

ARBITRAL AWARD

(BAT 1457/19)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Amani Khalifa

in the arbitration proceedings between

Mr. Kodi Andrew Justice

- First Claimant -

Mr. Eric Fleisher

- Second Claimant -

represented by Mr. Juan de Dios Crespo Pérez and
Mr. Alessandro Mosca, attorneys at law
Avenida Reino de Valencia, 19-4^a, 46005 Valencia, Spain

vs.

Grono Sportowa Spolka Akcyjna
22 Szosa Kisielinska St. 65-247, Zielona Góra, Poland

- Respondent -

represented by Mr. Kosma Zatorski, General Manager

1. The Parties

1.1. The Claimant

1. The Claimants are Mr. Kodi Andrew Justice, an American player (“First Claimant” or the “Player”) and Mr. Eric Fleisher, an agent with FIBA License number 2010022679 (the “Second Claimant” or the “Agent”).

1.2. The Respondent

2. The Respondent is Grono Sportowa Spolka Akcyjna, a basketball club in Poland (the “Respondent” or the “Club” and together with the Claimants the “Parties”).

2. The Arbitrator

3. On 20 November 2019, the President of the Basketball Arbitral Tribunal (“BAT”), Prof. Ulrich Haas appointed Ms. Amani Khalifa as arbitrator (“Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 January 2017 (“BAT Rules”). None of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of impartiality and independence.

3. Facts and Proceedings

3.1. Summary of the Dispute

4. On 27 February 2019, the Claimants and the Respondent entered into an agreement in which the Respondent hired the services of the First Claimant from 27 February 2019 until the end of the 2019-2020 sporting season (“the Agreement”).
5. Article 4 of the Agreement provides that the Club agrees to pay the First Claimant a total

salary of USD 36,000.00 net for the remainder of the 2018-2019 season and USD 140,000.00 net for the 2019-2020 season “*provided that the Agreement is still in force*”.
The breakdown of payments is as follows:

“Article 4. Remuneration

2018-19 season

The Club shall pay towards the Player a total salary of 36 000,00 (thirty six thousand dollars) Net for the 2018-19 basketball season under the conditions set out below:

The Club agrees to pay 2 800,00 USD (two thousand eight hundred dollars) Net as follows:

USD 700,00 *by April 15, 2019*
USD 700,00 *by May 15, 2019*
USD 700,00 *by June 15, 2019*
USD 700,00 *by July 15, 2019*

[...]

The Club agrees to pay to the Player’s Image Company (selected by the Player or his Agent) the following amount for image rights of the Player: 33 200,00 USD (thirty three thousand two hundred dollars) plus 6% tax towards the Image Company, paid after settling invoices, as follows:

USD 8 300,00 + 6% *by March 31, 2019*
USD 8 300,00 + 6% *by April 30, 2019*
USD 8 300,00 + 6% *by May 31, 2019*
USD 8 300,00 + 6% *by June 30, 2019*

[...]

2019-20 season

Provided that the Agreement is still in force during the 2019-20 basketball season, the Club shall pay towards the Player a total salary of 140 000,00 USD (one hundred forty thousand dollars) Net for the 2019-20 basketball season under the conditions set out below:

The Club agrees to pay 7 000,00 USD (seven thousand dollars) Net as follows:

USD 700,00 *by October 15, 2019*
USD 700,00 *by November 15, 2019*
USD 700,00 *by December 15, 2019*
USD 700,00 *by January 15, 2020*
USD 700,00 *by February 15, 2020*
USD 700,00 *by March 15, 2020*

USD 700,00 by April 15, 2020
USD 700,00 by May 15, 2020
USD 700,00 by June 15, 2020
USD 700,00 by July 15, 2020

[...]

The Club agrees to pay to the Player's Image Company (selected by the Player or his Agent) the following amount for image rights of the Player: 133 000,00 USD (one hundred thirty three thousand dollars) plus 6% tax towards the Image Company, paid after settling invoices, as follows:

USD 13 300,00 + 6% by September 30, 2019
USD 13 300,00 + 6% by October 31, 2019
USD 13 300,00 + 6% by November 30, 2019
USD 13 300,00 + 6% by December 31, 2019
USD 13 300,00 + 6% by January 31, 2020
USD 13 300,00 + 6% by February 29, 2020
USD 13 300,00 + 6% by March 31, 2020
USD 13 300,00 + 6% by April 30, 2020
USD 13 300,00 + 6% by May 31, 2020
USD 13 300,00 + 6% by June 30, 2020"

6. Article 11 of the Agreement sets out the consequences of late payments. If payments under Article 4 of the Agreement are late by more than 14 days, interest will be imposed at a rate of 10% *per annum*. If payments are late by more than 30 days, the Player is not required to participate in Club activities and the Player can serve a written notice to the Club. If payment is still not made within the next 7 days, the Player has the right to terminate the Agreement and be paid his full salary for the season in progress. Article 11 of the Agreement provides as follows:

"1. In case any and all payments described in Article 4 are made later than 14 (fourteen) days after the scheduled payment dates noted, the interests will be imposed at the rate 10% per annum. In the event that, despite filing a written payment demand to the Club by the Player or his Agent, any of the scheduled payments are not made by Club within 30 (thirty) days of the scheduled payment dates, Player shall not be required to perform in any practice sessions, games, or any Club activity whatsoever, until all scheduled payments and appropriate interest penalties have been paid.

2. In addition, in case of any scheduled payment is not being made to the Player by the Club within thirty (30) days of the scheduled payment date, Player will have the right to initiate resolution of this Agreement by serving a written notice to Club. In case of the scheduled

payment is not being made within the next seven (7) days after such a written notice is received by Club, Player will have right to terminate this Agreement and to be paid by Club his full salary for the season-in-progress by acceleration and shall have no further obligations to the Club. Upon presentation of Player's notice, Club agrees here-in to grant to Player his release and make him an unrestricted free-agent worldwide. All legal fees and BAT fees payable by Player and/or Agent in the enforcement of this Agreement and collection of monies due Player and/or Agent shall be payable by Club. Club agrees that there shall be no off-set or mitigation of Player's salary and/or bonuses or Agent's fee in the event Club shall breach this Agreement."

7. Article 13.2 of the Agreement sets out the process for unilateral termination:

"2. This Agreement can be terminated prior to its term by the mutual consent of the Parties, or unilaterally by any of the parties in cases stipulated in this Agreement. Unilateral termination of the Agreement shall become effective 7 (seven) days after the written notice of such termination was delivered to the other party, provided that the premises of the Agreement's termination will not be removed during that period."

8. Article 16 of the Agreement sets out the Respondent's obligations towards the Second Claimant as follows:

"1. The Club agrees to pay the agency fee to the Agents in the total amount of 3 600,00 USD (three thousand six hundred dollars) for the 2018-19 basketball season. The payment to the Agents will be made after invoice settling on or before the following day in the following amount: 3 600,00 USD – by April 15, 2019

*2. If the agreement is in full force for the 2019-20 basketball season, the Club agrees to pay a full amount of 14 000,00 USD (fourteen thousand dollars) for the 2019-20 season to the Agents, to be paid after settling invoices on or before the following dates:
October 31, 2019 – 7 000,00 USD
March 31, 2020 – 7 000,00 USD*

[...]

4. In case of any and all payments described in Article 16, paragraph 1 are made later than 14 (fourteen) days after the scheduled payment dates noted, the interests will be imposed at the rate 10% per annum. In the event that, despite filing a written payment demand to the Club by the Agent, any of the scheduled payments are not made by Club within 30 (thirty) days of the scheduled payment dates, the Player shall not be required to perform in any practice sessions, games, or any Club activity whatsoever, until such time as all scheduled payments and appropriate interest penalties have been paid.

5. In addition, if scheduled commission payment is not made by the Club as and when due within the next 7 (seven) days after such a written notice is received by Club, Player shall have the right, at Player's option, to terminate this Agreement."

9. Article 3.4 of the Agreement provides for the Respondent's right to terminate at the end of the 2018-2019 season by giving notice on or before 30 June 2019 and paying a USD 10,000.00 buyout fee as follows:

"4. The Club reserves the right to terminate the Agreement after the conclusion of the 2018-19 basketball season by serving a written notice to the Player's Agent email on or before June 30, 2019, and by transferring a total buyout amount of 10 000,00 USD (ten thousand US dollars) into the bank account provided by the Player's Agent. The Club will perform the transfer within 3 (three) days of being provided with the respective account number, and will confirm the transfer with a respective bank receipt."

10. On 31 March 2019, when the first image payment fell due to the First Claimant, the Respondent failed to pay.
11. On 15 April 2019, when the first salary payment fell due to the First Claimant and the agency fee fell due to the Second Claimant, the Respondent failed to pay.
12. On 26 April 2019, the Second Claimant sent the Respondent an invoice for the outstanding agency fees.
13. On 30 April 2019, when the second image payment fell due to the First Claimant, the Respondent failed to pay.
14. The Respondent failed to pay these and all remaining sums due to the Claimants for the 2018-2019 season by the deadlines or at all.
15. On 9 May 2019, the Second Claimant sent a "Written Notice of in Advance of Termination" (the "Notice"), on behalf of the First Claimant informing the Respondent that the First Claimant would terminate the contract under Article 11.2 of the Agreement if he did not receive the outstanding salary payment that fell due on 15 April 2019 and the image payment that fell due on 31 March 2019 within 7 days as follows:

“According to Article 11.2 of the February 17, 2019 Agreement between Grono Sportowa Spolka Akcyjna and Kodi Andrew Justice this letter shall provide written notice of Kodi Justice’s right to terminate his agreement with your club in the event he doesn’t receive his past due salary and image payments indicated below within 7 days of this notice.”

16. On 29 June 2019, the Club sent an email to the Claimants proposing amendments to the First Claimant’s contract including a reduction in his salary for the 2019-20 season to USD 100,000.00 and a new payment schedule for the outstanding amounts. The email referred expressly to the 30 June 2019 deadline for giving notice to terminate provided for in Article 3.4 of the Agreement and reads in the relevant parts as follows:

“On June 30, 2019, we must decide on Kodi Justice and [...] contracts.

We would like to keep both Players, however, on new financial conditions:

- Kodi Justice - \$ 100,000 for the entire 2019-20 season [...]

Please, confirm that the above payment terms are acceptable to you.

We would appreciate your response by tomorrow noon (CET).”

17. On the same date, the Second Claimant responded by email rejecting the Respondent’s proposal and confirming that the Agreement remained in force. The Second Claimant also drew the Respondent’s attention to the next day’s deadline for a buyout as follows:

“[...] Therefore, in the event you elect to terminate their respective agreements pursuant to paragraph 4 of said agreements you are required to provide written notice to me no later than tomorrow and to transfer a buyout amount of \$10,000 USD into the respective into the respective bank accounts of each player within 3 days of your written notice. [...]”

18. On 30 July 2019, the Second Claimant sent by email a “final demand” for payment of outstanding agent fees in the amount of USD 7,200.00.

19. On 1 August 2019, the First Claimant sent a termination letter (“Termination Letter”) to the Respondent citing Article 11.2 of the Agreement as follows:

“This letter is written confirmation of my termination of our Agreement dated February 27, 2019 pursuant to Articles 11 and 13 of said Agreement. On May 9, 2019 my agent sent you written notice of my right to terminate our agreement in the event I didn’t receive my past due salary

and image payments within 7 days of the notice. Not only did I not receive these payments but I have also never received my June 2019 and July 2019 League payments and April, May and June 2019 Image Payments.

*Accordingly, pursuant to Article 11.2 **“Upon presentation of Player’s notice Club agrees to here-in grant to Player his release and make him an unrestricted free-agent worldwide. All legal fees and BAT fees payable by Player and/or Agent shall be payable by Club. Club agrees there shall be no off-set or mitigation of Player’s salary and/or bonuses or Agent’s fee in the event Club shall breach this Agreement”***

20. On 7 August 2019, the First Claimant signed a contract for the 2019-2020 season with Club La Pallacanestro Trieste for a net salary of USD 100,000.00. Under this contract, the Second Claimant also stood to receive a net agents fee of USD 10,000.00 for the same season.
21. On 8 August 2019, the Respondent replied stating that the Agreement was still valid and requesting an explanation for why the First Claimant signed with a new club.
22. In early August 2019, the Polish Basketball Federation refused to issue a letter of clearance for the First Claimant.
23. On 12 August 2019, the Italian Basketball Federation disputed the refusal by the Polish Basketball Federation to issue the letter of clearance for the First Claimant.
24. On 14 August 2019, the Second Claimant replied on behalf of the Claimants to the Respondent’s communication of 8 August 2019 referring to their prior correspondence and explaining that the termination was made under the Agreement for non-payment.
25. On 29 August 2019, FIBA rendered its decision granting the First Claimant permission to register with the new club on the grounds that he validly terminated the Agreement.
26. The Respondent has not paid the First or Second Claimants any sums in respect of the 2019-2020 season.

3.2. The Proceedings before the BAT

27. On 19 November 2019, the Claimants filed a Request for Arbitration together with several exhibits in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 3,000.00 was received in the BAT bank account on 18 November 2019.
28. By letter dated 28 November 2019, the BAT Secretariat (a) notified the Parties of the Arbitrator's appointment; (b) invited the Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 19 December 2019; and (c) fixed the amount of the Advance on Costs to be paid by the Parties by 9 December 2019 as follows:
- First Claimant: EUR 4,500.00;
 - Second Claimant: EUR 1,000.00; and
 - Respondent: EUR 5,500.00
29. On 9 December 2019, the Claimants submitted a request for an extension of the time limit to pay the Advance on Costs. On 10 December 2019, the Claimants clarified that the request was for an extension of 7 days, due to difficulties co-ordinating the payments.
30. On 11 December 2019, the BAT Secretariat wrote by email to the Claimants granting an extension until 16 December 2019.
31. On 19 December 2019, the Respondent submitted its Answer to the Request for Arbitration together with exhibits.
32. By letter dated 19 December 2019, the BAT Secretariat wrote to the parties (a) acknowledging receipt of the Respondent's Answer; (b) acknowledging receipt of EUR

5,500.00 paid by the Claimants as their share of the Advance on Costs; (c) noting that the Respondent had failed to pay its share of the Advance on Costs; and (d) granting the Claimants until 3 January 2020 to pay the Respondent's share of the Advance on Costs.

33. On 2 January 2020, the Claimants submitted a request for an extension of the time limit to pay the Respondent's share of the Advance on Costs.
34. On 3 January 2020, the BAT Secretariat wrote by email to the Claimants granting an extension until 10 January 2020.
35. On 10 January 2020, the Claimants requested a further extension of the time limit to pay the Respondent's share of costs until 15 January 2020. The Claimants also requested a second round of submissions. On 14 January 2020, the BAT Secretariat wrote by email to the Claimants granting the requested extension.
36. By letter dated 28 January 2020, the BAT Secretariat wrote to the Parties (a) acknowledging receipt of EUR 5,500.00 paid by the Claimants as the Respondent's share of the Advance on Costs; (b) forwarding the Respondent's Answer to the Claimants; (c) inviting the Claimants to comment on the Respondent's Answer by 11 February 2020 (the "Reply"); and (d) inviting the First Claimant to submit details of all sums earned at his next club during the 2019-2020 season.
37. On 11 February 2020, the Claimants submitted their Reply.
38. On 12 February 2020, the BAT Secretariat wrote to the parties (a) acknowledging the Claimant's Reply and (b) inviting the Respondent to submit a rejoinder by no later than 26 February 2020.
39. On 26 February 2020, the Respondent submitted its rejoinder (the "Rejoinder").

40. By letter dated 26 March 2020, the BAT Secretariat wrote to the Parties (a) acknowledging receipt of the Rejoinder; (b) declaring the exchange of documents completed; and (c) inviting the parties to provide detailed cost submissions by 2 April 2020.
41. On 2 April 2020 the Claimants provided cost submissions. The Respondent failed to provide cost submissions.
42. On 12 May 2020, the Claimants submitted further evidence for consideration by the Arbitrator.
43. On 22 May 2020, the Arbitrator denied the Claimants application to submit new evidence on the ground that it was submitted after the closure of the proceedings on 26 March 2020.

4. The Positions of the Parties

4.1. Claimants' Position

44. The First Claimant claims unpaid salaries and image rights payments for both the 2018-2019 season and the 2019-2020 season by acceleration as well as pre-termination interest, post termination interest and costs.
45. The Second Claimant claims unpaid agency fees for both the 2018-2019 season and the 2019-2020 season as well as pre-termination interest, post-termination interest and costs.
46. For the 2018-2019 season, the First Claimant claims USD 38,631.04 in unpaid salary and image rights payments under Article 4 of the Agreement as follows:

First Claimant					
Payment type	Due date	Amount due (USD)	6% tax (USD)	10% interest (USD)	Total amount due (USD)
Image payment	31 March 2019	8,300.00	498.00	260.32	9,058.32
Salary payment	15 April 2019	700.00		17.84	717.84
Image payment	30 April 2019	8,300.00	498.00	188.01	8,986.01
Salary payment	15 May 2019	700.00		12.08	712.08
Image payment	31 May 2019	8,300.00	498.00	113.29	8,911.29
Salary payment	15 June 2019	700.00		6.14	706.14
Image payment	30 June 2019	8,300.00	498.00	40.98	8,838.98
Salary payment	15 July 2019	700.00		0.38	700.38
Total					38,631.04

47. The First Claimant argues that the Respondent failed to pay him these sums in clear breach of the Agreement and contrary to the principle *pacta sunt servanda*. He argues that he fully performed his obligations and that the Respondent conceded liability for these sums in its Answer.
48. The Claimants argue that the Respondent has routinely failed to honour its contractual obligations by reference to prior BAT cases brought against it.
49. The First Claimant relies on Article 11 of the Agreement to establish his entitlement to pre-termination interest at a rate of 10% starting from 14 days after the date the relevant payment fell due until the date of the Termination Letter (1 August 2019) as set out in

the table above. He relies on BAT case law, including case BAT 0418/13, establishing the principle that any penalty for late payment should be construed narrowly to prevent excessive results such that the period should run only until the date of termination.

50. The Second Claimant claims USD 3,691.71 in agent fees and interest under Article 16 of the Agreement for the 2018-2019 season as follows:

Second Claimant					
Payment type	Due date	Amount due (USD)	6% tax	10% interest (USD)	Total amount due (USD)
Agent fees	15 April 2019	3,600.00		91.73	3,691.73

51. The Second Claimant avers that he sent several reminders to the Respondent after issuing his invoice for agency fees but that the Respondent has failed to pay.
52. In respect of pre-termination interest, the Second Claimant relies on Article 16.4 of the Agreement to establish his right to claim interest at a rate of 10% per annum from 30 April 2019 (14 days after the due date of 15 April 2019) until 1 August 2019, the date of the Termination Letter yielding a total claim of USD 91.73. The Second Claimant argues that by claiming interest at the agreed contractual rate of 10% until 1 August 2019, his claim is not excessive and is consistent with BAT case law on late payment penalties.
53. The Claimants also claim sums under the Agreement in respect of the 2019-2020 season. In particular, the First Claimant claims USD 147,980.00 in salary and image rights payments by acceleration under Article 4 of the Agreement and the Second Claimant claims USD 14,000.00 under Article 16 of the Agreement.
54. The Claimants argue that the Agreement entered into force with regard to the 2019-2020 season on 1 July 2019 because the Respondent failed to terminate through the buyout process in Article 3.4 of the Agreement and the last possible date for the Respondent to

do so was 30 June 2019. They cite the Respondent's email of 29 June 2019 in which it referred to the "30 June deadline" for termination as evidence that the Respondent understood the termination provisions and elected not to exercise its rights to a buyout. The Claimants also rely on the Respondent's email of 8 August 2019 in which it argued that the Agreement was still in force as well as its objection to issuing the First Claimant's letter of clearance as further evidence that the Respondent knew the Agreement had entered into force in respect of the 2019-2020 season.

55. The Claimants argue that the Parties' choice of 30 June 2019 as the end date for the 2018-2019 season is consistent with the 2019-2020 Polish League Rules, Article 2 of which provides that the commencement date of the 2019-2020 season will be 1 July 2019. The Claimants further argue that the selection of this date is consistent with other league rules.
56. The Claimants claim that the First Claimant validly terminated the Agreement in accordance with its Article 11.2 and are therefore entitled to payment of all sums due to them by acceleration. They argue that the two preconditions for termination in the Agreement were satisfied and the Termination Letter was therefore valid. The Claimants identify the first condition as non-payment by the Respondent of sums due to the First Claimant within thirty days of the due date and the second as the service on the Respondent of written notice of termination granting the Respondent seven days to pay.
57. As to the first condition, the First Claimant argues that his first image payment fell due on 31 March 2019 and therefore, more than thirty days from the due date had elapsed when the First Claimant sent the Notice on 9 May 2019. As to the second, the First Claimant avers that since payment of this and subsequent sums had not been made when the Termination Letter was sent on 1 August 2019, this condition is also satisfied.
58. The Claimants assert that this entitles both Claimants to the full amounts specified in Articles 4 and 16 of the Agreement for the 2019-2020 season. In particular, the First

Claimant cites Article 11 of the Agreement, which provides that where the Agreement is terminated due to non-payment by the Club *“Player will have the right...to be paid by Club his full salary for the season-in-progress by acceleration”*. In response to the Respondent’s argument that it is not liable for these sums because the Agreement is not ‘fully guaranteed’, the Claimants argue that this is irrelevant to the present case, which involves termination by the Claimants and not by the Respondent (for failure to perform to the requisite standard or otherwise). Moreover, the Claimants aver that Article 11.2 of the Agreement itself provides a guarantee to the First Claimant that, in case of termination for non-payment, the remaining sums owing under the Agreement will become immediately due and payable.

59. The Second Claimant cites Article 16.2 of the Agreement in support of his claim for unpaid agency fees which provides that *“If the agreement is in full force for the 2019-20 basketball season, the Club agrees to pay a full amount of 14,000.00 USD (fourteen thousand dollars) for the 2019-20 season to the Agents”*.
60. The sums claimed by the Claimants for the 2019-2020 season are therefore as follows:

First Claimant			
Payment type	Amount due (USD)	6% tax (USD)	Total amount due (USD)
Image payment	133,000.00	7,980.00	140,980.00
Salary payment	7,000.00		7,000.00
Total			147,980.00
Second Claimant			
Payment type	Amount due (USD)	Interest accrued (USD)	Total amount due (USD)
Agent fees	3,600.00	91.73	\$3,691.73

61. The Claimants state that mitigation principles do not apply to their claims as per Article 11 of the Agreement, which provides that where the Agreement is terminated due to non-payment by the Club, *“there shall be no off-set or mitigation of Player’s salary and/or bonuses or Agent’s fee in the event Club shall breach this Agreement”*.
62. In support of this contention, the Claimants cite BAT case 0421/13 in which the arbitrator upheld the validity of a clause in which the parties agreed that the player was not under an obligation to mitigate his losses in the case of termination and that the Club would receive no offset by way of mitigation.
63. The Claimants argue that, due to the Respondent’s particularly egregious conduct, it would in any event be inequitable to deduct sums from the amounts claimed by way of mitigation. In support of this contention, the Claimants cite the Respondent’s failure to pay any sums at all to either Claimant for the duration of the Agreement. The Claimants also argue that the Respondent wrongfully induced them to sign the Agreement without

a genuine belief in its ability to pay the sums due and that it wrongfully opposed the First Claimant's letter of clearance in retaliation against his lawful termination, which prejudiced his ability to obtain alternative employment.

4.2. Claimants' Request for Relief

64. The Claimants requested the following relief (as amended in their reply date 11 February 2020):

"The Claimants request that the BAT issues a decision as follows:

a. To accept this claim;

b. That the Arbitrator decides as follows:

*i. Grono Sportowa Spolka Akcyjna is ordered to pay Mr. Kodi Andrew Justice **USD 38,631.04** as compensation for 2018-2019 unpaid salary, image payments and relevant penalty, together with interest of 5% p.a. since 1 August 2019 on the amount of USD 36,000.00 until its effective and entire payment;*

*ii. Grono Sportowa Spolka Akcyjna is ordered to pay Mr. Kodi Andrew Justice **USD 147,980.00** as compensation for unpaid 2019-2020 salary and image payments by acceleration, together with interest of 5% p.a. since 1 August 2019 until its effective and entire payment;*

*iii. Grono Sportowa Spolka Akcyjna is ordered to provide Mr. Kodi Andrew Justice with the **tax certificates** related to the salary of the 2018-2019 (being USD 2,800) and 2019-2020 sporting seasons (being USD 7,000).*

*iv. Grono Sportowa Spolka Akcyjna is ordered to pay Mr. Eric Fleisher **USD 3,691.73** as compensation for 2018-2019 unpaid fees and relevant penalty, together with interest of 5% p.a. since 1 August 2019 on the amount of USD 3,600.00 until its effective and entire payment;*

*v. Grono Sportowa Spolka Akcyjna is ordered to pay Mr. Eric Fleisher **USD 14,000.00** as compensation related to the 2019-2020 Agent's fee, together with interest of 5% p.a. since 1 August 2019 until its effective and entire payment;*

c. Further to article 17.3 of the BAT Arbitration Rules that the Respondent bear the entirety of the costs of this arbitration;

d. Further to article 17.4 of the BAT Arbitration Rules that the Respondent pays the legal fees of the Claimant with respect to this procedure in the amount of EUR 15,000.00;

4.3. Respondent's Position

65. In its Answer, the Respondent confirmed that the Claimants' claims have been properly submitted to the BAT.

66. The Respondent has conceded its liability for the sums sought by the Claimants in respect of the 2018-2019 season, including the pre-termination interest. Specifically, it expressly confirmed its obligation to pay:

"1) the amount of 38,631.04 USD to Mr. Kod Justice [sic] (Claimant 1) as his overdue salary for the season 2018-2019

2) the amount of 3.691,73 [sic] Euro to Mr. Eric Fleisher as overdue agents fee for the season 2018/2019 ."

67. The Respondent avers that the Second Claimant was informed of the Respondent's financial difficulties.

68. The Respondent denies its liability to pay the Claimants any sums under the Agreement in respect of the 2019-2020 season on the grounds that the Agreement is not "fully guaranteed".

69. The Respondent avers that the acceleration payment in Article 11.2 of the Agreement should be characterised in one of two ways. First, as a contractual penalty that the Arbitrator should reduce *ex aequo et bono* to prevent excessive results. According to the Respondent, penalty clauses should be characterised as such based on their effect and not necessarily on their name.

70. Alternatively, it could be characterised as a compensation clause that should only be applied if the Claimants can demonstrate actual loss. Since the First Claimant secured alternative employment, on the Respondent's case, they did not suffer any loss.

71. The Respondent submits that, according to the prevailing understanding in European

basketball, the season commences on 15 August each year and consequently, the 2019-2020 season had not yet commenced when the First Claimant sent the Termination Letter.

72. In the alternative, the Respondent claims that even if the Arbitrator were minded to award the Claimant sums in respect of the 2019-2020 season, these sums must be reduced in light of the duty to mitigate since the Claimants did not perform any services for the Respondent during that season and the First Claimant signed a contract with Club La Pallacanestro Trieste shortly after he sent the Termination Letter.
73. The Respondent denies the Claimants' allegation that it does not honour its contractual obligations and asserts that it has not been sanctioned by FIBA for failure to enforce a BAT award.
74. In its Rejoinder, the Respondent concedes the validity of the Termination Letter.

4.4. Respondent's Request for Relief

75. The Respondent requests the following relief:

"Taking into account all arguments pointed out above the Respondent hereby request the Arbitrator:

- To dismiss this part of the claim which relates to the payment of 147 980 USD to the Player*
- To dismiss this part of the claim which relates to the payment of the interest*
- To dismiss this part of the claim which relates to the payment of 14 000 USD for the agents fee for the season 2019/2020*
- To decide that each party covers its own legal costs"*

5. The Jurisdiction of the BAT

76. 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”).

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

78. The Arbitrator finds that the dispute referred to her is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.

79. Article 15 of the Agreement contains the following dispute resolution clause in favour of the BAT:

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

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

81. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity of the arbitration agreement in the present matter under Swiss law (cf. Article 178(2) PILA).

82. Furthermore, Respondent has conceded that the Claimants' claims have been properly

submitted to the BAT.

83. For the above reasons, the Arbitrator finds that she has jurisdiction to decide the claims subject of the present case.

6. Applicable Law

84. 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 authorise the arbitrators to decide “*en équité*” instead of choosing the application of rules of law. Article 187(2) PILA reads as follows:

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

85. Under the heading “Applicable Law”, Article 15.1 of the BAT Rules reads 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.”

86. Article 15 of the Agreement contains the Parties’ express agreement that disputes arising or related to the Agreement shall be decided *ex aequo et bono*.
87. The Arbitrator also notes that all Parties have relied on *ex aequo et bono* principles in their submissions in support of the claims and the defence.
88. For these reasons, the Arbitrator finds that the Claimant’s claims should be decided *ex aequo et bono*.

7. Procedural Issues

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

8. Findings

90. In the findings below, the Arbitrator has not only considered the positions of the Parties as summarised in the present Award, but also their numerous arguments detailed in their written submissions. To the extent that these arguments are not referred to expressly, they are subsumed in the analysis.

8.1. The First Claimant's Claim for the Unpaid Salary, Image Rights payments, Pre-Termination Interest, Post-Termination Interest and a Tax Certificate for the 2018-2019 season

91. In respect of the 2018-2019 season, the First Claimant claims USD 2,800.00 net of taxes in unpaid salary payments; USD 35,192.00 (including 6% tax) in unpaid image rights payments to his image company; an order compelling the Respondent to provide a tax certificate confirming tax paid on his salary of USD 2,800.00; pre-termination interest at a rate of 10% *per annum* until 1 August 2019 and post-termination interest at a rate of 5% *per annum* until the date of full payment.
92. The Respondent concedes the First Claimant's right to the sums claimed for the 2018-2019 season in respect of unpaid salaries, image rights payments and pre-termination interest in the total amount of USD 38,631.04.

8.1.1. The First Claimant's 2018-2019 Unpaid Salary Claim

93. In respect of the First Claimant's unpaid salary claim, the Arbitrator is satisfied that the total sum of USD 2,800.00 net of Polish taxes was due under Article 4 of the Agreement and that it was payable in four, equal instalments of USD 700.00 payable on the 15th day of each month from April to July 2019.
94. The Arbitrator is also satisfied based on all the evidence, including the Respondent's admission, that this sum was not paid to the First Claimant and that, accordingly, the Respondent is liable to pay it.

8.1.2. The First Claimant's Claim for a Tax Certificate for 2018-2019 Unpaid Salary

95. The First Claimant has also requested the Arbitrator to order that the Respondent provide a tax certificate confirming that taxes on his salary of USD 2,800.00 have been paid on his behalf to the authorities.
96. The Agreement specifically provides that these payments are owed to the First Claimant 'net'. Article 4 of the Agreement clarifies that the Respondent is not liable for any taxes on the sums paid to the First Claimant outside Poland as follows:

"The Club is not responsible for paying any taxes off the Player's image rights salary nor bonuses towards the tax authorities respective to the Player's place of residence and/or center of his main life interests."

97. Taking the parties' agreement that the salary payments are due 'net' together with their agreement that the Respondent is not responsible for payment of any taxes outside of Poland, the Arbitrator interprets the term 'net' in Article 4 to mean that salary payments are due to the First Claimant 'net of all Polish taxes'. That being the case, the Arbitrator

considers that the First Claimant is entitled to the tax certificate requested in respect of his 2018-2019 salary of USD 2,800.00.

8.1.3. The First Claimant's Claim for Unpaid Image Rights for 2018-2019

98. In respect of the First Claimant's claim for unpaid image rights payments in the amount of USD 35,192.00 (gross), the Arbitrator notes that the Player's image company has not been identified and the company is not a party to these proceedings. This remuneration structure is relatively commonplace in basketball and the question whether the Claimant has standing to assert a claim for payment to an image company has been addressed previously in case BAT 1280/18 in which the Arbitrator held that:

"...the Player may request payment of both shares of his remuneration from the Club, namely the salary and the compensation for the image rights. The Player Contract which serves as the legal basis for the Player's entire remuneration has been concluded between the Player and the Club only. [Company] was not a party to the Player Contract. It was the Club's contractual obligation to pay a part of the Player's compensation to [Company] which is described in the Player Contract as the "Player's Image Company". However, for the purpose of the payment of the remuneration, the Arbitrator considers [Company] as payment agent of the Player and not as a separate party. Altogether, the Player was the legitimate beneficiary of the entire compensation of EUR [...] for the 2018/2019 season. On the other hand, the Club was the legitimate beneficiary of both the Player's services and his image rights.

106. A creditor may always revoke the power of a payment agent and request direct payment of the due amounts. According to his Request for Arbitration, the Player has decided that not only the "salary part" of his remuneration but also the amount of EUR [...] shall be paid to him directly, instead of using [Company] as an intermediary. This result is further supported by Article 11 of the Player Contract, according to which the Player may file a "written payment demand to the Club", if any of the scheduled payments are not made by the Club. This provision does not distinguish between the payments made to the Player directly or to "his Image Company" [Company]. It is obvious that the parties considered the Club to be liable for the payment of the entire remuneration, whether it was paid directly to the Player or indirectly,

through “his Image Company” [Company]. Hence, when the Club alleged the Player was in breach of his contractual duties, the Club terminated not only the Player Contract but also the IR Agreement with [Company], albeit unjustifiably.

107. On the other hand, the Player’s revocation of [Company]’s function as a payment agent may not result in the Club making a double payment. However, no such argument has been raised in this arbitration.”

99. Like the contract subject of case BAT 1280/18, Article 4 of the Agreement sets out the entire remuneration due to the First Claimant for both the 2018-2019 and 2019-2020 seasons including salary, image rights payments and bonuses and Article 11 of the Agreement provides that if any payments listed in Article 4 are late, the First Claimant has the right to file a written demand for payment to the Respondent.
100. Article 11 does not distinguish between payment to the First Claimant directly on the one hand and payment to the First Claimant indirectly, through his image company, on the other hand. The Arbitrator therefore considers the First Claimant to be entitled to demand direct payment of the sums that would otherwise have been paid for image rights to his company.
101. The Respondent has conceded its liability for the entirety of this claim including the 6% tax. Therefore, the Arbitrator finds the Respondent liable to pay the First Claimant USD 35,192.00 net of Polish taxes in unpaid image rights.

8.1.4. The First Claimant’s Claim for Pre-Termination Interest for 2018-2019

102. As regards the First Claimant’s claim for pre-termination interest at 10% *per annum* on unpaid image rights and salary payments until 1 August 2019, Article 11 of the Agreement provides that in the event any of the payments in Article 4 of the Agreement (including salary and image rights) are overdue for 14 days, interest on these sums will start to run at a rate of 10% *per annum*.

103. In respect of each payment, the First Claimant is claiming interest starting from 14 days after the relevant payment fell due until 1 August 2019, the date of the Termination Letter.

104. The Arbitrator considers that the pre-termination interest claimed is consistent with the express terms of Article 11 of the Agreement and notes that the total sum conceded by the Respondent as being due to the First Claimant in respect of the 2018-2019 season includes these amounts, which total USD 639.04.

8.1.5. The First Claimant's Claim for Post-Termination Interest on Unpaid Salary and Image Rights Payments

105. The First Claimant claims interest at 5% *per annum* from, 1 August 2019, the date of the Termination Letter until the date of full payment.

106. It has been consistently held in previous BAT cases that interest on unpaid sums at a rate of 5% per annum can be imposed starting from the day following the day the relevant payment fell due if the Claimants have pursued their claim diligently. Otherwise, interest at this rate can be imposed from the date of the Request for Arbitration.

107. The First Claimant commenced proceedings less than four months after the Termination Letter to enforce his rights and has therefore pursued his claim diligently.

108. Because he already claims interest at the higher, contractual rate of 10% up to and including 1 August 2019, and since default and contractual interest cannot be recovered for the same period, the Arbitrator finds that the start date for interest to run on the First Claimant's claim is 2 August 2019, the day after the date of Termination.

109. The Arbitrator therefore finds that the Respondent is liable to pay the First Claimant interest at a rate of 5% *per annum* on all unpaid salaries and image rights payments from the 2018-2019 season, i.e. on the total amount of USD 36,000.00, from 2 August 2019

to the date of full payment.

110. For all these reasons, the Arbitrator therefore finds the Respondent to pay the First Claimant USD 38,631.04 plus interest in respect of the 2018-2019 season as follows:

- USD 2,800.00 net of all Polish taxes in unpaid salaries plus interest at a rate of 5% *per annum* from 2 August 2019 until the date of full payment.
- A gross payment of USD 35,192.00 in unpaid image rights payments plus interest at a rate of 5% *per annum* from 2 August 2019 until the date of full payment.
- USD 639.04 net of Polish taxes in pre-termination interest accruing until 1 August 2019.
- The Respondent is liable to provide the First Claimant with a tax certificate confirming payment of all Polish taxes to the relevant authorities in respect of the USD 2,800.00 unpaid salary payment

8.2. The First Claimant's Claim for the Salary, Image Rights payments, a Tax Certificate and Interest for the 2019-2020 season

111. The First Claimant claims USD 147,980.00 by acceleration for the 2019-2020 season salary and image rights payments under the Agreement together with interest at 5% *per annum* from 1 August 2019 until the date of full payment and an order compelling the Respondent to provide a tax certificate for the USD 7,000.00 salary portion of the payment.

8.2.1. The First Claimant's Claims for Salary and Image Rights Payments

112. Article 4 of the Agreement provides that the First Claimant's full salary is

USD 140,000.00 net for the 2019-2020 season comprised of USD 7,000.00 net in salary and USD 133,000.00 plus 6% tax in image rights payments. As explained above, the Arbitrator considers that when read together with the sub-clause excluding the Respondent's liability for taxes that might be due outside of Poland, the term "net" should be interpreted to mean "net of Polish taxes".

113. The First Claimant's claim for these amounts by acceleration is premised on Article 11.2 of the Agreement, which provides that the First Claimant is entitled to his full salary for the season-in-progress by acceleration if the Agreement is terminated due to the Respondent's non-payment as follows:

"[...] in case of any scheduled payment is not being made to the Player by the Club within thirty (30) days of the scheduled payment date, Player will have the right to initiate resolution of this Agreement by serving a written notice to Club. In case of the scheduled payment is not being made within the next seven (7) days after such a written notice is received by Club, Player will have right to terminate this Agreement and to be paid by Club his full salary for the season-in-progress by acceleration and shall have no further obligations to the Club."

114. The First Claimant states that at the point the Agreement was terminated, the 2019-2020 season was in progress, and that if the Respondent had wanted to avoid its payment obligations, it would have had to terminate the Agreement by 30 June 2019 under the buyout process outlined in Article 3.4 of the Agreement which provides:

"The Club reserves a right to terminate the Agreement after the conclusion of the 2018-19 basketball season by serving a written notice to the Player's Agent email on or before June 30, 2019, and by transferring a total buyout amount of 10 000,00 USD (ten thousand US dollars) into the bank account provided by the Player's Agent. The Club will perform the transfer within 3 (three) days of being provided with the respective account number, and will confirm the transfer with a respective bank receipt."

115. The Respondent maintains that when the First Claimant terminated the Agreement on 1 August 2019, the 2019-2020 season was not yet in force and that it actually commenced on 15 August 2019 in accordance with the prevailing convention in European basketball. As described more particularly above, the Respondent denies its liability for this payment on the grounds that this is a penalty clause and should be reduced for being excessive

and, in the alternative, that it provides for compensation which is not due because the First Claimant has suffered no loss.

116. The Respondent concedes, in its Rejoinder, that the conditions for termination were satisfied and that the Termination Letter itself was valid and effective.
117. As explained above, the Arbitrator considers that the First Claimant satisfied the stipulated conditions precedent to termination as provided for in the Agreement.
118. On the question as to whether or not the 2019-2020 season had started on 1 August 2019 when the Claimant terminated the Agreement, the Arbitrator disagrees with the Respondent's view that it had not yet commenced. The Parties clearly and expressly provided, in Article 3.4 of the Agreement that the cut-off date for the unilateral termination and buyout of the First Claimant's agreement was 30 June 2019. The benefit of the bargain struck by the First Claimant is that, in the event that the Respondent did not wish to continue his employment for the second season, he would have the benefit of sufficient time to secure another contract and he would receive USD 10,000.00 in buyout fees.
119. The Respondent was aware of these conditions as evidenced by its own email of 29 June 2019 as well as the Second Claimant's response.
120. In the circumstances, it would be unjust to deprive the First Claimant of the benefit of the bargain struck without a valid reason. Moreover, the Respondent continued to oppose the First Claimant's application for a letter of clearance after the Termination Letter and it was not until 28 August 2019 that FIBA decided that it should be granted. Having maintained that the Agreement was still in force throughout that period, it would be inequitable to allow the Respondent now to claim, to the First Claimant's detriment, that it was not.
121. The Arbitrator disagrees with the Respondent's characterisation of Article 11 of the

Agreement as a penalty clause. Typically, upon termination for non-payment, in the absence of a specific clause providing for acceleration of outstanding payments, a player might be entitled to damages in the amount of the remaining salaries due for the season subject to the duty to mitigate. Although payment by way of acceleration provides a benefit to the player because these sums become immediately due and payable, the Arbitrator does not consider it so onerous on the club that it is properly characterised as a penalty clause. At the time that the Parties entered into the Agreement, they may not have specifically considered that there would be termination for non-payment so early in the “season in progress”. However, this does not make the clause inherently unusual, unfair or punitive in nature even if the precise circumstances of the case could result in a windfall for the First Claimant.

122. The Arbitrator also rejects the Respondent’s characterisation of Article 11 of the Agreement as a clause providing for compensation that requires the First Claimant to prove its losses. This interpretation of Article 11 of the Agreement is inconsistent with its clear wording, which does not include any requirement for the First Claimant to demonstrate or show actual loss.
123. The Arbitrator therefore considers that, at the time the First Claimant sent the Termination Letter, the “season-in-progress” within the meaning of Article 11 of the Agreement was the 2019-2020 season and, considering that the termination was valid, he is *prima facie* entitled to payment under Article 11 of the Agreement by way of acceleration of his ‘full salary’ for the 2019-2020 season comprised of USD 7,000.00 net of all Polish taxes and USD 133,000.00 plus taxes of 6%.
124. The Respondent argues that, in the alternative, even if this sum is payable under Article 11.2 of the Agreement, it should be reduced by the Arbitrator *ex aequo et bono* and in accordance with the First Claimant’s duty to mitigate his losses that is well-established in BAT case-law.

125. In response, the Claimants claim that by express agreement between the Parties in Article 11 of the Agreement, the First Claimant has no duty to mitigate his losses. Article 11 of the Agreement provides in this regard that:

“Club agrees that there shall be no off-set or mitigation of Player’s salary and/or bonuses or Agent’s fee in the event Club shall breach the Agreement.”

126. In BAT 0421/13, the Arbitrator upheld a clause providing that *“PLAYER is under no obligation to mitigate his damages and CLUB shall receive no offset”* on the grounds that the clause was clear and specific. In that case, the Arbitrator rejected the Respondent’s argument that the Claimant would be unjustly enriched by the payment reasoning that this finding would be irreconcilable with the clear language of the contract. The Claimants cite this case in support of their position.

127. In BAT 0535/14, however, the Arbitrator took a different view and held that except where there was strong evidence that the parties discussed, understood and accepted all the consequences of such a far-reaching conclusion, the fairness of the clause may be evaluated *ex aequo et bono* in light of all the circumstances of a particular case. The Arbitrator proceeded to apply a discount to the sum claimed to take account of sums earned under a subsequent contract.

128. In BAT 0615/14, the arbitrator followed the principle that “no duty to mitigate” clauses can be evaluated in light of all the circumstances of a particular case but held that the principles of justice and fairness did not warrant overriding the clause in that case.

129. In BAT 0634/14, the arbitrator held that a similar clause should be upheld subject to a proportionality review in a case where the application of the provision would lead to a *‘manifestly unfair and unjust result under the specific circumstances.’*

130. Taking all the principles articulated above into consideration, the Arbitrator finds that the Parties’ exclusion of the First Claimant’s duty to mitigate his losses can be reviewed in

light of all the circumstances in order to prevent a manifestly unfair and unjust result.

131. In the present case, the non-payment that led to termination of the Agreement pertained to the season prior to the season for which compensation by way of acceleration is being sought. Therefore, although the First Claimant may be technically correct that, when he served the Termination Letter, the “season in progress” was the 2019-2020 season, the First Claimant had not yet started to perform his obligations in respect of that season. The First Claimant is therefore in a position in which he stands to gain the full salary that would have become due to him in respect of the entire season despite having concluded a contract with another club for this period. Therefore, although Article 11 of the Agreement does not define specifically what was meant by the Parties as the “season in progress”, the Arbitrator is of the view that the parties did not specifically intend the First Claimant to get the windfall payment he now stands to receive as a result of the application of this clause in these particular circumstances. In the ordinary course of events, the more likely scenario would be termination by the First Claimant for non-payment midway through either season and not termination before the commencement of the second season specifically. In that case, the First Claimant would have been entitled to damages equal to the remuneration for the remainder of the contract subject to the duty to mitigate losses, which would entail a reduction to reflect alternative income.
132. The Arbitrator considers that it would therefore be manifestly unjust, and irreconcilable with the principle that unjust enrichment needs to be avoided, for the First Claimant to receive the entirety of the sum claimed.
133. It therefore falls to the Arbitrator to determine what proportion of the acceleration payment the First Claimant should receive in light of all the circumstances. In BAT 0615/14, the arbitrator considered the conduct of the parties when considering the validity of the “no obligation to mitigate” clause in order to arrive at a just and fair result.
134. In the present case, the Claimants have argued that the Respondent’s conduct was

particularly egregious and unfair. They allege that the Respondent's failure to pay any sums whatsoever for the 2018-2019 season was abusive and that its opposition to issuing the letter of clearance having done so was inexcusable.

135. The Arbitrator agrees that the Respondent conducted itself unfairly towards the First Claimant. It failed to pay any part of the remuneration promised to him for a significant period. It then proceeded to negotiate the terms of the First Claimant's extension at the end of the season without demonstrating any intention to comply with the terms already agreed. Having failed in its attempt to secure the First Claimant's services for the next season, it then opposed his letter of clearance contrary to the Agreement and thereby jeopardised the First Claimant's chances of securing alternative employment. The First Claimant was then forced to retain counsel and incur costs just to perform the replacement contract he had signed.
136. In all the circumstances, considering the Parties' conduct and the terms of the Parties agreement, the Arbitrator considers that it would be fair to offset 40% of the amount that the First Claimant stood to gain under his contract with Pallacanestro Trieste which is USD 40,000.00.
137. The Arbitrator therefore finds the Respondent liable to pay the First Claimant USD 7,000.00 in salary net of all Polish taxes and USD 93,000.00 in image rights for the 2019-2020 season by acceleration plus 6% taxes yielding a total sum of USD 105,580.00

8.2.2. First Claimant's Claim for a Tax Certificate

138. The First Claimant has also requested the Arbitrator to order that the Respondent provide a tax certificate confirming that taxes on his accelerated salary of USD 7,000.00 have been paid on his behalf to the authorities.
139. As noted above, the Agreement specifically provides that these payments are owed to

the First Claimant ‘net’ and, considering Article 4 of the Agreement, the Arbitrator interprets the term “net” in Article 4 of the Agreement to mean that salary payments are due to the First Claimant “net of all Polish taxes”.

140. That being the case, the Arbitrator considers that the First Claimant is entitled to the tax certificate requested in respect of the 2019-2020 accelerated salary of USD 7,000.00.

8.2.3. The First Claimant’s claim for Interest

141. The First Claimant claims interest at 5% *per annum* from 1 August 2019, the date of the Termination Letter, until the date of full payment.

142. As described above, the First Claimant has pursued his claim diligently and, according to BAT case law, contractual and default interest cannot both be claimed for the same period.

143. Therefore, the Arbitrator finds the Respondent to pay the First Claimant USD 105,580.00 in respect of the 2019-2020 season net of all Polish taxes plus interest at a rate of 5% *per annum* from 2 August 2019 until the date of full payment.

144. The Respondent is liable to provide the First Claimant with a tax certificate confirming payment of all Polish taxes to the relevant authorities in respect of the USD 7,000.00 accelerated salary payment.

8.3. The Second Claimant’s Claim for the Unpaid Agent Fees, Pre-Termination Interest for the 2018-2019 season and Post-Termination Interest

145. The Second Claimant claims USD 3,600.00 in unpaid agency fees under Article 16 of the Agreement which provides:

“The Club agrees to pay the agency fee to the Agents in the total amount of 3 600,00 USD (three thousand six hundred dollars) for the 2018-19 basketball season. The payment to the Agents will be made after invoice settling on or before the following day in the following amount:

3 600,00 USD – by April 15, 2019.”

146. The Respondent concedes its liability for this amount which fell due and was invoiced before termination of the Agreement and remains unpaid.
147. The Second Claimant claims USD 91.73 in pre-termination interest at 10% *per annum* pursuant to Article 16 of the Agreement which provides in the relevant part that:

In case of any and all payments described in Article 16, paragraph 1 are made later than 14 (fourteen) days after the scheduled payment dates noted, the interests will be imposed at the rate 10% per annum. In the event that, despite filing a written payment demand to the Club by the Agent, any of the scheduled payments are not made by Club within 30 (thirty) days of the scheduled payment dates, the player shall not be required to perform in any practice sessions, games, or any Club activity whatsoever, until such time as all scheduled payments and appropriate interest penalties have been paid.

148. The Respondent also concedes its liability for this sum.¹
149. The Second Claimant also claims interest on this sum at 5% *per annum* from, 1 August 2019, the date of the Termination Letter until the date of full payment.
150. As described above, it is well-established in BAT case law that default interest is claimable at a rate of 5% *per annum* from the day after the due date of payment.
151. The Second Claimant has claimed interest at the higher, contractual rate of 10% until 1 August 2019. Because default and contractual interest cannot be recovered for the same period, the Arbitrator finds that the start date for interest to run on the sum claimed is 2 August 2019, the day after the date of Termination.

¹ The Answer provides that the amount is in Euros rather than US dollars, however this is a typographical error.

152. The Arbitrator therefore finds the Respondent liable to pay the Second Claimant a gross sum of USD 3,691.73 in respect of unpaid agency fees for the 2018-2019 season plus interest at a rate of 5% *per annum* from 2 August 2019 until the date of full payment.

8.4. The Second Claimant's Claim for the Unpaid Agent Fees for the 2019-2020 season plus Post-Termination Interest

153. The Second Claimant claims USD 14,000.00 for the 2019-2020 season for agent fees under Article 16 of the Agreement which provides:

"2. If the agreement is in full force for the 2019-20 basketball season, the Club agrees to pay a full amount of 14 000,00 USD (fourteen thousand dollars) for the 2019-20 season to the Agents, to be paid after settling invoices on or before the following dates:

October 31, 2019 – 7 000,00 USD

March 31, 2020 – 7 000,00 USD"

[...]

"5. In addition, if scheduled commission payment is not made by the Club as and when due within the next 7 (seven) days after such a written notice is received by Club, Player shall have the right, at Player's option, to terminate this Agreement"

154. As set out above, the Arbitrator considers that the 2019-2020 basketball season was the "season in progress" when the Agreement was terminated on 1 August 2019 and Article 11 of the Agreement, which applies equally to agent fees, can be reviewed in light of all the circumstances in order to prevent a manifestly unfair and unjust result.

155. Based on these findings, the fees claimed by the Second Claimant in respect of the 2019-2020 season are due in principle, subject to the requirement that the Second Claimant's unjust enrichment should be avoided. It therefore falls to the Arbitrator to determine what proportion of the agent fees the Second Claimant should receive in light of all the circumstances.

156. According to the First Claimant's agreement with Pallacanestro Trieste, the Second Claimant's agent fee for the 2019-2020 season was set at 10,000.00.
157. Considering the Respondent's failure to pay the agents fees due for the 2018-2019 season in their entirety, and considering the additional effort required on the Second Claimant's part to secure alternative employment for the First Claimant because of the Respondent's obstruction of his letter of clearance, the Arbitrator considers that it would be fair to offset 40% of the amount that the Second Claimant stood to gain under his contract with Pallacanestro Trieste which is USD 4,000.00.
158. The Arbitrator therefore finds the Respondent liable to pay the Second Claimant USD 10,000.00 in agent fees for the 2019-2020 season.
159. The Second Claimant claims interest at 5% *per annum* from 1 August 2019, the date of the Termination Letter, until the date of full payment.
160. As described above, it is well-established in BAT caselaw that default interest is claimable at a rate of 5% *per annum* from the day after the due date of payment and that contractual and default interest cannot both be claimed for the same period.
161. Therefore, the Arbitrator finds the Respondent to pay the Second Claimant a gross sum of USD 10,000.00 in unpaid agent fees in respect of the 2019-2020 season plus interest at a rate of 5% *per annum* from 2 August 2019 until the date of full payment.

9. Costs

9.1. Costs Claimed

162. The Claimants claim the following costs:

Cost	Amount (EUR)
Attorney's Fees	15,000.00
Advance on Costs (Claimants' share)	5,500.00
Advance on Costs (Respondent's share)	5,500.00
Non-Reimbursable Handling Fee	3,000.00
Total	29,000.00

163. The Respondent has not provided cost submissions. In both its Answer and the Rejoinder, the Respondent requested an order that each party should bear its own legal fees.

9.2. Findings

164. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration (which include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator) shall be determined by the BAT President and may either be included in the award or communicated to the Parties separately. It also provides that *"the fees of the arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time"*.

165. On 16 June 2020, the BAT President determined the arbitration costs in the present matter to be EUR 11,000.00.

166. Article 17.3 of the BAT Rules provides that, as a general rule, the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings. In doing so, *"the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and financial resources of the parties"*.

167. Article 11.2 of the Agreement provides for the Respondent to bear the costs paid by the Claimants to enforce their rights under the Agreement. It provides that:

“All legal fees and BAT fees payable by Player and/or Agent shall be payable by Club”.

168. The Arbitrator considers that the clear terms of the Parties’ agreement regarding the allocation of costs should be upheld in accordance with the principle of *pacta sunt servanda* and notes that there is no evidence on record of any circumstances that would warrant the disapplication of this agreed allocation in the present case. The Arbitrator further notes that the Claimants have, in any event, been largely successful in their claims.

169. The Arbitrator therefore finds that the Respondent should bear 100% of the cost of the present proceedings.

170. The Claimants claim EUR 15,000.00 in legal fees for both, First Claimant and Second Claimant, together. In support of this claim, the Claimants have submitted an invoice from their counsels. The invoice provides a breakdown of fees including the hourly rate and hours worked on the matter.

171. Under Article 17.4 of the BAT Rules, the maximum permissible contribution towards the Claimants legal fees is EUR 15,000.00.

172. Considering that the Parties have agreed that the Respondent is liable for legal fees incurred to enforce the Agreement, and given that the overall fee charged is not demonstrably unreasonable considering the length and complexity of the submissions filed, the Arbitrator finds the Respondent liable to pay the Claimants EUR 15,000.00 in legal fees and EUR 3,000.00 in respect of the non-reimbursable handling fee.

10. Award

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

- 1. Grono Sportowa Spolka Akcyjna shall pay Mr. Kodi Andrew Justice USD 2,800.00 net of all Polish taxes in unpaid salaries for the 2018-2019 season plus interest at a rate of 5% *per annum* from 2 August 2019 until the date of full payment.**
- 2. Grono Sportowa Spolka Akcyjna shall pay Mr. Kodi Andrew Justice USD 35,192.00 gross in unpaid image rights payments for the 2018-2019 season plus interest at a rate of 5% *per annum* from 2 August 2019 until the date of full payment.**
- 3. Grono Sportowa Spolka Akcyjna shall pay Mr. Kodi Andrew Justice USD 639.04 net of Polish taxes in pre-termination interest accruing until 1 August 2019 for sums owed in respect of the 2018-2019 season.**
- 4. Grono Sportowa Spolka Akcyjna shall pay Mr. Kodi Andrew Justice USD 7,000.00 net of all Polish taxes in unpaid salaries for the 2019-2020 season by acceleration plus interest at a rate of 5% *per annum* from 2 August 2019 until the date of full payment.**
- 5. Grono Sportowa Spolka Akcyjna shall pay Mr. Kodi Andrew Justice USD 98,580.00 gross in image rights for the 2019-2020 season by acceleration plus interest at a rate of 5% *per annum* from 2 August 2019 until the date of full payment.**
- 6. Grono Sportowa Spolka Akcyjna shall provide Mr. Kodi Andrew Justice with tax certificates in respect of the unpaid salary payment of USD 2,800.00 for the 2018-2019 season and USD 7,000.00 for the 2019-2020 season.**
- 7. Grono Sportowa Spolka Akcyjna shall pay Mr. Eric Fleisher USD 3,691.73 in respect of unpaid agency fees and pre-termination interest for the 2018-2019 season, plus interest at a rate of 5% *per annum* on the amount of USD 3,600.00 from 2 August 2019 until the date of full payment.**
- 8. Grono Sportowa Spolka Akcyjna shall pay Mr. Eric Fleisher USD 10,000.00 in**

respect of unpaid agency fees for the 2019-2020 season plus interest at a rate of 5% *per annum* on this amount from 2 August 2019 until the date of full payment.

- 9. Grono Sportowa Spolka Akcyjna shall pay Mr. Kodi Andrew Justice and Mr. Eric Fleisher jointly EUR 11,000.00 as reimbursement for their arbitration costs.**
- 10. Grono Sportowa Spolka Akcyjna shall pay Mr. Kodi Andrew Justice and Mr. Eric Fleisher jointly EUR 18,000.00 as contribution to their legal fees and expenses.**
- 11. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 25 June 2020

Amani Khalifa
(Arbitrator)