

ARBITRAL AWARD

(BAT 1652/21)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Rhodri Thomas

in the arbitration proceedings between

Mr. Andrea Trinchieri

- Claimant -

represented by Mr. Blaz T. Bolcar, attorney at law

vs.

Basketball Club Partizan
Humska 1, 11000 Belgrade, Serbia

represented by Mr. Ilija Drazic, attorney at law

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Andrea Trinchieri (hereinafter “the Claimant”) is a professional basketball coach.

1.2 The Respondent

2. Basketball Club Partizan (hereinafter the “Respondent”) is a professional basketball club located in Serbia.

2. The Arbitrator

3. On 15 February 2020, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), appointed Mr. Rhodri Thomas as arbitrator (hereinafter the “Arbitrator”) pursuant to Articles 0.4 and 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 (hereinafter the “BAT Rules”).
4. Neither party has raised objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. On 1 November 2018, the Claimant entered into an employment contract with the Respondent in relation to the 2018-2019, 2019-2020 and 2020-2021 basketball seasons (hereinafter the “Employment Contract”). The Employment Contract

contains, among others, the following provisions:

“2. Compensation. *In consideration for the services to be performed by Coach hereunder, Club shall pay to Coach the following amounts of compensation as follows:*

*(A) For contract Year One, Coach shall receive a NET salary of Three Hundred Twenty Thousand Euros (320,000.00), (**NET of all charges and any applicable taxes**). Such sums shall be payable upon the following schedule:*

<i>November 15, 2018</i>	<i>Euros 40,000.00</i>
<i>December 15, 2018</i>	<i>Euros 40,000.00</i>
<i>January 15, 2019</i>	<i>Euros 40,000.00</i>
<i>February 15, 2019</i>	<i>Euros 40,000.00</i>
<i>March 15, 2019</i>	<i>Euros 40,000.00</i>
<i>April 15, 2019</i>	<i>Euros 40,000.00</i>
<i>May 15, 2019</i>	<i>Euros 40,000.00</i>
<i>June 15, 2019</i>	<i>Euros 40,000.00</i>

*(B) For contract Year Two, Coach shall receive a NET salary of Five Hundred Thousand Euros (500,000.00), (**NET of all charges and any applicable taxes**). Such sums shall be payable upon the following schedule:*

<i>September 15, 2019</i>	<i>Euros 50,000.00</i>
<i>October 15, 2019</i>	<i>Euros 50,000.00</i>
<i>November 15, 2019</i>	<i>Euros 50,000.00</i>
<i>December 15, 2019</i>	<i>Euros 50,000.00</i>
<i>January 15, 2020</i>	<i>Euros 50,000.00</i>
<i>February 15, 2020</i>	<i>Euros 50,000.00</i>
<i>March 15, 2020</i>	<i>Euros 50,000.00</i>
<i>April 15, 2020</i>	<i>Euros 50,000.00</i>
<i>May 15, 2020</i>	<i>Euros 50,000.00</i>
<i>June 15, 2020</i>	<i>Euros 50,000.00</i>

(C) For contract Year Three, Coach shall receive a NET salary of Five Hundred Fifty Thousand Euros (550,000.00), (**NET of all charges and any applicable taxes**). Such sums shall be payable upon the following schedule:

September 15, 2020	Euros 55,000.00
October 15, 2020	Euros 55,000.00
November 15, 2020	Euros 55,000.00
December 15, 2020	Euros 55,000.00
January 15, 2021	Euros 55,000.00
February 15, 2021	Euros 55,000.00
March 15, 2021	Euros 55,000.00
April 15, 2021	Euros 55,000.00
May 15, 2021	Euros 55,000.00
June 15, 2021	Euros 55,000.00

All salary shall be paid in Euros, and is net of any and all bank charges and any Serbian Taxes, or any other costs, expenses, or charges whatsoever.

All Salary shall be fully guaranteed, and vested and owing in full upon execution of this Agreement by the Coach and Club and shall not be contingent upon any further events.

3. **Bonuses.** In the addition to the Compensation paid to Coach pursuant to Paragraph 2 above, during each applicable season, the Coach shall receive the following bonuses:

(A) Serbian League:

Winning the Serbian Championship	Euros 10,000.00
Winning Serbian Cup	Euros 5,000.00

(B) Adriatic League

Winning Adriatic League	Euros 80,000.00
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(C) Eurocup or Euroleague

Eurocup or Euroleague Top 8	Euros 15,000.00
Eurocup or Euroleague Top 4	Euros 25,000.00

Eurocup or Euroleague Championship

Euros 50,000.00

The foregoing Eurocup and Euroleague bonuses are cumulative, and shall be payable by Club to the Coach within five (5) days of Coach earning the applicable bonus.

4. Payments. *All compensation due Coach and the Agent by Club shall be payable within five (5) days of the payment date. Any failure by Club to make prompt payment of any amount due Coach and Agent herein shall constitute a breach of this Agreement by Club. All compensation due Coach and Agent shall be made payable to Coach and / or Agent in care of him / it by way of wire transfer to the account provided by the Coach and / or Agent.*

Taxes. *All the above-mentioned compensation to Coach shall be net of all taxes, social (employer and employee) charges, bank fees and other costs. Club acknowledges and agrees that Club is responsible for the payment of all applicable income, VAT, local, state, federal, and other taxes, social fees, and other costs on any monies paid to Coach under this Agreement and shall pay all such taxes and costs on Coach's behalf to the appropriate governmental entities. At the end of each season during the Term and prior to Coach's departure from Serbia, Club will provide Coach with a certified tax receipt that all applicable taxes have been paid on Coach's behalf. The Club will make all arrangements necessary within the Serbian banking system to allow the Coach to transfer funds to a bank account in any other country designated by the Coach at Club's sole cost and expense.*

5. Guaranteed Salary. *With respect to the payment of all compensation set forth in Paragraphs 2 and 3 above and 14 below, Coach's suffering or sustainment of any illness, injury, disability or death at any time during the period of this Agreement, shall in no way affect the Coach's, Agent's or the Coach's designated beneficiary's right to receive the sums payable pursuant to Paragraphs 2, 3 and 14 of this Agreement, in the amounts and at the times called for by such Paragraphs. **Club and Coach further agree that this is a "No-Cut, Guaranteed Contract" and that it can be terminated only pursuant to mutual accord of the parties involved in this Agreement, unless Club has breached the Agreement, or as otherwise specifically set forth below in Paragraphs 10 and 11.***

6. Amenities.

A. Housing. *Club shall provide, subject to Coach's approval, a fully furnished apartment for Coach's exclusive use with at least three (3) bedrooms, a living room, and a kitchen. In addition, it shall have at least (1) television, high speed wireless internet, washing machine and dryer, satellite/cable TV, shower with stall doors or an installed, new shower curtain and DVD player. Club acknowledges and agrees that the apartment shall be in good condition, with no mold, damage, or other poor conditions.*

Club will pay all rent and utilities on such apartment, including but not limited to gas, electricity, internet, cable or satellite, charges and taxes associated with Coach's lodging. Once an apartment is located, all phone, internet, satellite, television, and utilities shall be installed at Club's expense. Although the Club shall be responsible for the initial telephone installation charges, Coach shall be responsible for his own telephone bill. Coach shall be responsible for any damages to the apartment caused directly by Coach outside of normal wear and tear.

[...]

8. Commitments by Club. *Because the psychological, physical and mental well-being of the Club's Players are necessary for the Coach to meet his contractual obligations to the Club, the Club agrees to do and provide the following:*

a. Budget. *Club agrees to provide a budget sufficient to permit Coach to build a Championship-caliber team (the "Budget"). The amount of the Budget shall be at the sole discretion of the Club.*

[...]

10. Termination. *Notwithstanding anything to the contrary contained in this Agreement, Club agrees that Coach has the absolute right to terminate this Agreement if:*

i. After Contract Year One the Coach determines, in his good faith, reasonable discretion, that the Budget for Contract Year Two 2019 / 2020 is insufficient (less than budget of 2018/2019 increased for minimum of 30%) to enable the Coach to build a championship-caliber team and pay for all of the items set forth above in Paragraphs 8(a)(i-iv), or otherwise perform his duties under this Agreement;

ii. After Contract Year Two the Coach determines, in his good faith, reasonable discretion, that the Budget for Year Three 2020/2021 is insufficient (less than budget for season 2019/20 increased for minimum of 30%) to enable the Coach to build a championship-caliber team and pay for all of the items set forth above in Paragraphs 8(a)(i-iv), or otherwise perform his duties under this Agreement

[...]

14. Agency Fee. *For each year of this Agreement, the Club agrees to pay Agent, for their professional services of intermediation and mediation in negotiation and contracting of the Coach by the Club the following amounts and in the following manner:*

For the 2018-2019 Basketball Season:

Euros 32,000.00 September 30, 2018

For the 2019-2020 Basketball Season:

Euros 50,000.00 September 30, 2019

[...]

15. Remedies for Non-Payment. Club agrees that Coach may immediately terminate this Agreement in the event that: (i) any payment to Coach and/or Agent required by this Agreement is past due more than thirty (30) days; and/or (ii) Club breaches any non-payment term of this Agreement and fails to cure such breach within fifteen (15) days after notice of such breach.

In the case of such termination of this Agreement by Coach, Club will immediately grant Coach his unconditional release and free agency. Upon forty-eight (48) hours after notice has been given, all monies that otherwise would have been due to Coach and Agent had this Agreement been fully performed as if the Agreement were not terminated shall become immediately due and payable. Coach shall be under no obligation to mitigate his damages and Club shall receive no offset.

Without limiting other remedies, in the event Club has failed for any reason to make any payment mandated by this Agreement for fifteen (15) or more days, Coach shall, in his sole discretion, be entitled to refrain from participating in practices and games until all such scheduled payments have been made and Club shall be prohibited from fining or otherwise punishing the Coach or terminating this Agreement as a result. Coach's decision not to participate in any practice or game does not waive his right to terminate this Agreement for non-payment in accordance with the terms hereof.

[...]

21. Governing Law, Disputes, Translation. Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the dispute *ex aequo et bono*. The prevailing party shall be entitled to recover all costs, fees and attorneys' fees from the other party in any such dispute."

3.2 The Proceedings before the BAT

6. On 29 January 2021, the Claimant filed a Request for Arbitration dated 29 January 2021 in accordance with the BAT Rules and the BAT received the non-reimbursable handling fee of EUR 7,000.00 from the Claimant on 28 January 2021.

7. By letter dated 15 February 2021, the BAT Secretariat fixed a deadline of 8 March 2021 for the Respondent to file an Answer to the Request for Arbitration. By the same letter, and with a deadline of 25 February 2021 for payment, the following amounts were fixed as the Advance on Costs:

<i>“Claimant (Mr. Andrea Trinchieri)</i>	<i>EUR 6,000.00</i>
<i>Respondent (BC Partizan)</i>	<i>EUR 6,000.00”</i>

8. The Claimant paid his share of the Advance on Costs, which was received by the BAT on 24 February 2021. The Respondent failed to pay its share of the Advance on Costs. The Claimant paid the Respondent’s share of the Advance on Costs on 12 March 2021.
9. By Procedural Order dated 29 March 2021, the Arbitrator requested that the Parties provide further information by 19 April 2021 (the “First Procedural Order”).
10. On 16 April 2021, the Respondent submitted its response to the First Procedural Order. On 23 April 2021, the Claimant submitted his response to the First Procedural Order but requested an extension of time to 3 May 2021 for the submission of various translated exhibits. The Arbitrator agreed to this request for an extension. The Claimant submitted the translated exhibits on 3 May 2021.
11. By Procedural Order dated 18 May 2021, the Arbitrator requested that the Parties provide further information by 8 June 2021 (the “Second Procedural Order”).
12. On 8 June 2021, both the Claimant and the Respondent submitted their responses to the Second Procedural Order. The Claimant requested an extension of time to 11 June 2021 to provide a translated exhibit. The Arbitrator agreed to this request for an extension. The Claimant submitted the translated exhibit on 10 June 2021.
13. On 28 June 2021, the Arbitrator declared the exchange of submissions complete and requested that the Parties submit detailed accounts of their costs by 5 July 2021.

14. On 5 July 2021, the Claimant submitted the following account of costs:

“The Claimant agreed to pay the fees for the legal services on hourly basis pursuant to the flat fee rate of EUR 200,00. Legal Services are charged by 15-minute intervals, in a way that every initial and the further 15 minutes of work are charged.

The work done in relation to the partial Consent Award is as follows:

- *The Review of the documentation, drafting of the Request for Arbitration, assembling all the exhibits and filing of the request*
 - *16,25h – EUR 3.250,00;*
- *The Review of the Respondent’s Answer dated 8 March 2021 (part not related to the partial Consent Award)*
 - *1h – EUR 200,00;*
- *Drafting of the Comments to the Respondent’s Answer, assembling new exhibits (submission dated 23 April 2021)*
 - *9,5h – EUR 1.900,00;*
- *Drafting of Comments on Mr. Kijanovic’s affidavit dated 8 June 2021*
 - *2,25h – EUR 450,00;*
- *Obtaining the legal opinion on the matter (briefing of the Serbian Lawyer)*
 - *0,5h – EUR 100,00;*
- *The Correspondence between Wasserman and its legal representative related to the submissions*
 - *1,5h – EUR 300,00;*
- *The correspondence with the BAT (dated 18 March 2021, 16 April 2021, 23 April 2021, 26 April 2021, 3 May 2021, 8 June 2021, 9 June 2021, 10 June 2021)*
 - *0,45h – EUR 150,00;*
- *The costs of translation (see attached invoices)*
 - *EUR 988,09.*

The Claimant legal fees and expenses related to the proceedings in the above-cited case amount to EUR 7.338,09. To the latter amount the amount of non-reimbursable handling fee and advance on costs (paid entirely by the Claimant) should be added.”

15. On 7 July 2021, the Claimant submitted an additional invoice relating to a legal opinion prepared on his behalf by Joksovic, Stojanovic & Partners and submitted in support of his position in these proceedings amounting to EUR 750.00.
16. The Respondent failed to submit an account of costs.
17. Since neither of the Parties filed an application for a hearing, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to deliver the award on the basis of the written submissions of the Parties.

4. The Positions of the Parties

4.1 The Claimant's Position

18. The Claimant claims that he validly terminated the Employment Contract on 28 June 2020 for the following reasons (which were set out in a letter from the Claimant to the Respondent dated 28 June 2020 and are re-produced in full below):

- a) *"Pursuant to Section 2(B) and other sections of the Agreement, the Club was required to pay Coach a total of Fifty Thousand EUR (€50,000) on March 15, 2020, in addition to Twenty Thousand EUR (€20,000) in bonuses, Ten Thousand EUR (€10,000) in apartment rent, and additional apartment expenses in the amount of Four Thousand EUR (€4,000). The Club has failed to pay the aforementioned amount for over ninety-five (95) days, despite our demands for payment";*
- b) *"Pursuant to Section 4 of the Agreement, the Club was required to pay all taxes on behalf of Coach's compensation and provide receipt of such payment; the Club failed to do so despite our demands and as such, this is a material breach by the Club of the Agreement";*
- c) *"Pursuant to Section 10(ii) of the Agreement, the Club was required to increase the Club's budget for the 2020-2021 season by at least thirty percent (30%); the Club failed to do so despite our demands and as such this was a material breach by the Club of the Agreement";*
- d) *"Finally, pursuant to Section 14 of the Agreement, the Club was required to pay an agent fee of Fifty Thousand EUR (€50,000) on September 30, 2019, the Club failed to do so despite our demands and as such, this is a material breach by the Club of the Agreement".*

19. The Claimant submits that his termination of the Employment Contract was justified

for each reason cited above individually and / or, in the alternative, for each of the reasons taken together.

20. The Claimant claims that, following his termination of the Employment Contract on 28 June 2020, the Respondent is required to pay him the following amounts:

- a) *Salary instalments (in the sum of either EUR 700,000.00 or EUR 625,000.00).*
The Claimant claims that the Respondent failed to pay the April, May and June 2020 instalments of his salary in their entirety (amounting to EUR 150,000.00 or, in the alternative, owing to the Covid-19 pandemic and therefore the application of the BAT Covid-19 Guidelines, EUR 75,000.00). Pursuant to clause 5 of the Employment Agreement (“Guaranteed Salary”), the Claimant also claims salary instalments for the entirety of the 2020 – 2021 season (in the amount of EUR 550,000.00) (together the “Outstanding Salary Instalments”);
- b) *Bonus payments (in the sum of EUR 20,000)* – comprising bonus payments in the amounts of EUR 5.000,00 in respect of the Respondent having won the Radivoja Koraca (hereinafter referred to as the “Serbian Cup”) on 17 February 2020, and EUR 15.000,00 in respect of the Respondent having qualified for the EuroCup Top 8 teams on 4 March 2020 (together the “Outstanding Bonus Payments”); and
- c) *Rental amounts and housing expenses (in the sums of EUR 10,000.00 and EUR 1,600)* – comprising rental fees in the sum of EUR 10,000.00 relating to the period February to June 2020 and additional running costs incurred by the Claimant during the period November 2019 to June 2020 in the sum of EUR 1,600.00.

21. The Claimant also claims that the Respondent has failed to provide him with a tax certificate (as required by clause 4 of the Employment Contract) in respect of the amounts paid to him in accordance with the Employment Contract. The Claimant

submits that he has been unable to transfer funds to accounts outside of Serbia as a result of the Respondent's failure to provide him with appropriate tax documentation.

22. The Claimant also submits that the Respondent failed to pay agency fees relating to the 2019-2020 basketball season (as required by clause 14 ("Agency Fee") of the Employment Contract) in the sum of EUR 50,000.00. These fees are not being claimed by the Claimant in these proceedings, however, and the Claimant's agent is not a party to these proceedings.

4.2 The Claimant's request for relief

23. In the Request for Arbitration, the Claimant submitted the following request for relief:

"The Coach's [sic] claims the following payments and/or fulfilment of other obligations under the Agreement:

I. Pre-Lockdown era

By the payment on 29 June 2020 the Club paid all obligations related to the salary payments, save for the payments of all and any taxes and/or social contributions and bonus payments.

The Coach earned the respective bonus payments on 17 February 2020 (due on 22 February 2020) and on 4 March 2020 (due on 9 March 2020). Therefore, the bonus payments were earned before Lockdown and should be paid in full.

The Club acknowledges its debt arising from winning of the Serbian Cup by its notice dated 29 June 2020 (see Exhibit C6).

Failure to fulfil its obligations related to taxes results in the fact that the Coach cannot transfer its financial funds from the Serbian bank account to another bank account. This is still the case at the time of filing of this Request for Arbitration.

II. Lockdown era

As demonstrated herein, the Coach has made several proposals to the Club related to the payment of the salaries during the Lockdown. However, all were rejected by the Club.

Due to the reasons explained herein the Coach claims the full payment of his salaries under the Agreement for the duration of the Lockdown in the amount of EUR 150.000,00 net.

Alternatively, should the Arbitrator be of an opinion that the Club is entitled to any offset, the Coach claims 50% of the April, May and June salary payments, which amounts to EUR 75.000,00 net.

III. Post-Lockdown era

As above stated, the Agreement is the guaranteed agreement and the Coach is under no obligation to mitigate the damages. Therefore, the Coach claims all payments under the Agreement for 2020/21 season. The latter amount to EUR 550.000,00 net.

IV. Accommodation

The Coach claims the reimbursement of the amount EUR 10.000,00 in relation to the accommodation costs. Namely, the Coach has paid the rent for 5 months (February, March, April, May and June 2020; EUR 2.000 per month which is acknowledged by the Club – see Exhibit C8) and incurred additional costs in the amount of EUR 1.600,00 (running costs).

V. Tax certificate

[...]

The Coach claims all applicable interests (5% per annum) under the Agreement running from 17 December 2020 until the full payment.

2. REQUEST FOR RELIEF

The Coach requests:

- The amount of EUR 711.600 net; alternatively, the amount of EUR 636.600 net;*

- Interests of 5% p.a. running from 17 December 2020 which amount to EUR 4.090,41 (in case of*

the amount of EUR 711.600) or alternatively in the amount of EUR 3.659,29 (in case of the

amount of EUR 636.600) both calculated on the day of filing of this Request until the full

payment is made;

- The Tax Certificate for all payments under the Agreement and/or under BAT Award;*

- All costs related to the BAT proceedings (non-reimbursable handling fee, advance on costs,*

etc.);

• *Legal fees and expenses in relation to BAT proceedings.*”

4.3 The Respondent's Position

Termination of the Employment Contract

24. The Respondent submits that the Claimant was not entitled to terminate the Employment Contract on 28 June 2021. Prior to his termination of the Employment Contract, the Claimant wrote to the Respondent on 15 June 2020 requesting payment in respect of the outstanding March 2020 instalment of his salary (in the amount of EUR 50,000.00), the Outstanding Bonus Payments (in the amount of EUR 20,000.00) and the outstanding rent and additional apartment expenses (in the amount of EUR 14,500.00). The Claimant's letter dated 15 June 2020 requested that payment be made to him by the Respondent “*within thirty (30) days*” of the date of the letter. The Respondent submits that it took the decision to pay the March 2020 instalment of the Claimant's salary during the weekend of 27/28 June 2020 but that the Claimant, on discovering the Respondent's intention to make payment, terminated the Employment Contract on 28 June 2020 (i.e. a Sunday) at a time when the Respondent was unable to make the payment because “*the banks were closed for business*”.
25. The Respondent submits that the Claimant's motive in doing so (i.e. terminating the Employment Contract on a Sunday at a time when it was impossible for the Respondent to make payment) was to “*take the opportunity to terminate the Contract [...] using certain vacuum created by due to Covid-19 pandemic*” in order to commence alternative employment at FC Bayern Basketball Club. Notwithstanding this, the Respondent submits that it made payment to the Claimant (in the amount of EUR 55,000.00) in respect of the March 2020 instalment of his salary and the Serbian Cup Bonus on Monday 29 June 2020.

Respondent's position regarding sums being claimed by the Claimant

26. Without prejudice to its position that the Claimant was not entitled to terminate the Employment Contract on 28 June 2021, the Respondent made a number of submissions regarding the sums now being claimed by the Claimant in these proceedings.

2020-2021 season salary instalments

27. The Respondent submits that it should not be required to pay all of the Outstanding Salary Instalments to the Claimant because the Claimant has a duty to mitigate any damage he has suffered. Relatedly, the Respondent submits that the Claimant commenced negotiations with FC Bayern Basketball Club during his contractual term with the Respondent, contrary to FIBA Regulations. As a result of these negotiations, the Claimant concluded a new contract with FC Bayern Basketball Club which commenced very soon after his termination of the Employment Contract. The Respondent claims that to award the Claimant sums in respect of salary instalments for the 2020-2021 season would, in effect, amount to allowing him to earn “*two salaries at the same time (one from the old club that he left and other from the new club)*” and submits that the same is true in respect of bonus payments.
28. The Respondent requested that a copy of the Claimant’s contract with FC Bayern Basketball Club (hereinafter the “Bayern Contract”) be disclosed by the Claimant in these proceedings. Following a request from the Arbitrator, the Claimant disclosed a copy of the Bayern Contract to the BAT and asked that the Bayern Contract be kept confidential so far as possible.

April to June 2020 salary instalments

29. The Respondent submits that the Claimant is not entitled to payment in respect of the April to June 2020 salary instalments on the basis that basketball competitions were terminated “*months before*” the Claimant’s termination of the Employment Contract. The Respondent submits that the Claimant’s salary instalments were duly paid up to the point of lockdown in Serbia. The Respondent also made submissions in respect of

its financial position noting that, as a result of the economic difficulties it had faced because of the Covid-19 pandemic, it had been necessary for it to reduce the salaries of all of its employees, including that of the Claimant.

30. The Respondent submits, in the alternative, that if the Arbitrator considers that payment should be made to the Claimant in respect of the April to June 2020 salary instalments, then account be taken of the EUR 55,000.00 paid to the Claimant on 29 June 2020 (in respect of the March 2020 instalment of his salary and the winning of the Serbian Cup) such that the amount of EUR 50,000.00 (relating to the March 2020 instalment of the Claimant's salary) be deducted from the EUR 75,000.00 (being claimed in the alternative by the Claimant) in respect of his April to June 2020 salary instalments. The Respondent submits that this approach would take account of BAT's recommendation that the financial effects of the Covid-19 pandemic be shared between Clubs and their employees.

Rental amounts

31. The Respondent claims that it has previously made payment to the Claimant (in the amount of EUR 10,000.00) in respect of rental payments for accommodation used by the Claimant during the 2019-2020 season. The Respondent submits that, on receiving the Claimant's request for a further payment of EUR 10,000.00 in respect of rental sums, prior to agreeing to make any further payment, it asked to be provided with a copy of the Claimant's rental agreement. The Respondent claims that the Claimant has not yet provided it with a copy of the rental agreement and in these circumstances, it has been unwilling to make any further payment.

Additional housing expenses

32. The Respondent submits that it has fully complied with its obligations under clause 6 of the Employment Contract to pay all expenses associated with the Claimant's accommodation. The Respondent submits that it is unclear what the invoices provided by the Claimant in respect of the 'additional housing expenses' (which refer

to a company called 'Atrium Consulting' and an individual identified as Mr. Bojan Bukmira who are unknown to the Respondent) relate to and in these circumstances, it has not been willing to make payment.

Tax certificate

33. The Respondent denies that it is under an obligation to provide the Claimant with any further tax documentation and in this respect makes the following submissions:
- a) that it has no responsibility to pay any taxes in respect of the Claimant's annual income "*in Italy*";
 - b) that "*proof*" that the Claimant, after receiving his net salary instalments, has no tax liability in Serbia has already been provided to the Claimant with the relevant tax returns having been completed, stamped by the Respondent and electronically submitted to the Serbian tax authorities of which copies have been provided to the Claimant; and
 - c) that, in its opinion, the Arbitrator has "*no power to act regarding any non-monetary claim, such as a request from the Club to submit a tax certificate*".

Additional observations

34. The Respondent also makes the following observations regarding the Claimant's claim:
- a) against the background of the Covid-19 pandemic, which the Respondent describes as "*the biggest worldwide sport crisis*", it was unfair of the Claimant to rely on the Respondent's failure to increase its budget by 30% in respect of the 2020-2021 season (in accordance with clause 10(II) of the Employment Contract) as a purported ground for early termination of the Employment Contract;

- b) that in these proceedings the Claimant was now seeking a number of things that were not requested either in his letter dated 15 June 2020 or his letter dated 28 June 2020 in which he purported to terminate the Employment Contract. In particular, the Respondent noted that the amount being sought by the Claimant had increased from EUR 84,000.00 to EUR 711,600.00 or, in the alternative, EUR 636,000.00 and now included the request for the provision of further tax documentation.

5. The jurisdiction of the BAT

35. 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).
36. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
37. The Arbitrator notes that all but one of the Claimant’s claims against the Respondent are clearly of a financial nature and thus arbitrable within the meaning of Article 177(1) PILA.¹ In relation to the remaining claim – for a tax certificate – the Respondent has argued that the BAT has “*no power to act regarding any non-monetary claim, such as a request from a Club to submit a tax certificate*”. The Arbitrator rejects this argument; the BAT’s jurisdiction is in no way limited solely to monetary claims and this is reflected in BAT jurisprudence. The Arbitrator also rejects arguments made by the Respondent that the BAT is not competent to “*decide on the taxation/transfer of funds issue*” because, in this instance, the BAT is not making a taxation “*decision*”; the Arbitrator has simply been asked to uphold a contractual

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

obligation that the Respondent has to provide the Claimant with a certified tax receipt. The BAT is therefore competent to determine the Claimant's claim in respect of the tax certificate.

38. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in clause 11 of the Employment Contract, which reads as follows:

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

39. The Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
40. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In addition, with the exception of the claim for a tax certificate, the Respondent has not objected to the jurisdiction of the BAT.
41. For these reasons, the Arbitrator has jurisdiction to adjudicate the Parties' claims.

6. Applicable Law – ex aequo et bono

42. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the Parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the Parties may authorize the arbitrators to decide “*en équité*” instead of choosing the

application of rules of law. Article 187(2) PILA is generally translated into English as follows:

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

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

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

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

44. Article 11 of the Employment Contract states that “[t]he arbitrator shall decide the dispute ex aequo et bono”. The preamble to the BAT Rules states “the parties recognise [...] that the BAT arbitrators decide ex aequo et bono” and Article 15 of the BAT Rules provides that the Arbitrator shall decide the dispute ex aequo et bono unless the parties have expressly and specifically agreed that he is not authorized to do so.
45. In light of the above, the Arbitrator will decide the issues submitted to him in this proceeding ex aequo et bono.
46. The concept of *équité* (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the *Concordat intercantonal sur l’arbitrage*² (Concordat),³ under which Swiss courts have held that arbitration *en équité* is fundamentally different from

² 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).

³ P.A. KARRER, Basler Kommentar, No. 289 ad Art. 187 PILA.

arbitration *en droit*.

“When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.”⁴

47. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives “a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case”⁵.
48. 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*”.

7. BAT Covid-19 Guidelines

49. The BAT Covid-19 Guidelines are aimed at addressing “*the consequences of the COVID-19 crisis on contracts in basketball, in particular those consequences arising out of domestic championships being suspended or terminated early as a result of the pandemic*”⁶. Both Parties refer to and rely on the BAT Covid-19 Guidelines in their respective submissions.
50. For completeness, the principles included in the BAT Covid-19 Guidelines that are directly relevant to the issues in this case are set out below:

“2. Amicable settlements are the preferred means of resolving disputes arising out of the COVID-19 crisis. Parties are under a duty to renegotiate in good faith the terms of their contract in order to resolve on an amicable basis contractual issues arising from the pandemic.

⁴ JdT 1981 III, p. 93 (free translation).

⁵ Poudret/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626.

⁶ BAT Covid-19 Guidelines, p.1.

3. *Any breach of this duty may be taken into account by the arbitrator when deciding the merits of the case and when deciding on arbitration costs, legal fees and other expenses.*

[...]

8. *The consequences of the COVID-19 crisis cannot be allocated to one of the parties only, absent any clear contractual language stipulating otherwise for events sufficiently similar to the current pandemic and its consequences on basketball competitions. Without such clear language in the contract, the adverse consequences of the COVID-19 crisis shall be shared by both parties according to their respective circumstances [...]*

9. *The principle of pacta sunt servanda shall be generally upheld in a manner consistent with the standing jurisprudence of BAT in times of the COVID-10 crisis. Consequently, a contract is not automatically terminated because of the pandemic. Neither does the COVID-19 crisis give either party just cause to unilaterally terminate the contract.*

[...]

15. *Bonuses that fell due before the Lockdown Period continue to be owed, but their maturity shall be deferred to the beginning of the 2020/21 season in the relevant domestic championship [...]*

16. *The obligation of clubs to pay salaries to players and coaches must be adapted to take into account that*

- *during the Lockdown Period, the players' and coaches' obligation to provide services is largely suspended (see no. 18, 19 below for players) and that*
- *the COVID-19 crisis has disrupted the financial framework and presumptions based on which the contracts were executed between the parties.*

Based on the above considerations, it is fair and just that the obligation of the club to pay salaries during the Lockdown Period be subject to a general reduction as follows:

- a) *The size of the salary reduction will depend on the player's/coach's monthly salary, with the following scale guiding the arbitrators' assessment of the equitable reduction:*

<i>First EUR up to EUR 2,500/month</i>	<i>Reduction by 0-20%</i>
<i>EUR exceeding EUR 2,500/month</i>	<i>Reduction by 50% as a starting point, but subject to adjustment upwards or downwards (see below)</i>

When deciding the precise percentage to apply in an individual case, the arbitrator will take into account in particular the following (non-exhaustive) criteria:

- the overall amount of the salary, keeping in mind that, in principle, lower salaries shall be submitted to a lower reduction than higher salaries;*
 - the financial situation of the club as a result of the COVID-19 crisis;*
 - the individual circumstances of the player/coach, in particular his or her reasonable living costs and the extent to which he or she is financially responsible also for others;*
 - whether the parties have complied with their duty to no. 2 above of these Guidelines and, more generally, have acted in good faith...*
 - the principle of proportionality and reasonableness, in particular how the club will use any liquidity saved through the salary reduction.*
- b) It is the duty of the parties to substantiate and provide the necessary evidence to determine the appropriate salary reduction in an individual case...*

17. Clubs are under a duty of care towards their players and coaches. In particular, clubs shall apply for any and all financial help available in the applicable jurisdiction in order to ease any consequences arising for its player/coaches because of COVID-19-related pay cuts. A breach of this duty shall be taken into account when deciding on a reduction or deferral or the player's/coach's claim.

[...]

18. The obligation of players to provide sporting services shall be suspended during the Lockdown Period, except and to the sole extent applicable public health guidelines so permit. Obligations in respect of non-sporting services shall not be suspended except to the extent inconsistent with applicable public health guidelines.

19. Players are under an obligation to stay fit and healthy during the Lockdown-Period (to the extent possible under the conditions prevailing in the relevant country) and to participate in any scheduled team activities that are permissible in the relevant jurisdiction, e.g. team meetings by videoconferencing or, subject to applicable public health guidelines, individual or group training sessions.

[...]

20. While these Guidelines focus on contractual relations between clubs and their players/coaches, arbitrators will seek to draw on principles herein also for contractual relations with other actors, in particular agents, to the extent deemed appropriate".

51. The BAT Covid-19 Guidelines are not binding rules of mandatory application and the Arbitrator has not applied them in such a way. However, the Parties made

submissions by reference to them and, based on the circumstances of the case, the Arbitrator considers it is fair and appropriate to apply the BAT Covid-19 Guidelines.

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

8. Findings

8.1 Termination of the Employment Contract

53. On 28 June 2020, the Claimant purported to terminate the Employment Contract for the reasons set out in the Claimant's letter to the Respondent dated 28 June 2020:

- a) *"Pursuant to Section 2(B) and other sections of the Agreement, the Club was required to pay Coach a total of Fifty Thousand EUR (€50,000) on March 15, 2020, in addition to Twenty Thousand EUR (€20,000) in bonuses, Ten Thousand EUR (€10,000) in apartment rent, and additional apartment expenses in the amount of Four Thousand EUR (€4,000). The Club has failed to pay the aforementioned amount for over ninety-five (95) days, despite our demands for payment";*
- b) *"Pursuant to Section 4 of the Agreement, the Club was required to pay all taxes on behalf of Coach's compensation and provide receipt of such payment; the Club failed to do so despite our demands and as such, this is a material breach by the Club of the Agreement";*
- c) *"Pursuant to Section 10(ii) of the Agreement, the Club was required to increase the Club's budget for the 2020-2021 season by at least thirty percent (30%); the Club failed to do so despite our demands and as such this was a material breach by the Club of the Agreement";*
- d) *"Finally, pursuant to Section 14 of the Agreement, the Club was required to*

pay an agent fee of Fifty Thousand EUR (€50,000) on September 30, 2019, the Club failed to do so despite our demands and as such, this is a material breach by the Club of the Agreement”.

54. In determining whether the Claimant was entitled to terminate the Employment Contract on 28 June 2020, the Arbitrator will consider each of these points in turn.

March to June 2020 Salary Instalments

55. Clause 4 of the Employment Contract provides that *“All compensation due Coach [sic] and the Agent by Club shall be payable within five (5) days of the payment date”* and that *“Any failure by Club to make prompt payment of any amount due Coach and Agent herein shall constitute a breach of this Agreement by Club.”* Clause 2 of the Employment Contract required that all salary instalments be paid by the 15th of each month. As at the date on which the Claimant purported to terminate the Employment Contract (28 June 2020), the March to June 2020 salary instalments were therefore late by the following number of days (excluding the grace period of five days referred to in Clause 4 for payment to be made):
- a) March 2020 instalment – 100 days;
 - b) April 2020 instalment – 69 days;
 - c) May 2020 instalment – 39 days; and
 - d) June 2020 instalment – 8 days.
56. The Arbitrator therefore finds that the Respondent’s delay in making payment to the Claimant of the March to May 2020 salary instalments did constitute a breach of the Employment Contract by the Respondent, and prima facie gave the Claimant the right to terminate the Employment Contract in accordance with its terms.

Bonus Payments

57. Similarly, as at the date on which the Claimant purported to terminate the Employment Contract, the bonus payments referred to in the termination letter were late by the following number of days (excluding the grace period referred to in Clause 4 for payment to be made):
- a) The Serbian Cup (won by the Respondent on 17 February 2020) – 126 days; and
 - b) EuroCup Top 8 Teams (which the Respondent qualified to on 4 March 2020) – 111 days.
58. The Arbitrator notes, however, that the BAT Covid-19 Guidelines provide (at paragraph 15) in respect of bonus payments that *“Bonuses that fell due before the Lockdown Period continue to be owed, but their maturity shall be deferred to the beginning of the 2020/21 season in the relevant domestic championship.”*
59. The Claimant submitted as evidence a copy of an announcement made by the ABA League that the competition the Respondent was competing in was suspended on 12 March 2020. Both of the Claimant’s bonuses fell due before this date (i.e. the start of the Lockdown Period). The Respondent paid the Serbian Cup bonus on 29 June 2020 (i.e. before the beginning of the 2020-2021 season) and so, consistent with the BAT Covid-19 Guidelines, the Arbitrator considers *ex aequo et bono* that the delay by the Respondent in making payment of that bonus did not amount to a breach of the Employment Contract.
60. Regarding the bonus payable for reaching the top 8 of the EuroCup, the Arbitrator notes paragraph 15 of the BAT Covid-19 Guidelines which states: *“No bonuses shall accrue based on the placement of the club in its domestic and international championships for the 2019/20 season unless the relevant championship is completed after the Lockdown Period”*. The Arbitrator considers that this guidance is

primarily aimed at bonuses which are, for example, tied to a placement which is *unresolved* at the time of the Lockdown Period beginning. So if a club paid a bonus in the event that it finished the league in the top 6 places, and the club was in 5th position in a league at the point in time when games in that league were suspended, no bonus would accrue (assuming the league was not completed after the Lockdown Period). In that case, if the league had not been suspended, it would have been entirely possible for the team to drop out of the top 6 and finish 7th at the end of the season. The present case is, however, different. First, the Respondent had reached the top 8 of the Eurocup; this much was resolved. The fact that the Eurocup was not completed does not alter this achievement. Second, the bonus was achieved (and payable) before the Lockdown Period began. If the Respondent were able to avoid its contractual obligation to pay the bonus by virtue of the fact that it had failed to meet its payment obligation by the time the Lockdown Period began, it would be in a better position than if it had complied with its contractual obligation to pay the bonus on time. For these reasons, the Arbitrator considers *ex aequo et bono* that the Respondent was required to pay the Claimant a bonus for reaching the top 8 of the EuroCup. However, consistent with the BAT Covid-19 Guidelines, the bonus did not mature until the beginning of the 2020/21 season. Therefore, at the time when the Claimant terminated the Employment Contract, the bonus had not matured and so the fact that it had not been paid at that point in time did not form a legitimate basis for terminating the Employment Contract.

Outstanding rental amounts and additional apartment expenses

61. Clause 6 of the Employment contract provides that the “*Club will pay all rent and utilities*” in respect of the Claimant’s accommodation. The Respondent submits that it was unable to make payment in respect of the request made by the Claimant in his letter dated 15 June 2020 for payment of outstanding rental sums (in the amount of EUR 10,000.00) and apartment expenses (in the amount of EUR 4,500.00, which the Arbitrator notes has been adjusted for the purposes of these proceedings to EUR 1,600.00) because the Claimant failed to provide it with either a copy of the relevant rental agreement and / or invoices in respect of the additional apartment

expenses incurred. In response, the Claimant submits, in submissions dated 8 June 2021 that he had previously provided a *“physical (paper) copy of the [rental] contract to Mr. Kijanovic”*. The Claimant also submits that the Respondent *“paid regularly the rent adding to the monthly salary the amount of EUR 2.000”*. In light of the evidence submitted, the Arbitrator accepts the Claimant’s submissions that the Respondent had ultimately agreed to pay the sum of EUR 2,000.00 per month in respect of his rental accommodation (and had in fact duly paid this amount by adding it to his salary instalments in the months November 2019, December 2019, January 2020, February 2020 and May 2020).

62. The Arbitrator notes that paragraph 14 of the BAT Covid-19 Guidelines provide that, during the Lockdown Period, in respect of amenities (including housing) *“The Club shall continue to provide any amenities as provided for under the contract, provided that the player is making use of them in good faith, is dependent on them and to the extent they are proportionate.”* The Arbitrator therefore finds that the Respondent’s failure to continue to pay the Claimant’s rental payments did constitute a breach of the Employment Contract.
63. As regards the additional apartment expenses, the Arbitrator notes the Claimant’s submissions (provided on 8 June 2021 in response to the Second Procedural Order) that he had agreed with *“Mr. Kijanovic that the Club will refund me the running cost on a 3-month basis”*. Despite this, the Claimant accepts in his Request for Arbitration that he *“does not have all the invoices with detailed specifications save of the invoice for months of February 2020 and March 2020”*. In the circumstances of this case, i.e. where the Claimant selected his own accommodation and was directly responsible for making payment in respect of the running costs of that accommodation, the Arbitrator finds that it was reasonable for the Respondent to require the Claimant to provide invoices in respect of the costs incurred before being required to make payment in respect of them. To the extent that the Claimant was able to provide sufficient evidence during these proceedings of the costs he incurred, such evidence was provided only during these proceedings, i.e. after the Claimant’s purported termination of the Employment Contract. As such, the Arbitrator therefore finds that

the Claimant has not proven that Respondent breached the Employment Contract in failing to pay the apartment expenses referred to in the Claimant's letter dated 15 June 2020 (in the amount of EUR 4,500.00) of which EUR 1,600.00 are now being claimed in these proceedings.

2020-2021 Season Budget

64. Clause 10 of the Employment Contract provided that the Claimant had the “*absolute right to terminate this Agreement*” if “*After Contract Year Two the Coach determines, in his good faith, reasonable discretion, that the Budget for Year Three 2020/2021 is insufficient (less than budget for season 2019/20 increased for minimum of 30%) to enable the Coach to build a championship-caliber team and pay for all of the items set forth above in Paragraphs 8(a)(i-iv), or otherwise perform his duties under this Agreement*”. The Claimant has submitted that the Respondent's failure to increase its budget for the 2020–2021 season constituted a non-monetary breach, in respect of which he was entitled to terminate the Employment Contract.
65. In response, the Respondent produced evidence (in the form of an affidavit from Mr. Mijailovic, the President of the Respondent) which explained that, at the time the Claimant had attempted to commence discussions regarding the Respondent's budget for the 2020-2021 season, it had been too early for it to enter into detailed financial planning in respect of the forthcoming season (particularly in the context of the Covid-19 pandemic which had created significant uncertainty regarding the Respondent's financial position).
66. In his affidavit, Mr. Mijailovic states that he explained to the Claimant that “*it was too early to talk about [the budget] in May / June 2020, because of the situation with the pandemic which was not clear at all.*” Mr. Mijailovic also set out in his affidavit an explanation of the previous annual increases made by the Respondent to its budget in the seasons commencing prior to the Covid-19 pandemic. He states, “*I reminded Mr Trinchieri that the Club engaged him in the season 2018/2019 and accepted to increase budget in season 2019/2020 for 30% (and in season 2020/2021 for another*

30%) but even for season 2019/2020 BC Partizan increased its budget for 100% (more than in the aggregate promised to be done for entire period of two seasons)". Indeed, the financial position of the Respondent appears to have been understood by the Claimant, who acknowledged in his letter dated 15 June 2020 "*the economic hardships the Club is facing due to the COVID-19 pandemic*".

67. The Arbitrator accepts the submissions of the Respondent on this point. The Arbitrator also notes that Clause 10 of the Employment Contract provides that the Claimant must exercise "*reasonable discretion*" and requires that the Claimant's determination (regarding the sufficiency of the Respondent's budget) must be made in "*good faith*". In the circumstances (i.e. where the Covid-19 pandemic has created significant financial uncertainty, not only for individual clubs, but for the sport as a whole) the Arbitrator finds *ex aequo et bono* that the Claimant was not entitled to terminate the Employment Contract on the basis that the Respondent refused to confirm that it would increase the budget for the 2020/2021 season by 30%.

Agency fees

68. The Arbitrator notes that the Claimant's agent is not a party to these proceedings and that the Claimant has submitted that the overdue agency fees referred to in the Claimant's letter dated 28 June 2020 are the subject of separate arbitration proceedings. In light of this (and the findings made below) the Arbitrator considers that it is not necessary to deal with the agency fees in these proceedings and the Arbitrator therefore makes no findings on this issue.

Conclusion

69. Clause 15 of the Employment Contract provides that the "*Club agrees that Coach may immediately terminate this Agreement in the event that: (i) any payment to Coach and/or Agent required by this Agreement is past due more than thirty (30) days; and/or (ii) Club breaches any non-payment term of this Agreement and fails to cure such breach within fifteen (15) days after notice of such breach*".

Notwithstanding this, the Arbitrator notes that the Claimant's letter to the Respondent dated 15 June 2020 contained the following wording:

“if the Club is unable to pay the full Outstanding Balance within thirty (30) days from the date hereof, we request that the Club engage with us in good faith discussion to collaborate on a mutually agreeable payment plan”

70. The letter did refer to points subsequently relied on by the Claimant on 28 June 2020 as a basis for terminating the Employment Contract (specifically the failure of the Respondent to provide the Claimant with a tax certificate or to increase the budget of the Club in accordance with Clause 10 of the Employment Contract). In the circumstances, even though the Respondent did breach the Employment Contract (as explained above), the Arbitrator finds *ex aequo et bono* that the Claimant was not entitled to terminate the Employment Contract on 28 June 2020. The Respondent was entitled to rely on the Claimant's representation that it had 30 days in which to make payment to the Claimant of the amounts set out therein, failing which the parties would “engage [...] in good faith [...] to collaborate on a mutually agreeable payment plan”. Indeed, the Respondent did remedy at least some of its breaches by paying the Claimant certain overdue salary on Monday 29 June 2020. Given the unequivocal representation by the Claimant that the Respondent had 30 days from 15 June 2020 to remedy its breaches, it was not reasonable for the Claimant to terminate the Employment Contract within this 30-day period.

8.2 Outstanding Salary Instalment

71. Clause 5 of the Employment Contract provides that the “*Club and Coach further agree that this is a “No-Cut, Guaranteed Contract” and that it can be terminated only pursuant to mutual accord of the parties involved in this Agreement, unless Club has breached the Agreement, or as otherwise specifically set forth below in Paragraphs 10 and 11.*” However, as the Claimant did not validly terminate the Employment Contract, the Arbitrator finds that clause 5 does not apply and the Claimant is not entitled to any salary instalments whatsoever in respect of the 2020–2021 season, none of which had fallen due when the Claimant terminated the Employment

Contract.

72. The Arbitrator notes that the Respondent requested that a copy of the Bayern Contract be disclosed in these proceedings. Given the Arbitrator's finding that the Claimant is therefore not entitled to any salary instalments in respect of the 2020–2021 basketball season, the Arbitrator consider that it is not necessary to disclose the the Bayern Contract, which the Claimant requested be kept confidential.
73. It falls to the Arbitrator to determine the extent to which the Claimant is entitled to payment in respect of the April to June 2020 salary instalments and, in light of the BAT Covid 19 Guidelines, in what proportion.
74. Clause 2(B) of the Employment Contract provides for the April to June 2020 salary instalments to be incurred on the 15th of each month. The Arbitrator therefore notes that each of these salary instalments had already been incurred at the point at which the Claimant terminated the Employment Contract.
75. The Arbitrator notes the Respondent's alternate submissions that the Claimant should not be entitled to payment in respect of the April to June 2020 salary instalments on the basis that "*the competition was terminated months before the termination of the Agreement*" and its submission that, should the Arbitrator consider that the Claimant is entitled to payment in respect of the April to June 2020 salary instalments, the sum of EUR 50,000.00 (paid to the Claimant on 29 June 2020 in respect of his March 2020 salary instalment) be deducted from the amount now being sought by the Claimant.
76. The Claimant acknowledges in paragraph 36(II) of his Request for Arbitration that "*should the Arbitrator be of an opinion that the Club is entitled to any offset, the Coach claims 50% of the April, May and June salary payments, which amounts to EUR 75.000,00 net.*"
77. Paragraph 16 of the BAT Covid-19 Guidelines provides a scale to guide the

assessment of what reduction of a coach's salary is fair and just. The starting point of the scale is as follows:

"The size of the salary reduction will depend on the player's/coach's monthly salary, with the following scale guiding the arbitrators' assessment of the equitable reduction:

First EUR up to EUR 2,500/month

Reduction by 0-20%

Every EUR exceeding EUR 2,500/month

Reduction by 50% as a starting point, but subject to adjustment upwards or downwards (see below)"

78. Applying this formula to the April to June 2020 salary instalments claimed by Claimant provides as follows:

Payment Date	Contractual amount (in EUR)	BAT Covid-19 Guidelines	Result)
15 April 2020	50,000.00	First EUR up to EUR 2,500/month reduction by 0-20%	2,500.00 +
		Every EUR exceeding EUR 2,500/month reduction by 50%	23,750.00
			=
			26,250.00
15 May 2020	50,000.00		26,250.00
15 June 2020	50,000.00		26,250.00
Total	150,000.00	N/A	78,750.00

79. Paragraph 16 of the BAT Covid-19 Guidelines further provides a list of non-exhaustive criteria for the arbitrator to take into account *"when deciding the precise percentage to apply in an individual case"*.

80. The Arbitrator therefore takes EUR 78,750.00 as a starting point for determining the amount of the April to June 2020 salary instalments awardable to the Claimant. The next step is for the Arbitrator to determine whether any relevant criteria apply so as to require an adjustment upwards or downwards, and if so, by how much.
81. First, the Arbitrator must consider the overall salary given that lower salaries should be subjected to a lower reduction than higher salaries. The Claimant's salary is a relatively large salary, the Arbitrator therefore determines that in the circumstances, it is fair and reasonable for the amount to be adjusted downwards by 10% to EUR 70,875.00.
82. Secondly, the Arbitrator must consider the financial situation of the club as a result of the Covid-19 crisis. In its Answer to the Request for Arbitration, the Respondent made various submissions regarding its financial position. In particular, it stated that as a result of *"economic problems suffered by the Club"*, it had been necessary for it to reduce the salaries of all employees, including that of the Claimant. It noted that its losses had *"exceeded losses of most other clubs participating in same competitions for at least two reasons: (a) The Club was the most watched team in all competitions participated, with a record number of spectators; (b) The Club generates significant ticket revenue which participates in the Club's budget in a significant percentage which is very important for the Club and therefore lost over EUR 1m only due to the termination of the season"*. Further evidence regarding the impact of the Covid-19 pandemic was set out in the Affidavit of Mr Ostoja Mijailovic, dated 15 April 2021. In the affidavit, Mr Mijalovic explains that as a result of the interruption to the 2019-2020 season, the Respondent *"suffered a severe financial blow"* and continued that *"[d]ue to the interruption of the season, the Club lost at least one million Euros [...] a significant budget item for our club"*.
83. The Arbitrator accepts that the Respondent's financial position has indeed been significantly affected by the Covid-19 pandemic, however the Arbitrator does not consider that the evidence submitted demonstrates that this goes beyond the impact that other clubs in similar circumstances will have suffered. Accordingly, the evidence

available in the Respondent's submissions as to its financial position does not, of itself warrant further adjustment to the Claimant's April to June 2020 salary instalments.

84. Thirdly, the Arbitrator must consider the individual circumstances of the Claimant and his reasonable living costs and the extent to which he is financially responsible for others. No evidence has been submitted to persuade the Arbitrator that any adjustment should be made to reflect any special circumstances of the Claimant.
85. Fourthly, the Arbitrator must consider whether the Parties have complied with their duty to seek an amicable settlement and have acted in good faith. In this regard, the Arbitrator notes the following:
 - a) the Claimant terminated the Employment Contract without notice on 28 June 2020 following earlier representations made on 15 June 2020 which acknowledged the *"economic hardships the Club is facing due to the COVID-19 pandemic"* and stated that if the Respondent was *"unable to pay the full Outstanding Balance within thirty (30) days from the date hereof, we request that the Club engage with us in good faith discussion to collaborate on a mutually agreeable payment plan"*;
 - b) on 1 July 2020, the Claimant wrote to the Respondent again, now increasing the amount he claimed was owed to him to encompass an additional EUR 550,000.00. The Arbitrator notes that, by this time, the Claimant had entered into an alternative employment contract with FC Bayern Munich Basketball Club;
 - c) on 8 July 2020, the Respondent wrote to the Claimant explaining that it did not intend to make any further payment to the Claimant in respect of his Outstanding Salary Instalments, that it did not intend to make payment in respect of the Claimant's bonus for reaching the EuroCup Top 8 (as the *"competition was interrupted and declared void, causing severe damage for*

the club suffered”) but noting that it would be willing to discuss the Claimant’s request for additional apartment expenses;

- d) on 13 July 2020, the Claimant wrote to the Respondent requesting that the Respondent pay EUR 7,000.00 in apartment-related costs by 1 August 2020, pay EUR 75,000.00 in respect of the April to June 2020 salary instalments in two equal instalments of EUR 37,500.00 on 15 August 2020 and 15 September 2020 and that the Respondent provide appropriate tax documentation in respect sums already paid to the Claimant and any amounts paid to the Claimant going forwards. The Claimant acknowledged that he would waive any rights to the payment of interest and payment in respect of the EuroCup Top 8 bonus;
- e) on 15 July 2020, the Respondent wrote to the Claimant rejecting his proposal but offering to pay him a further EUR 25,000.00 by the end of 2020; and
- f) on 15 July 2020, the Claimant wrote to the Respondent stating that he would accept payment of EUR 50,000.00 in two equal instalments of EUR 25,000.00 on 15 August 2020 and 15 September 2020 and would require appropriate tax documentation in respect sums already paid to him and any amounts paid to him going forwards. The Claimant reiterated that he would waive any rights to the payment of interest and payment in respect of the EuroCup Top 8 bonus.

- 86. In light of the above, the Arbitrator considers that the Parties did attempt – in good faith – to settle the dispute amicably (albeit the Claimant appears to have been more willing to compromise in the context of the settlement discussions).
- 87. In light of the above, the Arbitrator considers that no further adjustment to the April to June 2020 salary instalments is required following application of the formula as set above. Therefore, the Arbitrator finds that the Respondent is liable to pay

EUR 70,875.00 net⁷ to the Claimant in respect of the April to May 2020 salary instalments.

8.3 Outstanding Bonus Payments

88. Clause 3 of the Employment Contract provides that the Claimant is entitled to a bonus payment of EUR 5,000.00 for winning the Serbian Cup and a bonus payment of EUR 15,000.00 for reaching the EuroCup Top 8.
89. The Arbitrator notes that the Respondent submits that it paid the sum of EUR 55,000.00 to the Claimant on 29 June 2020, in respect of both the Claimant's March 2020 salary instalment and the Claimant's bonus for the Respondent having won the Serbian Cup. The Respondent wrote to the Claimant's agent on 29 June 2020 and 8 and 15 July 2020 explaining that the payment of EUR 55,000.00 included the Claimant's bonus payment in respect of the Serbian Cup. This is accepted by the Claimant in his letter dated 1 July 2020 in which he states "*the Serbian Cup bonus payment you reference in the Response Letter was 'magically' paid the day after the Agreement was terminated*". The Arbitrator therefore accepts that payment has already been made to the Claimant in respect of the Serbian Cup bonus and nothing further is owed in respect of it by the Respondent.
90. As explained in paragraph 60 above, the Claimant is entitled to the bonus payment in respect of the Respondent having reached the EuroCup Top 8. The Respondent admits that it has not paid this bonus. Accordingly, the Arbitrator finds that the Respondent is required to pay the Claimant EUR 15,000.00 net in respect of the outstanding bonus.

⁷ The Claimant requested all amounts claimed in the RFA 'net'. This is consistent with clause 4 of the Employment Agreement, which provides that all compensation due to the Claimant under the Employment Contract shall be net of all taxes.

8.4 Rental Amounts and Housing Expenses

91. Clause 6(A) of the Employment Contract provides that the *“Club shall provide, subject to Coach’s approval, a fully furnished apartment for Coach’s exclusive use”* and that the *“Club will pay all rent and utilities on such apartment, including but not limited to gas, electricity, internet, cable or satellite, charges and taxes associated with Coach’s lodging”*.
92. The Claimant submits that he provided the Respondent with a *“physical (paper) copy of the [rental] contract”* and that the Respondent *“paid regularly the rent adding to the monthly salary the amount of EUR 2.000”*. The Claimant has submitted a copy of the rental contract in these proceedings. The Respondent submitted evidence that it added an amount of EUR 2,000.00 to certain of the Claimant’s salary instalments. In response to the Second Procedural Order, the Claimant accepted that the Respondent has paid rental amounts in respect of November 2019, December 2019, January 2020, February 2020 and March 2020 and that he was able *“to terminate the contract, with a 30 days notice in advance, before its natural ending on 1 July 2020. Meaning I had to pay rent until 1 August 2020”*. This means that the Claimant was required to pay 9 (as opposed to 10) months’ rent, of which the Respondent has already paid 5 months. The Arbitrator therefore finds that the Respondent is liable to pay to the Claimant four outstanding rental amounts, totalling EUR 8,000.00 net.
93. The Claimant provided invoices in relation to some of the additional apartment expenses he claims. The Respondent’s submits that these were not ‘proper’ invoices and that Atrium Consulting and Mr Bojan Bukmira – who were named in the invoices – are unknown to the Respondent. In response, the Claimant explained under clause 10 of the Rental Agreement he was *“obligated to pay running costs monthly basis. The invoice of such costs was issued on the name of Mr Bojan Bukumura as the owner of the property. However, it is clear from the wording of the rental Agreement that any running costs... shall be made in cash”*. The Arbitrator accepts that the Claimant was entitled to living expenses in addition to his rent, as the Employment Contract provides for housing expenses over and above rent. However, in

circumstances where the Claimant selected his own accommodation and was directly responsible for making payment in respect of the running costs of that accommodation, the Arbitrator finds that it is reasonable for the Respondent to require the Claimant to provide invoices in respect of all of the costs incurred before being required to make payment in respect of them. The Arbitrator notes that the Claimant has only been able to identify two invoices relating to the expenses now being claimed and that the Claimant is now seeking to use the amounts in those invoices as a basis on which it would be *“reasonable to assume that the running costs on an 8 month average amount to EUR 1,840,32”*. The Arbitrator rejects this approach and finds that the Claimant is entitled only to additional housing expenses which he can prove he incurred, for example by providing a copy of the relevant invoices. The Claimant provided two invoices, each for more than EUR 200.00, although the Claimant only claims EUR 200.00 in respect of each of them. Therefore, the Arbitrator finds that the Respondent must pay the Claimant EUR 400.00 net in respect of additional housing expenses.

8.5 Tax Certificate

94. Clause 4 of the Employment Contract provides that *“At the end of each season during the Term and prior to Coach’s departure from Serbia, Club will provide Coach with a certified tax receipt that all applicable taxes have been paid on Coach’s behalf. The Club will make all arrangements necessary within the Serbian banking system to allow the Coach to transfer funds to a bank account in any other country designated by the Coach at Club’s sole cost and expense.”*
95. The Respondent has argued that the BAT does not have jurisdiction to determine the Claimant’s claim in respect of the tax certificate. However, as explained at paragraph 37 above, the Arbitrator is competent to determine this claim. Further, the Arbitrator rejects as irrelevant the Respondent’s submission that it has no responsibility to pay any taxes in respect of the Claimant’s annual income in Italy, a claim that has not been made by the Claimant in these proceedings.

96. The Arbitrator considers the Claimant's submissions that he is currently unable to transfer money from his Serbian bank account credible and accepts the evidence submitted by the Claimant of his email exchanges with Addiko Bank in which Addiko Bank staff informed the Claimant, on 15 April 2021 that *"In order to transfer the funds from the account, the client has to submit a tax certificate issued by the competent tax authority of the Republic of Serbia certifying that all tax obligations due to the Republic of Serbia have been settled [...] There is no such certificate among the documents presented to me"*. The Arbitrator also notes the Legal Opinion of Joksovic, Stojanovic & Partners submitted by the Claimant in support of his position which states *"only official tax certificate on paid taxes issued by the Tax Authority could be adequate legal basis for Addiko Bank to proceed with transfer of funds from nonresident account of the Coach in Serbia to foreign account of the Coach"*.
97. Accordingly, the Arbitrator finds that the Respondent must provide the Claimant with a certified tax receipt that all applicable taxes have been paid on his behalf.

8.6 Interest

98. The Claimant has claimed "all applicable interests" on sums due under the Agreement, at a rate of 5% per annum from 17 December 2020 onwards. He has calculated this interest to be payable to him in the amounts of either EUR 4,090.41 (in the case of him being awarded EUR 711,600.00) or EUR 3,659.29 (in the case of him being awarded EUR 636,600.00). However, the Arbitrator takes this to be the amount of interest sought up until the date of filing of the Request for Arbitration, as needed to be indicated pursuant to Article 9.1 of the BAT Rules, rather than the overall amount of interest sought, not least because the Claimant also claims interest from *"the day of filing of this Request until the full payment is made"*.
99. The Employment Contract does not provide for the payment of interest. However, default interest is a generally accepted principle which is embodied in most legal systems. Indeed, payment of interest is often a customary and necessary

compensation for late payment and, according to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. The Arbitrator further considers, in line with BAT jurisprudence, that 5% per annum is a reasonable rate of interest.

100. All of the Outstanding Salary Instalments had fallen due under the Employment Contract by the date from which the Claimant claims interest (17 December 2020). Therefore, the Arbitrator finds the Claimant is entitled to interest on the Outstanding Salary Instalments at a rate of 5% per annum from 17 December 2020 until payment.
101. Similarly, the Claimant is entitled to interest on the bonus for reaching the top 8 of the Eurocup. The BAT Covid-19 Guidelines provide that the maturity of bonuses which fell due before the Lockdown Period shall be deferred to the beginning of the 2020-2021 season in the relevant domestic championship. The 2020-2021 season of the ABA League began on 2 October 2020⁸ and so the bonus had fallen due by 17 December 2020. Therefore, the Claimant is entitled to interest on the bonus at a rate of 5% per annum from 17 December 2020 until payment.
102. The Employment Contract does not specify the date on which the Respondent is required to make rental payments to the Claimant. However, all of the rental payments claimed were clearly due before 17 December 2020 and so the Arbitrator finds that the Claimant is entitled to interest on the rental payments at a rate of 5% per annum from 17 December 2020 until payment.
103. The Employment Contract does not specify the date on which the Respondent is required to reimburse the additional housing expenses to the Claimant. Furthermore, based on the evidence presented to the Arbitrator, it appears that the Respondent was provided with invoices relating to the additional housing expenses for the first time in these proceedings, together with the Request for Arbitration. As such, the

⁸ https://www.eurobasket.com/ABA-League/basketball_2020-2021.aspx

Arbitrator considers it fair that interest on the additional housing expenses should run from the date of the Request for Arbitration (29 January 2020) up to the date of payment.

9. Costs

104. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the award or communicated to the Parties separately. Furthermore, Article 17.3 of the BAT Rules provides that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
105. On 18 August 2021, considering that, pursuant to Article 17.2 of the BAT Rules, “*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*”, and 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*”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised, the BAT President determined the arbitration costs in the present matter at EUR 11,250.00.
106. Article 17.3 of the BAT Rules provides that the award shall determine which party shall bear the arbitration costs and in which proportion and 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.*”
107. The Claimant has been successful in respect of certain aspects of his claim, but failed entirely in his claim for salaries relating to the 2020-2021 season, which formed the

overwhelming proportion of his claims. The Arbitrator considers that this is the starting point for determining the proportion of the arbitration costs to be borne by the Respondent. The Arbitrator notes that the Respondent failed to pay its share of the advance on costs and in particular that it rejected a settlement offer from the Claimant for a smaller amount than what has now been awarded to the Claimant in these proceedings (albeit that was an offer that involved agency fees which are not part of these proceedings). Had the Respondent accepted the settlement offer, it would not have had to pay as much money to the Claimant as is being awarded and these proceedings would not have been necessary. In the circumstances of the case, the Arbitrator considers it is fair and in application of Article 17.3 of the BAT Rules, that the costs of the arbitration be borne 90% by the Respondent and 10% by the Claimant.

108. The Claimant submitted an account of costs which stated as follows:

"The Claimant legal fees and expenses related to the proceedings in the above-cited case amount to EUR 7.338,09. To the latter amount the amount of non-reimbursable handling fee and advance on costs (paid entirely by the Claimant) should be added."

109. The Claimant also submitted an additional invoice in the sum of EUR 750.00 in respect of the Legal Opinion of Joksovic, Stojanovic & Partners.
110. In light of the number, length and complexity of the submissions made by the parties, the Arbitrator considers the Claimant's claim of EUR 7,338.09 plus the additional invoice in the sum of EUR 750.00 (amounting in total to EUR 8,088.09) and EUR 7,000.00 for the non-reimbursable handling fee to be excessive. In light of the circumstances of this case, the Arbitrator considers that a fair contribution towards the Claimants' legal fees and expenses (including the non-reimbursable handling fee) would be EUR 11,000.00.
111. Therefore, the Arbitrator decides:

- a) the Respondent shall pay the Claimant EUR 10,125.00, as reimbursement of

arbitration costs advanced by the Claimant;

- b) the Respondent shall pay to the Claimant EUR 11,000.00, as a contribution towards the Claimant's legal fees; and
- c) the BAT shall reimburse EUR 750.00 to the Claimant, being the difference between the arbitration costs advanced by him and the arbitration costs fixed by the BAT President.

9. AWARD

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

- 1. Basketball Club Partizan shall pay to Mr. Andrea Trinchieri EUR 70,875.00 net in respect of unpaid salary, together with interest at a rate of 5% per annum from 17 December 2020 until the date of payment.**
- 2. Basketball Club Partizan shall pay to Mr. Andrea Trinchieri EUR 15,000.00 net in respect of unpaid bonus, together with interest at a rate of 5% per annum from 17 December 2020 until the date of payment.**
- 3. Basketball Club Partizan shall pay to Mr. Andrea Trinchieri EUR 8,000.00 net in respect of unpaid rental payments, together with interest at a rate of 5% per annum 17 December 2020 until the date of payment.**
- 4. Basketball Club Partizan shall pay to Mr. Andrea Trinchieri EUR 400.00 net in respect of unpaid housing expenses, together with interest at a rate of 5% per annum from 29 January 2021 until the date of payment.**
- 5. Basketball Club Partizan shall provide Mr. Andrea Trinchieri with a certified tax receipt indicating that all applicable taxes have been paid on Mr. Andrea Trinchieri's behalf.**
- 6. Basketball Club Partizan shall pay Mr. Andrea Trinchieri the amount of EUR 10,125.00 as reimbursement for his arbitration costs.**
- 7. Basketball Club Partizan shall pay Mr. Andrea Trinchieri the amount of EUR 11,000.00 as a contribution towards his legal fees and expenses.**
- 8. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 26 August 2021

Rhodri Thomas
(Arbitrator)