

# ARBITRAL AWARD

(BAT 1496/20)

by the

## BASKETBALL ARBITRAL TRIBUNAL (BAT)

**Mr. Stephan Netzle**

in the arbitration proceedings between

**Mr. Aleksandar Aranitovic**

**- Claimant -**

represented by Messrs. Guillermo López Arana, Javier Resa Ramos  
and Antonio Garcia-Aranda Stai, U1st Sports, Maestro Ripoll 9,  
28006 Madrid, Spain

vs.

**Basketball Club Partizan Belgrade**

Humska 1, 11000 Belgrade, Serbia

**- Respondent -**

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

## **1. The Parties**

### **1.1. The Claimant**

1. The Claimant is Mr. Aleksandar Aranitovic, a professional basketball player from Serbia ("Claimant" or "Player").

### **1.2. The Respondent**

2. The Respondent is the Basketball Club Partizan Belgrade, a basketball club located in Serbia ("Respondent" or "Club"). It is currently competing in the first Adriatic League and in the Basketball League of Serbia.

## **2. The Arbitrator**

3. On 9 February 2020, the Vice-President of the Basketball Arbitral Tribunal ("BAT"), Mr. Raj Parker, appointed Mr. Stephan Netzle as arbitrator ("Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force from 1 December 2019 ("BAT Rules"). None of the parties objected to his appointment or to his declaration of independence.

## **3. Facts and Proceedings**

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

4. On 26 July 2017, the Claimant and the Respondent entered into an employment contract for the 2017/2018, 2018/2019 and 2019/2020 seasons ("Employment Contract"), valid

until 30 June 2020.<sup>1</sup> In addition, the parties concluded an Annex to the Employment Contract ("Annex").<sup>2</sup> According to Article 1 of the Annex, the Claimant is entitled to the following salary payments:

- 2017/2018 season: EUR 30,000.00 to be paid in 10 equal monthly instalments of EUR 3,000.00 each, becoming due on the 15<sup>th</sup> of each month in the period from September 2017 to June 2018;
- 2018/2019 season: EUR 50,000.00 to be paid in 10 equal monthly instalments of EUR 5,000.00 each, becoming due on the 15<sup>th</sup> of each month in the period from September 2018 to June 2019;
- 2019/2020 season: EUR 90,000.00 to be paid in 10 equal monthly instalments of EUR 9,000.00 each, becoming due on the 15<sup>th</sup> of each month in the period from September 2019 to June 2020.

5. The Club did not have a good 2017/2018 season and a bad start into the 2018/2019 season. In November 2018, the Respondent entered into an employment agreement with a new coach, Mr. Andrea Trinchieri. The Claimant and his statistics did not meet the expectations and the new coach removed him from the team roster.<sup>3</sup> Since then, the Claimant has not played any games for the Respondent.<sup>4</sup>
6. Shortly thereafter, the Serbian club BC Borac from Čačak, currently competing in the second Adriatic League and the Basketball League of Serbia<sup>5</sup>, offered the Respondent to engage the Claimant for the same salary as stipulated in the Employment Contract as

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<sup>1</sup> Exhibit 2 of the Request for Arbitration.

<sup>2</sup> Exhibit 2 of the Request for Arbitration.

<sup>3</sup> Witness Statement of Nikola Lončar, Exhibit R1 of the Answer; Witness Statement of Andrea Trinchieri, Exhibit R10 of the Respondent's submission dated 22 April 2020.

<sup>4</sup> Witness Statement of the Claimant, Exhibit 2 of the Claimant's submission dated 7 April 2020.

<sup>5</sup> Exhibit R4 of the Answer.

a loaned player. In mid-January, the Player rejected this offer because he did not want to play for a lower-level club.<sup>6</sup>

7. After it was publicly announced that the Player had rejected the offer from BC Borac, the Respondent received another loan offer from Serbian club BC Mladost from Belgrade, currently competing in the Basketball League of Serbia.<sup>7</sup> After agreeing in principle with the Respondent on the conditions (in particular, that the Player would receive the same salary), the president of BC Mladost personally called the Player but the latter declined further discussions because he was not interested to move to BC Mladost.<sup>8</sup>
8. Shortly afterwards, BC Vršac, currently competing in the Basketball League of Serbia,<sup>9</sup> showed interest in loaning the Claimant with the same salary as stipulated in his Employment Contract. The Claimant declined this loan offer.<sup>10</sup>
9. After these rejections by the Player, the Club decided not to pay the last two salary instalments for the 2018/2019 season based on the Annex (i.e. the instalments due on 15 May 2019 and 15 June 2019 in the amount of EUR 5,000.00 each) as well as the first two instalments for the 2019/2020 season (i.e. the instalments due on 15 September 2019 and 15 October 2019 in the amount of EUR 9,000.00 each).
10. By e-mail dated 21 October 2019, the Player's counsel requested the payment of the outstanding salaries in the total amount of EUR 28,000.00 within the next ten days.<sup>11</sup>

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<sup>6</sup> Witness Statement of the Claimant, Exhibit 2 of the Claimant's submission dated 7 April 2020; Exhibits R2 and R3 of the Answer.

<sup>7</sup> Exhibit R5 of the Answer.

<sup>8</sup> Witness Statement of Nenad Pujaz, Exhibit R8 of the Respondent's submission dated 22 April 2020.

<sup>9</sup> Exhibit R 6 of the Answer.

<sup>10</sup> Witness Statement of Aleksandar Grujin, Exhibit R9 of the Respondent's submission dated 22 April 2020.

<sup>11</sup> Exhibit 3 of the Request for Arbitration.

11. On 15 November 2019, the Player's counsel sent another e-mail to the Club and terminated the Employment Contract based on Article 2 of the Annex, which reads as follows:

*"Should the Club be in default of any financial obligation assumed hereunder for more than 60 days, the Player shall be entitled to terminate this Contract unilaterally, by a written notice to the Club.*

*In that case, the Contract shall be deemed terminated as of the date of receipt of the termination notice by the Club, or the date of submission of a contract termination request to the Arbitral Tribunal of the Serbian Basketball Federation, and the Player shall be free to immediately transfer to any other club without any liability for damages or repayment of the money received, or any other obligation towards the Club.*

*The Club shall not be entitled to claim any damages.*

*The Club shall pay to the Player all amounts set forth in Article 1 hereof, for a game season in which the Contract was terminated."*

12. On 14 January 2020, the Claimant signed a new employment agreement with the French club ADA Blois Basket for the period between 15 January 2020 to 15 March 2020. According to Article 8 of that contract, the Player was entitled to a monthly net salary in the amount of approx. EUR 3,000.00.<sup>12</sup>
13. The Player is requesting from the Club the full salary for the 2019/2020 season (i.e. EUR 90,000.00) as well as the last two salary instalments for the 2018/2019 season (i.e. EUR 10,000.00), i.e. in total EUR 100,000.00.

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

14. On 3 February 2020, the Claimant filed a Request for Arbitration against the Respondent.

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<sup>12</sup> Exhibit 1 of the Claimant's submission dated 7 April 2020.

15. By letter dated 12 February 2020, the BAT Secretariat (a) notified the parties of the Arbitrator's appointment; (b) invited the Respondent on behalf of the Arbitrator to file an Answer to the Request for Arbitration in accordance with Article 11.4 of the BAT Rules by no later than 4 March 2020; and (c) fixed the amount of the Advance on Costs to be paid by the parties by 21 February 2020 as follows:
  - Claimant: EUR 4,500.00;
  - Respondent: EUR 4,500.00.
16. On 6 March 2020, the BAT Secretariat acknowledged receipt of the Respondent's Answer filed on 3 March 2020.
17. By letter dated 10 March 2020, the BAT Secretariat acknowledged that the Claimant had paid his share of the Advance on Costs on 20 February 2020. Since the Respondent had failed to pay its share of the Advance on Costs, the Claimant was invited to pay the other share of the Advance on Costs by no later than 20 March 2020 to ensure that the arbitration proceeds.
18. By letter dated 25 March 2020, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs (i.e. EUR 9,000.00) paid by the Player. In the same letter, the Claimant was invited to comment on the Respondent's Answer and to answer several questions of the Arbitrator by 8 April 2020.
19. On 7 April 2020, the Claimant answered the Arbitrator's questions.
20. By e-mail dated 8 April 2020, the BAT Secretariat acknowledged receipt of the Claimant's submission and, on behalf of the Arbitrator, invited the Respondent to comment on the Claimant's reply by no later than 23 April 2020.
21. On 22 April 2020, the Respondent submitted its comments to the Claimant's reply.
22. By letter dated 27 April 2020, the BAT Secretariat acknowledged receipt of the Respondent's comments on the Claimant's answers to the Arbitrator's questions. Furthermore,

the BAT Secretariat informed the parties that the Arbitrator had declared the exchange of submissions complete and that the final award would be rendered as soon as possible. Finally, the BAT Secretariat granted the parties a deadline until 4 May 2020 to provide a detailed account of their costs.

23. On 27 April 2020, both parties submitted their cost statements for legal services and disbursements.

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

##### **4.1. Claimant's Position**

24. The Claimant claims that he is entitled to outstanding salary payments in the total amount of EUR 100,000.00 net.
25. While the Club paid the Claimant's salary for the full 2017/2018 season, the last two salary instalments for the 2018/2019 season in the amount of EUR 5,000.00 each remained unpaid.
26. Since the Club promised the Player to pay the outstanding amounts and as a sign of goodwill towards the Club, the Player decided to continue to comply with his contractual obligations during the 2019/2020 season and not to exercise his early termination right based on Article 2 of the Annex.
27. Due to the fact that the Club neither paid the two outstanding instalments for the 2018/2019 season nor the first two salary instalments for the 2019/2020 season (in the amount of EUR 9,000.00 each), the Player's counsel granted the Club, on 21 October 2019, an additional time period of 10 days to resolve the issue. As the Club still refused to pay the outstanding salary instalments, the Claimant was entitled to exercise his early termination right on 15 November 2019.

28. According to Article 2 of the Annex, in case of an early termination, the Player is not only entitled to the outstanding salary payments but also to the full salary for the season in which the Employment Contract was terminated. Since the Player terminated the Employment Contract on 15 November 2019, he is entitled to the full salary for the 2019/2020 season (i.e. EUR 90,000.00) as well as the two outstanding salary instalments for the 2018/2019 season (i.e. EUR 10,000.00). Based on Article 5 of the Annex, all amounts mentioned in the Employment Contract are net amounts.
29. The Claimant emphasizes that he made various attempts to resolve the matter amicably. However, until today, the Club has not paid the outstanding EUR 100,000.00 to the Claimant.
30. According to the Claimant, this case is about a valid "non-cut guaranteed" agreement, which was violated by the Respondent by failing to make the salary payments established therein while the Claimant always complied with the obligations arising out of the Employment Contract. There is no legal basis in the Employment Contract according to which the Respondent is entitled to cease the salary payments due to bad performance, injuries or the fact that the Claimant rejected loan offers from other clubs. Due to the fact that the Claimant's approval to a loan agreement is a *conditio sine qua non*, the Claimant had the right to reject the loan offers. This conclusion is also in line with the principle of *ex aequo et bono*.
31. The Claimant emphasizes that he received only – however, without even consulting him – one formal loan offer from BC Borac, which interested him neither personally nor from a sporting point of view. He did not receive a formal offer from BC Mladost but only an informal phone call. The Claimant did not receive any information regarding the other conditions of the loan such as the salary.
32. The Claimant is only requesting the outstanding salary payments with interest, but neither penalties nor other damages resulting from the Respondent's breach. Because the Respondent did not pay all salaries, the Claimant was forced to make the difficult step to terminate the Employment Contract with his home club and to sign a new contract with



ADA Blois Basket with a substantially lower monthly salary. Furthermore, although the Respondent was obliged to provide the Claimant with training, the Claimant had train by himself at the beginning of the 2019/2020 season.

33. The Claimant is convinced that he lost his confidence and started to perform badly after the Respondent's sport director, Mr. Nikola Lončar, arrived, because the latter embarrassed him in front of the whole team. The Claimant himself comments on the witness statement of Mr. Nikola Lončar as follows:<sup>13</sup>

*"I am shocked with Mr. Loncar's pack of lies. Nothing he said is true. He constantly repeats in his statement how much he wanted to help me but he did the opposite, to my detriment, which is more than obvious. He is the last person to talk about moral values. Everyone know who Aleksandar Aranjitovic is and who Mr. Loncar is. This is a man who should not be trusted. Everybody knows that."*

#### **4.2. Claimant's Request for Relief**

34. In his Request for Arbitration dated 3 February 2020, the Player requests the following relief:

*"a) To award the Claimant with the amount of **ONE HUNDRED THOUSAND EUROS NET (100,000 € net)**, in unpaid salaries, plus interest at the applicable Swiss statutory rate, starting from the date of May 15<sup>th</sup>, 2019.*

*b) To award the Claimant with the full covered the costs of this arbitration."*

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<sup>13</sup> Witness Statement of the Claimant, Exhibit 2 of the Claimant's submission dated 7 April 2020.

### 4.3. Respondent's Position

35. On 1 November 2018, after an unsuccessful 2017/2018 season and a bad start into the 2018/2019 season, the Club signed an employment contract with the new coach Mr. Andrea Trinchieri. Although the new coach acknowledged the Claimant's talent, he decided not to give the Player a place in the team roster.<sup>14</sup>
36. After discussing the Claimant's lack of form internally, the Club's sport director, Mr. Nikola Lončar, informed the Claimant that his performance had not been good enough to be a part of the first team. Mr. Lončar emphasized during this conversation that he had faith in the Claimant's talent but that he obviously needed more time to get into shape after a long injury break. Furthermore, the sport director proposed to find an arrangement that would allow the Claimant to develop further to become again a player of the Respondent's first team. Mr. Lončar emphasized that a loan would only be a transitional solution and that the Claimant would receive the chance to get back to the Respondent in case he would show good results. Already during this conversation, the sport director informed the Player that his salary would remain unchanged during a loan.
37. Shortly thereafter, the Club received an offer for a loan agreement from Borac BC. This Serbian basketball club plays in Čačak, a town 140 km southwest of Belgrade. It is clearly one of the strongest clubs from Serbia. According to a witness statement of the vice-president of Borac BC, Mr. Mirko Petrović, Borac BC wanted to hire the Player at least until the end of the 2018/2019 season (with the option to prolong for the 2019/2020 season) and to pay the Claimant the same salary as stipulated in the Employment Contract.<sup>15</sup> Borac BC planned that the Player would have a key role in the team and was willing to pay the Claimant the highest salary of the whole team. This offer was a good opportunity for the Claimant to make developments and to collect game practice with less pressure. The Club emphasized towards the Claimant that it is not uncommon that loaned player

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<sup>14</sup> Witness Statement of Andrea Trinchieri, Exhibit R10 of the Respondent's submission dated 22 April 2020.

<sup>15</sup> Witness Statement of Mirko Petrović, Exhibit R7 of the Respondent's submission dated 22 April 2020.

return to the Club's roster after having played in another club. The Club considered that this was the fairest solution possible at that time. However, after having contemplated the offer for many weeks, the Player rejected the loan offer from Borac BC in mid-January 2019 without any clear explanation. The president of Borac BC informed the public about the unwillingness of the Claimant to play for Borac BC. It seemed to be that the Player was of the opinion that the loan to a smaller club would be a step back in his career and he was still hoping that the coach would change his mind.

38. Since the Player was not willing to accept the loan offer from Borac BC, the Respondent continued to make efforts to find a satisfactory solution for both parties. The Belgrade basketball club BC Mladost, with whom the Respondent has been cooperating for a long time and in which several talented players of the Respondent play, offered a loan arrangement regarding the Player. The offer contained the same financial conditions as stipulated in the Employment Contract. The Club's officials hoped that such offer would be more acceptable for the Claimant, even though BC Mladost is a club with far less ambitions than Borac BC, but with still realistic opportunities for the Player to return to the roster of the Respondent. Furthermore, by accepting this offer, the Player would not have had to move away from Belgrade. After agreeing in principle with the Respondent, the president of BC Mladost, Mr. Nenad Pujaz, personally called the Player but the latter categorically declined further discussions because he was not interested to move to BC Mladost.<sup>16</sup>
39. The Claimant continued to participate in the trainings, but did not play any game for the Respondent since November 2018. After the Claimant's rejection of the loan offers, the Respondent's sport director, Mr. Nikola Lončar, informed the Claimant that it was difficult for the Club to continue to pay salaries to a player who was not willing to listen to the advice of the Club's representatives while at the same time there was obviously no chance that he would play for the first team under the present conditions.

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<sup>16</sup> Witness Statement of Nenad Pujaz, Exhibit R8 of the Respondent's submission dated 22 April 2020.

40. Shortly afterwards, another Serbian basketball club, Vršac BC, showed interest in the Claimant. Although informed by Mr. Lončar that the Claimant had already rejected good and fair offers from Borac BC and BC Mladost, Mr. Aleksandar Grujin, a director of Vršac BC, insisted on asking the Player anyway whether he was interested in moving to Vršac. According to a witness statement of Mr. Grujin, also Vršac BC was willing to engage the Claimant as a loan player under the same financial obligations as stipulated under the Employment Contract.<sup>17</sup> Mr. Lončar informed the Player about the offer and the fact that Vršac BC was willing to pay the same salary. However, the Player declined any conversation with Vršac BC saying that he was not interested in the loan offer.
41. Since the Claimant rejected three fair offers from other clubs, the Respondent decided not to pay the last two salary instalments for the 2018/2019 season in the total amount of EUR 10,000.00. The idea behind this course of action was to ask a symbolic release fee of EUR 10,000.00 from the Claimant's potential new club and afterwards terminate the Employment Contract and pay the Claimant the last two instalments. According to the Respondent, the Claimant tacitly accepted this approach by informing the Club's representatives that after the end of the 2018/2019 season, he expected offers from far bigger clubs and that he would surely "relieve" the Club from the salary obligations after the end of the season.
42. The Respondent believed that everything would be resolved during the summer transfer window prior to the 2019/2020 season. During that time, the Club offered the Player the early termination of the Employment Contract and to pay the last two salary instalments for the 2018/2019 season. However, the Player rejected this offer because he did not find a new employment for the 2019/2020 season. The Club's representatives explained to the Player once again that he had to leave and decided not to pay the salary for the months September and October 2019.

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<sup>17</sup> Witness Statement of Aleksandar Grujin, Exhibit R9 of the Respondent's submission dated 22 April 2020.

43. Once the Player finally found another club, i.e. ADA Blois Basket, in November 2019, the Player formally terminate the Employment Contract based on Article 2 of the Annex, in order to secure a salary from the Respondent for the whole 2019/2020 season. According to the Respondent, ADA Blois Basket is a weaker club from a sporting perspective than the three Serbian clubs that had offered to loan the Player.
44. The Respondent considers the Claimant's claim for salaries unfair given that he rejected three different offers to play for other clubs for the same salary and did not play for the Club since November 2018. Furthermore, the Player should not receive two parallel salaries (one from the Respondent and one from ADA Blois Basket) for the same period, in violation of the principle of unjust enrichment and longstanding BAT jurisprudence on the duty to mitigate, which the Player failed to fulfil.
45. The Respondent made significant efforts to find a solution for both parties with no adverse financial effect for the Player, thus acting as a prudent employer that did more than one could have expected from a professional basketball club.
46. The Club acknowledges the principle of *pacta sunt servanda* and that it cannot escape its payment obligations because the Player's performance did not meet the Club's expectations. However, a mutual relationship requires also justice and fairness. By rejecting all loan offers, the Claimant failed to act according to these principles. He did not accept any reasonable proposal by the Club, failed to mitigate the Respondent's loss and must, therefore, bear the consequences. Furthermore, instead of objectively reflecting his current sporting situation, the Claimant improperly attacks the Club's sport director, Mr. Lončar.
47. The Respondent emphasizes that under the FIBA Regulations, no club is allowed to contact directly any player who has a valid contract with another club. This is the reason why all three clubs that had an interest to conclude a loan agreement regarding the Player first contacted the Respondent and not the Claimant himself.
48. Finally, the Club re-iterates that there is no legal basis that justifies the Claimant's request for interest on the entire amount of EUR 100,000.00 as of 15 May 2019.

#### 4.4. Respondent's Request for Relief

49. In its Answer, the Club submitted the following prayers for relief:

*"[...] the Respondent requests entire Request for Relief **to be dismissed**.*

*The Respondent also requests that the Claimant pays legal fees to the Respondent, in the amount that would be stated in the request that will be timely delivered in the Cost Submission."*

#### 5. Jurisdiction of the BAT

50. 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).

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

52. 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>18</sup>.

53. As to the existence of a valid arbitration clause, the Arbitrator notes that the Employment Contract contains to different dispute resolution clauses.

54. Article 13 of the Employment Contract provides the following:

*"Any dispute arising herefrom or in connection herewith shall be settled amicably an in the spirit of sports best practices.*

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<sup>18</sup> Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

*In the event of any status dispute hereunder, the Parties agree to the jurisdiction of authorities of the Basketball Federation of Serbia (an arbitration clause)."*

55. Article 8 of the Annex reads as follows:

*"Any dispute arising hereunder or in connection herewith shall be referred to the FIBA Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland, and shall be finally resolved under the BAT Rules, by an arbiter, on ex aequo et bono basis."*

56. In principle, this would raise the question as to the relationship of the two clauses, and whether it provides a sufficient basis for the Arbitrator to assume jurisdiction. However, given that the Respondent participated in the arbitration, the Arbitrator does not examine his jurisdiction ex officio, but only if the Respondent contests it by raising a plea of lack of jurisdiction.<sup>19</sup> The Respondent has failed to do. Therefore, the Arbitrator does not need to examine whether Article 13 of the Employment Contract or Article 8 of the Annex takes precedence. Rather, the Respondent's Answer not containing an objection to BAT jurisdiction amounts to an acceptance of jurisdiction by appearance.

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

## **6. Discussion**

### **6.1. Applicable Law – ex aequo et bono**

58. 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

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<sup>19</sup> See BSK-IPRG, Schott/Courvoisier, N 88 to Art. 186 of the PILA.

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".*

59. Under the heading "Applicable Law", 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."*

60. Article 8 of the Annex provides that the Arbitrator shall decide the dispute *ex aequo et bono* and both parties made reference to this legal principle in their written submissions.

61. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in these proceedings.

62. The concept of "équité" (or *ex aequo et bono*) used in Article 187 para. 2 of the Swiss Private International Law Act ("PILA") originates from Article 31 para. 3 of the *Concordat intercantonal sur l'arbitrage*<sup>20</sup> (Concordat)<sup>21</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>20</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>21</sup> P.A. KARRER, Basler Kommentar, No. 289 ad Art. 187 PILA.



*those rules.*"<sup>22</sup>

63. 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"*.
64. In light of the foregoing considerations, the Arbitrator makes the findings below.

## **6.2. Findings**

### **6.2.1 Claims arising out of the Employment Contract and its termination**

65. According to Article 2 of the Annex, the Player is entitled to terminate the Employment Contract early in case the Club is in default with the salary payments for more than 60 days.
66. The due date of the first salary instalment that remained unpaid was 15 May 2019. The Claimant terminated the Employment Contract on 15 November 2019, i.e. 184 days later and therefore in compliance with the Employment Contract based on Article 2 of the Annex.
67. According to Article 2 of the Annex, in case of an early termination, the Club shall pay the Player all salaries *"for a game season in which Contract was terminated"*. Since the Claimant terminated the Employment Contract during the 2019/2020 season, the Club is, in principle, obliged to pay the Player the salary for the whole 2019/2020 season, i.e. in total EUR 90,000.00.
68. In principle and based on Article 1 and 2 of the Annex, the Claimant is therefore entitled to the last two salary instalments for the 2018/2019 season in the total amount of EUR 10,000.00 as well as to the whole salary for the entire 2019/2020 season in the

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<sup>22</sup> JdT 1981 III, p. 93 (free translation).

total amount of EUR 90,000.00. According to Article 5 of the Annex, all amounts are net amounts.

69. Since the Employment Contract is a so-called "no cut agreement", the obligations of the Club remain in place even though the Player did not meet the Club's expectations and did not play any game with the Respondent since November 2018. However, the question arises whether a reduction of the salary is justified on the basis of the principle of mitigation.

#### **6.2.2 Mitigation**

70. The Arbitrator will first address the question whether the rejections by the Player of the several loan offers justify a reduction of the compensation claimed (see below under a). Then, the Arbitrator will examine whether the Player is entitled to two salaries from two different clubs for the same period of time (see below under b).

##### *(a) Rejection of the loan offers*

71. The Respondent claims that the Claimant violated his "duty to mitigate the Club's damages" when he refused the loan offers of other clubs which were ready to pay him the same salary. A "duty to mitigate" only exists if the employment contract has already been terminated without the fault of the player, who is then entitled to compensation for the remaining term of the contract. In such scenario, the Arbitrator would need take into account what the player has earned or could have earned elsewhere in the remaining contract period.
72. In the present case, however, the three loan offers were made during the term of the employment contract and not after its termination. Therefore, the Player having rejected these offers does not affect his claim to those salaries that accrued prior to termination of the Employment Contract. Accordingly, the Player is entitled in full to the last two instalments for the 2018/2019 season (in the amount of EUR 5,000 each) and the first two instalments for the 2019/2020 season (in the amount of EUR 9,000 each), both of which accrued prior to termination and have remained unpaid.

73. That said, the Arbitrator finds that the rejected loan offers cannot be disregarded altogether in the present case: The three offers were made shortly before the employment contract was terminated and give a useful indication of the market value of the player and what he could have earned back then. This, in turn, is relevant when applying the principle of mitigation to the compensation due to the player for the remainder of the 2019/2020 season after the Employment Contract was terminated. This period covers another eight salary instalments under the Employment Contract of EUR 9,000 each, i.e. an amount of EUR 72,000 in total.
74. The Claimant argues that he received only one formal offer from Borac BC and that he was not even consulted by the Respondent about such offer. Furthermore, he alleges that he was not aware that the offering clubs would pay the same salary as the Respondent.
75. Considering the credible witness statements of representatives of the offering clubs, i.e. Mr. Mirko Petrović from Borac BC<sup>23</sup>, Mr. Nenad Pujaz from BC Mladost<sup>24</sup> and Mr. Aleksandar Grujin from Vršac BC<sup>25</sup>, the Arbitrator finds that all three clubs were willing to engage the Claimant as a loaned player for the same financial conditions as stipulated in the Employment Contract and that the Claimant must have been fully aware of that.
76. Not only the Respondent's sport director, Mr. Nikola Lončar, testified in his witness statement<sup>26</sup> that he had informed the Player about the fact that the conditions of the loan would be the same as determined in the Employment Contract, but also Mr. Mirko Petrović from Borac BC<sup>27</sup>:

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<sup>23</sup> Witness Statement of Mirko Petrović, Exhibit R7 of the Respondent's submission dated 22 April 2020.

<sup>24</sup> Witness Statement of Nenad Pujaz, Exhibit R8 of the Respondent's submission dated 22 April 2020.

<sup>25</sup> Witness Statement of Aleksandar Grujin, Exhibit R9 of the Respondent's submission dated 22 April 2020.

<sup>26</sup> Witness Statement of Nikola Lončar, Exhibit R1 of the Answer.

<sup>27</sup> Witness Statement of Mirko Petrović, Exhibit R7 of the Respondent's submission dated 22 April 2020.

*"In principle, before our call Partizan BC informed Aleksandar Aranitovic about the possibility of transfer. Communication went smoothly. The Player's Agent was very kind, and stressed that everything depends on the Player's decision, saying that the offer is really fair. The Player made further inquiry about the conditions for a while, where he was repeatedly confirmed that is offered the same conditions as he has in Partizan BC, although Borac BC is a smaller club, but including possibility to constantly play and progress, and if he chooses to be at loan that he will have opportunity to return to Partizan BC (if BC Partizan accepts that), if it proves to be the way we all expect it at the club."*

77. In addition, the Arbitrator considers the Player's statement that he only received one formal offer as unconvincing. While it is more likely that he has not received a draft contract ready to sign, all three representatives of the offering clubs confirmed in their witness statements that they had huge interest in the Claimant. The reason why they have not provided the Player with a draft contract was probably because the Player rejected the offers at an early stage. The president of the second offering club, i.e. BC Mladost, described the Players behaviour in his witness statement as follows:<sup>28</sup>

*"After agreeing in principle with Partizan BC, I personally called the Player on the phone number given to me by Partizan BC director, Mr. Kijanovic. The Player was not surprised because he was told to expect the call, but practically he immediately categorically declined further talks, pointing out that he was not interested saying that he did not know where the idea came from to move to Mladost BC. In unpleasant communication I emphasized that this is a common way given the relationships between Partizan BC and Mladost BC, and that I personally think it is better for him to play as much as possible and present his real qualities himself to new coach at Partizan BC, especially considering unchanged financial conditions that BC Mladost guarantees for the rest of the season. However, the Player no longer wanted to talk, saying there was nothing to talk about."*

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<sup>28</sup> Witness Statement of Nenad Pujaz, Exhibit R8 of the Respondent's submission dated 22 April 2020.

78. Furthermore, the Arbitrator finds that the offering clubs cannot be accused of having contacted the Respondent first and not the Claimant. As stated by the Respondent and based on the principle of fairness, a club interested in a certain player under contract by another club, shall first get in contact with the club and not the player.
79. For all these reasons, the Arbitrator concludes that the Claimant received three valid offers to play for other clubs for the same salary as stipulated in the Employment Contract. Although the Arbitrator is aware that these clubs do not have the same international standing as the Respondent, the Arbitrator accepts that (a) the Player would have played a key role in all three offering clubs, (b) he could have gained match practice, (c) there would have been the possibility to re-join the Respondent's team with good performances, and (d) this solution would also have been financially advantageous for the Respondent because it did not have to pay a salary for a player he could not use. In sum, these offers give an indication what the Player could have earned at the time when he terminated the employment with the Club.
80. On the other hand, a club should not have a unilateral right to first conclude a multi-year contract with a player and then, after only one season, deport the player to another club if he did not meet the expected standard. A club must still bear the risk that it assumed when signing a long-term contract, namely the risk that the player does not meet the expectations and that the coach no longer counts on the player. Moreover, by stopping to pay the salary instalments in May 2019 to put the Player under pressure, the Club did not act fairly either.
81. Considering the above, as well as the fact that the Player could not be expected to secure alternative employment immediately after termination of the Employment Agreement, the Arbitrator finds that the Player must accept a reduction of his claim for compensation by an amount of EUR 36,000.

(b) *Salary of the new club*

82. According to the employment agreement between the Claimant and ADA Blois Basket, the Claimant received approx. EUR 6'000.00 net for the time period between 15 January 2020 to 15 March 2020.<sup>29</sup>
83. According to the well-established legal principle to mitigate the damages, the Arbitrator has, in principle, to deduct any amounts that the Player earned while playing for ADA Blois Basket.<sup>30</sup>
84. However, Article 2 of the Annex explicitly states that in case of an early termination of the Employment Contract by the Player due to the default of the Club to pay the salary, *"the Player shall be free to immediately transfer to any other club without any liability for damages or repayment of the money received, or any other obligation towards the Club"*.
85. The question arises whether this provision removes the Player's obligation to set off his new salary or whether this provision is merely intended to ensure that the Player does not have to pay anything back to his old club. The Arbitrator follows the second way of interpretation.
86. The Arbitrator doubts that an advance, complete and unconditional exclusion of the duty to mitigate and the right of the Club to request the offset of any amounts earned by the Player under a new contract was the will of the parties. The Arbitrator's interpretation of Article 2 of the Annex is also in line with the legal principle *ex aequo et bono*.
87. For these reasons, the Arbitrator finds that it would be fair to deduct the salary earned by the Player in France. However, this amount is consummated by the reduction of the

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<sup>29</sup> Exhibit 1 of the Claimant's submission dated 7 April 2020.

<sup>30</sup> See e.g. BAT 1314/18; BAT 0487/13; BAT 0556/14; BAT 1005/17; BAT 0902/16; BAT 0975/17.

salary claim set out in para. 81, i.e. the reduction of his salary because of the alternative salary which he earned or could have earned during the very same period of time.

### **6.3. Interest**

88. The Claimant requests in its Request for Arbitration the BAT to order *"interest at the applicable Swiss statutory rate, starting from the date of May 15<sup>th</sup>, 2019"*.
89. Neither the Employment Contract nor the Annex provide a regulation concerning interest.
90. According to standing BAT jurisprudence<sup>31</sup>, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. This is a generally accepted principle, which is embodied in most legal systems. As requested by the Claimant and in correspondence with the standing BAT jurisprudence the default interest rate is of 5% per annum.
91. As to the date from which the interest starts to run, the Arbitrator notices that the Employment Contract foresees the following due dates for the salary instalments: 15 May 2019, 15 June 2019, 15 September 2019 and 15 October 2019. Since with the termination of the Employment Contract on 15 November 2019 all obligations became due, the starting date for the interest for the remaining salary for the 2019/2020 season is on 16 November 2019.

## **7. Conclusion**

92. Based on the foregoing, and after taking into due consideration all the evidence submitted and all arguments made by the parties, the Arbitrator finds that the Respondent is obliged to pay the Claimant the following salary:

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<sup>31</sup> See e.g. BAT 0685/15.

- EUR 5,000.00 net (May 2019 instalment), plus interest of 5% per annum since 16 May 2019;
- EUR 5,000.00 net (June 2019 instalment), plus interest of 5% per annum since 16 June 2019;
- EUR 9,000.00 net (September 2019 instalment), plus interest of 5% per annum since 16 September 2019;
- EUR 9,000.00 net (October 2019 instalment), plus interest of 5% per annum since 16 October 2019;
- EUR 36,000.00 net (November 2019 to June 2020), plus interest of 5% per annum since 16 November 2019.

## 8. Costs

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

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

94. On 29 July 2020, the BAT President determined the arbitration costs in the present matter to be EUR 9,000.00.

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

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

96. As the Claimant was only successful with a part of his claim, and considering the fact that he did not provide the BAT with precise answers to the questions asked whereas the Respondent has contributed significantly to the clarifications of the facts of this case, the Arbitrator finds it as fair and adequate that the Claimant shall bear 50% and the



Respondent 50% of the arbitration costs. Given that the Player paid the entire Advance on Costs in the amount of EUR 9,000.00, the Club shall reimburse EUR 4,500.00 to the Player.

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

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

98. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses.
99. The Claimant requests a contribution to his legal fees in the total amount of EUR 6,500.00. This does not include the non-reimbursable handling fee of EUR 3,000.00.
100. The Respondent requests in its cost submission a contribution to its legal fees in the total amount of EUR 6,000.00.
101. The maximum contribution for an amount in dispute between EUR 30,001.00 and EUR 100,000.00 excluding handling fee according to Article 17.4 of the BAT Rules is EUR 7,500.00. The amount in dispute in this case is EUR 100,000.00.
102. Considering the efforts of counsel and the outcome of the proceedings, the Arbitrator finds it adequate that the Claimant shall pay to the Respondent 50% of the requested contribution, i.e. EUR 3,000.00, and the Respondent shall pay to the Claimant 50% of the requested contribution (including the non-reimbursable handling fee), i.e. EUR 4,750.00. Therefore, already offset, the Respondent shall pay to the Claimant EUR 1,750.00.

## **AWARD**

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

- 1. Basketball Club Partizan Belgrade shall pay Mr. Aleksandar Aranitovic the following amounts:**
  - **EUR 5,000.00 net (May 2019 instalment), plus interest of 5% per annum from 16 May 2019 until payment;**
  - **EUR 5,000.00 net (June 2019 instalment), plus interest of 5% per annum from 16 June 2019 until payment;**
  - **EUR 9,000.00 net (September 2019 instalment), plus interest of 5% per annum from 16 September 2019 until payment;**
  - **EUR 9,000.00 net (October 2019 instalment), plus interest of 5% per annum from 16 October 2019 until payment; and**
  - **EUR 36,000.00 net (November 2019 to June 2020), plus interest of 5% per annum from 16 November 2019 until payment.**
- 2. Basketball Club Partizan Belgrade shall pay Mr. Aleksandar Aranitovic an amount of EUR 4,500.00 as reimbursement for his arbitration costs.**
- 3. Basketball Club Partizan Belgrade shall pay Mr. Aleksandar Aranitovic an amount of EUR 1,750.00 as reimbursement for his legal fees and expenses.**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 3 August 2020

Stephan Netze  
(Arbitrator)