

**ARBITRAL AWARD**

(BAT 1516/20)

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Clifford J. Hendel**

in the arbitration proceedings between

**Ms. Marica Gajic**

- Claimant 1-

**Mr. Lluís Túnez García**

- Claimant 2-

both represented by Mr. Sergiu Gherdan, attorney at law,  
Str. Vasile Stroescu nr. 8  
41054 Oradea City, Bihor county, Romania

vs.

**Hatay Büyükşehir Belediyespor Spor Kulubu**  
HBB Spor Kompleksi ve yaşam merkezi  
Altıncay mah. 119. Sk. No. 11, Antakya Hatay, Turkey

- Respondent -

## **1. The Parties**

### **1.1 The Claimants**

1. Ms. Marica Gajic (“the Player” or “Claimant 1”) is a Bosnian professional basketball player.
2. Mr. Lluís Túnez García (“the Agent” or “Claimant 2”, and collectively with Claimant 1, “the Claimants”) is a Spanish FIBA licensed agent.

### **1.2 The Respondent**

3. Hatay Büyükşehir Belediyespor Spor Kulubu (“the Club”, and together with the Claimants, “the Parties”) is a professional basketball club competing in the Turkish professional women basketball league.

## **2. The Arbitrator**

4. On 30 April 2020, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Clifford J. Hendel as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 (the “BAT Rules”). None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

## **3. Facts and Proceedings**

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

5. The relevant facts and allegations presented in the Parties’ written submissions and evidence are summarised below. Additional facts and allegations may be set out, where

relevant, in connection with the legal discussion that follows.

6. Although the Arbitrator has considered all the facts, allegations and evidence submitted by the Parties in the present proceedings, he refers in this Award only to those necessary to explain its reasoning.

### 3.1.1 The Agreements

7. On 10 May 2018, the Player, the Agent, and the Club entered into an agreement, executed in the English language, whereby the latter engaged the Player for the 2018/19 season (the “First Season Agreement”).<sup>1</sup>
8. On 25 April 2019, the Parties entered into a second agreement, also executed in the English language, whereby the Club engaged the Player for the 2019/20 season (the “Second Season Agreement”, and together with the First Season Agreement, the “Agreements”).<sup>2</sup>
9. Both Agreements are virtually identical.
10. According to Article First of the Agreements:

*“Marica Gajic is obligated to provide her services as a professional basketball Player to the Club during the 2018/20 season [2019/20 season in the Second Season Agreement], taking part exclusively in all competitions and practices with the team that competes in Turkish Top Women League, Cup and Euroleague/Eurocup [...]”.*

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<sup>1</sup> Exhibit A1 attached to the Request for Arbitration (“RfA”).

<sup>2</sup> Exhibit A2 attached to the RfA.

11. With regard to the Player's salary, Article Third of the Agreements provides:

*"As payment for her services, the Club will pay to the Player the net amounts stated in Manifesto A, attached here as a reference.*

*These amounts will be considered as net of all taxes, social (employer and employee) charges, statutory, visa, license, development fee, insurance and other costs and Club shall be responsible for the payment of all applicable taxes and social fees on monies paid to the Player under this agreement.*

*The Club is obligated to pay all taxes and under no circumstances shall the Player be obligated to pay any taxes or her salary. The Club shall provide to the Player with the appropriate certificate of tax indicating that all required income tax due in Club's nation, state or province 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."*

12. Manifesto A, Article First, of the First Season Agreement provides for the following Player's salary for the 2018/19 season:

*"The Club will pay and give to the Player the amounts and services detailed below as payment for her services as a basketball Player explained in this contract and will be made in Euro net (€) free of wire transfers to a bank account provided by the Player:*

*FIRST. – 2018/19 SEASON: 110.000 EURO Net | One Hundred and Ten Thousand Euro Net, for the period from joining the team in the 2018/19 season until the day after the last official game played by the team in the season, irrespectively of the date.*

*This amount will be paid in the following manner:*

*13.750 € (Euros) net, September the 16th, 2018 or within 5 days of arrival*

*13.750 € (Euros) net, October the 16th, 2018*

*13.750 € (Euros) net, November the 16th, 2018*

*13.750 € (Euros) net, December the 16th, 2018*

*13.750 € (Euros) net, January the 16th, 2019*

*13.750 € (Euros) net, February the 16th, 2019*

*13.750 € (Euros) net, March the 16th, 2019*

*13.750 € (Euros) net, April the 16th, 2019"*

13. Manifesto A, Article First, of the Second Season Agreement provides for the Player's salary for the 2019/20 season as follows:

*"The Club will pay and give to the Player the amounts and services detailed below as payment for her services as a basketball Player explained in this contract and will be made in Euro net (€) free of wire transfers to a bank account provided by the Player:*

*FIRST. – 2019/20 SEASON: 110.000 EURO Net | One Hundred and Ten Thousand Euro Net, for the period from joining the team in the 2019/20 season until the day after the last official game played by the team in the season, irrespectively of the date.*

*This amount will be paid in the following manner:*

*13.750 € (Euros) net, September the 16th, 2019 or within 5 days of arrival*

*13.750 € (Euros) net, October the 16th, 2019*

*13.750 € (Euros) net, November the 16th, 2019*

*13.750 € (Euros) net, December the 16th, 2019*

*13.750 € (Euros) net, January the 16th, 2020*

*13.750 € (Euros) net, February the 16th, 2020*

*13.750 € (Euros) net, March the 16th, 2020*

*13.750 € (Euros) net, April the 16th, 2020"*

14. Further, Manifesto A, Article Third, of the Agreements provides:

*"The Club will give to the Player, free of any cost, THREE round trip economy tickets in each season which will include 2 paid (23kg or more each) bags each, from an airport of her choice in Bosnia to the closest airport to the Club's home, and back.*

*In case that the Player has to fly from Turkey to Belgium [sic] or to another country in order to obtain or extend any kind of visa, that flight won't count as one of the three round trip tickets that the Player is entitled to receive from the Club."*

15. According to Article Fourth of the Agreements:

*"The Club agrees that this Agreement is an unconditionally guaranteed contractual*

*Agreement and that Player's salary, bonuses and services received as well as the Agent Fees are fully guaranteed, due and payable, including but not limited to in the event of Player's injury, illness, and/or lack of skill.*

*The Club agrees that this Agreement is a no-cut guaranteed agreement, and that the Club will not have the right to suspend or release the Player in the event that the Player does not exhibit sufficient skill or competitive ability, or in the event that an injury or illness shall befall the Player unless otherwise stated in this Agreement.*

*During the term of this agreement, the Club may not sell, assign, or transfer this contract to any other team without the consent of the Player and her Agent. The Player and her Agent may withhold consent for any reason."*

16. Article Fifth of the Agreements provides:

*"If the Club is more than twenty (20) days late in the payment of any of the amounts detailed in this contract or in the payment of the Agent's fee, the Player may choose to refrain from participating in Team practice sessions and/or games until the total amount owed to Player or Agent is remitted in full to the Player or her Agent.*

*If the Player chooses to take any of these actions, there will be no sanction levied against her and the Club cannot consider this action as a breach of the agreements set forth in this contract.*

*In addition, if the Club is in total more than thirty (30) days late in the payment of any of the amounts stipulated in this Agreement, the Player will have the right, any time after these 30 days and till the execution of the full payment, to unilaterally rescind the present contract, with serving a final termination e-mail to the Club (erdaloktay\_3@hotmail.com) through her Agent, while the Club will remain automatically obligated to pay to the Player and to the Agent all the economic amounts and services stipulated in the initial full length of this contract, which will become automatically accelerated and due in the exact moment that the final termination will be sent. [...]"*

17. With regard to the Agent's fees, Article Fourteenth of the Agreements provides:

*"Club agrees to pay to the Agent the following guaranteed Agent fee for their services in contracting the Player and elaboration of the contract, net of taxes and wire fees (the "Agent Fee")*

*5.500 € (Euro) \*, will be paid through bank transfer, free of any wire fee, with deadline October the 16<sup>th</sup>, 2018 [October the 16<sup>th</sup>, 2019 in the Second Season Agreement] to a bank account provided by Agent ("fee 1a")*

*5.500 € (Euro) \*, will be paid through bank transfer, free of any wire fee, with deadline November the 16<sup>th</sup>, 2018 [November the 16<sup>th</sup>, 2019 in the Second Season Agreement] to*

*a bank account provided by Agent (“fee 1b”)*

*It is agreed that the role of the Agent is to bring the Player and the Club together and to prepare this contract and for this, the Agent is entitled to the full fee. The payment of the full fee is not subject to the actual length of the agreement. In addition, the Club shall not have the right to restructure or in any way alter terms of payments to the Agent in the event of matters including, but not limited to, economic hardship, demotion to lower league, skill, injury, illness and death of the Player and/or the Agent, and acts of God.*

*\* If the club will not have a valid VAT code (specifically VIES code) at the date in which the amount representing agency fee is due, to such amount will be added the applicable rate of VAT at the date of issuing the invoice.*

*If the Agent fee is not paid once that the deadline set in this contract has arrived, the Club will pay 10 € to the Agent for every extra day after each mentioned deadline.”*

18. Finally, in Article Nineteenth of the Second Season Agreement the Club acknowledges it owes the Player and the Agent certain amounts corresponding to their salaries and fees, respectively, for the 2018/19 season:

*“In the date of signing this contract, the Club has a debt towards the player of 43.250 € net (\*), has to provide to the Player with the paid taxes official document for this amount and also has not paid to the agent the agency fees corresponding to the 2018/19 season.*

*(\*) 6.750 € (Feb 16) + 13.750 € (Mar 16) + 13.750 € (Apr 16) + 1.250 € bonus Fenerbahce + 1.250 € bonus Galatasaray + 6.500 € (3rd place regular season). [...]”*

### **3.1.2 Factual background of the dispute**

19. Between the months of August and December 2019, the Agent maintained informal communications via WhatsApp with the Club’s President whereby he requested the payment of the amounts due to Claimants for the 2018/19 and the 2019/20 seasons.<sup>3</sup>

20. On 13 December 2019, the Agent addressed a warning letter via email to the Club

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<sup>3</sup> Exhibits C3.0, C3.1, C3.2 and C3.3 attached to the RfA.

requesting the payment of the amounts due to Claimants:<sup>4</sup>

*“Apart from what Serhat [Club’s President] and me have been speaking during these days (which I still need an update about the “mayor conversation” and how club will solve the current problems), I want to send you a formal notice in order to clarify, if needed, the current situation regarding on one side players Hind Ben Abdelkader, Marica Gajic and myself and on the other side the club.*

*As you both know, in date of today, December 13, 2019, the club still owes a big amount to player Hind Ben Abdelkader corresponding to the 18/19 season and in addition the payment that had to be made in November 16, 2019 has not been made.*

*Therefore, if we would take exclusively the November 16, 2019 payment into an account, the Club would be already 27 days late today.*

*With player Marica Gajic, the situation is exactly the same and exclusively about the November 16, 2019 payment, it is already 27 days late.*

[...]

*So to sum up, consider this e-mail as a reminder that in current non-payment situation, none of the players have any obligation to practice or play for the club (so if they decide not to do it, they are in their right, even if no “communication” had been sent to the club - as I am doing now) and that in 4 days is arriving the “more than 30 days late” in case of the players while at the same time we are giving “grace time” because legally both contracts could have been already terminated by the fact that the amounts already owed to me have also not been paid.*

*So I appreciate if, on one side, you avoid creating any problem to the players for using their rights and on the other side I will highly appreciate if on Monday the debts can/will become 0 with all of us, and send us the proof of transfers, so that season can continue in a normal way and not in the way in which I am sure that none of us would want it to continue.”*

21. There is no evidence on the record of any reply from the Club or any payments made to the Claimants.
22. On 19 December 2019, the Agent sent a further letter via email to the Club by means of which he terminated, on behalf of the Player and himself as Agent, the Second Season

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<sup>4</sup> Ibid.



# BASKETBALL ARBITRAL TRIBUNAL

## Agreement:<sup>5</sup>

*"Following the written notice that I already sent you on December 13, 2019, I'm sending you this e-mail in order to officially terminate the contract that was signed in April 25, 2019 between your club, player Marica Gajic and myself, being that termination effective immediately.*

*As you know well, some of the conditions in that contract were:*

- 1) Pay the amount of 13.750 € to the player in date November 16, 2019 (33 days ago), which HAS NOT BEEN PAID.*
- 2) Pay the amount of 13.750 € to the player in date December 16, 2019 (3 days ago), which HAS NOT BEEN PAID.*
- 3) Pay the debt to the player corresponding to the 2018/19 season, which was supposed to be 43.250 €. Club paid only 17.250 € of such amount and therefore in date of today 26.000 €, HAVE NOT BEEN PAID.*
- 4) Pay the amount of 5.500 € as 50% of the agency fee in October 16, 2019 (64 days ago), which HAS NOT BEEN PAID*
- 5) Pay the amount of 5.500 € as 50% of the agency fee in November 16, 2019 (33 days ago), which HAS NOT BEEN PAID.*

*[...]*

*At this point, we consider that it is not acceptable anymore that the Club owes her a big amount from last season, it is not acceptable neither that nor the December 16 payment but specially the November 16 payment has been made and it is also not acceptable that no agency fees have been paid.*

*As you know, we already have vast prior experience in "trusting the club", including trusting you to re-sign with the club for the 2019/20 season with the promise that during the summer all debts would be paid and that this season there would be no problems.*

*At this point, despite warning the club about the right of the players to terminate the contract in case of their payment not being made, despite the club being warned that such termination will eventually be performed in the case the players will not be paid, the current result that we have at this point is no action from the club apart from verbal promises thrown with several successive payment dates which were not respected insofar and after so many times we heard that "this will be paid in X date or in Y date" and when dates X and Y, the*

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<sup>5</sup> Exhibit A4 attached to the RfA.

*payments were never made, we can't trust anymore that the situation will be solved.*

*In addition, the factor of the rest of players sitting out of practice last week (also because of no payments), the club being banned at this point from registration of players because of debts with former players, one of the other foreigners in the last couple days having also terminated her contract because of no payment and overall the uncertain situation that the Player is currently exposed in the Club, makes us not to have any other option than sending you this termination.*

*About the consequences [sic] of the termination, you already know them and they are explained in the contract."*

23. There is no evidence on the record of any reply from the Club.
24. On 10 January 2020, once the Player had returned to Bosnia and Herzegovina, she was examined by a local doctor and diagnosed an injury in her right ankle ("*Minor bone edema of the cuneiform bone.*").<sup>6</sup>
25. On 14 February 2020, the Player was examined by the doctor for a second time and recommended to "*continue treatment for 3-4 weeks*".<sup>7</sup>

### **3.2 The Proceedings before the BAT**

26. On 29 April 2020, the Claimants filed a Request for Arbitration dated the same day, in accordance with the BAT Rules. The non-reimbursable handling fee in the amount of EUR 3,000 was received in the BAT bank account on 27 and 28 February 2020.<sup>8</sup>

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<sup>6</sup> See Exhibit A6 attached to the RfA.

<sup>7</sup> See Exhibit A7 attached to the RfA.

<sup>8</sup> A previous version of this RfA had already been filed on 3 February 2020. However, the RfA at that time included claims of two additional players which were not in close connection with the claims of the present Claimants. Accordingly, these claims were deconsolidated and thus the RfA was filed again on 29 April 2020, including the claims of Ms. Gajic and Mr. Túnez García only.

27. On 4 May 2020, the BAT informed the Parties that Mr. Clifford J. Hendel had been appointed as the Arbitrator in this matter, invited the Respondent to file its Answer by 25 May 2020, and fixed the advance on costs to be paid by the Parties as follows:

*“Claimant 1 (Ms Marica Gajic) EUR 3,500.00  
Claimant 2 (Mr. Lluís Túnex García) EUR 1,500.00  
Respondent (Hatay Büyükşehir Belediyesi Spor Kulübü) EUR 5,000.00”*

28. On 5 and 12 May 2020, the Claimants paid their part of the foregoing advance on costs.
29. On 26 May 2020, the BAT informed the Parties that the Respondent had failed to submit its Answer to the Request for Arbitration and to pay its share of the advance on costs. The Respondent was given a final opportunity until 2 June 2020 to pay its share of the advance on costs and to file an Answer to the Request for Arbitration. The Respondent was informed that, in accordance with Article 14.2 of the BAT Rules, if the Respondent fails to submit an Answer the Arbitrator may nevertheless proceed with the arbitration and deliver an award.
30. On 27 May 2020, Claimant 2 paid EUR 1,500 of Respondent’s share of the advance on costs.
31. On 5 June 2020, the BAT informed the Parties that Respondent had failed to submit its Answer to the Request for Arbitration and to pay its share of the advance on cost, and invited the Claimants to substitute for the remaining Respondent’s share of EUR 3,500 by 16 June 2020.
32. On 8 June 2020, Claimant 2 paid the remaining EUR 3,500 of Respondent’s share of the advance on costs.
33. On 15 June 2020, the Arbitrator noted that the archive containing Exhibit A6 to the Request for Arbitration (Player’s MRI) could not be opened properly and invited the

Claimants to send it in another format by 22 June 2020. The Arbitrator informed the Parties that upon expiry of such time-limit the exchange of submissions would be closed in accordance with Article 12.1 of the BAT Rules. The Claimants were granted a deadline until 22 June 2020 to set out how much of the applicable maximum contribution to costs should be awarded to them and why, and to include a detailed account of their costs, including any supporting documentation in relation thereto.

34. On 22 June 2020, the Claimants' counsel informed the BAT that the Parties had entered into settlement negotiations. The Claimants submitted Exhibit A6 in a new format and filed their costs submission *ad cautelam*.
35. On 6 July 2020, the Claimants' counsel informed the BAT that the negotiations between the Parties had failed.
36. On 7 July 2020, the BAT confirmed that the proceedings were closed and that the final award would be rendered in due course.

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

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

37. In their Request for Arbitration, the Claimants requested the following relief:

*"The Claimants requests that the Respondent to be obliged to:*

*a) Pay towards Marica Gajic the amount of 108.735,92 EUR net representing unpaid monetary rights (26.000 EUR net in relation to the 2018/2019 season; 82.500 EUR net in relation to the 2019/2020 season and 235,92 EUR - equivalent of 1.565,70 TRY - representing flight and luggage costs) alongside default interest of 5%:*

*a.1.) For the amount of 26.000 EUR from the date of 30th of April 2019 until the date in which the amount would be fully paid (interest until the date of lodging this Request for Arbitration in amount of 993,70 EUR)*

a.2.) *For the amount of 82.500 EUR from the date of 19th of December 2019 until the date in which the amount would be fully paid (interest until the date of lodging this Request for Arbitration in amount of 519,16 EUR)*

a.3.) *For the amount of 235,92 EUR (equivalent of 1.565,70 TRY) from the date of 19th of December 2019 until the date in which the amount would be fully paid (interest until the date of lodging this Request for Arbitration in amount of 1,49 EUR)*

b) *Provide a tax certificate issued by the competent Turkish fiscal authority which shall state all the applicable taxes and also that all the applicable taxes had been paid on the Claimant's #1 (Marica Gajic) behalf's by the club, in accordance to the amounts the club has paid towards such Claimants, for any fiscal year in which payments to the Claimants had been made*

c) *Pay towards Lluís Tunez Garcia the amount of 22.000 EUR towards [sic], representing unpaid agency fees alongside default interest of 5% from the date of 3rd of February 2020 (date of lodging this arbitration request) until the date in which the amount would be fully paid*

d) *Pay towards Lluís Tunez Garcia the amount of 5.000 EUR, representing late penalty fees*

e) *Pay all arbitration proceeding costs of the Claimants*

f) *Pay all legal fees and expenses of accrued from these arbitration proceedings of the Claimants*

*Total amount in dispute: 137.250,27 EUR\**

#### **4.2 Respondent's Position**

38. The Respondent has not participated in this proceeding but has been duly notified of its existence and has received copies of all submission of the Claimants and all communications of the BAT.

#### **5. The jurisdiction of the BAT**

39. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.

40. 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).
41. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
42. The dispute is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA<sup>9</sup>.
43. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under the Preamble of the Agreements, which 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.*

*The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex pacta sunt servanda, based on the provisions of this contract without the power to moderate them or to decline their enforcement. The BAT award shall be final and binding. The parties agree that, by the effects of this contract, any award issued by BAT is considered recognized according to Turkish, Bosnian and Spanish Law and will be executed without the possibility to invoke any aspect regarding the award. In addition, the parties agree to waive any right to the action in annulment in the Swiss courts against such BAT award.”*

44. The Agreements are in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

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<sup>9</sup> Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

45. 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) PILA).
46. The jurisdiction of BAT over the Claimants' claims arises from the Agreements. The wording "[a]ny dispute arising from or related to the present contract [...]" clearly covers the present dispute.
47. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimants' claims.

## **6. Other Procedural Issues**

48. Article 14.2 of the BAT Rules specifies that "*the Arbitrator may [...] proceed with the arbitration and deliver an award*" if "*the Respondent fails to submit an Answer.*" The Arbitrator's authority to proceed with the arbitration in case of default by one of the parties is in accordance with Swiss arbitration law and the practice of the BAT.<sup>10</sup> However, the Arbitrator must make every effort to allow the defaulting party to assert its rights. This requirement is met in the present case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules. It was also given sufficient opportunity to respond to Claimants' Request for Arbitration. Respondent, however, chose not to participate in this Arbitration.
49. None of the parties requested a hearing. In accordance with Article 13.1 of the BAT Rules, the Arbitrator will decide the Claimants' claims based on the written submissions and the evidence on record.

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<sup>10</sup> See *ex multis* BAT cases 0001/07; 0018/08; 0093/09; 0170/11.

## 7. Discussion

### 7.1 Applicable Law – *ex aequo et bono*

50. 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”.*

51. Under the heading “ Law Applicable to the Merits”, Article 15 of the BAT Rules reads as follows:

*“15.1 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.*

*15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead.”*

52. The arbitration clause in the Preamble of the Agreements provides that “[t]he arbitrator shall decide the dispute *ex pacta sunt servanda*, based on the provisions of this contract without the power to moderate them or to decline their enforcement”. The arbitration clause further provides that the dispute “shall be resolved in accordance with the BAT Arbitration Rules”.

53. While the Agreements do not expressly provide that the Arbitrator shall decide the

dispute *ex aequo et bono*, the reference to the BAT Rules -including Article 15.1- in the arbitration clause, and the fact that the Parties have not chosen any other particular national or international law, can be regarded as an implicit agreement of the Parties to have their dispute decided *ex aequo et bono*. Additionally, the principle of *pacta sunt servanda*, which is expressly mentioned in the arbitration clause, is consistent with justice and equity.

54. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.
55. 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*<sup>11</sup> (Concordat),<sup>12</sup> 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.”*<sup>13</sup>

56. 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*”.
57. In light of the foregoing considerations, the Arbitrator makes the findings below.

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<sup>11</sup> 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).

<sup>12</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

<sup>13</sup> JdT 1981 III, p. 93 (free translation).

## **7.2 Findings**

### **7.2.1 Player's unpaid salaries for the 2018/19 season**

58. Claimant 1 requests the amount of EUR 26,000, net of taxes, for her unpaid salaries for the 2018/19 season.
59. As set out above (Section 3.1.1), in Article Nineteenth of the Second Season Agreement the Club acknowledges that, at the time of the signing of such agreement, it owes the Player EUR 43,250 net for her outstanding 2018/19 season salaries.<sup>14</sup>
60. Claimant 1 states that she has received from the Club part of the EUR 43,250 due. She claims the outstanding amount of EUR 26,000.<sup>15</sup>
61. The Respondent not having participated in the proceeding, it is not disputed -and it appears indisputable- that the requested amount is due and owing by the Club.
62. Therefore, the Club shall pay the Player's outstanding salaries for the 2018/19 season in the amount of EUR 26,000 net of taxes.

### **7.2.2 Player's unpaid salaries for the 2019/20 season**

63. Claimant 1 further requests the amount of EUR 82.500, net of taxes, for her unpaid salaries for the 2019/20 season.
64. The Player claims that by mid December 2019, the Respondent had failed to pay

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<sup>14</sup> Exhibit A2 attached to the RfA.

<sup>15</sup> RfA, para 5.

EUR 27,500 for her 2019/20 season salaries, corresponding to her monthly salaries due, respectively, on 16 November and 16 December 2019 (EUR 13,750 each).

65. On 19 December 2019, the Player exercised her right to terminate the contract under Article Fifth of the Second Season Agreement.<sup>16</sup> As set out above (Section 3.1.1), Article Fifth gives the Player the right to unilaterally terminate the Agreement in case the Club is more than 30 days late in the payment of any of the amounts due under the Agreement, with the effect that all the amounts due to the Player under the Agreement “*will become automatically accelerated and due in the exact moment that the final termination*” is sent.
66. The Respondent has not participated in the proceeding thus it has not disputed -and it appears indisputable- that it failed to pay the amount of EUR 27,500, corresponding to the Player’s salaries due on 16 November and 16 December 2019.
67. Respondent’s breach of its payment obligations under the Second Season Agreement entitled the Player to unilaterally terminate the Agreement and to claim her full outstanding salary for the 2019/20 season.
68. As the Claimants rightly acknowledge, the BAT jurisprudence establishes unequivocally the concept of mitigation of damages. However, under the particular circumstances of the case, the Arbitrator considers that the Player’s recovery need not be reduced by reasons of mitigation. The evidence on the record shows that shortly after the termination of her contract, on 10 January 2020, the Player was diagnosed an injury in her right ankle.<sup>17</sup> On 14 February 2020, after a second examination by the doctor, the Player was recommended to “*continue treatment for 3-4 weeks*”.<sup>18</sup> Within this timeframe, the Covid-

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<sup>16</sup> Exhibit A4 attached to the RfA.

<sup>17</sup> Exhibit A6 attached to the RfA.

<sup>18</sup> See Exhibit A7 attached to the RfA.

19 pandemic was officially declared. Under such circumstances it is fair to conclude that the Player's chances to find a new contract for the remainder 2019/20 season were minimal.

69. For these reasons, the Arbitrator finds that Claimant 1 shall be awarded EUR 82,500, net of taxes, for her unpaid salaries for the 2019/20 season.

### 7.2.3 Player's unpaid travel costs

70. Claimant 1 further requests the reimbursement of the travel costs (flight ticket and luggage) incurred in her return from Turkey to Bosnia after the termination of her contract, in the amount of EUR 235.92 (equivalent to TRY 1,565.71).<sup>19</sup>

71. As set out above (see section 3.1.1), Article Third of Manifesto A of the Second Season Agreement provides that "[t]he Club will give to the Player, free of any cost, *THREE round trip economy tickets in each season which will include 2 paid (23kg or more each) bags each, from an airport of her choice in Bosnia to the closest airport to the Club's home, and back.*"<sup>20</sup>

72. According to Claimant 1 "*at the moment of the termination, the Respondent ha[d] provided only a one-way ticket (Bosnia to Turkey) at the start of the contract*".<sup>21</sup> There is no evidence on the record of the Club having reimbursed to the Player the cost of her return ticket to Bosnia.

73. Therefore, the Arbitrator finds it fair and reasonable to award EUR 235.92 to the Player

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<sup>19</sup> Exhibit A5 attached to the RfA.

<sup>20</sup> Exhibit A2 attached to the RfA.

<sup>21</sup> RfA, para 17.

for her non-reimbursed travel costs.

#### **7.2.4 Tax certificate**

74. Lastly, Claimant 1 requests that the Club provides *“a tax certificate issued by the competent Turkish fiscal authority which shall state all the applicable taxes and also that all the applicable taxes had been paid on the Claimant’s #1 behalf’s by the club, in accordance to the amounts the club has paid towards such Claimant, for any fiscal year in which payments to the Claimants had been made.”*<sup>22</sup>
75. As set out above (Section 3.1.1), under Article Third, third paragraph, of both agreements *“[t]he Club shall provide to the Player with the appropriate certificate of tax indicating that all required income tax due in Club’s nation, state or province 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”*.
76. Therefore, the Club shall provide Claimant 1 with a tax certificate issued by the competent Turkish fiscal authority stating all the applicable taxes that the Club has paid on her behalf for any applicable fiscal year.

#### **7.2.5 Unpaid Agent’s fees**

77. Claimant 2 requests the amount of EUR 22,000 for his unpaid fees (EUR 11,000 for the 2018/19 season and EUR 11,000 for the 2019/20 season).
78. As set out above (Section 3.1.1) in Article Nineteenth of the Second Season Agreement the Club acknowledges that it *“has not paid to the agent the agency fees corresponding*

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<sup>22</sup> RfA, para 18.

to the 2018/19 season”.

79. The Respondent not having participated in the proceeding, it is not disputed -and it appears indisputable- that the requested amount is due and owing by the Club. Moreover, the Club’s President acknowledged such debt in his WhatsApp conversations with the Agent.<sup>23</sup>
80. Therefore, the Club shall pay the Agent’s outstanding fees for the 2018/19 and the 2019/20 seasons in the amount of EUR 22,000.

#### **7.2.6 Late Payment Penalty in relation to Agent’s fees**

81. Claimant 2 further requests “late penalty fees” in the amount of EUR 5.000.
82. As set out above (Section 3.1.1), Article Fourteenth of the Agreements, *in fine*, provides that “[i]f the Agent fee is not paid once that the deadline set in this contract has arrived, the Club will pay 10 € to the Agent for every extra day after each mentioned deadline.”
83. Having established that the Agent’s fees for the 2018/19 and the 2019/20 seasons had not been paid by the Club, the late payment penalty provided in the last paragraph of Article Fourteenth of the Agreements is applicable.
84. The Arbitrator finds that the amount of the penalty claimed by the Agent is proportionate in light of the BAT jurisprudence, taking into consideration that:
- a) Claimant 2 has chosen, “*in the light of the ex aequo et bono principle governing the contractual relationship between the parties and this arbitration as well*”, to

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<sup>23</sup> Exhibits C3.0, C3.1, C3.2 and C3.3 attached to the RfA.

voluntarily reduce (as a “gesture”) his penalty claim to the amount of EUR 5000, approximately 45% of the maximum contractual penalty allowed under Article Fourteenth, calculated from the day the fees were due until the date the Request for Arbitration was initially filed (i.e. EUR 11.080).<sup>24</sup>

- b) The amounts claimed for penalties do not exceed the amounts awarded as Agent’s fees.

85. For these reasons, the Arbitrator finds that Claimant 2 shall be awarded EUR 5,000 as late penalty payment for his agreed fees under the Agreements.

#### **7.2.7 Interest**

86. Claimant 1 requests “*default interest at a rate of 5% per annum*” on the amounts claimed, according to the following schedule:

- On the amount of EUR 26,000, Claimant 1 requests interest at the 5% rate starting from 30 April 2019 (the date where “*all and any monetary amounts owed by the club from the 2018/2019 season would had been due*”).
- On the amount of EUR 82,500, Claimant 1 requests interest at the 5% rate starting from 19 December 2019 (the date of the termination of the Second Season Agreement).
- On the amount of EUR 235,92, Claimant 1 requests interest at the 5% rate starting from 19 December 2019 (the date of the termination of the Second

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<sup>24</sup> See calculation in Exhibit B2 attached to the RfA.

Season Agreement).

87. Claimant 2 requests “*default interest at a rate of 5% per annum*” on some of the amounts claimed, according to the following schedule:
- On the amount of EUR 22,000, Claimant 2 requests interest at the 5% rate starting from 3 February 2020 (the date the Request for Arbitration was initially filed).
88. Not having participated in the proceeding, the Respondent has not disputed the Claimants’ request for interest.
89. The Agreements do not provide for interest. However, in accordance with consistent BAT jurisprudence, and deciding *ex aequo et bono*, the Arbitrator considers it fair and reasonable to award interest at the rate of 5% per annum, until complete payment, as follows:
- On the amount of EUR 26,000, Claimant 1 shall be awarded interest at the 5% rate starting from 30 April 2019 (as requested by Claimant 1).
  - On the amount of EUR 82,500, Claimant 1 shall be awarded interest at the 5% rate starting from 19 December 2019 (as requested by Claimant 1).
  - On the amount of EUR 235,92, Claimant 1 shall be awarded interest at the 5% rate starting from 19 December 2019 (as requested by Claimant 1).
  - On the amount of EUR 22,000, Claimant 2 shall be awarded interest at the 5% rate starting from 4 February 2020 (the day after the date the Request for Arbitration was initially filed).

## 8. Costs

90. In respect of determining the arbitration costs, Article 17.2 of the BAT Rules provides as follows:

*“At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4). [...]”*

91. On 5 August 2020, the BAT Vice-President determined the arbitration costs in the present matter to be EUR 6,150.

92. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 of the BAT Rules provides as follows:

*“The award shall determine which party shall bear the arbitration costs and in which proportion. [...] When deciding on the arbitration costs [...], the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties.”*

93. Considering that the Claimants were the prevailing party in this arbitration, it is consistent with the provisions of the BAT Rules that costs of the arbitration be borne by the Respondent alone. Given that the Claimants paid the entire Advance on Costs in the amount of EUR 10,000 (of which EUR 3,850 will be reimbursed to the Claimants by the BAT), Respondent shall reimburse EUR 6,150 jointly to the Claimants.

94. In relation to the Parties' legal fees and expenses, Article 17.3 of the BAT Rules provides that

*“as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding [...] on the amount of any contribution to the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties.”*

95. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses (in this case, Claimant 1 up to EUR 10,000 and Claimant 2 up to EUR 5,000).
96. The Claimants claim legal fees in the total amount of EUR 9,000 (Claimant 1 claims EUR 6,000 and Claimant 2 claims EUR 3,000). They also claim for the expense of the non-reimbursable handling fee (EUR 3,000).
97. Taking into account that the Claimants have succeeded in full with their prayers, that they were represented by the same attorney, that the Respondent has not intervened in the proceeding and thus the Claimants' only had to make one substantive submission on the merits of this case, the Arbitrator considers it fair and reasonable to award the amount of EUR 5,000 to Claimant 1 and EUR 2,500 to Claimant 2 in legal fees, as well as the payment of the non-reimbursable handling fee in the amount of EUR 3,000.
98. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:
- (i) The BAT shall reimburse EUR 3,850 to the Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the BAT Vice-President.
  - (ii) The Club shall pay EUR 6,150 jointly to the Claimants, being the difference between the costs advanced by them and the amount they are going to receive in reimbursement from the BAT.
  - (iii) The Club shall pay jointly to the Claimants EUR 7,500 representing the amount of their legal fees (of which EUR 5,000 correspond to Claimant 1 and EUR 2,500 correspond to Claimant 2), as well as EUR 3,000 for the non-reimbursable handling fee.

## **9. AWARD**

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

- 1. Hatay Buyuksehir Belediyespor Spor Kulubu shall pay Ms. Marica Gajic EUR 26,000, net of taxes, as compensation for unpaid salaries for the 2018/19 season, plus interest at 5% per annum on such amount, commencing on 30 April 2019, until complete payment.**
- 2. Hatay Buyuksehir Belediyespor Spor Kulubu shall pay Ms. Marica Gajic EUR 82,500, net of taxes, as compensation for unpaid salaries for the 2019/20 season, plus interest at 5% per annum on such amount, commencing on 19 December 2019, until complete payment.**
- 3. Hatay Buyuksehir Belediyespor Spor Kulubu shall pay Ms. Marica Gajic EUR 235,92, as reimbursement for her travel costs, plus interest at 5% per annum on such amount, commencing on 19 December 2019, until complete payment.**
- 4. Hatay Buyuksehir Belediyespor Spor Kulubu shall provide Ms. Marica Gajic with a tax certificate issued by the competent Turkish fiscal authority stating all the applicable taxes that the Club has paid on her behalf for any applicable fiscal year.**
- 5. Hatay Buyuksehir Belediyespor Spor Kulubu shall pay Mr. Lluís Túnez García EUR 22,000, as compensation for his unpaid fees, plus interest at 5% per annum on such amount, commencing on 4 February 2020, until complete payment.**
- 6. Hatay Buyuksehir Belediyespor Spor Kulubu shall pay Mr. Lluís Túnez García EUR 5,000, as late penalty payment.**
- 7. The costs of this arbitration until the present Award, which were determined by the President of the BAT to be in the amount of EUR 6,150 shall be borne by Hatay Buyuksehir Belediyespor Spor Kulubu alone. Accordingly, Hatay Buyuksehir Belediyespor Spor Kulubu shall pay EUR 6,150 jointly to Ms. Marica Gajic and Mr. Lluís Túnez García.**



**BASKETBALL**  
ARBITRAL TRIBUNAL

- 8. Hatay Buyuksehir Belediyespor Spor Kulubu shall pay EUR 10,500 jointly to Ms. Marica Gajic and Mr. Lluís Túnéz García, as a contribution to their legal fees and expenses (including the non-reimbursable handling fee).**
- 9. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 5 August 2020

Clifford J. Hendel  
(Arbitrator)