

ARBITRAL AWARD

(BAT 0272/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Zoran Savić,

- Claimant -

represented by Mr. Massimo Coccia and Mr. Mario Vigna,
Coccia De Angelis & Associati, Piazza Adriana 15, 00193 Rome, Italy

vs.

Mr. Nenad Krstić,
c/o CSKA Moscow, 39A Leningradsky Prospect,
125167 Moscow, Russia

represented by Mr. Ilija Dražić, Dražić, Beatović & Stojic LLP,
Kralja Milana 29, 11000 Belgrade, Serbia

- Respondent -

1. The Parties

1.1 The Claimant

1. Mr. Zoran Savić (hereinafter also referred to as “the Agent” or “the Claimant”) is a FIBA-certified agent that provides services to professional basketball players.

1.2 The Respondent

2. Mr. Nenad Krstić (hereinafter also referred to as “the Player” or “the Respondent”) is a Serbian professional basketball player.

2. The Arbitrator

3. On 23 April 2012, the President of the Basketball Arbitral Tribunal (the "BAT"), Prof. Richard H. McLaren, appointed Mr. Quentin Byrne-Sutton as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). Neither 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

3.1.1 Nature of the Dispute

4. In a nutshell, the dispute is derived from the fact that after the parties entered into an Agency Contract dated 27 May 2011 (the “Agency Contract”), the Player terminated it on 21 June 2011, the day before he signed an Employment Agreement with the Russian club CSKA Moscow (hereafter “the Club”) on 22 June 2011 (the “Employment

Agreement”).

5. The Player considers he was justified in terminating the Agency Contract and therefore owes no fees or other compensation to the Agent, while the latter deems the termination was without cause and in breach of contract, meaning that he is entitled to damages representing the lost opportunity of earning the commission he would have been entitled under the Agency Contract.

3.1.2 Signature of the Agency Contract

6. With respect to the events and actions leading up to the signature of the Agency Contract, the Player alleges the following in his own statements and/or via the witness statements he filed:

- *“In April 2011 [the Respondent's] friend Spomenko Pajovic told him that he personally knows some people from the management of the basketball club CSKA Moscow, and that he can check with them if they are interesting in hiring him. Respondent agreed with that and the first contact was established with assistance of his friend, Mr Pajovic. CSKA Moscow confirmed interest immediately in April 2011, several times Respondent and Mr Pajovic spoke with Ms Furaeva and Mr Vatutin, but CSKA Moscow management told them that though deeply interested everything have to wait finish of 2011 Euroleague Final Four tournament in Barcelona, Spain, scheduled for the beginning of May 2011...”*
- In the beginning of May 2011, a certain Mr Kilibarda made contact by SMS with the Managing Director of CSKA, Mr. Vatutin (who personally knew Mr. Kilibarda), indicating that Mr Zoran Savic wished to negotiate the engagement of the Player on the latter’s behalf. Mr Vatutin discussed this matter internally with CSKA’s Vice-President, Natalia Furaeva, and the latter subsequently informed Mr

Kilibarda during a telephone conversation that the Club was already in contact with the Player and would need written proof that Mr. Savic is an agent representing the Player.

- The Club received no such written document and through its Vice-President, Ms Natalia Furaeva, in May 2011 “... continued to communicate directly with Mr. Krstic and occasionally with his advising friend Mr. Spomenko Pajovic, discussing terms of eventual transfer and engagement that are acceptable for the Parties, the Club and the Player ...” (Witness statement of Ms Furaeva)
- “The Claimant made first communication with me in the beginning of May 2011, probably between 6th and 8th May afternoon [in Boston via mobile phone] ... and informed me that he just opened Agency for representation of professional basketball players and offering me to cooperate with him ... During that communication we did not mention at all CSKA...”
- “After a few weeks, approximately in Mid-May the Claimant called me again and offered me to represents (sic) me in negotiations with CSKA Moscow. That was again phone communication [...] Since I was already in continuous communications with CSKA, I did not need contact from the Claimant because I had direct personal contact with the Club, so I rejected help of the Claimant explaining that I am already speaking with CSKA straightaway and that my personal friend Pajovic help me with advices when necessary, on purely friendly basis.”
- During that conversation in mid-May, Mr Savic “... said that he has really good contacts with CSKA Moscow, especially his apprentice Mr Kilibarda who is friend with Mr Vatutin, president of the Moscow club, and that acting as [a]n agent Mr Savic shall procure very good terms of the agreement with the Club if eventually Mr Krstic is willing to accept to engage him”.

- Thereafter, *“Occasionally, few times, he [Mr. Savic] called Mr Krstic in the second part of May 2011, but the Respondent position remained unchanged and in those occasions they just briefly chat without any development”*.
- *“Basically, in May 2011 [I] continued talks and negotiations with CSKA Moscow without even thinking about the Claimant”*.
- Around 19-20th May the Club invited the Player to a meeting in Moscow and *“Mr Krstic flied to Moscow on 25th May 2011, jointly with his friend Mr Pajovic to negotiate terms of his engagement for CSKA Moscow. He was received cordially and negotiated with the Clubs’ officials, primarily Ms Furaeva, during the evening of that day and then continued during the next day. During the negotiation relatively fast CSKA Moscow disclosed its final offer stated that it is the Club’s best offer, that the Club wants to close the arrangement as soon as practicable [...] Mr Krstic asked for delivery of such offer in writing (practically to have it in written form for the first time after talks started) and Ms Furaeva sent by email that offer to him at the very same day, 26th May 2011, about noon... ”*.
- *“Mr Krstic was not completely satisfied with proposed terms” [...] Day after Mr Krstic had returned to Moscow, Mr Savic called him again and continue to persuade him that in case of decision to engage his agency Mr Savic can brought to him additional value and that he surely can improve offered terms, upgrading all financial points that have to be agreed, from salary to bonuses. Mr Krstic told him that he is really interesting in improving those terms and if Mr Savic is sure that he is able to do so he may engage him exclusively for that purpose. Mr Savic confirmed that he is sure in that, repeat that Mr Kilibarda is friend of Mr Vatutin, knowing him well from time when Mr Kilibarda worked in “Nike” in Moscow, one of the biggest CSKA sponsors...”*
- Mr Savic represented that he will be eligible for fees only if he could *“... improve*

the terms of engagement in comparison with those offered to the Respondent by CSKA Moscow... and that *"... he will be paid exclusively and directly from CSKA, whatever amount he additionally agreed with the Club..."*. The Player accepted to engage Mr Savic under those conditions: *"I accepted such engagement just in case the Claimant could be adequately efficient to significantly improve the Club's terms (to €3m or close to that amount)"* and if he can *"[...] agree with CSKA Moscow to pay any agents' fee independently of that amount"*. *"Normally, I did not insist on CSKA Moscow but inform Mr Savic that I can also accept other big club under (in principle) similar terms"*. *"That was task offered to Mr Savic and Mr Savic clearly accepted that"*.

- *"However, Mr Savic told him that he needs just a formal agency agreement to represent himself as authorized agent, and Mr Krstic accepted to sign it, considering such explanation as reasonable. Mr Krstic briefly consulted Mr Pajovic and he told him that if it is the case such offer seems to be reasonable from his angle"*.
- *"After some time, day or two, close to very end of May, I spoke with Mr Marc Cornstein who was my NBA agent (at that time we had lock out in NBA) and informed him that I want to use the services of Mr Savic as an agent, told him what Mr. Savic promised to me [...] and asked him to call Mr Savic and to confirm to him that he understood my choice and offer to him assistance if necessary. My knowledge is that he did that almost immediately"*.
- Mr Cornstein therefore called Mr Savic in May 2012: *"I first spoke to Mr. Savic sometime in May, 2011. Mr. Krstic asked me to contact Mr. Savic because he decided to use Mr. Savic as his European agent and he wanted me to be in cooperation with Mr. Savic on his behalf"* (witness statement of Mr. Cornstein)
- *"I spoke occasionally with Mr. Savic for the brief time that he was Mr. Krstic's*

agent. I asked Mr. Savic to send me a copy of his contract with Mr. Krstic and he obliged [on 30 May 2011]" [...] "Several days after Mr. Savic sent me the contract entered into between himself and Mr. Krstic, Mr. Krstic sent me SMS messages stating that things are not going well and that he was dissatisfied with Mr. Savic's performance. We then had a few conversations where I told Mr. Krstic that he hired Mr. Savic to do this job and he needed to be a little patient. I reminded Mr. Krstic that Mr. Savic was his choice to represent him in Europe and it might be confusing if he made a change [...] Mr. Krstic then sent me a SMS message informing me that he was terminating his contract with Mr. Savic. When Mr. Krstic eventually signed his deal with CSKA, I asked him which agent did the deal for him. Mr. Krstic called me and told me that he finalized the contract with CSKA on his own, without the help of an agent" (witness statement of Mr. Cornstein)

- *"In short, Mr. Krstic told me that Mr. Savic promised he would deliver him a great deal, but Mr. Krstic felt he did nothing to better his position with CSKA" (witness statement of Mr. Cornstein)*

7. Concerning the same period and the events and actions leading up to the signature of the Agency Contract, the Agent alleges the following in his own statements and based on the documents and affidavits he filed:

- He has known Mr. Cornstein since 2003.
- He has known Mr. Krstić for quite some time. They had a lunch in New York in April 2004 at the Plaza hotel with his then manager for Europe, Aleksandar Raskovic.
- *"I first contacted Mr. Cornstein on April 11th or 12th 2011 and we spoke about the possibility of me representing his players in Europe [...] It was important for him to have someone who spoke the same language as Mr. Krstic, because that*

makes the conversation with the player much easier. He explained that we had to wait until the end of the season in the NBA because there was still a possibility of Mr. Krstic staying in Boston or getting some other offer in the NBA [...] He called me back the next day and said that Mr. Krstic was pleased with the idea of us working together. He gave me Mr. Krstic's number in the US and told me to contact him to make a strategy of actions for Europe if he would have failed to get an adequate offer in the NBA. Then, Mr. Krstic and I were constantly in contact throughout April and May 2011 concerning his offers in the NBA and the possibility of him coming to Europe. The NBA lockout was almost certain and Marc Cornstein was pretty sure that it would have lasted a while."

- *"... The first conversation I had with Mr. Krstic concerning our cooperation occurred on April 14th 2011, after my conversation with Mr. Cornstein. We spoke on the phone. Marc Cornstein gave me his number the previous day. Mr. Krstic told me that he had spoken to Marc and that Marc had suggested the option of us working together. He liked the idea and we agreed on the fact that NBA should be his first option and if that does not work out then he would come back to Europe and I could talk to clubs in Europe on his behalf."*
- *"I first spoke to CSKA representatives concerning the possibility of hiring Mr. Krstic at the Final Four tournament in Barcelona in May 2011. The meeting took place in the lobby of the El Rey Juan Carlos Hotel where all the teams were accommodated on May 7th 2011."*
- It is untrue that the Player was not aware of the contacts and connections that Mr. Savić had with CSKA Moscow and that the Player told him in mid-May 2011 that the Player already had contacts with CSKA Moscow and about the role of Mr. Spomenko Pajovic.
- After the Player's negotiation in Moscow on 25-26 May 2011, "... Mr. Krstić

expressly represented to Claimant that he was not satisfied at all of the work and assistance of Mr. Pajovic since he was utterly bland during the discussion, substantially accepting without any remarks the proposed terms of the agreement [...] Moreover, Mr. Krstić described the meeting held with Mrs. Furaeva and Mr. Vatutin and that the Russian Club's representatives urged him to sign the contract drawn up by them in order to avoid the possible intervention and competition of other clubs."

- *"Having spoken to Ms. Furaeva on May 27th 2011, she had requested me to email her the contract of representation I had signed with Mr. Krstic since she would have not talked to anyone who did not have a contract signed with the player concerning representation. I completely agreed with Ms. Furaeva and asked Mr. Krstic to formalize in writing our understanding about my agency role and to sign a contract with me so that we had written evidence supporting the agency relationship between Mr. Krstic and me. Mr. Krstic signed the contract on May 28th 2011, and that contract was sent to Ms. Furaeva and Mr. Vatutin on May 30th 2011. That contract was also sent to Mr. Cornstein on May 30th 2011 after Mr. Krstic's request."*
- *"Before he signed the agency contract we spoke about the possible engagement he would be satisfied with. We also spoke about the possibilities of signing various European clubs who had the financial capacities to offer him a good contract (e.g. CSKA, Barcelona, Real Madrid, Efes Pilsen, Olympiakos etc.). Based on the impression I got after having spoken to CSKA representative at the Final Four in Barcelona, my suggestion was that we should take advantage of the fact that they were interested in him. After the signing of our contract on May 28th 2011, in particular on May 30th 2011, I sent it to the representatives of Olympiakos, Efes Pilsen, Real Madrid, Barcelona, Caja Laboral, Panathinaikos [...] Then, we intensified negotiations with CSKA representatives. Indeed, we concluded that at that particular moment (end of May, beginning of June 2011),*

CSKA was the only club that was ready to offer him a contract of that value.”

- *“All the conversations I had with Mr. Krstic up until we signed the agency contract were telephone conversations. We did not have email contact. Mr. Krstic often used SMS as a communication tool.”*

3.1.3 Basic Provisions of the Agency Contract

8. As mentioned above, on 28 May 2011, the Player signed the Agency Contract proposed to him by the Agent.

9. In its relevant part, article 1.2 of the Agency Contract stipulates:

“The Player hereby employs the Agent and the Agent hereby agrees to act as Agent for the player.”

10. Article 3 of the Agency Contract provides:

“For any contract procured by the Agent and signed by the Player, the Player agrees to pay to the Agent an agent fee of 10% of the Player’s base net salary.”

11. Article 4 of the Agency Contract provides:

“This Agreement shall begin on the day of signature hereof by both parties and shall expire on May 27, 2013 unless renewed by written agreement between the parties.”

3.1.4 Negotiation of the Employment Agreement and Termination of the Agency Contract

12. During the second half of May 2011, the Player had pre-discussions with the Club

directly regarding his possible engagement by CSKA, which led to him being invited to Moscow for a meeting with representatives of the club (Mr. Vatutin and Ms. Furaeva) on 25-26 May 2011.

13. The Agent was not involved in those pre-discussions or during the 25-26 May 2011 meeting.
14. During the 25-26 May 2011 meeting, the Club made a financial offer to the Player orally, which was confirmed to him by Ms Furaeva by email on 26 May 2011 after the end of the meeting.
15. According to the offer contained in the foregoing email of 26 May 2011, the Player would receive for the 2011/2012 season, a base salary of EUR 2,400,000 + EUR 240,000 to cover agents' fees + EUR 70,000 to cover additional expenses + EUR 100,000 as possible bonuses, making it a total remuneration of **EUR 2,710,000** plus any obtained bonuses. For the 2012/2013 season, the base salary would be EUR 2,500,000, with the amount allocated for agency fees representing EUR 250,000 and the coverage of additional expenses remaining the same, making it a total remuneration of **EUR 2,820,000** plus any obtained bonuses.
16. The Club insisted on the fact that for reasons of policy the entire amount would be paid onto the Player's bank account and that the latter would be responsible for paying any agent's fees directly.
17. After the Agency Contract was signed and sent to the Club on 30 May 2011 by the Agent, Mr. Kilibarda (who was assisting the Agent) met with the Club's representatives on 1 June 2011 in order to take up the negotiation on behalf of the Player.
18. Thereafter, the Club sent the Agent/Mr. Kilibarda, the draft terms of the employment agreement the Club was willing to propose to the Player, which led to a negotiation of

those terms and of the amount of remuneration.

19. Between 2-6 June 2011, the Club and the Agent/Mr. Kilibarda exchanged several drafts of the employment agreements, concerning the two documents the Club had drafted, one being entitled "*Labour Agreement of Professional Basketball Player*", which was to be filed with the Russian Basketball Federation, the other being named "*Additional Agreement N°1 to the Labour Agreement of Professional Basketball Player*", which contained various supplementary terms as well as the details of the total remuneration and of the schedule of payment.
20. During this negotiation, the Agent/Mr. Kilibarda tried unsuccessfully to obtain a higher remuneration for the Player. In that relation, on 5 June 2011, Ms Furaeva sent an email to the Agent stating: "*All money will go the the (sic) player's account, as I have told you by phone. So it's up to you – what you are ready to give to the player from your agency fee and in which season, and how player will pay you this money. We just can help him to do it technically (bank's operations). And of course we will find him an apartment, car and air tickets. But money will be paid from his account. We explained about our system of paying to Nenad even before you became his agent as well as that it was really our final maximum proposal. Again, please note, that in the contract will be shown only the total amount as a salary (2 710 000 and 2 820 000). Plus bonuses of 90 000, but only in case of victories*".
21. With the assistance of a lawyer who was engaged and consulted internally by the Agent, the latter also insisted during the negotiation on coordinating various terms of the two contractual documents (the so-called Labour Agreement and the so-called Additional Agreement N°1), with modifications being proposed in marked-up track change form.
22. By such means, the Agent was able to obtain certain changes of legal and practical importance, some of which could also indirectly be of financial value in case of a

dispute. The Club accepted some but not all of the proposed changes/additions.

23. While that process was ongoing, the Player and the Agent also had two face-to-face meetings in restaurants in Belgrade on the 5th and 7th of June 2011, during which the latter updated the Player as to the advancement of the negotiations with the Club. The parties' allegations as to what was said during those two meetings and regarding the atmosphere of the talks are quite largely discrepant, except that they seem to agree that the Agent was explaining what terms were being negotiated in general and why certain legal terms were important, whereas the Player was above all focusing on the financial terms.
24. According to the Agent, the Player did not express serious discontent upon being presented the latest draft of the Employment Agreement during the second meeting in Belgrade (on 7 June), whereas the latter contends he politely but firmly indicated and repeated his dismay with the lack of improvement of the financial terms and with the Agent's inability to fulfil his promises to improve the contract.
25. The Player took the draft Employment Agreement with him at the end of the meeting of 7 June, intending to study it, and, after discussing internally with Mr. Pajovic, sent the Agent an SMS the next days saying:

"I signed just a moment ago. I don't think that anyone in particular contributed to the deal so I decided to go alone. Thanks for everything, I didn't mean anything negative but I just couldn't be unfair to anyone. I hope that we can cooperate in the future, if not then all the best".
26. Thereafter, i.e. from 7 June 2011 onwards, neither the Club nor the Player negotiated or communicated with the Agent any more, and the Player continued the negotiation directly with the Club.
27. On 21 June 2011, the Player sent the Agent a written notice stating: "*Hereby I, Nenad*

Krstic, notify you about my intention to terminate a Standart (sic) Contract – Players’ Agent and Player between us dated May 27th, 2011 starting June 21st, 2011”.

28. On 22 June 2011, the Player signed his Employment Agreement with the Club, which contained the same financial terms (for the 2011/2012 and 2012/2013 seasons) as those insisted on from the beginning by the Club, as well as some but not all of the additional/modified terms that the Agent had previously requested to include during his participation in the negotiation between 1-6 June.

3.1.5 Letter of Notice

29. After some informal contacts, the exact content of which is controversial, to try and find an amicable solution, the Agent put the Player on notice by letter dated 11 January 2012 to pay him agency fees in an amount corresponding to what is being claimed in this arbitration.
30. On 17 January 2012, the Player replied personally, contesting the Agent’s right to claim any fees and arguing in substance that he had terminated the Agency Contract before signing the Employment Agreement with the Club, and that his own efforts and “*Work of Mr. Spomenko, as my agent...*” had led to the signature of the final version of the Employment Agreement.
31. On 24 January 2012, the Player sent a further reply signed by a lawyer, elaborating on what had already been stated in the first notice and requesting the Agent to desist from alleged representations regarding his relationship with the Player.
32. On 26 January 2012, the Agent sent a brief answer to the Player’s lawyer indicating surprise, denying any unlawful actions and reserving his rights.

3.2 The Proceedings before the BAT

33. On 20 March 2012, the Claimant filed a Request for Arbitration in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 4,000.

34. On 27 April 2012, the BAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the Advance on Costs to be paid by the Parties as follows:

<i>“Claimant (Mr. Zoran Savić)</i>	<i>€ 6,000.00</i>
<i>Respondent (Mr. Nenad Krstić)</i>	<i>€ 6,000.00.”</i>

35. On 18 May 2012, the Respondent filed his Answer.

36. On 13 June 2012, the BAT acknowledged receipt of the full amount of the Advance on Costs and informed the Parties that the Arbitrator was ordering a second round of written submissions.

37. On 6 July 2012, the Claimant submitted his reply to the Respondent’s Answer.

38. On 29 July 2012, the Respondent filed his Rejoinder.

39. By procedural order of 30 August 2012, the Parties were each invited to answer a list of additional questions and file the requested related documentary evidence.

40. On 14 September 2012, both Parties filed their answers to the questions and related documents.

41. On 18 September 2012, the Respondent filed an outstanding part of his answers that he had neglected to provide due to a misunderstanding.

42. By procedural order of 19 September 2012, the proceedings were closed and the Parties invited to submit their statements of costs.
43. On 23 September 2012, the Respondent submitted his statement of costs.
44. On 1 October 2012, the Claimant submitted his statement of costs.
45. On 8 October 2012, the Respondent commented on the Claimant's statement of costs and the latter submitted a brief reply as a matter of clarification.

4. The Positions of the Parties

4.1 The Claimant's Position

46. The Agent submits the following in substance:
 - He made the initial contact with the Club via Mr. Kilibarda in the beginning of May 2011, after having verified through discussions with the Player and his US agent (Mr. Cornstein) in April 2011, that the Player would likely be seeking employment with a European club for the 2011/2012 season.
 - Although the Player had begun some negotiations with the Club during the second half of May 2011 and was using Mr. Pajovic to assist him, on 27 May 2011, upon the Player's return from a meeting with the Club in Moscow, he had a telephone conversation with the latter during which the Player expressed his discontent with both the proposal being made by the Club and with Mr. Pajovic's lack of useful input into the negotiation.
 - At that point, he informed the Player that he could only help him with the negotiation if the Player signed an agency contract that he could present to the

Club.

- Upon signing the Agency Contract, the understanding was that the Agent would seek to improve the terms of a possible employment agreement with the Club while also looking for other better financial opportunities with other European clubs.
- It is not clear that the financial offer made to the Player by the Club before the signing of the Agency Contract included an amount for agents' fees which would be paid to the Player even if no agent were finally involved.
- In any event, the mandate that the Agent received was not only to seek improved financial conditions with the Club for the Player but also to negotiate better and more favourable overall contractual terms and to seek opportunities with other clubs.
- On such basis, the Agent and his assistant (Mr. Kilibarda) did negotiate directly and intensely with the Club throughout the first week of June 2011 (after sending the Club a copy of the Agency Contract as required) and managed to obtain (using also the internal advice of a lawyer) important improvements to various terms of the draft employment agreements being proposed by the Club, while the Agent at the same time sought to establish contact with a number of other important European Clubs.
- Thereafter and without having first clearly expressed any discontent with the Agent and without having put him on notice in any manner, the Player decided to "by-pass" him and to take over the negotiations from 7 June 2011 onwards before unilaterally and without valid reasons, terminating the Agency Contract on 21 June 2011, the day before signing the Employment Agreement with the Club.

- By doing that, the Player was unfair, breached his contractual duties and unlawfully terminated the Agency Contract in a manner that caused damage to the Agent in an amount representing the agency fees he was entitled to under the Agency Contract.

47. On the basis of the foregoing arguments and in its Request for Arbitration dated 20 March 2012, the Claimant requested the following relief:

“VIII. MOTIONS FOR RELIEF

71. For all the above reasons and those which may be added at a later stage, Mr. Savic respectfully requests that the BAT:

On a evidentiary basis,

- 1) Order Mr. Krstic to produce his signed contract with CSKA and any other documentation on the subject;*

On the merits,

- 2) Adjudge and declare that Mr. Krstic unlawfully breached the Agency Contract with Mr. Savic;*
- 3) Adjudge and declare that Mr. Krstic has the obligation to pay Mr. Savic an agent's fee equal to 10% of the net salary - included any possible buyout sum - received by the CSKA; as a consequence, on the basis of the contract negotiated and finalized by Mr. Savic and CSKA,*
- 4) Order Mr. Krstic to pay the amount of EUR 490.000 to Mr. Savic or, only eventualiter [sic] as a subordinate ground, the different amount decided by the BAT Arbitrator ex aequo et bono;*
- 5) order Mr. Krstic to pay the costs of this arbitration alone and the Agent's legal and other costs, which will be quantified very precisely at later stage of these proceedings, or the other amount the BAT considers equitable.”*

4.2 The Respondent's Position

48. The Player submits the following in substance:

- He made the first contact with the Club (before the Agent).
- When the Agent first allegedly made contact with the Club, he was not authorized to represent the Player and only became authorized on 28 May 2011 after the signature of the Agency Contract.
- The Player negotiated alone with the Club in May 2011 before engaging the Agent.
- Mr. Pajovic was not representing the Player as an agent, but was simply assisting him as a friend and never got paid any fee for the assistance he provided.
- The Agency Contract was a standard FIBA template with very little significance beyond the limited scope of the Agent's mandate fixed between the parties orally during their prior telephone discussion.
- The Agency Contract did not give any exclusive rights to the Agent and it was made clear during the discussions with him that his only mandate was to improve the financial conditions offered to the Player by the Club by email on 26 June after their meeting in Moscow, or alternatively to obtain a better financial offer from another well-known European club.
- During the two meetings in restaurants in Prague on 5 and 7 June 2011, the Player confirmed that the only essential matter was the improvement of the financial conditions and during the second meeting (7 June), he made it very obvious that he was unhappy with the Agent's negotiations with the Club and that

he believed the Agent had failed in his undertaking.

- The Agent breached his contractual duties by having his (insufficiently experienced) assistant Mr. Kilibarda primarily handle the negotiations with the Club and by demonstrating through his unprofessional attitude during their meetings and discussions and by the lack of results, that he was incapable of obtaining better financial terms from the Club.
- The termination of the Agency Contract by the Player cannot have come as a surprise to the Agent given the prior deep dissatisfaction the Player had voiced on several occasions; i.e. the Agent clearly recognized the Player's dissatisfaction.
- Consequently, the Player was justified in terminating the Agency Contract and it would be contrary to the agreed terms and unfair for the Agent to receive any remuneration, including in light of the case law of BAT.

49. In his Answer, the Player submitted the following request for relief:

"V. Prayers for Relief

50. In these arbitration proceedings the Respondent respectfully requests that BAT fully dismiss the claims of the Claimant, order that the Claimant bear the entire cost of these arbitration proceedings and order that the Claimant compensate the Respondent for all of its attorney's fees and all other costs arising out of Claimant's pursuit of this arbitration."

5. The Jurisdiction of the BAT

50. Pursuant to Article 2.1 of the BAT Rules, "[t]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland". Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law

(PILA).

51. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
52. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.¹
53. The arbitration clause contained under clause 8 of the Agency Contract dated 27 May 2011 between the Parties reads as follows:

“Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties’ domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.”
54. The foregoing arbitration agreement is in written form and thus it fulfils the formal requirements of Article 178(1) PILA.
55. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA) and that the dispute between the parties falls within its scope. In addition, neither of the parties challenged the jurisdiction of the BAT in their submissions.
56. For the above reasons, the Arbitrator finds he has jurisdiction to entertain the dispute between the parties.

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

6. Discussion

6.1 Applicable Law – ex aequo et bono

57. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the Arbitrators to decide “en équité” instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

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

58. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

“Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.”

59. Clause 5 of the Agency Contract stipulates that Swiss substantive law governs it. However, the last sentence of the arbitration clause (clause 8 of the Agency Contract) provides that if and when any dispute is submitted to the BAT: *“The arbitrator shall decide the dispute ex aequo et bono”*.

60. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Agent against the Player in this arbitration in front of the BAT.

61. 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'arbitrage² (Concordat)³, under

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).

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

62. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives “a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case.”⁵
63. This is confirmed by Article 15.1 of the BAT Rules in fine, according to which the Arbitrator applies “*general considerations of justice and fairness without reference to any particular national or international law*”.
64. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2 Findings

65. As a first preliminary matter, the Arbitrator notes that the dates of signature of the Agency Contract (28 May 2011), of termination of the Agency Contract (21 June 2011) and of signature of the Employment Agreement (22 June 2011) are undisputed.
66. Furthermore, it is undisputed that in July 2012 the Player extended his Employment Agreement with the Club for an additional season (2013/2014) beyond the two seasons that were covered by his Employment Agreement of 22 June 2011.

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.

67. As a second preliminary matter, the Arbitrator notes that with regard to numerous factual matters, including the chronology of certain events, the parties' respective allegations remain in direct and flagrant contradiction.
68. In such context, where it is sometimes difficult for the Arbitrator to make out where factual reality lies, the question of which party has the burden of proving a given disputed fact is an important element of consideration.
69. In keeping with the general and fair principle that it is normally the party alleging a fact in support of its claim that has the burden of establishing it, the Arbitrator finds the following in terms of burden of proof:
- Since the Agent is alleging the existence of an exclusive agency contract entitling him to the commission and that he provided the services stipulated thereunder to be entitled to his commission/fees, he must establish the existence of the Agency Contract and that he was in the process of fulfilling its conditions when the Player terminated it.
 - Since in his defence the Player is alleging that the parties orally agreed on some particular conditions that needed to be met for the commission/fees to be owed and that the Agent did not meet them, the Player has the burden of proving the existence of those conditions and the fact that they were not met.
 - Since, in substance, in his defence the Player is alleging that he was entitled to stop using the services of the Agent in negotiating with the Club (from 7 June 2011 onwards) and was then justified in terminating the Agency Contract on 21 June before signing the Employment Agreement with the Club the next day, the Player has the burden of proving the actions and/or inactions of the Agent which allegedly justify those unilateral acts of the Player.

70. In connection with the burden of proof, the main broader questions that need answering are: (i) what was the material scope of the Agent's services that the parties agreed to as the basis of the stipulated commission/fees; (ii) whether the Player breached his contractual obligations by excluding the Agent from the negotiations with the Club from 7 June 2011 onwards and/or by unilaterally terminating the Agency Contract on 21 June 2011; and (iii), if so, what compensation the Agent is entitled to.
71. With respect to the first point, the formal existence and validity of the Agency Contract is not at issue. Neither has the Player directly submitted in this proceeding that it was a non-exclusive contract (although that argument is made in the Player's responses to Agent's letters of notice prior to the arbitration). In any event, the Arbitrator finds that in the circumstances of this case, the parties must in good faith have understood the Agency Contract as being exclusive, since the Club had apparently been complaining about the fact that it wished to have a clear picture of who was the Player's agent and in addition it seems clear from the evidence on record that both the Player and his NBA agent considered Mr. Zoran Savić to have been engaged as an exclusive agent, while at the same time, the Player is contending that Mr. Pajovic did not act as his agent.
72. According to the wording of articles 1.2 and 3 of the Agency Contract, in order to be entitled to his commission/fee the Agent must introduce the Player to interested clubs and then negotiate and procure an employment agreement on his behalf.
73. In this case, it is undisputed that when the Agency Contract was signed on 28 May 2011 the Agent knew the Player already had a meeting in Moscow on 25-26 May 2011 with representatives of the Club and that the purpose of engaging the Agent was for him to help the Player negotiate and procure an employment agreement with the Club or with any other interested club in Europe willing to offer a high enough salary.
74. Therefore, factually speaking, the controversial question of whether it was the Player or the Agent who first made contact with the Club can be left open.

75. Furthermore, it is undisputed that on 30 May 2011, the Agent sent a copy of the Agency Contract to the Club (as he was requested and entitled to do) and thereafter began negotiating with the Club the terms of a draft employment agreement, with the open assistance of Mr. Kilibarda and the internal assistance of a legal advisor named Federico Lolli.
76. The fact that the Agent negotiated with the Club for a week (until the end of the 6th of June) is also undisputed, as are the facts that during those days, the Agent and the Player had two meetings in restaurants in Belgrade (on the 5th and 7th of June) and that on 8 June, the Player sent the Agent an SMS with the following content (undisputed free translation of the SMS by the Claimant): *“I signed just a moment ago. I don’t think that anyone in particular contributed to the deal so I decided to go alone. Thanks for everything, I didn’t mean anything negative but I just couldn’t be unfair to anyone. I hope that we can cooperate in the future, if not then all the best”*.
77. Although there is substantial dispute between the Player and the Agent about many aspects of the contents of their discussions during the restaurant meetings on the 5th and 7th of June in Belgrade, it is not contended that at the end of the second meeting, the Player expressly indicated that he was henceforth going to take over the negotiation with the Club alone, instead of the Agent.
78. The Player alleges that he stated his dissatisfaction with the Agent’s services, *“... that he will not sign the [draft Employment] Agreement that Mr Savic brought to him because it is not the result of Mr Savic’s work, and he did not contribute to it at all...”*, that at the end of the meeting he *“... took the draft with himself, clearly but politely expressed his dissatisfaction and after that concluded that Mr Savic surely cannot help him at all...”* and that *“After the meeting in restaurant Cashmere Mr Krstic was completely disappointed. He spoke about certain details from that meeting with Mr Pajovic. Mr Pajovic told him that he has to make his stand alone and independently, but that from his perspective it is very “dangerous” proposal to completely neglect*

CSKA's offer, except if he decides to reject it'.

79. In view of the above considerations, the second point that needs examining is whether the Player has established that there existed an implicit or express understanding between them that the Agent's right to his 10% commission under the Agency Contract was contingent upon him negotiating a better total salary than the one which has already been proposed by the Club directly to the Player at the end of the meeting of 26 May 2011 in Moscow.
80. The Player is adamant that such was the case, and contends that he made this condition clear to the Agent immediately when talking to him by telephone upon returning from Moscow after the meeting with the Club on 26th of June, and then repeated this requirement on a number of occasions during subsequent telephone conversations as well as during the two restaurant meetings they had in Belgrade.
81. Among others, the Player alleges: *"I immediately and clearly told to the Claimant that I was expecting about € 3,000,000 net, since written offer from CSKA forwarded also from me to Mr Savic mentioned exactly €2,710,000 (€2,820,000) [the latter figure being for the second season 2012/2013] for myself before inclusion of Mr Savic...."*
82. The Agent acknowledges that the Player was very focused on the salary amount and less on the other contractual terms of the employment agreement to be negotiated: *"Mr. Krstic was absolutely not interested in the contract clauses. He only spoke about the amount of the contract. On both occasions when we met I insisted on the importance of some clauses of the contract and the protection of the contract ..."*
83. However, the Agent also states that: *"Following our last meeting which took place on June 7th 2011 in the presence of Mr. Goran Savic and Mr. Krstic's wife and baby daughter, Mr. Krstic was pleased with the agreed amounts of 2.710.000 EUR and 2.820.000 EUR in total'.*

84. More generally, the Agent underlines that his goal and proposal to the Player was also to seek higher salaries from other possibly interested reputed clubs in Europe, and the evidence on record shows that he did have such intention and started some ground work in that respect by informing a number of clubs at the beginning of June 2011 of his new status as the Player's agent.
85. The Player acknowledges that looking for possibilities with other clubs was also part of the mandate he gave to the Agent during their telephone conversation upon his return from the meeting in Moscow on 26 May: "*Normally, I did not insist on CSKA Moscow but inform Mr Savic that I can also accept other big club under (in principle) similar terms*".
86. The Agent argues in addition that if one examines the financial offer made by the Club to the Player by email on 26th of May (after their meeting in Moscow), it becomes clear that the total amount being offered to the Player for both seasons (2011/2012 and 2012/2013) was actually broken up into what was deemed his salary and what was to cover his agent's commission of 10%; meaning that if the Player had operated alone from the beginning, without the Club believing he had an agent, the Player would have received a lower salary than the one that became the basis of the negotiation between the Agent and the Club during the first week of June 2011. The Club has affirmed that this is not the case, and that it was simply making the distinction for budgetary reasons as well as for the event the Player felt a commission had to be paid to an agent, which was a matter for the Player to decide since the entire amount would be transferred to his account.
87. In light of the parties' respective positions summarized above, the chronology of events and the various elements of evidence relied on by each party, the Arbitrator finds that the most likely occurrence is that when the Agency Contract was signed, there was not a complete meeting of the minds on the scope of the Agent's task and on the conditions under which he would be entitled to his commission/fee, i.e. that the parties

partly misunderstood each other in the sense that the Player was focused mainly on the remuneration which could be obtained from the Club and, in that respect, naturally and in good faith felt that the Agent's task was above all to improve the existing offer obtained before the latter's intervention, whereas the Agent believed that other contractual terms could also be of significant value to the Player (which is correct) and that the goal of improving the salary included the latitude for the Agent to seek opportunities with other clubs.

88. Furthermore, on the basis of the evidence adduced, the Arbitrator finds that for as long as they lasted – between 30 May after the Agency Contract was signed and the 8th of June when the Player decided to act alone – the Agent's services seem to have been of reasonable quality and at least were not in breach of his duties, since even if he was using an assistant in the person of Mr. Kilibarda they were trying as a team not only to improve the Player's remuneration but were also rightly and in part successfully focusing and insisting on changes to other important contractual clauses. For example and although this may not have been immediately obvious to the Player who was focusing on the salary, the choice-of-forum and choice-of-law clauses as well as the prevailing language of the contract and the relationship between the two labour agreements are all important matters that the Agent sought to negotiate and that could be of significant value in case of a subsequent dispute between the Player and the Club.
89. For the above reasons, the Arbitrator finds that the Player had no good cause and was not contractually entitled to exclude the Agent from 7 June 2011 onwards in the negotiations with the Club; while at the same time, when taking that unilateral step to "bypass" the Agent, the Player appears to have expressed himself in a manner which was not entirely transparent, since in his SMS of 8 June to the Agent he stated that "*I signed just a moment ago*", which was not the case given the undisputed fact that the Employment Agreement was only signed two weeks later.

90. By not communicating with the Agent after that date (8 June 2011) and by terminating the Agency Contract on 21 June 2011 (the day before the Employment Agreement was signed with the Club), the Player made matters worse, because by acting in this manner he prevented the Agent from seeking any opportunities with other clubs then or in the future (even if the chances were only slim) and also gave the impression that he was picking the date of termination for strategic reasons.
91. The Arbitrator finds therefore that the Player breached his contractual duties by *de facto* excluding the Agent from the negotiations with the Club from 8 June onwards and by then unilaterally terminating the Agency Contract on 21 June 2011 when it was still valid until its term in May 2013.
92. At the same time, the Arbitrator considers that those actions by the Player were most likely the fruit of the initial misunderstanding between the parties as to the precise scope of the Agent's services – in the somewhat unusual circumstances of this case where the Player had already independently secured a substantial offer from the Club for the two forthcoming seasons after some negotiation and where the broad terms of the standard agency contract had been agreed in a rush.
93. For the above reasons, the Arbitrator finds that it would be exaggerated and unfair if the Agent were able to claim the entire commission/fee representing 10% of the Player's salary for two seasons under the Employment Agreement that was finally signed with the Club.
94. Therefore, in conclusion and taking all the discussed aspects into account, the Arbitrator finds it fair and just to award the Agent an amount of compensation representing 10% of the salary due under clause 2 of the Employment Agreement for the 2011-2012 season alone, i.e. an amount of EUR 271,000 (10% of EUR 2,710,000), instead of the sum of at least EUR 490,000 being claimed by the Agent.

7. Costs

95. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.
96. On 31 October 2012 - considering that pursuant to Article 17.2 of the BAT Rules “the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator”, and that “the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time”, taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised - the BAT President determined the arbitration costs in the present matter to be EUR 12,000.
97. Although the Claimant only partially prevailed in his claim, the Arbitrator finds it fair and just that in the particular circumstances of this case the Respondent bear the fees and costs of the arbitration and that he be required to cover his own legal fees and expenses as well as make a contribution of 50% to those of the Claimant, since even if there was a misunderstanding as to the scope of the Agency Contract, the Respondent did not act in a transparent manner when excluding the Claimant from the negotiations with the Club from 7 June 2011 onwards and then unilaterally terminating the Agency Contract the day before the Employment Agreement was signed, thereby causing the parties’ relationship to degenerate in a fashion which led to this arbitration as the only manner by which to Claimant could seek some form of compensation for his services provided as an agent.

98. Given that the Parties each paid an advance on costs of EUR 6,000 and in addition the Claimant paid a non-reimbursable handling fee of EUR 4,000 (which will be taken into account when determining the Claimant's legal fees and expenses), the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

- The Respondent shall pay to the Claimant EUR 6,000, being the amount of arbitration costs advanced by the latter;
- The Respondent shall pay to the Claimant EUR 13,250 (50% of EUR 4,000 for the non-reimbursable fee + 50% of EUR 22,500 for legal fees) representing the amount of his contribution to the latter's legal fees and other expenses.

8. AWARD

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

- 1. Mr. Nenad Krstić shall pay Mr. Zoran Savić an amount of EUR 271,000.00, as damages for breach of contract.**
- 2. Mr. Nenad Krstić shall pay Mr. Zoran Savić an amount of EUR 6,000.00 as reimbursement for the latter's arbitration costs.**
- 3. Mr. Nenad Krstić shall pay Mr. Zoran Savić an amount of EUR 13,250.00 as a contribution to the latter's legal fees and expenses.**
- 4. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 5 November 2012.

Quentin Byrne-Sutton
(Arbitrator)