BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 1067/17)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Raj Parker

in the arbitration proceedings between

Mr. Nikola Milutinov

- First Claimant -

Entersport LLC

- Second Claimant -

both represented by Mr. Reed Nopponen,
128 Heather Drive, New Canaan, CT 06840,
New Canaan, Connecticut, USA

vs

Basketball Club Partizan Belgrade
Humska 1, 11000 Belgrade, Serbia

- Respondent -

represented by Mr. Ilija Dražić, attorney at law,
Kralja Milana 29, 11000 Belgrade, Serbia

1. The Parties

1.1 The Claimant

1. Nikola Milutinov (hereinafter the “First Claimant") is a Serbian professional basketball player.

2. Entersport LLC (hereinafter the “Second Claimant”) is a sports management company based in the United States of America.

1.2 The Respondent

3. Basketball Club Partizan Belgrade (hereinafter the "Respondent") is a professional basketball club based in Belgrade, Serbia.

2. The Arbitrator

4. On 6 September 2017, 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

6. On 10 May 2012, the Claimants and the Respondent entered into a Standard Player

Contract (hereinafter the "Contract"). The Contract contained, among others, the following express provisions:

> *"THIS AGREEMENT is entered into this 10th day of May 2012 by and among Kosarkaski Klub Partizan Beograd (hereinafter referred to as the "Club") which owns and operates a basketball club located in Humska 1, 11000 Beograd, Srbija, Nikola Milutinov, a _____ (hereinafter referred to as the "Player"), and Reed Nopponen (FIBA License #2007019221), Entersport LLC, 128 Heather Drive, New Canaan, CT 06840 (hereinafter referred to as the "Agent").*
>
> *In consideration of the mutual promises contained herein, the parties agree as follows:*
>
> *1. The Club does hereby engage the Player as a skilled basketball player for a four season term (the 2012-2013, 2013-2014, 2014-2015 and 2015-2016 seasons). […]*
>
> *2. The Club agrees to pay the Player for rendering services to the Club during the term, a fully guaranteed net* salary as set out below in accordance with the following schedule:*
>
> ***2012-13 Season 50 000 EUR (fiftythousandeuros) net to be paid as follows:** […]*
>
> ***2013-14 Season 110 000 EUR (onehundredtenthousandeuros) net to be paid as follows:** […]*
>
> ***2014-15 Season 220 000 EUR (twohundredtwentythousandeuros) net to be paid as follows:** […]*
>
> ***2015-16 Season 450 000 EUR (fourhundredfiftythousandeuros) net to be paid as follows:** […]*
>
> *The salaries set forth above for all the seasons of the term of this Contract are net of all Serbian taxes including without limitation, income tax. Club does hereby agree to pay any and all Serbian*

taxes due on the salary and bonuses provided herein on Player's behalf and shall furnish Player with a tax certificate verifying Club's full payment of the taxes required, on a timely basis.

The guarantee salary payments above are vested in and owing to the Player upon the completion of the execution of this Agreement, and are not contingent upon anything other than the Player passing a physical examination as specified in paragraph 7 of this contract. […]"

7. Clause 9 of the Contract contained provisions concerning breaches of the Contract. Insofar as breaches of contract by the Respondent were concerned, it stated:

"BREACH OF CONTRACT: Club agrees that Player may void this Contract in the event that (A) any payment mandated by this Contract is past due more than sixty (60) calendar days, or (B) any non-economical clause is not performed by Club for thirty (30) calendar days or longer. In such case, as soon as he makes such request in writing to any Club Official, Player will be granted his unconditional release and free agency. 72 hours after notice has been given, all monies due to Player during the entire term of this Contract shall become immediately due and payable. In the event of non-payment the Player may, in addition to his other rights and remedies set forth herein or as provided by law, refrain from practicing or playing for the Club until all such outstanding payments have been made. Club is hereby prohibited from suspending, fining or otherwise punishing Player for exercising this right."

8. Clause 14 concerned the payment of an "*AGENT FEE*". It stated:

"In addition to the compensation set forth herein for Player, Club agrees to pay as a material term of this Contract an agent's fee to Player's Agent Reed Nopponen/Entersport for his services in the negotiation of this Contract. The agent's fee shall be equal to six percent (%) of the net compensation payable to Player according to Paragraph 2 herein and shall be in EUROS and net of all Serbian taxes. The first season's agent fee of 3000 EUR (net) shall be paid by December 15, 2012. The 2013-14 season's agent fee of 6,600 EUR (net) shall be paid, provided this Agreement has not been terminated pursuant to Paragraph 1 above, by December 15,

> *2013. The 2014-15 season's agent fee of €13,200 EUR (net) shall be paid, provided this Agreement has not been terminated pursuant to Paragraph 1 above, by December 15, 2014. The 2015-16 season's agent fee of €27 000 EUR (net) shall be paid, provided this Agreement has not been terminated pursuant to Paragraph 1 above, by October 15, 2015. In the event any of the agent's fees is overdue by twenty one (21) days or longer of the due date listed herein, a late fee of €50.00 (fifty) EUR per day shall be applied for every day, beginning with the twenty-second (22nd) day the Club is late in paying the fee. In addition, Player may refuse to report to Club or refrain from practicing without penalty until such time as agent has received his fee. All agent fees shall be wire transferred to the bank account designated by Reed Nopponen/Entersport LLC by invoice to the Club. Failure by the Club to pay the Agent Fee within forty-five (45) days shall be covered by terms of Article 9 herein."*

9. On 22 December 2014, Marc S. Fleisher, the President of the Second Claimant, sent a letter to the Respondent which stated:

> *"As you undoubtedly know, Partizan owes my company, Entersport, a lot of agent fees consisting of 27.600 EUR for Davis Bertans covering the 2011-12, 2012-13 and 2013-14 seasons, and 22.800 for Nikola Milutinov covering the 2012-13, 2013-14, and this season. The above totals 50.400 EUR.*
>
> *We have been extremely patient and understanding of your club's difficult financial situation. However, we do need your club to make us a partial payment of no less than 10.000 EUR within the next 30 days. The remaining fees due we can discuss a payment schedule for once we have received the 10.000 EUR. In the event that we do not receive the partial payment, you are leaving us with no choice but to file a BAT claim for the fees due. It is my sincere hope that we will be able to resolve this without is going to BAT."*

10. On 13 January 2015, the Claimants and the Respondent entered into a further agreement which amended the terms of the Contract ("the Amendment Agreement"). The Amendment Agreement provided amongst other things that:

> *"This AMENDMENT is entered into this 13th day of January 2015*

> *to that Standard Player's Contract ("Contract") dated the 10th day of May 2012, by and between the parties listed in that Contract; [...]*
>
> *The parties hereby agree to amend their Contract as follows:*
>
> *The first subparagraph of Paragraph 1 shall be amended so that an additional season –the 2016-17 season– is added to the Contract.*
>
> *[…]*
>
> *Paragraph 14 shall be amended so that the agent's fee for the 2014-15 season shall be 9.000 (nine thousand) EUR net instead of 13.200 EUR net and the agent's fee for the 2015-16 season shall be 12.000 (twelve thousand) EUR net instead of 27.000 EUR net.*
>
> *For the 2016-17 season, the agent fee shall be 18.000 (eighteen thousand) EUR net and shall be paid to Agent, provided the Contract has not been terminated pursuant to Paragraph 1 of the Contract, by October 15, 2016.*
>
> *All other terms and conditions of the Contract are not amended and shall remain in full force and effect."*

11. On 23 July 2015, the First Claimant sent an email to Mr. Predrag Danilovic, the President of the Respondent. The email stated:

> *"Pursuant to Paragraph 9 of our Standard Player's Contract, dated May 10, 2012 (as amended January 13, 2015), this letter shall serve as notice to void immediately said Contract due to your Club's repeated breaches by not paying me within 60 days of various respective due dates. Accordingly, I am immediately entitled to my Letter of Clearance and, 72 hours from now, entitled to be paid immediately all unpaid monies due me during the entire term of our Contract."*

12. On 28 February 2016, the Second Claimant's President, Mr Fleisher, sent a further

email to the Respondent which stated:

> *"As you are well aware, our client Nikola Milutinov is owed 187,000 euros by your Club in unpaid salary. He has been very patient as he understands your difficult financial situation but until now KK Partizan has not provided him with a timetable for the full payment of all the monies owed him. Therefore please immediately send us a schedule of payments including the specific amounts and the dates when he will be paid. Once we receive your proposed payment schedule we will inform you whether it is acceptable to Nikola. In the event that we do not receive your proposal in the next few days Nikola will have no choice but to bring a BAT proceeding to recover the monies he is owed. In such a case your Club will also be responsible for the costs of the BAT case as well as interest and possibly legal fees. It is Nikola's sincere hope that KK Partizan presents him with an acceptable payment schedule and then makes the payments in a timely manner, so as to avoid having to go to BAT."*

13. On 13 February 2017, Mr. Fleisher sent a further letter by email to the Respondent. The letter stated:

> *"As you undoubtedly know, Partizan still owes our client, Nikola Milutinov, the sum of 187.000 EUR pursuant to his contract with your club dated May 10, 2012, as amended January 13, 2015. . [sic] In addition, Partizan still owes my company, Entersport, agent fees relating to said Milutinov contract in the amount of 18.600 EUR as follows: 3.000 EUR for the 2012-13 season, 6.600 EUR for the 2013-14 season and 9.000 EUR for the 2014-15 season.*
>
> *We have been extremely patient and understanding of your club's difficult financial situation. However, our patience has now run out. Your club needs to pay immediately by wire transfer the above respective amounts to Mr. Milutinov and Entersport. In the event that Mr. Milutinov and Entersport do not receive the said abovementioned respective amounts within 1 week from the date of this letter, we will be left with no choice but to file a BAT claim for these amounts due as well as, in accordance with Paragraph 14 of the contract, for the substantial late fees due Entersport. It is my sincere hope that we will be able to resolve this without us going to BAT."*

14. The Respondent did not subsequently make any payment to either of the Claimants in response to the letters and emails set out above.

3.2 The Proceedings before the BAT

15. On 13 August 2017, the Claimants filed the Request for Arbitration ("RFA") in accordance with the BAT Rules.

16. The non-reimbursable handling fee of EUR 5,000 was received by the BAT from the Claimants on 30 August 2017.

17. On 8 September 2017, the BAT wrote to the parties confirming receipt of the non-reimbursable handling fee and (amongst other things) notifying the parties that the deadline for the parties to pay their respective shares of the Advance on Costs was 22 September 2017, while the deadline for the Respondent to file its answer to the RFA ("Answer") was 29 September 2017.

18. On 21 September 2017, the Second Claimant paid the Claimants' share of the Advance on Costs (in the sum of EUR 6,000).

19. By a letter dated 5 October 2017, the BAT:

    (a) confirmed receipt of the Claimants' share of the Advance on Costs;

    (b) noted that the Respondent had failed to submit the Answer to the RFA and had failed to pay its share of the Advance on Costs as requested in the letter from the BAT dated 8 September 2017;

    (c) stated that the Claimants had the right to pay the Respondent's share of the Advance on Costs and set a time limit of 16 October 2017 for doing so; and

(d) afforded the Respondent a final opportunity to file an Answer to the RFA by no later than 13 October 2017.

20. On 13 October 2017, the Respondent filed an Answer to the RFA. The Answer was accompanied by various documentary exhibits, some of which were in Serbian with no English translation.

21. On the same date, the Second Claimant paid EUR 1,000 towards the Respondent's share of the Advance on Costs

22. On 17 October 2017, the Second Claimant paid a further EUR 5,000 towards the Respondent's share of the Advance on Costs. As a result of that payment, the full amount of the Respondent's share of the Advance on Costs was paid by the Second Claimant.

23. On 19 October 2017, the BAT wrote to the Parties acknowledging receipt of the Respondent's Answer and directing the Respondent to submit English translations of all of the Serbian documents that had been filed with the Respondent's Answer by no later than 20 October 2017.

24. On 20 October 2017, the Respondent submitted English translations of the relevant Serbian documents.

25. On 3 November 2017, the Arbitrator issued a Procedural Order (hereinafter the "First Procedural Order"), in which the Claimants were requested to provide further information in respect of the matters alleged in the RFA. In particular, the First Procedural Order invited the Claimants to reply to the following questions by 16 November 2017:

1. *"Did the Respondent and the First Claimant enter into an "Agreement on Professional Engagement of the Player" dated 31*

December 2012?

2. *If the answer to (1) is yes:*

   a. What is the relationship between the "Agreement on Professional Engagement of the Player" and the "Standard Player's Contract" dated 10 May 2012?

   b. Is the Respondent correct that the First Claimant's entitlement to remuneration was determined by the "Agreement on Professional Engagement of the Player" rather than the "Standard Player's Contract"?

3. *Is the Respondent correct that (i) in the 2013/2014 season the Respondent paid a total of EUR 68,000 to the First Claimant; and (ii) in the 2014/15 season the Respondent paid a total of EUR 30,000 to the First Claimant (see paragraph 15 of the Respondent's Answer)?*

4. *What is the Second Claimant's response to the Respondent's submission that the daily EUR 50 late payment fee claimed by the Second Claimant is an invalid and unenforceable penalty clause (see paragraphs 18 to 20 of the Respondent's Answer)?*

5. *Did the First Claimant enter and then breach an agreement with the Respondent that he would remain at the club until 1 August 2015 (as alleged at paragraph 24 of the Respondent's Answer)?"*

26. On 15 November 2017, the Claimants replied to the First Procedural Order. The Claimants confirmed that they had entered into an Agreement on Professional Engagement of the Player (the "APEP"), which they stated was "*the Serbian League contract which is utilized merely for registration purposes*". According to the Claimants, the APEP incorporated via the annex all of the terms and conditions of the Contract. The annex to the APEP therefore could not change the salary terms of the Contract. The Claimants' reply went on to state that:

    (a) The Respondent had double-counted a payment of EUR 5,000 to the First Claimant on 23 January 2014, meaning that the Respondent still owed the First Claimant EUR 5,000 in respect of the 2013-14 season.

(b) The RFA had inadvertently omitted to refer to a payment of EUR 30,000 in the 2014/15 season. However, the total amounted claimed by the First Claimant in the RFA – namely EUR 187,000 – remained correct.

(c) In light of the Respondent's prior history of failing to pay agency fees that were due to the Second Claimant, the Second Claimant would not have negotiated the Contract with the Respondent but for the inclusion of a provision which established a meaningful penalty in the event that the Respondent failed to pay sums due on time. The Respondent had freely signed the Contract and never previously sought to suggest that the clause was invalid or unenforceable. Had the Respondent paid the sum of EUR 18,600 within 21 days of the relevant dates when the components of that sum fell due, there would have been no late penalty. The daily penalty of EUR 50 is "*small*", being about 0.25 per cent of the outstanding debt of EUR 18,600.

(d) The First Claimant had not entered any written or verbal agreement with the Respondent that he would remain at the club until 1 August 2015. Had the First Claimant and the Respondent intended to modify the Contract, they would have done so in writing. The Respondent, however, had not tendered any evidence that a written or oral agreement to modify the Contract existed.

27. On 2 January 2018, the Arbitrator issued a Procedural Order (hereinafter the "Second Procedural Order"), in which the Respondent was requested to provide its response to certain statements in the Claimants' reply to the First Procedural Order. In particular, the Respondent was requested to provide its answers to the following questions by no later than 15 January 2018:

> *"1. What is the Respondent's response to the Claimant's statement that the Respondent has offered no evidence that the parties intended to replace the Standard Player's Contract with the Serbian league contract and, moreover, acted in a*

way which suggested that it considered the Standard Player's Contract to be binding on the parties?

2. *What is the Respondent's response to the Claimant's statement that the Respondent has "double count[ed]" the EUR 5,000 payment made on 23 January 2014?*

3. *What is the Respondent's response to the Claimant's submission that the Respondent has not adduced any evidence to establish the existence of an oral representation by the Claimant that he would waive his rights to be paid according to the schedule contained in the written contract?"*

28. On 15 January 2018, the Respondent replied to the Second Procedural Order. In its reply the Respondent stated that:

(a) The First Claimant could not deny that he had signed and concluded the APEP. The APEP was binding on the First Claimant and the Respondent and superseded the Contract.

(b) Further, the Contract was concluded at a time when the First Claimant was under the age of 18 and therefore did not have legal capacity to conclude any legally binding agreement. The First Claimant turned 18 on 31 December 2012, which was the date when the APEP was signed. It follows that the Contract was null and void, while the APEP was lawful and binding.

(c) The Respondent had not double-counted a payment of EUR 5,000. The Respondent's calculations in its Answer to the RFA were correct.

(d) The First Claimant was wrong to say that the Respondent had provided no evidence concerning an oral agreement between the parties. In fact, in the middle of the 2014-15 season the Parties had agreed that the First Claimant would be permitted to leave the Respondent despite the existence of the Contract, but that the entire amount of the First Claimant's unpaid salary

would be paid to the First Claimant from the "Buyout Amount" received from the First Claimant's new club (which it subsequently transpired would be Olympiakos in Greece). The Respondent stated that the parties "*completely obeyed*" that oral agreement.

(e) The Second Claimant was seeking a penalty equivalent to an interest rate of 610% per annum (or 50.83% per month). This claim was "*absurd*" and would be unlawful in both Switzerland and Serbia.

29. The Respondent's reply to the Second Procedural Order was accompanied by an affidavit from Mr. Dragan Todorić, the Respondent's Sport Director, which contained an account of the circumstances of the First Claimant's departure from the Respondent, and the discussions between the First Claimant and the Respondent that preceded that departure.

30. On 13 February 2018, the Arbitrator issued a further procedural order (the "Third Procedural Order") which directed the Claimants to respond to the following questions by no later than 27 February 2018:

> *"1. What is the Claimants' response to the Respondent's argument that, since the "Agreement on Professional Engagement of the Player" was concluded several months after the "Standard Player's Agreement", the later contract superseded the earlier contract?*
>
> *2. What is the Claimants' response to the Respondent's argument that, in any event, the "Standard Player's Agreement" was concluded when Claimant 1 was aged under 18 and, as a result, did not have capacity to enter a binding contract at that date?*
>
> *3. What is the Claimants' response to the Respondent's argument that the Claimants have overlooked a payment of RSD 555,221 (EUR 5,000) paid to the Claimant(s) by the*

Respondent on 17 October 2012?

4. Do the Claimants agree with the content of the affidavit of Mr Dragan Todorić dated 15 January 2018? If not, please explain which aspects of the affidavit the Claimants do not agree with."

31. On 27 February 2018, the Claimants responded to the Third Procedural Order. The Claimants' response stated:

(a) BAT jurisprudence establishes that an individually negotiated agreement will prevail over a general template league contract unless there are indications that the parties intended to replace the individual agreement with a template league contract. In the present case, the Respondent's conduct in adhering to, and amending, the provisions of the Contract demonstrate that the Respondent did not intend its contractual relationship with the First Claimant to be governed by the APEP.

(b) The Respondent's argument concerning the First Claimant's alleged lack of capacity wrongly elided the concepts of voidness and voidability. Under general principles of law, a contract with a minor is valid and binding unless and until the minor elects to void it. Since the First Claimant never voided the Contract, it remained valid and binding on the Respondent.

(c) The Claimants had not overlooked the payment of EUR 5,000 dated 17 October 2012.

(d) Mr Todorić's statement is not accurate. (The Claimants' reply set out a detailed counter version of events concerning the circumstances that preceded and followed the First Claimant's departure from the Respondent. For the purposes of this Award, it is unnecessary to summarise the detail of that account.)

32. On 20 March 2018, the Arbitrator issued a further procedural order (the "Fourth Procedural Order") which requested the Respondent to file a short written submission setting out its response (if any) to the matters set out in the Claimants' reply to the Third Procedural Order. The Respondent was requested to file that submission by no later than 3 April 2018.

33. On 3 April 2018, the Respondent wrote to the BAT stating that the Parties had "*extensively communicated about possible settlement and BC Partizan already reached mutual understanding with the Player, Claimant Nikola Milutinov (with respect to his claim), while for ending of negotiations (with preferably positive outcome but still without agreement) with the Agent, Entersport, the Respondent need[s] another week.*" Accordingly, the Respondent requested an extension of between seven and ten days to the deadline for responding to the Fourth Procedural Order.

34. On 3 April 2018, the Arbitrator granted the Respondent's request and extended the deadline for responding to the Fourth Procedural order to 13 April 2018.

35. On 4 April 2018, the First Claimant and the Respondent signed a settlement agreement (the "Settlement Agreement"). The Settlement Agreement stated that the First Claimant and the Respondent proposed that the Arbitrator render a Consent Award in the following terms:

> *"For reasons set forth in this Award above and in accordance with Article 16.6 of the BAT Rules, the Arbitrator decides, holds and order[s] as follows:*
>
> *1. BC Partizan shall pay to Mr. Nikola Milutinov in aggregate, total amount EUR 145,000 (hundred and forty-five thousand Euros) in five equal instalments of EUR 29,000 (twenty-nine thousand Euros) each, payable annually no later than 15 November each year, starting 2018 and finishing 2022. If BC Partizan does not timely fulfil any of its obligation to pay annual instalments, BC*

Partizan will lose instalment deferral and all other instalment will be considered due for one-time aggregate payment after a period of seven (7) days from the due dates of unpaid individual instalment.

2. BC Partizan shall pay to Entersport in aggregate amount of EUR 18,600 (eighteen thousand six hundred Euros) no later than 24 December 2018.

3. Each Party, Mr. Nikola Milutinov and to Entersport as the Claimants and BC Partizan as the Respondent, shall bear arbitration costs that were paid and their own legal fees and expenses.

This settlement and relating Consent Award with respect to the matter in merit and relating to all arbitration costs and legal fees and expenses [sic]."

36. The Settlement Agreement was signed by the First Claimant and by an authorised representative of the Respondent. It was not signed by a representative of the Second Claimant.

37. On 13 April 2018, the Respondent filed a submission responding to the Fourth Procedural Order. The submission stated that:

(a) The First Claimant and the Respondent had signed a Settlement Agreement and therefore jointly requested the Arbitrator to make a Consent Award embodying the terms of that Settlement Agreement.

(b) While the Respondent had offered to pay the Second Claimant the full amount of the agent's commission (namely six per cent of the First Claimant's contractual salary), the Second Claimant had rejected that offer.

(c) In light of the settlement reached between the First Claimant and the Respondent, the questions in the Fourth Procedural Order that related to the

relationship between those two parties were now irrelevant. Accordingly, there was no need for the Respondent to provide any answers to those questions, since the dispute between the First Claimant and the Respondent no longer existed.

(d) In view of the Second Claimant's rejection of the Respondent's settlement offer, the Second Claimant's claim remained to be determined by the Arbitrator. The Respondent accepted that it is liable to pay the Second Claimant the amount of EUR 18,600; however, it denied that it is liable to pay anything to the Second Claimant beyond that sum. In this regard, the Respondent explained that, "*the Respondent believes that the Agent which agreed with the Club on 6% commission calculated on the Player's actual salary (which results in commission of EUR 8,700 – including interest and costs of the procedure), the Respondent accepts to pay to the Agent initially agreed amount of EUR 18,600 and does not dispute […] the obligation in connection with that exact amount. The Respondent disputes any and all amounts over the amount of EUR 18,600 demanded in the Request for Relief by Entersport…*"

(e) Regarding the claim to late payment penalties, it is notable that while the First Claimant had originally claimed EUR 187,000 and had settled his claim for EUR 145,000, the Second Claimant (who is merely the First Claimant's agent) seeks a total payment of EUR 213,800 plus interest and costs in respect of an unpaid principal debt of just EUR 18,600. This request is unfair, unbalanced and contrary to *ex aequo et bono* standards.

(f) In the circumstances of the Second Claimant's claim, a late payment penalty of EUR 50 per day would equate to a monthly interest rate of over 8%. Even applying that rate (which equates to approximately EUR 1,500 per month) it is impossible to understand how the Second Claimant reaches the total of EUR

195,300 which it claims, since it would take more than ten years for penalties accumulating at this rate to reach that total.

(g) In addition, the Second Claimant had previously demonstrated an unacceptable attitude toward the Respondent with respect to the First Claimant's transfer to a new club in Greece. This was reflected in the contemporaneous press coverage, which referred to the Second Claimant having "*tricked*" the Respondent's management.

38. On 3 May 2018, the Arbitrator issued a further procedural order (the "Fifth Procedural Order") which invited the Second Claimant to file a short written submission making any response it wished to make in relation to the content of the Respondent's submission dated 13 April 2018. The Second Claimant was requested to file that submission by no later than 11 May 2018.

39. On 10 May 2018, the Second Claimant responded to the Fifth Procedural Order. In its response the Second Claimant stated that:

(a) The Respondent was wrong to suggest that the Second Claimant's entitlement to agency fees was just EUR 8,700 (being six per cent of the EUR 145,000 which the Respondent had agreed to pay to the First Claimant under the Settlement Agreement). The figure of EUR 8,700 wrongly disregarded the commission that the Respondent was contractually entitled to receive in respect of remuneration already paid to the First Claimant under the Contract prior to the institution of these proceedings before the BAT.

(b) The Respondent therefore remains liable for the full agency fees of EUR 18,600 plus late payment fees and costs as provided for in the Contract.

40. On 19 June 2018, the Arbitrator notified the parties that in accordance with Article

12.1 of the BAT 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.

41. On 25 June 2018, the Second Claimant submitted its account of costs to the BAT.

42. On 26 June 2018, the Respondent submitted its account of costs (which was erroneously dated 26 June 2016) to the BAT.

43. 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 and the submissions provided by the Respondent.

4. The Parties' submissions

4.1 The Claimant's Submissions

The Claimants' Request for Relief

44. The request for relief in the RFA stated that the Claimants sought:

> "*Salary compensation to Mr. Nikola Milutinov in the amount of 187.000 EUR (one hundred eighty-seven thousand Euros) which is the amount still owed; PLUS agent fees to Entersport in the amount of 18.600 EUR (eighteen thousand six hundred Euros) which is the amount still owed to Entersport under the Contract; PLUS late fees owed under the Contract to Entersport totalling 195.300 EUR (one hundred ninety five thousand three hundred Euros); PLUS all BAT costs and expenses associated with this BAT proceeding; PLUS accrued interest from the respective due dates of each outstanding payment.*"

The First Claimant's Claim

45. The First Claimant alleged that the Respondent had:

    (a) failed to pay the First Claimant his contractual bonus of EUR 10,000 in respect of the 2012-13 season;

    (b) failed to pay the First Claimant EUR 57,000 of his contractual remuneration (including a contractual bonus of EUR 10,000) in respect of the 2013-14 season; and

    (c) failed to pay the First Claimant any of his contractual remuneration of EUR 150,000 in respect of the 2014/15 season.

46. 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 (as varied by the Amendment Agreement), together with interest and costs.

47. As explained at paragraph 35 above, on 4 April 2018 the First Claimant and the Respondent signed a Settlement Agreement and jointly requested the Arbitrator to issue a Consent Award in terms set out at paragraph 35. For the reasons set out below, the Arbitrator has concluded that it is appropriate to render a Consent Award disposing of the claim brought by the First Claimant against the Respondent on the basis of the terms set out in the Settlement Agreement. In light of the fact that the First Claimant and the Respondent have settled the First Claimant's claim, and in light of the Arbitrator's decision to issue a Consent Award reflecting the terms of that settlement, the Arbitrator does not consider it necessary to set out a detailed summary of the First Claimant's submissions beyond the summary already provided in section 3.2 above.

<u>The Second Claimant's Claim</u>

48. The Second Claimant contends that it is entitled to a payment of EUR 18,600 in respect of unpaid agency fees due to the Second Claimant under the terms of the Contract (as amended by the Amendment Agreement). In addition to that principal sum, the Second Claimant also claims that it is entitled to late payment penalties totalling EUR 195,300. The calculation of these sums is explained in the RFA as follows:

> *"[T]he late fees owed by Respondent to Entersport shall be calculated as follows pursuant to the Contract:*
>
> *For the fee covering the 2012-13 season due December 15, 2012 which still has not been paid: there have been 1,667 days from 6 January, 2013, which is the 22nd day after the December 15th due date, through today, August 1, 2017, multiplied by 50 EUR per day = 83.350 EUR*
>
> *For the fee covering the 2013-15 season due December 15, 2013 which still has not been paid: there have been 1,302 days from January 6, 2014, which is the 22nd day after the December 15th due date, through today, August 1, 2017, multiplied by 50 EUR per day = 65.100 EUR*
>
> *For the fee covering the 2014-15 season due December 15, 2014 which still has not been paid: there have been 937 days from January 6, 2015 which is the 22nd day after the December 15th due date, through today, August 1, 2017, multiplied by 50 EUR per day = 46.850 EUR*
>
> *The total of all the late fees above is 195.300 EUR."*

49. The Second Claimant submitted that the Arbitrator should enforce the daily penalty of EUR 50 against the Respondent and should therefore order the Respondent to pay to the sum of EUR 213,900 (consisting of EUR 18,600 in respect of unpaid agency fees and EUR 195,300 in respect of late payment penalties) together with a further amount in respect of interest and costs to the Second Claimant.

4.2 The Respondent's Submissions

The First Claimant's Claim

50. As stated above, the Respondent has entered a Settlement Agreement with the First Claimant in respect of the First Claimant's claim. In the circumstances, it is therefore unnecessary to provide a detailed summary of the Respondent's submissions in respect of the matters which formed the subject of that claim.

The Second Claimant's Claim

51. In respect of the Second Claimant's claim – which has not been settled – the Respondent concedes that it is liable to pay the principal debt of EUR 18,600 to the Second Claimant. In this respect, the Respondent's Answer to the RFA originally stated that the Second Claimant was entitled to EUR 15,928.20, rather than EUR 18,600. (The Respondent did not dispute that it had not paid any of this sum to the Second Claimant.) The Respondent maintained that stance until its submission dated 13 April 2018, which conceded that the Second Claimant was entitled to recover the sum of EUR 18,600 in respect of the unpaid agency fees due to the Second Claimant.

52. The Respondent disputes, however, that it is liable to pay any late payment penalty to the Second Claimant in respect of that debt. In this connection, the Respondent submits that the amount of the late payment penalty claimed by the Second Claimant is unreasonable and grossly disproportionate. The Respondent emphasises that the sum claimed in respect of late payment penalties far exceeds the amount of the unpaid principal debt. In the circumstances, the Respondent submits that the Second Claimant's claim is manifestly contrary to *ex aequo et bono* standards and should therefore be rejected by the Arbitrator.

53. In support of its position, the Respondent submits that since the First Claimant and

the Respondent "*are Serbian persons*" it necessarily follows that the legal basis for their relationship "*is and must be exclusively Serbian regulation*". In this regard, the Respondent states that Serbian law prohibits the enforcement of liquidated damages clauses for breaches of monetary obligations (citing Article 270 of the Serbian Law on Obligations). Accordingly, the Respondent submits that the provision in the Contract that established a daily late payment penalty of EUR 50 is null and void. Instead, the Respondent states that it is liable "*to pay default interest calculated…from the due date until the day of final payment*". (The Respondent did not specify the rate at which such "*default interest*" should be calculated; instead it merely submitted that the interest rate must be "*appropriate*".)

5. Jurisdiction

54. 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).

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

56. 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.[1]

57. The Arbitrator notes that clause 11 of the Contract provided 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*

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

> *Arbitration Rules by a single arbitrator 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. […]"*

58. Further, the final (unnumbered) paragraph of the Amendment Agreement likewise stated:

> *"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 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.*

59. The Contract and the Amendment Agreement are 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 agreement under Swiss law (referred to by Article 178(2) of the PILA). In particular, the wording "*Any dispute arising from or related to the present contract*" in both the Contract and the Amendment Agreement clearly covers the present dispute.

60. In its Answer, the Respondent expressly accepted that the BAT has jurisdiction with respect to the Claimants' claims.

61. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimants' claims.

6. Discussion

6.1 Applicable Law

62. 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"*

63. 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."*

64. Clause 12 of the Contract provided as follows:

> *"This Agreement shall be governed by the laws of Switzerland."*

65. The Amendment Agreement did not contain any term concerning a national law applicable to that agreement.

66. As noted above, both the Contract and the Amendment Agreement contained an identical express term which provided that any disputes concerning those instruments shall be submitted to a BAT arbitrator, who "*shall decide the dispute ex aequo et*

bono".

67. The First and Second Claimants did not make any submissions regarding the law applicable to their claims.

68. As noted above, the Respondent contended that by virtue of the Serbian "*person[ality]*" of the First Claimant and the Respondent, provisions of the Serbian law of obligations are applicable to the Second Claimant's claim. The Respondent also made submissions on the merits by reference to *ex aequo et bono* standards.

69. The Arbitrator does not accept the Respondent's submission that provisions of Serbian law have any application to the present proceedings. On the contrary, the Arbitrator notes that the Respondent's submission is contradicted by the provisions of the Contract, which states that the Contract shall be governed by the laws of Switzerland, and that any disputes arising in relation to it shall be determined *ex aequo et bono*.

70. The Arbitrator notes that on the face of it there is a potential tension between clause 12 of the Contract (which provides that the Contract shall be governed by the laws of Switzerland) and clause 11 of the Contract (which provides that any dispute concerning the Contract shall be determined by the BAT *ex aequo et bono*). In the circumstances, the Arbitrator considers that clause 11 must be interpreted as a specific derogation from the general principle in clause 12. In other words, although the parties intended that the Contract should be generally governed by Swiss law, they intended that in the event of a contractual dispute requiring independent adjudication, the dispute would be determined via a specifically identified mechanism (*viz.* arbitration before the BAT) applying a specifically identified approach (*viz. ex aequo et bono*).

71. The Arbitrator considers that this analysis is reinforced by the terms of the

Amendment Agreement, which does not contain any provision concerning a national law applicable to the agreement, but which expressly provides that in the event of a dispute arising in connection with the Amendment Agreement the dispute shall be determined *ex aequo et bono* by a BAT arbitrator.

72. In the circumstances, the Arbitrator therefore concludes that in accordance with clause 11 of the Contract and the materially identical provisions of the Amendment Agreement, the dispute shall be decided *ex aequo et bono*.

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

6.2 Findings

6.2.1 Settlement of First Claimant's claim

74. Article 16.6 of the BAT Rules provides:

> *"If the parties reach a settlement after the Arbitrator has been appointed, the settlement shall be recorded in the form of a Consent Award if so requested by the parties and if the Arbitrator agrees to do so."*

75. As noted above, the First Claimant and the Respondent have concluded a written Settlement Agreement in respect of the First Claimant's claim. The two parties have jointly invited the Arbitrator to render a Consent Award reflecting that agreed settlement. The First Claimant's claim therefore falls within the ambit of Article 16.6 of the BAT Rules, subject to the requirement for the Arbitrator to agree to the parties' request.

76. In the circumstances, the Arbitrator is entirely satisfied that it would be appropriate to accede to the parties' request. In particular, the Arbitrator notes that both parties had the opportunity to present their arguments in full to each other and to the Arbitrator

before entering the Settlement Agreement. The Settlement Agreement was therefore premised on a mutual and informed understanding of the parties' respective positions and arguments. No concerns have been raised before the Arbitrator concerning the capacity of either party to enter into the Settlement Agreement. Nor is there anything in the terms of the Settlement Agreement that gives rise to any concern regarding the fairness or appropriateness of the agreed resolution of the First Claimant's claim in respect of Swiss public policy. In all the circumstances, the Arbitrator therefore considers it appropriate to exercise the power conferred under Article 16.6 of the BAT Rules by issuing a Consent Award that reflects the terms of the Settlement Agreement concluded by the First Claimant and the Respondent on 4 April 2018.

77. At the same time, the Arbitrator notes that the terms of the Settlement Agreement envisaged a global settlement of both the First and Second Claimants' claims. The Second Claimant is not a party to the Settlement Agreement and has not agreed to settle its claim against the Respondent. Accordingly, while the Arbitrator has determined that it is appropriate to issue a Consent Award in respect of the claim brought by the First Claimant against the Respondent, the Arbitrator considers that the existence and terms of the Settlement Agreement have no bearing at all on the outcome of the separate claim brought by the Second Claimant against the Respondent. Accordingly, the Consent Award – as incorporated into this award – shall only embody the terms of the Settlement Agreement that relate exclusively to the First Claimant's claim against the Respondent.

6.2.2 Second Claimant's contractual entitlement to unpaid agency fees

78. There is no dispute between the Second Claimant and the Respondent that the Respondent is liable to pay the sum of EUR 18,600 in respect of unpaid agency fees due to the Second Claimant under the Contract (as amended by the Amendment Agreement).

79. The Arbitrator notes in this respect that clause 14 of the Contract expressly stated that the Second Claimant would be entitled to agency fees of EUR 3,000 in respect of the 2012-13 season, EUR 6,600 in respect of the 2013-14 season and EUR 13,200 in respect of the 2014-15 season. The Amendment Agreement subsequently amended the latter figure by substituting the lower amount of EUR 9,000 in respect of the 2014-15 season. Accordingly, the terms of the Contract (as varied by the Amendment Agreement) established a clear obligation on the Respondent to pay a total of EUR 18,600 to the Second Claimant in respect of agency fees for the 2012-13, 2013-14, and 2014-15 playing seasons.

80. The Arbitrator notes that the Respondent does not allege that it paid any of that sum to the Second Claimant pursuant to that obligation and accepts that it is therefore liable to pay that sum to the Second Claimant. Accordingly, the Arbitrator concludes that the Respondent is liable to pay the sum of EUR 18,600 to the Second Claimant in respect of those unpaid agency fees.

6.2.3 Late payment penalties claimed by the Second Claimant

81. In contrast to the position regarding the principal unpaid debt of EUR 18,600, there is a significant dispute between the Second Claimant and the Respondent about the Second Claimant's entitlement to contractual late payment penalties in respect of the late payment of that debt.

82. The Arbitrator notes that the Contract contains 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 21 days late in complying with the payment obligations owed to the Second Claimant. The question is whether, ruling *ex aequo et bono*, the Arbitrator is required to give full effect to that contractual provision by enforcing a daily late payment of EUR 50 against the Respondent.

83. 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."*

84. 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 servanta. 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)."*

85. 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 14 of the Contract should be moderated:

(a) The Second Claimant has not sought to argue (still less adduced any evidence) that it has suffered any damage as a result of the Respondent's failure to pay the agency fees due to the Second Claimant beyond the fact that it has been deprived of a sum of money that it is lawfully entitled to.

(b) The Respondent's breach of contract is severe – in the sense that it represents a longstanding failure to honour contractual debts as they fell due – and has not been adequately explained. There is no evidence on the record to suggest that the Respondent's breach of contract was inadvertent (in the sense of constituting an accidental oversight for which no or little blame should attach to the Respondent). On the contrary, it is apparent that the Respondent's failure to meet its contractual obligations was repeatedly brought to its attention by the Second Claimant between late 2014 and early 2017. Despite those communications, there is no evidence that the Respondent took any meaningful steps to engage with the Second Claimant's reasonable demands for payment of the unpaid fees that were lawfully due to it.

(c) There is no detailed evidence on the record concerning the Respondent's financial position. The Arbitrator notes, however, that the letter from the Second Claimant's President dated 13 February 2017 (see paragraph 13 above) refers to "*your club's difficult financial situation*". This statement echoed earlier correspondence from the same individual dated 28 February 2016 (which referred to "*your difficult financial situation*") and dated 22 December 2014 (which also referred to "*your club's difficult financial situation*"). In addition, the Arbitrator notes that the Respondent's Answer to the RFA refers to the Respondent "*suffering serious financial crisis and problems like many other*

"non-profitable" sport clubs in Serbia". In the circumstances, it is therefore reasonable to infer that the Respondent's failure to honour its contractual debts was caused (or at least substantially contributed to) by ongoing financial difficulties, rather than an insolent disregard for its contractual obligations.

(d) The Second Claimant has persistently requested payment of outstanding agency fees and late payment penalties from the Respondent. Despite those requests, the Respondent has not paid any portion of the outstanding debt to the Second Claimant. The Respondent's failure to meet its contractual payment obligations and its failure to engage with those reasonable requests support the credibility of the Second Claimant's statement that it would not have agreed to enter a contract with the Respondent unless the contract contained an enforceable penalty clause to protect the Second Claimant's interests.

86. In the circumstances of the present case, the Arbitrator considers that the existence of a penalty clause is not per se unreasonable or disproportionate. On the contrary, the evidence establishes that the Second Claimant had good reason to seek the inclusion of such a term in the Contract. At the same time, the Arbitrator considers that the magnitude of the late payment penalties sought by the Second Claimant is severely disproportionate. In particular, the Arbitrator notes that:

(a) The total amount of late payment penalties sought by the Second Claimant (EUR 195,300) is more than ten times the amount of the unpaid principal debt (EUR 18,600) that forms the basis of the claim.

(b) The Second Claimant's claim is calculated on the basis that the Second Claimant is entitled to a separate daily fee of EUR 50 in respect of each of the three unpaid instalments of the agency fees due under the Contract. Thus, the Second Claimant contends that since 6 January 2015 (which is 21 days after the third of those instalments fell due) the Second Claimant has been (and

continues to be) entitled to a total late payment penalty of EUR 150 per day. This equates to an annual late payment penalty of EUR 54,750, which is almost three times the amount of the principal debt.

87. In these circumstances, the Arbitrator considers that the effect of the contractual penalty clause must be moderated in order to avoid a manifestly disproportionate result. At the same time, the Arbitrator considers that the deterrent and punitive purpose of the contractual penalty clause must not be negated, since this would subvert the intention of the parties and would confer an unwarranted windfall on a party that has persistently and unjustifiably failed to honour its contractual obligations over a number of years.

88. Accordingly, applying *ex aequo et bono* standards and having regard to all of the factors set out above, the Arbitrator concludes that the effect of the contractual penalty clause should be moderated so that the Respondent is required to pay a total late payment penalty to the Second Claimant in an amount equal to 100% of the amount of the unpaid principal debt. Accordingly, the Arbitrator concludes that the Respondent is required to pay a late payment penalty of EUR 18,600 to the Second Claimant.

6.2.3 Conclusion

89. For these reasons, in respect of the First Claimant's claim against the Respondent the Arbitrator considers it appropriate to make an order reflecting the terms of the Settlement Agreement reached between those two parties. Accordingly, the Respondent must pay the amount of EUR 145,000 to the First Claimant. This amount shall be paid in five annual equal instalments of EUR 29,000, which shall be payable on or before 15 November each year starting in 2018 and ending in 2022. Should the Respondent fail to make any of those annual payments by the relevant deadline, the Respondent shall immediately be required to pay the entirety of the outstanding

balance to the First Claimant within seven days of the date of the missed payment.

90. In respect of the Second Claimant's claim against the Respondent, the Arbitrator considers it appropriate to order the Respondent to pay the following amounts to the Second Claimant:

(a) EUR 18,600 in respect of unpaid agency fees due to the Second Claimant under the Contract; and

(b) EUR 18,600 in respect of late payment penalties arising from the Respondent's failure to pay the agency fees in accordance with the deadlines specified in the Contract.

6.2.3 Interest

The First Claimant's Claim

91. In the circumstances of the present cases, the Arbitrator considers it appropriate not to make any award of interest in respect of the First Claimant's claim. In particular, the Arbitrator notes that:

(a) The Arbitrator has been jointly requested by the First Claimant and the Respondent to render a Consent Award reflecting the terms of a settlement agreed by those parties. While the RFA sought an award of "*accrued interest from the respective due dates of each outstanding payment*", the Arbitrator considers that this request has been superseded (insofar as it relates to the First Claimant) by the Settlement Agreement. Since the terms of the Settlement Agreement do not make any reference to the awarding of interest, it appears to the Arbitrator that the parties' request for a Consent Award does not extend to making any award of interest. Accordingly, the Arbitrator does not have power

to award interest in favour of the First Claimant when issuing a Consent Award under Article 16.6 of the BAT Rules.

(b) Further and in any event, the terms of the Settlement Agreement that the Arbitrator has been requested to enshrine within a Consent Award establish payment obligations on the Respondent that are entirely prospective in nature. Under the Settlement Agreement, the Respondent is not required to make any payment to the First Claimant until 15 November 2018. Since no obligation to make any payment to the First Claimant has yet accrued, the Arbitrator considers that there is no basis for an award of interest in favour of the First Claimant at this point in time.

The Second Claimant's Claim

92. In addition to the claim for a late payment penalty, the Second Claimant also seeks a further payment of interest at an unspecified rate.

93. As noted above, the Respondent concedes that it should pay an "*appropriate*" rate of interest to the Second Claimant (albeit this concession was made in the context of a submission that the Second Claimant was not entitled to enforce any late payment penalty against the Respondent under the terms of the Contract).

94. Since the Arbitrator has concluded that the Second Claimant is entitled to EUR 18,600 from the Respondent as late payment penalties, the Arbitrator considers that no further award of interest is justified in respect of the period prior to the date of this Award. The Arbitrator considers, however, that the Second Claimant should be entitled to receive interest at the rate of 5% per annum – in compliance with BAT jurisprudence – from the date of this Award. An Award of interest at that rate and from that date will guard against any erosion in the value of the Second Claimant's entitlement to damages arising from any further failure by the Respondent to comply

with its legal obligations towards the Second Claimant.

95. Accordingly, the Arbitrator concludes that in addition to a payment of EUR 37,200 in total, the Respondent shall also pay interest to the Second Claimant at the rate of 5% per annum on that sum from the date of this Award until payment in full by the Respondent of that sum.

7. Costs

96. On 5 September 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 12,000.00.

97. 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*."

Costs in respect of the First Claimant's claim

98. As noted above, the terms of the Settlement Agreement concluded between the First Claimant and the Respondent envisage that both parties should bear the arbitration costs they have paid and shall bear their own legal fees and expenses in respect of the First Claimant's claim against the Respondent. The Arbitrator is satisfied that this represents an appropriate apportionment of costs between those two parties and sees no reason to depart from the mutually agreed position which he has been invited

to enshrine within a Consent Order. Accordingly, the Arbitrator concludes that:

(a) The First Claimant shall bear his own legal costs and expenses and shall not receive any further payment from the Respondent in respect of the First Claimant's contribution to his share of the Advance on Costs.

(b) The Respondent shall bear its own legal costs and expenses insofar as they relate to the claim brought against it by the First Claimant.

Costs in respect of the Second Claimant's claim

99. The Second Claimant submitted an account of costs of EUR 11,845 which included EUR 450 in respect of the Second Claimant's share of the non-reimbursable handling fee; EUR 1,000 in respect of the Second Claimant's share of the Advance on Costs; EUR 6,000 in respect of the Respondent's share of the Advance on Costs (which was paid entirely by the Second Claimant) and EUR 4,395 in respect of legal expenses incurred by the Second Claimant.

100. The Respondent's Statement of Costs stated that the Respondent's total costs are EUR 6,900. This comprises:

- EUR 3,000 in respect of preparing the Answer to the RFA;
- EUR 900 in respect of drafting witness evidence; and
- EUR 2,975 in respect of preparing the written submissions dated 15 January, 3 April and 13 April 2018.

101. The Respondent submits that the BAT should order the Second Claimant to pay the Respondent 75% (EUR 5,125) of the Respondent's total costs. In support of that

position, the Respondent submits that the Second Claimant unreasonably rejected a fair settlement offer and instead insisted on pursuing an unreasonable and unrealistic claim for more than EUR 200,000. This meant that the Respondent was required to incur unnecessary legal costs in defending itself against that meritless claim.

102. The Arbitrator notes that in the present case:

(a) The final paragraph of clause 11 of the Contract provided that, "*In the event Player and/or Agent shall bring a proceeding before BAT as a result of any breach of this Agreement by Club, then Club shall be solely responsible for all of Player's and/or agent's legal fees associated with said BAT proceeding.*" The parties therefore specifically contemplated and agreed that the Respondent would be liable to pay the Second Claimant's legal fees in the event that the Second Claimant successfully brought proceedings before BAT in respect of a breach of the Contract by the Respondent.

(b) The Respondent failed for several years to pay sums that were contractually due to the Second Claimant. The Respondent has not sought to provide any justification or valid explanation for its persistent and longstanding failure to honour its contractual obligations;

(c) As at the date when these proceedings were initiated, there is no evidence that the Respondent had indicated any willingness to pay the full outstanding amount due to the Second Claimant. It was therefore necessary for the Second Claimant to bring these proceedings in order to secure the enforcement of its contractual rights;

(d) Although the Respondent subsequently accepted that it was liable to pay the principal sum of EUR 18,600 to the Second Claimant, it denied throughout these proceedings that the Second Claimant was entitled to any late payment

penalties in respect of that unpaid debt. For the reasons set out above, the Arbitrator has concluded that the Respondent's position in this respect is without merit. The Second Claimant has therefore succeeded in establishing that it is entitled to receive a substantial payment in respect of such penalties from the Respondent;

(e) At the same time, the Arbitrator has also rejected the Second Claimant's claim that it is entitled to EUR 195,600 in respect of late payment penalties. Instead, the Arbitrator has determined that the Second Claimant is entitled to a payment of EUR 18,600, which is less than 10 per cent of the amount claimed by the Second Claimant. The Arbitrator considers that the amount claimed by the Second Claimant was unrealistic and the Respondent's decision to contest its obligation to pay a sum as large as that was reasonable.

103. In all the circumstances, the Arbitrator concludes that the Respondent should bear the costs of the arbitration. Since the Second Claimant paid the entirety of the Respondent's Advance on Costs (EUR 6,000) and paid EUR 1,000 towards the Claimant's share of the Advance on Costs and EUR 450 towards the non-reimbursable handling fee, the Arbitrator concludes that the Respondent should pay the amount of EUR 7,450 to the Second Claimant in response of those arbitration costs.

104. The Arbitrator further concludes that the Second Claimant is entitled in principle to receive a contribution towards its legal fees and expenses from the Respondent. At the same time, the Arbitrator considers that the amount of that contribution must reflect the fact that the Second Claimant has succeeded in part, but not all, of its claim.

105. The Arbitrator also notes that the Second Claimant states that it has incurred total expenses of EUR 4,395 in connection with these proceedings. Having regard to the

relatively straightforward factual and legal issues underlying the Second Claimant's claim, the Arbitrator considers this figure to be mildly excessive.

106. 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 Second Claimant a total amount of EUR 3,500 in respect of the legal fees and expenses the Second Claimant has incurred in pursuing its claim against the Respondent before the BAT.

107. The Respondent shall bear its own legal fees and other expenses.

8. AWARD

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

1. **Basketball Club Partizan Belgrade is ordered to pay to Nikola Milutinov the total sum of EUR 145,000 as unpaid contractual remuneration, to be paid in five equal instalments as follows:**

   a. **EUR 29,000 on or before 15 November 2018;**

   b. **EUR 29,000 on or before 15 November 2019;**

   c. **EUR 29,000 on or before 15 November 2020;**

   d. **EUR 29,000 on or before 15 November 2021; and**

   e. **EUR 29,000 on or before 15 November 2022.**

2. **In the event that Basketball Club Partizan Belgrade fails to pay any of the instalments of EUR 29,000 by the dates specified in paragraph 1(a)-(e) of this Award, Basketball Club Partizan Belgrade shall immediately pay to Nikola Milutinov the full outstanding balance of the EUR 145,000 within seven days of the date of the missed instalment.**

3. **Basketball Club Partizan Belgrade is ordered to pay to Entersport LLC EUR 37,200 as unpaid agency fees and late payment penalties, together with interest on that sum at the rate of 5% p.a. from the date of this Award.**

4. **Basketball Club Partizan Belgrade is ordered to pay to Entersport LLC the amount of EUR 7,450 in respect of its advances on arbitration costs and in**

respect of its share of the non-reimbursable handling fee.

5. **Basketball Club Partizan Belgrade is ordered to pay to Entersport LLC EUR 3,500 as reimbursement of its legal fees and expenses.**

6. **Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 2 October 2018.

Raj Parker
(Arbitrator)