ARBITRAL AWARD

(BAT 1533/20)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert

in the arbitration proceedings between

Ms. Regan Magarity

- Claimant 1 -

Sports International Group
267 Kentlands Blvd., Suite 105, Gaithersburg, MD 20878, USA

- Claimant 2 -

Mr. Mustafa Bozkurt

- Claimant 3 -

all represented by Mr. Jonathan A. Jordan, attorney at law,
267 Kentlands Blvd., Suite 105, Gaithersburg, MD 20878, USA

vs.

Hatay Büyüksehir Belediyesi Spor Kulübü
HBB Spor kompleksi ve yasam merkezi, Altincay mah. 119 sk. No:11,
Antakya 31120, Hatay, Turkey

- Respondent -

1. The Parties

1.1 The Claimants

1. Ms. Regan Magarity ("Player") is a Swedish-American professional basketball player.

2. Sports International Group ("Agency") is an US-American professional basketball agency.

3. Mr. Mustafa Bozkurt ("Agent") is a Turkish professional basketball agent.

1.2 The Respondent

4. Hatay Büyüksehir Belediyesi Spor Kulübü ("Club") is a Turkish professional basketball club.

2. The Arbitrator

5. On 17 April 2020, Prof. Ulrich Haas, the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert as arbitrator ("Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 ("BAT Rules"). None of the Parties have raised any objection to the appointment of the Arbitrator, to his declaration of independence and impartiality, or to his conduct of this arbitration.

3. Facts and Proceedings

3.1 Summary of the Dispute

6. By a contract dated 18 May 2019 ("Contract") Player was retained by Club for its 2019-

2020 season. Agency and Agent were also parties to the Contract in respect of their services facilitating Player being retained by Club. Player commenced playing with Club, but by a further contract dated 30 December 2019 ("Termination Agreement") the Parties brought the Contract to an end and provided for certain agreed payments by Club by certain dates. According to Claimants, Club was persistently late in paying Player and this led to the Parties going their separate ways. The Termination Agreement's terms were as follows:

> *"1. The Club, Player, and Agents agree to the termination of the Agreement dated May 18, 2019 for the 2019-20 season.*
>
> *2. The Club will pay Player EUR 28,500 in salary and EUR 500 for the Cukurova bonus. Paid in two (2) equal payments on or before January 15, 2020 and February 15, 2020.*
>
> *3. The Club will pay Agents the agent fee of EUR 7,000 on or before January 15, 2020.*
>
> *4. If the Club is late on any of the above mentioned payments, the Club, as a penalty to this Termination Agreement, will be responsible for EUR 52,500 to the Player. The Club will no longer be entitled to the right of set-off through the Player's mitigation, from Player's signing a contract in France. The Agent's Fee will also double from EUR 7,000 to EUR 14,000 as a penalty if they*[sic] *Agents' do not receive payment on or before January 15, 2020.*
>
> *5. Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.*
>
> *6. The Club agrees to be responsible for any and all legal or arbitral costs, including the non-reimbursable handling fee, which may be necessary should the Player or her Agents have to enforce their rights under this Agreement."*

7. Club has not paid any of the amounts recorded in the Termination Agreement. Its non-payment is what has brought about this arbitration.

3.2 The Proceedings before the BAT

8. On 6 April 2020, Claimants filed a Request for Arbitration in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 3,000.00 on 8 April 2020.

9. On 22 April 2020, the BAT informed the parties that Mr. Klaus Reichert had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

"Claimant 1 (Ms Regan Magarity)	*EUR 2,950.91 (after deduction of overpaid handling fee)*
Claimant 2 (Sports International Group)	*EUR 500.00*
Claimant 3 (Mr Mustafa Bozkurt)	*EUR 500.00*
Respondent (Hatay BB)	*EUR 4,000.00"*

10. The advance on costs in the total amount of EUR 8,008.17 was paid as follows:

Date	Amount	Received from	Description
08.04.2020	49.09 €	Mustafa Bozkurt	Advance on Costs (Claimants' share)
27.04.2020	1,011.59 €	Sports International Group	Advance on Costs (Claimants' share)
04.05.2020	2,950.91 €	Regan Magarity	Advance on Costs (Claimants' share)
29.05.2020	996.58 €	Mustafa Bozkurt	Advance on Costs (Respondents' share)
02.06.2020	3,000.00 €	Regan Magarity	Advance on Costs (Respondents' share)

11. Club did not submit an Answer to the Request for Arbitration (notwithstanding notification of the arbitration and an extension of time for the Answer granted by the Arbitrator), and did not participate in this arbitration.

12. On 5 June 2020, the Parties were invited to set out (by no later than 15 June 2020) how much of the applicable maximum contribution to costs should be awarded to them and

why. The Parties were also invited to include a detailed account of their costs, including any supporting documentation in relation thereto. Finally, the Parties were also notified that the exchange of submissions was closed in accordance with Article 12.1 of the BAT Rules.

13. Claimants filed their costs submission on 8 June 2020. Club did not file any costs submission.

4. The Positions of the Parties

4.1 Claimants' Position

14. Claimants' position is, in substance, recorded above in Section 3.1. They say that Club did not make any of the agreed payments as per the Termination Agreement.

15. In the Request for Arbitration Claimants seek the following relief:

"Claimant 1 seeks:

a. Salary Payment of EUR 14,500 due on January 15, 2020

b. Salary and Bonus Payment of EUR 14,500 due on February 15, 2020

c. Penalty Payment of EUR 23,500 due on February 16, 2020

d. Respondent shall bear all costs generated by this arbitration

Claimant 2 seeks:

a. Agent Fee of EUR 4,200 due on January 15, 2020

b. Penalty Payment of EUR 4,200 due on February 16, 2020

c. Respondent shall bear all costs generated by this arbitration

Claimant 3 seeks:

a. Agent Fee of EUR 2,800 due on January 15, 2020

b. Penalty Payment of EUR 2,800 due on February 16, 2020

c. Respondent shall bear all costs generated by this arbitration."

4.2 Respondent's Position

16. As already noted, Club did not participate in this arbitration.

5. The jurisdiction of the BAT

17. As a preliminary matter, the Arbitrator wishes to emphasize that, since Club did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.[1]

18. First, the President of BAT has determined pursuant to Article 11.1 of the BAT Rules, *prima facie*, that the subject matter of this arbitration is arbitrable and the arbitration could thus proceed. Secondly, according to Article 1.3 of the BAT Rules it now falls to the Arbitrator to finally decide jurisdiction.

19. 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).

20. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence

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[1] Judgement of the Swiss Federal Tribunal, 120 II 155, *162*.

of a valid arbitration agreement between the parties.

21. 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]

22. The jurisdiction of the BAT over the dispute is said by Claimants to result from clause 5 of the Termination Agreement, which is already set out in full above at para. 6.

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

24. 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).

25. The predicate wording "[a]*ny dispute arising from or related to the present contract* […]" clearly covers the present dispute.

26. For the above reasons, the Arbitrator rules and finds, pursuant to Article 1.3 of the BAT Rules, that he has jurisdiction to finally decide and rule upon Claimants' claims.

6. Other Procedural Issues

27. Article 14.2 of the BAT Rules specifies that "*the Arbitrator may* […] *proceed with the arbitration and deliver an award*" if "*the Respondent fails to submit an Answer*." The Arbitrator's authority to proceed with the arbitration in case of default by one of the parties

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

is in accordance with Swiss arbitration law and the practice of the BAT.[3] However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

28. This requirement is met in the present case. Club was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with the relevant rules. It was also given sufficient opportunity to respond to Claimants' Request for Arbitration. Club, however, chose not to participate in this arbitration.

29. None of the parties requested a hearing. In accordance with Article 13.1 of the BAT Rules, the Arbitrator will decide the Claimants' claims based on the written submissions and the evidence on record.

7. Discussion

7.1 Applicable Law – ex aequo et bono

30. 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".

31. Under the heading " Law Applicable to the Merits", Article 15 of the BAT Rules reads as

[3] See *ex multis* BAT cases 0001/07; 0018/08; 0093/09; 0170/11.

follows:

> *"15.1 The Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.*
>
> *15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead."*

32. Clause 5 of the Termination Agreement provides, expressly, that the Arbitrator shall decide the dispute *ex aequo et bono*. Consequently, the Arbitrator shall proceed accordingly.

33. 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[4] (Concordat)[5], 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."*[6]

34. 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".

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4 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).

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

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

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

7.2 Findings

36. By way of introduction, the Arbitrator recalls the consistent position taken now over many years by BAT arbitrators that the 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 corner-stone principle by which the merits of the claims are examined.

37. Secondly, and also by way of introduction, the Arbitrator notes the following principles of contract interpretation which are reflected in prior reasoned BAT awards. It is a matter of particular importance for the doctrine of *pacta sunt servanda* that there is clarity as to the methods by which the "pacta" (*i.e.* the content of the obligations concerned) are duly ascertained. As already noted above, it is abundantly clear that an arbitrator, sitting in Switzerland and mandated to rule *ex aequo et bono*, is not bound by any particular set of national legal rules. However, it is also the case that such an arbitrator is not free to do whatever it is they want and, for example, completely disregard the words used by parties in their contractual documentation on a plea *ad misericordiam* from one side or the other.

38. The sort of principles which might inform the exercise of interpretation in the context of a BAT arbitration include: (a) looking at all of the contractual language chosen by parties through the eyes of a reasonable reader to see what is the ordinary and natural meaning of the words used; (b) the overall background context of professional basketball and general common understanding amongst such users together inform the ordinary and natural meaning of the words used; (c) when it comes to considering the centrally relevant words to be interpreted in a particular case, the less clear they are, or, to put it another way, the worse their drafting, the more ready an arbitrator might be to depart from the ordinary and natural meaning; that is simply the obverse of the sensible proposition that the clearer the ordinary and natural meaning the more difficult it is to

justify departing from it; (d) the description or label given by parties to something in a contract is not inflexibly determinative of its true nature; (e) the mere fact that a contractual arrangement, if interpreted according to its ordinary and natural language as described above, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from that language; and (f) in general, it is not the function of an arbitrator when interpreting an agreement to relieve a party from the consequences of his or her imprudence or poor advice. Accordingly, when interpreting a contract, *ex aequo et bono*, an arbitrator avoids re-writing it in an attempt to assist an unwise party or to penalise an astute party. Also, parties should not seize on a literal translation of the phrase *ex aequo et bono* and consider that "justice" and "equity" provide them with a route to unprincipled and unmoored indulgence for poor contractual choices.[7]

39. Turning to the Player's claims, clauses 2 and 4 of the Termination Agreement (interpreted according to the principles set out above) are virtually unambiguous as to the obligations taken on by Club: "*The Club will pay Player EUR 28,500 in salary and EUR 500 for the Cukurova bonus. Paid in two (2) equal payments on or before January 15, 2020 and February 15, 2020.* […] *If the Club is late on any of the above mentioned payments, the Club, as a penalty to this Termination Agreement, will be responsible for EUR 52,500 to the Player. The Club will no longer be entitled to the right of set-off through the Player's mitigation, from Player's signing a contract in France*. […]"

40. Player was clearly promised EUR 28,500.00 by way of salary and EUR 500.00 bonus, payable in two equal instalments on specified dates. The Arbitrator is satisfied that those payments were not made. Thus, there can be no reason whatsoever but that, according to the doctrine of *pacta sunt servanda*, Club must pay Player those amounts. The Arbitrator notes, in passing, that the obligation to make these payments was crystallised prior to the onset of the current COVID-19 pandemic and, also, Player and Club had

[7] See BAT 0756/15, para. 60.

parted company by means of the Termination Agreement. Thus, no element of the Termination Agreement was to be performed by Player thereafter and COVID-19 was therefore temporally irrelevant. Nothing in the COVID-19 Guidelines issued by the BAT on 20 April 2020 would come into play in the Arbitrator's assessment as the Parties had made their final contractual arrangements before the outbreak of the pandemic, and these arrangements were expressly agreed to be concluded in a relatively short space of time.

41. Thus, Player's claims for unpaid salary and bonus are duly upheld by the Arbitrator.

42. Player's claim for a penalty in the amount of EUR 23,500.00 arises, having duly interpreted the Termination Agreement according to the principles set out above, as follows: If Club did not make the agreed payments of salary and bonus (totalling EUR 29,000.00) by the two stipulated dates in January and February 2020, then an overall obligation arose whereby it was to pay Player EUR 52,500.00. If one subtracts EUR 29,000.00 from EUR 52,500.00 then the remaining amount is EUR 23,500.00. There appears to be no doubt but that this is what the Parties agreed to in the Termination Agreement and once the stipulated dates passed without Club's payment, then the obligation to pay the penalty was presumptively engaged. The Parties also expressly disallowed Club from any reduction by way of mitigation in the Termination Agreement payments. Thus, even if Player went on to earn salaries during the then-current basketball season elsewhere, Club would not get any corresponding reduction.

43. The Arbitrator says "presumptively engaged" as penalties (which the EUR 23,500.00 plainly is) are themselves the subject of particular attention in prior BAT awards. Claimants have fairly and duly drawn the Arbitrator's attention to the issue of penalties and their enforcement in the Request for Arbitration and, therefore, the penalty at hand will be examined now.

44. First, it is well-established in reasoned BAT awards that contractual clauses which apply

in the context of a breach, or termination for cause, such as penalties, or liquidated damages (this is not a closed list), are subject to careful scrutiny when ruling *ex aequo et bono*. In particular, such a clause which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party (*e.g.* by reference to the primary or substantive obligations in a contract), may be refused enforcement, or moderated in its application. Whether or not a BAT arbitrator might refuse enforcement of such a penalty, or moderate its application to some extent, is usually left to their discretion depending on the individual circumstances of a case. This is a highly fact-sensitive exercise, and the discretion in that regard is not to be taken to be unfettered.

45. Secondly, the general principle of mitigation which results in the deduction of salaries earned elsewhere, for example when a player moves to a different club during a current season following a wrongful termination, is well established in BAT awards. However, it is also the case that parties may seek to expressly disallow or exclude the application of that general principle. Such clauses, given their consequences, are also subject to careful scrutiny in a manner broadly consistent with the principles just set out in the foregoing paragraph.[8] While it might be said that such a club, having wrongfully terminated a contract during a season, is placed in no worse position than it would have been had the contract been performed according to its terms to a conclusion (*i.e.* paying Player the full salary it had bargained for with them), that is not in and of itself a reason to protect such clauses from arbitral scrutiny. Applying such a clause in favour of such a player without such scrutiny would, in substance, confer a windfall on that player. Club would also, in substance, be funding such a windfall and thereby paying more than might be consistent with the established principle of mitigation as repeatedly articulated in BAT awards (and international professional basketball practice). There is a tension as between such clauses and the established principle of mitigation, but that tension is not inflexibly resolved one way or the other, and depends on the specific nuances of each

[8] BAT 0634/14, para. 73.

case. However, as a general principle, such clauses are susceptible to careful scrutiny in a manner similar to penalty clauses. Also, the more particular context of settlement agreements and such clauses adds a further nuance to potential scrutiny, and requires careful consideration of the full ramifications of such arrangements. As already discussed above, the description or label given by parties to something in a contract is not inflexibly determinative of its true nature.

46. Turning to the actual case at hand, the Arbitrator considers that the following factors are of relevance.

47. First, it must not be overlooked that the Termination Agreement arose in the context of Club's failures to pay agreed salary to Player in a timely fashion for the period she was actually playing pursuant to the Contract. The Arbitrator notes that the fully guaranteed base salary for the 2019-2020 season was agreed in the Contract to be EUR 70,000.00, net of all Turkish taxes (as per clause 3.f of the Contract). Player was, according to the Request for Arbitration, only paid EUR 17,500.00 by the time of the Termination Agreement. This has to be contrasted with, in the Arbitrator's calculation based on the terms of the Contract, an amount of EUR 35,000.00 which should have been paid to her by that time.

48. Secondly, by the Termination Agreement Player was (in the Arbitrator's view) generously agreeing to forego EUR 24,000.00, net of Turkish taxes, which she would have been paid had the Contract been duly performed according to its terms. This figure is arrived at by subtracting the agreed two payments in the Termination Agreement (EUR 28,500.00, leaving aside the bonus of EUR 500.00) from the balance of EUR 52,500.00 (again, net of Turkish taxes) which would have been paid had the Contract been duly performed according to its terms (EUR 70,000.00 less the amount actually paid, EUR 17,500.00).

49. Thirdly, if the Termination Agreement's payment schedule was not, itself, followed by

Club (which it was not), then Player would not be effectively worse off for having entered into that arrangement in the first place.

50. In summary, the detriment imposed on Club by the Termination Agreement are not out of proportion to the legitimate interests of Player. Effectively she is going to get what she originally bargained for under the Contract. Further, the exclusion of mitigation as a *quid pro quo* for her willingness to forego a significant part of her outstanding salary in case Club duly performed the Termination Agreement, is a relevant factor borne in mind by the Arbitrator in weighing up his scrutiny of that clause.

51. The Arbitrator sees no reason to attenuate, moderate, or disallow the application of both the penalty clause itself, or the removal of the obligation on Player's part to mitigate. It is in Player's interests to obtain the salaries she bargained for during the course of a professional season (professional basketball is not a lifetime occupation for a player, and every season counts). Moreover, she agreed to potentially forego a significant amount of the salary owed to her under the Contract (EUR 24,000.00, net of Turkish taxes). In comparison thereto, the exclusion of the duty to mitigate in these precise circumstances, is not out of proportion to the much reduced (but agreed) obligation of Club had it fulfilled that which it had promised her via the Termination Agreement. Indeed, the value of the exclusion of the duty to mitigate is less than 40% of the amount Player was prepared to forego had the Termination Agreement been performed by Club.[9] This seems entirely reasonable. In summary, the Arbitrator finds that the Termination Agreement is structured in such a way that the Player's legitimate interests are duly vindicated.

52. Taking into account the principles associated with penalty clauses as set out earlier in this Award, the Arbitrator upholds the penalty in this case and awards Player

[9] This calculation is based on the amount of EUR 9,488.87, which the Player was paid by her new club.

EUR 23,500.00.

53. For the avoidance of doubt, the Arbitrator notes that this finding, and the analysis which preceded it, does not depart from the principles discussed in BAT 0826/16 and BAT 0828/16 as regards the application of the principle of mitigation to termination agreements. As discussed above, the established principle of mitigation applies, generally, to termination agreements in a highly nuanced and careful manner. For example, if a termination agreement effectively resurrects the obligations in the original player contract in the event of a further default (*i.e.* the *status quo ante* is deemed to exist again, whether expressly articulated or not does not matter, it is the substance which counts) that may carry with it a reintroduction to the analysis of the full application of the established principle of mitigation.

54. In the Arbitrator's view, this is clearly the case here because the Termination Agreement, in reality, obliges Club to pay the full outstanding amount which would have been applicable under the Contract (due to its non-compliance with the Termination Agreement). However, neither in BAT 0826/16 nor in BAT 0828/16 did the relevant termination agreements contain a clause excluding mitigation. The precise circumstances, nuances and subtleties of those cases are, therefore, not quite on all fours with the present case, but that is neither here nor there. In each case, care is taken to discern exactly the circumstances surrounding the parties' chosen language; and the appropriate scrutiny is given to such clauses in a manner concomitant with such surrounding circumstances. As a general guiding approach, if parties choose to bring their contractual arrangements to an end in a once-and-for-all manner, that would be a relevant surrounding circumstance for an arbitrator to consider against a mitigation argument if it were raised at a later time.

55. In the present case, given the circumstances explained above, the clause in the Termination Agreement is not held against Player (but still has been scrutinised by the Arbitrator) due to its resurrection of the payment obligations under the Contract.

56. Turning to the claims of Agency and Agent, the Arbitrator notes that unlike the Contract, the Termination Agreement does not refer explicitly to Agency. However, the preamble of the Contract states the Player is "*represented by Sports International Group Inc. in person of Mr. Boris Lelchitski* […], *Miss. Patricia Penicheiro* […]". The latter were the ones that also signed the Termination Agreement. The Termination Agreement, thus, shows that the Agency, in substance, is the possessor of the relevant claims arising from the Termination Agreement. These claims arise from clauses 3 and 4 of the Termination Agreement: *"The Club will pay Agents the agent fee of EUR 7,000 on or before January 15, 2020*. […] *The Agent's Fee will also double from EUR 7,000 to EUR 14,000 as a penalty if they* [sic] *Agents' do not receive payment on or before January 15, 2020*."

57. Applying the same interpretation principles as discussed above, the Arbitrator perceives no issue with the claimed fee of EUR 7,000.00 (which is allocated as between Agency and Agent in the following proportion, EUR 4,200.00 and EUR 2,800.00 respectively). Club promised to pay that amount, and did not do so. Thus, those claims are established.

58. Turning to the penalty, which doubles the claims of Agency and Agent, applying the same principles as discussed above the Arbitrator notices a difference as between Player on the one hand, and Agency and Agent on the other. In the Contract the fees for Agency and Agent totalled EUR 7,000.00 (as with Player, this was to be paid net of Turkish taxes) which generally reflects the market for such fees as understood by the Arbitrator, namely, 10% of a player's base salary. However, with the application of the Termination Agreement's penalty clause, Agency and Agent will get twice what they would have been paid had the Contract been performed according to its terms.

59. Agency and Agent make the following submission in the Request for Arbitration: "[P]*revious BAT awards have held that a late payment penalty equal to the principal amount may be fair and proportionate*." They cite to BAT 0826/16 in particular and para. 69 of that BAT award. However, neither para. 69, nor indeed any part of that BAT award, does not contain that language. BAT 0826/16 does indeed discuss penalty

clauses, and the outcome was as follows (para. 74):

> *"*[…] *the Arbitrator, exercising her discretion to moderate the application of the penalty clause, considers a penalty in the amount of the Compensation Claim plus 50% thereof to be fair and just. In other words, she awards the Player the amount of USD 94,350 (USD 62,900 plus USD 31,450) in contractual penalties under the Termination Agreement. This amount honors the fact that the Player would have collected the entire Compensation Claim (his minimum damage) had the Club honored the Termination Agreement, irrespective of the Player's subsequent engagement in China. The extra amount of USD 31,450 (= 50% of the Compensation Claim) is an appropriate penalty for the Club's failure to pay the Compensation Claim. In light of the circumstances at hand, the Arbitrator considers this penalty a reasonable and sufficient sanction for the Club's delinquency."*

60. It does not require extensive discussion to arrive at the conclusion that BAT 826/16 does not provide support for the quoted proposition advanced in the Request for Arbitration.

61. The Arbitrator has located the source of the quoted proposition in the Request for Arbitration and it is found in an earlier BAT award (BAT 0635/14) and now sets out in full the relevant paragraphs:

> *"52. In light of all of the factors described above, the Arbitrator considers, ex aequo et bono, that the late payment penalty of EUR 86,000.00 (being the consequence of non-payment between 31 January 2015 and 28 February 2015, which is the equivalent of an interest rate of approximately 2220% per annum) is excessive and unfair. However, the Arbitrator considers that the Claimant should be entitled to more than a late payment penalty of interest at 5% per annum, which was the amount proposed by the Respondent. This is, in particular, because the late payment penalty was contained in the Termination Contract, the predominant purpose of which was to create a standalone contractual obligation for the Respondent to pay the Claimant unpaid salary amounts and to provide a credible deterrent for late payment.*
>
> *53. Previous BAT awards have held that a late payment penalty equal to the amount of principal owing may be a fair and proportionate sum. In the circumstances of this case, the Arbitrator considers that a payment penalty equal to the amount of principal owing (EUR 46,500.00) would be excessive. This is, in particular, because (i) the Claimant had an alternative income from his new club at the time that the penalty was accruing; and (ii) the principal was outstanding for a relatively short period of time before the penalty payment accrued (the first part of the penalty payment had accrued within approximately one month after execution of the Termination Agreement and the remainder had accrued within approximately two months after the Termination Agreement was signed). Accordingly, the Arbitrator considers, ex aequo et bono, that a late payment penalty of EUR 31,000.00 (an amount equal to two-thirds of the principal owing) is fair and appropriate."*

62. As can be seen from the first sentence in para. 53 of that BAT award, the proposition does not set out an immutable point of principle, but is a general statement of what might be fair and proportionate. However, taken in its fuller context and not viewed in isolation, the outcome of this BAT award was not that an amount equal to the amount of owed principal should be awarded as a penalty.

63. The Arbitrator, therefore, must examine this penalty clause afresh in line with the established principles set out above.

64. It is of relevance that the agency fees in the Contract were EUR 7,000.00 and the full amount was carried forward into Termination Agreement. Those fees were, originally, to be paid to Agency and Agent on 15 October 2019, but the Termination Agreement moved that payment deadline to 15 January 2020. In effect, Agency and Agent were giving Club an interest-free holiday on payment for a number of months, but nothing much beyond that. They were not, like Player, giving a discount on their original owed amounts.

65. If Agency and Agent are granted the penalty fee as sought (and as written in the Termination Agreement) they will get an amount equivalent to approximately 20% of the overall amount paid/awarded to Player. That does not, in the Arbitrator's view, comport with the legitimate interest of Agency and Agent, which is to be paid their usual fees (which, as already noted, is generally in the region of 10%). It appears, further, to the Arbitrator that such a penalty fee would impose an outcome on Club which would be out of proportion to the legitimate interest of Agency and Agent; namely, an agency fee in the region of 10%.

66. However, Agency and Agent did have a clear interest in getting paid and a penalty can indeed (in the words of BAT 0635/14) act as a credible deterrent in ensuring compliance.

67. Taking all of the foregoing into account, and in the exercise of his discretion according to the principles discussed above, the Arbitrator considers that the penalty clause in the

Termination Agreement insofar as it applies to Agency and Agent must be attenuated. A proportion of 25% is, in the Arbitrator's view, an appropriate amount.

68. Thus, the Arbitrator awards EUR 1,750.00 to Agency and Agent by way of penalties. This is apportioned as between Agency and Agent at EUR 1,050.00 and EUR 700.00 respectively.

8. Costs

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

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

70. On 9 August 2020, the BAT President determined the arbitration costs in the present matter to be EUR 8,008.17.

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

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

72. Considering that the Claimants prevailed in this arbitration, it is consistent with the provisions of the BAT Rules that the fees and costs of the arbitration be borne by Club alone. Given that Claimants paid the entire Advance on Costs in the amount of EUR 8,008.17, Respondent is ordered to pay EUR 8,008.17 to Claimants.

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

that

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

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

75. Claimants claim legal fees in the following amounts: (a) USD 3,600.00 for Player; (b) USD 3,000.00 for Agency; and (c) USD 3,000.00 for Agent.

76. Taking into account the factors required by Article 17.3 of the BAT Rules, and, in particular the provisions of the Termination Agreement concerning costs ([T]*he Club agrees to be responsible for* ***any and all*** *legal or arbitral costs, including the non-reimbursable handling fee, which may be necessary should the Player or her Agents have to enforce their rights under this Agreement*)(emphasis added), the maximum awardable amount prescribed under Article 17.4 of the BAT Rules (in this case, EUR 7,500.00 for Player, EUR 5,000.00 for Agency and EUR 5,000.00 for Agent), the fact that the non-reimbursable handling fee in this case was EUR 3,000.00, and the specific circumstances of this case, the Arbitrator holds that EUR 3,000.00 for the non-reimbursable handling fee and USD 5,000.00 for the Claimants' legal fees and expenses represent a fair and equitable contribution by Club to Claimants in this regard.

77. The phrase "any and all" in the Termination Agreement quoted above does not preclude the Arbitrator from examining the legal fees and expenses as claimed. The element of reasonableness as provided for in the BAT Rules is not displaced when assessing the quantum thereof. The Arbitrator has reviewed three attorney invoices presented by Claimants (one for each) and the description contained in each is identical. First, there is a line for "Contract Review" with two hours noted for Player, and one hour each noted

for Agency and Agent. Secondly, there is a line for “Research/Collection” with four hours noted per Claimant. Thirdly, there is a line for “Drafting Request for Arbitration” with three hours noted per Claimant. Fourthly, there is a line for “Communication” with three hours noted for Player, and two hours each noted for Agency and Agent. While the claims made by Player on the one hand, and Agency and Agent on the other, are different, they are not entirely separate in their background. Further, the contractual documentation for each Claimant is one and the same. No such distinction can be made as between the claims for Agency and Agent. Thus, the Arbitrator considers that USD 5,000.00 is an appropriate amount for legal fees and expenses.

78. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:

(i) Club shall pay EUR 8,008.17 to Claimants, being the the costs advanced by them;

(ii) Club shall pay to Claimants EUR 3,000.00 for the non-reimbursable fee plus USD 5,000.00 for legal fees, representing the amount of their legal fees and other expenses.

9. AWARD

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

1. **Hatay Büyüksehir Belediyesi Spor Kulübü is ordered to pay Ms. Regan Magarity EUR 28,500.00 by way of unpaid salary, EUR 500.00 by way of unpaid bonus, and EUR 23,500.00 by way of penalty.**

2. **Hatay Büyüksehir Belediyesi Spor Kulübü is ordered to pay Sports International Group EUR 4,200.00 by way of unpaid agency fees and EUR 1,050.00 by way of penalty.**

3. **Hatay Büyüksehir Belediyesi Spor Kulübü is ordered to pay Mr. Mustafa Bozkurt EUR 2,800.00 by way of unpaid agency fees and EUR 700.00 by way of penalty.**

4. **Hatay Büyüksehir Belediyesi Spor Kulübü is ordered to pay jointly Ms. Regan Magarity, Sports International Group and Mr. Mustafa Bozkurt an amount of EUR 8,008.17 in respect of arbitration costs.**

5. **Hatay Büyüksehir Belediyesi Spor Kulübü is ordered to pay jointly Ms. Regan Magarity, Sports International Group and Mr. Mustafa Bozkurt EUR 3,000.00 and USD 5,000.00 in respect of their legal fees and expenses.**

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

Geneva, seat of the arbitration, 10 August 2020

Klaus Reichert
(Arbitrator)