ARBITRAL AWARD

(BAT 1560/20)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Rhodri Thomas

in the arbitration proceedings between

Mr. Artsiom Parakhouski

- Claimant 1 -

UAB "East Players"
Fabijoniskiu g. 5C-1031, Vilnius, Lithuania

- Claimant 2 -

TCA, LLC
7260 W Azure, Las Vegas, NV 89130, USA

- Claimant 3 -

all represented by Mr. Antanas Paulauskas, attorney at law,

vs.

Košarkaški klub Partizan Beograd
Humska 1, 11000 Belgrade, Serbia

- Respondent -

represented by Mr. Ilija Dražic, attorney at law,

1. The Parties

1.1 The Claimants

1. Mr. Artsiom Parakhouski (hereinafter "Claimant 1") is a professional basketball player from Belarus.

2. UAB "East Players" (hereinafter "Claimant 2") is a basketball agency from Lithuania that represented Claimant 1 in his dealings with the Respondent.

3. TCA, LLC (hereinafter "Claimant 3") is a basketball agency from the USA that also represented Claimant 1 in his dealings with the Respondent.

1.2 The Respondent

4. Košarkaški klub Partizan Beograd (hereinafter the "Respondent") is a professional basketball club in Belgrade, Serbia, that competes in the international ABA League with other teams from the Adriatic region.

2. The Arbitrator

5. On 23 June 2020, Prof. Ulrich Haas, President of the Basketball Arbitral Tribunal (hereinafter the "BAT"), appointed Mr. Rhodri Thomas as arbitrator (hereinafter the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 December 2019 (hereinafter the "BAT Rules").

6. None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

7. The relevant facts and allegations presented in the Parties' written submissions and evidence are summarised below. Additional facts and allegations are set out, where relevant, in connection with the legal discussion that follows.

8. Although the Arbitrator has considered all the facts, allegations and evidence submitted by the Parties in the present proceedings, he refers in this Award only to those necessary to explain its reasoning.

3.1.1 The Contract

9. On 5 August 2019, Claimant 1 and the Respondent entered into a player contract in relation to the 2019-2020 and 2020-2021 seasons (hereinafter the "Contract"). Claimant 2 and Claimant 3 are not named parties to the Contract, although the Contract was countersigned on their behalf by Mr. Šarūnas Broga (Claimant 2) and Mr. Dan Tobin (Claimant 3). The Contract contains, among others, the following provisions:

> "***3. Club's Rights and Duties.***
>
> […]
>
> *3.2. The Club shall:*
>
> […]
>
> *3.2.6. fulfil financial obligations provided for in this Agreement (its annexes);*
>
> […]
>
> ***4. Terms of Payment.***
>
> *4.1. For the sports activities of the Player, the Club shall pay remuneration in the amount and in accordance with the payment procedure and within terms* [sic] *indicated in Annex 1 hereto.*
>
> […]

8. Termination of the Agreement.

8.1. The Agreement may be terminated in the following circumstances:

8.1.1. by a mutual agreement between the Parties;

[…]

8.2. The Club has the right to terminate the Agreement unilaterally in accordance with Table 5 of Annex 1 hereto.

[…]

11. Agency / Actual representative.

11.1. The Player confirms and the Club acknowledeges that UAB "East Players" (agent Šarūnas Broga (LTU), FIBA licence No. 2007019356) and "The Capital Associates" (agent Daniel Tobin, FIBA license no 2007018972) are his exclusive representatives (hereinafter referred to as "Player's agents") concluding contracts with professional basketball organizations, including the Club negotiating this Agreement.

11.2. Whereas, East Players (Šarūnas Broga) and The Capital Associates (Daniel Tobin) assisted the Club in locating and contracting with the Player, the Club shall, in addition to the compensation and other payments payable to the Player hereunder, pay commission fee pay commission fee [sic] *of 28 750 USD (twenty eight thousand seven hundred fifty US dollars) to the Player's agents according to the two equal invoices issued by the Player's agents to the Club not later than till the 15th September 2019 and 28 750 USD (twenty eight thousand seven hundred fifty US dollars) to the Player's agents according to the two equal invoices issued by the Player's agents to the Club not later than till the 15th January 2020, also 27 500 USD (twenty seven thousand five hundred US dollars) to the Player's agents according to the two equal invoices issued by the Player's agents to the Club not later than till the 15th September 2020 and 27 500 USD (twenty seven thousand five hundred US dollars) to the Player's agents according to the two equal invoices issued by the Player's agents to the Club not later than till the 15th January 2021. In case of failure by the Club to timely pay any part of fee to any of the Player's agents the provisions of Articles 4.5 and 8.1.2 above shall apply. The agent fee has also to be fully paid in case of early termination (due to whatever ground) of this Agreement. In case of unilateral termination of this Agreement by the Club or by the Player after 2019-2020 season the Club will be released from the following Agents Fee Payments for the season 2020-2021 under this Agreement.*

[…]

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

parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.

[…]

ANNEX 1 TO AGREEMENT ON SPORTS ACTIVITIES NO. 20190805-1

[…]

3. Conditions of payment for sports activities and bonuses

Season	***Amount***	***Payment schedule***
2019-2020	*575.000 USD (Five hundred seventy five thousand US dollars)* *The Club at its own expense on behalf of the Player pays all taxes applicable under Serbian law.*	*57 500 USD by 2019-09-15* *57 500 USD by 2019-10-15* *57 500 USD by 2019-11-15* *57 500 USD by 2019-12-15* *57 500 USD by 2020-01-15* *57 500 USD by 2020-02-15* *57 500 USD by 2020-03-15* *57 500 USD by 2020-04-15* *57 500 USD by 2020-05-15* *57 500 USD by 2020-06-15*
2020-2021	*550.000 USD (Five hundred fifty thousand US dollars)* *The Club at its own expense on behalf of the Player pays all taxes applicable under Serbian law.*	*55 000 USD by 2020-09-15* *55 000 USD by 2020-10-15* *55 000 USD by 2020-11-15* *55 000 USD by 2020-12-15* *55 000 USD by 2021-01-15* *55 000 USD by 2021-02-15* *55 000 USD by 2021-03-15* *55 000 USD by 2021-04-15* *55 000 USD by 2021-05-15* *55 000 USD by 2021-06-15*

[…]

5. Right of unilateral termination by the Club

No.	***Season after the end of which the Club shall have the right of unilateral termination***	***Date until which the Club should inform the Player about unilateral termination of the Agreement***	***Termination conditions***

1.	*2019-2020*	*01-07-2020*	*Failure by the Club to provide timely notice shall result in the Agreement remaining in full force and effect.* *In case of termination Club has to pay the amount of 50 000 USD (fifty thousand US dollars) (plus VAT tax if applicable) to the Player as compensation not later than 01-07-2020 and to send by e-mail copy of document, proving that such payment was made to the Player.*"

3.1.2 The Termination Agreement

10. Following the execution of the Contract, the relationship between Claimant 1 and the Respondent quickly deteriorated. The Respondent alleges that Claimant 1 arrived at the club out of shape. While this is not denied, Claimant 1 and his representatives clearly thought that he was not given a fair opportunity by the Respondent. Only a few months into the 2019-2020 season, the Parties decided to terminate the Contract by mutual consent in November 2019.

11. There is a dispute as to which Party first requested the Contract to be terminated, although not much turns on this. For the purposes of this arbitration, it is sufficient to note that all Parties considered it to be in their best interest to move on.

12. At this point, the Respondent had paid Claimant 1 his first two salary instalments under the Contract in the amount of USD 57,500.00 each. The third instalment had become due on 15 November 2019. No payments had yet been made to Claimant 2 or Claimant 3. The first instalment of the agent fees of USD 28,750.00 had become due on 15 September 2019.

13. On 20 November 2019, the Parties entered into an agreement to terminate the Contract early (hereinafter the "Termination Agreement"). The Termination Agreement contains, among others, the following provisions:

> *"The Parties entered into an Agreement for the seasons 2019/20 and 2020/21 on August 5, 2019.*
>
> *As of the date of this early termination the Club owes the Player the sum of $460,000.00 USD NET for the balance due for the 2019/20 season as agreed upon in the contract of August 5, 2019 between the Parties and an additional $ 50,000.00 USD NET to buy the Player out of the season 2020/21 and owes the Agents the sum of $57,500.00 USD NET for the 2019/20 season.*
>
> *In lieu of the above sum of $510,000.00 the Club shall pay to the Player the total amount of $144,000.00 USD NET (One Hundred and Forty Four Thousand Dollars NET) to settle the Agreement of August 5, 2019. The payments shall be as follows:*
>
> | | |
> |---|---|
> | *Within seven business days of the signing of this Agreement:* | *$57,750.00 USD NET* |
> | *December 15, 2019:* | *$28,750.00 USD NET* |
> | *January 15, 2020:* | *$28,750.00 USD NET* |
> | *February 15, 2020:* | *$28,750.00 USD NET* |
>
> […]
>
> *In lieu of the above sum of $57,500.00 USD the Club will pay to the Agents the following amounts:*
>
> *$28,750.00 USD NET to Mr. Sarunas Broga of UAB "East Players" FIBA license 2007019356 on or before March 1, 2020 to the following bank account:*
>
> […]
>
> *$20,000.00 USD NET to Mr. Daniel Tobin of TCA "The Capital Associates" FIBA license 2007018972 on or before March 1, 2020 to the following bank account:*
>
> […]
>
> *In the event that any of the scheduled payments to either the Player or the Agents is delayed for more than 7 (seven) days the Parties agree the entire season contract is*

due and the Player and Agents may seek to recover the entire amounts.

Upon receipt of the total amount of the above scheduled payments the Player and his Agents will relinquish further claim to the original agreement and the Club agrees to give the Player FIBA letter of clearance upon the signing of this resolution. Should the Club sign the agreement and fail to wire the money to the Player or the Agents specifically within the time ranges prescribed above then this resolution to the agreement is considered null and void and the Club would then immediately owe the Player and his Agents their full compensation from the August 5, 2019 agreement and the Player would still be free to sign with any other Club in the world. The Club paying the Player, but not the Agents, or vice versa, will be treated by this settlement as though they paid neither party and the Player, by example, would have the right to recover the entire amount of the August 5, 2019 Agreement if the Club paid him but not the Agents.

[…]

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

3.1.3 Factual background to the dispute

14. The Termination Agreement provided that at the date of its execution:

a) the Respondent owed Claimant 1 the sum of USD 510,000.00 net, comprising (i) outstanding salary instalments under the Contract of USD 460,000.00 net, and (ii) a buy-out fee of USD 50,000.00 net (hereinafter the "C1 Full Contract Sum"); and

b) the Respondent owed Claimant 2 and Claimant 3 the sum of USD 57,500.00 net in outstanding agent fees under the Contract (hereinafter the "C2/C3 Full Contract Sum", and together with the "C1 Full Contract Sum", the "Full Contract Sums").

15. The Parties agreed that, "*in lieu of*" the Full Contract Sums, the Respondent would make the following payments to the Claimants under the Termination Agreement:

    a) USD 144,000.00 to Claimant 1, in four instalments between 29 November 2019 and 15 February 2020 (hereinafter the "C1 Termination Fee");

    b) USD 28,750.00 net to Claimant 2 by 1 March 2020 (hereinafter the "C2 Termination Fee"); and

    c) USD 20,000.00 net to Claimant 3 by 1 March 2020 (hereinafter the "C3 Termination Fee", and together with the C1 Termination Fee and the C2 Termination Fee, the "Termination Fees").

16. The Termination Agreement provided the Respondent with a grace period of "*7 (seven) days*" to pay the Termination Fees, failing which "*the Parties agree the entire season contract is due and the Player and Agents may seek to recover the entire amounts*". The Respondent does not dispute that "*the entire season contract*" and "*the entire amounts*" refer to the Full Contract Sums.

17. The Parties disagree, however, on the length of the grace period. The Claimants contend that the grace period referred to calendar days; the Respondent submits that it meant business days. In light of the findings made by the Arbitrator, as set out below, the relevance of this distinction is negligible.

18. The Respondent paid the first instalment of the C1 Termination Fee on 6 December 2019, i.e. within the grace period of seven days on either case.

19. The Respondent paid the second instalment of the C1 Termination Fee on 27 December 2019. In the Request for Arbitration, the Claimants alleged that this instalment had been paid after the expiry of the grace period. They subsequently accepted that the payment was made "*within the grace period of 7 (seven) days taking into consideration the Christmas holidays that fell before its payment*".

20. On 11 January 2020, Claimant 1 signed a new contract for the remainder of the 2019-2020 season with SIG Strasbourg SASP, a professional basketball club in France that competes in the domestic LNB Pro A League. Under the terms of the Strasbourg Contract, Claimant 1 was entitled to receive "***a net monthly salary, before Income Taxes Withholding, of 18.200 €***" (emphasis as in the original).

21. The third instalment of the C1 Termination Fee became due on 15 January 2020.

22. On 21 January 2020, Mr. Tobin sent a reminder to the Respondent to make the payment "*within the seven day grace period*". The Respondent replied on the same day that "*these days we will make the payment*".

23. Mr. Tobin sent another reminder to the Respondent on 23 January 2020 noting that the expiry of the grace period on 22 January 2020 meant that Claimant 1 was entitled "*to collect his entire contract*" under the terms of the Termination Agreement, i.e. the C1 Full Contract Sum. Mr. Tobin further noted that "[a]*cceptance of the Club's payment due January 15 beyond the seven day grace period will not constitute a waiver of the player or agent's right to pursue the entire contract should your club not make future payments to the player or agents, within the agreed upon seven day period*". The Respondent replied on the same day that it would pay the outstanding instalment on 24 January 2020. The payment was eventually made on 28 January 2020, i.e. 4 days late on the Respondent's case and six days late on the Claimants' case. Notwithstanding the threat to collect the C1 Full Contract Sum in light of the late payment, no further actions were taken by Claimant 1 at this point.

24. The fourth and final instalment of the C1 Termination Fee of USD 28,750.00 became due on 15 February 2020. The instalment represented 20% of the C1 Termination Fee.

25. On 25 February 2020, Mr. Tobin sent an email to the Respondent noting that the grace period for the fourth instalment had expired, while reserving the rights of the Claimants in relation to the late payment in substantially the same terms as his previous email. Mr. Tobin further reminded the Respondent that the C2 Termination Fee and the C3

Termination Fee had to be paid, at the latest, by 8 March 2020. He noted that if the Claimants had not received the outstanding Termination Fees by that date, they were entitled "*to recover the entire amounts due from* [*the Contract*] *regardless of whether one party (Player or Agent) has been paid the full amount of the settlement*". By way of example, Mr. Tobin stated that "*paying the Player his full amount, but not the agents in the prescribed time, would allow the Player to recover the full $460,000 due at which point the parties entered into* [*the Termination Agreement*] *and the agents their fully contracted amounts as well*". It is unclear why Mr. Tobin only referred to the recovery of USD 460,000.00, rather than the C1 Full Contract Sum of USD 510,000.00.

26. The Respondent did not respond to this email.

27. On 29 February 2020, the World Health Organisation published guidance to its member states on the quarantine of individuals in order to contain the spread of COVID-19. The Respondent contends that this is when the COVID-19 pandemic "*factually started*", although no evidence has been provided that this event had any impact on the operations of the Respondent.

28. On 4 March 2020, Mr. Tobin sent a WhatsApp message to Mr. Nikola Lončar, one of his contacts at the Respondent, requesting payment of the outstanding Termination Fees "*this week*". Mr. Lončar did not respond.

29. On 6 March 2020, Serbia reported its first COVID-19 case. The Respondent contends that this is the date when "*the covid-19* [sic] *pandemic* […] *began in Serbia*".

30. On 9 March 2020, Mr. Tobin sent a follow-up message to Mr. Lončar noting that "*there are supposed to be three different wires this morning* […] *Artsiom and the two agents*". Mr. Lončar acknowledged receipt of the message on 10 March 2020.

31. On the same day, 10 March 2020, counsel for the Claimants sent an email to the Respondent noting that the Respondent had breached its payment obligations under

the Termination Agreement. The Respondent was therefore requested to pay the following amounts to the Claimants by 17 March 2020:

a) USD 366,000.00 net to Claimant 1, i.e. the C1 Full Contract Sum minus the C1 Termination Fee (including, it would appear, the final instalment of the C1 Termination Fee that remained outstanding at this date);

b) USD 28,750.00 to Claimant 2, i.e. the C2 Full Contract Sum; and

c) USD 28,750.00 to Claimant 3, i.e. the C3 Full Contract Sum.

32. On 12 March 2020, the World Health Organisation characterised COVID-19 as a pandemic.

33. One day later, on 13 March 2020, the LNB Pro A League was suspended. By this point, Claimant 1 had received salary payments of EUR 46,395.66 under the Strasbourg Contract, which he submits amounts to USD 50,885.75 (hereinafter the "Strasbourg Salary"). Claimant 1 did not receive any further payments.

34. The ABA League was suspended on 16 March 2020.

35. During this period, Mr. Tobin sent a number of further WhatsApp messages to Mr. Lončar requesting to speak. Mr. Lončar replied on 23 March 2020 that he would try to call Mr. Tobin the next day.

36. On 5 April 2020, Mr. Tobin informed the Respondent by e-mail that the Claimants had still not received the outstanding Termination Fees and had therefore instructed counsel to recover the "*full*" amounts due under the Termination Agreement.

37. On 23 April 2020, counsel for the Claimants sent a letter to the Respondent noting that the Respondent had "*missed*" the due dates in relation to: (i) the final instalment of the C1 Termination Fee; (ii) the C2 Termination Fee; and (iii) the C3 Termination Fee. The letter noted that the Respondent had therefore become liable to pay the Claimants "*the*

whole salaries and fees in accordance with the Contract" (emphasis as in the original), i.e. the Full Contract Sums. The letter continued that the Claimants "*might not seek to pursue their claims*", while reserving their right to do so, if the Respondent would make the following payments by 30 April 2020:

a) USD 57,500.00 net to Claimant 1, which appears to have been calculated on the basis of the outstanding instalment of the C1 Termination Fee of USD 28,750.00 plus an additional amount of USD 28,750.00;

b) USD 28,750.00 to Claimant 2, which is the same amount as the outstanding C2 Termination Fee or the C2 Full Contract Sum; and

c) USD 28,750.00 to Claimant 3, which is the same amount as the C3 Full Contract Sum.

38. On 30 April 2020, the Respondent paid Claimant 1 the final instalment of the C1 Termination Fee of USD 28,750.00. No further payments were made to the Claimants.

3.2 The Proceedings before the BAT

39. On 27 May 2020, counsel for the Claimants filed a Request for Arbitration in accordance with the BAT Rules, following payment of the non-reimbursable handling fee of EUR 5,000.00, which was received by the BAT on 21 May 2020, 22 May 2020 and 26 May 2020, respectively.

40. By letter dated 24 June 2020, the BAT Secretariat fixed a deadline of 15 July 2020 to file an Answer to the Request for Arbitration. By the same letter, and with a deadline of 6 July 2020 for payment, the following amounts were fixed as the Advance on Costs:

"*Claimant 1 (Mr. Parakhouski)*	*EUR 5,000.00*
Claimant 2 (UAB East Players)	*EUR 1,000.00*
Claimant 3 (TCA LLC)	*EUR 1,000.00*

Respondent (KK Partizan Belgrade) *EUR 7,000.00*"

41. The BAT received the Claimants' share of the advance on costs on 2 July 2020, 6 July 2020 and 9 July 2020, respectively. The Respondent did not pay its share.

42. On 15 July 2020, the Respondent filed its Answer.

43. On 16 July 2020, the BAT Secretariat notified the Parties that the Respondent had failed to pay its share of the advance on costs. The BAT Secretariat therefore invited the Claimants to pay the Respondent's share under Article 9.3 of the BAT Arbitration Rules and fixed a deadline of 27 July 2020 for payment.

44. The Claimants accordingly paid the Respondents' share of the advance on costs on 22 July 2020 and 24 July 2020, respectively.

45. By Procedural Order dated 13 August 2020, the Arbitrator requested the Parties to provide further information by 27 August 2020 (hereinafter the "First Procedural Order").

46. The Respondent responded to the First Procedural Order on 14 August 2020. The Claimants responded to the First Procedural Order on 27 August 2020.

47. By Procedural Order dated 15 September 2020, the Arbitrator declared the exchange of submissions complete, and requested that the Parties submit detailed accounts of their costs by 22 September 2020.

48. On 16 September 2020, the Respondent submitted the following account of its costs:

> "· *15 July 2020 - the Answer (jointly with preparation of all proofs, review of special regulations and jurisprudence, review of statement of claim and attached documentation, Power of Attorney) [EUR 2,500]*
>
> · *14 August 2020 - brief submission by request of the BAT [EUR 50]*
>
> **TOTAL: EUR 2,550.00**" (Emphasis as in the original.)

49. On 22 September 2020, the Claimants submitted the following account of their costs:

"*1. Handling fee and advance on costs:*

Claimant which incurred the costs	***Details (purpose) of costs incurred***	***Amount of incurred costs***
Claimant 1	*Handling fee*	*EUR 3,000.00*
Claimant 2	*Handling fee*	*EUR 1,000.00*
Claimant 3	*Handling fee*	*EUR 1,000.00*
Claimant 1	*Advance on costs (on behalf of both the Claimant 1 and the respondent)*	*EUR 10,000.00*
Claimant 2	*Advance on costs (on behalf of both the Claimant II and the respondent)*	*EUR 2,000.00*
Claimant 3	*Advance on costs (on behalf of both the Claimant III and the respondent)*	*EUR 2,005.00*
Total amount of costs incurred by the Claimant 1:		***EUR 13,000.00 (thirteen thousand euros)***
Total amount of costs incurred by the Claimant 2:		***EUR 3,000.00 (three thousand euros)***
Total amount of costs incurred by the Claimant 3:		***EUR 3,005.00 (three thousand five euros)***

2. Costs of the legal services:

Claimant who incurred costs	***Details (purpose) of costs incurred***	***Amount of incurred costs***
Claimant 1	*Preparation of the Request for Arbitration, provision of other services relating to the*	*EUR 2,000.00*
Claimant 2		*EUR 1,000.00*

Claimant 3	*submission of the Request for Arbitration to the BAT*	*EUR 1,000.00*
Claimant 1	*Analysis of the respondent's Answer and preparation of the reply to it*	*EUR 2,000.00*
Claimant 2		*EUR 500.00*
Claimant 3		*EUR 500.00*
Claimant 1	*Preparation of the detailed account of costs*	*EUR 100.00*
Claimant 2		*EUR 100.00*
Claimant 3		*EUR 100.00*
Total amount of costs incurred by the Claimant 1:		***EUR 4,100.00 (four thousand one hundred euros)***
Total amount of costs incurred by the Claimant 2:		***EUR 1,600.00 (one thousand six hundred euros)***
Total amount of costs incurred by the Claimant 3:		***EUR 1,600.00 (one thousand six hundred euros)***"

50. Since none of the Parties filed an application for a hearing, and the Arbitrator did not deem a hearing necessary, 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 Position of the Parties

4.1 Claimant 1

51. Claimant 1 accepts that the Respondent paid the C1 Termination Fee in full by 30 April 2020. However, Claimant 1 submits that: (i) the payment of the third and fourth instalments of the C1 Termination Fee was delayed by more than seven (calendar)

days; and (ii) the C2 Termination Fee and the C3 Termination Fee remain outstanding to date. Claimant 1 contends that (i) and/or (ii) entitle him to recover the C1 Full Contract Sum under the terms of the Termination Agreement, in the amount of USD 510,000.00.

52. Claimant 1 accepts that this amount should be reduced to reflect the receipt of both the C1 Termination Fee and the Strasbourg Salary.

53. Claimant 1 is therefore claiming a total amount of USD 315,114.25, i.e. USD 510,000.00 minus USD 144,000.00 minus USD 50,885.75. Claimant 1 also claims interest at a rate of 5% per annum from: (i) 23 December 2019 until the filing of the Request for Arbitration, totalling USD 6,733.95; and (ii) the filing of the Request for Arbitration until payment.

54. Claimant 1 submitted the following request for relief:

> "*- To order the Respondent (Košarkaški klub Partizan Beograd) to pay the Claimant 1 (Artsiom Parakhouski) the amount of USD 315,114.25 (three hundred and fifteen thousand one hundred and fourteen US dollars twenty-five cents) net of Serbian social charges and taxes (employer and employee) plus interest at rate of 5 % per annum on this amount starting from submission of the present Request for Arbitration until its payment;*
>
> *- To order the Respondent (Košarkaški klub Partizan Beograd) to pay the Claimant 1 (Artsiom Parakhouski) interest in amount of USD 6,733.95 (six thousand seven hundred and thirty-three US dollars ninety-five cents);*"

55. The Arbitrator notes that the interest calculation appears to have been prepared on the basis that the second instalment of the C1 Termination Fee, which fell due on 15 December 2019 and was paid on 27 December 2019, was delayed by more than seven (calendar) days. As explained below, the interest calculation for Claimant 2 and Claimant 3 appears to have been prepared on the same basis. The Arbitrator notes that the Claimants subsequently accepted that the second instalment of the C1 Termination Fee was not paid late, but maintained their original request for relief.

4.2 Claimant 2

56. For the same reasons as those provided by Claimant 1, Claimant 2 submits that it is entitled to recover the C2 Full Contract Sum in the amount of USD 28,750.00, plus interest at 5% per annum from: (i) 23 December 2019 until the filing of the Request for Arbitration, totalling USD 346.58, and (ii) the filing of the Request for Arbitration until payment.

57. Claimant 2 accordingly submitted the following request for relief:

> "*- To order the Respondent (Košarkaški klub Partizan Beograd) to pay the Claimant 2 (UAB "East Players") the outstanding commission fee of USD 28,750.00 (twenty-eight thousand seven hundred and fifty US dollars) plus interest at rate of 5 % per annum on this amount starting from submission of the present Request for Arbitration until its payment;*
>
> *- To order the Respondent (Košarkaški klub Partizan Beograd) to pay the Claimant 2 (UAB "East Players") interest in amount of USD 346,58 (three hundred and forty-six US dollars fifty-eight cents);*"

4.3 Claimant 3

58. For the same reasons as those provided by Claimant 1 and Claimant 2, Claimant 3 submits that it is entitled to recover the C3 Full Contract Sum in the amount of USD 28,750.00, plus interest at 5% per annum from: (i) 23 December 2019 until the filing of the Request for Arbitration, totalling USD 346.58; and (ii) the filing of the Request for Arbitration until payment.

59. Claimant 3 accordingly submitted the following request for relief:

> "*- To order the Respondent (Košarkaški klub Partizan Beograd) to pay the Claimant 3 (TCA, LLC) the outstanding commission fee of USD 28,750.00 (twenty-eight thousand seven hundred and fifty US dollars) plus interest at rate of 5 % per annum on this amount starting from submission of the present Request for Arbitration until its payment;*
>
> *- To order the Respondent (Košarkaški klub Partizan Beograd) to pay the Claimant 3 (TCA, LLC) interest in amount of USD 346,58 (three hundred and forty-six US dollars fifty-eight cents);*"

4.4 All Claimants

60. As to costs, the Claimants submitted the following request for relief:

> "*- To order the Respondent (Košarkaški klub Partizan Beograd) to pay legal fees and other expenses incurred by the Claimants in connection with the proceedings of arbitration.*"

4.5 The Respondent

4.5.1 The C1 Full Contract Sum

61. The Respondent accepts that the third and fourth instalments of the C1 Termination Fee were paid after the expiry of the grace period under the Termination Agreement, regardless of whether the grace period refers to calendar days or business days. (Indeed, the Respondent also accepts that the second instalment was paid late, although the Claimants abandoned that claim during the course of the proceedings.)

62. However, the Respondent submits that it was only "***slightly late** with the payment of three instalments of the* [*C1 Termination Fee*] *(of which the last one was somewhat longer*" and that it "***paid everything that was agreed upon** significantly **before the** Request for arbitration* [*sic*] *was filed on May 27, 2020*" (emphasis as in the original).

63. The Respondent further asserts that it made "*significant efforts to pay the last instalment in the pick* [sic] *of the covid-19* [sic] *pandemic (which began in Serbia on March 6, 2020, with the state of emergency being introduced on March 15, 2020)*, although no evidence was provided in support of this assertion.

64. In summary, the Respondent submits that it would be "*inequitable*" to award Claimant 1 the claimed sum in circumstances where Claimant 1: (i) received the C1 Termination Fee in full (albeit ten weeks late); (ii) did not play for the Respondent since November 2019; and (iii) received substantial salary payments from his new club in France, while the Respondent was dealing with the impact of the COVID-19 pandemic on its operations, particularly after the suspension of the ABA League on 16 March 2020.

65. The Respondent accepts, however, that Claimant 1 should receive interest on the late instalments of the C1 Termination Fee at a rate of 5% per annum, totalling USD 295.95.

4.5.2 The C2 Full Contract Sum

66. The Respondent accepts that it did not pay the C2 Termination Fee and that Claimant 2 is therefore owed the sum of USD 28,500.00 net under the Termination Agreement. It is unclear from the Answer whether the Respondent accepts liability for this sum on the basis that Claimant 2 is entitled to recover the C2 Termination Fee (USD 28,500.00) or the C2 Full Contract Sum (USD 28,500.00), which is the same amount in any event.

67. While the Respondent acknowledges that it did not pay the C2 Termination Fee, it submits in mitigation that the due date for payment on 1 March 2020, and the expiry of the grace period after seven (business) days on 10 March 2020, coincided with the start of the COVID-19 pandemic in Serbia. The Respondent asserts that it lost over EUR 1,000,000.00 in ticket sales and broadcasting revenues following the suspension of the ABA League on 16 March 2020 and that was "***the only reason*** *why the Club did not pay the sports Agents what really owes* [*sic*], *what is indisputable and what the Club is certainly obliged to pay*" (emphasis as in the original).

68. In light of the continuing impact that the COVID-19 pandemic has on the operations of the Respondent, the Respondent offered in its Answer to pay the sum of USD 28,500.00 net in six equal monthly instalments, starting in October 2020.

69. That offer was rejected by Claimant 2.

4.5.3 The C3 Full Contract Sum

70. The Respondent accepts that it did not pay the C3 Termination Fee, for the reasons set out above, and that Claimant 3 is therefore owed the sum of USD 20,000.00 net under the Termination Agreement.

71. While the Respondent does not say so expressly, it is clear from the Answer that it only accepts liability for the C3 Termination Fee (USD 20,000.00) and not the C3 Full Contract Sum (USD 28,750.00). The Respondent does not contend that it would be inequitable to award Claimant 3 the C3 Full Contract Sum.

72. For the same reasons as set out above, the Respondent offered in its Answer to pay the sum of USD 20,000.00 net in six equal monthly instalments, starting in October 2020.

73. That offer was rejected by Claimant 3.

5. The Jurisdiction of the BAT

74. 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).

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

76. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.[1]

77. Article 13.3.1 of the Contract as well as the final paragraph on page 3 of the Termination Agreement stipulate identically:

> "*Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of arbitration shall be Geneva, Switzerland. The arbitration shall be*

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

> *governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.*"

78. The Contract as well as the Termination Agreement are in written form and thus the arbitration clauses fulfil the formal requirements of Article 178(1) PILA. With respect to their substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreements contained in the Contract as well as the Termination Agreement under Swiss law (referred to by Article 178(2) of the PILA). In addition, the Respondent expressly submitted that the Arbitrator had jurisdiction to adjudicate the dispute.

79. For these reasons, the Arbitrator has jurisdiction to adjudicate the claims against the Respondent.

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

80. 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*", as opposed to a decision according to the rule of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

> "[*T*]*he parties may authorise the arbitral tribunal to decide ex aequo et bono.*"

81. 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.*"

82. Article 13.3.1 of the Contract as well as the final sentence on page 3 of the Termination Agreement state that "[*t*]*he arbitrator shall decide the dispute ex aequo et bono*". Article 13.3.1 of the Contract as well as the final paragraph on page 3 of the Termination Agreement further provide that any disputes submitted to the BAT shall be determined in accordance with the BAT Rules. The preamble to the BAT Rules states that "*the parties recognise* […] *that the BAT arbitrators decide ex aequo et bono*" and Article 15.2 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 authorised to do so.

83. For the sake of completeness, the Arbitrator notes that Article 13 of the Contract also states that the Contract has to be interpreted in accordance with "*the laws of the Republic of Serbia*" (Article 13.1) and the "*rules, statues, regulations and other documents of KSS, KLS, ULEB, FIBA, EuroLeague and WADA*" (Article 13.2). As the present dispute arises under the Termination Agreement, the choice of law provisions in Article 13.1 and Article 13.2 of the Contract are irrelevant for determining the issues before the Arbitrator, and none of the Parties has sought to rely on these provisions.

84. In light of the above, the Arbitrator will decide the issues submitted to him in these proceedings *ex aequo et bono*.

85. The concept of *équité* (or *ex aequo et bono*) used in 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 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]

86. In substance, it is generally considered that an 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]

87. 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*".

6.2 BAT Covid-19 Guidelines

88. The BAT Covid-19 Guidelines (hereinafter the "Covid 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] While the Respondent

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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.

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.

does not refer to the Covid Guidelines in its submissions, it alleges that its ability to make timely payments of the Termination Fees was affected by the Covid-19 pandemic. The Arbitrator will therefore have due regard to the Covid Guidelines in reaching his decision, bearing in mind their non-binding nature and the importance to judge each case on its merits.

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

6.3 Findings

6.3.1 The C1 Full Contract Sum

90. The Respondent accepts that it was required to pay the instalments of the C1 Termination Fee before the expiry of the seven day grace period. Regardless of whether the grace period refers to business days or calendar days (and in the view of the Arbitrator, it clearly refers to calendar days), the Respondent breached its obligation to make timely payments under the Termination Agreement.

91. Claimant 1 now contends that on the proper construction of the late payment clause in the Termination Agreement, he is entitled to recover the C1 Full Contract Sum. If Claimant 1 were to succeed in his claim, the late payment by the Respondent of USD 28,750.00 by around ten weeks would trigger an additional liability to Claimant 1 in the amount of USD 315,114.25.

92. Claimant 1 submits that BAT jurisprudence accepts claims of this nature. He refers to two cases in support of his position: BAT 0289/12 and BAT 0294/12. Both cases held that the failure by a club to pay the stipulated sums under a termination agreement entitled the player to recover the full amounts outstanding under the original player contract. However, the Arbitrator notes that both cases are distinguishable from the present claim as they concern the failure by a club to make <u>any</u> payments under a termination agreement, which is an altogether different scenario.

93. The Arbitrator considers that a key issue in these proceedings is not whether the breach of the late payment clause in the Termination Agreement entitles Claimant 1 to recover the C1 Full Contract Sum in principle (it clearly does), but whether that clause is, *ex aequo et bono*, enforceable in the particular circumstances of the case.

94. The Arbitrator notes in this context that the purpose of the late payment clause is, essentially, to penalise the Respondent for breaching its contractual commitments under the Termination Agreement. The late payment clause therefore constitutes a contractual penalty.

95. Contractual penalty clauses are permissible in principle, pursuant to BAT jurisprudence. They are, however, subject to careful judicial scrutiny. A clause which imposes a detriment on the breaching party which is out of all proportion to any legitimate interest of the innocent party may be found to be unenforceable, or moderated in its application.

96. Whether a penalty clause is excessive has to be determined on a case-by-case basis. BAT jurisprudence has identified a number of factors that need to be considered in this context, including: (i) the damage suffered by the creditor as a result of the contractual breach; (ii) the severity of the breach and the conduct of the debtor; (iii) the economic situation of the debtor; and (iv) the creditor's opportunities to mitigate the (incurred or prospective) damage (see, for example, BAT 0826/16).

97. Applying these factors to the present case, the Arbitrator makes the following findings:

    a) The actual damage suffered by Claimant 1 as a result of the late payment of the C1 Termination Fee is relatively low. If the Respondent had complied with the Termination Agreement, Claimant 1 would have received the third instalment of the C1 Termination Fee by 22 January 2020 and the final instalment by 22 February 2020. In reality, Claimant 1 received the third

instalment on 28 January 2020 (6 days late) and the final instalment on 30 April 2020 (68 days late). The principal damage suffered by the Claimant is therefore the interest that he would have earned on the third and fourth instalments of the C1 Termination Fee if he had received these instalments on time. That amount is likely to be low. (Assuming an annual interest rate of 5%, the outstanding instalments would have incurred interest of USD 288.90.) There is no evidence that Claimant 1 suffered any other significant loss, or was put into a precarious financial position, as a result of the late payments.

b) The severity of the breach by the Respondent of its payment obligations towards Claimant 1 is moderate. The Arbitrator considers that the Respondent was aware of its payment obligations and that it evaded the attempts by Claimant 1 to seek clarity on the status of the final instalment of the C1 Termination Fee in particular. At the same time, the Respondent paid 80% of the C1 Termination Fee more or less on time, and the remaining 20% was paid within ten weeks.

c) The Arbitrator is not persuaded that the economic situation of the Respondent prevented the payment of the final instalment of the C1 Termination Fee. The instalment fell due one month before the suspension of the ABA League. No evidence has been provided that any events leading up to the suspension impacted the ability of the Respondent to make the payment. The Arbitrator notes in this context that Principle 16(d) of the Covid Guidelines recommends that salaries that became due before the suspension of the 2019-2020 season should not be reduced on account of the Covid-19 pandemic. However, the maturity of up to 50% of any such outstanding salaries "*may be deferred to the beginning of the 2020/21 season in the respective domestic championship, provided that the club substantiates and proves that such deferral is necessary to avoid insolvency*". Applying this principle to the C1 Termination Fees by

analogy, the Arbitrator finds that the Respondent has provided no evidence that the deferral of the final instalment was necessary to avoid insolvency. The Respondent was able to make the payment as is obvious from the fact that it did make the payment only a few weeks after the suspension of the ABA League, on 30 April 2019, "*in the pick* [sic] *of the covid-19* [sic] *pandemic*", as acknowledged by the Respondent itself.

d) Finally, the Arbitrator considers that the mitigation principles developed by BAT arbitrators should not be applied in the same manner to the Termination Agreement as they might be to an employment agreement because the payment of the C1 Termination Fee is not a *quid pro quo* for services already rendered or to be rendered by Claimant 1. As noted in BAT 0826/16, the mitigation principles should only apply to termination agreements in particular circumstances, including: (i) where the original player contract is 'resurrected' such that the player's claim becomes a damages claim subject to the terms of the original contract; (ii) when the amounts the player is to receive under the agreement would result in a significant windfall for the player, which is disconnected from the quantum of any (mitigated) damages the player would have received under the original player contract; and (iii) when the player had very obvious opportunities to mitigate his damages (e.g. by signing a contract with a new club), but unreasonably refused to realise such opportunity. None of these particular circumstances apply in the present case. In particular, the Arbitrator considers that it was not the parties' intention to *actually* resurrect the Contract and revert to the original payment schedule. Rather, they seem to have used the payment obligations under the Contract as a reference point for an obligation that would flow from the Termination Agreement (which would remain in place). While the Arbitrator recognises that some of the language in the Termination Agreement is ambiguous in this regard, this finding is consistent with: (i) the late payment clause, which provides for the payment of the Full Contract Sums regardless of whether such sums would have been due under

the original payment schedule in the Contract; and (ii) the Request for Arbitration, which states that the Respondent is liable for the C1 Full Contract Sum, including amounts that would not have yet fallen due under the original payment schedule.

98. In light of the above, the Arbitrator finds *ex aequo et bono* that the amount claimed by Claimant 1 is excessive in the particular circumstances of this case. The Arbitrator considers that a fair penalty amount would be 10% of the final instalment of the C1 Termination Fee, i.e. USD 2,850.00. That amount is considerably higher than an award of interest at a rate of 5% per annum would have been, but is nonetheless proportionate in light of the above factors and given that the parties contractually agreed to a late payment penalty. In particular, the Arbitrator has also considered, *ex aequo et bono*, that this is not a case where there was a history of a club failing to pay its player and the player being forced to forfeit a considerable amount of salary by signing a termination agreement, in an effort to make the club pay at least a reduced amount. Instead, both parties were performing their underlying contractual obligations and wanted to terminate the Contract for reasons other than any party's failure to abide by its contractual obligations.

99. Claimant 1 is seeking the late payment penalty "*net of Serbian social charges and taxes (employer and employee)*". The Arbitrator notes in this regard that the late payment clause in the Termination Agreement does not specify whether Claimant 1 is entitled to "*the entire season contract*" / "*the entire amounts*" gross or net of taxes. However, when read in context, it is clear that the "*the entire season contract*" / "*the entire amounts*" is a reference to the Full Contract Sum on page 1 of the Termination Agreement, which includes the C1 Full Contract Sum "*NET*". For completeness, the Arbitrator notes that the Annex to the Contract provides that "*The Club at its own expense on behalf of the Player pays all taxes applicable under Serbian law*." The Arbitrator therefore finds, *ex aequo et bono*, that the late payment penalty has to be paid net of Serbian taxes.

100. The Arbitrator emphasises in this context that he has decided this case on its particular facts. Different circumstances and, in particular, any further delays in settling the outstanding obligations would have undoubtedly led to a different outcome.

6.3.2 The C2 Full Contract Sum

101. The Respondent accepts that it did not pay the C2 Termination Fee and that Claimant 2 is therefore owed the amount of USD 28,750.00 under the Termination Agreement. As noted above, it is unclear from the Answer whether the Respondent accepts liability for this sum on the basis of its obligation to pay the C2 Termination Fee (USD 28,750.00), or its obligation to pay the C2 Full Contract Sum (USD 28,750.00) under the late payment clause. As the amount is the same, this distinction has no practical relevance.

102. While Claimant 2 did not specify in its request for relief whether it is seeking the outstanding amount under the Termination Agreement net of taxes, the Arbitrator finds that this was clearly its intention. The Termination Agreement provides that the C2 Termination Fee would be paid net of taxes. That payment is to be made in lieu of the C2/C3 Full Contract Sum which is said to be owed net of taxes on page 1 of the Termination Agreement. Claimant 2 refers to the net amount (USD 28,750.00) in its request for relief, and the Respondent expressly accepted liability for this amount "*net*" in its Answer. The Arbitrator therefore finds that the absence of a specific request for a net payment in the request for relief was an inadvertent omission.

103. The Arbitrator further notes that in its Answer the Respondent has proposed a payment plan to settle the sum of USD 28,750.00 in six monthly instalments. However, the Respondent has provided no evidence that it would be unable to pay the claimed amount as a lump sum and that sum is now long overdue. The Arbitrator therefore finds, *ex aequo et bono*, that the net C2 Full Contract Sum is payable immediately.

6.3.3 The C3 Full Contract Sum

104. The Respondent accepts that it did not pay the C3 Termination Fee in the amount of USD 20,000.00, and that Claimant 3 is therefore owed this amount under the Termination Agreement. While the Respondent does not expressly address this point, it does not appear to accept liability for the C3 Full Contract Sum of USD 28,500.00 under the late payment clause in the Termination Agreement.

105. As noted above, the late payment constitutes a contractual penalty. The Arbitrator therefore needs to consider whether the clause is, *ex aequo et bono*, enforceable in the particular circumstances of the case. The Arbitrator notes in this regard that the C3 Full Contract Sum exceeds the C3 Termination Fee by USD 8,750.00, which represents 30% of the C3 Termination Fee. The Arbitrator finds that this amount is not excessive when considering the severity of the breach, and particularly the failure by the Respondent to make any payments to Claimant 3 over the last year, whether under the Contract or the Termination Agreement.

106. The Arbitrator notes that Claimant 3 did not specify in its request for relief whether it is seeking the C3 Full Contract Sum under the Termination Agreement net of taxes. The Arbitrator further notes that the Respondent only accepts liability for the C3 Termination Fee "*net*" in its Answer, without addressing the position of the C3 Full Contract Sum. This gives rise to two issues, namely, whether Claimant 3 is entitled to claim the difference between the C3 Termination Fee and the C3 Full Contract Sum net of taxes in the first place and, if so, whether Claimant 3 intended to seek the C3 Full Contract Sum net of taxes.

107. As to the first issue, and as noted above, the Arbitrator finds that the reference to "*the entire season contract*" / "*the entire amounts*" in the late payment clause is a reference to the Full Contract Sum on page 1 of the Termination Agreement, which includes the C2/C3 Full Contract Sum "*NET*". The Arbitrator therefore finds, *ex aequo et bono*, that Claimant 3 is entitled to receive the late payment penalty net of taxes.

108. Regarding the second issue, the Arbitrator finds that Claimant 3 clearly intended to claim for the C3 Full Contract Sum net of taxes. The Termination Agreement provides that the C3 Termination Fee and the C3 Full Contract Sum would be paid net of taxes. The Arbitrator further notes that Claimant 3 refers to the net amount (USD 28,750.00) in its request for relief, and to the extent that the Respondent accepted liability in its Answer it did so on the basis that it would pay Claimant 3 "*net*". The Arbitrator therefore finds that the absence of a specific request for a net payment in the request for relief was an inadvertent omission.

109. For the same reasons as those given above in relation to the C2 Full Contract Sum, the Arbitrator finds, *ex aequo et bono*, that the net[7] C3 Full Contract Sum is payable immediately.

6.3.4 Interest

110. The Claimants have claimed interest at 5% per annum on the Full Contract Sums from 23 December 2019 onwards, in each case until payment.

111. The Arbitrator notes that the Termination Agreement does not provide for the payment of interest. However, consistent with BAT jurisprudence, the Arbitrator considers that an interest rate at 5% per annum is reasonable in the circumstances.

112. The Arbitrator notes that 23 December 2019 is the date following the expiry of the seven-day grace period for the payment of the second instalment of the C1 Termination Fee. As stated above, the Claimants accepted during the course of these proceedings that the second instalment was not made late.

113. The Arbitrator notes that the grace period for the payment of the third instalment of the C1 Termination Fee expired on 22 January 2020. The payment was made on 28

[7] The Termination Agreement provides that the C3 Termination Fee is payable net.

January 2020. The Arbitrator further notes that the late payment clause in the Termination Agreement envisages that the delay in any payments under the Termination Agreement entitle the Claimants to seek the Full Contract Sums.

114. At the same time, the Arbitrator notes that the third instalment of the C1 Termination Fee was made within days of the expiry of the grace period while the Claimants did not actually seek payment of the C2 Termination Fee and the C3 Termination Fee until their contractual due date on 1 March 2020.

115. The Arbitrator therefore finds, *ex aequo et bono*, that interest on the C1 Full Contract Sum (as reduced) should run from 23 February 2020, i.e. one day after the expiry of the grace period for the final instalment of the C1 Termination Fee, and interest on the C2 Full Contract Sum and C3 Full Contract Sum should run from 9 March 2020, i.e. one day after the expiry of the grace period for the final instalment of the C2 Termination Fee and C3 Termination Fee.

116. Accordingly, the Arbitrator finds that interest is payable to Claimant 1 at 5% per annum on the sum of USD 2,850.00 from 23 February 2020.

117. In relation to Claimant 2 and Claimant 3, interest is payable at 5% per annum, in each case on the sum of USD 28,750.00 from 9 March 2020.

7. Costs

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

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

119. On 24 November 2020, the BAT President determined the arbitration costs in the present matter to be EUR 10,875.00.

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

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

121. Broadly speaking, the Claimants were the prevailing parties, given that they all recovered sums owed them by the Respondent. However, there is a significant difference in the degree of success between them. Claimant 2 and Claimant 3 have both been awarded 100% of the principal claimed; Claimant 1 was awarded less than 1%. In addition, the Arbitrator takes into account that the Respondent failed to pay its share of the Advance on Costs.

122. In light of the above, the Arbitrator considers it is fair in the circumstances and in application of Article 17.3 of the BAT Rules, that 50% of the costs of the arbitration be borne by the Respondent and 50% of the costs be borne by Claimant 1.

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

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

124. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses (maximum contribution of EUR 15,000.00 to a party's legal fees for cases of this size with the sum in dispute being between EUR 200,001.00 and EUR 500,000.00).

125. The Claimants claimed EUR 5,000.00 in respect of the non-reimbursable handling fee and EUR 7,300.00 in legal fees (EUR 4,100.00 for Claimant 1; EUR 1,600.00 for Claimant 2; EUR 1,600.00 for Claimant 3). The Claimants all used the same legal representative and while that representative submitted considerably higher fees in respect of Claimant 1 to Claimant 2 and Claimant 3, the Arbitrator considers that Claimant 2 and Claimant 3 would have benefitted from the time spent by their legal representative in relation to Claimant 1's case. In the circumstances, the Arbitrator finds that it would be fair and reasonable for the Respondent to pay the Claimants EUR 11,000.00 as a contribution towards their legal fees and expenses (including the non-reimbursable handling fee).

126. The Respondent broadly speaking lost the arbitration and the Arbitrator makes no award in respect of its legal fees and expenses.

127. Therefore, the Arbitrator decides:

a) the Respondent shall pay to Claimant 2 EUR 2,000.00 being the costs of the arbitration already advanced by it;

b) the Respondent shall pay to Claimant 3 EUR 2,005.00 being the costs of the arbitration already advanced by it;

c) the Respondent shall pay to Claimant 1 EUR 1,432.50 being the difference between 50% of the costs of the arbitration and the EUR 4,005.00 being paid by the Respondent to Claimant 2 and Claimant 3;

d) The balance of the advance on costs, in the amount of EUR 3,130.00, will be reimbursed to Claimant 1 by the BAT; and

e) the Respondent shall pay to the Claimants EUR 11,000.00, as a contribution towards their legal fees and expenses.

8. AWARD

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

1. **Košarkaški klub Partizan Beograd shall pay Mr. Artsiom Parakhouski the amount of USD 2,850.00 net of all Serbian taxes as compensation for the late payment of termination fees, plus interest thereon at a rate of 5% per annum from 23 February 2020 until the date of payment.**

2. **Košarkaški klub Partizan Beograd shall pay UAB "East Players" the amount of USD 28,750.00 net as compensation for unpaid termination fees, plus interest thereon at a rate of 5% per annum from 9 March 2020 until the date of payment.**

3. **Košarkaški klub Partizan Beograd shall pay TCA, LLC the amount of USD 28,750.00 net as compensation for unpaid termination fees, plus interest thereon at a rate of 5% per annum from 9 March 2020 until the date of payment.**

4. **Košarkaški klub Partizan Beograd shall pay Mr. Artsiom Parakhouski the amount of EUR 1,432.50, UAB "East Players" the amount of EUR 2,000.00, and TCA, LLC the amount of EUR 2,005.00, as reimbursement for arbitration costs.**

5. **Košarkaški klub Partizan Beograd shall pay Mr. Artsiom Parakhouski, UAB "East Players", and TCA, LLC jointly the amount of EUR 11,000.00 as a contribution towards their legal fees and expenses.**

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

Geneva, seat of the arbitration, 25 November 2020

BASKETBALL
ARBITRAL TRIBUNAL

Rhodri Thomas

(Arbitrator)