ARBITRAL AWARD

(BAT 1521/20)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Clifford J. Hendel

in the arbitration proceedings between

Ms. Olesia Malashenko

- Claimant -

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

vs.

Adana Basketbol Kulübü Dernegi
Resatbey Mah. Ordu Cd. No. 48/A, Seyhan, Adana, Turkey

- Respondent -

represented by Mr. Özcan Yüksel, attorney at law,
Mansuroglu Mah 273/5 Sk No:5 Isil Ap A Blok K:7 D:13, Bayrakli, Izmir, Turkey

1. The Parties

1.1 Claimant

1. Ms. Olesia Malashenko (the “Player”) is a Ukrainian professional basketball player.

1.2 Respondent

2. Adana Basketbol Kulübü Dernegi (the “Club”) is a professional basketball club from Adana, Turkey. It is currently competing in the top Turkish Women’s Basketball League.

2. The Arbitrator

3. On 15 March 2020, Prof. Ulrich Haas, the 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"). Neither of the Parties 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

4. On 30 August 2018, the Player and the Club entered into an employment agreement whereby the latter engaged the Player for the 2018/2019 season (the “Employment Agreement”).

5. The Employment Agreement provided for the Player to receive an annual "*guaranteed*" (see clause 6) base salary of USD 70,000.00 net, as well as certain bonuses and other benefits.

6. On 26 October 2018, the Parties entered into a new agreement by virtue of which they mutually decided to terminate the Employment Agreement (the "Termination Agreement").

7. In light of said Termination Agreement, the Club agreed in clause 2 to compensate the Player in the following amounts: (i) USD 2,200.00 to be paid on 25 November 2018, as "*termination fee*"; and (ii) USD 20,000.00 to be paid on or before 15 December 2018, as overdue payables, apparently arising from the 2014-2015 season, from a previous employment agreement concluded (or novated) between the Player and the Club on 14 May 2016 in relation to the 2016-2017 season (the "Previous Employment Agreement")[1].

8. The Termination Agreement also included a penalty clause which provided as follows:

> *"6/ If the Club is more than FIFTEEN (15) business days late in the payment of the amounts stipulated above then the Player and Club agree that an additional indemnity of 20 000 USD will be applied and directly due from the Club to the player"*

9. In this regard, while the Player alleges that no amounts have been paid to her by virtue of the Termination Agreement, the Club asserts that some of the claimed amounts have already been paid in cash, that others have been deducted as previous fines imposed on the Player and that in any case these payments arise from an "inexistent" agreement, i.e., that the signature on the part of the Club was the product of forgery.

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[1] This Previous Employment Agreement was executed by Mersin Basketball Kulübü, former name of Respondent (*vid*. BAT 1356/19).

3.2 The Proceedings before the BAT

10. On 4 March 2020, Claimant filed the Request for Arbitration giving rise to this proceeding in accordance with the BAT Rules. She also duly paid the non-reimbursable handling fee of EUR 1,500.00, which was received by the BAT on 5 March 2020.

11. On 18 March 2020, the BAT informed the Parties that Mr. Clifford J. Hendel had been appointed on 15 March 2020 as the Arbitrator in this matter, invited Respondent to submit its Answer by 10 April 2020 and fixed the advance on costs to be paid by the Parties on or before 31 March 2020 as follows:

> *"Claimant (Ms Olesia Malashenko)* *EUR 2,500.00*
> *Respondent (Adana Basketbol Kulübü Denergi*[sic]*)* *EUR 2,500.00"*

12. By e-mails dated 26 and 27 March 2020, Respondent's counsel advised the BAT Secretariat that he represented Respondent and submitted a Power of Attorney to that effect, also requesting an extension to file the Answer until, at least, 31 May 2020 stating that:

> *"Unfortunately, our main office and all the documents we need are at the gym of the Club and the gym is owned by the Ministry of Youth and Sports. The Turkish Government has closed all of their gyms and offices and we are not allowed to enter the premises since it is under quarantine. It is crucial for our answers to enter to premises and get the documents since some if not all of the payments to the Claimant were in person, not through a wire transfer. Therefore, all of the payment information and their receipts are at the office and it is impossible for us to get the information to prepare our answer or submit documents".*

13. By e-mail dated 31 March 2020, the BAT invited Claimant to contact Respondent promptly with the aim of reaching a joint position with respect to Respondent's extension request that could be communicated to the Arbitrator on or before 3 April 2020. If no joint position was so communicated, then Claimant was directed to submit her position or observations on Respondent's request by 3 April 2020.

14. No joint position was communicated, nor (so far as the record reflects) did the Parties even endeavour to reach one. Instead, Claimant presented on 1 April 2020 a vehement rejection of the request, referring to it as a "*manifestly* [and] *absolutely outrageous"* dilatory tactic, a "*pure formal excuse….to achieve nothing less than buy time*."

15. By Procedural Order of 7 April 2020, the Arbitrator decided to extend the deadline for Respondent's Answer until 24 April 2020 and for the payment of Respondent's share of the advance on costs until 14 April 2020.

16. On 8 April 2020, Respondent's counsel replied to the abovementioned Procedural Order as follows:

> *"We are duly stumped with this act of shortening the answer time period* ***which was given to us before*** *solely based on assumptions.*
>
> *As we can understand the frustration of the Claimant, in these extraordinary circumstances this is not acceptable.*
>
> *The Claimant has no proof or whatsoever to their statements, only assumptions regarding their biased opinions.* ***The Arbitrator, who should be neutral and objective, changes their decision*** *which was given accordingly to the objective situations with an angry e-mail based on nothing but an assumption. This is outrageous and unacceptable.*
>
> *We will provide an official letter from the municipality as soon as possible that shows that we are not able to get into the gym and as many clubs and sportive enterprises, our documents are at the gym.*
>
> *This unacceptable act of the Arbitrator not only harms our integrity as a club but a message from the Arbitrator that shows that the BAT does not prioritize human health during these extraordinary circumstances by forcing us risking our health to get documents which obviously is more important to the Arbitrator and therefore to BAT. Most especially, we cannot understand the reason that he* [sic] *Arbitrator* ***changes his mind*** *based on nothing but assumptions after understanding our situation, the legal and operational problems and expanding the time for answers ethically.*
>
> *We cannot understand the reasons for this rush disregarding a pandemic and precautions to it, asking us to risk people's health to get the documents, we doubtlessly object to this unempathetic decision"* (emphasis added).

17. By e-mail of 14 April 2020, the BAT responded that, notwithstanding Respondent's assertions, the Arbitrator had at no time "*accepted*" Respondent's request to file the Answer until 31 May 2020 and, therefore, he did not thereafter "*change his mind*" or shorten any deadline previously granted to Respondent in order to submit its Answer. Instead, the Arbitrator made only one decision in this regard, on 7 April 2020, which was to extend the deadline to 24 April 2020. The e-mail in question concluded as follows: *"If the Respondent seeks to file a further request extension based on additional submissions or documents, the Arbitrator will review such request – along with any reaction of Claimant – with attention*."

18. Further to the above, on 17 April 2020, Respondent's counsel sent a new e-mail asking for another extension in order to file its Answer, attaching a letter apparently issued (albeit not signed) by the Municipality of Adana, indicating that the Club's premises were closed at that time and insisting that the documents needed to prepare its Answer were there.

19. On 21 April 2020, Respondent was invited to indicate the desired timeframe of its request no later than 23 April 2020. On that same date, Respondent specified (again) that it sought an extension until 31 May 2020.

20. On 22 April 2020, Claimant was invited to comment on Respondent's request no later than 24 April 2020. By e-mail dated 23 April 2020, Claimant's counsel rejected once more what it referred to as Respondent's "*bad faith*" and *"cascade*" extension-requests, especially in light of the BAT's communication entitled "Information on COVID-19 Situation", and its express mention that the specificity requirements of Article 7.2 of the BAT Rules, in the context of a COVID-19-based extension request, render insufficient a merely generic reference to the pandemic situation.

21. On 24 April 2020, Respondent partially answered (*ad cautelam*) the Request for Arbitration alleging that it was not possible for it to prepare a proper Answer as it had

no access to the documents / evidence located at the Club's premises.

22. By Procedural Order of 29 April 2020, Respondent was granted an extension to supplement its Answer until 18 May 2020. Claimant was also granted a deadline until that same date in order to pay Respondent's share of the advance on costs.

23. On 1 May 2020, Claimant paid Respondent's share in substitution (received by the BAT on 4 May 2020).

24. On 18 May 2020, Respondent filed a last-minute request for a new extension of time in order to submit its Answer (or complement the *ad cautelam* Answer already submitted), on the grounds that it was still not able to enter the Club's premises and indicating that the normalization process would begin after 15 June 2020 in Turkey. Claimant was invited to comment on Respondent's request by 20 May 2020.

25. On that same date, Claimant filed her comments referring to her previous submissions and making reference again to Article 7.2 of the BAT Rules, meaning that Respondent's request should have been filed "*before the last day of the relevant deadline*" and not on that same day.

26. By e-mail dated 20 May 2020, the Arbitrator invited Respondent to provide by 22 May 2020 explanation and evidence as to the two assertions that it made in support of its request of 18 May 2020 (i.e. that it tried and failed to obtain clearance to access its premises and that normalization of the situation in Turkey was expected to commence in mid-June). The e-mail concluded as follows. "*Assuming such explanation and evidence is so provided by 22 May, the Answer shall be due on 29 May. If Respondent should find itself in a similar position on that date, any request for further extension shall be accompanied by explanation and evidence as above*."

27. On 22 May 2020, Respondent submitted another unsigned and undated letter from the

Adana Metropolitan Municipality. This letter states in its English translation provided by Respondent, *inter alia*, as follows:

> *"With the circular of Ministry of Interior, dated 16.03.2020 with the number of 89780865/153 and also with Circular of Adana Governorate, dated 16.03.2020 with the number of E.9044, all cultural, entertainment and sportive activities in all closed areas has been stopped.*
>
> *With the Circular of our Municipality, dated 16.03.2020 with the number of 30297, all open an* [sic] *closed facilities being used for sportive activities have been shut down.*
>
> *With the Circular of the Presidency of the Republic of Turkey, dated 19.03.2020 with the number of 2020/3 and with the Circular of Adana Governorate dated 20.03.2020 with the number of E.9434, all sportive activities have been suspended.*
>
> *All Professional leagues have been canceled in order with the Turkish Basketball Federation's decision dated 19.03.2020.*
>
> *By the reason of all these decisions and measures taken, all of your activities both sportive and administrative has been stopped in the Aski Atatürk Spor Salonu which was allowed for your usage for official games and practices".*

28. On that same date, Claimant responded as follows:

> "***1.*** *The Respondent does not provide any comment or evidence related to the assertion that "normalization of the situation in Turkey is expected to commence in mid-June".*
>
> ***2.*** *The document that the Respondent provides is a* ***simple draft (not signed in anyway, not having any number)*** *that has no whatsoever value as evidence.*
>
> ***3.*** *Even considering that such document would be representing evidence (despite not even signed…), actually it proves that the Respondent is only not allowed to use the gym for public activities (practices and games)".*

29. By Procedural Order of 25 May 2020, the Arbitrator characterized Respondent's submission as "*patently insufficient to explain and evidence the assertions made in its request*". Nonetheless, said Procedural Order also stated, as a "*final indulgence*" to Respondent, "*the Arbitrator will permit Respondent to supplement its previously-submitted ad cautelam Answer on or before* ***Friday, 29 May 2020*** *with anything*

additional that it desires to and is able to submit at that time".

30. On 29 May 2020, Respondent submitted its "complemented Answer", stating, *inter alia*, and for the very first time in this proceeding, that the Club's signature on the Termination Agreement was forged.

31. In light of the foregoing, by e-mail dated 3 June 2020, Claimant was invited to respond to the above allegation by 5 June 2020. Then Respondent would be given the possibility to reply to Claimant's submission by 10 June 2020.

32. On 6 June 2020 (at 0.00), Claimant replied noting, *inter alia*, that it was not disputed that the Termination Agreement bore the stamp of the Club and had emanated from the Club, and asserting that the forgery claim resembled a *"'Hail Mary' type of juridical approach with the sole intention to further* […] *prolong the duration of this case*."

33. Respondent's responsive communication of 7 June 2020 stated that "*the claimant should stop thinking on behalf of the Respondent,* [and] *guessing that legal arguments and legal evidence are* […] *attempts to delay the issuance of an award. Instead, use their energy and time to explain how did they take possession of this document which, again, is not signed by any authorized person*".

34. By Procedural Order dated 12 June 2020, the Parties were advised, *inter alia*, as follows:

> "*The burden of establishing that the signature on the contract under discussion is false rests with the party making the allegation, here Respondent. Asserting only that the signature of the Club's President on the Termination Agreement does not appear identical or particularly similar to other signatures of his on other documents, including on his specimen signature with the public register, and not accompanying the claim with an affidavit of the President, Respondent has not met its burden. The Arbitrator is not a handwriting expert, but looking closely at the five or six signatures of the President on file (including the three specimen signatures provided on the last page of Respondent's recent submission), it could indeed be said that no two of them appear identical.*

> *The Arbitrator also takes note of the fact that Respondent has had ample opportunity to bring this allegation of forgery during the course of this proceeding, during which it has requested and received three time-extension and submitted an ad cautelam Answer, and after a Procedural Order dated 25 May 2020 was issued as a "final indulgence" for Respondent to supplement any of its previous arguments."*

35. By that same Procedural Order, the Arbitrator declared the exchange of documents completed in accordance with Article 12.1 of the BAT Rules and invited the Parties to indicate (by no later than 19 June 2020) how much of the applicable maximum contribution to their costs should be awarded to them and why, including a detailed account of their costs and any supporting documentation in relation thereto.

36. On the same day, Respondent submitted an e-mail objecting to the content of the foregoing Procedural Order:

> *"We are shocked and surprised by Arbitrator's comments on the forged signature.*
>
> *The basic law is that the Claimant is obliged to prove her case. In this situation of a forged signature, the Claimant still did not and could not explain how did she take possession of this document. The Claimant should explain this, and also why did the agreement terminated.*
>
> *We are sad that the timing of our claims of a forged signature is questioning. If our claims and evidence would not be taken into account just because it is submitted later but still in the given answer time, why did the arbitrator has given an extension of time?*
>
> *If the Arbitrator is not a handwriting expert and could not take our claim into account even with all the evidence and especially with the specimen signatures, the Arbitrator should have asked for an expert to examine the signatures. We understand that the Arbitrator act arbitrarily in this situation, opposite to his own decisions.*
>
> *Again, if the submission time of this situation, why did an expansion of time have given, and how is it possible for us to prove that the signature is forged with all this evidences. The only explanation if this is that the Arbitrator acts arbitrarily, biased, and inadequate and against equity.*
>
> *In the circumstances of a pandemic, we are not understanding what is expected from us. It was impossible to reach the documents, even one on one meetings to examine the situation. Even with all this, even with all evidence submitted that it is not possible to enter to premises, this case has been rushed. Even with all this, we have explained our case*

> *and submitted our answers within the given time. How else could we prove our case other than the specimen of signature and earlier agreements signed? Also, how is it our burden to prove that this agreement is not signed by anyone who is authorized? How come the Claimant is not expected to explain and prove her case. If this is the way the BAT decides on, no rightful decision can be expected and the institution of this Tribunal has become functionless before law en equity* [sic].
>
> *We repeat that the basic is that the Claimant is obliged to prove her case. The burden of proof is on the Claimant. In this epitome, the Claimant has failed to prove her case and still did not explain how did she take possession of this document of a forged signature. The Claimant has to explain this. Even if we are not obliged to prove that the signature is forged, the Claimant has to prove that it is not, we still submitted evidence regarding the specimen of signature with the public register and earlier agreements. If the case has been finalized without this question answered, it would be a great example of an inadequate proceeding and a failure of BAT.*
>
> *We reject the Arbitrator's decision without this problem solved. We also want to state that in these circumstances, especially with this act, the Arbitrator act against neutral and adequate in this case. Therefore, we challenge that another Arbitrator to be assigned to the case with the President of BAT examine this case."*

37. Claimant responded immediately by e-mail, saying only as follows: "*The Claimant's position is that the level of such topic (in the light of the allegations performed by the Respondent) had degraded to such an extent that the Claimant wishes to not engage in any whatsoever comment on this matter."*

38. Claimant filed her costs submission on 19 June 2020. Respondent did not present a cost submission.

39. By e-mail dated 22 June 2020, Respondent reiterated and formalized its challenge of the Arbitrator. By Procedural Order dated 23 June 2020, the BAT President invited both the Arbitrator and Claimant to provide their position regarding the challenge by 1 July 2020, 6pm Geneva time.

40. The Arbitrator's position was submitted on 30 June 2020 providing as follows:

> *"I respond to your kind invitation of 23 June 2020 that I comment on Respondent's challenge of 12/22 June 2020 as to my continuing as arbitrator in this matter.*

Respondent alleges that my decisions and handling of the proceeding to date evidence a lack of neutrality and adequacy. I believe this allegation to be unfounded.

I stand ready to conclude my work on this case, or step aside, as you deem appropriate.

Please let me know if any further information would be helpful".

41. Claimant's position, submitted on 1 July 2020, provided, *inter alia*, as follows:

"The Claimant's position in relation to the challenge of the Arbitrator appointed in this matter is that such request is ***unfounded*** *and the Claimant opinion is that such challenge would require to be* ***rejected****.*
There is no whatsoever basis for such a challenge (apart from a party of this arbitration being unsatisfied with the procedural orders of an Arbitration, which, in it's in independence and neutrality, decided in a certain matter; yet however this is no whatsoever basis for challenging the neutrality of the Arbitrator; a contrario then every unsatisfied party of any BAT arbitration procedure or of any other procedure would be filing challenges of the appointed person to render an award).

Furthermore and en passant being mentioned, such challenge comes nota bene after actually the Respondent being granted a treatment that was more than favourable, an objective observer may note, by the BAT (respectively the Respondent receiving three time-extension […] *while being also awarded ex officio, after an ad cautelam submitted answer, as a "final indulgence" the right to supplement such ad cautelam answer)* […]*".*

42. On 15 July 2020, pursuant to Article 8.3 of the BAT Rules and in light of the jurisprudence of the Swiss Federal Tribunal (SFT 4A_292/1029), the President of the BAT issued a decision dismissing the challenge of the Arbitrator, providing in its operative paragraphs as follows:

*"14. In the Challenge, the Respondent claims that the Arbitrator's way of handling the issue of the allegedly forged documents demonstrates a lack of independence and impartiality. However, the mere fact that the Arbitrator does not follow the argumentation submitted by one of the parties is no issue that "****in an objective view, creates a perception of bias and prejudice****." Instead, the BAT President finds that the view taken by the Arbitrator on the burden of proof with respect to the allegation of forgery is perfectly in line with general principles of Swiss law and equity and does not give rise to any objective grounds as to his independence and/or impartiality. Consequently, the BAT President does not find anything in the Challenge that raises an issue of independence. The BAT President has set out in this decision the procedure leading to the request for this ruling (see above, para.* […]*). The procedural process to date has been carried out without delay. The Arbitrator provided the parties with ample opportunities to present their*

> *case and also took account of the special circumstances of the COVID-19 pandemic in the conduct of the proceedings. In particular, the Respondent was given various time extensions to submit an Answer and/or to complement it. Only at the very last second the Respondent alleged forgery of the termination agreement submitted by the Claimant without presenting any evidence in that respect. This procedural behaviour was completely unrelated to the COVID-19 pandemic. In addition, the BAT President finds that conclusions drawn by the Arbitrator from the Respondent's procedural conduct are in no way biased or arbitrary. The decision of the Arbitrator to refer to the burden of proof and to close the submissions between the parties do not justify the assertion of lack of independence because of the way the case has been managed to date from a procedural aspect.*
>
> *15. Consequently, the BAT President dismisses the Challenge of the Arbitrator."*

43. By e-mail of 16 July 2020, Respondent reiterated its position after the dismissal of the challenge:

> *"After all the latest developments on the case, we would like to kindly repeat that there is a forged signature on a document which is the standing point of this case.*
> *Therefore, again, we request an expert examining the signature to be made. If the Arbitrator does not ask for an examination, we kindly ask for a time given to our party so* [sic] *send the documents to an official expert to examine it, and also, most importantly, the Claimant to explain how did they take possession of this document.*
> *Ruling an award without an expert examination would be a disaster from a legal point of view. Our client should not be responsible for paying an amount that is irrelevant and not signed by him* [sic].
> *By this explanation.* [sic] *we kindly remind you that if the award is given without that explanation, our client insists on holding a press conference, explaining that they forced to pay an amount by FIBA without a legal perspective, with a forged signature and without an expert examination and by this stand of view, there is no point on investing by trusting the objectivity of FIBA and BAT and will close the club with these reasons".*

44. While the amount in dispute in this proceeding falls below the threshold of EUR 50,000.00 established in Article 16.2 of the BAT Rules for the issuance of an award with reasons, the BAT President has determined, pursuant to the discretion afforded to him by Article 16.3 (b) of the BAT Rules, that given the circumstances, certain of the issues that the case raises and the interest of the basketball community in having a sufficient body of publicly-available awards with reasons, a reasoned award is appropriate in this case.

4. The Positions of the Parties

4.1 Claimant's Position

45. Claimant submits that Respondent failed to pay her all amounts arising from the Termination Agreement (USD 22,200.00).

46. Therefore, the Player not only claims for the entirety of the debt under clause 2 of the Termination Agreement (together with interest of 5% per annum on said amount), but also for the contractual penalty referred to in para. 8 of this award above (even though in the voluntarily-reduced amount of 50% of the same).

47. In her Request for Arbitration, Claimant requested the following relief:

> *"The Claimant requests that the Respondent to be obliged to pat* [sic]*:*
> ***a) The amount of 22.200 USD representing unpaid financial rights alongside with default interest in amount of 5% per annum (Swiss statutory rate)***
> ***a.1) on the amount of 2.200 USD from the date of 17th of December 2018 until full payment of such amount (in amount of 133,51 USD until the date of lodging this arbitration request)***
> ***a.2) on the amount of 20.000 USD from the date of 7th of January 2019 until full payment of such amount (in amount of 1.156,16 USD until the date of lodging this arbitration request)***
> ***b) The amount of 10.000 USD representing contractual penalty***
> ***c) Pay all arbitration costs accrued from these arbitration proceedings***
> ***d) Pay all legal fees and expenses of [sic] accrued from these arbitration proceedings.***
>
> ***Total amount in dispute: 33.289,67 USD (~29.780 EUR)"***

4.2 Respondent's Position

48. The Club insists on the fact that it was not possible for it to prepare an answer with all the facts and evidence, as the Club's premises were inaccessible.

49. However, both in the (*ad cautelam*) Answer and in its complementary submission, the

Club provided a number of arguments aimed at establishing the alleged lack of merit of the Player's Request for Arbitration:

- Regarding the USD 20,000.00 to be paid in relation to the Previous Employment Agreement, the Club argued that (i) "*this amount was partly deducted from the previous fines applied to the Claimant by the Respondent*"; and that (ii) USD 10,000.00 was already paid, even though Respondent could not prove the above, as the corresponding documentation was physically at the Club's premises.

- With regard to the USD 20,000.00 agreed as penalty, the Club argued that this amount was "*inequitable*", as it interpreted the principal amount of the Termination Agreement to be USD 2,200.00 (which it does not contest), thus rendering a USD 20,000.00-penalty entirely disproportionate (but with no commentary on the voluntarily-reduced amount claimed by the Player).

- Further, in its last submission, the Club also alleges that the Club's signature on the Termination Agreement was forged and that, consequently, it was not signed by an authorised person.

50. In its "complemented Answer" of 29 May 2020, Respondent requested the rejection of Claimant's petitions as follows:

> *"To sum up, we object to requests of the Claimant with the reasons explained above and ask for the dismissal of the case; in the contrary case, we ask for a suitable time to given to submit the receipts and documents to prove our objections."*

5. The jurisdiction of the BAT

51. 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).

52. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.

53. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA[2].

54. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under clause 8 of the Termination Agreement, which reads as follows:

> *"8/ 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 BAT President.*
> *The seat of the arbitration shall be in Geneva, Switzerland.*
> *The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PILA), irrispective* [sic] *of the parties' domicile.*
> *The language of the arbitration shall be english* [sic].
> *The arbitrator shall decide the dispute ex aequo et bono".*

55. The Termination Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

56. 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).

57. The jurisdiction of the BAT over the Player's claim arises from the Termination

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

Agreement. The wording "[a]*ny dispute arising from or related to the present contract* […]" clearly covers the present dispute. Moreover, the Club has not challenged the jurisdiction of the BAT.

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

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

59. 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".*

60. 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. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead."*

61. Clause 8 of the Termination Agreement provides that: "[t]*he arbitrator shall decide the*

dispute ex aequo et bono".

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

63. 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[3] (Concordat)[4], 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."*[5]

64. 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".

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

6.2 Findings

6.2.1 Breach of the Termination Agreement

66. The central issue in discussion is whether the Player is really entitled to the amounts contained in the Termination Agreement, or if any of the Club's various requests for

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3 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). .

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

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

rejection or reduction of the amounts due is substantiated. Doctrine of *pacta sunt servanda* (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the principle by which the Arbitrator will examine the merits of the claim.

67. Claimant and Respondent were bound to the Employment Agreement in October 2018 that they mutually decided to terminate by virtue of the Termination Agreement.

68. While the Player claims that no amounts arising from said Termination Agreement have been paid by the Club to the Player, the Club argues that "*even though **we*** [they] ***accept there is an unpaid amount to the Claimant**, the amount alleged by the Claimant is unrealistic*" (emphasis added). However, the Club does not provide further detail in support of said affirmation.

69. Aside from the penalty, the Player asks for two different (principal) amounts: (i) a "*termination fee*" of USD 2,200.00; and (ii) overdue payables in the amount of USD 20,000.00 arising from the Previous Employment Agreement.

70. Apart from the fact that the Club first acknowledged that there was "*an unpaid amount to the Claimant*", there is no refutation of the appropriateness of the payment of the abovementioned "*termination fee*".

71. However, in justifying the impropriety of the other amount claimed, the Club maintains that these overdue payables were partly reduced as a consequence of the deduction of "*previous fines*" allegedly imposed by Respondent on Claimant and also that USD 10,000.00 from said amount were actually paid in cash to the Player (asserting that all the documentation to support said affirmations was at the Club's premises which Respondent could not enter because of the COVID-19 situation). In this regard, the Arbitrator notes the utter lack of specificity of the Club's assertions that fines allegedly imposed and/or cash payments allegedly effected should reduce the amount of

overdue payables due to the Player. The Club has had more than ample time and opportunity to provide evidentiary support for the same (e.g. by submitting correspondence, notification of the fines, witness statements, or similar), notwithstanding the difficulty or impossibility of accessing the Club's premises and documents stored there. However, it has failed to do so, rendering its assertions entirely conclusory and unsubstantiated.

72. In addition to the above, and notwithstanding the fact that the aim of Respondent's chance for a last submission was "*to supplement its previously-submitted ad cautelam Answer*", the Club took advantage of said "right to the last word" to invoke that the Termination Agreement was not signed by an authorised person, i.e. that the signature of the Club was forged.

73. As mentioned above, the Arbitrator took note of the fact that Respondent had ample opportunity to bring this allegation during the course of the proceeding, and found the evidence proffered entirely insufficient to satisfy Respondent's burden of proof with respect to the claimed forgery (taking into account Respondent's prior acknowledgement of part of the debt).

74. The Arbitrator also finds inapplicable to the circumstances of the dispute the well-established (in BAT and Swiss jurisprudence) doctrine of *Verwirkung.*[6] Notwithstanding that the origin of the USD 20,000.00 debt reflected in the Termination Agreement is, apparently, quite dated (arising from the 2014-2015 season under the Previous Employment Agreement, or even an earlier version thereof), its acknowledgement in a new agreement some years later (the Termination Agreement) means that, for all practical purposes, the *Verwirkung* "clock" started again in October 2018 by reason of such agreement's acknowledgment of the earlier debt and establishment of payment

6 *Vid*. BAT 0581, BAT 0879, BAT 1082.

terms and conditions for it[7].

75. Thus, Respondent has not provided sufficient evidence to establish any of its defences regarding these allegations and must be held to its bargain and therefore must comply with its existing payment obligations. Accordingly, the Arbitrator finds it fair and reasonable to award to the Player the USD 22,200.00 claimed.

6.2.2 Penalty

76. Because of Respondent's failure to fulfil its obligations under the Termination Agreement with more than fifteen days of delay, Claimant requests a penalty amounting to USD 10,000.00 (one-half of the USD 20,000.00 penalty established in clause 6 of the Termination Agreement cited in para. 8 of this award above).

77. The BAT has consistently held that late payment penalties are generally lawful but subject to review and eventual moderation by the Arbitrator so as to ensure that they are not disproportionate, especially when compared to the amount claimed as principal ("*in most jurisdictions, contractual penalties are subject to judicial review and can be adjusted if they are excessive. Whether a contractual penalty is excessive is usually left to the discretion of the judge and depends on the individual circumstances. As a general rule, a contractual penalty is considered to be excessive if it is disproportionate to the basic obligation of the debtor*"[8]).

78. In practice, arbitrators have taken into account the following criteria for purposes of this review: (i) proportionality; and (ii) Claimant's conduct.

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7 *Vid* BAT 1262/18.

8 Award FAT 0036/09.

79. In relation to proportionality, the Arbitrator notes that the principal amount of the debt in this case (USD 22,200.00) is slightly higher than the penalty agreed in the Termination Agreement, and that established BAT jurisprudence admits (in principle, unless the circumstances require otherwise) penalties which equal but do not exceed the principal amount.

80. Moreover, as mentioned, Claimant seeks in this proceeding a reduced amount (USD 10,000.00), so the Arbitrator's first conclusion is that such a penalty is, *prima facie*, not excessive and/or disproportionate in light of the circumstances of the present case.

81. On the other hand, with regard to Claimant's conduct, the Arbitrator considers Claimant has acted diligently during the long and tortuous course of these proceedings, by reducing *ex officio* her claims with regard to the penalty to be imposed for Respondent's default of payment.

82. Therefore, under these circumstances, the Arbitrator finds it fair, reasonable and neither excessive nor disproportionate to award in full the USD 10,000.00 penalty requested by Claimant.

6.2.3 Net amounts

83. In spite of the fact that clause 2 of the Termination Agreement provides for the Club to pay the Player the "*net amounts*" there described, clause 4 of the Termination Agreement provides*, inter alia*, as follows:

> *"4/ The abovementioned payments from Club to Player include all taxes. No additional payments apart from the abovementioned payments can be requested by Player from the Club Adana Basketball Kulübü Dernegi* […]*".*

84. The Arbitrator takes note of the clear wording of this clause 4 and of the fact that Claimant has not requested the amounts net. Therefore, the Arbitrator concludes that

the amounts requested must be awarded gross.

6.2.4 Interest

85. Lastly, Claimant has requested the accrual of 5%-interest on the amount of USD 2,200.00 from 17 December 2018 and on the amount of USD 20,000.00 from 7 January 2019.

86. 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 on both amounts.

87. As for the time when such interest should accrue, the Arbitrator considers it fair and reasonable that interest should commence on the dates requested by Claimant, as clause 2 of the Termination Agreement provides that "*any delays of up to 15 business days shall not be deemed and constructed as violation of this termination agreement*".

7. Costs

88. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

89. On 13 September 2020 – considering that pursuant to Article 17.2 of the BAT Rules "*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*", and that "*the fees of the Arbitrator shall be*

calculated on the basis of time spent at a rate to be determined by the BAT President from time to time", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 8,000.00.

90. Moreover, in light of the importance of this case for the development of the BAT jurisprudence, the BAT President orders in accordance with Article 18.2 of the BAT Rules that an amount of EUR 3,000.00 of the costs of this arbitration shall be borne by the BAT Fund.

91. Considering that Claimant was the prevailing party in this arbitration, it is consistent with the provisions of the BAT Rules that the fees and costs of the arbitration (with the exception of the EUR 3,000.00 to be borne by the BAT Fund), as well as the Claimant´s reasonable costs and expenses, be borne by Respondent.

92. Claimant claims legal fees in the amount of EUR 3,000.00. She also claims for the expense of the non-reimbursable handling fee in the amount of EUR 1,500.00.

93. Taking into account the factors required by Article 17.3 of the BAT Rules, the provision in the arbitration agreements as regards costs, the maximum awardable amount prescribed under Article 17.4 of the BAT Rules (in this case, EUR 5,000.00), the fact that the non-reimbursable handling fee in this case was EUR 1,500.00, and the specific circumstances of this case, the Arbitrator holds that the legal fees claimed by Claimant (i.e., EUR 3,000.00) represents a fair and equitable contribution by Respondent to Claimant in this regard. In particular, the numerous extensions requested by Respondent, together with the fact that Claimant has had no other alternative but to bring this proceeding as a consequence of Respondent's breach of the Termination Agreement, justifies the above conclusion.

94. Given that Claimant paid advances on costs of EUR 5,000.00 as well as a non-reimbursable handling fee of EUR 1,500.00 (which will be taken into account when determining Claimant's legal fees and expenses), and considering the contribution from the BAT Fund to the arbitration costs in the amount of EUR 3,000.00 the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

(i) Respondent shall pay EUR 5,000.00 to Claimant, representing the arbitration costs fixed by the BAT President (excluding the contribution from the BAT Fund);

(ii) Respondent shall pay to Claimant EUR 4,500.00 (EUR 1,500.00 for the non-reimbursable fee + EUR 3,000.00 for legal fees), representing the reasonable amount of her legal fees and other expenses.

8. AWARD

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

1. **Adana Basketbol Kulübü Dernegi shall pay Ms. Olesia Malashenko a total amount of USD 2,200.00, plus interest on such amount at 5% per annum from 17 December 2018, until full payment, as termination fee.**

2. **Adana Basketbol Kulübü Dernegi shall pay Ms. Olesia Malashenko a total amount of USD 20,000.00, plus interest on such amount at 5% per annum from 7 January 2019, until full payment, as overdue payables arising from the Previous Employment Agreement.**

3. **Adana Basketbol Kulübü Dernegi shall pay Ms. Olesia Malashenko a total amount of USD 10,000.00, as penalty for breach of the Termination Agreement.**

4. **Adana Basketbol Kulübü Dernegi shall pay Ms. Olesia Malashenko an amount of EUR 5,000.00 as reimbursement for her arbitration costs.**

5. **Adana Basketbol Kulübü Dernegi shall pay EUR 4,500.00 to Ms. Olesia Malashenko as a contribution to her legal fees and expenses.**

6. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 18 September 2020

Clifford J. Hendel

(Arbitrator)