



**BASKETBALL**  
ARBITRAL TRIBUNAL

**ARBITRAL AWARD**

**(BAT 1739/21)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

Ms. Annett Rombach

in the arbitration proceedings between

**Mr. Rashawn Thomas**

- Claimant 1 -

**Wasserman Media Group**

10900 Wilshire Blvd., Suite 1200, Los Angeles, CA 90024, USA

- Claimant 2 -

both represented by Mr. Howard L. Jacobs, attorney at law

vs.

**Basketball Club Partizan**

Humska 1, 11040 Belgrade, Serbia

- Respondent -

represented by Mr. Ilija Drazic, attorney at law

## The Parties

### 1.1 The Claimants

1. Mr. Rashawn Thomas (the “**Player**” or “**Claimant 1**”) is a professional basketball player of U.S. nationality.
2. Wassermann Media Group (the “**Agency**” or “**Claimant 2**”) is a sports agency with its registered seat in Los Angeles, USA.

### 1.2 The Respondent

3. Basketball Club Partizan (the “**Club**” or “**Respondent**”) is a professional basketball club located in Belgrade, Serbia.

## 2. The Arbitrator

4. On 10 November 2021, Mr. Raj Parker, Vice-President of the Basketball Arbitral Tribunal (the “**BAT**”), appointed Ms. Annett Rombach as arbitrator (the “**Arbitrator**”) pursuant to Articles 0.4 and 8.1 of the Rules of the Basketball Arbitral Tribunal (the “**BAT Rules**”). None of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

## 3. Facts and Proceedings

### 3.1 Summary of the Dispute

5. On 8 July 2019, the Player and the Club entered into an employment agreement, pursuant to which the Club engaged the Player as a professional basketball player for the 2019-20 and 2020-21 basketball seasons (“**2019 Agreement**”).

6. On 29 July 2019, the Player was arrested in Gainesville, USA, on account of his possession of two vials of Butane Hash Oil, several ecstasy pills and 3.5 grams of marijuana. After posting a bail of USD 32,000.00, the Player was released from jail on the next day. He was requested to perform a \_\_\_\_\_ before an authorized institution and to submit the results of such \_\_\_\_\_ to the court in the United States.
7. Despite this \_\_\_\_\_, the Player and the Club agreed to perform the 2019 Agreement. The Player performed throughout the 2019-20 season without any issue arising between the Parties in respect of \_\_\_\_\_.
8. Shortly before pre-season preparations for the 2020-21 season began, the Club's new head coach requested the Player to take \_\_\_\_\_. This \_\_\_\_\_ which was performed on 19 August 2020, showed a \_\_\_\_\_.
9. On 21 August 2020, the Club's Disciplinary Committee imposed a monetary fine on the Player in the amount of USD 135,000.00 because of the \_\_\_\_\_ and proposed to the Club the immediate termination of the 2019 Agreement.
10. On 22 August 2020, the Club terminated the 2019 Agreement. In response to the termination, the Player acknowledged \_\_\_\_\_ and provided explanations and justifications. The Player and his agent promised that the Player would undertake a \_\_\_\_\_ and would \_\_\_\_\_ in the future. As a result of further discussions, the Club agreed to give the Player a new contract, under the condition that the Player would undergo mandatory \_\_\_\_\_ upon the Club's request.
11. On 25 August 2020, the Player, the Agency and the Club entered into a new employment contract pursuant to which the Club engaged the Player as a professional basketball player for the 2020-21 and 2021-22 basketball seasons (the "**Player Contract**").

12. The term of the Player's employment, including leave and reporting duties during the summer break, are described in Clause I.A of the Player Contract as follows:

***"A. Term.** The Club hereby engages the services of Player as a professional basketball player for the 2020-21 and 2021-2022 basketball seasons, commencing as of the Effective Date and continuing through and including two (2) days following Club's last official game of the 2021-2022 season (the "Term"). Player shall be able to leave the Club no later than two (2) days following Club's final game of each season hereunder, but shall be required to report back to the Club no earlier than August 15 for the 2021-2022 season, unless this Agreement is earlier terminated according to the terms herein. [...]"* (emphasis original)

13. Clause I.B of the Player Contract provided for the Player's following \_\_\_\_\_ obligations:

***"B. \_\_\_\_\_.** Club and Player agree that the Player shall undergo \_\_\_\_\_ on a weekly basis during the 2020-2021 and 2021-2022 basketball season and while the Player is with the Club (i.e., not in the off-season) (individually, a "\_\_\_\_\_" and collectively, the "\_\_\_\_\_s"). [...] If it is conclusively determined that the Player has failed any of the required \_\_\_\_\_s, the Club may terminate this Agreement within three (3) business days of the Club's receipt of the results that Player failed the applicable \_\_\_\_\_; provided, however, that in the event of termination by the Club pursuant to this Section I.B, the Club shall at all times remain obligated to: (1) pay Player all money, including salary and bonuses, earned by the Player up through and including the date of termination, (2) pay Agent the Agent Fee (a) for the 2020-2021 season if such termination occurs prior to the start of the 2021-2022 season and (b) for both the 2020-2021 seasons if such termination occurs after the start of the 2021-2022 season, (3) pay for Player's transportation (ground and air) to a location of Player's choice back to the United States, and (4) immediately issue Player's Letter of Clearance.*

*In the event the Club fails to terminate this Agreement in accordance with this Section I.B. in connection with any failed \_\_\_\_\_, the Club shall have waived its right to terminate this Agreement at any subsequent time in connection with such failed \_\_\_\_\_, and this Agreement and all its terms shall remain fully guaranteed." (emphasis original)*

14. Under the Player Contract, the Player was to earn a guaranteed base salary of USD 200,000.00 (net of taxes and free of social charges, bank fees and other costs) for the 2020-21 season and USD 300,000.00 for the 2021-22 season (Clause II of the Player Contract).
15. Clause VIII of the Player Contract provided the Club with the following early termination right:

***“VIII. Early Termination by Club.*** Club and Player acknowledge and agree that Club shall have the right to terminate this Agreement without any further obligation to Player, and without paying a buyout of any kind, following the Club’s 2020-2021 season and continuing through thirty (30) days after the Club’s last official game of the 2020-2021 season by providing written notice to Player and Agent (the “Club’s Early Termination Option”). Notwithstanding the foregoing, in the event the Club properly exercises the Club’s Early Termination Option, the Club shall nevertheless remain obligated to pay Player and Agent all amounts earned by Player and Agent up through and including the date that the Club exercises the Club’s Early Termination Option. Additionally, the Club shall immediately provide Player with his Letter of Clearance so that Player may sign with any team worldwide.” (emphasis original)

16. Clause IX of the Player Contract established an early termination right for the Player, pursuant to which he was allowed to terminate the Player Contract after the 2020-21 season against a buy-out fee payment in the amount of USD 150,000.00.
17. In Clause V of the Player Contract, the Player agreed to observe and comply with the Club's reasonable rules and regulations, both on and off the court (“**Rulebook**”). However, Clause V further provided that “*in order for the Club to be entitled to enforce such rules and fines, it must obtain the signature of the Player on a formal, written copy of such rules and fines written in English as confirmation of receipt and acceptance of the content*”.
18. The Agency was to earn the following commission fee (Clause IV of the Player Contract):

***“IV. Agent’s Commission.*** Club agrees to pay Agent a guaranteed agent fee for the Term as set forth below (which is incorporated herein by this reference) (the “Agent Fee”):

  - For the 2020-2021 season a total amount of \$10,000 net paid by February 1, 2021;
  - For the 2021-2022 season, if this Agreement has not previously been terminated, a total amount of \$30,000 net paid by November 1, 2021. [...]” (emphasis original)
19. On 5 June 2021, the Club played its last game of the 2020-21 season, being defeated by KK Mega Basket in the semi-finals of the Serbian Super League playoffs.



20. On 7 and on 8 June 2021, respectively, the Club requested the Player to perform a \_\_\_\_\_, which was refused by the Player.

21. In the following days, the Club's Disciplinary Committee issued an undated disciplinary decision (the "**Disciplinary Decision**") against the Player, in which it imposed a fine and proposed to the Club the termination of the Player Contract as follows:

*"Professional basketball player of the Club **RASHAWN THOMAS** [»Player«] **IS FINED USD 104,000** (one hundred and four thousand \$), that is equal to the last three salaries, for disciplinary violation [»Misdemeanour«] from Clause III Paragraph B, of the Rulebook, because he rejected the \_\_\_\_\_ (making blood and/or urine analysis) on use of \_\_\_\_\_, psychoactive substances and other illicit substances, two times required by the Club: the first time on June 7, 2021 and the second time on June 8, 2021 (additionally in written form), though at that time he was in Belgrade and the first time even in the Club's premises and available for testing.*

*In accordance with authorization of the Disciplinary Committee, considering that Mr. Rashawn Thomas breached basic conduct, disciplinary and health rule of the Club, and severely breached the Agreement concluded with the Club on September 7, 2020 - doing that in spite of firm promises made to the Club more than a few times and ignoring any and all friendly advices, ignoring human approach the Club had towards him and acting extremely unprofessional, the Disciplinary Committee strongly recommends to the management of the Club:*

- *to immediately consider all other consequences of the breach of the Clause I.B of the Agreement;*
- *to immediately report (in details) to FIBA authorities about all Mr. Thomas' problems with \_\_\_\_\_, psychoactive substances and other illicit substances providing adequate evidence, in order to avoid any negative impact to the Club, to protect the basic principles of basketball sport and prevent further Mr. Thomas' behaviour of that type; and*
- *To immediately report (in details) to US's authorities Mr. Thomas' Serbian episodes with \_\_\_\_\_, psychoactive substances and other illicit substances also providing adequate evidence, in order to avoid any further negative consequences for the Club.*

*Also, in accordance with Clause III, Paragraph 8 of the Rulebook, the Disciplinary Committee proposes to the Club to **terminate the Agreement concluded on 8 July 2019**, due to the fault of the Player, but after the Player compensate damage of loss with respect to Clause IX of the Agreement, in the amount of **USD 150,000** (one hundred fifty thousand \$). [...]"* (emphasis original)

22. On 12 June 2021, the Player returned to the United States. The flight costs amounted to USD 1,282.75. Until that day, the Player had received USD 96,000.00 in salary

payments from the Club for the 2020-21 season.

23. On 17 June 2021, the Player's counsel officially rejected the Disciplinary Decision and requested the Club to timely pay the overdue salaries. The Player's request remained unanswered.
24. On 30 June 2021, the Club terminated the Player Contract.

### 3.2 The Proceedings before the BAT

25. On 5 November 2021, the BAT received a Request for Arbitration, together with several exhibits, filed by the Claimants in accordance with the BAT rules. The non-reimbursable handling fee of EUR 3,000.00 had been received in the BAT bank account on 20 October 2021.
26. On 7 December 2021, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited the Respondent to file its Answer in accordance with Article 11.4 of the BAT Rules by no later than 28 December 2021 (the "**Answer**"), and fixed the amount of the Advance on Costs to be paid by the Parties by 17 December 2021 as follows:

<i>"Claimant 1 (Mr. Rashawn Thomas)</i>	<i>EUR 4,000.00</i>
<i>Claimant 2 (Wassermann Media Group)</i>	<i>EUR 1,000.00</i>
<i>Respondent (Basketball Club Partizan)</i>	<i>EUR 5,000.00"</i>

27. By procedural order of 11 January 2022, the BAT acknowledged receipt of the Claimants' share of the Advance on Costs and noted Respondent's failure to pay its share. In accordance with Article 9.3 of the BAT Rules, Claimants were invited to substitute for Respondent's (yet unpaid) share in order to ensure that the arbitration could proceed.

28. On 7 March 2022, BAT acknowledged receipt of the full amount of the Advance on Costs (paid by the Claimants) and receipt of the Answer. The Arbitrator invited the Claimants to comment on the Respondent's Answer by no later than 14 March 2022 (the "**Reply**"). Upon the Claimants' request, the time limit was extended until 1 April 2022.
29. On 1 April 2022, the Claimants submitted their Reply. The Respondent was invited to comment on the Reply by no later than 5 May 2022 (the "**Rejoinder**").
30. On 5 May 2022, the Respondent submitted its Rejoinder. The Rejoinder contained a request for a hearing.
31. On 3 June 2022, the Arbitrator informed the Parties of her decision not to hold a hearing, the reasons for which decision are explained in this Award (see below at Section 6). Furthermore, in accordance with Article 12.1 of the BAT Rules, she declared that the exchange of documents was completed and requested the Parties to submit their detailed cost accounts by 10 June 2022.
32. On 2 August 2022, the Claimants submitted their cost account. The Respondent did not submit any cost account.

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

##### **4.1 Claimants' Position and Request for Relief**

33. The Claimants submit the following in substance:
  - The Respondent owes Claimant 1 a total of USD 104,000.00 net in outstanding salaries, consisting of two instalments of each USD 12,000.00 (net), payable on the 10<sup>th</sup> day of May and June 2021, and of one instalment of USD 80,000.00



(net), payable on 30 June 2021. Moreover, the Respondent owes Claimant 1 an amount of USD 1,282.75 (net) as a reimbursement for a flight ticket advanced by Claimant 1. Furthermore, the Club failed to pay any of the guaranteed agency fee to Claimant 2 for the 2020-21 season as required by Clause IV of the Player Contract, totalling USD 10,000.00.

- The Player Contract is fully guaranteed. The Respondent has no valid reason for the non-payment, nor can it offset the amount through the Disciplinary Decision.
- The Respondent's Disciplinary Decision is invalid for the following reasons:
  - There is no evidence that the Player signed the Rulebook, as required by Clause V of the Player Contract. The BAT jurisprudence makes it clear that clubs cannot impose fines without a valid contractual basis.
  - The Player was entitled to refuse the Club's testing on 7 and 8 June 2021 because he was required to submit to \_\_\_\_\_ only while he was "*with the Club*", which was specifically defined as meaning "*not in the off-season*" (Clause I. B. of the Player Contract). This is the very meaning of the abbreviation "*i.e.*", which means "*that is*". The contractual language could not be clearer on this point. The off-season started after the last game on 5 June 2021, so 7 and 8 June 2021 were indisputably during the off-season. Because the Player Contract defines "*with the club*" as "*not in the off-season*", the Player was not "*with the club*" within the meaning of the Player Contract when the Club sought to test him, neither on 7 June 2021 nor on 8 June 2021.
  - In any event, the imposed fine of USD 104,000.00 (the exact salary amount still outstanding at the time) is excessive.
- The Club terminated the Player Contract on 30 June 2021. Pursuant to Clause VIII of the Player Contract, the Club is obligated to pay the Claimants all amounts earned up through and including the date the Club exercised its termination right, i.e. the three outstanding salary instalments totalling

USD 104,000.00, the compensation for the flight tickets and the outstanding agency fees.

- The Club's termination on 30 June 2021 was not provoked by the Player. The Club was not allowed to terminate the Player Contract on the basis of the Player's refusal to take the \_\_\_\_\_. In any event, a termination on the basis of a \_\_\_\_\_ refusal would have only been possible within three business days after the refusal (Clause I.B of the Player Contract). Under Clause I.B of the Player Contract, the Club is deemed to have waived its right to terminate the Player Contract if the termination right is not exercised within three days of the refusal.
- The Respondent is not allowed to request payment of a buy-out fee, because such fee is only triggered upon the Player's termination of the Player Contract, not upon the Club's termination.

34. With their Request for Arbitration dated 4 November 2021, the Claimants request the following relief:

*"For all of the foregoing reasons, Claimants request an award against Partizan in the following amounts:*

1. *Unpaid compensation to Rashawn Thomas under the 25 August 2020 Partizan contract in the amount of US \$104,000.00;*
2. *Unpaid airplane ticket expenses to Rashawn Thomas under the 25 August 2020 Partizan contract in the amount of US \$1,282.75;*
3. *Unpaid agent fees to Wasserman under the 25 August 2020 Partizan contract in the amount of US \$10,000.00; and*
4. *Arbitration costs, arbitrator costs, attorney's fees, and legal interest at 5% per annum.*

*In the alternative, Claimants request an award against Partizan in an amount which the arbitrator deems to be owed under the contract, including an award of costs, legal fees and interest in an amount which the arbitrator deems just and proper."*

#### **4.2 Respondent's Position and Request for Relief**

35. The Respondent submits the following in substance:

- The imposed fine of USD 104,000.00 is valid. The Club is also entitled to request a buy-out fee of USD 150,000.00. The Player had no right to refuse \_\_\_\_\_ on 7 and 8 June 2021 because at that time the Player was still “with the Club” within the sense of Clause I.A of the Player Contract. There is no reason why the Player would refuse testing other than his intention to cover up \_\_\_\_\_. The Claimant was also duly acquainted with the Club’s Rulebook.
- It cannot be ignored that the Player had a \_\_\_\_\_ history and that this was the only reason why Clause I.B was included into the Player Contract. The Claimant now tries to make a linguistic debate about the wording of Clause I.B. This case is about the implementation of one of the most basic and important rules of sports, and of FIBA and BAT, that includes zero tolerance for the use of prohibited substances. The Player has to understand that he cannot use \_\_\_\_\_ without serious negative consequences for his career as long as he is a member of the Club under the jurisdiction of FIBA.
- The Player intentionally refused to play certain games during the 2020-21 season, e.g. the last game on 5 June 2021, in order to hide his \_\_\_\_\_ and to prevent \_\_\_\_\_ .
- Both the Player and his Agency had firmly promised after the \_\_\_\_\_ in the summer of 2020 that no\_\_\_\_\_ would arise again while the Player was under contract with the Club. Neither the Player nor the Agency kept such promises. Therefore, the Club believes that the Agency should also not receive the agency fee.
- The Disciplinary Decision was rendered on 8 or 9 June 2021, i.e. after the Player refused the \_\_\_\_\_ s. The date of 6 June 2021 mentioned in the Disciplinary Decision is a typographical error.

36. The Respondent requests the following relief:

*“[37] Respondent entirely rejects Claims of both Claimants as set out in the Request for*

*Arbitration and rejects the Relief Sought regarding whole amount of the Claim, based on reasons stated herein in the Answer*

*[38] Respondent respectfully requests the Arbitrator to dismiss entirely Claimants' claims and to award the Respondent against the Claimant by the Legal Fees."*

## **5. The Jurisdiction of the BAT**

37. Pursuant to Art. 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").

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

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

40. The Player Contract (Clause VII) contains the following dispute resolution clause in favour of BAT:

*"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. The prevailing party shall be entitled to recover all costs, fees, and attorney's fees from the other party in any such dispute."*

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

42. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast any doubt on the validity of the arbitration agreement in the

present matter under Swiss law (cf. Article 178(2) PILA). The Parties to this arbitration are expressly identified as parties to the Player Contract in the recitals, and are thus bound by the arbitration clause *ratione personae*. The Respondent did also not dispute BAT's jurisdiction.

43. Hence, the Arbitrator has jurisdiction to decide the present dispute.

#### **6. Respondent's Request for a Hearing**

44. In its Rejoinder, the Respondent requested the BAT to hold a hearing, with the possibility to (cross-)examine the Player. The Claimants did not request a hearing.

45. Pursuant to Article 13.1 of the BAT Rules, no hearings shall be held, in principle, in BAT proceedings, unless the Arbitrator decides otherwise. In the present case, the Respondent has not further specified the relevant evidence it intended to obtain through the hearing, other than the generic proposition that "*such hearing will fully allow the Arbitrator to find out whether what the Club claims is true [sic]*" (Rejoinder, para 15). The Arbitrator is, however, not convinced that previous \_\_\_\_\_ the Player may have had before the conclusion of the Player Contract are in any way relevant for the question of whether or not the Player breached the Player Contract by refusing to take a \_\_\_\_\_ after the last match of the 2020-21 season. This is all the more true given that the Club could not point to any problems the Player had with \_\_\_\_\_ during the term of the Player Contract. Therefore, the Arbitrator decided that it was not necessary to hold a hearing in this case.

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

46. 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 reads as follows:

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

47. Under the heading "Applicable Law to the Merits", Article 15.1 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.”*

48. In the arbitration agreement quoted above at para. 40, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to her in this proceeding *ex aequo et bono*.

49. 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<sup>1</sup> (Concordat)<sup>2</sup>, under which Swiss courts have held that arbitration “en équité” is fundamentally different from arbitration “en droit”:

*“When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is*

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<sup>1</sup> That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

<sup>2</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

*not inspired by the rules of law which are in force and which might even be contrary to those rules.*<sup>3</sup>

50. 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*”.

51. In light of the foregoing considerations, the Arbitrator makes the findings below.

## **8. Findings**

52. The Player seeks payment of outstanding salaries for the 2020-21 season and reimbursement of the costs for a flight ticket (below at **8.1** and **8.2**), whereas the Agency request payment of its agency fee for the same season (below at **8.3**). Furthermore, both Claimants request default interest (below at **8.4**).

### **8.1 The Player’s Claim for Outstanding Salaries**

53. It is – in principle – undisputed between the Parties that the Club failed to pay the requested salaries in the amount of USD 104,000.00 (net) to the Player. According to Clause II of the Player Contract, the Player was entitled to receive a total amount of USD 200,000.00 (net) for the 2020-21 season until 30 June 2021. However, by that date, the Club had only paid the Player USD 96,000.00 (net). It is also undisputed that the Player Contract ended on 30 June 2021 as a result of the Club’s exercise of its early termination option under Clause VIII of the Player Contract, and that “*the Club shall nevertheless remain obligated to pay Player and Agent all amounts earned by Player and Agent up through and including the date that the Club exercises the Club’s*

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<sup>3</sup> JdT 1981 III, p. 93 (free translation).

*Early Termination Option*" (Clause VIII, 2<sup>nd</sup> sentence of the Player Contract).

54. What is in dispute between the Parties is whether the Club validly set off a disciplinary fine in the amount of USD 104,000.00 against the Player's outstanding salary (below at **8.1.1**), or – in the alternative or additionally – damages compensation in the amount of EUR 150,000.00 (below at **8.1.2**).

**8.1.1 Offset of the disciplinary fine in the amount of USD 104,000.00?**

55. The Club fined the Player in the amount of USD 104,000.00 for his (undisputed) refusal to undertake a \_\_\_\_\_ on 7 and 8 June 2021. The Disciplinary Decision is based on the Club's Rulebook and the Player's alleged failure to comply with the terms of the Player Contract.
56. The set-off of a disciplinary fine requires that such fine has been duly imposed by the Club. Under constant BAT jurisprudence, a disciplinary sanction is valid and enforceable (and may, therefore, be the due subject for a set-off) if (1) there is a legal basis for it, and if it is (2) formally and (3) substantively lawful. Under the circumstances of the present case, the Arbitrator finds that the Disciplinary Decision does not fulfill these prerequisites.
57. The Disciplinary Decision already lacks a proper legal basis, because the Club failed to demonstrate that its Rulebook was validly incorporated into the Parties' contractual relationship. Pursuant to Clause V of the Player Contract, for the Player to be bound by the Rulebook, the Club had to "*obtain the signature of the Player on a formal, written copy of such rules and fines written in English as confirmation of receipt and acceptance of the content*" (Clause V). The Club failed to submit any proof that it obtained the Player's signature in the required manner. While the Club, during this arbitration, alleged that the Player received and signed the Rulebook, the Player insisted that no such proof exists. Because the Club relies on this fact as the basis for

its set-off, the Club would have been required to submit appropriate proof (i.e. the signed Rulebook), which it did not do. Therefore, the Disciplinary Decision lacked the required legal basis and is, therefore, invalid.

58. Furthermore, while the disciplinary sanction must be considered invalid for the identified lack of a legal basis alone, the Arbitrator notes that she also has serious doubts with respect to the lawfulness of the fine, both regarding its justification as such, and regarding its quantum. Pursuant to Clause I.B of the Player Contract, the Player was to undergo \_\_\_\_\_ while he was with the Club, but “*not in the off-season*”. The Respondent purports that the “*off-season*” does not begin “*at the moment when the referee whistles the end of the last basketball game during the season*”, but at the time when the Player is contractually allowed to leave Belgrade, which – in Respondent’s view – is 2 days, or 48 hours, after the last match. Under Respondent’s interpretation, given that the Club played its last game in the afternoon/evening of 5 June 2021, the Club’s request for the Player to test in the morning of 7 July 2021 would have been legitimate.
59. However, the contractual interpretation suggested by the Respondent is all but compelling. The Player Contract does not contain a definition of the “*off-season*” to begin with. Furthermore, Clause I.A of the Player Contract, on which the Respondent relies, provides that the Player was free to leave the Club “*no later than two (2) days following Club’s final game*” (emphasis added). Under this wording, the Player could have indeed left the Club “*at the moment when the referee whistles the end of the last basketball game during the season*”, unless the Club required him to stay for up to two days longer (of which there is no evidence in this case).
60. In the end, the contract interpretation issues associated with the temporal scope of the Player’s \_\_\_\_\_ obligations can be left undecided here, because the Arbitrator considers that the Club’s testing requests on 7 and 8 June 2021 (after the last game of the season) were made in bad faith and, seemingly, in an attempt to evade (overdue)

salaries the Player had yet to receive. There is no convincing explanation why the Club waited until after the last game of the season, and until hours before the Player was free to leave Belgrade, to obtain a \_\_\_\_\_ it could have easily obtained earlier. Upon the Respondent's own submission, the Player declined to play for the Club during the entire play-offs (and not only in the last game) because of an alleged \_\_\_\_\_ problem. If the Player's alleged problem and refusal to play made the Club suspect that he had a \_\_\_\_\_ again, it could have, and should have, administered a \_\_\_\_\_ immediately when such suspicions were arising. The Club's explanation that its decision to postpone \_\_\_\_\_ until after the last game was made deliberately to ensure that the team's concentration for the play-offs would not be disturbed is unpersuasive. Such testing could have been done in a secret and confidential manner to the exclusion of any publicity. Furthermore, not administering a \_\_\_\_\_ at the time when the suspicion arises entails a significant risk that an assumed \_\_\_\_\_ remains undetected, a risk that no reasonable person would take voluntarily in light of the severe consequences of a positive finding.

61. Similarly, there is no convincing explanation for the exorbitant amount of the fine in the amount of USD 104,000.00 (which is more than half of the Player's salary for the entire season) other than that this amount precisely matches the Player's outstanding salary. The Club generically and repeatedly refers to the Player's \_\_\_\_\_, which is not a sufficient reason for such an inflated fine absent any other indications that the Player \_\_\_\_\_. In fact, the Player appears to have been \_\_\_\_\_ during the entire 2020-21 season, when the Club had the contractual right to administer \_\_\_\_\_ week.
62. As a result, the Arbitrator finds that the Disciplinary Decision, including the fine imposed therein, is invalid both because it lacked a legal basis and because the timing of the Club's \_\_\_\_\_ requests was inequitable. As a result, there is no basis for the alleged set-off.



### 8.1.2 Offset of a damages compensation claim in the amount of USD 150,000.00?

63. The Respondent further asserts that it has an (alternative) right to offset an amount of USD 150,000.00 (net) against the Player's salary claims. In the Disciplinary Decision, this amount is characterized as damages compensation under Clause IX of the Player Contract. In relevant part, Clause IX reads as follows:

***“IX. Early Termination by Player.** Club and Player acknowledge and agree that Player shall have the right to terminate this Agreement without any further obligations to Club following the 2020-2021 season according to the following terms:*

*During the period commencing as of the Club's last official game of the 2020-2021 season and continuing through and including July 31, 2021 (the “Player Buyout Period”), Player shall have the right to terminate this Agreement upon written notice to Club. Upon termination of this Agreement by Player in accordance with this Paragraph IX, Player shall be a free agent and Club shall immediately issue a Letter of Clearance to allow Player to sign with any team worldwide. Upon the valid issuance of such Letter of Clearance, Club shall receive a buyout payment of One Hundred Fifty Thousand Dollars (USD\$150,000), which shall be paid to Club no later than July 31, 2020. Club agrees that all buyout payments made directly to the Club by another entity or club that has the written approval of the Player to make such buyout payment will be valid, accepted, and binding under this Agreement.”*

64. Hence, this clause provides for a “buyout payment” in favour of the Club in case of the Player's early termination of the Player Contract. However, in the present case, it was the Respondent, and not the Player, who terminated the Player Contract. The Respondent's exercise of the early termination option does not trigger any payment obligation on the part of the Player under Clause IX.
65. The Respondent neither has a claim for damages against the Player on any other basis. It remains unclear and unexplained which damages the Club alleges to have suffered. In any event, Clause I.B of the Player Contract provides for a special termination mechanism in the event that the Player fails a \_\_\_\_\_ (or unjustifiably refuses to do a \_\_\_\_\_), which the Club failed to follow. Specifically, the Club failed to terminate the Player Contract within three business days following the Player's refusal to undergo testing. As per Clause I.B of the Player Contract,

*"[i]n the event the Club fails to terminate this Agreement in accordance with this Section I.B. in connection with any failed \_\_\_\_\_, the Club shall have waived its right to terminate this Agreement at any subsequent time in connection with such failed \_\_\_\_\_, and this Agreement and all its terms shall remain fully guaranteed."*

66. Consequently, the subsequent termination issued on 30 June 2021 (i.e. more than three weeks after the refused tests) cannot be based on the failure to test, and can – accordingly – not form any basis for a damages request. This termination was clearly based on Clause VIII of the Player Contract, i.e. the early termination right. But even if the termination could be based on the refusal to be tested (*ad arguendo*), Clause I.B goes on to provide that any outstanding amounts at the time of termination would anyway remain payable.

67. In conclusion, the Arbitrator finds that the offset is invalid. The Player is entitled to receive outstanding salaries in the amount of USD 104,000.00 (net).

## **8.2 The Player's Claim for Flight Ticket Reimbursement**

68. Pursuant to Clause III.B of the Player Contract,

*"Club shall pay for one (1) round trip premium economy class airline ticket and three (3) round trip economy class tickets, for Player from Player's residence or other Player designated location in the United States to Club's location during the Term".*

69. The Player submitted a receipt for the purchase of a flight ticket for a trip from Belgrade to Los Angeles via Frankfurt am Main (economy/premium economy ticket in the amount of USD 1,282.75). The Club has not contested the claim. Therefore, the Arbitrator finds that the Player is entitled to receive USD 1,282.75 as a reimbursement for the advanced flight ticket.

## **8.3 The Agency's Claim for Outstanding Agency Fees**

70. Pursuant to Clause IV of the Player Contract (quoted above at para. 18), the Agency

was to earn a “*guaranteed*” agent fee for the 2020-21 season of USD 10,000 (net), to be paid by 1 February 2021. In accordance with Clause VIII of the Player Contract, under which the Club terminated the Player Contract, the Club “*shall nevertheless remain obligated to pay Player and Agent all amounts earned by Player and Agent up through and including the date that the Club exercises the Club’s Early Termination Option.*”

71. Hence, under Clause IV, the termination of the Player Contract by the Club does principally not affect the agent fee for the 2020-21 season. The Club’s argument why the Agency shall not be entitled to receive the agent fee is that the Agency (together with the Player) promised to the Club prior to concluding the Player Contract that he would not \_\_\_\_\_ anymore, which promise the Club considers broken (as it surmises that the refusal to take the \_\_\_\_\_ means the Player did \_\_\_\_\_).
72. Apart from the legal question of whether a broken promise would compromise the Agency’s claim to receive the agent fee, the Arbitrator finds that there is no factual basis for assuming that the Player’s refusal to submit himself to \_\_\_\_\_ justifies the conclusion that the Player was guilty of \_\_\_\_\_. As explained above, the Player was entitled to \_\_\_\_\_ under the terms of the Player Contract, and under the specific circumstances at hand. There is also no evidence or even an indication on the record that the Player had issues with \_\_\_\_\_ during his term at the Club.
73. Hence, the Arbitrator finds that there is no basis for a denial of the contractually agreed agent fee, and that the Agency is entitled to receive USD 10,000.00 (net).

#### **8.4 Interest**

74. Pursuant to their request for relief and the additional explanations contained in their Request for Arbitration, Claimants request the payment of default interest in the amount of 5% per annum on the following amounts:

- USD 12,000.00 from 10 May 2021;
- USD 12,000.00 from 10 June 2021;
- USD 80,000.00 from 30 June 2021;
- USD 10,000.00 from 1 February 2021.

75. The Player Contract does not provide for any provision concerning interest. According to constant BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. As requested by the Claimants, and in line with BAT's jurisprudence, the interest rate shall be 5% per annum.

76. With respect to the starting dates requested by the Claimants (the respective due dates for the salary instalments and the agency fee), the Arbitrator notes that interest principally begins running as of the day after the principal debt falls due. Hence, the Arbitrator finds that the Claimants' claims for interest start running as of the day after the respective due date of the instalment pursuant to Clauses II and IV of the Player Contract, i.e.

- from 11 May 2021 on the amount of USD 12,000.00;
- from 11 June 2021 on the amount of USD 12,000.00;
- from 1 July 2021 on the amount of USD 80,000.00;
- from 2 February 2021 on the amount of USD 10,000.00.

## **8.5 Summary**

77. The Player is entitled to receive USD 104,000.00 (net of all taxes, fees and other charges) in outstanding salary together with interest of 5% per annum

- from 11 May 2021 on the amount of USD 12,000.00 net;

- from 11 June 2021 on the amount of USD 12,000.00 net;
- from 1 July 2021 on the amount of USD 80,000.00 net.

78. The Player is also entitled to receive USD 1,282.75 as a reimbursement for the advanced flight ticket.

79. The Agency is entitled to receive USD 10,000.00 (net) in outstanding agency fees, together with interest of 5 % per annum from 2 February 2021.

## **9. Costs**

80. 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). [...]”*

81. On 20 September 2021, the Vice-President of the BAT determined the arbitration costs in the present matter to be EUR 9,500.00.

82. With respect to the allocation of the arbitration costs 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.”*

83. Considering that it was the Claimants who entirely prevailed in this arbitration, it is consistent with the provisions of the BAT Rules that 100% of the costs of the arbitration, as well as 100% of the Claimants' reasonable fees and expenses, be borne by the Respondent. Hence, the Respondent shall pay the Claimants the arbitration costs



advanced by them in the amount of EUR 9,500.00. The remainder of the Advance on Costs in the amount of EUR 500.00 shall be reimbursed to the Claimants by BAT.

84. 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."*

85. 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. In case of multiple Claimants and/or Respondents (as in this case) the maximum contribution is determined separately for each party on the basis of the relief sought by/against this party. The maximum contribution in respect of the amount in dispute for the Player's claim of EUR 91.020,90,<sup>4</sup> plus interest (and excluding the handling fee), according to Article 17.4 of the BAT Rules is EUR 7,500.00. The maximum contribution in respect of the amount in dispute for the Agency's claim of EUR 8.645,38<sup>5</sup>, plus interest, is EUR 5,000.00. Hence, the maximum contribution is EUR 12,500.00 in total.

86. The Claimants claim a total of EUR 13,300.50 in legal fees and expenses for both Claimants, which exceeds the maximum contribution available in this case under Article 17.4 of the BAT Rules. These legal fees are excessive under the circumstances, given that no hearing took place and that the pertinent issues were confined and primarily of

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<sup>4</sup> Corresponding to the requested amount of USD 105,282.75; exchange rate of EUR 0,864538 on 5 November 2021 (filing date of the Request for Arbitration).

<sup>5</sup> Corresponding to the requested amount of USD 10,000.00; exchange rate of EUR 0,864538 on 5 November 2021 (filing date of the Request for Arbitration).



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a legal nature. The Arbitrator further notes that Claimants submitted their statement of costs with a delay of almost 8 weeks, due to Claimants' counsel having "*mis-calendered the deadline*". Taking all of these circumstances into account, the Arbitrator finds that the requested contribution to Claimants' legal fees must be significantly reduced, and that an amount of EUR 3,000 is appropriate in this respect.

87. Furthermore, in accordance with the cost allocation explained above, Claimants are entitled to a reimbursement of the non-reimbursable handling fee in the amount of EUR 3,000.00.

**10. Award**

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

1. **Basketball Club Partizan is ordered to pay Mr. Rashawn Thomas an amount of USD 104,000.00 net of all taxes, fees and other charges, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) until complete payment**
  - from 11 May 2021 on the amount of USD 12,000.00 net;
  - from 11 June 2021 on the amount of USD 12,000.00 net;
  - from 1 July 2021 on the amount of USD 80,000.00 net.
2. **Basketball Club Partizan is ordered to pay Mr. Rashawn Thomas an amount of USD 1,282.75 as a reimbursement for a flight ticket.**
3. **Basketball Club Partizan is ordered to pay Wasserman Media Group an amount of USD 10,000.00 net of taxes for outstanding agency fees, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) from 2 February 2021 until complete payment.**
4. **Basketball Club Partizan shall pay jointly to Mr. Rashawn Thomas and Wasserman Media Group EUR 9,500.00 as reimbursement for their arbitration costs.**
5. **Basketball Club Partizan is ordered to pay jointly to Mr. Rashawn Thomas and Wasserman Media Group EUR 6,000.00 as a contribution towards their legal fees and expenses.**
6. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 28 September 2022

Annett Rombach  
(Arbitrator)