FÉDÉRATION INTERNATIONALE
DE VOLLEYBALL

The

FIVB TRIBUNAL

herewith issues the following

DECISION

FIVB 2018-01

on the Request for Review of CC149/2017 filed by

Mr. Nikola Jovovic ("Claimant")
represented by Mr. Sébastien Ledure and Mr. Arnaut Kint
Attorneys at law, Brussels, Belgium

vs.

Volley Milano SRL ("Respondent")
represented by Mr. Cristiano Novazio
Attorney at law, Milan, Italy

1. The Parties

1. The Claimant is a professional male volleyball player from Serbia (hereinafter the "Claimant" or "Player").

2. The Respondent is a professional volleyball club with its legal seat in Milan, Italy (hereinafter the "Respondent" or "Club").

2. The FIVB Tribunal (FIVB Tribunal Judge)

3. Article 19.1.5 of the FIVB Sports Regulations (hereinafter the "Regulations") provides as follows:

> *"Cases before the FIVB Tribunal shall be heard by the Chairperson, provided that the amount in dispute does not exceed CHF 200'000 (two hundred thousand Swiss Francs). All other cases shall be heard by the Chairperson and two (2) other members of the FIVB Tribunal, appointed by the Chairperson.* […]*"*

4. Because the amount in dispute in the present case does not exceed CHF 200,000.00, this Request for Review will be heard by the Chairperson as a single judge. Dr. Karsten Hofmann from Germany is the current Chairperson of the FIVB Tribunal and, thus, was appointed as the single judge in the present case (hereinafter the "FIVB Tribunal Judge").

3. Facts and Proceedings

3.1 Background Facts

5. On 5 November 2015, the Player and the Club concluded an employment agreement for the 2016-2017 and 2017-2018 seasons (hereinafter the "Contract"), according to which the Player should have received salary in the amount of EUR 81,000.00 net per season.

6. In a game on 19 October 2016, the Player received a red card and was fined by the Club with a penalty of EUR 4,000.00.

7. The Player played the 2016-2017 season for the Club's team and was paid through March 2017. The Club has acknowledged that it did not pay salaries totalling EUR 27,000.00 for the remainder of the 2016-2017 season, i.e. the salaries for April, May and June 2017 of EUR 9,000.00 net each.

8. Starting in March 2017, the Parties began discussing the mutual termination of the Contract at

the end of the 2016-2017 season.

9. Around May 2017, a Turkish club from Istanbul contacted the Player and offered a salary of EUR 180,000.00 net for the 2017-2018 season. The Player informed the Club of this issue, and the Parties intensified their negotiations regarding the mutual termination of the Contract. Those intensified negotiations included, *inter alia*, an email of the Club's President on 9 May 2017 and text messages of the Club's General Manager concerning a buy-out.

10. By the end of May 2017, the Parties orally agreed on the conditions of a mutual termination agreement (hereinafter the "Termination Agreement"). The Player agreed to pay a buy-out sum of EUR 47,000.00 by 1 June 2017. The amount of EUR 27,000.00 (equal to the Player´s outstanding salaries for the 2016-2017 season) was to be offset from this amount, and, thus, the Player had to only effectively pay EUR 20,000.00 to the Club. However, it remains disputed between the Parties whether the Termination Agreement was subject to a condition precedent, i.e. the Player becoming employed by another club under specific conditions.

11. Early June 2017, the Turkish club from Istanbul informed the Player that it was no longer interested in his employment because of financial reasons.

12. On 5 June 2017, the Player's agent sent an email to the Club by which he announced his intention to forward "*the agreement of termination of the contract of Nikola*" on the following day.

13. Between 22 May and 22 June 2017, the Player neither participated in practices nor games for the Club´s team because he was absent from Milan while playing for the Serbian national team in the FIVB Volleyball World League 2017. Thereafter, the Player did not return to the Club.

14. On 22 June 2017, the Club sent a letter to the Player requesting the amount of EUR 20,000.00 as agreed upon under the Termination Agreement (to be paid by 1 June 2017) within no later than 10 days upon receipt of the letter.

15. On 30 June 2017, the Club's President sent a letter to the Italian League informing its Admission Committee that all of payments to its players for the 2016-2017 season had been made (confirmed by the signatures of the players), except the outstanding amount to the Claimant. Thereafter, the Conciliation Chamber of the Italian League initiated a mediation proceeding and a meeting was held on 4 July 2017; however, the Parties failed to reach an agreement during the mediation proceeding.

16. By letter dated 5 July 2017, the Player's former counsel replied to the Club's letter of 22 June 2017 and contested the Club's claim and informed the Club that the Player's agent was already working on finding a new club.

17. On 14 July 2017, the Admission Committee of the Italian League admitted the Club to compete in the Serie A1 Super Lega for the 2017-2018 season.

18. By email dated 19 July 2017, the Player's agent asked the Club for payment of the three remaining monthly salary instalments for the 2016-2017 season and announced the Player's intention to file a claim before CEV if payment was not rendered within one week.

19. On 14 August 2017, the Player signed an employment contract for the 2017-2018 season with a Turkish club from Izmir (hereinafter the "Izmir Contract") for a total salary of EUR 110,000.00 net (ten monthly instalments of EUR 11,000.00 from August 2017 to May 2018).

20. On 16 August 2017, the Player filed a complaint with the CEV and paid the applicable handling fee of EUR 400.00. He requested payment of EUR 27,000.00 net for outstanding salary related to the 2016-2017 season. During the CEV proceedings, both Parties filed several submissions through 20 October 2017.

21. On 10 January 2018, the CEV issued a decision in the present manner (hereinafter the "Decision") ruling that the Player should pay the amount of EUR 20,000.00 to the Club as outstanding compensation for the termination of the Contract and that the Player should comply with the Decision by 10 February 2018.

3.2 The Proceedings before the FIVB Tribunal

22. On 23 January 2018, the FIVB Tribunal Secretariat received the Player's Request for Review including a request for provisional measures in order to stay the effect of the Decision "*as from the date of filing of Claimant's Request for Review until the date of a decision on the merits*".

23. By email of 24 January 2018, the FIVB Tribunal Secretariat acknowledged receipt of the Request for Review, forwarded it to the Club and invited the Club to file its Answer by no later than 15 February 2018.

24. By email of 8 February 2018, the FIVB Tribunal Judge informed the Parties that he had requested the FIVB to provisionally stay the effect of the Decision until further notice in accordance with

Article 20.1.2 of the Regulations and the last bullet point in the Decision. Furthermore, the FIVB Tribunal Judge requested the Club to inform the FIVB Tribunal in its Answer due by 15 February 2018 whether the Club agrees with the Player's request for a stay. In case of disagreement, the Club should provide reasons based on three criteria: 1) "irreparable harm", 2) "likelihood of success on the merits" and 3) whether the interests of the Club outweigh those of the Player. Additionally, the Parties were informed that the procedural order issued by the FIVB Tribunal in its email of 24 January 2018 remained in full force.

25. On 15 February 2018, the FIVB Tribunal Secretariat received the Club's Answer dated 13 February 2018, which included submissions on the three criteria for a stay of execution as listed in the FIVB Tribunal's email of 8 February 2018.

26. By emails of 16 February 2018, the FIVB Tribunal Secretariat acknowledged receipt of the Club's Answer and forwarded it to the Player. Furthermore, the FIVB Tribunal Judge invited the Player to comment on specified sections of the Club's Answer by no later than 23 February 2018.

27. On 22 February 2018, the FIVB Tribunal Secretariat received the Player's respective comments.

28. By email of 6 March 2018, the FIVB Tribunal Secretariat informed the Parties of the FIVB Tribunal Judge's decision to request the FIVB to stay the effect of the Decision until the date of a decision on the merits in accordance with Article 20.1.2 of the Regulations and the last bullet point of the CEV decision. Furthermore, the Player was requested to provide further information and comments on issues specified by the FIVB Tribunal Judge by no later than 20 March 2018.

29. By email of 21 March 2018, the FIVB Tribunal Secretariat acknowledged receipt of the Player's submissions of 20 March 2018 and forwarded it to the Club.

30. By email of 13 April 2018, the FIVB Tribunal Judge invited the Club to comment on the Player's submissions of 20 March 2018 by no later than 26 April 2018.

31. By email of 27 April 2018, the FIVB Tribunal Secretariat acknowledged receipt of the Club's submission dated 24 April 2018 but received only on 26 April 2018.

32. By email of 15 June 2018, the FIVB Tribunal Secretariat informed the Parties that, in accordance with Article 20.6.1 of the 2017 Regulations (identical wording as Article 20.7.1 of the 2018 Regulations), the FIVB Tribunal Judge had decided that no further submissions were required. In

accordance with Article 20.11.2 of the 2018 Regulations (identical wording as Article 20.10.2 of the 2017 Regulations), the FIVB Tribunal Judge requested the Parties to provide a detailed account of their respective costs as well as supporting documentation in relation thereto by no later than 28 June 2018.

33. By emails of 28 and 29 June 2018, the FIVB Tribunal Secretariat acknowledged receipt of the Player's submission on costs on 27 June 2018 and of the Club's submission on costs on 28 June 2018.

4. The Parties' Submissions

34. The following section provides a brief summary of the Parties' submissions and does not purport to include every contention put forth by the Parties. However, the FIVB Tribunal Judge has thoroughly considered all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference has been made to those arguments in this section.

4.1 The Claimant's Position

4.1.1 The Claimant's submissions on the merits

35. The Termination Agreement was subject to a condition precedent, i.e. that the Player signed an employment contract with the Turkish club from Istanbul for a value of EUR 180,000.00 for the 2017-2018 season or with another club for a similar value ("*a new team under acceptable conditions*"). As neither an employment contract with the Turkish club from Istanbul nor another employment contract of a similar value was concluded, the Termination Agreement did not enter into effect. Hence, the Contract remained in effect, which, in turn, was then breached by the Club.

36. The Player was ready to terminate the Contract if his financial position at least maintained the same level as under the Contract but he did not accept any loss of income: By agreeing to a buy-out fee in the amount of EUR 47,000.00 and taking into account his salary for the 2017-2018 season under the Contract in the amount of EUR 81,000.00, "*acceptable conditions*" would have needed to provide him with a salary of at least EUR 128,000.00 for the 2017-2018 season. Therefore, the Izmir Contract, which provided a salary in the amount of EUR 110,000.00 net, does not fulfil the condition agreed upon under the Termination Agreement.

37. Both Parties have the burden to prove the facts that they are presenting (principle of *actori incumbat probation*). In the Decision, the CEV accepted the Club's claim although the Club had failed to prove the unconditional nature of the Termination Agreement. The Club´s correspondence in May and June 2017, including but not limited to the email of the Club´s President dated 9 May 2017, does not demonstrate an agreement without conditions. The same applies for the Player's agent´s statement dated 5 June 2017. Thus, the CEV did not correctly apply the principle of *actori incumbat probation* and departed from procedural public policy.

38. The main question in the present dispute is the determination of the nature of the termination. An overview of the "*cascade of theoretically possible ways*" the Contract could have been terminated is as follows:

    a. *Mutual termination by the Termination Agreement under a condition precedent as mentioned above:* The buy-out fee of EUR 47,000.00 did never enter into force. Thus, the Player is entitled to outstanding salaries amounting to EUR 27,000.00 net.

    b. *Mutual termination by the Termination Agreement without any condition precedent*: The existence of a termination agreement without any conditions is not proven by the Club. Consequently, no buy-out fee is due by the Player to the Club.

    c. *Unilateral termination by the Club by signing two new players for the Player´s position*: The Club decided to sign new players for the Player's position. Thus, the Player was deprived of the chance to do his job, which equals to a termination. As the Player itself fulfilled all his obligations under the Contract, such termination by the Club is not justified, and, hence, the Player is entitled to a termination indemnity.

    d. *Unilateral termination by the Player*: The Player was permitted to terminate the Contract for just cause because the Club had been late with salary payments set forth in the Contract. Therefore, the Player is entitled to a termination indemnity. In the alternative: If the Player had terminated the Contract without just cause, the Club would be entitled to a termination indemnity. But this indemnity could not exceed the amount of EUR 12,500.00. The Club's acquisition costs for the Player were EUR 25,000.00, which were paid to the Player´s former German club in Friedrichshafen. Deciding *ex aequo et bono* and taking into account that the Player played for the Club's team in only one of the two seasons agreed under the Contract, the maximum indemnity should be 50% of the Club's acquisition costs. Finally, such amount would have to be set-off against the outstanding

salaries that were owed by the Club to the Player.

39. The Player is entitled to the outstanding salaries for the 2016-2017 season and, in principle, for the 2017-2018 season. However, the Player acknowledges the principle to mitigate losses and does not claim the salaries for the 2017-2018 season because of his subsequent contract with the Turkish club from Izmir. The Club´s debt concerning salaries for April, May and June 2017 is shown by a balance sheet provided by the Player. According to Swiss law, the Player is also entitled to interest in the rate of 5% p.a. upon the due date of each outstanding salary instalment.

40. Taking into account that the Player accepted the buy-out fee of EUR 47,000.00 in light of an employment contract for EUR 180,000.00, under *ex aequo et bono* principles, it could be reasonably expected to accept only a buy-out fee of EUR 13,770.00 in light of the salary under the Izmir Contract (EUR 110,000.00). Thus, the Player is entitled to, at least, EUR 13,230.00 (EUR 27,000.00 - EUR 13,770.00).

41. Finally, the Player´s absence between 22 May and 22 June 2017 can be explained by his attendance in games with the Serbian national team in the FIVB Men's Volleyball World League 2017. The attendance for the Serbian national team is mentioned in clause 1 of the Contract.

4.1.2 The Claimant's submissions on the stay of execution

42. At the end of the Decision, the CEV stated that a Request for Review may not suspend the effect of the Decision unless otherwise decided by the FIVB. However, such a provisional enforcement measure had never been requested by the Parties; thus, the CEV decided *ultra vires* beyond the limits of the Parties' claims and against the principle of *ne eat iudex extra petita partium.*

43. Pursuant to the jurisprudence of the Court of Arbitration for Sport (hereinafter the "CAS"), decisions of financial nature are not enforceable (see e.g. CAS 2014/A/3765 and CAS 2004/A/780). The case cited by the Club (i.e. CAS 2008/A/1674) concerns a disciplinary decision, which is generally enforceable while under appeal. Hence, the Decision, which deals with a financial dispute, is not enforceable.

44. Even if the Decision is considered as a financial decision enforceable while under appeal, the Club has failed to demonstrate the fulfilment of the three criteria "irreparable harm", "likelihood of success on the merits" and "balance of interests". The respective burden of proof lies with

the Club:

a. *Irreparable harm*: The Club did not even assert that it may suffer any irreparable harm in the event that the Decision could not be enforced while under appeal. To the contrary, the Player would suffer irreparable harm by receiving a transfer ban, not being able to play volleyball and earn his income. Furthermore, the Club´s submission that a player cannot transfer during a proceeding before the FIVB is incorrect.

b. *Likelihood of success*: According to the Player, a *prima facie* analysis of the merits shows a likelihood of success in his favour.

c. *Balance of interests*: If the interests are balanced out correctly, it will become clear that the Club will not suffer any potential damage during a stay of execution. To the contrary, the Player might be banned from transfers and prevented from playing volleyball and earning money in the event of an immediate enforcement of the Decision.

4.1.3 The Claimant's Request for Relief

45. The Claimant stated in its Request for Review as follows:

> *"57. Claimant requests a provisional decision to be rendered per which, as a provisional measure, the CEV's decision d.d. January 10, 2018 in case CC149/2017 shall be stayed as from the date of filing of Claimant's Request for Review until the date of a decision on the merits;*
>
> *58. Claimant requests a decision per which:*
>
> - *the CEV's decision d.d. January 10, 2018 in case CC149/2017 shall be reviewed and fully overruled;*
> - *Respondent shall:*
>   - *pay Claimant a principal amount of twenty-seven thousand euros (27.000 €) net as overdue salaries;*
>   - *pay Claimant late payment interest at a rate of five percent (5%) per annum as follows and until the date of full payment*
>   - *on nine thousand Euro (€ 9.000) as from May 1, 2017;*
>   - *on nine thousand Euro (€ 9.000) as from June 1, 2017; and*
>   - *on nine thousand Euro (€ 9.000) as from July 1, 2017;*
>   - *provide Claimant with tax certificates indicating the net nature of all amounts already paid and to be paid by Respondent under the Employment Agreement and/or the FIVB's decision;*

- *reimburse Claimant all CEV and FIVB Tribunal expenses and procedural costs, including the CEV's handling fee of four hundred euros (400€) and the FIVB Tribunal's handling fee of two thousand Swiss Francs (2.000 CHF); and*

- *indemnify Claimant for all incurred legal and advisory expenses up to an amount to be determined during the FIVB Tribunal proceedings.*

4.2 The Respondent's Position

4.2.1 The Respondent's submissions on the merits

46. The existence of the Termination Agreement as such is undisputed; however, the Player failed to prove the existence of a condition. None of the communications between the Parties prior to the first instance proceeding made reference to a specific condition. In particular, the wording of the email of the Club´s President dated 9 May 2017 shows the intention to mutually terminate the Contract. In the end, it was the Player, who wanted to terminate the Contract, and the Club agreed to a buy-out clause, a typical instrument to release a player.

47. The buy-out fee was agreed before the Club became aware of the Player's negotiations with the Turkish club from Istanbul. If the Club had known of these negotiations, it would have not reduced the amount of the buy-out fee proposed at the beginning of the negotiations, i.e. EUR 100,000.00. Additionally, the agreed buy-out fee of EUR 47,000.00 became due on 1 June 2017, i.e. during a period when the Player was still negotiating with the club from Istanbul but had not signed a new employment contract yet. The Player accepted an unconditional termination agreement because he was confident that he would sign an employment contract with the club from Istanbul. As this did not happen, he regretted the Termination Agreement, and any further actions have to be understood as an attempt to avoid a formerly agreed payment to the Club.

48. The Player's agent's email dated 5 June 2017 contained no reference to any transfer or new employment contract with another club. This fact demonstrates the Player's intention to terminate the Contract even though he had not signed with a new club at that time. The Player's agent already knew at that time that the negotiations with the club from Istanbul had failed. The circumstances show that the Termination Agreement is valid, binding and unconditional.

49. The Italian Admission Chamber's decision to allow the Club to participate in the Serie A1 Super Lega evidenced that the Club acted in accordance with all league regulations and was considered to have paid 100% of remuneration to all of its players. This decision meant that the Player was not entitled to outstanding salary as this was considered to be set off in the Termination

Agreement. Any settlement proposal discussed in the league mediation proceedings was without any prejudice and cannot be understood as proof of a conditional Termination Agreement. Moreover, as from 22 May 2017, the Player did not offer his performance to the Club and did not ask for any outstanding salary because he knew this issue would be decided in the proceeding in front of the Admission Chamber. Finally, the Admission Chamber decided on the Termination Agreement and found that it was unconditioned.

50. The Club´s signing of two other players cannot be understood as a unilateral termination of the Contract because the Club is free to sign up to five setters. Moreover, the Respondent looked for players at the Player's position because the Player had communicated his wish to leave the Club in May 2017. The Club concluded employment agreements with two new players only later.

51. The Player's "*arithmetic calculation*" of a buy-out fee is evidentially unfounded because the Izmir Contract was signed for two seasons (10 August 2017 to 15 May 2019), which both should be considered for any calculation.

52. As to the Player's alternative argument that the Contract was terminated unilaterally by the Player for just cause: This argument was not raised during the first instance proceeding and, therefore, the FIVB Tribunal shall dismiss this alternative argument. In addition, the Club suffered damages of EUR 42,000.00: a) signing of an employment contract with a new player, who replaced the Player and earned more than the Player (difference of EUR 17,000.00); b) a hypothetical transfer fee like the one paid by the Club to the Player´s former German club (EUR 25,000.00). Taking into account the Player´s remaining salaries with the Club (EUR 27,000.00), the amount of damages that should be recognised in the event of a wrongful unilateral termination by the Player should be EUR 15,000.00.

4.2.2 The Respondent's submissions on the stay of execution

53. The provisional execution of a decision is a general principle of law, which can be suspended if certain circumstances are present.

54. By reference to a CAS award (CAS 2008/A/1674), three elements shall be considered: irreparable harm, likelihood of success and balance of interests. In the present case, the Player did not suffer "irreparable harm" because he cannot be transferred to a club of a different federation during the FIVB Tribunal proceedings and the Club has a solid financial situation. Thus, there is no risk that the Player could not recover the amount recognised by the CEV. Moreover, the "likelihood

of success" should be excluded because the Player did not provide evidence in support of his Request for Review. Finally, the Club´s interest in a provisional execution of the decision outweighs the Player´s interest in staying of execution of the decision because the Player´s financial situation might change during the FIVB Tribunal proceedings, and the Club might have problems recovering any damages from the Player.

4.2.3 The Respondent's Request for Relief

55. The Respondent concluded in his Answer as follows:

> *"- Acquire the file of the proceeding in front of CEV.*
>
> *- Reject the Request for review presented by Mr. Nikola Jovovic and confirm the Decision rendered by CEV on January 10, 2018.*
>
> *- Recognized to the Respondent an amount as legal expenses and eventual handling fees due ex equo*[sic] *et bono.*
>
> *- Take all the measures deriving from the decision."*

5. Jurisdiction

56. The FIVB Tribunal must first examine whether it has jurisdiction to hear the present dispute. In order to do so, it must first look at the relevant provisions of the Regulations.

57. Article 19.2.1 of the Regulations reads as follows:

> *"The FIVB Tribunal is competent to decide financial disputes of an international dimension between clubs, players, FIVB-licensed agents and coaches from within the world of volleyball. The FIVB tribunal´s jurisdiction extends also to financial disputes of an international dimension between a coach and a National Federation."*

58. Article 19.2.2 of the Regulations stipulates that the FIVB Tribunal can only resolve disputes:

> *"19.2.2.1* *arising between the natural and legal persons/entities mentioned in Article 19.2.1; and*
>
> *19.2.2.2* *decided previously by the FIVB / a Confederation or referred by the FIVB/a Confederation to the FIVB Tribunal"*

59. Article 19.2.3 of the Regulations grants the FIVB Tribunal the power to rule on its own jurisdiction.

60. Thus, in order for the FIVB Tribunal to have jurisdiction over the dispute, the FIVB Tribunal Judge

shall examine whether the conditions of both Articles 19.2.1 and 19.2.2 of the Regulations are satisfied.

61. The present dispute involves claims concerning a player from Serbia and a club from Italy concerning outstanding salaries and a buy-out fee. The FIVB Tribunal Judge finds that this dispute clearly qualifies as a financial dispute of an international dimension between a player and a club in accordance with Articles 19.2.1 and 19.2.2.1 of the Regulations.

62. Furthermore, the Request for Review at hand is made against the Decision, which was rendered by the CEV. Therefore, the present Request for Review stems from a decision of a Confederation and the FIVB Tribunal Judge holds that Article 19.2.2.2 of the Regulations is also satisfied.

63. Based on the above, the conditions of Articles 19.2.1 and 19.2.2 of the Regulations are satisfied. Additionally, the Claimant's Request for Review was received by the FIVB Tribunal on 23 January 2018, i.e. within the 14-day period described in Article 18.2 of the Regulations. Moreover, neither Party contested the FIVB Tribunal's jurisdiction to hear this case. Therefore, the FIVB Tribunal has jurisdiction over the present Request for Review pursuant to the Regulations.

6. Discussion

6.1 Applicable Law

64. Under the heading "Law Applicable to the Merits", Article 20.9 of the 2018 Regulations (identical wording as Article 20.8 of the 2017 Regulations) reads as follows:

> *"Unless otherwise agreed by the parties, the Tribunal shall apply general considerations of justice and fairness without reference to any particular national or international law (ex aequo et bono)."*

65. Neither of the Parties has contested the applicability of *ex aequo et bono* to the present dispute nor based their arguments on any national law. In light of the above, the FIVB Tribunal Judge will decide the issues submitted to it in this proceeding *ex aequo et bono*.

66. In substance, it is generally considered that an arbitrator/judge 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*" (POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-626).

67. In light of the foregoing matters, the FIVB Tribunal Judge decides as follows:

6.2 Procedural Issues

68. In his Request for Review, the Player requested "*a provisional decision to be rendered per which, as a provisional measure, the CEV's decision d.d. January 10, 2018 in case CC149/2017 shall be stayed as from the date of filing of Claimant's Request for Review until the date of a decision on the merits*".

69. By procedural order dated 6 March 2018, the FIVB Tribunal Judge upheld the Claimant's request for provisional measures and requested the FIVB to stay the effect of the Decision until the date of a decision on the merits in accordance with Article 20.1.2 of the Regulations and the last bullet point of the Decision. The reasons for the FIVB Tribunal Judge's decision on provisional measures are as follows:

a. The FIVB Tribunal Judge has taken note of exceptional circumstances of the present case: In the first instance, both Parties filed financial claims against the other party (the Club's counterclaim was fully awarded whereas the Player's initial claim was fully dismissed); thus, the Player's Request for Review results in a counterclaim under review/appeal. Such a situation is quite exceptional and needs to be taken into consideration when deciding on the possibility of the execution of the Decision while under review/appeal.

b. The FIVB Tribunal Judge has also taken into consideration the consistent CAS jurisprudence whereas a decision of a financial nature issued by a private Swiss association is not enforceable under appeal. In the present case, the decision under review stems from the CEV, which is headquartered in Luxembourg instead of the FIVB with its headquarters in Switzerland. However, given the fact that first instance decisions for review by the FIVB Tribunal can be rendered by the FIVB itself (see Articles 18.1 and 19.2.2.2 of the Regulations), the FIVB Tribunal Judge recognizes the reasonable effect of a similar approach for any decisions under review.

c. Furthermore, both Parties made submissions on the three criteria "irreparable harm", "likelihood of success on the merits" and "balance of interests".

- As to "irreparable harm": On the one hand, the Club submitted that it has a "*solid financial situation*" but did not provide any evidence for this statement, particularly

not on the issue as to why the Club's situation would not or could not change during the FIVB Tribunal proceedings. On the other hand, regardless of whether the execution of the Decision is stayed until the end of the present proceedings, the Club's risk of non-payment by the Player remains the same. The Player's Izmir Contract relates not only to the 2017-2018 season but also to the 2018-2019 season, and no information has been provided by the Parties that the Player's situation would or could change. Therefore, the Player bears some risk that he would not been paid the amount possibly awarded by the FIVB Tribunal while the Club's risk for non-payment remains on the same level.

- As to "likelihood of success on the merits": Given the exceptional circumstances of the present case (counterclaim under review/appeal) and the highly disputed question of a mutual contract termination that may or may not have had conditions, there was some likelihood of success on the merits at the moment of the decision for provisional measures (stay of execution).

- As to "balance of interests": The Player submitted that he might be banned from transferring to a new club, prevented from playing volleyball and prevented from earning money in the event of an immediate enforcement of the Decision. However, the Club failed to provide evidence for its allegation that the Player's financial situation would or could become worse during the FIVB Tribunal proceedings. No evidence was provided for any planned transfer and the Player's Izmir Contract also relates to the 2018-2019 season. Thus, the balance of interests also did not favour the provisional execution of the Decision while under appeal/review.

d. In accordance with Article 20.1.2 of the Regulations and deciding *ex aequo et bono* under the present circumstances, the FIVB Tribunal Judge has decided to follow the principle established by the CAS for pure financial disputes and, thus, requested the FIVB to stay the effect of the Decision until the date of a decision on the merits. In addition, the FIVB Tribunal Judge found that 1) the Club would not cause irreparable harm in the event of a stay of the execution of the Decision, 2) there was some likelihood of success on the merits in favour or the Player at the moment of the decision for provisional measures and 3) the balance of interest did not favour the provisional execution of the Decision while under review.

6.3 Findings

70. First of all, the FIVB Tribunal Judge fully agrees with the CEV's preliminary remark in Section 4.3 of the Decision regarding the level of the Parties' precaution when they only concluded the Termination Agreement orally. Because there is no written form of the Parties' agreement regarding the termination of the Contract, the review proceedings before the FIVB Tribunal must also deal with different interpretations concerning the Parties' respective intent when they were concluding the Termination Agreement. Those different interpretations shall be dealt with according to general rules and principles of law regarding the burden of proof.

71. Moreover, the FIVB Tribunal Judge fully agrees with the burden of proof rules highlighted by the CEV under Section 4.3 of the Decision, i.e. "*the party, invoking a right or a claim or pleading an objection or defence leading to the dismissal of a claim, has the burden of proof with regard to the relevant facts*".

6.3.1 The Player´s claim for outstanding salaries of EUR 27,000.00 net

72. According to the Player´s Request for Relief, his main request concerns the payment for outstanding salaries in the amount of EUR 27,000.00 net from the Club.

73. Such claim is based on the Parties' agreement for payment of salaries under the Contract. It is undisputed between the Parties that the Club failed to pay the last three salary instalments of EUR 9,000.00 net each (for April, May and June 2017) to the Player. However, the Parties provided different submissions regarding the off-set of the amount of EUR 27,000.00 against the Club's claim of EUR 47,000.00 as the buy-out sum agreed under the Termination Agreement.

74. According to the Player, the Termination Agreement (including the off-set resulting in a payment of EUR 20,000.00 from the Player to the Club) contained a condition precedent. This alleged condition precedent has been explained by the Player in more detail during the present proceeding before the FIVB Tribunal, namely that the Player sign an employment contract with the Turkish club from Istanbul for a value of EUR 180,000.00 for the 2017-2018 season or with another club for a similar value. This is the Player's interpretation of his statement made in the first instance proceeding: "*a new team under acceptable conditions*". According to the Player's submissions, the Izmir Contract with a value of EUR 110,000.00 for the 2017-2018 season does not fulfil this condition, and, therefore, the Termination Agreement (including the agreement of a buy-out sum of EUR 47,000.00) never entered into effect. To the contrary, the Club submitted

that the Termination Agreement was concluded unconditionally, and, thus, it objects to the Player´s arguments.

75. Both Parties have submitted that they agreed on a buy-out fee of EUR 47,000.00. Consequently, this element of the Termination Agreement is not disputed and, therefore, considered a fact by the FIVB Tribunal Judge.

76. As to any condition precedent, following general legal principles and deciding *ex aequo et bono*, the FIVB Tribunal Judge holds that, in principle, agreements are concluded without any conditions precedent unless said condition is clearly defined and agreed upon by the Parties. This is particular because of the *pacta sunt servanda* principle and the fact that agreements are the product of good faith negotiations, and, thus, an agreement should not be voided unless the negotiations result in a clear and unequivocal condition. In the present case, it is the Player who claims an exception to this general rule, and, thus, he must prove that the Termination Agreement (including the payment of a buy-out fee) was concluded under a specific condition precedent. Consequently, the Club does not need to prove the unconditional character of the Termination Agreement.

77. The FIVB Tribunal Judge has thoroughly considered all of the evidence and arguments submitted by the Parties. In the end, he has not taken into consideration any of the internal Italian league proceedings, i.e. neither the mediation including settlement proposals (no prejudice to the present proceeding) nor the decision to allow the Club to participate in the Serie A1 Super Lega (different purpose and jurisdiction). Moreover, the Player´s absence from the Club as of 22 May 2017 is irrelevant to any determinations related to the termination because his absence is justified by his participation with the Serbian national team in the FIVB Volleyball World League.

78. However, the FIVB Tribunal Judge has taken note of the fact that the buy-out fee became due on 1 June 2017 and that the Player did not contest the payment of a buy-out fee until that date. Thus, the Parties' mutual intention until at least that date was the termination of the Contract and a payment of EUR 20,000.00 by the Player to the Club (EUR 47,000.00 as a buy-out fee less EUR 27,000.00 for outstanding salary). Even on 5 June 2017, the Player´s agent sent an email to the Club in which he expressed his intention to forward "*the agreement of termination of the contract of Nikola*" the next day but did not refer to any condition precedent regarding the Player's signing with a new club. This email also highlights the Player´s intention at that time, namely to terminate the Contract without a condition precedent as alleged by the Player now. It was only later, probably one month later by letter of the Player's former counsel dated 5 July

2017, that the Player contested the requested payment of EUR 20,000.00. At that time, the negotiations with the club from Istanbul had failed, and the Player was seeking new opportunities for the upcoming 2017-2018 season.

79. Whether the Player was too confident that he would sign an employment contract with the club from Istanbul for a total salary of EUR 180,000.00, later regretting the Termination Agreement or whether any further actions have to be understood as an attempt to avoid a formerly agreed payment to the Club – as both submitted by the Club – is irrelevant for the present case as are the reasons for the Club's subsequent signing of two new players at the Player's position. What is relevant in the present case is merely the correct application of the burden of proof.

80. This application results in the FIVB Tribunal Judge´s finding that the Player has failed to prove that a condition precedent regarding the Termination Agreement was agreed upon by the Parties while the Club has proven the Player's obligation to pay EUR 20,000.00 to the Club (undisputed part of the Termination Agreement, namely the Parties´ agreement on a buy-out fee in the amount of EUR 47,000.00 less EUR 27,000.00 for outstanding salary). Taking into consideration the principle of *pacta sunt servanda*, the payment of EUR 20,000.00 had clearly been agreed by the Parties, and the present circumstances do not provide for an amendment under the application of *ex aequo et bono*.

81. Furthermore, the FIVB Tribunal Judge finds that, even if the condition precedent had been agreed upon by the Parties (*quod non*), the condition precedent alleged by the Player would have been fulfilled. The FIVB Tribunal Judge has taken note of the Parties´ respective submissions, *inter alia*, the Player´s explanation in the proceeding before the FIVB Tribunal that the Player was ready to terminate the Contract if his financial position at least maintained the same level as under the Contract ("*a new team under acceptable conditions*"). From the FIVB Tribunal Judge´s understanding, the term "acceptable conditions" does not automatically refer to financial aspects only. A contractual situation includes more than the salary clause because the potential bonuses and agreed amenities as further financial components should also be taken into account. In addition, non-financial aspects need to be considered, e.g. a club´s participation in international competitions and a player´s respective improvement on the international level. Thus, the Player´s higher income of EUR 29,000.00 net under the Izmir Contract (the Player´s salary under the Contract for the 2017-2018 season was EUR 81,000.00 net while his salary under the Izmir Contract for the same season was EUR 110,000.00 net) on the one hand and the amount of EUR 20,000.00 as the payment taking into account the offset (buy-out fee of EUR 47,000.00 and outstanding salaries totalling to EUR 27,000.00) on the other

hand need to be considered under the full circumstances of the Izmir Contract, namely financial and non-financial aspects. Taking into consideration the above and deciding *ex aequo et bono*, the FIVB Tribunal Judge finds that signing the Izmir Contract was an agreement with "a new team under acceptable conditions".

82. As to the four termination scenarios submitted by the Player, the FIVB Tribunal Judge holds that the Contract was terminated mutually, not unilaterally. As no condition precedent for such mutual termination has been proven by the Player, the Termination Agreement entered into effect, and the Club is entitled to the payment of EUR 20,000.00 from the Player. Any damage argued by the Club in its latest submission will not be taken into account by the FIVB Tribunal Judge because the Club´s Request for Relief does not contain any claim for damages, and no respective evidence has been submitted.

6.3.2 The Player´s claim for late payment interest

83. The Player requests payment of late payment interest on each of the three salary instalments due on 1 May, 1 June and 1 July 2017.

84. However, as agreed upon in the Termination Agreement, the payment of those salary instalments has been set off against the buy-out fee to be paid to the Club. Consequently, no interest has to be paid by the Club to the Player and, therefore, the FIVB Tribunal Judge rejects the Player's claim for late payment interest.

6.3.3 The Player´s claim for tax certificates

85. In his Request for Relief, the Player requests "*tax certificates indicating the net nature of all amounts already paid and to be paid by Respondent under the Employment Agreement and/or the FIVB´s decision*".

86. However, neither the Request for Review nor any further submissions by the Player contained any reasons or explanations regarding his claim for tax certificates. Therefore, the FIVB Tribunal Judge rejects this unsubstantiated claim for formal reasons.

6.3.4 Summary

87. Based on the above determinations and in line with the Decision in the first instance, the FIVB Tribunal Judge holds that the Club is entitled to the amount of EUR 20,000.00 as agreed upon in

the unconditional Termination Agreement.

88. Consequently, the Player's Request for Review is dismissed, and the Decision dated 10 January 2018 is fully confirmed.

6.3 Costs

89. In its Decision, the CEV ordered the Player to bear the full amount of costs of EUR 400.00 for the first instance proceedings. Given that the Decision is upheld in full and the Player's Request for Review fails, the FIVB Tribunal fully confirms section 4.3 lit. t) of the Decision, whereby the CEV handling fee of EUR 400.00 shall be borne by the Player.

90. Article 20.11.2 of the 2018 Regulations (identical wording as Article 20.10.2 of the 2017 Regulations) allows the prevailing party to be granted a contribution towards legal fees and expenses (including the applicable handling fee) in the proceedings before it. However, legal fees must be reasonable and are limited to fees related to the proceedings before the FIVB Tribunal. When determining the contribution, the FIVB Tribunal Judge must take into account the outcome of the proceedings as well as the conduct and financial resources of the Parties.

91. The Player paid a handling fee of EUR 1,710.00 (equal to CHF 2,000.00) and submitted an account of costs for legal fees and expenses in the total amount of EUR 19,965.00 (including VAT). The Club submitted an account of costs for legal fees and expenses in the total amount of EUR 6.671,08 (including VAT). Given that the Player's Request for Review was dismissed and taking into consideration the Parties' conduct not only during the present proceedings but also prior – particularly the lack of precaution by the Parties when they concluded the Termination Agreement, which severely contributed to the present legal dispute – the FIVB Tribunal Judge finds that the Player has to bear his own legal costs (including the handling fee) while the Club is entitled to a contribution towards its reasonable legal fees and expenses. In accordance with Article 20.11.2 of the 2018 Regulations (identical wording as Article 20.10.2 of the 2017 Regulations), the FIVB Tribunal Judge determines the amount of the Player´s contribution to be in the amount of EUR 2,400.00.

92. Consequently, the Player shall pay to the Club the additional amount of EUR 2,400.00.

DECISION

93. For the reasons set forth above, the FIVB Tribunal Judge decides as follows:

1. **The Request for Review filed by Mr. Nikola Jovovic is dismissed.**

2. **The decision rendered by the CEV in CC149/2017 dated 10 January 2018 is confirmed.**

3. **Mr. Nikola Jovovic shall bear his own legal fees and expenses including the applicable handling fee. In addition, Mr. Nikola Jovovic shall pay the amount of EUR 2,400.00 to Volley Milano SRL as a compensation towards its reasonable legal fees and expenses.**

4. **Any other requests for relief are dismissed.**

Lausanne, seat of the proceedings, 28 September 2018

Dr. Karsten Hofmann

FIVB Tribunal Chairperson

NOTICE OF APPEALS

An appeal may be filed against this decision exclusively before the Court of Arbitration for Sport (CAS), in accordance with

a) Article 20.12 of the 2018 FIVB Sports Regulations (identical wording as Article 20.11 of the 2017 FIVB Sports Regulations) which provides as follows:

> *"Decisions of the FIVB Tribunal can only be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland and any such appeal must be lodged with CAS within twenty-one (21) days from the receipt of the decision. The CAS shall decide the appeal ex aequo et bono and in accordance with the Code of Sports-related Arbitration, in particular the Special Provisions Applicable to the Appeal Arbitration Procedure."*

b) The CAS Code of Sport-related Arbitration, which is available under www.tas-cas.org.

The address and contact details of the CAS are the following:

Court of Arbitration for Sport
Avenue de Beaumont 2
1012 Lausanne, Switzerland
Tel: +41 21 613 50 00
Fax: +41 21 613 50 01
email: info@tas-cas.org

In the event of an appeal, this decision shall remain in effect while under appeal unless the CAS orders otherwise.