

## **ARBITRAL AWARD**

(BAT 1211/18)

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Raj Parker**

in the arbitration proceedings between

**Mr. Vlad Sorin Moldoveanu**

**- First Claimant -**

**Tangram Sports Ltd.**  
c/o Mr. Stefano Meller  
Clarinda Park North 4, Dun Laoghaire  
Dublin A96 U2F8, Ireland

**- Second Claimant -**

both represented by Messrs. Sébastien Ledure and Wouter Janssens,  
attorneys at law. Brussels, Belgium

vs

**B y k ekmeke Basketbol Kul b **  
Kordonboyu cad. Atarirk mah. Albatros mevkii 135,  
B y k ekmeke, Istanbul, Turkey

**- Respondent -**

represented by Mr. Mertay Kugay and Mr. Baris Efe Sen, attorneys at law,  
Istanbul, Turkey

## **1. The Parties**

### **1.1 The Claimant**

1. Mr. Vlad Sorin Moldoveanu (hereinafter the "First Claimant") is a professional basketball player of Romanian nationality.
2. Tangram Sports Ltd. (hereinafter the "Second Claimant") is an international professional basketball agency with legal seat in Dublin, Ireland.

### **1.2 The Respondent**

3. Büyükçekmeke Basketbol Kulübü (hereinafter the "Respondent") is a professional basketball club based in Istanbul, Turkey.

## **2. The Arbitrator**

4. On 28 June 2018, Prof. Richard H. McLaren, O.C., the President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), appointed Mr. Raj Parker as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules").
5. Neither party has raised any objection to the appointment of the Arbitrator or to his declaration of independence.

## **3. Facts and Proceedings**

### **3.1 Background Facts**

#### The Employment Agreement between the First Claimant and the Respondent

6. On 4 July 2017, the First Claimant and the Respondent entered into a written contract in respect of the 2017/18 playing season ("the Employment Agreement"). The Employment Agreement was signed by the First Claimant and the Vice President of the Respondent.

7. Clause 1 of the Employment Agreement contained the following express provisions:

*"Club hereby employs the Player as a skilled basketball player for a term of one (1) basketball season (2017/2018) to commence on the date hereof and to continue through three (3) days following the final official game in which the Club participates in the 2017/2018 basketball season. [...]"*

8. Clause 4 of the Employment Agreement contained the following express provisions concerning the First Claimant's remuneration:

*"The Club agrees to pay the Player a fully guaranteed Base Salary, net of any applicable taxes, of USD \$226,000.00 (two hundred and twenty six thousand/00 USD) for the 2017/2018 basketball season. All payments to Player hereunder must be made in US \$ in accordance with wire transfer instructions or other instructions to be provided by the Player from time to time. The payment schedule is as follows;*

**PAYMENT SCHEDULE:**

**2017/2018 season Two Hundred and Twenty Six Thousand USD (\$226.000,00) net of any taxes:**

- three days after passing the examinations    \$10.000.00    (ten thousand) net of any taxes
- September 30<sup>th</sup>, 2017    \$24.000.00 (twenty four thousand) net of any taxes
- October 30<sup>th</sup>, 2017    \$24.000.00 (twenty four thousand) net of any taxes
- November 30<sup>th</sup>, 2017    \$24.000.00 (twenty four thousand) net of any taxes
- December 30<sup>th</sup>, 2017    \$24.000.00 (twenty four thousand) net of any taxes
- January 28<sup>th</sup>, 2018    \$24.000.00 (twenty four thousand) net of

any taxes

February 30<sup>th</sup> [sic], 2018 \$24.000.00 (twenty four thousand) net of any taxes

March 30<sup>th</sup>, 2018 \$24.000.00 (twenty four thousand) net of any taxes

April 30<sup>th</sup>, 2018 \$24.000.00 (twenty four thousand) net of any taxes

May 30<sup>th</sup>, 2018 \$24.000.00 (twenty four thousand) net of any taxes

TOTAL for season 2017/2018 Two Hundred and Twenty Six Thousand USD (\$226.000,00) net of any taxes.

Club agrees that this Agreement is a one (1) year (2017/2018) fully guaranteed agreement. If Player is removed or released from the Club, or this Agreement is terminated or suspended by Club due to Player's lack of or failure to exhibit sufficient skill, Player's death, illness, injury or other mental or physical disability (whether incurred on or off the court), or for any other reason whatsoever other than Player's direct and material breach of this Agreement [sic].

Club agrees that this Agreement is a fully guaranteed agreement. In this regard, even if Player is removed or released from the Club or this Agreement is terminated or suspended by Club due to Player's lack of or failure to exhibit sufficient skill, Player's illness, injury or other mental or physical disability (whether incurred on or off the court) or for any other reason than Player's direct and material breach of the contract, Club shall nevertheless be required to pay to Player and Agent, on the dates set forth above, the full amounts set forth above.

Notwithstanding anything to the contrary contained above, it is understood by Player that this Agreement will not be guaranteed for injuries suffered by Player while: (i) player is legally intoxicated, (ii) player is under the influence of illegal substance, (iii) Player participated in a sport which endangered his health or safety (including, but not limited to, boxing, wrestling, motorcycling, moped-riding, auto racing, sky-diving and hand-gliding [sic] or (iv) Player was grossly negligent in his activities off the basketball court. The Player agrees to make himself available for insurance examinations in order to allow the Club to purchase a policy of disability insurance, being understood that the above guarantee is not contingent upon the purchase of or Club's ability to procure such policy.

*Payment to the Player shall be deemed to be made when the payment is received by the Player's Payment Destination. If any scheduled payment is not received by Player's bank within thirty (30) days of the date due, the Player's performance obligations shall cease, Player shall have the right, at Player's option, to terminate this Agreement and accelerate all future payments under this Agreement. In this case, Player shall be free to leave the Club with his FIBA Letter of Clearance as a free agent to play basketball anywhere in the world Player chooses, but the duties and liabilities of Club toward Player and Agent under this Agreement shall continue in full force and effect. Furthermore, the Club shall have no rights over or with respect to Player, and Club will not be entitled to request or receive any payments pertaining to the Player playing basketball anywhere in the world. Notwithstanding anything to the contrary contained above, in the event that at anytime during the term of this Agreement Player fails official doping test, Club shall have the right to terminate this Agreement, in which event, Club shall be relieved of all of its obligations and liabilities toward the Player under this Agreement from and after the date on which Player fails his doping test.*

*It is understood that Club shall not have the right to terminate this Agreement unless agents are notified exactly as specified above."*

9. Clause 6 of the Employment Agreement contained the following express provisions concerning the payment of Turkish taxes by the Respondent:

*"Club agrees to make all payments of Turkish taxes of any nature (including, but not limited to, income taxes) on behalf of the Player. All bonus payments paid to Player here under shall be fully net of all taxes. All commission payments paid by Club to Agent shall be net and free of any Turkish taxes which shall be paid for by the Club. The payments for Turkish taxes on behalf of the Player will be in addition to all other payments required to be made to Player under this Agreement and will be fully guaranteed by Club in the same manner that all payments to Player are guaranteed here under. It is understood that Club shall be required to provide to Player with a tax certificate evidencing that all Turkish taxes have been paid by Club on behalf of Player as provided in this Paragraph 6 when requested by Player or Agent."*



10. Clause 8 contained the following express provisions concerning the payment of performance-related “BONUSES” to the First Claimant:

*“In addition to the guaranteed Base Salary to be paid to Player in Paragraph 4 above, the Club shall pay the Player the following bonuses, net of any taxes (collectively, “Bonuses”), for each specific goal listed in this Paragraph 8 that is achieved by the Club and/or Player:*

*[...]*

*FIBA Cup  
Advancing to 2<sup>nd</sup> round                      USD \$2.000,00 (two thousand) net*

*[...]*

*All bonuses earned under this Paragraph 8 are cumulative and net of any taxes and will become due and payable to Player with the last salary payment scheduled for the season.*

*The Club shall make all payments for Turkish taxes of any nature (including, but not limited to, income taxes) on any payments made to Player under this Paragraph 8.”*

11. Clause 10 of the Employment Agreement contained the following express provision regarding the termination of the contract:

*“The Club agrees that this Agreement is No Cut agreement, which means that neither the Club nor any assignee thereof nor the League can terminate this Agreement. This Agreement shall not be assigned, transferred, traded or sold in manner to any other team anywhere in the world without the express written consent and approval of Player which may be granted or denied in his sole discretion. Upon completion of this Agreement, the Club shall have no rights over or with respect to Player, and the Club will not be entitled to request or receive any payments pertaining to Player playing basketball anywhere in the world.”*

12. Clause 12 of the Employment Agreement contained an arbitration clause in favour of

the BAT. The text of this provision is set out in full at paragraph 47 below.

13. Clause 13 of the Employment Agreement contained the following express provisions concerning “AGENT’S FEE”:

*“For services of locating and contracting the Player, Club shall pay to the Agent a commission fee in the amount of 10% of the Player’s base salary, as specified in a separate agreement that shall serve as an addendum to this Agreement. Club’s obligation to pay the Agent shall survive any premature termination of the Agreement. Player agrees and accepts that in the event the Club wishes to extend this contract with the Player, Club shall always have to use the services of the Agent for the negotiation and execution of the new contract or its extension.”*

14. The fourteenth clause of the Employment Agreement (which was erroneously numbered as a second clause 13) contained the following express provision:

*“This Agreement contains the entire agreement between Club and Player with respect to the matters set forth herein (and therein) and supersedes all previous oral or written agreements, communications, and understandings with respect to such matters, and there are no oral or written inducements, promises, or agreements except as contained herein (or therein). Any modification of this Agreement must be in writing and signed by both Club and Player. In the event Player at any time executes any documents written in the native tongue of Club, it is understood that in the event of a conflict between the terms and conditions of such other documents and the terms and conditions of this Agreement, the terms and conditions of this Agreement shall absolutely control. Each of Player, Club and Agent agree that the contract which shall control the relationship between the parties shall be this Agreement and this Agreement shall be the only Agreement submitted to the arbitrator referred to in Paragraph 11 [sic] above. Parties agree that faxed or scanned signed copies of this Agreement shall have legal power as an original.*

*THE PAYMENTS REQUIRED TO BE MADE BY CLUB TO PLAYER AND AGENT PURSUANT TO PARAGRAPHS 4, 8 AND 12 ABOVE, AND THE TAX PAYMENTS AS DESCRIBED IN*

PARAGRAPH 6 ABOVE AND THE GOODS AND SERVICES PROVIDED BY CLUB TO PLAYER PURSUANT TO THE APPLICABLE TERMS OF THIS AGREEMENT, ARE ALL FULLY GUARANTEED AS SET FORTH HEREIN.”

The Agency Agreement between the Second Claimant and the Respondent

15. On the same date as the Employment Agreement was concluded, the Second Claimant and the Respondent concluded a separate agreement (the “Agency Agreement”). The Second Claimant was referred to as the “Agent” throughout the Agency Agreement.
16. The Agency Agreement contained the following express provisions:

“1. **LEGAL FEE.** The Club hereby agrees to pay a Legal Fee, to the Agent, for its role in the contract drafting between the Club and Mr. Vlad Sorin Moldoveanu (hereinafter referred to as the “Player”) for the basketball season 2017-2018.

2. **PAYMENTS SCHEDULE.**

The total amount of the Legal Fee is fixed at USD \$22.600,00 (twenty-two thousand six hundred) net of any VAT taxes or any other Turkish taxes and charges, and shall be paid as follow [sic]:

- USD \$12.600,00 (twelve thousand six hundred) by and no later than October 30<sup>th</sup>, 2017
- USD \$10.000,00 (ten thousand) by and no later than December 30<sup>th</sup>, 2017

3. **BANK INFO.** The Legal Fee shall be paid by bank wire transfer to the bank account of the Agent presented to the Club in writing by regular invoice with all necessary details for wire transfer.

4. **LATE PAYMENT.** It is understood and agreed by both parties that if the Agent does not receive the payment of the Legal Fee by the Club within Thirty (30) days of the due date, pursuant to paragraph 2 of this Agreement, then the Agent shall be entitled to receive an interest penalty of Fifty Euro (€50,00) per day for each day after the fifteenth (15<sup>th</sup>) day said payment was due.

5. **FUTURE SEASONS.** Club shall pay ten percent [sic] (10%) of



*the agreed Player's base salary to the Agent for any future agreement (new or change [sic] terms) between Club and Player.*

6. **FACSIMILE COPIES.** *This Agreement may be executed in counterparts, each of which shall constitute an original but all together shall constitute one and the same Agreement. Facsimile copies of the signed Agreement may be transmitted between the parties hereto and a facsimile copy of a signed Agreement shall be deemed a counterpart hereof.*

7. **ENTIRE AGREEMENT.** *This Agreement cancels any previous agreement between the parties and contains the entire agreement between the Agent and the Club. There are no oral or written inducements, promises, agreements or modifications, except as contained herein. Any modification of this Agreement must be in writing and signed by both the Agent and the Club.*

8. **GOVERNING LAW.** *Any disputes arising or related to the present Agreement shall be submitted to the FIBA Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved definitely in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The seat of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

17. The Agency Agreement was signed by Mr. Stefano Meller on behalf of the Second Claimant and by Mr. Osman Yesigül on behalf of the Respondent.

Events following the conclusion of the Employment Agreement and Agency Agreement

18. According to the Claimants, on 25 October 2017 the First Claimant sustained an injury \_\_\_\_\_ during a competitive game against the Belgian professional basketball club Mons-Hainaut.
19. On 26 January 2018, Mr. Meller wrote to the Respondent on behalf of both of the

Claimants. His letter referred to the Employment Contract and the Agency Contract, before going on to state that:

*"Following the provisions of such contracts, you are in serious breach of the economic obligations contained in the contracts themselves.*

*I have to express our strong disappointment for the enormous delay of payments to Mr. Moldoveanu, which is happening since the beginning of the season, and for the total lack of payment of the agent's fee, as agreed.*

*In fact, as of today, Mr. Moldoveanu only received a partial payment of the amount due on December 30<sup>th</sup> 2017, which is now due and payable since 27 days. Moreover the further sum of **USD 24.000,00** will become due and payable within 2 days, on 28/01/2018, as provided in paragraph 4 of the Agreement.*

*In addition, the payment of the agents fee in the amount of **USD 22.600,00** was due on October 20<sup>th</sup>, 2017. Such amount has not been paid and is now overdue since 98 days. According to the contract we are now entitled to a penalty fee of 50 euro per day after the 30<sup>th</sup> day of delay, which results in the further amount of **Euro 3.400,00**.*

*Despite our various contacts and your repeated promises of payments, Mr. Moldoveanu and my company have not yet received what agreed [sic].*

*This letter is now intended as a warning for breach of contract and as an official request of payment of the total sum of **USD 41.000,00** to Mr. Moldoveanu and **USD 22.600,00** and **Euro 3.400,00** to Tangram Sports. If we will not receive all of the above amount past due within 5 natural days from the receipt of this letter, we will be obliged to take further action and start a legal procedure at FIBA Basketball Arbitral Tribunal."*

20. On 29 January 2018, the First Claimant underwent a medical examination of his \_\_\_\_\_ at an orthopaedic clinic in Antwerp, Belgium. According to a contemporaneous letter produced by the examining clinicians, that examination had identified \_\_\_\_\_. The

clinicians proposed two treatment options, namely \_\_\_\_\_ or alternatively \_\_\_\_\_.

21. A short while later, Mr. Yesigül sent a letter to the First Claimant which provided “*official authorization to you, on behalf of our Club, in order to undergo the necessary surgery \_\_\_\_\_*” at the orthopaedic centre in Antwerp, Belgium.
22. On 6 February 2018, Mr. Meller sent a letter to the Respondent on behalf of the First Claimant. The letter explained that while the surgery had been successful, the situation was “*worse than expected as there were \_\_\_\_\_*”. It added that, “*we still do not understand why it was not timely diagnosed by your medical staff but only by our designated specialist after several weeks.*” The letter outlined the projected timetable for the First Claimant’s rehabilitation before “*finally reminding you, once again, about the delayed payments to Mr. Moldoveanu and to my company Tangram Sports, and we expect to receive such payments within the present week, as you promised to Mr. Moldoveanu.*”
23. On 10 February 2018, Mr. Yesigül sent a letter to the First Claimant granting “*official authorization to you, on behalf of our Club, in order to return to USA on February 12<sup>th</sup> 2018 to immediately start the necessary rehabilitation, after the surgery \_\_\_\_\_.*” The letter ended by requesting that the Respondent be provided with “*monthly reports of the rehabilitation process*”.
24. On 14 March 2018, the Claimants’ legal representatives sent a letter to the Respondent entitled “*formal notice*”. The letter referred to various provisions in the Employment Agreement and the Agency Agreement before stating that:

*“Despite the numerous reminders, the Player has only received an aggregate amount of eighty-nine thousand US dollars (\$89.000) from the Club, which was consistently paid late. Hence, at present, an aggregate amount of sixty-five thousand US dollars (\$ 65.000)*

*remains due to the Player. In addition, an aggregate amount of seventy-two thousand US dollars (\$ 72.000) shall become due to the Player for the remainder of the 2017-2018 season.*

*Besides, the Agent has not received any payment from the Club. Hence, at present, an aggregate amount of twenty-two thousand six hundred dollars (\$ 22.600) remains due to the Agent.”*

25. The letter went on to state that, in accordance with Article 4 of the Agency Agreement, the Second Claimant was entitled to receive a late payment penalty of EUR 6,050 in respect of the unpaid instalment of commission that fell due on 30 October 2017 and a further EUR 3,500 in respect of the unpaid instalment that fell due on 30 December 2017. The letter then stated:

*“We therefore address you this formal notice to urge the Club to wire the aggregate amounts of **eighty-seven thousand six hundred US dollars (\$ 87.600)** and **nine thousand and fifty Euro (€9.050)** to the following escrow account **within the next fifteen (15) days**:*

*[...]*

*In default, our clients will duly consider initiating a joint proceeding with FIBA’s Basketball Arbitral Tribunal (hereinafter: “the BAT”) per article 12 of the Employment Agreement and article 8 of the Agent Agreement. [...]*”

26. On 15 May 2018, the Claimants’ legal representative sent a further letter entitled “*final formal notice*” to the Respondent. The letter stated, amongst other things, that:

*“Despite our formal notice d.d. March 14, 2018, our firm nor our clients [sic] have received any payment from the Club.*

*Hence, at present, an aggregate amount of one hundred and thirteen thousand US dollars (\$ 113.000) net remains due to the Player. In addition, an amount of twenty-four thousand US dollars (\$ 24.000) shall become due to the Player on May 30, 2018.*

*Besides, the Agent has not received any payment from the Club. Hence, at present, an aggregate amount of twenty-two thousand six hundred US dollars (\$22.600) remains due to the Agent."*

27. The letter went on to state that, in accordance with Article 4 of the Agency Agreement, the Second Claimant was entitled to receive a late payment penalty of EUR 9,150 in respect of the unpaid instalment that fell due on 30 October 2017 and a further EUR 6,100 in respect of the unpaid instalment that fell due on 30 December 2017. The letter then stated:

*"We therefore address you this final formal notice to urge the Club to wire the aggregate amounts of **one hundred and thirty-five thousand six hundred US dollars (\$ 135.600)** and **fifteen thousand two hundred and fifty Euro dollars (€15.250)** to the following escrow account **within the next fifteen (15) days**:*

*[...]*

*In default, our clients have instructed us to immediately initiate a joint proceeding with FIBA's Basketball Arbitral Tribunal ("the BAT") per article 12 of the Employment Agreement and article 8 of the Agent Agreement, including the claim for the final salary instalment due to the Player by May 30, 2018."*

28. Despite these repeated written requests for payment, Claimants submit that the Respondent made no further payments to either of them.

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

29. On 10 June 2018, the Claimants filed the Request for Arbitration ("RFA") in accordance with the BAT Rules.
30. The non-reimbursable handling fee of EUR 3,000 was received by the BAT from the Claimants on 14 June 2018.



31. On 18 July 2018, the Claimants paid EUR 6,000 towards their share of the Advance on Costs.
32. On 3 August 2018, the Claimants paid EUR 6,000 towards the Respondents' share of the Advance on Costs.
33. On 8 August 2018, the Respondent sent an email to the BAT attaching a note of an (undated) communication from the Respondent regarding the Claimant's situation. This stated as follows:

*"We want to solve the BAT Case concerning Vlad Moldoveanu with mutual understanding. This is our first case at BAT and we really would like to end it.*

*These days, Turkey is having really difficult days financially and the USD Currency is going up everyday. We, as a club had really difficult days and still struggling. We ended our contract with the old sponsor.*

*We would like to offer you a new payment plan and a new contract for these payments.*

*The new payment plan is like this :*

*25th September 22.000 USD*

*25th October 22.000 USD*

*25th November 11.000 USD*

*25th December 11.000 USD*

*25th January 35.000 USD*

*25th February 20.000 USD*

25th March 20.000 USD

25th April 20.000 USD

Total Amount : 161.000 USD

*This total amount is the amount that we owe to the player and the agent.*

*We would kindly request you to accept this payment plan and withdraw the BAT Case.”*

34. On 13 August 2018, the Arbitrator issued a Procedural Order which noted that the Respondent had failed to file an Answer to the RFA and which therefore gave the Respondent a further and final opportunity to file an Answer by no later than 23 August 2018. The Respondent did not respond to this Procedural Order and did not file any Answer to the RFA.
35. In the absence of a request by the parties, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the Award on the basis of the written submissions and evidence submitted by the Claimant.
36. On 11 September 2018, the Arbitrator notified the Parties that in accordance with Article 12.1 of the BAT Arbitration Rules, the exchange of documents was completed. The Parties were therefore directed to set out how much of the applicable maximum contribution to their costs should be awarded to them and why.
37. On 12 September 2018, the Claimants submitted their joint account of costs to the BAT.
38. On the same date, the BAT Secretariat received an email communication from attorneys who had recently been appointed on behalf of the Respondent. The Respondent's newly appointed representatives referred to the order closing the evidential stage of the proceedings on 11 September 2018 and explained that, in light

of that order, the Respondent did not seek to submit any pleading. Instead, the Respondent “*request[ed] to settle the dispute at hand*” pursuant to Article 12 of the BAT Arbitration Rules. The communication stated that the Respondent “*accepts that they failed to pay its debts to the Claimant regarding the agreement signed between with them*”. It therefore requested the Arbitrator to “bring a settlement to the dispute” subject to “*two conditions*”, namely that (a) any payments the Respondent was ordered to make should be “*in reasonable amounts*” and (b) the first installment should not fall due until the last week of October 2018.

39. Having regard to the Respondent’s persistent failure to engage at all with the proceedings for a period of several months (despite repeated opportunities to do so) and the fact that the evidential proceedings had already been closed by the time of the Respondent’s request for a mediated settlement of the dispute, the Arbitrator concluded that in all the circumstances it would not be appropriate to accede to that request. The Arbitrator therefore decided not to attempt to bring about a settlement to the dispute at this very late stage in the proceedings.
40. On 20 September 2018, the Arbitrator invited the Claimants to inform him by 24 September 2018 whether they preferred for the Award to be held back for a period of time in order for the parties to conduct settlement discussions.
41. On 24 September 2018, the Claimants responded stating that they were willing to enter into settlement discussions and inviting the Arbitrator to hold back the delivery of the Award until 8 October 2018.
42. On 27 September 2018, the Arbitrator decided to suspended the proceedings until 10 October 2018.
43. On 10 October 2018, the Claimants requested the Arbitrator to hold back the delivery of the Award until 15 October 2018 to enable settlement discussions to continue.

44. On 11 October 2018, the Arbitrator decided to continue the suspension of the proceedings until 15 October 2018.
45. On 15 October 2018, the Respondent requested a further extension of the suspension of the proceedings until 30 October 2018 in order to enable the settlement discussions to continue. On 18 October 2018, the Arbitrator decided to continue the suspension of the proceedings until 25 October 2018.
46. On 31 October 2018, the Claimants notified the Arbitrator that they had not heard further from the Respondent and therefore requested the Arbitrator to proceed to deliver the Award.

#### **4. The Parties' submissions**

##### **4.1 The Claimant's Submissions**

###### The First Claimant's Claim

47. The First Claimant alleged that the Respondent had:
- (a) failed to pay USD 137,000 of the USD 226,000 salary that the First Claimant is entitled to receive from the Respondent under the Employment Agreement; and
  - (b) failed to pay a performance bonus of USD 2,000 that the First Claimant is entitled to receive from the Respondent as a result of the Respondent reaching the second round of the FIBA Europe Cup.
48. The First Claimant therefore sought an award requiring the Respondent to pay all of the unpaid contractual salary and bonuses due to him under the Contract, which totals USD 139,000, together with interest on the unpaid amounts and costs.

49. In respect of interest, the First Claimant submitted that in accordance with consistent BAT jurisprudence, he should be awarded interest at the rate of 5 per cent per annum on the outstanding unpaid remuneration, to be calculated from the dates when each instalment of that unpaid remuneration fell due.

The Second Claimant's claim

50. The Second Claimant alleged that the Respondent had:
- (a) failed to pay the commission fee of USD 12,600 which the Respondent was required to pay to the Second Claimant by 30 October 2017; and
  - (b) failed to pay the commission fee of USD 10,000 which the Respondent was required to pay to the Second Claimant by 30 December 2017.
51. The Second Claimant therefore sought an award requiring the Respondent to pay a total amount of USD 22,600 to the Second Claimant in respect of unpaid commission. In addition, the Second Claimant also sought a further payment of EUR 7,675 in respect of late payment penalties arising from the Respondent's failure to pay the instalments of the commission fees on time. In support of this claim, the Second Claimant stated that an unqualified application of the terms of the Agency Agreement would result in the imposition of aggregate late payment penalties totalling EUR 17,850 (357 days multiplied by a daily penalty of EUR 50). The Second Claimant, however, had "*deliberately reduce[d] its claim for late payment penalties*" by:
- (a) limiting the scope of the claim to late payment penalties that accrued in the period between the date when the respective instalments fell due and the date when the Employment Agreement expired (16 May 2018), rather than the date when the RFA was filed (10 June 2018); and



- (b) reducing the amount of the daily penalty by 50% from EUR 50 per day (the rate expressly specified in the contract) to EUR 25 per day.

52. The Second Claimant submitted that the amount of EUR 7,675 is not excessive and is proportionate to the amount of the unpaid principal debt (USD 22,600) on which those late payment penalties have accrued.

53. In addition to the claim for late payment penalties, the Second Claimant also sought an award of interest at the rate of five per cent per annum on the unpaid sum of USD 22,600, to be calculated from 17 May 2018 (the day after the expiry of the Employment Agreement) until payment in full of the outstanding debt by the Respondent.

#### The Claimants' Request for Relief

54. The request for relief in the RFA stated that the Claimants sought an order that the Respondent must:

*“pay Claimant 1:*

- *an amount of one hundred and thirty-seven thousand US dollars (\$ 137.000) net as overdue salaries;*
- *an amount of two thousand US dollars (\$2.000) net as overdue bonuses; and*
- *late payment interest at a rate of five percent (5%) per annum on the principle [sic] amounts as follows:*

<i>principle [sic]</i>	<i>start</i>	<i>end</i>
<i>\$17.000</i>	<i>December 31, 2017</i>	<i>January 30, 2018</i>
<i>\$41.000</i>	<i>January 31, 2018</i>	<i>February 28, 2018</i>
<i>\$65.000</i>	<i>February 27, 2018</i>	<i>March 30, 2018</i>
<i>\$89.000</i>	<i>March 31, 2018</i>	<i>April 30, 2018</i>

\$113.000	May 1, 2018	May 30, 2018
\$139.000	May 31, 2018	date of full payment

*pay Claimant 2:*

- *in principle:*
  - *an amount of twenty-two thousand six hundred US dollars (\$22.600) net as fee; and*
  - *an amount of seven thousand six hundred and seventy-five Euro (€7.675) as late payment penalties; and*
  - *late payment interest at a rate of five percent (5%) per annum on the amounts of twenty-two thousand six hundred US dollars (\$22.600) and seven thousand six hundred and seventy-five Euro (€ 7.675) as from May 17, 2018, until the date of full payment.*
- *In the alternative:*
  - *an amount of twenty-two thousand six hundred US dollars (\$22.600) net as fee; and*
  - *late payment interest at a rate of five percent (5%) per annum as follows:*

<i>principle [sic]</i>	<i>start</i>	<i>end</i>
\$12.600	October 31, 2017	December 30, 2017
\$22.600	December 31, 2017	Date of full payment

- *provide Claimant 1 with a tax certificate indicating the net nature of all past and future payments under the Employment Agreement;*

- *reimburse Claimants all BAT expenses and procedure costs; and*
- *indemnify Claimants for all incurred legal and advisory expenses up to an amount to be determined during the BAT proceedings.*

#### **4.2 The Respondent's Submissions**

55. As explained above, the Respondent failed to file any submissions in response to the RFA. The only communication received from the Respondent consisted of the email dated 8 August 2018 attaching a note summarising an undated telephone conversation and a short email dated 12 September 2018 (the date following the closure of the evidential stage of the proceedings) in which the Respondent's newly appointed lawyers stated that the Respondent "*accepts that they failed to pay its debts to the Claimant regarding the agreement signed between with them*". The communication did not otherwise address – still less contest or respond to – any of the Claimant's submissions or evidence before the BAT.

#### **5. Jurisdiction**

56. 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).
57. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
58. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and

is thus arbitrable within the meaning of Article 177(1) PILA.<sup>1</sup>

59. The Arbitrator notes that clause 12 of the Employment Agreement and clause 8 of the Agency Agreement each contained an arbitration clause in favour of the BAT in the following terms:

*“Any disputes arising or related to the present Agreement shall be submitted to the FIBA Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved definitely in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties’ domicile. The seat of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.”*

60. The Arbitrator notes that the Respondent has not made any challenge to the jurisdiction of the BAT with respect to the present dispute.
61. The Employment Agreement and the Agency Agreement are both in written form and thus the arbitration clauses fulfil the formal requirements of Article 178(1) PILA. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreements under Swiss law (referred to by Article 178(2) of the PILA). In particular, the wording *“Any dispute arising or related to the present Agreement”* in the two contracts clearly covers the circumstances of the present case.
62. For the above reasons, the Arbitrator concludes that he has jurisdiction to adjudicate the Claimants’ claims against the Respondent.

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

## 6. Discussion

### 6.1 Applicable Law

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

*“the parties may authorize the arbitral tribunal to decide ex aequo et bono”*

64. Under the heading “Law Applicable to the Merits”, Article 15.1 of the BAT Rules provides as follows:

*“Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.”*

65. As noted above, clause 12 of the Employment Agreement and clause 8 of the Agency Agreement each provided that:

*“The arbitrator shall decide the dispute ex aequo et bono”*

66. The Claimants made submissions by reference to the standard of *ex aequo et bono* in the RFA. The Respondent did not file an Answer to the RFA and, therefore, did not address the issue of applicable law.



67. Therefore, the Arbitrator concludes that in accordance with the identical provisions in clause 12 of the Employment Agreement and clause 8 of the Agency Agreement, the dispute shall be decided *ex aequo et bono*.

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

## **6.2 Findings**

### **6.2.1 The First Claimant's claim for unpaid contractual remuneration**

69. The Arbitrator begins by noting that there is nothing in the documentary record that calls into question the validity of the Employment Agreement. The terms of clause 1 of the Employment Agreement make it clear that the Parties intended to establish a binding contract of employment between the First Claimant and the Respondent in respect of the 2017/18 professional basketball season. There is nothing to suggest that the Employment Agreement was tainted by any invalidity; on the contrary, it is apparent that all Parties proceeded on the basis that there was a binding agreement in force between the First Claimant and the Respondent.

70. The Arbitrator further notes that clause 4 of the Employment Agreement established the First Claimant's right to contractual remuneration in terms that are clear, precise and unambiguous. In this regard, the Arbitrator observes that clause 4 contained three separate references to the First Claimant's entitlement to receive a total salary of "*two hundred and twenty six thousand USD*" to be paid "*net of any taxes*" for the 2017/18 playing season. It then specified a clear timetable for the payment of that total amount through one instalment of USD 10,000 and nine subsequent instalments of USD 24,000.

71. The Arbitrator also notes that:

- (a) Clause 4 stipulated that the Employment Agreement was a *“fully guaranteed agreement”*, which meant that even if the contract was suspended by the Respondent on the basis of the First Claimant’s *“illness, injury or other mental or physical disability (whether incurred on or off the Court)”* then the Respondent would *“nevertheless be required to pay to Player and Agent, on the dates set forth above, the full amounts set forth above”*. Accordingly, unless the First Claimant sustained an injury as a result of one of the narrow range of prohibited activities (e.g. intoxication, gross negligence or participating in a dangerous sport described in the fourth paragraph of that clause) then the fact that he sustained an injury which prevented him from participating in competitive games would have no effect on his legal rights against the Respondent under the Employment Agreement. In this regard, there is no evidence in the documentary record to suggest that the First Claimant sustained an injury as a result of participating in any of those prohibited activities. On the contrary, there is uncontested documentary evidence that the First Claimant sustained an injury while playing in a professional game for the Respondent.
- (b) Clause 10 of the Employment Agreement provided that the Agreement was a *“No Cut agreement”* which meant that the Respondent had no right to terminate, transfer or assign the contract. There is no evidence in the record to suggest that the Respondent ever attempted to terminate, transfer or assign the Employment Agreement in breach of that prohibition.
- (c) The fourteenth clause of the Employment Agreement (which was erroneously numbered as clause 13) expressly provided that the Employment Agreement *“contains the entire agreement between [the First Claimant] and [the Respondent] with respect to the matters set forth herein”* and that the agreement *“supersedes all previous oral or written agreements, communications, and understanding with respect to such matters”*. Accordingly, it is apparent that the terms set out in the Employment Agreement represent the totality of the

contractual rights and obligations of the First Claimant and the Respondent *inter se*.

- (d) Further, the fourteenth clause of the contract also stated that any modification of the Employment Agreement could only be effected “*in writing...signed by both [the Respondent] and [the First Claimant]*”. There is nothing in the documentary record to suggest that either party sought to effect any written modification of the terms of the Employment Agreement at any point after it was signed on 4 July 2017.
- (e) Finally, the Arbitrator notes that the First Claimant’s right to the remuneration specified in clauses 4 and 8 of the Employment Agreement was reinforced by the (unnumbered) penultimate paragraph of the Employment Agreement, which stated that: “*THE PAYMENTS REQUIRED TO BE MADE BY CLUB TO PLAYER...PURSUANT TO PARAGRAPHS 4 [AND] 8...ARE FULLY GUARANTEED AS SET FORTH HEREIN.*”

- 72. In light of these provisions, the Arbitrator concludes that the First Claimant had a clear, express and unqualified contractual right to be paid a total of USD 226,000 by the Respondent as salary for the 2017/18 playing season.
- 73. The Arbitrator notes that the First Claimant has adduced evidence which indicates that he received a total of USD 89,000 from the Respondent. This apparently consisted of one payment of USD 10,000 on 30 September 2017, three payments of USD 24,000 in October and November 2017 and a final payment of USD 7,000 on 30 December 2017. Accordingly, the evidence before the Arbitrator establishes that there was a shortfall of USD 137,000 between the amount of salary that the Respondent was required to pay to the First Claimant under the Employment Agreement and the amount which it in fact paid to him. Having regard to the terms of the Employment Agreement and the evidence before the Arbitrator, the Arbitrator concludes that the Respondent is

therefore liable to pay USD 137,000 to the First Claimant in respect of unpaid salary due under the Employment Agreement.

74. The Arbitrator's conclusion is reinforced by the content of the attachment to the communication dated 8 August 2018, which outlined a proposed payment plan which would involve the Respondent making payments totalling USD 161,000 and which stated that, *"This total amount is the amount that we owe to the player and agent"*. The Arbitrator's conclusion is also reinforced by the communication from the Respondent's newly appointed lawyers on 12 September 2018 (the day after the evidential stage of the proceedings was closed). In that communication it was stated on behalf of the Respondent that: *"the Respondent Club accepts that they failed to pay its debts to the Claimant regarding the agreement signed between with them"*. The communication did not contest any aspect of the Claimant's pleaded case.
75. In relation to performance related bonuses, the Arbitrator observes that clause 8 of the Employment Agreement provided that the First Claimant would receive a bonus of USD 2,000 if the Respondent advanced to the second round of the FIBA Cup. The First Claimant has produced documentary evidence that establishes that the Respondent did reach that stage of the competition during the 2017/18 season. Accordingly, the Arbitrator concludes that the First Claimant was entitled to a bonus payment of USD 2,000 in addition to his contractual salary.
76. The Arbitrator notes that the First Claimant has adduced uncontested evidence that this bonus payment was not paid by the Respondent. Again, the Arbitrator notes that the Respondent did not seek to contest this during the evidentiary stage of the proceedings or in the communication from its newly appointed lawyers on 12 September 2018.
77. Accordingly, the Arbitrator concludes that the Respondent is liable to pay USD 2,000 to the First Claimant in respect of that unpaid bonus due under the Employment

Agreement.

#### **6.2.2 The First Claimant's claim for a tax certificate**

78. Clause 6 of the Employment Agreement provides that the Respondent “*shall be required to provide to [the First Claimant] with a tax certificate evidencing that all Turkish taxes have been paid by [the Respondent] on behalf of [the First Claimant] as provided in this Paragraph 6 when requested by [the First Claimant or Second Claimant]*”. According to the First Claimant, the Respondent has not provided any tax certificate to the First Claimant pursuant to this provision in the Employment Agreement.
79. The Arbitrator notes that, according to the language of clause 6, the Respondent's obligation to supply a tax certificate is triggered when it is “*requested*” by the First or Second Claimant to do so. It is unclear from the material before the Arbitrator whether the First or Second Claimant made such a request prior to the institution of these proceedings before the BAT. Notwithstanding this, the Arbitrator considers it appropriate to require the Respondent to produce such a tax certificate for the following reasons:
- (a) First, it is apparent from the documentary record that the Respondent has consistently failed to engage with correspondence sent by the Claimants in connection with the Respondent's obligations under the Employment Agreement. In the circumstances, it is apparent that making a formal request for a tax certificate would have been unlikely to yield any response in light of the Respondent's persistent failure to comply with its primary obligation to pay the First Claimant's contractual remuneration.
  - (b) Second, the Arbitrator notes that the contents of the RFA – which has been communicated directly to the Respondent – are capable of being construed as



such a request. In particular, paragraph 39 of the RFA states that the First Claimant “*requests to be provided with tax certificates indicating the net nature of all past and future payments made to him by Respondent under the Employment Agreement*”. Thus, even if no request had been made for the purposes of clause 6 of the Employment Agreement before these proceedings were instituted, the contents of the RFA do meet that requirement.

- (c) Third, the obligation in clause 6 of the Employment Agreement concerns the provision of a tax certificate evidencing that all taxes have been paid by the Respondent “*as provided in this Paragraph 6*”. In other words, the tax certificate is intended to evidence the Respondent’s compliance with its duty to pay taxes in respect of all payments of remuneration to the Claimants required under the Employment Agreement. Since the Arbitrator has concluded that the Respondent has failed to fulfil its payment obligations under the Employment Agreement, it is self-evident that the Respondent has also failed to pay the tax that would be due on those unpaid payments. As such, it is reasonable for the Claimant to defer making a formal request for a tax certificate until after the Respondent has complied with its primary payment obligations under the Employment Agreement. Since the Respondent must now pay those outstanding sums in accordance with the relief directed by this Award, it is appropriate to simultaneously require the Respondent to produce a tax certificate evidencing that it has complied with its contractual tax-related obligations in respect of those payments.

80. For all these reasons, the Arbitrator concludes that it is appropriate to direct the Respondent to provide a tax certificate to the First Claimant in accordance with clause 6 of the Employment Agreement.

### **6.2.3 The Second Claimant’s claim for unpaid commission fees**

81. Clause 13 of the Employment Agreement provided that in exchange for “*services of locating and contracting the Player*”, the Respondent “*shall pay to the [Second Claimant] a commission fee in the amount of 10% of the Player’s base salary as specified in a separate agreement that shall serve as an addendum to this Agreement*”. That “*separate agreement*” was the Agency Agreement, which was concluded on the same date as the Employment Agreement.
82. As explained above, clause 1 of the Employment Agreement stated that the Respondent agreed “*to pay a Legal Fee, to the [Second Claimant] for its role in drafting the contract*” between the First Claimant and the Respondent (viz. the Employment Agreement). Clause 2 of the Agency Agreement then established a schedule for the payment of that commission fee, which was “*fixed at USD \$22.600,00 (twenty-two thousand six hundred) net of any VAT taxes or any other Turkish taxes and charges*”. It then went on to specify that the fee of USD 22,600 would be paid in two instalments of USD 12,600 and USD 10,000 on 30 October 2017 and 30 December 2017 respectively.
83. As stated above, there is nothing in the record to cast any doubt on the validity of the Employment Agreement. Nor is there anything that calls into question the validity of the Agency Agreement. The Arbitrator is therefore satisfied that both contracts were binding on the Respondent. The Arbitrator further considers that the terms of clauses 1 and 2 of the Agency Agreement are clear, precise and unambiguous. Those clauses conferred a clear and unqualified right on the Second Claimant to receive a commission fee of USD 22,600 from the Respondent. The unqualified nature of that right is reinforced by clause 7 of the Agency Agreement, which expressly provided that the Agency Agreement superseded any previous agreement and “*contains the entire agreement between the [Second Claimant] and the [Respondent]*”.
84. The Second Claimant has adduced documentary evidence – in the form of correspondence with the Respondent – which corroborates its uncontested claim that

it did not receive any payment from the Respondent pursuant to the obligations owed under the Agency Agreement. The payment of USD 22,600 due to the Second Claimant under the Agency Agreement therefore remains unpaid.

85. Accordingly, the Arbitrator concludes that the Respondent is liable to pay the amount of USD 22,600 to the Second Claimant in respect of unpaid commission fees due under the Agency Agreement.

#### **6.2.4 Late payment penalties claimed by the Second Claimant**

86. The Arbitrator notes that clause 4 of the Agency Agreement contained a clearly worded clause which makes express provision for the payment of a daily late penalty of EUR 50 in the event that the Respondent is more than 30 days late in complying with the payment obligations owed to the Second Claimant. The Arbitrator also notes that the Second Claimant has voluntarily reduced the size of its claim based on that provision in the manner described at paragraph 40 above.
87. Accordingly, the question is whether, ruling *ex aequo et bono*, the Arbitrator is required to give full effect to that contractual provision in the attenuated manner advanced by the Second Claimant.
88. In BAT 0826/16 the arbitrator examined the BAT jurisprudence concerning contractual penalty clauses. The arbitrator explained at para 64 that:

*“Pursuant to constant BAT jurisprudence, contractual penalty or liquidated damages clauses are permissible in principle. They are, however, subject to careful scrutiny when ruling ex aequo et bono. Specifically, a clause which imposes a detriment on the breaching party which is out of all proportion to any legitimate interest of the innocent party may be refused enforcement, or moderated in its application.”*

89. The arbitrator went on to explain that:

*“65. A penalty clause has the purpose of urging one party to comply with its contractual obligations, either because such compliance is of exceptional importance for the other party, and/or because that other party is particularly concerned that the debtor might not honor its promise. It is a legitimate and appropriate contractual tool to facilitate adherence to the principle of pacta sunt servata. However, because of the penal character of such clauses, their scope cannot be unlimited, i.e. cannot be entirely out of proportion in relation to the economic value of the parties’ contract.*

*66. Whether or not a penalty clause is excessive has to be determined on a case-by-case basis. There are a number of particular factors which inform such an exercise, e.g.:*

- The damage the creditor has suffered or will suffer as a result of the contractual breach;*
- The severity of the breach and the conduct of the debtor (e.g. intentional vs. negligent behavior);*
- The economic situation of the debtor;*
- The creditor’s opportunity to mitigate the (incurred or prospective) damage.”*

90. In the present case, the Arbitrator notes that the following factors are relevant to a consideration of whether (and, if so, to what extent) the late payment penalty provisions in clause 4 of the Agency Agreement should be moderated so as to further reduce the applicable penalty below the amount of the Second Claimant’s existing voluntary reduction:

- (a) The Second Claimant had a legitimate interest in including a clause in the Agency Agreement which safeguarded its right to timely payment of the commission fees due in respect of the valuable services it provided to the Respondent.
- (b) The Second Claimant made multiple written requests to the Respondent for

payment of the unpaid agency fees. Despite those requests, no payment was forthcoming and no reasonable explanation was provided to the Second Claimant for the Respondent's repeated and persistent breaches of contract.

- (c) Despite having the opportunity to do so, the Respondent has not elected to provide any explanation to the Arbitrator for its persistent failure to honour its obligations to the Second Claimant. The note attached to the email from the Respondent dated 8 August 2018 made passing reference to the "*difficult*" exchange rate and stated that the Respondent had experienced "*really difficult days*" and was "*still struggling*". Beyond these limited remarks, however, the Respondent made no attempt to explain the reasons for its persistent breaches of its contractual obligations. In the circumstances, the Arbitrator considers it reasonable to infer that the Respondent's breach of its obligations was intentional and that there was no reasonable excuse for that failure.
- (d) The Second Claimant has deliberately limited the size of its claim to an amount that is less than 50% of the amount that a literal application of clause 4 of the Agency Agreement would result in. As a result, the Second Claimant seeks a total of EUR 7,675, which equates to approximately 40 per cent of the principal debt (based on the exchange rate prevailing at the date of this Award). The BAT has previously found that late payment penalties equating to 100 per cent of the principal unpaid debt were not disproportionate (see for example BAT 0233/11).

91. In the circumstances of the present case, the Arbitrator considers that the existence of a penalty clause is not per se unreasonable or disproportionate. Moreover, the Arbitrator considers that the amount claimed by the Second Claimant pursuant to that clause is reasonable and not excessive having regard to the size of the principal debt, the period of the breach and the absence of any mitigating factors for the Respondent's failure to comply in a timely fashion with its contractual obligations to the Second Claimant.



92. Accordingly, applying *ex aequo et bono* standards and having regard to all of the factors set out above, the Arbitrator concludes that the Respondent is liable to pay the amount of EUR 7,675 to the Second Claimant as late payment penalties pursuant to clause 4 of the Agency Agreement.

#### **6.2.5 Conclusion**

93. For these reasons, the Arbitrator concludes that the Respondent is required:
- (a) to pay USD 139,000 to the First Claimant in respect of unpaid salary and bonuses;
  - (b) to pay USD 22,600 to the Second Claimant in respect of unpaid commission fees;
  - (c) to pay EUR 7,675 to the Second Claimant in respect of late payment penalties arising in connection with the unpaid commission fees; and
  - (d) to provide a tax certificate to the First Claimant evidencing that the Respondent has paid all Turkish taxes that are due in connection with all salary and bonus payments made by the Respondent to the First Claimant and all commission payments made to the Second Claimant.

#### **6.2.6 Interest**

##### The First Claimant's Claim

94. The First Claimant seeks an award of interest at the rate of five per cent per annum calculated from the date when the unpaid instalments fell due under the Employment Agreement.

95. Article 73 of the Swiss Code of Obligations provides that *“Where an obligation involves the payment of interest but the rate is not set by contract, law or custom, interest is payable at the rate of 5% per annum.”*
96. As explained above, the Arbitrator is empowered to decide the present case *ex aequo et bono* and not based on Swiss law. That said, in compliance with BAT jurisprudence the Arbitrator finds that an interest rate of 5 per cent per annum is in principle reasonable in the circumstances of this case.
97. In terms of calculation, the Arbitrator considers that the award of interest should in principle reflect the incremental nature of the Respondent’s breaches of the Employment Agreement and should be tailored by reference to the timetable of the Respondent’s cumulative failures to pay consecutive instalments over a period spanning several months. Accordingly, the Arbitrator concludes that the Claimant should be entitled to interest at the rate of five per cent per annum:
- (a) on the amount of USD 17,000 between 31 December 2017 and 30 January 2018;
  - (b) on the amount of USD 41,000 between 31 January 2018 and 28 February 2018;
  - (c) on the amount of USD 65,000 between 1 March 2018 and 30 March 2018;
  - (d) on the amount of USD 89,000 between 31 March 2018 and 30 April 2018;
  - (e) on the amount of USD 113,000 between 1 May 2018 and 30 May 2018; and
  - (f) on the amount of USD 139,000 between 31 May 2018 and the date of payment in full of that amount.

The Second Claimant’s Claim

98. The Arbitrator has concluded that the Second Claimant is entitled to EUR 7,675 from the Respondent as late payment penalties. As explained above, this reflects the Second Claimant's voluntary reduction of the scope of its claim, which was premised on a daily penalty of EUR 25 (half the rate specified in the Agency Agreement) accruing each day between the date 14 days after the day when the respective unpaid instalments fell due under the Agency Agreement and the date when the Employment Agreement expired (17 May 2018). Accordingly, these penalties reflect the Respondent's breach of its contractual obligations up to and including 17 May 2018. The Respondent's failure to comply with those obligations has persisted, however, beyond that date.
99. In these circumstances, in recognition of the Respondent's ongoing failure to pay the sums due to the Second Claimant, the Arbitrator considers that the Second Claimant should be entitled to receive interest at the rate of five per cent per annum on the amount of USD 22,600 from 18 May 2018. Since the late payment penalties relate to the Respondent's failure to pay the sums due during the period prior to 18 May 2018, the Arbitrator is satisfied that this approach is compatible with the BAT jurisprudence which rejects the awarding of concurrent daily fines and interest.
100. At the same time, however, the Arbitrator declines to grant any award of interest on the sum of EUR 7,650 awarded as late payment penalties. The Arbitrator does not consider that the rationale for awarding interest on the principal unpaid debt from 18 May 2018 also extends to awarding interest on the late payment penalties that arise from the Respondent's earlier failure to pay the principal debt.
101. Accordingly, the Arbitrator concludes that in addition to a USD 22,600, the Respondent shall also pay interest to the Second Claimant at the rate of 5% per annum on that sum from 18 May 2018 until payment in full by the Respondent of that sum.

## 7. Costs

102. On 28 November 2018, pursuant to Article 17.2 of the BAT Rules, the BAT President determined the final amount of the costs of the arbitration to be EUR 5,950.

103. Article 17.3 of the BAT Rules provides that:

*“The award shall determine which party shall bear the arbitration costs and in which proportion. In addition, as a general rule, the award shall grant the prevailing party a contribution towards its reasonable legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When deciding on the arbitration costs and on 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.”*

104. In their joint account of costs the Claimants requested the Arbitrator to award an aggregate amount of EUR 16,875 in respect of the Claimants’ costs of the proceedings. This total reflected legal expenses and disbursements totalling EUR 13,875 and a further EUR 3,000 in respect of the BAT non-reimbursable handling fee. The amount claimed in respect of legal expenses was based on a total of 46.25 hours of work by the Claimants’ legal representatives.

105. In determining the appropriate award of costs in this case, the Arbitrator notes that the Claimants have succeeded virtually in full in respect of their claims against the Respondent. The Arbitrator also notes that the Claimants were compelled to pursue these proceedings before the BAT by virtue of the Respondent’s persistent and unjustified failure to comply with contractual obligations that it freely entered into. The Claimants have therefore necessarily had to incur legal costs in order to vindicate their legal rights and to secure payment of debts owed to them by the Respondent. Furthermore, despite voluntarily entering binding contracts with the Claimants which contain arbitration clauses in favour of the BAT, the Respondent deliberately elected

not to make substantive submissions in these proceedings for a period of several months. The Respondent's only engagement with these proceedings consisted of a short email from its general manager addressed to the Claimants and a short email from its lawyers which was sent after the evidential stage of the proceedings had been closed. In these circumstances, the Arbitrator considers that the Respondent should bear the costs of the arbitration and should also make a contribution towards the Claimants' legal fees and related expenses.

106. At the same time, the Arbitrator considers that the amount sought by the Claimants in respect of those legal fees and related expenses is excessive. In particular, the Arbitrator notes that the issues in the case are relatively straightforward, as was reflected by the relatively concise length of the RFA and the relatively low number and length of evidential exhibits. While the total amount sought by the Claimants is within the maxima established by Article 17.4 of the BAT Rules (which limits the recoverable costs to EUR 10,000 in respect of the First Claimant and EUR 5,000 in respect of the Second Claimant), the Arbitrator considers that the amount of EUR 13,875 is excessive in the present context. Instead, the Arbitrator considers that an award of EUR 8,500, including the non-reimbursable handling fee, represents a reasonable contribution having regard to all the circumstances of the case.

107. Accordingly, having regard to all of the factors set out above, pursuant to article 17.4 of the BAT Rules the Arbitrator concludes that Respondent shall pay to the Claimants a total amount of EUR 8,500 in respect of the legal fees and expenses the Claimants have incurred in pursuing its claim against the Respondent before the BAT.

108. The Arbitrator finds that

- the Respondent is liable to pay the Claimants jointly EUR 5,950.00, being the full amount of the arbitration costs of these proceedings; and



- BAT shall reimburse EUR 6,050.00 to the Claimants, being the difference between the costs advanced by the Claimants and the arbitration costs fixed by the BAT President.

## **8. AWARD**

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

- 1. Büyükçekmeke Basketbol Kulübü is ordered to pay Mr. Vlad Sorin Moldoveanu the total sum of USD 139,000 as unpaid contractual remuneration, together with interest at the rate of 5% p.a. on the following amounts:**
  - a. on the amount of USD 17,000 between 31 December 2017 and 30 January 2018;**
  - b. on the amount of USD 41,000 between 31 January 2018 and 28 February 2018;**
  - c. on the amount of USD 65,000 between 1 March 2018 and 30 March 2018;**
  - d. on the amount of USD 89,000 between 31 March 2018 and 30 April 2018;**
  - e. on the amount of USD 113,000 between 1 May 2018 and 30 May 2018; and**
  - f. on the amount of USD 139,000 between 31 May 2018 and the date of payment in full of that amount.**
- 2. Büyükçekmeke Basketbol Kulübü is ordered to pay Tangram Sports Ltd. USD 22,600 as unpaid agency fees, together with interest on that sum at the rate of 5% p.a. from 18 May 2018 until payment in full of that sum.**
- 3. Büyükçekmeke Basketbol Kulübü is ordered to pay Tangram Sports Ltd.**

**EUR 7,675 as late payment penalties.**

- 4. Büyükçekmeke Basketbol Kulübü is order to provide a tax certificate to Mr. Vlad Sorin Moldoveanu evidencing that it has paid all Turkish taxes that are due in connection with all salary, bonus and commission payments made by Büyükçekmeke Basketbol Kulübü to Mr. Vlad Sorin Moldoveanu and Tangram Sports Ltd (which, for the avoidance of doubt, includes the payments required to be made in accordance with paragraphs 1 to 3 above of the operative part of this Award).**
- 5. Büyükçekmeke Basketbol Kulübü is ordered to pay the amount of EUR 5,950.00 jointly to Mr. Vlad Sorin Moldoveanu and Tangram Sports Ltd as a reimbursement of their advance on arbitration costs.**
- 6. Büyükçekmeke Basketbol Kulübü is ordered to pay the total amount of EUR 8,500 jointly to Mr. Vlad Sorin Moldoveanu and Tangram Sports Ltd as reimbursement of their legal fees and expenses.**
- 7. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 7 December 2018.

Raj Parker  
(Arbitrator)