

**ARBITRAL AWARD**

(BAT 1822/22)

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Benny Lo**

in the arbitration proceedings between

**Mr. Akil Mitchell**

- Claimant 1-

**Mr. Daryl T. Graham**

- Claimant 2-

both represented by Mr. Özcan Yüksel, attorney at law

vs.

**Karşıyaka Spor Kulübü Derneği**  
Mustafa Kemal Atatürk Spor Salonu Karşıyaka İzmir Turkey

- Respondent -

## **1. The Parties**

### **1.1. The Claimants**

1. Mr. Akil Mitchell (“Player” or “Claimant 1”) is a US-American professional basketball player.
2. Mr. Daryl T. Graham (“Agent” or “Claimant 2”) is a US-American FIBA agent.

### **1.2. The Respondent**

3. Karşıyaka Spor Kulübü Derneği (“Club” or “Respondent”) is a professional basketball club competing in the Turkish Basketball League.

## **2. The Arbitrator**

4. On 4 June 2022, Prof. Ulrich Haas, the President of the Basketball Arbitral Tribunal (“BAT”), appointed Mr. Benny Lo as arbitrator (“Arbitrator”) pursuant to Article 8.1 of the Arbitration Rules of the Basketball Arbitral Tribunal in force as from 1 January 2022 (“BAT Rules”). None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

## **3. Facts and Proceedings**

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

5. On 15 July 2021, (i) the Player, (ii) G.A.M.E as represented by the Agent and a Mr. Onder G. Malatyali (“Mr. Malatyali”), and (iii) the Club entered into a tri-party written agreement providing for the Club’s employment of the Player, as represented by his agent G.A.M.E and Mr. Malatyali, for the 2021-22 and 2022-23 basketball seasons (“Agreement”).<sup>1</sup>

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<sup>1</sup> RfA, Evidence 1.



***For the 2021/2022 season: 22.500 USD (11.250 USD to Daryl Graham and 11.250 USD to Onder G. Malatyali) net of any Turkish taxes payable in 2 equal instalments on 15 December 2021 (5.625 USD to Daryl Graham and 5.625 to Onder G. Malatyali) and 15 February 2022 (5.625 USD to Daryl Graham and 5.625 to Onder G. Malatyali).***

[...]

#### **11. IN EVENT OF DISPUTE**

[...]

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

[...]” (emphasis original)

7. Thus, under the Agreement, the Club was obligated to pay the Player, *inter alia*, a total salary of USD 225,000.00 for 2021/2022 season, net of any Turkish taxes. The Club was also obligated to pay the Agent agency fees of USD 5,625.00 by 15 December 2021 and of USD 5,625.00 by 15 February 2022, both net of any Turkish taxes.
8. On 22 November 2021, the Player, the Agent, Mr. Malatyali and the Club entered into a written “*Termination Agreement*” to terminate the Agreement (“*Termination Agreement*”).<sup>2</sup>
9. The Termination Agreement relevantly provides as follows:-

*“1. THIS RESOLUTION dated on November 22, 2021 by and between Karsiyaka Spor Kulubu Demegi [...] (“the Club”), Akil Mitchell from USA (“The Player”) and Agents “Mr. Daryl GRAHAM FIBA License 2013028039” and “Mr. Onder G. MALATYALI” serves to terminate the professional Agreements had been signed on the date July 15, 2021 and Turkish Basketball Federation contract August 25, 2021 for the seasons 2021-22 and 2022-23, between the Club, the Player and The Agents. Accordingly the parties agree to conclude the Agreement in the following manner.*

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<sup>2</sup> RfA, Evidence 2.

1. **A. The Club agrees to pay the pleyer [sic] a total of \$ 67,500 Dollar NET + VAT,**

**Oct (22,500) Pay 25 Nov, 2021**

**Nov (22,500) Pay 15 Jan 2022**

**Dec (22,500) Pay 15 March 2022**

**B. Agents fee total: \$ 18.000 NET + VAT.**

*Daryl Graham total of \$ 9.000 NET + VAT before Dec 10, 2021*

*Önder Göksu Malatyali total of \$ 9.000 NET + VAT before Dec 10, 2021.*

*This payment is in addition to any previous payments already made. After the full payment is made, the Player agrees that the Club no longer has any obligations to the player, financial or otherwise.*

**C. If club fails to make any payment based on agreed upon schedule, player has right to pursue full value of current contract in BAT.**

[...]

*A- 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 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 league [sic] of the arbitration shall be English. [...]*

2. **B- If the payments are not received by Player's / Agents' bank on the date due, the Player/Agents will notify the club of the mentioned delay, and if owed amounts are not paid by the club to the player/Agents within **five (5) days** of the mentioned notification, then this resolution agreement becomes null and void, the **Player / Agents have right to pursue the full value in BAT.**" (emphasis original)**

10. It is the Claimants' case that the Club only paid the October payment to the Player under the Termination Agreement and, despite their repeated demands by emails dated 15 December 2021 and 1 May 2022, defaulted in all other payments to the Player and the Agent thereunder. The Claimants therefore contend that the Club is liable to pay (i) the Player the November and December payments totalling USD 45,000.00, without prejudice to his claim for the surplus; and (ii) the Agent the full sums referred to

in para. 7 above, i.e. USD 11,250.00 in total under the Agreement.<sup>3</sup>

11. Both Claimants reserve the right to demand payments under the Agreement for the 2022/2023 season through a separate lawsuit.<sup>4</sup>

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

12. On 13 May 2022, the Claimants filed their Request of Arbitration dated 7 May 2022 (“RfA”) in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 4,000.00 on 16 May 2022.
13. On 7 June 2022, the BAT informed the Parties that Mr. Benny Lo had been appointed as the Arbitrator in this case, invited the Respondent to file its Answer to the RfA by 28 June 2022, and fixed the advance on costs to be paid by the Parties by 17 June 2022 as follows:

<i>“Claimant 1 (Mr. Akil Mitchel)</i>	<i>EUR 2,750.00</i>
<i>Claimant 2 (Mr. Daryl Graham)</i>	<i>EUR 750.00</i>
<i>Respondent (Karsiyaka Spor Kulubu Dernegi)</i>	<i>EUR 3,500.00”</i>

14. On 10 June 2022, the BAT received an advance on costs paid by Claimant 1 in the amount of EUR 2,750.00.
15. On 15 June 2022, the BAT received an advance on costs paid by Claimant 2 in the amount of EUR 750.00.
16. On 29 June 2022, the BAT fixed a final deadline until 6 July 2022 for the Respondent to pay its share of the advance on costs and submit its Answer to the RfA. The Respondent had not paid its share nor submitted its Answer by the said deadline.

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<sup>3</sup> RfA, paras. 6-11; RfA, Evidence 3.

<sup>4</sup> RfA, para. 12.

17. On 7 July 2022, given Respondent's failure to submit an Answer and pursuant to Article 9.3.1 of the BAT Rules, the BAT adjusted the advance on costs as follows:

<i>"Claimant 1 (Mr. Akil Mitchel)</i>	<i>EUR 2,500.00</i>
<i>Claimant 2 (Mr. Daryl Graham)</i>	<i>EUR 500.00</i>
<i>Respondent (Karsiyaka Spor Kulubu Dernegi)</i>	<i>EUR 3,000.00"</i>

18. As the Claimants had already paid the amount of EUR 3,500.00 in advance on costs, the BAT on 7 July 2022 also invited the Claimants to pay the outstanding amount of EUR 2,500.00 in substitution for the Respondent, pursuant to Article 9.3 of the BAT Rules, by 18 July 2022. On 11 July 2022, the Claimants duly paid the said amount.
19. On 13 July 2022, the BAT invited the Claimants to address certain questions raised by the Arbitrator by 20 July 2022. The Respondent was also given the right to reply by the same deadline.
20. On 14 July 2022, the Claimants filed submissions in reply to the above BAT's order of 13 July 2022 ("Cs' Sub"). The Respondent had filed no reply by 20 July 2022.
21. On 21 July 2022, the BAT informed the Parties that the exchange of submissions was completed in accordance with Article 12.1 of the BAT Rules. The Claimants were invited to file submissions on how much of the applicable maximum contribution to costs should be awarded to them and why, and to include a detailed account of their costs, including any supporting documentation in relation thereto, by 28 July 2022.
22. On 24 July 2022, the Claimants filed their costs submissions.
23. On 11 August 2022, the Respondent purported to file, belatedly, its one-page Answer to the RfA dated 8 August 2022 ("Answer").
24. On 17 August 2022, the BAT informed the Parties that the Arbitrator has decided to exceptionally admit the Answer, despite it having been filed late, and to re-open the

proceedings. The Claimants were invited to reply to the Answer by 6 September 2022. In view of the complexity of the dispute and the earlier adjustment of advance on costs by reason of the previous lack of an Answer from the Respondent, the BAT invited the Parties to pay an additional advance on costs by 26 August 2022 as follows:

<i>“Claimant 1 (Mr. Akil Mitchel)</i>	<i>EUR 500.00</i>
<i>Claimant 2 (Mr. Daryl Graham)</i>	<i>EUR 500.00</i>
<i>Respondent (Karsiyaka Spor Kulubu Dernegi)</i>	<i>EUR 1000.00”</i>

25. On 18 August 2022, the Claimants took issue with the Arbitrator’s said decision to admit the Answer and the BAT’s request for additional advance on costs. The Claimants’ correspondence concluded with the following paragraphs:

*“It is unfair for the arbitrator to request extra court costs.*

*After the closing procedures have started, it is unacceptable to delay the decision process based on an unjustified and maliciously prepared letter with deceptive excuses, and to demand extra litigation expenses from the parties. It is incompatible with justice.*

*Even children can easily guess that the respondent club will not pay the advance on costs and the proceedings will be prolonged.*

*For these reasons, we request the honorable arbitrator to return from interim decision and make a judgment, taking into account our explanations from the interim decision. Otherwise, as mentioned in the FIBA BAT legislation, we request challenge of the arbitrator and ask BAT President to handle the case.”*

26. On 22 August 2022, the BAT wrote to the Parties explaining, *inter alia*, (i) that the Arbitrator’s consideration to admit the Answer was to ensure that both Parties (including the Respondent) had a reasonable opportunity to present their respective case and to avoid any potential enforcement issues, and (ii) that given the length of the Answer, the Arbitrator did not believe that allowing its filing would result in material or significant delay in the rendering of the Award. The BAT also clarified that the decision to request an additional advance on costs was made by the BAT Secretariat but not the Arbitrator. In view of the aforesaid, the BAT requested the Claimants to confirm in writing, by 24



August 2022, whether they would wish to challenge the Arbitrator, and if so, the matter will be referred to the BAT President in accordance with Article 8.3 of the BAT Rules.

27. On 23 August 2022, the Claimants replied to BAT stating:

*“Please find the advance on cost receipt attached*

*We declare that we have decided not to challenge the arbitrator”*

28. On 24 August 2022, the BAT received the Claimants’ share of the additional advance on costs from Claimant 1 in the amount of EUR 1,000.00.

29. On 1 September 2022, the BAT received the Respondent’s share of the additional advance on costs from Claimant 2 in the amount of EUR 1,000.00. The Arbitrator invited the Claimants to file a succinct final reply to the Answer by 9 September 2022.

30. On the same day, the Claimants file their reply to the Answer.

31. On 2 September 2022, the BAT informed the Parties that the proceedings are conclusively closed and invited them to file a (updated) detailed account of their costs, including any supporting documentation in relation thereto.

32. On the same day, the Claimants filed an updated account of their legal fees.

33. Up to the date hereof, the Respondent has failed to file any submission on costs.

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

##### **4.1. The Claimants’ Position**

34. The Claimants’ case is a simple one: the Club has defaulted under the Termination Agreement and should be ordered to pay them the outstanding sums agreed under it.

35. Specifically, the Player’s claim is for the November payment in the amount of USD 22,500.00 due on 15 January 2022 and the December payment of USD 22,500.00

due on 15 March 2022 pursuant to clause 1A of the Termination Agreement. He makes this claim “*without prejudice to [his] claim and litigation rights regarding the surplus.*”

36. On the other hand, the Agent relies on clauses 1B and 2B of the Termination Agreement and claims that he is entitled to the agent fee as provided for under the Agreement, being the amount of USD 11,250.00 under clause 5.1.1 of the Agreement. The Agent also relies on the award made in BAT 1772/22, in which Mr. Malatyali was awarded the sum of USD 11,250.00 by another BAT arbitrator in a related dispute.
37. In addition, both the Player and the Agent expressly reserve their right to make further claims in respect of the 2022/2023 season through a separate lawsuit.
38. In the RfA, the Claimants seek the following relief:

<i>“Unpaid Salaries</i>	<i>USD 45.000,00</i>
<i>Agent Fee</i>	<i>USD 11.250,00</i>
<i>Interest %5 per annum after the request of arbitration</i>	
<i>Advance on costs</i>	
<i>Non-reimbursable handling fee</i>	
<i>Legal / Arbitration costs and expenses</i>	
<b><i>Total amount in dispute</i></b>	<b><i>USD 56.250,00”</i></b>

#### **4.2. The Respondent’s Position**

39. In its Answer, the Club does not dispute that the Agreement was entered into between the Parties, nor does it dispute that the Agreement was terminated on 22 November 2021. The Club also does not challenge the Termination Agreement itself and its validity. Instead, the Club only makes some brief comments in answer to the Claimants’ claim.
40. The Club first submits that “*it is a well known that the Player signed another contract with another team right after the termination, so that means the [Claimant / Claimants]*

*also deserved an income occurly in the same season. This is another way to show, that the [Claimant / Claimants] can not ask the amount fully. [...]"*

41. In relation to the 2021/2022 season, the Club submits that *"the player Akil Mitchell signed a new contract with another European Club. This was also found place in public media. From this point of view, the [Claimant / Claimants] can not ask the full amount for the season 2022 – 23, while a new contract with a new club is signed."*
42. The Club goes on to submit that *"it is so clear the Player Akil Mitchell signed another contract with another Club for the rest of the season. And the [Claimant] reaches to a second agency fee for the same season. We kindly request [...] to set-off this second reached agency fee amount from the grand total of the claimed amount. Otherwise this will cause a second time earn, and that will have a meaning of 'unjust enrichment'."*
43. In conclusion, the Respondent requests in the Answer that *"the amount [claimed by the Claimants] has to be set, after set-off the amount of the new contract/contracts."*

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

44. 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, the BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).
45. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the exercise of a valid arbitration agreement between the parties.
46. 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.<sup>5</sup>
47. The jurisdiction of the BAT over the dispute results from the arbitration clause contained

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

under clause 2A of the Termination Agreement as follows:

*“Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL). Irrespective of the parties’ domicile. The league [sic] of the arbitration shall be English.”*

48. The Termination Agreement is in writing and thus the arbitration agreement fulfil the formal requirements of Article 178(1) PILA.
49. 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).
50. The predicate wording in clause 2A of the Termination Agreement, i.e. *“Any dispute arising from or related to the present contract [...]”*, clearly covers the present dispute.
51. In any event, the Respondent has not challenged the jurisdiction of the BAT in this case.
52. 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 the Claimants’ claims.

## **6. Other Procedural Issues**

53. 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***

54. 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”.*

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

*“15.1 The Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.*

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

56. As the Termination Agreement is silent on the choice of applicable law, Article 15 of the BAT Rules above dictates that the Arbitrator shall decide the dispute *ex aequo et bono*.
57. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in these proceedings.
58. The concept of “*équité*” (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the *Concordat intercantonal sur l’arbitrage*<sup>6</sup> (Concordat),<sup>7</sup> under which Swiss courts have held that arbitration “*en équité*” is fundamentally different from arbitration “*en droit*”:

*“When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to*

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<sup>6</sup> That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

<sup>7</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

*those rules.*<sup>8</sup>

59. 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*”.

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

## 7.2 Findings

61. As the Claimants’ claims are to enforce contractual payment obligations, the doctrine of *pacta sunt servanda* (which provides that parties who make a bargain are expected to stick to that bargain) is the principle by which the Arbitrator will examine their merits.

62. In the Arbitrator’s view, the factual and legal issues presented by the Parties outlined under Section 4 above give rise to three broad issues for consideration, namely:

(a) First, was the Club in breach of the Termination Agreement? (“Issue 1”)

(b) Second, if the Club was in breach of the Termination Agreement, what are the Claimants’ *prima facie* entitlements thereunder? (“Issue 2”)

(c) Third, what if any compensation should be awarded to the Claimants? (“Issue 3”)

### 7.1.1. Issue 1 – Was the Club in breach of the Termination Agreement?

63. To begin with, the Arbitrator has seen no indication that would cast doubt on the Parties’ execution of the Agreement and the Termination Agreement, as well as the validity and binding nature of the same. In fact none of the Parties have suggested otherwise.

64. It is also plain that the Termination Agreement was signed on 22 November 2021 to terminate the engagement of the Player and the Agent under the Agreement. This is confirmed by the phrase “*THIS RESOLUTION dated on November 22, 2021 [...]*”

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<sup>8</sup> JdT 1981 III, p. 93 (free translation).

serves to terminate the professional Agreements had been signed on the date July 15, 2021 [...] for the seasons 2021-22 and 2022-23.” in the preamble to the Termination Agreement.

65. The Claimants claim that that the Club defaulted on paying the November and December instalments, each in the amount of USD 22,500.00, to the Player (under clause 1A of the Termination Agreement) and the amount of USD 9,000.00 to the Agent (under clause 1B of the Termination Agreement) by their respective due dates.
66. On 15 December 2021, the Claimants sent the following reminder to the Club:

*“I am reaching out to you regarding the payments of agent fee contractually needs to be paid to Mr. Daryl Graham and Önder Göksu Malatyalı which was understood and signed on the agreement with the Karşıyaka Spor Kulübü Derneği.*

*The Club owes 9.000,00 USD to Mr. Daryl Graham and 9.000,00 to Önder Göksu Malatyalı The agreement was to Club to pay it on 10 December 2021 but still has not been paid.*

*Our efforts to reach you without official channels have not been heard therefore, we send this official notice.*

*We hereby notify you, as of this date, the contract signed has been breached. If the payment will not be made by December 20th, we will start the legal procedure before BAT and all the other amenities regarding to the original contract will be asked.”*

67. This was followed by a further email on 1 May 2022 in which the Claimants stated:

*“I am a sports attorney and I’m representing Mr. Akil Mitchell and his agent Mr. Daryl Graham. I’m reaching out to you regarding the unpaid payments of agent fees and salaries.*

*The Club owes USD 9.000,00 to Mr. Daryl Graham (notice on this has already been sent) and USD 45.000,00 to Mr, Akil Mitchell.*

*Our efforts to reach you without official channels have not been heard therefore, we send this official notice.*

*We hereby notify you, as of this date, the contract signed has been breached. According to Article 2-B of the termination agreement dated November 22, 2021 we are notifying you to pay the above mentioned amount within 5 days till May 6, 2022. If the payment will not be made in the given time, we will start the legal procedure before BAT and all the other amenities regarding the original contract will be asked.”*

68. There is no dispute that, at all material times prior to the Claimants' filing of the RfA, the Club had not paid any of the outstanding amounts to the Player or the Agent. As mentioned above, the only matters raised by the Club in its Answer to the Claimants' claim on breach of contract appear to relate to questions of quantum but not liability.

69. On the available evidence, the Arbitrator is therefore satisfied and finds that the Club was in wrongful breach of clauses 1A and 1B of the Termination Agreement by failing to make the relevant payments to the Player and the Agent as alleged by the Claimants.

**7.1.2. Issue 2 – What are the Claimants' *prima facie* entitlements if the Club has breached the Termination Agreement?**

70. Given the Club's breach of the Termination Agreement as aforesaid, the next question is what the respective rights of the Claimants are in consequence of the breach.

71. This is expressly dealt with in two clauses of the Termination Agreement: clauses 1C and 2B. Under clause 1C, upon the Club's default the "[Player] *has right to pursue full value of current contract in BAT*". Clause 2B provides that, if any part of the agreed payments is not made within 5 days of a late payment notice, "*this resolution agreement becomes null and void, and Player/Agents have right to pursue the full value in BAT.*"

72. In the Arbitrator's view, the contractual basis of the remedies provided for under clauses 1C and 2B appears to be different. Under clause 1C, the Player's redress is to pursue the "*full value of the current contract in BAT*". There is little doubt that the term "*current contract*" refers to the Termination Agreement. This is particularly so given the express reference in its preamble to the Agreement having been *terminated* upon the signing of the Termination Agreement. It is thus reasonably clear that, what clause 1C seems to be saying is that the Player would be entitled to claim for the full outstanding amount *under the Termination Agreement* upon the Club's default of that agreement.

73. On the other hand, clause 2B provides that "*this resolution agreement becomes null and void, and Player/Agents have right to pursue the full value in BAT*" if the Club's



late-payment upon notice is not remedied. If the “*resolution agreement becomes null and void*”, it is unlikely that the latter phrase “*full value*” would be referring to the “*full value*” under the Termination Agreement but would more likely be referring to that under the Agreement instead. This then raises another question: what is the effect of the phrase “*this resolution agreement becomes null and void*”? In the Arbitrator’s view, there are two equally plausible possibilities. First, this can be taken to mean the Termination Agreement would be rendered “*null and void*” such that the Agreement would be revived. Secondly, this phrase can also be taken to mean that it was the compromised amounts under clause 1 that would become “*null and void*”, such that the Player and/or the Agent may *invoke clause 2B itself* in claiming for the “*full value*” of their respective entitlements as provided for under the (original) Agreement.

74. These discussions on the contractual basis of the Claimants’ remedies, albeit technical, are in fact highly relevant. It is worth noting that the Claimants’ claims are made under the Termination Agreement, not the Agreement (see page 2 of the RfA, where it is confirmed that “*an arbitration agreement dated 22.11.2021*” was relied on in commencing the present arbitration). At the same time, the amount of compensation claimed by the Player originates from the Termination Agreement (clause 1A: USD 22,500.00 each for November and December) but the amount of compensation claimed by the Agent originates from the Agreement (clause 5.1.1: USD 11,250.00).
75. In view of these somewhat curious (and perhaps slightly dissonant) features in the formulation of the Claimants’ case, it is vital for the Arbitrator to be satisfied that *both* the Player’s claim *and* the Agent’s claim are accommodated by the terms of the Termination Agreement for the Claimants to succeed in their respective claims in full.
76. So far as the Player is concerned, the Arbitrator accepts that it is open for him to claim the total amount of USD 45,000.00 pursuant to the Termination Agreement.
77. Specifically, the Arbitrator considers the Player’s claim to be supported by clause 1C of the Termination Agreement as that amount represents the “*full value*” of the

outstanding unpaid amount to him under that agreement (i.e. the “*current contract*”).

78. The Player’s claim is further supported by the second interpretation of clause 2B (see para. 73 above), which the Arbitrator also accepts, as it gives the Player an independent right to sue for the “*full value*” under the Agreement even though the Agreement has not been revived. Even though the amount claimed by the Player herein is less than his full entitlement under the Agreement, no issue arises as what clause 2B gives the Player is the *right* but not the *obligation* to claim for the “*full value*” under the Agreement.
79. Likewise for the Agent, the Arbitrator accepts that it is open for him to claim the amount of USD 11,250.00, which originates from clause 5.1.1 of the Agreement, pursuant to clause 2B of the Termination Agreement. As mentioned, clause 2B gives the Agent an independent right to claim the full amount of his entitlement under the Agreement when the Club had failed to answer a late payment notice, as was indeed the case here.
80. For all these reasons, the Arbitrator finds that the Claimants are *prima facie* entitled to their respective claims, subject to any reduction on quantum discussed under Issue 3.

**7.1.3. Issue 3 – What if any compensation should be awarded to the Claimants?**

81. The final issue relates to the quantum of any compensation payable to the Claimants.
82. As stated in paras. 40-43 above, the only points made by the Club relates to the possibility of double recovery, or “*unjust enrichment*”, by the Player and the Agent by reason of its allegation that the Player has signed a new contract with another club. Relying on this allegation, the Club seeks to reduce the quantum of the Claimants’ claim.
83. Despite raising the said allegation, the Club has not particularized nor produced any evidence to show that the Player had entered into a new contract with another club, whether for the remainder of the 2021/2022 season or for the 2022/2023 season. In particular, there is no evidence showing what the Player and/or the Agent has or would have received as a result of any new contract signed by the Player with another club.

Furthermore, no request for document production was filed.

84. Absent any such evidence on the Player's subsequent employment situation, it is impossible for the Arbitrator to take into account the Club's defence on quantum. In any event, the Player is asking for the payment of the amounts based on the Termination Agreement (and not based on the Agreement) so the relevance of the alleged new contract has not been made clear by the Club.
85. The Player and the Club should be awarded their respective principal claims in full.

#### **7.1.4. Conclusion on Liability**

86. In the procedural order of 13 July 2022, the Arbitrator explicitly sought clarification with the Claimants, *inter alia*, as to whether either or both of their respective principal claims are sought on a "net" basis, and whether any VAT is sought in addition to the respective principal sums.
87. In the Cs' Sub, the Claimants refer to the clause in the Agreement providing for payments be made "*net of any Turkish taxes*", and submit that "[the] *amount determined for [the Agent] in the contract is the net amount. VAT will not be added to this amount.*"
88. In conclusion, and deciding the case *ex aequo et bono*, the Arbitrator is satisfied and finds that the Respondent is liable to pay Claimant 1 the amount of USD 45,000.00 net of any Turkish taxes and to pay Claimant 2 the principal amount of USD 11,250.00 net of any Turkish taxes.
89. The Claimants also claims interest at 5% per annum "*after the request of arbitration*". In line with established BAT jurisprudence, the Arbitrator finds it fair and reasonable to award the interest sought by Claimants on the foregoing principal amounts at the rate of 5% per annum from the date of receipt of the RfA, i.e. 13 May 2022.

#### **8. Costs**

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

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

91. On 30 September 2022, the BAT President determined the arbitration costs in the present matter to be EUR 8,000.00.

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

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

93. The Claimants have been wholly successful in their claims and there are no special features that, in the Arbitrator’s view, call for a displacement of the costs to follow the event approach. Thus, in the exercise of its discretion pursuant to Article 17.3 of the BAT Rules, the Arbitrator determines that the costs of the arbitration be borne entirely by the Respondent. Since the Claimants have respectively paid EUR 6,250.00 and EUR 1,750.00 of the total advance on costs, the Respondent shall reimburse the amount of EUR 8,000.00 to the Claimants jointly in terms of arbitration costs.

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

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

95. Moreover, Article 17.4 of the BAT Rules provides for the maximum amounts a party can receive as a contribution towards its reasonable legal fees and other expenses (excluding the non-reimbursable handling fee).
96. As set out in their updated costs submissions, the Claimants claim legal fees in total amount of USD 8,500.00. The Claimants also claim the non-reimbursable handling fee they paid to the BAT for this case in the amount of EUR 4,000.00.
97. While the Claimants are wholly successful in this case, the Arbitrator considers that the legal fees claimed by the Claimants are on the high side in view of the length of the Claimants' submissions. Further, the Claimants' objections made on 18 August 2022 were subsequently withdrawn. In all the circumstances, the Arbitrator determines that it is fair and reasonable to award the Claimants jointly (i) USD 4,000.00 as a contribution towards the Claimants' legal fees and expenses and (ii) EUR 4,000.00 as reimbursement for the non-reimbursable handling fee paid in the present arbitration.

## **9. AWARD**

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

- 1. Karsiyaka Spor Kulübü Dernegi shall pay Mr. Akil Mitchell the sum of USD 45,000.00 net of any Turkish taxes together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 13 May 2022 until payment in full.**
- 2. Karsiyaka Spor Kulübü Dernegi shall pay Mr. Daryl T. Graham the sum of USD 11,250.00 net of any Turkish taxes together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 13 May 2022 until payment in full.**
- 3. Karsiyaka Spor Kulübü Dernegi shall pay the amount of EUR 8,000.00 to Mr. Akil Mitchell and Mr. Daryl T. Graham jointly as reimbursement of the arbitration costs.**
- 4. Karsiyaka Spor Kulübü Dernegi shall pay Mr. Akil Mitchell and Mr. Daryl T. Graham jointly (i) the amount of USD 4,000.00 as a contribution towards their legal fees and expenses, and (ii) the amount of EUR 4,000.00 as reimbursement of the non-reimbursable handling fee.**
- 5. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 11 October 2022

Benny Lo  
(Arbitrator)