

ARBITRAL AWARD

(BAT 1713/21 and BAT 1718/21)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Sports International Group (President and CEO Mr. Boris Lelchitski)
267 Kentlands Blvd., Suite 105, Gaithersburg, MD 20878, USA

- First Claimant -

represented by Mr. Jonathan A. Jordan, attorney-at-law

vs.

Galatasaray Spor Kulübü Derneği
Hasnun Galip Sok 7-11, Beyoglu, Istanbul, Turkey

- First Respondent -

represented by Messrs. Süleyman Anil Özgüç and Özgün Barış Erbay, attorneys-at-law

and

Galatasaray Spor Kulübü Derneği
Hasnun Galip Sok 7-11, Beyoglu, Istanbul, Turkey

- Second Claimant / Counter-Respondent -

represented by Messrs. Süleyman Anil Özgüç and Özgün Barış Erbay

vs.

Ms. Angel Lajuane McCoughtry

- Second Respondent / Counter-Claimant -

and

Mr. Boris Lelchitski

- Third Respondent -

and

Mr. Mustafa Boskurt

- Forth Respondent -

Second, Third and Fourth Respondent represented by
Mr. Jonathan Jordan, attorney-at-law

1. The Parties

1. Sports International Group is an American basketball agency and the Claimant in the proceeding BAT 1713/21 (hereinafter referred to as the "Agency").
2. Galatasaray Spor Kulübü Dernegi is a professional basketball club competing in the Turkish professional basketball league. It is the Respondent in the proceeding BAT 1713/21 and the Claimant and Counter-Respondent in the proceeding BAT 1718/21 (hereinafter referred to as the "Club").
3. Ms. Angel Lajuane McCoughtry is an American professional basketball player and the first of the three Respondents in the proceeding BAT 1718/21. In the same proceeding, the Player lodged a counterclaim against the Club (hereinafter referred to as the "Player").
4. Mr. Boris Lechitski is a basketball agent. Mr. Boris Lechitski is the president and CEO of the Agency and the second of the three Respondents in the proceeding BAT 1718/21 (hereinafter referred to as "Agent 1").
5. Mr. Mustafa Boskurt is a basketball agent and the third of the three Respondents in the proceeding BAT 1718/21 (hereinafter referred to as "Agent 2").
6. Agent 1 and Agent 2 are also collectively referred to as the "Agents".

2. The Arbitrator

7. On 28 and 29 September 2021, respectively, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (hereinafter referred to as the "BAT"), appointed Mr. Stephan Netze as arbitrator in both procedures (hereinafter referred to as the

"Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter referred to as 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

8. On 5 January 2021, the Player and the Club entered into an agreement whereby the latter engaged the Player for the remainder of the 2020/2021 season (hereinafter referred to as the "Employment Contract"). Upon signing the Employment Contract, the Player was represented by the Agents, who also signed the Employment Contract.
9. On 9 January 2021, the Player arrived in Turkey and on 11 January 2021, she passed the medical examination.
10. Article 3 Employment Contract provides for the following payments:

"3 A. Salary Payments:

*Total net value of the base salary in this Agreement for 2020-2021 season shall be **80.000,00 USD**. [...]*

*The Club agrees to pay the Player the following guaranteed compensation net of all taxes, fees, and other charges (the '**Guaranteed Compensation**') during the Term according to the following schedule:*

For 2020/201 Season

<i>After Medical Exam</i>	<i>13.250</i>	<i>USD</i>
<i>FEBRUARY 25TH, 2021</i>	<i>13.250</i>	<i>USD</i>
<i>MARCH 25TH, 2021</i>	<i>27.000</i>	<i>USD</i>
<i>APRIL 25TH, 2021</i>	<i>26.500</i>	<i>USD</i>
TOTAL FOR 2020-2021 SEASON	80.000	USD

[...]

3. C. REPRESENTATIVE'S FEE

The Club agrees to pay the Agent a guaranteed agent fee for the Term as set forth below (which is incorporated herein by this reference). The Agent fee payment is only contingent on Player's arrival and passing the medical exam. The Agent fee shall be paid as follows:

\$ 4,000 USD net on or before January 25, 2021;

\$ 4,000 USD net on or before March 25, 2021;

Sports International Group Inc.

[bank details of the Agency]"

11. Articles 5 and 12 Employment Contract provide the following duties and responsibilities, in case the Player gets injured:

"5) DUTIES AND RESPONSIBILITIES

During the term of this Agreement:

A. *[...]*

B. *If Player suffers an injury due to basketball related activity and Player has a reasonable ground to not to agree with the Club doctor's diagnosis, the Player will be allowed to select a physician of their [sic] choice to render a second medical opinion concerning the Player's injury. In the event that the Club disagrees with the second medical opinion, a third reviewing physician who is mutually acceptable by the Club and the Player and the Agent shall render a medical opinion concerning Player's injury and such opinion shall not be final and binding.*

C. *In the event that the Player sustains an incapacitating injury or illness during the term of this Agreement, as long as injury and illness are incurred due to agonistic activity made by the Player for the Club that renders the Player incapable of performing in some or all of the remaining games, the Club agrees to meet all payment obligations as though the Player had performed in all games. [...]"*

"12) GUARANTEE CONTRACT

The Club agrees that this Agreement is an unconditionally guaranteed contractual Agreement and that Player's salary and bonuses and the Agent Fee are fully guaranteed, due and payable, including but not limited to in the event of Player's injury, illness, and/or lack of skill unless otherwise stated in this Agreement.

The Club agrees that this Agreement is a no-cut guaranteed agreement, and that the Club

shall 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."

12. During the term of the Employment Contract, the Player must comply with the following obligations, among others:

"8) PLAYER'S LIABILITIES

8.1 The Player shall comply with Club's reasonable internal rules and regulations attached herein as an integral part of this Agreement and accepts a disciplinary action and/or penalty of fines provided in same that will be reasonable, propositional and proved with irrefutable proof. The Player also agrees to act in line with the Code of Ethics.

For the effective realization of the above stipulation, the Player should abide by the following guidelines, which are set forth by the Club:

8.1.1

To train and practice appropriately in order to stay in the best possible physical condition, with the objective being to obtain the best possible performance as a basketball player.

[...]

8.1.3

The Player shall attend all matches-exhibitions and practices organized by the Club during the Term of this Agreement, except in case of injury or illness, or other justifiable reason, which prevents such participation, after receiving permission in written from the applicable the Club's representative [sic].

[...]

8.1.5

The Player shall obey all the rules of the Turkish Basketball League and the Turkish league management and all the rules of the European association (FIBA, and all other competition/leagues applicable rules).

[...]

8.1.11

If the Player leaves Turkey during the Term without providing prior written notification to the Club, she will be subject to a fine as set forth in the rules contemplated in Section 8.1 above."

13. Article 9.6 Employment Contract provides for the following possibility to early terminate the Employment Contract:

"9) PREMATURE ENDING OF THE AGREEMENT

In the following situations, the Club is entitled to terminate this Agreement immediately with just cause, without any further obligations or without paying any unearned compensation to the Player:

[...]

9.6

If for any reason the Player repeatedly violates clauses other than stated above which materially affect the purposes of this Agreement. Two written warnings to the Player and the Agent must be submitted before the Club may contend a material breach has occurred. However, if the action of the Player extraordinarily damages the Club's or its Coach's reputation and authority, then such action shall be deemed material. This is only intended to cover actions by Player that are completely outside the boundaries of normal behaviour and common decency, not, for example routine differences of opinion with the coach or frustrated comments to the media.

In this case, the Club may terminate the Agreement immediately with cause but only after first giving the Player the opportunity to explain his actions to the Club management."

14. On 12 January 2021, the Player played the first game for the Club. Between 18 and 22 January 2021, the Player was fielded in four more games for the Club.
15. The Club allowed the Player to take a break from 27 January 2021 to 7 February 2021 to fly to the United States as was provided for in the Employment Contract. During this time, the Player felt discomfort in her _____, which she had _____ already in August 2018 and which was subsequently surgically repaired.
16. On 2 February 2021, the Player went to see Dr Michael Miao, an _____ surgeon in Las Vegas, who performed a MRI examination and recommended the Player the following:

"Immediate cessation of competitive basketball play and strict rest from running and cutting

manuevers. Initiation of physical therapy for _____ rehabilitation and _____ 1 per week for 3 weeks to assist with inflammation, lubricate and assist with _____ health. We will reassess her _____ condition in the next 3 weeks to evaluate her potential for return to basketball in Turkey.

If, at three weeks, her _____ has not demonstrated readiness to return to full basketball, then I would recommend proceeding with a _____ surgery."

17. On 5 February 2021, the Club received a copy of this medical report.
18. On 7 February 2021, Agent 1 and the Player proposed to the Club to allow the Player to continue her rehabilitation in the United States for three weeks without receiving any salary during that period and asked for the Club's consent to an amendment of the Employment Contract. According to this proposal, the Club should only be entitled to terminate the Employment Contract with immediate effect if the Player does not return to Istanbul by 1 March 2021.
19. The next day, i.e. on 8 February 2021, the Club sent a counter-proposal to Agent 1 and the Player, according to which

"[t]he Club has the unconditional right to terminate the Employment Agreement until [2 March 2021] without any further obligations towards any of the Parties arising from the Employment Agreement ('Termination Option'). If the Club does not exercise the Termination Option by [2 March 2021], the Player shall arrive in Istanbul by no later than March 4, 2021 ('Arrival Date'). If the Player does not arrive in Istanbul on the Arrival Date, the Employment Agreement is automatically terminated with no further obligations of the Club towards any of the Parties. [...] the Player and the Agent hereby irrevocably renounce and forgive their whole receivables and claims that are due or will be due [...] arising out of or in connection with the Agreement."

20. Neither of the two proposed amendments to the Employment Agreement was ever signed.
21. On 15 February 2021, the Player underwent her first physical therapy in the United States.

22. On 17 February 2021, the Player posted pictures on Instagram, which showed that she was practicing on court with the basketball club Las Vegas Aces.
23. On 23 February 2021, Dr Michael Miao examined the Player again and issued the following medical report:

"At this juncture, her _____ has demonstrated modest improvements that are not sufficient for return to play at a competitive level. She is medically advised to defer basketball play or risk further injury that could have long term effects on her health.

Angel will continue to rest and participate in physical therapy. She will be reassessed for any further consideration for surgical intervention which, at this point in time, is on hold. The hope is that her progress will continue in such a time that she will be able to return to Turkey in the coming weeks."

24. On 23 and 24 February 2021, respectively, the Club sent warning letters to the Agents and informed them that the Player had breached the Employment Contract by consulting an American doctor without knowledge and permission of the Club, and by staying in the United States longer than agreed. The Club also summoned the Player to the team's trainings on 24 and 25 February 2021.
25. On 24 February 2021, the counsel of the Player, the Agency and the Agents informed the Club that

"[i]n accordance with medical experts, Ms. Angel McCoughtry will not be able to practice on February 25, 2021 or anytime soon. Ms. McCoughtry felt significant discomfort in her _____ from playing four (4) games in five (5) days in Turkey before her break to the United States. While in the United States, she decided it was necessary to have an MRI on the _____. [...] [Agent 2] has kept your Club informed over the phone throughout Ms. McCoughtry's recovery. We will be sending you a(n) updated medical report tomorrow, February 25, 2021 on Ms. McCoughtry's condition and timetable for her return".

26. On 25 February 2021, Agent 1 sent Dr Michael Miao's medical report of 23 February 2021 to the Club.

27. By letter dated 25 February 2021, the Club reminded the Player that she had missed the team activities for 18 days. In addition, the Club informed the Player that in case of failure to remedy the breach of contract without further delay, the Club would have no other option but to terminate the Employment Contract.
28. On 26 February 2021, the Club terminated the Employment Contract. In response, the counsel of the Player, the Agency and the Agents informed the Club that it still owed the Player the remaining salary of USD 66,750.00 and the agent fee of USD 8,000.00.
29. On the same day, the Club signed an employment agreement with Ms. Samantha Whitcomb as a replacement for the Player.
30. In a letter dated 27 February 2021, the Club stated, that "[r]egarding the Agent fee, we shall pay \$ 4,000 scheduled on January 25th, 2021 in due course". However, no agent fee has been paid to the Agency or the Agents, to date.
31. On 2 April 2021, the Player returned to Istanbul to collect her personal belongings which she had left in her apartment.
32. On 19 April 2021, the Player underwent her last physical therapy and was fully cleared to resume all basketball activities without restrictions thereafter.
33. On 27 May 2021, the counsel of the Player, the Agency and the Agents sent another letter to the Club requesting the outstanding agent fee.

3.2 The Proceedings before the BAT

34. On 25 August 2021, the Agency filed a Request for Arbitration in the proceeding BAT 1713/21 against the Club in accordance with the BAT Rules and duly paid the

non-reimbursable handling fee of EUR 1,459.63¹ received in the BAT bank account on 24 August 2021.

35. On 16 September 2021, the Club filed a Request for Arbitration in the proceeding BAT 1718/21 against the Player and the Agents in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 1,485.00² received in the BAT bank account on the same day.
36. On 28 September 2021, the BAT informed the Parties that Mr. Stephan Netzle had been appointed as the Arbitrator in the proceeding BAT 1718/21 and fixed the Advance on Costs to be paid by the Parties as follows:

<i>"Claimant (Galatasaray SK)</i>	<i>EUR 3,015.00 [...]</i>
<i>Respondent 1 (Ms McCoughtry)</i>	<i>EUR 1,000.00</i>
<i>Respondent 2 (Mr. Boris Lelchitski)</i>	<i>EUR 1,000.00</i>
<i>Respondent 3 (Mr. Mustafa Bozkurt)</i>	<i>EUR 1,000.00"</i>

37. On 30 September 2021, the BAT informed the Parties that Mr. Stephan Netzle had been appointed as the Arbitrator in the proceeding BAT 1713/21 and fixed the Advance on Costs to be paid by the Parties as follows:

<i>"Claimant (Sports International Group)</i>	<i>EUR 2,040.37 (including the remaining Handling Fee)</i>
<i>Respondent (Galatasaray)</i>	<i>EUR 2,000.00"</i>

¹ The applicable handling fee was EUR 1,500.00 pursuant to Article 17.1 of the BAT Rules. The outstanding amount of EUR 40.37 was added to the Advance on Costs of the Agency.

² The applicable handling fee was EUR 1,500.00 pursuant to Article 17.1 of the BAT Rules. The outstanding amount of EUR 15.00 was added to the Advance on Costs of the Club.

38. On the same day, the BAT Secretariat informed the Parties of the proceedings BAT 1713/21 and BAT 1718/21 that the Arbitrator was considering to consolidate these two proceedings and that a decision would be taken in due course.
39. On 4 October 2021, the Player's counsel informed the BAT Secretariat that the Player would file a counterclaim against the Club.
40. By letter dated 5 October 2021, the BAT Secretariat informed the Parties of the proceedings BAT 1713/21 and BAT 1718/21 that the time-limits for the payment of the Advance on Costs and for filing the Answer would be synchronized and invited the Parties to pay their respective shares of the Advance on Costs by no later than 11 October 2021 and the Respondents to submit an Answer by 21 October 2021.
41. On 7 October 2021, the Agency paid its share of the Advance on Costs in the proceeding BAT 1713/21 and the share of the Advance on Costs of the Player and the Agents in the proceeding BAT 1718/21. On the same day, the Club paid its share of the Advance on Costs in the proceeding BAT 1718/21.
42. On 20 October 2021, the Club submitted its Answer to the Request for Arbitration in the proceeding BAT 1713/21.
43. On 21 October 2021, the Player and the Agents submitted their Answer to the Request for Arbitration in the proceeding BAT 1718/21, including a counterclaim of the Player.
44. By letter dated 27 October 2021, the BAT Secretariat acknowledged receipt of the Agency's share of the Advance on Costs and that the Club had submitted its Answer to the Request for Arbitration in the proceeding BAT 1713/21. In the same letter, the BAT Secretariat acknowledged that the Club had failed to pay its share of the Advance

on Costs in the proceeding BAT 1713/21 and fixed a final deadline until 10 November 2021 for the Agency to substitute for Club's share of the Advance on Costs.

45. By letter dated 25 November 2021, the BAT Secretariat acknowledged receipt of the Club's share of the Advance on Costs paid by the Agency in the proceeding BAT 1713/21. In the same letter, the BAT Secretariat informed the Parties that the Agency is not itself a party to the Employment Contract, but only the Agents. For this reason, the Agency was invited to submit any proof of an assignment of the claims of the Agents to the Agency by no later than 2 December 2021.
46. On 2 December 2021, the Agency responded to the Procedural Order of 25 November 2021.
47. By e-mail dated 6 December 2021, the BAT Secretariat invited the Club to comment on the Agency's reply by no later than 13 December 2021.
48. On 9 December 2021, the Club commented to the Agency's reply to the Procedural Order of 25 November 2021.
49. On 15 December 2021, the BAT Secretariat informed the Parties of the proceedings BAT 1713/21 and BAT 1718/21 about the Arbitrator's decision to consolidate the two proceedings in accordance with Article 11.3 BAT Rules. In addition, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs in the proceeding BAT 1718/21. In the same letter, the BAT Secretariat informed the Parties that the Arbitrator had declared the exchange of submissions complete and that the final award would be rendered as soon as possible. Finally, the BAT Secretariat granted the Parties a deadline until 21 December 2021 to provide a detailed account of their costs.

50. On 20 December 2021, the counsel of the Player, the Agency and the Agents submitted the cost statement for legal services and disbursements.
51. On 21 December 2021, the BAT Secretariat informed the Parties that the Arbitrator had decided to re-open the proceeding considering the counterclaim contained in the Player's Answer, and invited the Player to pay a non-reimbursable handling fee for the counterclaim in the amount of EUR 3,000.00 by no later than 4 January 2022.
52. By letter dated 5 January 2022, the BAT Secretariat acknowledged receipt of the non-reimbursable handling fee for the counterclaim paid by the Player. In the same letter, the BAT Secretariat invited the Club to comment on the Player's counterclaim by no later than 19 January 2022.
53. On 17 January 2022, the Club requested a deadline extension of two days to submit its comments on the Player's counterclaim.
54. By e-mail dated 18 January 2022, the BAT Secretariat granted the deadline extension.
55. On 21 January 2022, the Club submitted its comments on the Player's counterclaim.
56. On 25 January 2022, the BAT Secretariat informed the Parties that the Arbitrator had declared the exchange of submissions complete and that the final award would be rendered as soon as possible. Finally, the BAT Secretariat granted the Parties a deadline until 1 February 2022 to provide a detailed account of their costs.
57. On 25 and 29 January 2022, respectively, the Parties submitted their cost statements for legal services and disbursements.

58. By letter of 17 February 2022, the BAT Secretariat informed the Parties that due to the complexity of the matter and the volume of the submissions, an additional Advance on Costs was requested to be paid as follows:

<i>Sports International Group (Agency)</i>	<i>EUR 200.00</i>
<i>Ms Angel Lajuane McCoughtry (Player)</i>	<i>EUR 400.00</i>
<i>Mr. Boris Lelchitski (Agent 1)</i>	<i>EUR 200.00</i>
<i>Mr. Mustafa Boskurt (Agent 2)</i>	<i>EUR 200.00</i>
<i>Galatasaray Spor Kulübü Derneği (Club)</i>	<i>EUR 1,000.00</i>

59. By letter of 21 February 2022, the BAT Secretariat acknowledged receipt of the additional Advance on Costs.

4. The Positions of the Parties

4.1 The Agency's position

60. In response to the Club's objection to the jurisdiction of the BAT because the Agency was not a party to the arbitration agreement in the Employment Contract, the Agency submits that the BAT is indeed competent to hear the present case and has standing to sue to claim the outstanding agent fee:
- (a) According to Article 3 C) Employment Contract, the agent fee shall be paid to the bank account of the Agency and not to the Agents as individuals. In the past, the Club has refused to allow the Agency to be a party of employment contracts in order to preserve the possibility to raise an objection of jurisdiction before the BAT. If the Agents would have been named as Claimants in the present

proceeding, the Club would, in turn, have argued that the Agents had assigned their rights to the Agency in Article 3 C) Employment Contract.

- (b) Furthermore, the Agents have previously signed an agreement that all agent fees paid by Turkish clubs shall be paid to the Agency directly and then distributed to the individual Agents. Moreover, the Club always paid all agent fees for transfers negotiated by the Agents directly to the Agency and not to the Agents. In addition, Agent 1 communicated with the Club through his e-mail address of the Agency and used the letterhead of the Agency. Moreover, Agent 1 signed the Power of Attorney on behalf of the Agency.
 - (c) The Club knows of course that Agent 1 is the President and the CEO of the Agency, which has negotiated over 40 contracts with the Club. Finally, Agent 1 is the sole owner of the Agency and employed by the latter.
61. Based on Article 12, the Employment Contract was guaranteed for injury. The Club acted negligently by fielding the Player in four games within five days despite the fact that it was well aware of her _____ injury. As the Club's termination of the Employment Contract was directly related to the Player's injury, the Club wrongfully terminated the Employment Contract.
62. By not paying the agent fee, the Club violated the Employment Contract before its termination, as the agent fee was only contingent of the Player's arrival in Istanbul and passing the medical examination. Therefore, the Club disregarded the fundamental legal principle of *pacta sunt servanda*.
63. In its Request for Arbitration, the Agency requests the following relief:

"[The Agency] requests an award to be rendered, per which [the Club] shall:

- *in principle, pay [the Agency]:*

- *An amount of eight thousand dollars (\$8,000) as indemnity for the Agent Fee owed; and*
- *Interest of five percent (5%) starting from January 26, 2021 and March 26, 2021 as of today totaling one hundred and ninety eight dollars and ninety one cents (\$198.91); and*
- *Interest of five percent (5%) starting from the date of filing the present Request for Arbitration until the date payment is received in full by [the Agency].*
- *in any event, reimburse [the Agency] all BAT expenses and procedure costs including:*
 - *Reimbursement of the BAT Handling Fee ex article 17.1 of the BAT Rules in the amount of one thousand five hundred Euro (€ 1.500); and*
 - *reimbursement of [the Agency]'s share of the advance in [sic] costs; and*
 - *in case [the Agency] would have to substitute for (part of) [the Club]'s share on the advance on costs, the reimbursement hereof; and*
 - *in any event, indemnify [the Agency] for incurred legal and advisory expenses up to an amount to be determined in the course of the BAT proceedings, at present estimated at five thousand Euro (€ 5.000).*

Total amount in dispute: \$8,198.91"

4.2 The Club's Position

64. The Agency has no standing to sue and the BAT is not competent to hear the present case. The Agency is not a signatory of the Employment Contract, but only the Agents. The Employment Contract does not stipulate any obligations or rights for the Agency. Based on Article 3 C) Employment Contract, the agent fee should be paid to the Agents and not to the Agency. That is also why the Club never mentioned the Agency in its notifications to the Player, which it sent to the Agents.
65. The Agency was also not a party of the drafts of the amendments to the Employment Contract. In addition, the Club addressed its claim in the proceeding BAT 1718/21 against the Agents and not against the Agency. Although invited by the Arbitrator, the Agency did not provide any evidence of a valid assignment of the claims of the Agents.

The submitted assignment is not valid as it does not contain a reference to the main legal relationship between the debtor and the creditor, the name of the debtor, the nominal amount of the debt, etc. In addition, an assignment of future debts is not valid.

66. According to Article 178 of the Swiss Act on Private International Law (hereinafter referred to as the "PILA"), an arbitration clause cannot be extended to non-signatories. Swiss legal literature and jurisprudence is rather restrictive in terms of extending an arbitration agreement to non-signatories. The BAT is therefore not competent to issue an award in favour of the Agency, which does not have the right to claim the agent fee.
67. In any event, the Club terminated the Employment Contract with just cause based on Article 9.6, since the Player violated Articles 5 B), 8.1.1, 8.1.3, 8.1.5 and 8.1.11 Employment Contract. In particular, she infringed the Employment Contract
- by staying in the United States (although she would have been able, from a medical point of view, to return to Istanbul),
 - by not participating in the team trainings,
 - by not informing the Club immediately about the pain in her _____,
 - by hiding her previous injury from the Club and afterwards using her injury as a pretext for not returning to Istanbul,
 - by undergoing a medical examination without any permission from the Club and
 - by not contacting the Club's doctor for medical examination.

68. The Club never put the Player's health at risk as argued by the Player. Only three months prior to her arrival in Turkey, the Player played an average of 25:06 minutes per game in the WNBA playoffs. In her first five games with the Club, the Player played an average of 21:52 minutes per game, which is considerably less than in the WNBA playoffs. The Player never complained about her playing time or her _____ problems. If she had serious concerns regarding her playing time, the Player should have insisted on inserting a corresponding clause into the Employment Contract. In addition, Dr Michael Miao is the medical doctor of the Player's previous club and, therefore, not objective and biased when he opined that the Player's _____ was _____ after playing four games within five days. The Player did not even complain about her _____ in the time between her last game (i.e. on 22 January 2021) and her departure to the United States (i.e. on 27 January 2021), but surprisingly only upon her arrival in the United States. This is not credible and the Club cannot be held liable for the Player's injury.
69. The Club offered the Player to stay in the United States for three weeks if she would (i) be ready to accept a reduction of her remuneration for that period, (ii) regularly update the Club regarding the rehabilitation, (iii) go through a medical examination upon her return in Istanbul and (iv) return by a certain date. However, the Player refused to sign the Club's proposal and did not cooperate to settle the matter. The Player did not intend to fulfil the Employment Contract. She even emptied her apartment in Istanbul before she left for her break on 27 January 2021.
70. The Club's termination of the Employment Contract was justified and fully in compliance with Article 9 Employment Contract. The Club sent two warning letters reminding the Player of her contractual duties as stipulated in Article 9.6 Employment Contract.

71. According to BAT jurisprudence, no further salary is owed in case of a justified termination of an employment contract by a club.³ This finding applies also in the present case regarding the Player's salary and, by analogy, also to the agent fee. Not only the Player, but also the Agents violated their ancillary duties under the Employment Contract. In particular, the Agents failed to provide the Club with the necessary information about the Player's health condition. In addition, they failed to cooperate with the Club to resolve the matter, after the Player's had departed to the United States. Therefore, the Club owes no agent fee to the Agents.
72. Should the Arbitrator find that the Agents are still entitled to a remuneration, the agent fee shall be calculated on a *pro rata* basis in accordance with the period of time until the termination of the Employment Contract.⁴ The payment schedule for the agent fee in Article 3 C) Employment Contract indicates that the agent fee was deemed to be a compensation for the services of the agents provided during the term of the Employment Contract and not only a signing fee.
73. The Club had huge expectations when it signed the Employment Contract. The Player's unexpected behaviour, which resulted in the justified termination of the Employment Contract, put the Club into a very difficult situation: Between 7 and 26 February 2021, the Player was not available in three important games. Furthermore, the Club had to find a replacement player at a time when it was almost impossible to find new players on the transfer market. In the end, the Club signed an employment agreement with Ms. Samantha Whitcomb as a replacement. This led to additional and unexpected payments such as salary payments, agency commissions and registration fees.

³ The Club refers in this context to BAT 0644/15, para. 32.

⁴ The Club refers in this context to BAT 0506/14, para. 50; BAT 0544/14, para. 109.

74. Based on well-established BAT jurisprudence, the Club is entitled to a "special indemnity" in case of a justified termination of the Employment Contract. By applying the principle of *ex aequo et bono*, it would be just and fair to award the Club a remuneration in the amount of USD 40,000.00.
75. In addition, according to established employment law principles, an employee must compensate an employer for all proven costs and damages, caused as direct consequences of his or her breach of the employment contract. Therefore, the Player shall be obliged to compensate the Club for the license fee of TRY 45,000.00, which was paid by the Club to the Turkish Basketball Federation for the registration of the replacement player.
76. The Agents are jointly and severally liable together with the Player for the Club's compensation.
77. In its Request for Arbitration of 16 September 2021 in the proceeding BAT 1718/21, the Club requests the following relief:

"The Club respectfully requests the BAT to order that:

(a) the Club had terminated the Player's Agreement dated 5 January 2021 with just cause;

(b) the Player and the Agents be held jointly and severally liable to compensate the Club as the Club had terminated the Player's Agreement dated 5 January 2021 with just cause;

(c) that the Club is entitled to receive a special indemnity in the amount of USD 40.000,00 (together with the interest at the rate of 5% per annum accruing as from 27 February 2021 until the effective payment);

(d) that the Player and the Agents are liable to compensate the Club's positive damages and therefore the Club is entitled to receive TRY 45.000,00 (together with the interest at the rate of 5% per annum accruing as from 2 March 2021 until the effective payment); and

(e) that the Club is entitled to its legal and other costs in bringing these proceedings, including the handling fee, attorney fees, details of which shall be provided to the BAT during the proceedings.

Total amount in dispute: USD 40.000,00 plus accrued interest of USD 1105,56 (from 27 February 2021 until the date of filing) and TRY 45.000,00 plus accrued interest of TRY 1225 (from 2 March 2021 until the date of filing)."

78. In its Answer of 20 October 2021 in the proceeding BAT 1713/21, the Club requests the following relief:

"The [Club] respectfully requests the BAT to order that:

i. the tribunal has no jurisdiction to hear this present case, since the arbitration agreement could not be extended to non-signatories.

In the case that this Tribunal upholds its jurisdiction, the [Club] primarily and respectfully requests the BAT to order that:

i. the [Agency] does not have the right to claim the agent fee in view of the principle of privity [sic] of contract.

OR ALTERNATIVELY:

ii. the [Agency] is not entitled to receive any agent fee, since the agreement was terminated by the [Club] with just cause.

In the unlikely event that this Tribunal decides that the [Agency] is entitled to claim the agent fee, the [Club] respectfully requests the BAT to order that the agent fee shall be calculated on a pro-rata basis by applying general considerations of justice and fairness.

In any event, the [Club] respectfully requests the BAT to order that the [Agency] shall cover the legal and other costs of the [Club] in the present proceedings."

79. In its comments to the Player's counterclaim of 21 January 2022, the Club requests the following relief:

"[O]n behalf of the Club, we herein request the BAT to dismiss the Player's counterclaim in its entirety."

4.3 The Player's Position

80. The Player submits that the Club agreed that she left Turkey to travel to the United States for a break. As she expected to return to Istanbul after the break, she left many

of her personal items in her apartment. After she had left Turkey, her _____ and she felt discomfort in her surgically repaired _____.

81. On 8 May 2021, the Player _____. That injury directly related to the Club's negligent management of her playing time and rest by committing her to play in four games in five days in January 2021. Her body overused _____ to protect _____ during the increased playing time for the Club.
82. The drafts of the amendment to the Employment Contract show that the Club and the Player agreed to let the Player recover in the United States until the beginning of March 2021. The negotiations fell apart because the Club wanted the right to terminate the Employment Contract immediately and without compensation, while the Player wanted to grant this right only after further three weeks of recovery.
83. The Player and the Agents regularly updated the Club on her health status. If anyone acted without good faith, it was the Club by terminating the Employment Contract without any justification.
84. The Player's obligations under Article 5 B) Employment Contract only concern injuries that are discovered in Turkey. However, the Player noticed the _____ only after she had left Turkey. The Club cannot seriously expect from the Player to take a 12-hours flight to Turkey for a medical examination by the Club's doctor while Dr Michael Miao explicitly recommended not to travel. If the Club truly wanted its doctor to examine the Player, it would have sent the doctor to the United States for medical examination or at least let him consult with Dr Michael Miao. However, the Club did not trust Dr Michael Miao.
85. It is not true that the Player was practicing in full health with the basketball club Las Vegas Aces. She was photographed doing light basketball training and acting as a passer and a stationary defender. After the photos surfaced on social media, she was

actually reprimanded by Dr Michael Miao for these activities. On the photos, there is clear proof of a _____ from the Player's most recent _____ injection.

86. The Club wrongfully terminated the guaranteed Employment Contract as this termination was directly linked to the Player's injury. The Club only paid the first instalment of the Player's salary in the amount of USD 13,250.00, which was due after passing the medical examination. Based on the principle of *pacta sunt servanda*, the Player is entitled to the remaining salary of USD 66,750.00.
87. The Club's claim for a "special indemnity" is unwarranted and unjustified. As the Employment Contract was only signed on 5 January 2021, the Club's argument, according to which it had planned the season around the Player, is not true. The Player was included in the squad only after more than 55% of the Turkish regular season had already been played. Furthermore, the Player did not walk away from the Club and she did not hide an injury before signing the Employment Contract. It was only mere coincidence that the injury was discovered while she was on a contractual break in the United States. For these reasons, the BAT cases quoted by the Club do not apply in the present matter.
88. Finally, the Club should not be entitled to a compensation for "positive damages" for registering a new player. The termination of the Employment Contract took place when the Club had just received the second medical report. The Club decided to terminate the Employment Contract and register a new player instead of awaiting the Player's full recovery. For this reason, the Club is responsible for the respective registration fee itself.
89. In its Answer dated 21 October 2021 in the proceeding BAT 1718/21, the Player requests the following relief:

"[The Player] requests an award to be rendered, per which [the Club] shall:

- *in principle, pay [the Player]:*

- *An amount of sixty-six thousand seven hundred and fifty dollars and zero cents (\$66,750.00) as indemnity for the remainder of her salary owed; and*
- *Reimbursement of return flight to Istanbul to collect her belongings of \$5,869.70; and*
- *Interest of five percent (5%) starting from the payment due dates until today totaling one thousand eight hundred and fifty-eight dollars and forty-nine cents (\$1,858.49); and*
- *Interest of five percent (5%) starting from the date of filing the present Request for Arbitration until the date payment is received in full by [the Club].*

- *in any event, reimburse [the Player, the Agent 1 and the Agent 2] all BAT expenses and procedure costs including:*

- *reimbursement of [the Player's, the Agent 1's and the Agent 2's] share of the advance in [sic] costs; and*
- *in case [the Player, the Agent 1 and the Agent 2] would have to substitute for (part of) [their] share on the advance on costs, the reimbursement hereof; and*
- *in any event, indemnify [the Player, the Agent 1 and the Agent 2] for incurred legal and advisory expenses up to an amount to be determined in the course of the BAT proceedings, at present estimated at seven thousand five hundred Euro (€ 7.500).*

Total amount in dispute: \$74,478.19"

4.4 The Agents' Position

90. The Agents cannot be held liable for an alleged breach of the Employment Contract. They have fulfilled all obligations arising from the Employment Contract. In particular, they brought the Player to the Club. In addition, they were in regular contact with the Club and submitted the medical reports to the Club in a timely manner. It was the Club that breached the Employment Contract by not paying the agent fee and wrongfully terminated the Employment Contract because it was not happy with the content of the medical reports.

91. In its letter dated 27 February 2021, the Club promised to pay USD 4,000.00 as agent fee. If the Club actually believed that the Agents breached the Employment Contract or any duties as agents, the Club would not have agreed to pay any part of the agent fee.
92. The requests for relief of the Agents correspond to the ones of the Player (see section 4.3 above).

5. The jurisdiction of the BAT

93. Pursuant to Article 2.1 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 PILA.
94. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
95. 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) PILA⁵.
96. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under Article 11 Employment Contract, 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."

⁵ Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.

The prevailing party shall be entitled to recover all costs, fees, and attorneys' fees from the other party in any such dispute. [...]"

97. The Employment Contract is in written form and thus the arbitration agreement fulfills the formal requirements of Article 178(1) PILA.
98. With respect to the subjective scope of the arbitration agreement, the Arbitrator notices the Club's objection to the jurisdiction of the BAT to decide the Agency's claim as the Agency is not a party of the Employment Contract. The Club claims that the Agents signed the Employment Contract which contains the arbitration agreement in their personal capacity and not on behalf of the Agency, which filed the claim for the agent fee with the BAT (BAT 1713/21).
99. The applicable Swiss Arbitration Law is rather liberal when it comes to the extension of a formally valid arbitration agreement to a third party, whether that is the claimant or the respondent. An extension to a third party may be justified if the third party was involved in the conclusion or performance of the main contract in such a way that the parties of the arbitration clause (in the present case the Club, the Player and the Agents) had to assume that this third party intended to become a party to the main contract, including the arbitration agreement therein.⁶ Therefore, the decisive question in the present case is whether the Club had to assume in good faith that the Agency would invoke the arbitration clause in Article 11 Employment Contract.

⁶ See e.g. BAT 0378/13, para. 29.

100. The Arbitrator finds that the arbitration agreement applies also to the Agency for the following reasons:

- (a) First, according to Article 3 C) Employment Contract, the agent fee shall be paid to the banking account of the Agency and not to the accounts of the Agents.
- (b) Second, the Agency submitted convincing evidence that the Club received invoices for the agent fees regarding other players from the Agency and not from the individual agents.
- (c) Third, in a previous BAT case between the same parties, the BAT held that it had jurisdiction in a dispute between the Club and the Agency although the latter was not a signatory of the arbitration agreement but only Agent 1. The Arbitrator concluded that

*"(i) [t]here is a sufficient link between Mr. Lechitski [Agent 1] and Claimant 3 [the Agency].
(ii) The Parties had proceeded on the common understanding that the agent fees owed to the three individual agents under [the employment contract] would be payable to [the Agency]. Accordingly, the Arbitrator holds that [the Club] owes [the Agency] EUR [...] in unpaid agency fees."*

101. For all these reasons, the Club had to accept that the Agency would rely on the arbitration clause in Article 11 Employment Contract and was entitled to claim the agent fee before the BAT.

102. Due to this close proximity of the Agency to the Employment Contract and the matter at stake in this arbitration, the Arbitrator accepts jurisdiction to adjudicate the concerned claims.

6. Consolidation of the Proceedings

103. By Procedural Order of 15 December 2021, the Arbitrator decided to consolidate the proceedings BAT 1713/21 and BAT 1718/21 into one single proceeding based on Article 11.3 BAT Rules, which reads as follows:

"The BAT President (or, if the same Arbitrator is appointed for the cases concerned, the Arbitrator after his/her appointment) may consolidate two or more Requests for Arbitration into one arbitration. [...] In exercising his/her discretion, the BAT President (or the Arbitrator, as the case may be) shall take into account whether there is a sufficiently close connection between the claims and whether they are subject to arbitration clauses that are identical in substance. Claims that are neither based on the same contract nor on contracts that directly relate to each other shall, absent exceptional circumstances, not be deemed to have a sufficiently close connection."

104. Even though not all claims affect the same parties, they are all based on the same Employment Contract and the same arbitration clause. Due to the close connection of the claims and in the interest of procedural efficiency, it was appropriate and evident to consolidate the proceedings BAT 1713/21 and BAT 1718/21. The Arbitrator also notes that none of the Parties raised any concerns after the Arbitrator announced that he considered consolidating the two proceedings.

7. Discussion

7.1 Applicable Law – *ex aequo et bono*

105. 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".

106. Under the heading "Applicable Law", Article 15 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."

107. As seen above, Article 11 Employment Contract stipulates that: *"[t]he arbitrator shall decide the dispute ex aequo et bono".*

108. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

109. 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'arbitrage⁷ (Concordat)⁸, 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."*⁹

⁷ 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).

⁸ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

⁹ JdT 1981 III, p. 93 (free translation).

110. This is confirmed by Article 15.1 BAT Rules, according to which the Arbitrator applies "general considerations of justice and fairness without reference to any particular national or international law".

111. In light of the foregoing considerations, the Arbitrator makes the findings below.

7.2 Findings

7.2.1 Standing to Sue

112. As mentioned in the Procedural Order of 25 November 2021, the Arbitrator notes that the Agency itself is not a party of the Employment Contract. In the preamble of the Employment Contract, only the Agents are listed as the agents of the Player, but not the Agency. Therefore, the question arises whether the Agency has standing to sue in the present proceeding.

113. Although disputed by the Club, the Arbitrator concludes that it was the common understanding of the parties to the Employment Contract that the agent fee owed to the individual persons would be payable to the Agency and that the latter would be entitled, if necessary, to claim it before the BAT for the reasons set out in paragraph 100 above.

114. For the same factual reasons which led the Arbitrator to accept jurisdiction over the Agency, he also holds that the Agency has standing to sue to claim the outstanding agent fee.

7.2.2 Termination of the Employment Contract

115. It is undisputed that the Club terminated the Employment Contract on 26 February 2021. However, the question arises whether this termination was justified. While the Club argues that it was entitled to terminate the Employment Contract due to several violations of the Employment Contract by the Player, the latter claims that this termination was without just cause.
116. The Club argues that the Player violated the Employment Contract (i) by not informing the Club immediately about the pain in her _____, (ii) by staying in the United States and not participating in the team trainings, (iii) by hiding her previous injury from the Club and afterwards using her injury as a pretext for not returning to Istanbul, (iv) by undergoing a medical examination without the Club's permission and by not contacting the Club's doctor for medical examination. The Arbitrator will deal with each of these arguments in turn:
- i. Pursuant to Article 8.1.3 Employment Contract, the Player is obliged to participate in trainings and games except in case of an injury. In such a case, a written permission of the Club's representatives is mandatory under the Employment Contract. It is the Player's obligation to inform the Club immediately about an injury. The Arbitrator considers the Player's argumentation, according to which the injury was discovered only after she arrived in the United States, not credible. Although it is difficult for the Player to prove the exact time when a pain or discomfort occurs for the first time, it is difficult to accept that it took five days until the Player felt the consequences of the alleged injury, that required treatment and absence from any basketball activity for a prolonged period of time, only five days after the game during which the incident happened. It seems more plausible that the Player took the break on 27 January 2021 to receive medical treatments back in the United States. As the Player informed the Club about the medical condition only on 5 February 2021, i.e. 14 days after her last

game with the Club, the Player has violated her notification duties stipulated in the Employment Contract.

- ii. According to Articles 8.1.1, 8.1.3 and 8.1.11 Employment Contract, the Player is obliged to participate in all trainings and games with the Club and to notify the Club if she wants to leave Turkey to travel to the United States. In the present case, the Player was allowed to travel to the United States for the time between 27 January 2021 and 7 February 2021. Although negotiations took place, the Player and the Club did not find an agreement according to which the Player would have been entitled to stay in the United States for recovery. It would have been the contractual obligation of the Player to discuss the medical measures with the Club's representatives and the medical staff and travel back to Istanbul within the agreed time if the Club insisted on her return.

The Player argues that Dr Michael Miao had strongly advised against any plane travel. However, the doctor only said that *"[t]he hope is that her progress will continue in such a time that she will be able to return to Turkey in the coming weeks"*. This statement cannot be interpreted as a recommendation not to travel by plane, but merely means that the Player is currently unable to play basketball. Therefore, when the Player stayed in the United States without the Club's authorization, the Player violated her duties based on Articles 8.1.1, 8.1.3 and 8.1.11 Employment Contract.

- iii. The Club argues that the Player concealed a previous injury from the Club and used it afterwards as an excuse not to travel back to Istanbul. According to BAT jurisprudence, clubs are responsible for taking reasonable measures to reduce the risk of an undetected pre-existing injury by conducting a medical examination consistent with the best practice in the basketball industry and by researching

public available sources about the player's health.¹⁰ Once a player has passed a medical examination, the club bears the risk of an injury.

There may be exceptional circumstances that would hinder a player from relying on the fact that she passed a medical examination, e.g. if she concealed a medical condition in bad faith, made provisions to shield a pre-existing condition or provided false information to the examining doctor.¹¹ In the present case, however, there is no indication on record that the Player knowingly or deliberately misled the Club. To the opposite, she submitted evidence that her previous _____ injury was made public in the American media. In addition, the Club did not provide evidence that the Player used the injury as an excuse not to fulfil the Employment Contract. The Arbitrator therefore concludes that the Player did not violate the Employment Contract by concealing a previous injury.

- iv. According to Article 5 B) Employment Contract, the Player is obliged to have an injury first be examined by the Club's doctor, because it is the Club which must bear the economic and sporting consequences of the Player's injury – especially if she cannot train and play with the team. Only if the Player has a reasonable ground not to agree with the diagnosis of the Club's doctor, the Player may select a doctor of her choice to get a second opinion. The condition of a first examination by the Club's doctor does not contradict with a player's right to be treated by a doctor of her choice.

The Player's argument that she was obliged to see the Club's doctor only when she was in Turkey, is of no avail. She was obliged to see the Club's doctor when she felt the pain, and she should not have left Turkey before she had informed

¹⁰ See e.g. BAT 0502/14; BAT 0733/15; BAT 1518/20.

¹¹ See e.g. BAT 0863/16; BAT 1518/20.

the Club about her medical situation. Therefore, by leaving Turkey and seeing a doctor in the U.S. without informing the Club in advance, the Player has violated Article 5 B) Employment Contract.

117. However, not all violations of the Employment Contract by the Player justify a termination by the Club. According to Article 9.6 Employment Contract, only material and repeated or ongoing violations of the Employment Contract, which unreasonably jeopardize the cooperation shall entitle the Club to terminate the Employment Contract for cause. A less severe violation may however justify termination if the employee was warned before and did not cure the breach.
118. The Player's departure to the USA to receive medical treatment there, and her refusal to return to the Club despite her contractual obligation, was severe enough to justify the termination by the Club.
119. The nature and gravity of the Player's injury has not been contested, and one can assume that she would not have been able to play either if she had stayed with the Club. While it is understandable that the Player wanted to be at home for recovery, it is equally understandable that the Club insisted on taking care of the medical examination and treatment of the valuable players of its team. There is no indication whatsoever that the Club's medical personnel could not do this as equally well as club doctors in the USA. The Player must accept that the duty to report to the medical personnel of the Club and to be examined by the team doctor first is a material condition to her employment worth of legal protection.
120. The Player's excuse that the injury was caused by her being overloaded with an overly strenuous schedule is not acceptable. While the fact of the injury is not questioned, it is not supported by objective evidence that the injury can be blamed to the Club. If it was the Player's honest opinion that she would not be able to play four games within

five days due to her previous injury, it would have been up to her to notify the Club and ask for a medical opinion.

121. Based on Article 9.6 Employment Contract, the Club has to send two written warning letters to the Player. On 23 and 24 February 2021, respectively, the Club sent two letters to the Player informing her about the breach of contract. The Employment Contract remains silent on the question whether there is a certain period to respect between these warnings. The Club gave the Player only one day to react before it sent another warning letter. This left her hardly a chance to react. On the other hand, there is no indication that she would have reacted differently if she had been given more time to react to the Club's first warning. Furthermore, it shall not be to the Club's detriment that it waited several days before issuing the first warning. In addition, considering the behavior of the Player and the severity of the Player's injury, the Club could not assume that the Player would return upon the first warning.

122. For all these reasons, the Club's termination of the Employment Contract was justified.

7.2.3 Financial consequences of the termination of the Employment Contract

a. Agent Fee

123. The Agency submits that it is entitled to an agent fee of USD 8,000.00 in accordance with Article 3 C) Employment Contract. The Club argues that no agent fee is owed as both Agents violated their duties under the Employment Contract by failing to inform the Club immediately about the Player's injury status. In any event, the agent fee should be calculated on a *pro rata* basis for the period lapsed until the date of termination of the Employment Contract.

124. According to Article 3 C) Employment Contract, the agent fee is contingent on the Player's arrival and her passing of the medical examination only. These conditions have been fulfilled.
125. The Employment Contract does not impose any other obligation to the Agency or the Agents to provide further services to the Club. When the Agents acted as messengers between the Player and the Club, they acted on behalf and in the interest of the Player, not the Club. Whether or not they informed the Club timely on the Player's injury status is therefore irrelevant for the calculation of the agent fee. Also the fact that the agent fee is payable in two instalments does not impose any ongoing obligations on the Agents.
126. The Arbitrator therefore concludes that the agent fee stipulated in Article 3 C) Employment Contract was due as a fee for the successful closing of the Employment Contract with the Player and not as a service fee. It is due irrespective of whether the Player fulfilled her contract to the agreed end. The Club actually acknowledged to owe the agent fee in its letter of 27 February 2021. It does not assert that the Agency or the Agents provoked the termination of the Employment Contract in bad faith. It would be therefore unfair to burden the Agents with the negative consequences arising from the termination by reducing the otherwise due agent fee.¹² The Agency is therefore entitled to the full agent fee in the amount of USD 8,000.00.

¹² See e.g. BAT 1479/20.

b. Salary and reimbursement of the flight ticket

127. According to Article 12 Employment Contract, the agreement is unconditionally guaranteed, meaning that the Player's salary is fully guaranteed also in the event of an injury.
128. However, according to the well-established BAT case law, a guaranteed salary is not absolute but "subject to certain explicit or implied exceptions: No salary can, e.g., be claimed in case of a justified termination of the Player Contract by the Club"¹³, which can also be concluded from Article 9 Employment Contract. Since the early termination of the Employment Contract was justified because of the Player's breach of Contract, she is not entitled to the remaining salary in the amount of USD 66,750.00. Her respective claim must be dismissed.
129. In addition, the Player requests the reimbursement of the return flight to Istanbul on 2 April 2021 to collect her belongings in the amount of USD 5,869.70.
130. According to Article 5 D) Employment Contract, the Club is obliged to
- "provide two (2) one-way economic class tickets for the Player's use as long as the destination (USA or Spain) that Turkish Airlines has a direct-flight. The Player must inform the Club regarding the demanded ticket information at least one (1) months' notice prior to such travel".*
131. Independently of whether the Club has already paid the Player flight tickets to travel to Turkey, respectively back to the United States, the Arbitrator finds that the reimbursement of flight tickets is, like the remaining salary, an exception with regard to the guaranteed Employment Contract. It would not be fair and equitable that the Player would still be able to claim rights under the Employment Contract, which the

¹³ See e.g. BAT 0644/15, para. 32.

Player seriously violated and which was therefore rightfully terminated by the Club. It was the Player's decision to stay in the United States for over two months and to return only in April to Turkey to collect her belongings. Furthermore, the Player failed to submit evidence that she has informed the Club one month in advance about the journey, as required in Article 5 D) Employment Contract. The Player is therefore not entitled to a reimbursement of the flight ticket.

c. Compensation to the Club

132. The next question is whether the Club is entitled to a compensation for the registration fee of a replacement player in the amount of TRY 45,000.00 and a "special indemnity" in the amount of USD 40,000.00 as a compensation for the additional efforts caused by the Player's behavior.
133. Based on well-established BAT jurisprudence, a damage compensation can only be awarded if the Club demonstrates to the Arbitrator's satisfaction that it suffered a financial loss. The injured party, i.e. the Club, has to prove that, as a result of the breach of contract, its financial situation is worse than it would be had the other party, i.e. the Player, complied with her contractual duties.¹⁴
134. The Player violated the Employment Contract by staying in the United States for her recovery. The Arbitrator has no doubts about the seriousness of her injury and he did not find that she deliberately concealed a previous injury when signing the Employment Contract. Even if she had fulfilled the Employment Contract and travelled back to Turkey in February 2021, the Club could not count on her services on the playing field until her full recovery on 19 April 2021 and would have had to find a

¹⁴ See e.g. BAT 1172,18, para. 120.

replacement player anyway. The signing of a replacement player and the payment of the registration fee was a consequence of the Player's injury-related absence and not her refusal to return immediately from the USA. The claim for compensation for the registration fee in the amount of TRY 45,000.00 is therefore not justified.

135. The concept of a "special indemnity" was already discussed in different BAT cases and can be summarized as follows¹⁵:

"According to the employment laws of all known legal systems, the employee who walks away without reasons must compensate the employer for all proven costs and damages which have been caused as a direct consequence of his breach. In addition, it is generally accepted – and in compliance with principles of justice and fairness – that the judge may grant the employer compensation for the damage which is either non-monetary or difficult to calculate and which may also include a punitive part. On the other hand, the Player's salary and other costs which the Club retained because of the early termination must be taken into account. [...] The Arbitrator accepts that the departure of the Player caused substantial complications for the Club in maintaining its competitive level which are difficult or even impossible to quantify. However, this should not deprive the employer from claiming an adequate compensation (or 'special indemnity'), as it has been generally accepted in employment law that the employee owes a compensation to the employer because of his unjustified departure from his employment."

136. The specific circumstances of this case indeed justify a "special indemnity" to the Club.

137. When calculating the quantum of the "special indemnity", the Arbitrator enjoys a wide range of discretion, especially when he is empowered to decide the case *ex aequo et bono*.¹⁶

138. On the one hand, the Player's poor communication about the true reason for her absence and the lack of the possibility to get an own picture of the situation and to

¹⁵ See e.g. BAT 1172/18, para. 124; BAT 1030/17, para. 84.

¹⁶ See e.g. BAT 1030/17, para. 85; BAT 1172/18, para. 125.

take therapeutic measures deemed appropriate caused confusion and mistrust at the Club's. The Arbitrator also accepts that the "special indemnity" may have a certain punitive and deterrent effect.

139. On the other hand, the Club had little choice but to look out for a substitute after the Player got injured and was unable to play in the team. Her inability to play was due to her injury and not of her refusal to return from the USA to Turkey. In addition, the Club has provided no assistance on how it arrived at an amount of USD 40,000.00. The calculation is rather fact-specific.
140. In other BAT cases, the Arbitrators considered a "special indemnity" in the amount of three monthly salaries to be fair and appropriate.¹⁷ In one of these cases, the player left shortly before the start of the season preparation (without any injury).¹⁸ In another case, the player concealed an injury that occurred between the conclusion of the employment agreement and the start of the season. The case at hand, however, lacks of the element of surprise and dishonesty, which characterised the two cited cases.
141. By considering all circumstances of the present case and, in particular, the fact that the Club has to pay the agent fee in the amount of USD 8,000.00 although the Player provided her services for not even one month and by applying the principle of *ex aequo et bono*, the Arbitrator considers it fair and adequate that the Club is entitled to a "special indemnity" in the amount of USD 8,000.00.

¹⁷ See BAT 1030/17, para. 86; BAT 0209/11.

¹⁸ See BAT 0209/11.

7.2.4 Interest

142. The Agency requests the BAT to order

"[i]nterest of five percent (5%) starting from January 26, 2021 and March 26, 2021 as of today totaling one hundred and ninety eight dollars and ninety one cents (\$198.91); and Interest of five percent (5%) starting from the date of filing the present Request for Arbitration until the date payment is received in full by [the Agency]".

143. The Club requests "interest at the rate of 5% per annum accruing as from 27 February 2021 until the effective payment" regarding the "special indemnity" and "interest at the rate of 5% per annum accruing as from 2 March 2021 until the effective payment" regarding the damage compensation concerning the registration fee.

144. The Employment Contract does not provide a regulation concerning interest. 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. As requested by the Agency and the Club and in correspondence with the standing BAT jurisprudence the default interest rate is of 5% per annum.

145. As to the date from which the interest for the agent fee starts to run, the Arbitrator notices that the Employment Contract foresees the following due dates for the agent fee: 25 January 2021 and 25 March 2021. Therefore, the interest for the first instalment started on 26 January 2021. As the fate of the Employment Contract or the performance thereunder is irrelevant for the due date of the agent fee, the interest of the second instalment did not start to run with the termination on 26 February 2021, but only on 26 March 2021.

146. As to the date from which the interest for the "special indemnity" starts to run, the Arbitrator notices that with the termination of the Employment Contract on 26 February

2021 all obligations became due. Therefore, the starting date for the interest for the "special indemnity" is on 27 February 2021.

8. Conclusion

147. Based on the foregoing, and after taking into due consideration all the evidence submitted and all arguments made by the Parties, the Arbitrator finds that the following payments are owed:

- The Club shall pay the Agency an outstanding agent fee of USD 8,000.00 net, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) of USD 4,000.00 from 26 January 2021 and of USD 4,000.00 from 26 March 2021 until payment in full.
- The Player shall pay the Club a "special indemnity" of USD 8,000.00 net, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 27 February 2021 until payment in full.

9. Costs

148. In respect of determining the arbitration costs, Article 17.2 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). [...]"

149. On 17 February 2022, the BAT President determined the arbitration costs in the present matter to be EUR 12'091.44.

150. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 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."

151. Considering the fact that only the Agency and the Agents can be considered as full prevailing parties in this arbitration, it is consistent with the provisions of the BAT Rules that the arbitration costs be borne by the Club and the Player.
152. The Agency fully prevailed with its claim for the agent fee (BAT 1713/21). The entire arbitration costs related to this claim of EUR 6,045.72 shall be borne by the Club, which shall therefore reimburse EUR 2,045.72 to the Agency.
153. The Club partially succeeded with its claim against the Player for a "special indemnity" while the Player's claim for the remaining salary was rejected. The entire costs related to this claim and counterclaim (BAT 1718/21) of EUR 6,045.72 shall be borne by the Player.
154. In relation to the Parties' legal fees and expenses, Article 17.3 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."

155. Moreover, Article 17.4 BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses.

156. The Agency, the Agents and the Player claim legal fees in the total amount of USD 16,650.00 (i.e. 55 hours à USD 300.00). He also claims for the expense of the non-reimbursable handling fees.
157. The Club did not submit a list of the legal costs incurred, but merely informed the BAT Secretariat that, according to the "attorneyship fee tariff of Republic of Turkey", the Club is entitled to a reimbursement of EUR 10,000.00 in the case BAT 1718/21 and of EUR 5,000.00 in the case BAT 1713/21.
158. Taking into account the factors required by Article 17.3 BAT Rules, the provision in the arbitration agreement as regards costs, the maximum awardable amount prescribed under Article 17.4 BAT Rules (in this case, EUR 10,000.00), the fact that the Player had the same counsel as the Agency and the Agents and the specific circumstances of this case, the Arbitrator holds that it is fair and equitable that all parties bear their own legal fees and expenses.

10. AWARD

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

- 1. Galatasaray Spor Kulübü Derneği shall pay Sports International Group an agent fee of USD 8,000.00 net, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) of USD 4,000.00 from 26 January 2021 and of USD 4,000.00 from 26 March 2021 until payment in full.**
- 2. Ms. Angel Lajuane McCoughtry shall pay Galatasaray Spor Kulübü Derneği a "special indemnity" of USD 8,000.00 net, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 27 February 2021 until payment in full.**
- 3. Galatasaray Spor Kulübü Derneği shall pay Sports International Group an amount of EUR 2,045.72 as reimbursement for its arbitration costs.**
- 4. The Parties shall bear their own legal fees and expenses.**
- 5. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 28 February 2022

Stephan Netzle
(Arbitrator)