BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 1082/17)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Annett Rombach

in the arbitration proceedings between

Mr. James Gist

- Claimant 1 -

Mr. Dominic James

- Claimant 2 -

Mr. Drew Gordon

- Claimant 3 -

Bill A. Duffy International Inc.
507 N. Gertruda Ave, Redondo Beach, CA 90277, USA

- Claimant 4 -

all represented by Mr. Billy J. Kuenziger, attorney at law,
1601 I St., 5th floor, Modesto, CA 95354, USA

vs.

Basketball Club Partizan
Humska 1, 11000 Belgrade, Serbia

- Respondent -

represented by Mr. Ilija Dražić, attorney at law,
Kralja Milana br. 29, 11000 Belgrade, Serbia

1. The Parties

1.1 The Claimants

1. Mr. James Gist (“Player Gist” or “Claimant 1”), Mr. Dominic James (“Player James” or “Claimant 2”), and Mr. Drew Gordon (“Player Gordon” or “Claimant 3”, and together with Player Gist and Player James the “Players”) are professional basketball players of U.S. nationality, who have all been under contract with the respondent in the past.

2. Bill A. Duffy International Inc. (the “Agency” or “Claimant 4”, and together with the Players the “Claimants”) is a basketball agency which represented the Players leading to their respective retainers by the Respondent.

1.2 The Respondent

3. Basketball Club Partizan (the “Club” or “Respondent”, and together with Claimants the “Parties”) is a professional basketball club located in Belgrade, Serbia.

2. The Arbitrator

4. On 4 October 2017, Prof. Richard H. McLaren O.C., the President of the Basketball Arbitral Tribunal (the "BAT"), appointed Ms. Annett Rombach as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (the "BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to her declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. The Players seek payment of outstanding salaries and bonuses for different basketball seasons under their respective employment contracts with Respondent. The basic terms of the employment relationships, to the extent relevant for this dispute, can be summarized as follows:

6. Player Gist signed an employment contract with Respondent on 23 October 2010 for the 2010-11 basketball season (the "Gist Contract"). The total salary compensation was agreed at USD 300,000.00 (net), with 9 equal instalments of each USD 37,500.00, payable after passing of the physical exam, and on the 10th of each month between December 2010 and June 2011. Furthermore, Player Gist was promised a bonus for winning the Adriatic League in the amount of USD 10,000 (net) (the "Bonus"). It is undisputed that the Club has not paid Player Gist a part of the June 2011 salary (USD 20,000) and the Bonus.

7. Player James signed an employment contract with Respondent on 1 February 2012 for the remainder of the 2011-12 basketball season (the "James Contract"). Player James's total salary of USD 100,000 (net) was to be paid in four equal instalments between 20 February 2012 and 20 June 2012. It is undisputed that the Club has not paid Player James the May 2012 salary (USD 25,000) and a part of the June 2012 salary (USD 12,500).

8. Player Gordon signed an employment contract with Respondent on 16 August 2012 for the 2012-13 basketball season (the "Gordon Contract"). Player Gordon's total annual salary was agreed at USD 130,000.00, payable in 10 equal instalments of USD 13,000.00 between September 2012 and June 2013. The Gordon Contract was later replaced by a settlement agreement (the "Gordon Settlement Agreement") executed on

26 March 2013. Pursuant to the Gordon Settlement Agreement the Parties agreed to settle the outstanding amounts under the Gordon Contract (which, at the time, amounted to USD 65,000.00), at USD 32,933.28, payable by no later than 1 September 2013. It is undisputed that the Club has not made this payment to date.

9. Under all of the above-mentioned contracts, the Club had also promised to pay certain commission fees to the Agency, *inter alia*, USD 10,000.00 until 20 April 2012 for procuring the James Contract (Clause 5.1.1 of the James Contract), and USD 9,793.33 by no later than 1 September 2013 for procuring the Gordon Contract (First Clause of the Gordon Settlement Agreement). Undisputedly, those payments have also not been made to date.

10. Claimants undertook various efforts to collect the above-described amounts from the Respondent over many years. In particular, the following correspondence took place between the Parties:

11. On 26 September 2013, the Club addressed the Agency as follows:

> *"Regarding our Club debts toward players and Agency; James Gist 20.000 $, Dominic James 37.500$ + 10.000$ Agent Fee, Drew Gordon 32.933$ + 9.793$ Agents Fee, we would like to inform you that in spite of very hard financial situation in our Club we are finally found a solution* […] *For now we are going to pay both Agent's fee (Dominic 10.000$ and Gordon 9.793$) in the next two month at latest, but probably even earlier.* […] *At the end of next 2013/14 we will sell 2 or maybe three players, and our plan is to concluded our debts (Gist 20.000$, James 37.500$ and Gordon 32.933$) by paying in total, at the end of the 2013/14 season (July or August 2014)."* [sic]

12. On 20 December 2013, upon a further inquiry about the (still unpaid) debts by the Claimants, the Club informed the Agency by e-mail that "*at the end of next 2013/14 we will sell 2 or maybe 3 players, and our plan is to pay in total our debts towards players (Gist 20.000$, James 37.500$ and Gordon 32.933$)*".

13. On 14 January 2014, the Agency sent a formal warning letter to the Club with respect to the outstanding salaries for Players Gist, James and Gordon (USD 20,000.00, USD 37,500.00, and USD 32,933.00, respectively), and the outstanding agency fees (USD 10,000 under the James Contract and USD 9,793.00 under the Gordon Settlement Agreement). The Agency threatened the initiation of a BAT arbitration in the event that the outstanding amounts would not be received by 21 January 2014.

14. In an internal e-mail of 21 January 2014, a member of the Agency reported that Respondent had promised, via phone, to pay the outstanding commission fees by the end of the month and the players' salaries by September/October 2014.

15. On 5 May 2014, Respondent informed the Agency by e-mail that "[w]*e are fully aware of our debt*" and that "[o]*ur plan is that by the end of the season up to August at latest* […] *to pay the agents commission at full amount* [and] *the rest of the debt would be paid off soon after*."

16. On 31 March 2015, the Club explained to the Agency by e-mail that due to a loss of sponsoring funds, the Club's financial situation had worsened, but that the Club hoped that new financial resources could be secured soon. The e-mail ended as follows:

> *"We are kindly asking for some more patience and we are doing our best to pay out our debts to you, since we have a great cooperation with you, which we also hope for the future."*

17. On 27 April 2015, the Club again asked for more patience and expressed its hope to gain new funds by selling players during summer time.

18. On 5 January 2016, the Club informed the Agency that while it still had financial problems, the situation was getting "*better and better every day*" and that "*we are sure that very soon we will be able to propose a final solution*" in respect of the outstanding payments.

19. On 30 August 2016, the Club – in reply directly to Player James – proposed a payment schedule for his outstanding salaries, which Mr. James accepted. On 10 October 2016, Player James notified the Club that he still had not received any (partial) payments.

20. On 24 November 2016, the Club sent another e-mail to Player James, promising a first payment of USD 5,000.00 within the next seven days.

21. On 6 December 2016, Player James informed the Club that he had not received any payment. A further e-mail exchange between Player James and the Club took place in March and April 2017, with no result and no payments being made by the Club.

3.2 The Proceedings before the BAT

22. On 11 September 2017, the Claimants filed a Request for Arbitration together with several exhibits (received by the BAT Secretariat on the same day) in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 3,000 was received in the BAT bank account on 18 September 2017.

23. On 17 October 2017, the BAT informed the Parties that Ms. Annett Rombach had been appointed as Arbitrator in this matter, invited the Respondent to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 7 November 2017 (the "Answer"), and fixed the amount of the Advance on Costs to be paid by the Parties as follows:

"Claimant 1 (Mr. James Gist)	*EUR 1,500.00*
Claimant 2 (Mr. Dominic James)	*EUR 1,500.00*
Claimant 3 (Mr. Drew Gordon)	*EUR 1,500.00*
Claimant 4 (Bill A Duffy International Inc)	*EUR 1,000.00*
Respondent (BC Partizan)	*EUR 5,500.00"*

24. On 7 November 2017, Respondent filed its Answer.

25. On 8 November 2017, BAT acknowledged receipt of Claimants' share of the Advance on Costs as well as Respondent's Answer. Because of Respondent's failure to pay its share, in accordance with Article 9.3 of the BAT Rules, Claimants were invited to substitute for Respondent's share for the arbitration to proceed.

26. On 23 November 2017, BAT acknowledged receipt of the full Advance on Costs, with Claimants having substituted for Respondent's share. Claimants were invited to comment on Respondent's Answer (the "Reply") by no later than 7 December 2017.

27. On 5 December 2017, Claimants filed their Reply. Respondent was invited to comment on Claimants' Reply (the "Rejoinder") by no later than 10 January 2018.

28. On 10 January 2018, Respondent filed its Rejoinder.

29. On 22 January 2018, the Arbitrator (in accordance with Article 12.1 of the BAT Rules) declared that the exchange of documents was completed and requested the submission of cost accounts by 12 February 2018.

30. On 23 January 2018, Claimants submitted their statement of costs. Respondent did not file any cost account.

31. As none of the Parties requested to hold a hearing, the Arbitrator decided, in accordance with Article 13.1 of the BAT Rules, not to hold a hearing and to render the award based on the written record before her.

4. The Positions of the Parties

4.1 Claimants' Position and Request for Relief

32. Claimants submit the following in substance:

- While the outstanding payments claimed in this arbitration are fully undisputed, the reason for the delay of this action is that the Club continually promised that it would make the payments and asked the Claimants to be patient.
- The present claims are not time-barred. Neither the Serbian nor the Swiss statute of limitations are applicable here. The dispute is governed by the principles of *ex aequo et bono*, which means that the question of whether the Claimants have timely filed their claims must be determined in accordance with general guidelines for a waiver of rights.
- Mr. Filipovich and Mr. Dragutinovic, members of the Agency, have always had a close relationship with Respondent. Because they wanted to avoid causing damage to the Club, they continued to try to work with Respondent to resolve the debts.
- Besides the numerous e-mails exchanged between them and the Club, a couple of personal discussions took place in October 2015, September 2016 and September 2017. In all of these meetings, the Club assured the Agency that the outstanding payments would be made.

33. Claimants request the following relief:

> *"1. $30,000 USD to Claimant 1 Mr. Gist for the 2010/2011 season*
> *2. $37,500 USD to Claimant 2 Mr. James for the 2011/2012 season*
> *3. $32,933 USD to Claimant 3 Mr. Gordon for the 2012/2013 season*
> *4. $ 19,793 USD for the agent fee pertaining to the 2011/2012 and 2012/2013 seasons.*
>
> *For all Claimants, costs of this action plus attorney's fees."*

4.2 Respondent's Position and Request for Relief

34. Respondent submits the following in substance:

- As a starting point, Respondent expressly acknowledges that the payments Claimants request in this arbitration have not been made by it due to its difficult financial situation.
- However, Respondent maintains that all of the claims presented in this arbitration are time-barred and thus unenforceable under either the Serbian or the Swiss statute of limitations.
- Primarily, Respondent argues that since the Players were Serbian employees at the times of their employment with Respondent, the Serbian labor law, including the statute of limitations, applies mandatorily (including to the agency fees). Pursuant to Article 198 of the Serbian Labor Law, all monetary claims arising from labor relationships become time-barred within 3 years as of the day when the obligation became due.
- Alternatively, if one considered the issue of the punctuality of a claim to be a procedural one (such as certain Anglo-Saxon jurisdictions), because the seat of arbitration is in Switzerland, the Swiss statute of limitation would be applicable. Under Swiss law, the claims would have become time-barred after 5 years (Article 128 Swiss Code of Obligations).
- Separately, Player Gists's claims have to be rejected for yet another reason. Player Gist was verbally fined by the Club after the last game of the season for having committed a doping violation, which resulted in a doping ban of 3 months imposed by FIBA. Because of his serious misconduct, the Club had agreed with Player Gist and the Agency that the Club would not pay to him the still outstanding salaries and the Bonus.

35. Respondent requests the following relief:

> *"Considering content of this Answer the Respondent completely challenge and deny arguments of the Claimants, and completely opposes to the Request for Relief, asking from the Tribunal to entirely REJECT that Request made by the Claimants."*

5. The Jurisdiction of the BAT

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

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

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

39. The Gist Contract (Clause 11) contains the following dispute resolution clause in favor of BAT:

> *"Any dispute arising from or related to the present contract shall be resolved by arbitration, and shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English. Awards of the FAT can be appealed to the Court of Arbitration for Sport (CAS) upon appeal, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator and CAS upon appeal shall decide the dispute ex aequo et bono."*

40. The James Contract (Clause 11), the Gordon Contract (Clause 11), and the Gordon Settlement Agreement (Clause 6) provide for the following identical BAT provision:

> *"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."

41. The above-quoted arbitration agreements are in written form and thus fulfill the formal requirements of Article 178(1) PILA.

42. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity of any of the arbitration agreements in the present matter under Swiss law (cf. Article 178(2) PILA). The arbitration clauses cover both the Players' remuneration claims and the Agency's commission fee claims.

43. The reference to BAT's old name "FAT" in the Gist Contract must be understood as a reference to BAT (Article 18.2 of the BAT Rules).

44. Furthermore, Respondent, in its Answer, expressly accepted the jurisdiction of the BAT.

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

6. Applicable Law – *ex aequo et bono*

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

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

47. Under the heading "Applicable Law", 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."*

48. In the respective arbitration agreements quoted above at para. 39 and 40, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to her in this proceeding *ex aequo et bono*.

49. Whether or not any local statute of limitation laws have to be taken into account in addition to or instead of the principles of *ex aequo et bono* is a question which will be discussed in the merits section of this Award.

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

7. Findings

51. As a starting point, the Arbitrator notes that it is undisputed that the amounts claimed in this arbitration have not been paid by Respondent. Respondent expressly acknowledges that, except for Player Gist, the Claimants were principally entitled to the claimed salaries and commission fees, but that such claims have become unenforceable because they have been filed too late (statute of limitations defence). Only with respect to Player Gist does the Club introduce additional arguments as to why his claims are meritless.

52. The Arbitrator will first address Respondent's statute of limitations defense (below at 7.1), which applies to all of the claims pursued in this proceeding. Subsequently, the Arbitrator will analyze Respondent's separate defense relating to Player Gist's claims (below at 7.2).

7.1 Respondent's statute of limitation defense

53. Respondent argues that either the Serbian or the Swiss statute of limitation must be applied to the present claims, and that under the relevant limitation periods of either law, all of the claims – or at least a significant part thereof – are time-barred and thus unenforceable. Respondent emphasizes the necessity to limit a claimant's freedom to initiate legal action with respect to claims which arose many years or even decades ago.

7.1.1 Applicability of the Serbian Statute of Limitation (3 years limitation period)

54. Respondent agrees, in principle, that as a result of the Parties' respective agreements, this dispute is governed by *ex aequo et bono* principles. However, Respondent maintains that the Serbian statute of limitation, which applies to employees based in Serbia, is a mandatory rule of law which cannot be disposed of by the Parties.

55. The Arbitrator disagrees. Respondent's view is incompatible with the notion of *ex aequo et bono* in international arbitration. It is generally acknowledged that the arbitrator deciding *ex aequo et bono* is not required to apply mandatory provisions of the law that would otherwise be applicable to the dispute.[1] In particular, the arbitrator is not required to apply the limitation periods provided by the law which would otherwise govern the contract.[2] The only limitations to which an arbitral tribunal is bound when making a decision *ex aequo et bono* are the fundamental principles of law protected by public policy.[3] Mandatory provisions relating to the statute of limitations are not considered part of the (Swiss) public policy. Additionally, the concept of *ex aequo et*

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1 SFT 107 I b, 63, 66; SFT 4P.114/2001, para 2c. bb. aaa (cited in *Kaufmann-Kohler/Rigozzi*, International Arbitration, Law and Practice in Switzerland [2015], para. 7.67 fn. 117).

2 *Berger/Kellerhals*, International and Domestic Arbitration in Switzerland (2nd ed.), para. 1319.

3 *Berger/Kellerhals*, supra.

bono does not mean that claims can be filed with BAT unlimited. When seized with the question of whether a claim has been filed (still) in time, BAT Arbitrators rely on the doctrine of "*Verwirkung*", which has been developed over many years in BAT's jurisprudence,[4] and which puts time limits on a claimant's right to collect its debts.

56. Accordingly, there is no room for the application of the Serbian statute of limitations within the framework of *ex aequo et bono.*

7.1.2 Applicability of the Swiss Statute of Limitation (5 years limitation period)

57. Respondent suggests that if the Serbian statute of limitations is deemed inapplicable, Swiss law (as the law at the seat of arbitration) should govern the issue of the punctuality of Claimants' filing.

58. Again, the Arbitrator disagrees. Swiss law could only be relevant in this context if the statute of limitations issue were considered to be of a procedural nature. Procedural rules of Swiss law may play a role in an arbitration proceeding seated in Switzerland. However, Swiss law – just as most other civil law jurisdictions – qualifies the statute of limitations issue as a substantive law issue.[5] Accordingly, the Swiss statute of limitations is applicable only when Swiss law governs the substance of the dispute, which is not the case here.

7.1.3 The punctuality of Claimants' claims under the doctrine of *Verwirkung*

59. As noted above, the inapplicability of national statutes of limitations is not a *carte blanche* for a claimant to lodge claims before BAT without any time restrictions. Rather,

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4 See, e.g. BAT 0581, 0593, 0674, 0726, 0753, 0777, 0803, 0806; on the concept of *Verwirkung* in the present case, see below at 7.1.3.

5 *Schnyder/Liatowitsch*, Internationales Privat- und Zivilverfahrensrecht (4th ed. 2017), § 18 para. 540.

BAT arbitrators apply the doctrine of *Verwirkung* in order to impose time restrictions to a claimant's attempt to collect his or her alleged debts. *Verwirkung* is rooted in the principle of legal certainty, which requires that any payment must be claimed within a reasonable period of time after it has become due.[6] This also applies to claims by an employee against his or her employer. While the question of whether a claimant is estopped from collecting his debts must be determined on a case-by-case basis, BAT arbitrators apply two criteria as guidelines for their analysis: *Verwirkung* may be assumed when (1) a substantial period of time has elapsed since the concerned claim fell due and (2) the debtor has reasonable grounds to rely on the assumption that the creditor will not exercise his right in the future.[7] The longer the period of time which has elapsed is, the easier it should (principally) be for the debtor to show that he justifiably relied on the creditor's waiver of his claims. *Verwirkung* was assumed, for example, in cases involving three[8] or five[9] years of inactivity on the claimant's part.

60. In the present case, a significant period of time has elapsed with respect to all of the claims pursued in this arbitration:

- Player Gist's payments fell due more than 6 years before the filing of the RfA;
- Player James's payments fell due more than 5 years before the filing of the RfA;
- Player Gordon's payments fell due more than 4 years before the filing of the RfA;
- The Agency's payments fell due 4 and 5 years before the filing of the RfA.

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6 BAT 0777.

7 BAT 0581, 0879.

8 BAT 0581; BAT 0879.

9 BAT 0777.

61. Considering that these are substantially long time periods, the question remains whether the Club, at the time the Claimants initiated this arbitration, could reasonably rely on the assumption that the Claimants would not exercise their rights any longer. Based on the record before the Arbitrator, she finds that Respondent did not and could not rely on a waiver of the Claimants' claims, except for one bonus payment relating to Player Gist, for the following reasons:

62. The Arbitrator is satisfisfied, that the Claimants repeatedly and continuously tried to collect the outstanding debts from Respondent. They submitted numerous e-mails (including internal e-mails with phone call memoranda) sent to Respondent reminding the latter of the outstanding debts, including threats to commence legal action (see above the factual discussion at paras 11-21). The reason why Claimants waited for years to finally start this arbitration were Respondent's repeated assurances that it would pay the debts upon the (much anticipated) improvement of its financial situation. For example, Respondent promised payment of the outstanding amounts on 26 September 2013, 20 December 2013, 21 January 2014, 5 May 2014, 31 March 2015, 27 April 2015, 5 January 2016, 30 August 2016, 24 November 2016, and in March and April 2017. Furthermore, the Arbitrator accepts Claimants' submission that the Agency and Respondent have had a longstanding and trustworthy relationship, which explains Claimants' tolerance and patience with the Club.

63. The Club has also never disputed the claimed payments. To the contrary, it fully acknowledged the claims and repeatedly begged for Claimants' patience and leniency. In such a setting, the Arbitrator finds that it constitutes bad faith for the Club to argue now that the claims are time-barred. In light of the many notices and reminders, the Club never did and never could rely on the assumption that Claimants would drop their claims. Accordingly, the Arbitrator finds that Claimants are not estopped from bringing their claims under the doctrine of *Verwirkung*.

64. The only exception is the Bonus for Player Gist (USD 10,000). With respect to the Bonus, the Arbitrator has not found any proof in the record indicating that Claimants ever put the Club on notice. In particular, the formal warning letter of 14 January 2014 does not mention the Bonus, but only Player Gist's salary. The Bonus became due more than 6 years before the beginning of this arbitration. Because it was never included in the list of claims conveyed to the Respondent, Claimants are now estopped from enforcing this claim under the doctrine of *Verwirkung*.

7.2 Respondent's further defense with respect to Player Gist's claims

65. Respondent argues that it had agreed with Player Gist and his agents not to pay him the outstanding salaries and bonuses in lieu of a disciplinary fine which it would otherwise have imposed on the Player for an anti-doping rule violation.

66. The Arbitrator does not accept this defense. Respondent has failed to submit any proof for the alleged waiver of the claims. More specifically, Respondent cannot point to any document evidencing a respective agreement between Player Gist and itself. Respondent's submission that the agreement was verbal is disputed by Claimants, and does not seem credible in light of Respondent's failure to identify the details of any such oral commitment, and its failure to offer relevant witness testimony.

67. Furthermore, Respondent would be barred from relying on this defense under the doctrine of *Verwirkung.* Since the termination of Player Gist's employment at Respondent in spring 2011, Respondent repeatedly confirmed the existence and legitimacy of Player Gist's salary claims. The waiver of the claims-defense has been introduced for the first time in this arbitration, after many assurances that Player Gist would receive his salary. Under these circumstances, Respondent is estopped from introducing this defense for the first time after almost seven years.

68. Hence, Respondent has no basis to challenge Player Gist's salary claims.

8. Costs

69. 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 legal fees and expenses incurred in connection with the proceeding.

70. On 25 May 2018 – 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"; 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", and 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 9,050.00.

71. Considering that Claimants prevailed in the present arbitration with all of their requests but for the Bonus claim (which constitutes less than 10% of the total quantum of the claims), it is consistent with the provisions of the BAT Rules that 100% of the fees and costs of the arbitration, as well as 100% of Claimants' reasonable costs and expenses, be borne by Respondent. Of specific relevance in this regard is an aspect of Article 17.3 of the BAT Rules ("[W]*hen deciding on the arbitration costs and on the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties*").

72. In light of these principles, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

- Respondent shall pay EUR 9,050.00 to Claimants, being the amount of the arbitration costs determined by the BAT President;

- The BAT shall reimburse Claimants the amount of EUR 1,950.00, being the difference between the amount advanced by them and the reimbursement to be received from Respondent (EUR 11,000 – EUR 9.050.00);

- Respondent shall pay EUR 1,950.00 to Claimants as a reimbursement towards their attorneys' fees. The Arbitrator finds that such amount is reasonable under the circumstances. Respondent shall further pay a reimbursement to the Claimants in the amount of EUR 3,000.00, constituting the handling fee.

9. AWARD

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

1. **Basketball Club Partizan is ordered to pay Mr. James Gist USD 20,000.00 net in unpaid salaries.**

2. **Basketball Club Partizan is ordered to pay Mr. Dominic James USD 37,500.00 net in unpaid salaries.**

3. **Basketball Club Partizan is ordered to pay Mr. Drew Gordon USD 32,933.00 net in unpaid salaries.**

4. **Basketball Club Partizan is ordered to pay Bill A. Duffy International Inc. USD 19,793.00 net in unpaid agency fees.**

5. **Basketball Club Partizan is ordered to pay jointly to Mr. James Gist, Mr. Dominic James, Mr. Drew Gordon and Bill A. Duffy International Inc. EUR 9,050.00 as reimbursement of the arbitration costs.**

6. **Basketball Club Partizan is ordered to pay jointly to Mr. James Gist, Mr. Dominic James, Mr. Drew Gordon and Bill A. Duffy International Inc. EUR 4,950.00 as a contribution towards their legal fees and expenses.**

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

Geneva, seat of the arbitration, 4 June 2018

Annett Rombach

(Arbitrator)