option to terminate the agreement and

shorten the contractual term by one season by written notice on or before 30 March 2016:

"Both the Club and the Player are entitled to terminate this agreement, unilaterally and without paying any compensation for the term covering the 2016-17 season, by serving a written notice on or before March 30th, 2016 midnight Turkish time. In this case, all articles of this agreement governing the 2016-17 season will become null and void. Any notification after said date will be not valid unless a bilateral agreement is found between the Player and the Club, and such agreement validly confirmed by the Agents' signatures."

71. There is no such written notice by the Club on record. Also the Club's email of 5 May 2015 (see paras. 10 and 53 above) cannot be understood as a clear statement that the Club intended to terminate the Player Contract by the end of the season 2015-2016. The Arbitrator also finds that the justified termination of the Player Contract because of the Club's fault prohibits the latter from exercising the early termination option. The Club remains therefore obliged to compensate the Player for the loss of her salary also for the season 2016-2017. This compensation is however subject to deduction of any salary that the Player earned or which she could have earned from other sources.
72. The Player has not yet signed a contract for the season 2016-2017 and it is unknown today what future income should be deducted from her compensation as alternative income. The Player herself expects that she will improve her current income which will however still fall short by EUR 75,000 of the salary agreed with the Club for the 2016-2017 season. That is the difference she claims today.
73. The Arbitrator finds the Player's assumption reasonable and he has no indication that her income in the 2016-2017 would be substantially higher. It may even be lower which is a risk that the Player must bear herself because of the principle *ne eat iudex ultra petita partium*. The Arbitrator therefore accepts the Player's claim of a compensation of EUR 75,000 for the season 2016-2017.

8.3.6. Agent Fees for the season 2014-2015

74. The Agents submit that the Club did not pay any Agent Fees as agreed by Article 7 let. a of the Player Contract. Article 7 (a) of the Player Contract reads, inter alia, as follows:

“a) The Club agrees to pay the Agents an agency fee of twenty-five thousand (25,000) Euros net for the 2014-15 season, [...]

For 2014-15 season:

- 15 000 € be paid on November 15th, 2014 to Mr. Nicolas San Jose Garcia*
- 10. 000 € to be paid on November 15th, 2014 to Mr. Mural Kurdoglu 25,000 Euros total for 2014-15 season*

This agency fee is a fixed and freely agreed amount among the Club, the Player and the Agents. This agency fee is owed definitely upon the present contract becomes in force. Such agency fee could not be prorated in case of premature termination of the present contract by any reason, except in case of the execution of the termination option for the 2016-17 season by either party.”

75. The Club confirms that it never paid any Agent Fees to the Agents but it also submits it was not obliged to do so because the Player did not explicitly consent to such payments. The Arbitrator finds this argument unconvincing. The Player Contract does not contain any such condition; the Club was simply obliged to timely pay the agreed Agent Fees.
76. Thus, the Arbitrator finds that the Agents are entitled to Agent Fees for the season 2014-2015 which amount to EUR 15,000.00 for Agent 1 and EUR 10,000.00 for Agent 2.

8.3.7. Agent Fees for the season 2015-2016 and 2016-2017

77. The Agents also submit that the Club remains fully obliged to pay the Agent Fees for the seasons 2015-2016 and 2016-2017.
78. Article 7 (a) of the Player Contract reads, inter alia, as follows:

“The Club agrees to pay the Agents [...]

Such agency fee could not be prorated in case of premature termination of the present contract by any reason, except in case of the execution of the termination option for the 2016-17 season by either party.

For 2015-16 season:

- 18,000 Euros to be paid on November 15th, 2015 to Mr. Nicolas San Jose Garcia*
- 12.000 Euros to be paid on November 15th, 2015 to Mr. Murat Kurdoglu*
- 30,000 Euros total for 2015-16 season*

For 2016-17 season:

- 21,000 Euros to be paid on November 15th, 2016 to Mr. Nicolas San Jose Garcia*
- 14.000 Euros to be paid on November 15th, 2016 to Mr. Murat Kurdoglu*
- 35,000 Euros total for 2016-17 season.*

This contract is one of common interest and the Club 's obligation to pay the agency fee in full shall still survive in case of any premature termination of the present contract or any termination of the agent services to the Player."

79. The Arbitrator finds therefore, that the Club is obliged to pay the Agent Fees as agreed in Article 7 of the Player Contract for the season 2015-2016, i.e. EUR 30,000.
80. With regard to the season 2016-2017, the Club argues with reference to the clause "[such Agent Fees] could not be prorated in case of premature termination of the present contract by any reason, except in case of the execution of the termination option for the 2016-17 season by either party" that it is not obliged to pay the Agent Fees for season 2016-2017.
81. The Arbitrator finds that, similar to the compensation due to the Player, the Agents must also accept a deduction of the amount which they earned or could have earned following the termination of the Player Contract and which was related to the Player's transfer to another club. The new player contract with Club Baloncesto Avenida provides for an agent fee in the amount of EUR 10,000 for Agent 1. This amount has to be deducted from the Agent Fee payable by the Club to Agent 1 (EUR 18,000) which results in a remainder of EUR 8,000 for the season 2015-2016.
82. The new player contract with Club Baloncesto Avenida does not provide for an agent fee for Agent 2 at all and the Arbitrator has no other information about any alternative

income of Agent 2 in connection with the transfer of the Player to Avenida. He therefore finds that Agent 2 is entitled to the full Agent Fees in the amount of EUR 12,000.00 for the season 2015-2016.

83. Since the Player Contract was terminated by the Player due to late payment – and not upon exercising the termination option according to Article 12 of the Player Contract – the Arbitrator finds that the Club remains obliged to pay the Agent Fees for the season 2016-2017 as well.
84. The Player has not yet signed a contract for the season 2016-2017 and it is unknown today what she or the Agents will earn or receive in the future and what must be deducted from the Agent Fees as alternative income. Against this background the Arbitrator supports the Agents' claim of a reduced fee of EUR 5,000.00 for the season 2016-2017 (which corresponds to 14% of the initially owed Agent Fees in the amount of EUR 35,000.00). Thus, the Arbitrator finds that the Agents are entitled to Agent Fees for the season 2016-2017 of EUR 2,500.00 each.

8.3.8. Penalty for late payment of the Agent Fees

85. The Agents request a late penalty payment of EUR 25,000.00 pursuant to Article 7 (a) of the Player Contract which provides, inter alia:

"[F]or every day late on the payment of the agency fee, the Club agrees to pay automatically a penalty fee of fifty (50) Euros for each day late, over and above what the Agents should receive in agency fee. The final amount about penalty fee cannot exceed 100% of the agency fee."

86. Article 7 (a) of the Player Contract indicates the date on which the Agent Fees must be paid, namely on 15 November 2014. They have not been paid to date. According to BAT jurisprudence, the late payment penalty may be due from the agreed payment date until – at the latest – the date of the Request for Arbitration but it may not be excessive.

87. Whether a late payment penalty must be considered excessive depends on the circumstances (see, e.g. FAT 0036/09 Petrosean v Women Basketball Club Spartak St Petersburg and FAT 0100/10 Taylor v KK Crvena Zvezda) which may include
- (a) the amount of the penalty payment in comparison to the outstanding Agent Fees that are owed;
 - (b) any payment requests;
 - (c) the fact that the final amount of the penalty fee cannot exceed 100% of the agency fee; and
 - (d) the reasons why the Club refused payment.
88. In the case at hand, the payment date was explicitly agreed in the Player Contract and the amounts became due on 15 November 2014 without any further requirements. The Agents' only request on record dates from 13 July 2015. The requested amount of EUR 25,000 for both Agents does not exceed the sum of the initially owed Agency Fee. However, the Arbitrator finds the fact that payment delay doubled the Agency Fee although payment was requested only shortly before the initiation of this proceeding leads to a disproportionate result. Deciding *ex aequo et bono* and respecting the requested 50/50 splitting between the Agents, he reduces the late payment penalty for the season 2014-2015 to EUR 8,000 for each Agent.

8.3.9. Penalty for the late delivery of the letter of clearance

89. Undisputedly, the Spanish Basketball Federation requested the TBF to issue the Player's letter of clearance on 22 July 2015; such request was rejected. Eventually, the Player's transfer to Club Baloncesto Avenida was authorized on 6 August 2015 (which is more than 12 days of delay since the initial request).
90. The Claimants argue that the Club is responsible for the delay of the issuance of the Player's letter of clearance. The Club replies that it would have been up to the

Claimants (and not the Club) to inform the TBF about the termination of the Player Contract according to the TBF Directive for license, registration and transfers of contract players.

91. The Arbitrator disagrees with the Club for two reasons: First, there is no explicit notification duty of the Player stipulated in the TBF Contract, and the reference to the Registration, Licence and Transfer Instructions was made only to confirm the validity of the TBF Contract under the respective regulations. Second, Article 3 (c) of the Player Contract regulates the notification duty in clear words:

"Upon receipt of a request for the Player's Letter of Clearance, the Club must authorize the Turkish Basketball Federation to deliver the Letter of Clearance unconditionally within twenty-four (24) hours without charging a transfer fee. In case the Club does not authorize the Federation to deliver the Letter of Clearance within twenty-four (24) hours, it will pay a penalty fee of two hundred and fifty (250) Euros for each day not in compliance."

92. This confirms that it would have been the Club's obligation to authorize the TBF to issue the letter of clearance which was obviously not done. Non-compliance with this obligation results in a penalty of EUR 250 per day of delay. The delay did not cause any damages to the Player since the Letter of Clearance still arrived well before the start of the new season. However, it made it necessary for the Player to file another application with FIBA to obtain that Letter of Clearance. The Arbitrator finds therefore that the penalty of EUR 3,000 for the late delivery of the letter of clearance is justified.

8.3.10. The tax receipts

93. The Player argues that she is entitled to the tax receipts for the taxes paid on her behalf by the Respondent. The Club argues that it has already sent a *"document concerning the tax receipt dated February 25, 2015"*.
94. Article 3 a) of the Player Contract provides the following:

"THIRD:

a) The Player will receive from the Club, in the course of the 2014-15, 2015-16 and 2016-17 seasons, the guaranteed net amount of nine hundred thousand (900,000)

Euros in total. In other words, no taxes of any kind will be included in this amount and any Social Security which needs to be paid will be done so by the Club. The Club is obligated to pay a/1 taxes and under no circumstance shall the Player be obligated to pay any taxes on her salary. The Club shall provide the Player upon her request with the appropriate certificate of tax credit indicating that all required income tax due in Club's nation, state or providence and city on all salary and bonus sums have been paid and showing the amount of tax that have been paid on the Player's behalf by the Club.

95. The Club's confirmation letter of 25 February 2015 does not meet the agreed requirements. The Club remains obliged to issue the requested official tax certificates for the entire amount which must be paid according to this Award, with the minimum information as set out in Article 3 of the Player Contract, indicating all required income tax due in the Club's nation, state or providence and city on all salary and bonus sums have been paid and showing the amount of tax that have been paid on the Player's behalf by the Club. For the avoidance of misunderstanding, the Arbitrator reminds the Club that "tax" includes all kinds of public duties that have to be paid by the Club based on the amounts that are owed to the Player (e.g. taxes at source, social security, health insurance, unemployment duties).

8.3.11. Interest

96. The Player has claimed interest at a rate of 5% per annum on the various amounts awarded. The Player Contract and the TBF Contract do not stipulate the obligation to pay interest on overdue amounts. According to standing BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. This is a generally accepted principle which is embodied in most legal systems. However, it is also generally accepted that the obligee has to request payment of interest from the obligor if not agreed in the underlying agreement in advance.
97. It appears from the case file that the Player never requested the Club pay any interest. From the documents on record, the Player requested payment of interest only in her Request for Arbitration. The Arbitrator, deciding *ex aequo et bono*, finds therefore that the starting date for the calculation of the default interest shall be the day of receipt of

the Request for Arbitration by the BAT Secretariat which is 10 August 2015 while he accepts the requested interest rate of 5% which is in line with standing BAT jurisprudence.

98. The Arbitrator agrees with the Player that interest shall be awarded not only on the salaries but also on the bonus. The Arbitrator therefore finds that the Respondent shall pay the Player interest on the sum of EUR 50,000.00 (outstanding salaries for season 2014-2015) and on the sum of EUR 5,000.00 (bonus) at a rate of 5% per annum since 10 August 2015.

8.3.12. Summary of the financial consequences of the termination of the Player Contract

99. The Player shall be entitled to
- a) salaries for the season 2014-2015 in the amount of EUR 50,000 and a bonus of EUR 5,000 plus interest of 5% on both amounts since 10 August 2015;
 - b) compensation for the loss of salaries for the season 2015-2016 in the amount of EUR 200,000 and for the season 2016-2017 in the amount of EUR 75,000; and
 - c) a penalty for the late delivery of the letter of clearance in the amount of EUR 3,000,
- totalling EUR 333,000.
100. Agent 1 shall be entitled to
- a) Agent Fees of EUR 15,000 and a late payment penalty of EUR 8,000 for the season 2014-2015;

- b) Agent Fees of EUR 8,000 for the season 2015-2016; and
 - c) Agent Fees of EUR 2,500 for the season 2016-2017,
- totalling EUR 33,500.

101. Agent 2 shall be entitled to

- a) Agent Fees of EUR 10,000 and a late payment penalty of EUR 8,000 for the season 2014-2015;
 - b) Agent Fees of EUR 12,000 for the season 2015-2016; and
 - c) Agent Fees of EUR 2,500 for the season 2016-2017,
- totalling EUR 32,500.

9. Costs

102. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

103. On 20 February 2016 – 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 “[t]he fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions

raised – the BAT President determined the arbitration costs in the present matter to be EUR 10,250.00.

104. Considering Article 8 (a) of the Player Contract (*“The failure by the Club to comply with the clauses in this contract may result in the election of the Player or the Agents to take legal action against the Club in order to receive the full compensations and bonuses stipulated in the contract. The Club understands that it will be responsible for any and all legal or arbitral costs, which may be necessary should the Player or her representatives have to obtain the assistance of an attorney or counsel.”*), the Arbitrator finds it fair that 90% of the fees and costs of the arbitration be borne by the Club and 10% by the Claimants. The Arbitrator finds that this outcome is also in line with the outcome of this case, i.e. that the Claimants prevailed on approximately 90% of their claims (Article 17.3. of the BAT Rules).
105. Given that the Advance on Costs of EUR 13,957.30 was paid by the Parties as set forth in para. 20 *supra*, in application of Articles 17.3 of the BAT Rules the Arbitrator decides as follows:
- a) Respondent shall bear EUR 9,225.00 (90% of the arbitration costs) and Claimant shall bear EUR 1,025.00 (10% of the arbitration costs);
 - b) BAT shall reimburse the remainder of the advance of costs, in the amount of EUR 3,707.39, to the Claimants;
 - c) Respondent shall pay EUR 2,267.61 to the Claimants
106. The Arbitrator finds that, for the same reasons as explained in para. 104 above, the Respondent shall also bear 90% of the Claimants’ reasonable legal fees and expenses. Respondent objected to Claimants’ account of costs (totalling EUR 13,500, i.e. 9,500 in legal fees and 4,000 for the non-reimbursable handling fee) for being excessive and not detailed. Considering the circumstances of this case, the Arbitrator decides that Respondent shall pay jointly to Claimants the amount of EUR 9,000 for

their legal fees and expenses. This amount does not exceed the maximum set forth in Article 17.4 of the BAT Rules for disputes of this value.

10. AWARD

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

- 1. Fenerbahce Spor Kulübü is ordered to pay to Ms. Astou Barro Ndour Gueye the net amount of EUR 333,000.00 net, plus interest of 5% p.a. on the amount of EUR 55,000.00 since 10 August 2015.**
- 2. Fenerbahce Spor Kulübü is ordered to pay to Mr. Nicolas San Jose Garcia the amount of EUR 33,500.00 net.**
- 3. Fenerbahce Spor Kulübü is ordered to pay to Mr. Murat Kurdoglu the amount of EUR 32,500.00 net.**
- 4. Fenerbahce Spor Kulübü is ordered to provide to Ms. Astou Barro Ndour Gueye the confirmations for all taxes and other public duties paid on all amounts paid or payable to her for the seasons 2014-2015, 2015-2016 and 2016-2017.**
- 5. Fenerbahce Spor Kulübü is ordered to pay jointly to Ms. Astou Barro Ndour Gueye, Mr. Nicolas San Jose Garcia and Mr. Murat Kurdoglu the amount of EUR 2,267.61 as a reimbursement of the advance on arbitration costs.**
- 6. Fenerbahce Spor Kulübü is ordered to pay jointly to Ms. Astou Barro Ndour Gueye, Mr. Nicolas San Jose Garcia and Mr. Murat Kurdoglu the amount of EUR 9,000.00 as a contribution to their legal fees and expenses.**
- 7. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 2 March 2016

Stephan Netzle
(Arbitrator)