BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 1358/19)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Ms. Amani Khalifa

in the arbitration proceedings between

Mr. Rimas Kurtinaitis

- First Claimant -

Mr. Obrad Fimic

- Second Claimant -

both represented by Mr. Branko Pavlovic, attorney at law

vs.

Pallacanestro Cantu
Via Matteotti 53, 22072 Cermenate (CO), Italy

- Respondent -

represented by Mr. Florenzo Storelli, attorney at law

1. The Parties

1.1 The Claimant

1. The First Claimant is Mr. Rimas Kurtinaitis, a professional basketball coach of Lithuanian nationality (the "Coach" or "First Claimant").

2. The Second Claimant is Mr. Obrad Fimic, a FIBA Agent, license no. 2007019222 of Polish nationality ("Second Claimant" or together with the First Claimant, "Claimants").

3. The Claimants are represented by Mr. Branco Pavlovic, attorney at law.

1.2 The Respondent

4. The Respondent is Pallacanestro Cantu, a basketball club located in Italy (the "Club" or “Respondent” and, together with Claimants, the “Parties").

5. The Respondent is represented by Mr. Florenzo Storelli, attorney at law.

2. The Arbitrator

6. On 21 March 2019, the President of the Basketball Arbitral Tribunal ("BAT"), Prof. Ulrich Haas, appointed Ms. Amani Khalifa as arbitrator (“Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force from 1 January 2017 ("BAT Rules"). None of the Parties objected to her appointment or to her declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

7. On the Claimants' case, on 2 August 2016, the Parties executed an employment contract ("the Employment Agreement") in which the Club engaged the Coach for the 2016-2017 and 2017-2018 seasons. The Employment Agreement bears signatures on each page for the Respondent's owner, Mr. Dmitry Gerasimenko, and each of the Claimants. The Respondent denies entering into the Employment Agreement and contests its validity on numerous grounds.

8. Article 3 of the Employment Agreement provides that the Club agrees to pay the First Claimant EUR 500,000.00 net in basic compensation for two seasons (2016-2017 and 2017-2018), and additional amounts as bonuses under Article 4. Article 3 provides as follows:

> *"Basic Compensation*
> *In consideration for the services to be performed hereunder by Employee during the Term, Club agrees to pay Head Coach the total amount of 500.000 (Five hundred thousand) Euro's Net for two seasons (2016-2017, and 2017-2018 seasons). This amount is split in two seasons: For 2016-2017 season 250.000 (Two hundred Fifty thousand Euro's, and for 2017-2018 season 250.000 (Two hundred Fifty thousand) Euro's net (the "**Basic Compensation**"). Payments will be maid* [sic] *according to the following schedule:*
>
> *For the 2016-17 Season, the Basic Compensation shall be 250.000 (Two hundred fifty thousand) Euro's Net of all Italian Taxes;*
>
> - *25.000 (Twenty five thousand) Euro's on 15th September 2016*
> - *25.000 (Twenty five thousand) Euro's on 15th October 2016*
> - *25.000 (Twenty five thousand) Euro's on 15th November 2016*
> - *25.000 (Twenty five thousand) Euro's on 15th December 2016*
> - *25.000 (Twenty five thousand) Euro's on 15th January 2017*

- *25.000 (Twenty five thousand) Euro's on 15th February 2017*
- *25.000 (Twenty five thousand) Euro's on 15th March 2017*
- *25.000 (Twenty five thousand) Euro's on 15th April 2017*
- *25.000 (Twenty five thousand) Euro's on 15th May 2017*
- *25.000 (Twenty five thousand) Euro's on 15th June 2017*

For the 2017-18 Season, the Basic Compensation shall be 250.000 (Two hundred fifty thousand) Euro's Net of all Italian Taxes;

- *25.000 (Twenty five thousand) Euro's on 15th September 2017*
- *25.000 (Twenty five thousand) Euro's on 15th October 2017*
- *25.000 (Twenty five thousand) Euro's on 15th November 2017*
- *25.000 (Twenty five thousand) Euro's on 15th December 2017*
- *25.000 (Twenty five thousand) Euro's on 15th January 2018*
- *25.000 (Twenty five thousand) Euro's on 15th February 2018*
- *25.000 (Twenty five thousand) Euro's on 15th March 2018*
- *25.000 (Twenty five thousand) Euro's on 15th April 2018*
- *25.000 (Twenty five thousand) Euro's on 15th May 2018*
- *25.000 (Twenty five thousand) Euro's on 15th June 2018*

These payments are fully guaranteed to be paid by the Club to Head Coach. The Club will assist Head Coach to the best of its ability to help in transfer of his payments abroad to Account of his choosing."

9. Under Article 6B, if the Respondent terminates the Employment Agreement other than in circumstances of wrongdoing by the First Claimant (detailed in Article 6A), the Respondent's only liability is the continued payment of Basic Compensation under Article 3, which could be reduced based on subsequent income. Article 6B provides as follows:

"Premature Termination by Club.

[…]

B. In the event Club terminates the Term under any other circumstances not explicitly provided for in this Agreement, Club's only liability and obligation to Employee shall be to

continue payment of Basic Compensation, as provided for in Section 3 hereof for the remainder of the original Term. However, Club shall be entitled to reduce the amount of Basic Compensation payable to Employee pursuant to this Subsection 8.B. to the extent of compensation Employee earns from other employment or consulting arrangements in which he engages subsequent to such termination but during the original Term of this Agreement."

10. Under Article 16 of the Employment Agreement, the Club agreed to pay the Second Claimant 10% of the First Claimant's salary as an agent fee, amounting to EUR 50,000.00, as follows:

"Agent Fee. The Club will pay a total commission fee of 10 percent on this and on any future contracts between parties which will not be deducted from Head Coach's salary. For the season 2016-2017 the amount of 25.000 (Twenty Five Thousand) Euro's net no later than 15th October 2017. For the season 2017-2018 the amount of 25.000 (Twenty Five Thousand) Euro's net no later than 15th October 2018. Agent's fee will be paid to Obrad Fimic a FIBA licensed agent with No: 2007019222."

11. On the Respondent's case, on 27 September 2016, the Parties entered into an Agreement to retain the First Claimant's services as Head Coach of the Respondent for a total annual salary of EUR 80,000.00 ("Sport Agreement"). This contract is in the one-page *pro forma* format for contracts registered with the Italian league. The Respondent maintains that the Sport Agreement governed the entirety of its relationship with the Parties and that it did not enter into the Employment Agreement, which is a false document. The Claimants' position is that the Sport Agreement has no legal effect since it was created purely for the purpose of the Respondent's reporting obligations to the Italian league.

12. On or around November 2016, the Parties decided to terminate their employment relationship. The underlying reason for terminating the employment relationship is contested between the Parties. The Claimants claim that the Employment Agreement

was terminated at the Respondent's request. By contrast, the Respondent claims that the First Claimant was not satisfied with the Respondent's results and decided to leave.

13. On the Claimants' case, on 30 November 2016, the Parties entered into a Settlement Agreement ("Settlement Agreement"). The Settlement Agreement is signed by the Claimants and Mrs. Irina Gerasimenko, the Respondent's President, and is stamped by the Respondent. The Respondent denies entering into the Settlement Agreement and claims that it is formally invalid.

14. Under Article 2 of the Settlement Agreement, the Club agreed to pay the First Claimant EUR 234,000.00 net of all Italian taxes "*in consideration of the settlement of all relationships between the parties*" as follows:

> *"In consideration of the termination and in consideration of the settlement of all relationships between the parties, Pallacanestro shall pay to Kurtinaitis the amount of Euro 234.000 (Two hundred thirty four Thousand) Euro's Net of all Italian taxes as follows:*
>
> ***a.*** *58.500 (Fifty eight Thousand five hundred) Euro's by 15th December 2017*
> ***b.*** *58.500 (Fifty eight Thousand five hundred) Euro's by 15th January 2017*
> ***c.*** *58.500 (Fifty eight Thousand five hundred) Euro's by 15th April 2017*
> ***d.*** *58.500 (Fifty eight Thousand five hundred) Euro's by 15th May 2017"*

15. The Claimants aver that the reference in sub-paragraph a. to "*15th December 2017*" is a typographical error and that the Parties' intended to refer to 15 December 2016, i.e. the following month.

16. Under Article 3 of the Settlement Agreement, the Club agreed to pay the Second Claimant EUR 25,000.00 net of all Italian taxes by 15 January 2017:

> *"In consideration of the termination and in consideration of the settlement of all relationships between the parties, Pallacanestro shall pay to Agent (Obrad Fimic) the amount of Euro 25.000 (Twenty five Thousand) Euro's Net of all Italian taxes no later than*

15 January 2017."

17. Under Article 5, if the Respondent delayed payment of the settlement amounts by more than 15 days, the Claimants could terminate the Settlement Agreement by giving written notice. Fifteen days after termination, the Claimants would become entitled to payments under Articles A and D of the Settlement Agreement:

> *"If any of the above payment is delayed by more than 15 days, then this Settlement Agreement may be terminated by Kurtinaitis or his Agent by means of a notice in writing via email to Pallacanestro Cantu, effective upon receipt, and in such event Kurtinaitis shall have the right to immediate all payments by Pallacanestro Cantu from Article A and his agent from Article D of this agreement within 15 days after receipt by Pallacanestro of the termination notice of Kurtinaitis or his Agent."*

18. Articles A and D of the Settlement Agreement provide for payment of EUR 500,000.00 to the First Claimant and EUR 50,000.00 to the Second Claimant in the event of default as follows:

> *"A. Pallacanestro Cantu and Kurtinaitis entered into a contract on 2nd August 2016 and signed Employment Agreement (the "Contract"), which provided that Pallacanestro Cantu employed the Head Coach (Kurtinaitis) for the period covering the 2016-2017, and 2017-2018 basketball seasons: the Contract provided, with respect to the all two seasons the amount of 500.000 (Five Hundred Thousand) Euro's Net of all Italian Taxes, or per each basketball season 250.000 (Two Hundred fifty Thousand) Euro's Net of all Italian taxes ;*
> […]
> ***D.*** *Pallacanestro agreed to pay Agent of Kurtinaitis for his services according to the Contract for the period covering the 2016-2017, and 2017-2018 basketball seasons: the Contract provided, with respect to the all two seasons the amount of 50.000 (Fifty Thousand) Euro's Net of all Italian Taxes, or per each* basketball season 25.000 (Twenty five Thousand) Euro's Net of all Italian

taxes,"

19. On 2 December 2016, Parties concluded another *pro forma* agreement bearing the stamp of the Italian Basketball League entitled '*Reserved Document – Act of Resolution by Mutual Consent*' ("Act of Resolution"). In it, the Parties declared the termination of the Sport Agreement. The Respondent maintains that the Act of Resolution was a full and final mutual waiver of all claims between the Parties. The Claimants maintain that the Act of Resolution was a simple notification to the league that a settlement between the parties had been reached. The Act of Resolution provides in the relevant part that:

> *"With the present letter we declare that we resolve by mutual consent, with no exceptions, the professional contract no. 57 dated 27 September 2016 registered in the headquarters of the League on 27 September 2016 Prot. No. 4Z."*

20. On 14 February 2017, the First Claimant was engaged by Vsl Krepsinio Rytas/BC Lietuvos Rytas to provide coaching services for the remainder of the 2016-2017 season and the 2017-2018 season. His salary for the remainder of the 2016-2017 season was EUR 40,000.00 and his salary for the 2017-2018 season was EUR 250,000.00.

21. On the Claimants' case, between 27 December 2016 and 1 February 2018, the Second Claimant collected several cash payments on their behalf, in person, from the personal secretary of the Respondent's owner at the Moscow offices of Red October, another club which he owns. These payments, which the Claimants claim were made under the Settlement Agreement, total EUR 133,275.00 to the First Claimant and EUR 15,000.00 to the Second Claimant leaving EUR 116,725.00 owing to the First Claimant and EUR 10,000.00 to the Second Claimant under the terms of the settlement. The Respondent alleges that it did not make these payments.

22. On 24 January 2019, on the Claimants' case, they sent a notice to the Respondent terminating the Settlement Agreement ("Notice"). In the Notice, the Claimants informed

the Respondent that unless it paid the outstanding amounts owed under the Settlement Agreement within 30 days, it would be obliged to pay the higher amount agreed under Articles 5, A and D of the Settlement Agreement (EUR 500,000.00 total base salary to the First Claimant and EUR 50,000.00 in agency fees to the Second Claimant). The Respondent denies having received the Notice.

3.2 The Proceedings before the BAT

23. On 26 February 2019, the Claimants submitted a Request for Arbitration (of the same date) together with several exhibits (the Settlement Agreement, Employment Agreement and the Notice) in accordance with the BAT Rules. In the Request for Arbitration, the First Claimant claimed EUR 116,725.00 in outstanding payments owed under Article 2 of the Settlement Agreement plus interest and costs. The Second Claimant claimed EUR 10,000.00 in outstanding payments owed under the Article 3 of the Settlement Agreement plus interest and costs. The non-reimbursable handling fee of EUR 3,000.00 was received in the BAT bank account on 25 February 2019.

24. By letter dated 1 April 2019, the BAT Secretariat (a) notified the Parties of the Arbitrator's appointment; (b) invited the Respondent to file its Answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules by no later than 22 April 2019; (c) requested that the Second Claimant provide residential address details; and (d) fixed the amount of the Advance on Costs to be paid by the Parties by 11 April 2019 as follows:

    - First Claimant: EUR 4,000.00;
    - Second Claimant EUR 500.00; and
    - Respondent: EUR 4,500.00.

25. On 11 April 2019, the Claimants requested an 8-day extension to pay the Advance on Costs.

26. On 12 April 2019, the BAT Secretariat wrote to the parties by email granting the extension until 19 April 2019.

27. On 22 April 2019, the Respondent submitted an Answer to the Request for Arbitration.

28. By letter dated 15 May 2019, the BAT Secretariat wrote to the Parties (a) acknowledging receipt of the full Advance on Costs; (b) acknowledging receipt of the Respondent's Answer to the Request for Arbitration; and (c) inviting the Respondent to provide an English translation of exhibits 6 and 7 of its Answer by 22 May 2019.

29. On 20 May 2019, the Respondent submitted translations of Exhibits 6 and 7.

30. On the same date, the BAT Secretariat wrote to the parties (a) acknowledging receipt of the Respondent's translations; and (b) inviting the Claimant to comment on the Answer by 3 June 2019 and, pursuant to the Arbitrator's request, to address in particular:

    - Substantiation of all amounts claimed;
    - Whether the First Claimant obtained alternative employment for any part of the contract period covered by the Employment Agreement and, if so, what his remuneration was.

31. On 2 June 2019, the Claimants requested an extension to the deadline for submitting their Reply.

32. On 3 June 2019, the BAT Secretariat informed the parties by email that the Arbitrator had granted an extension to the Claimants to submit their Reply until 17 June 2019.

33. On 17 June 2019, the Claimants submitted their Reply (dated 16 June 2019) amending their claims and prayers for relief. Whereas their previous claim was for the sums originally due to each of them under Articles 2 and 3 of the Settlement Agreement, the amended claim was for breach of the Settlement Agreement and compensation under

Articles 5, A and D. The First Claimant, therefore, increased the value of his claim to EUR 366,725.00 based on Articles 5 and A of the Settlement Agreement citing the Respondent's failure to pay the sums in the payment schedule contained in Article 2 of the Settlement Agreement. The Second Claimant increased his claim to EUR 35,000.00 based on Articles 5 and D of the Settlement Agreement, Respondent's failure to pay the settlement sum owed to him under Article 3 of the Settlement Agreement.

34. On 18 June 2019, the BAT Secretariat wrote to the parties by email (a) acknowledging the Claimants' submission in reply to the Procedural Order dated 20 May 2019; (b) granting the Respondent the opportunity to comment on the Claimants' reply by 9 July 2019.

35. On 9 July, the Respondent submitted its comments on the Claimants' reply.

36. By letter dated 22 July 2019, the BAT Secretariat wrote to the parties (a) acknowledging receipt of the Respondent's rejoinder; and (b) inviting the Respondent to submit a translation of Exhibit 2 to the Answer by 29 July 2019.

37. On 25 July 2019, the Respondent submitted a translation of Exhibit 2 to the Answer.

38. On 6 August 2019, the BAT Secretariat wrote to the Parties by email (a) acknowledging the Respondent's submissions in reply to the 22 July 2019 Procedural Order; and (b) inviting the First Claimant to provide details of mitigation by 19 August 2019, including to which club he went, the date he joined the club, his salary and the actual payments received.

39. On 7 August 2019, the First Claimant requested an extension to the deadline for providing details of mitigation until 28 August 2019.

40. On 9 August 2019, the BAT Secretariat informed the parties by email that the Arbitrator

had granted this extension.

41. On 28 August 2019, the First Claimant submitted a reply to the BAT's correspondence of 6 August 2019 detailing subsequent employment.

42. On 29 August 2019, the BAT Secretariat wrote to the parties by email (a) acknowledging receipt of the First Claimant's reply to the BAT's correspondence of 6 August 2019; and (b) inviting the Respondent to comment on the First Claimant's reply by 12 September 2019.

43. On 12 September 2019, the Respondent submitted comments on the First Claimant's reply.

44. By letter dated 23 September 2019, the BAT Secretariat wrote to the parties (a) acknowledging receipt of the Respondent's comments and exhibit; and (b) inviting the Claimants to clarify by 7 October 2019 whether they had abandoned their claim for breach of the settlement agreement by revising it in the reply or maintained this claim in the alternative.

45. On 1 October 2019, the Claimants clarified that the basis of their claims, as amended by their Reply, remains the Settlement Agreement. Specifically, the Claimants' explained that their reference to the Employment Agreement in the Reply was to give background context to the Parties' agreement in Articles 5, A and D of the Settlement Agreement that the Respondent would be liable for an increased sum in the event of its non-compliance with the payment schedules laid down in Articles 2 and 3:

> *"Therefore, it is not the issue that request in RfA is based on one agreement (Settlement Agreement), and the raised request (Claimants Submission dated 16.06.2019.) on other agreement (Employment Agreement). Both request are based on Settlement Agreement, as previously stated. In the Provision 1.4 of RfA,*

we stated „(based on the Employment Agreement)", but only as the explanation that amounts given on the first side of the Settlement Agreement are the same ones as those in the Employment Agreement. Therefore, it is not the issue of legal foundation of the claim, but technical explanation why the Settlement Agreement states those exact amounts.

46. The Claimants also clarified that they do not claim the reduced sums contained in the prayers for relief in the Request for Arbitration in the alternative as follows:

"By filing request for the amounts 366.725 EUR for the Claimant 1 and 35.000 EUR for the Claimant 2 in the Claimants' Submission dated 16.06.2019., previous request incorporated in RfA ceased to exist. This is the only request and there is no alternative request."

47. On 2 October 2019, the BAT Secretariat notified the Parties that the exchange of documentation was completed in accordance with Article 12.1 of the BAT Rules and the Parties were invited to set out by 9 October 2019 how much of the applicable maximum contribution to costs should be awarded to them and why. The Parties were also invited to include a detailed account of their costs, including any supporting documentation in relation thereto.

48. On 8 October 2019, the Claimants submitted their reply to the Procedural Order of 2 October 2019 with cost submissions. On 9 October 2019, the Respondent submitted its reply to the Procedural Order of 2 October 2019 with cost submissions.

49. On 10 October 2019, the BAT Secretariat wrote to the Parties by email acknowledging receipt of their cost submissions.

50. On 9 December 2019, the BAT Secretariat informed the Parties of an additional non-reimbursable handling fee due to the increased value in dispute and requested the

Claimants to pay the remainder of the non-reimbursable handling fee in the amount of EUR 2,000.00 by no later than 19 December 2019. Furthermore, given the complexity of this procedure, the Advance on Costs needed to be increased in order to remunerate the time spent by the Arbitrator and the BAT President and, therefore, the Parties were requested to pay an additional Advance on Costs by 19 December 2019 as follows:

- First Claimant: EUR 1,300.00;
- Second Claimant EUR 200.00; and
- Respondent: EUR 1,500.00.

51. On 23 December 2019, the BAT Secretariat acknowledged receipt of the Claimants´ additional non-reimbursable handling fee and the Claimants´ additional Advance on Costs. However, the Respondent had failed to pay its share of the additional Advance on Costs, therefore, the Claimants were invited to pay Respondent's share of the Advance on Costs by 7 January 2020 in order to ensure that the arbitration proceeds.

52. On 8 January 2020, the BAT Secretariat acknowledged receipt of the full additional Advance on Costs actually paid by Claimants and Respondent.

4. Parties' Positions

4.1 The Claimants' Position and their Requests for Relief

53. In the Request for Arbitration, the Claimants initially claimed that because of the Respondent's failure to abide by its payment obligations, they were, in principle, entitled to the full amounts that would have fallen due to them under the Employment Agreement less sums already paid. However, they limited their claims only to the remaining sums that were due to be paid to them by way of settlement on a without prejudice basis. In the Request for Arbitration they explain:

"Since Respondent didn't pay anything in accordance with the Notice, the entire debt is now due to pay, in accordance with the Article 5 of the Settlement Agreement.

With aim to preserve good relations with the Club and understanding the financial situation, Claimants gave the instruction to the Counsel to claim only the amounts stipulated in the Article 1.3 of this RfA"

54. The First Claimant's claim was therefore initially quantified at EUR 234,000.00 based on the sums contained in payment schedule in Article 2 of the Settlement Agreement. The Second Claimant's claim was initially quantified at EUR 25,000.00 based on Article 3 of the Settlement Agreement.

55. However, as clarified in their letter dated 1 October 2019, the Claimants amended their claims in the Reply citing the Respondent's breach of its obligations in Articles 2 and 3 of the Settlement Agreement and they are now based on Articles 5 and A in respect of the First Claimant, and Articles 5 and D in respect of the Second Claimant. Therefore, the Claimants now claim the full amount that they would have received under the Employment Agreement for both seasons, which was EUR 500,000.00 to the First Claimant and EUR 50,000.00 to the Second Claimant, less amounts they have already received from the Respondent, leaving a further EUR 366,725.00 and EUR 35,000.00 owed to the First and Second Claimants respectively. The Claimants claim interest at 5% p.a. from the date of the Request for Arbitration.

56. The Claimants claim that both the Employment Agreement and the Settlement Agreement are valid and enforceable notwithstanding the Respondent's objections. The Claimants maintain that the Sport Agreement and the Act of Resolution were created to meet the requirements of the Italian league and the fee noted in the former was incorrect and the latter did not settle the Claimants' claims but is properly characterised as a notice to the league that a settlement was reached. Therefore, on the Claimants' case, these,

alternative agreements have no legal effect and do not provide any valid defence to the Claimants' claims.

57. The Claimants state that mitigation principles should not apply to their claims under the Settlement Agreement, as the short deadline in which the Club was obliged to pay the termination compensation per Article 2 of the Settlement Agreement shows that the amount was not intended to be reduced by any subsequent income of the Coach for the same season. In this regard, the Claimants also argue that the sums due following the breach of the Settlement Agreement were intended by the Parties to compensate the Claimants for the damage to the First Claimant's reputation caused by the termination of the Employment Agreement and that they should therefore not be characterised as unpaid salaries which would otherwise be subject to reduction for mitigation.

58. The Claimants argue that their claims are not time-barred because they were submitted to arbitration one year and nine months from the date the last instalment under the Settlement Agreement fell due.

59. The Claimants' requests for relief are set out in the Reply as follows:

> *"The Claimant 1 requests for compensation, total amount of 366.725 EUR, net of all Italian taxes, plus interests at 5% per annum, from the date of RfA submission, onward until final payment, costs of BAT arbitration and legal fees according to the BAT Award which will resolve this dispute.*
>
> *The Claimant 2 requests for compensation, total amount of 35.000 EUR, net of all Italian taxes, plus interests at 5% per annum, from the date of RfA submission, onward until final payment, costs of BAT arbitration and legal fees according to the BAT Award which will resolve this dispute.*
>
> *In everything else, Claimant 1 and Claimant 2 stand by all previous statements."*

4.2 The Respondent's Position and its Requests for Relief

60. The Respondent avers that the First Claimant left the Respondent because he found alternative employment for a higher salary elsewhere. In support of this contention, the Respondent relies on the evidence of Mr. Sergio Paparelli, a shareholder in the Respondent.

61. The Respondent claims that the documents submitted by the Claimants are "*unauthorised*", that the Respondent has no record that the agreements ever existed, and that the Respondent never received the Notice from the Claimants. The Respondent states that the signatures and stamps on the documents provided by the Claimants, including the Employment Agreement and the Settlement Agreement, are not genuine and that they are inconsistent across the various documents.

62. The Respondent states that on 27 September 2016, the Club entered into an agreement with the First Claimant for him to be the Head Coach for the 2016-2017 season only, for an annual fee of EUR 80,000.00 and that the Act of Resolution constituted a full and final settlement and waiver of any outstanding claims. The Respondent relies on the witness statement of Mr. Paparelli and Mr. Gianluca Berti, the Respondent's sports director, to support its contention that it never entered into the Employment Agreement.

63. In the alternative, the Respondent argues that the Employment Agreement is not binding on the Respondent because Mr. Gerasimenko did not have the prior shareholder approval to enter into it, which was needed because its value exceeded EUR 400,000.00.

64. The Respondent also states that there has since been a change of ownership of the Club and the representative alleged to have signed the agreements the Claimant relies upon is no longer associated with the Club.

65. The Respondent claims that, in the alternative, as the First Claimant was engaged by

another club soon after termination of the Employment Agreement for a higher salary than the amount claimed in his request, the Claimants have successfully mitigated any losses and the Respondent does not owe them any further amounts.

66. The Respondent claims that it never received the Notice. It relies on the witness testimony of Mr. Walter Gorini, an IT specialist employed by the Respondent to manage their email accounts, who claims the Respondent never received the Notice, nor did it receive any emails pertaining to the Claimants from the end of 2016 until April 2019.

67. The Respondent's prayers for relief as set out in the Answer to the Request for Arbitration are as follows:

> *"For all the above, the Respondent,* ***Pallacanestro Cantù S.p.A.*** *requests that the BASKETBALL ARBITRAL TRIBUNAL,*
>
> *in thesis, rejects in toto the request for relief submitted by Mr. Rimas Kurtinaitis and Mr. Obrad Fimic;*
>
> *in hypothesis, reduces the claim of the Claimants in accordance to the principles of equo*[sic] *et bono, taking into account the behaviours of the parties and the sums already received by the Claimants due to the effect of Sport Contracts stipulated by the Claimants after the termination by mutual consent of the agreement with the Respondent.*
>
> *The Respondent also requests that the BASKETBALL ARBITRAL TRIBUNAL in thesis, orders the Claimants to refund to the Respondent all costs and legal fees; in hypothesis, orders all parties to pay their own respective costs."*

5. The Jurisdiction of the BAT

68. 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").

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

70. 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.

71. The Claimants' claims arise out of the Settlement Agreement. The Arbitrator's jurisdiction to decide the Claimants' claims is derived from Article 6 of the Settlement Agreement, which contains a BAT jurisdiction clause. It provides:

> *"Any dispute arising from or related to this Settlement Agreement 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 Geneve, 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 *but in regards of any payment due to be done as stipulated in articles "A" "D", "2.a.b.c.d" , "2.b.", "3", "5" or potentially conducted payments and terms according to article "A" and "5" of this settlement, the arbitrator shall decide respecting principle* pacta sunt servanda *and shall not have the right to decide* ex aequo et bono.
>
> *The Arbitrator shall rule due to principle* pacta sunt servanda *in matters of financial conditions and payments (Ariticle*[sic] *2, Article 3, Article 5, Article A, and Article D of this Agreement) to be made to Head Coach and his agent stipulated in this Agreement."*

72. Although the claims do not arise from the Employment Agreement, in all cases, Article 10 of the Employment Agreement also contains a BAT jurisdiction clause. It provides:

> *"Governing Law. Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President.*
> *The seat of arbitration shall be Geneva, Switzerland.*
> *The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL) irrespective of the parties' domicile.*
> *The language of the arbitration shall be English. The arbitrator shall decide the dispute* ex aequo et bono*.*
> *The Arbitrator shall rule due to principal pacta sunt servanda in matters of financial conditions and payments (Ariticle*[sic] *3 and Article 4 of this Agreement) to be made to Head Coach and his representative stipulated in this agreement.*
> *All arbitral costs will be cover by the loosing side."*

73. Both, the Settlement Agreement and the Employment Agreement are in written form and thus the arbitration agreements fulfil the formal requirements of Article 178(1) PILA .

74. 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 the arbitration agreement in the present matter under Swiss law (cf. Article 178(2) PILA). In particular, the wordings *"any dispute arising from or related to this Settlement Agreement"* and *"any dispute arising from or related to the present contract"* in the above-mentioned arbitration clauses encompass the claims in these proceedings.

75. Although this has not been characterised as a jurisdictional objection *per se*, the Respondent states in the Answer to the Request for Arbitration that the claim 'cannot be brought against the Club' due to a change in ownership, with the majority shareholder having sold its shares to another party. However, there is no suggestion that the change

in shareholding has resulted in a different legal entity.

76. According to BAT jurisprudence, such as case BAT 0507/14 and under Swiss law, the arbitration agreement remains valid notwithstanding the transfer of shares in the Respondent entity because the entity continues to exist.

77. For the above reasons, the Arbitrator finds that she has jurisdiction to decide the present dispute.

6. Applicable Law

78. 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".*

79. 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."*

80. In Article 6 of the Settlement Agreement (quoted above), the Parties have, in principle, mandated the Arbitrator to decide the present dispute *ex aequo et bono*. However, they have purported to limit this mandate in respect of financial conditions and payment matters, which the Arbitrator "shall rule due to principal *pacta sunt servanda*".

81. In BAT 1158/18, the arbitrator considered a similarly worded clause which stated:

> *"The arbitrator shall decide the dispute ex aequo et bono but in regards of any payment and terms stipulated in articles "B", "2.a.", 2.b.", "5" or potentially conducted payments and terms according to article "A" and "4" of this settlement, the arbitrator shall decide respecting the principle pacta sunt servanda and shall not have the right to decide ex aequo et bono."*

82. In that case, the Arbitrator held that this wording did not have the effect of altering the parties' choice for the dispute to be decided *ex aequo et bono* as follows:

> *"The Arbitrator notes that this provision is somewhat unclear, because the reference to "pacta sunt servanda" is not a reference to a particular law or set of rules, but to a single legal principle applicable in many different laws, including when a dispute is decided ex aequo et bono. The Arbitrator understands that the Parties' reference to "pacta sunt servanda" regarding financial matters shall emphasize that it is particularly important to them that the Arbitrator follows the language of their contract for these matters before applying general considerations of justice and fairness which may not be imminently rooted in the contractual language.*
>
> *While it is questionable if this limitation of the Arbitrator's mandate is legally permissible under Swiss law and the BAT Rules, this question can be left open since the Arbitrator – whether relying on ex aequo et bono considerations or merely on the principle of pacta sunt servanda as part of ex aequo et bono – would still make the findings below."*

83. In the present case the Arbitrator reaches the same conclusion as to the parties' obligations under Articles 5, A and D of the Settlement Agreement, which would be interpreted the same way under both *pacta sunt servanda* and *ex aequo et bono* principles.

7. Procedural Issues

84. Neither party requested a hearing. In accordance with Article 13.1 of the Rules, the arbitrator will decide the Claimants' claims based on the written submissions and the evidence on record.

8. Admissibility

85. The Respondent avers that the Claimants' claims are stale and that it had no notice of their intention to recover any debt for a substantial period. Specifically, the Respondent asserts that it did not receive the Notice by email or otherwise (relying on the witness statement of Mr. Walter Gorini) and that it received no request for payment after the Act of Resolution. The Act of Resolution predates the Request for Arbitration by two years and three months.

86. In response to the Respondent's objection, the Claimants claim that the Respondent made payments under the Settlement Agreement until 1 February 2018 in the case of the First Claimant, and 28 August 2017 in the case of the Second Claimant. The Respondent denies making any such payments. The evidence of these payments submitted by the Claimants includes the witness statement of the Second Claimant, in which he testifies that he received payments in person, in cash, from the Red October offices in Moscow. The Claimants also submitted a PDF of an email from the Second Claimant to an account belonging to "Dima Gerasimenko Krasniy Oktyabr" sent on 25 August 2017 that includes an extract of a handwritten note confirming receipt of cash. Finally, the Claimants claim that they sent the Respondent the Notice, which was dated 24 January 2019, and have submitted evidence in the form of the cover email which was sent from Claimants' counsel's email account to info@pallacanestrocantu.com.

87. In light of this objection, the Arbitrator considers below the defence of *Verwirkung* which is well-established in BAT case law. The *Verwirkung* principle was discussed in the case

BAT 0408/13, in which the Arbitrator stated, at paragraphs 89-91:

> *"The principle of "Verwirkung" requires two prerequisites: (a) that the creditor has failed during a significant period of time to exercise his right and (b) that the debtor had reasonable grounds to rely on the assumption that the creditor would not avail himself of his right or claim in the future…*
>
> *The Arbitrator finds this an equitable concept and, thus, deems that – in principle – for the condition of "significant period of time" to be fulfilled a minimum of two years must have elapsed from the occurrences that gave rise to the present dispute until the filing of the Request for Arbitration. The Arbitrator would, however, be prepared to accept a lesser period of time in truly exceptional circumstances, in particular in a case where there was no exchange of correspondence between the claimant(s) and the respondent, i.e., if a respondent is taken by complete ambush when notified of the filing of the Request of Arbitration through the BAT."*

88. In case BAT 0107/10 the Arbitrator stated, at paragraphs 56 and 57:

> *"Regarding the "significant period of time", in general a stringent standard has to be applied. In an environment in which contracts are rather short-lived and players move quickly from one club to the other, the period of one year could - in principle - be seen as a limit. Accordingly, a party to the contract that does not avail itself of a right or claim for a period of one year after the end of the contract could be perceived by the other contracting party as having accepted the status quo. In any event, the individual circumstances of each case will have to be taken into account."*

89. As explained in these awards, the principle of *Verwirkung* requires the claimant's failure to assert contractual rights over a significant period of time, and reasonable grounds for the respondent to believe that those rights will not be pursued. There is some divergence as to what constitutes a significant period of time, with between one and two years discussed in previous awards.

90. The burden of proof for the facts underlying the application of the principle of *Verwirkung* is on the Respondent, since it is the latter that would benefit from it. The Respondent has not discharged its burden of proof. Instead, the Arbitrator prefers the Claimants' account of the facts and finds that the Respondents did make part-payments to both Claimants under the Settlement Agreement. Thus, in the case at hand there is no room to assume that the Claimants failed to assert their rights or that the Respondent had reasonable grounds to believe that the Claimants will not pursue their contractual rights. As discussed further below, the Respondent has not met the burden of proving that the Settlement Agreement and the Employment Agreement are forgeries. The Employment Agreement was duly signed by Mr. Gerasimenko, the Respondent's owner and the Settlement Agreement by Mrs. Irina Gerasimenko, the Respondent's President. Mr. Gerasimenko's signature clearly appears on the signature block of the Employment Agreement, and, although the signature on each individual page looks different, a cursory examination shows that, in fact, the e-signature is the same as the one in the signature block at the end but, on the preceding pages the signature image was resized causing it to be slightly out of proportion.

91. It is not uncommon for basketball clubs to enter into short, standard-form contracts for the purposes of registration with the national league and for these contracts to differ significantly from the 'real', longer contracts that govern the club's relationship with coaches and players. The Sport Agreement and Act of Resolution are typical examples of the purely formal contracts commonly used in basketball. Not only does their existence not preclude the existence of the Employment Agreement and Settlement Agreement, it would be highly unusual for the Parties to have contracted with each other purely based on a Sport Agreement for a contract of this value. Given the signatures on both the Employment Agreement and the Settlement Agreement and the club stamp on the latter, the Arbitrator considers these documents to be genuine, notwithstanding the Respondent's objections. As discussed further below, the Respondent has not met the evidentiary burden of proving that these documents are forgeries, nor has it established that, as a matter of fairness and equity, these documents should not have any legal effect

due to what it suggests are formal deficiencies (the absence of a stamp on the Employment Agreement or the use of different stamps on the Settlement Agreement or the lack of shareholder approval to enter into the Employment Agreement).

92. The Arbitrator also accepts the Claimants' contention that payments were made by the Respondent under the Settlement Agreement based on all the evidence submitted including the witness statement of the Second Claimant and the PDF of an email from the Second Claimant to an account belonging to "Dima Gerasimenko Krasniy Oktyabr" sent on 25 August 2017 that includes an extract of a handwritten note confirming receipt of cash.

93. Because the Respondent effected part-payment to the First Claimant and Second Claimant of sums due under the Settlement Agreement up to 1 February 2018, and 28 August 2017 respectively, the Claimants did not fail to exercise their rights during this period. The Arbitrator concurs with the arbitrator in case BAT 0408/13 in that unless there are "*truly exceptional circumstances"* a two-year period is the minimum period needed for the first condition of the *Verwirkung* test to be satisfied. The Arbitrator considers that there are no exceptional circumstances in the present case that would warrant a departure from this two-year period.

94. In the case of the First Claimant, just over one year lapsed from the date of the last payment made under the Settlement Agreement until the date of the Request for Arbitration. In the case of the Second Claimant, approximately one year and six months lapsed from the date of the payment under the Settlement Agreement until the date of the Request for Arbitration. The Arbitrator therefore considers that the Claimants did not fail to exercise their rights for the minimum period that would be required for the Respondent successfully to establish a defence of *Verwirkung* to their claims.

95. The Arbitrator therefore finds the Claimants claims to be admissible.

9. The Claimant's Claim for Unpaid Amounts under the Agreements

96. The First Claimant claims EUR 366,725.00 net of all Italian taxes under Articles 5 and A of the Settlement Agreement. The Second Claimant claims EUR 35,000.00 net of all Italian taxes under Articles 5 and D of the Settlement Agreement.

97. The Claimants also claim interest of 5% per annum from the date of the Request for Arbitration and costs.

B. Forgery Allegations

98. In the Respondent's Answer to the Request for Arbitration, it states that it "*contests and disputes all the documents attached by Claimants, as all unknown to the Club, never seen before and all without a certain date*". The Respondent asserts that the only employment agreement entered into with the Claimants is the Sport Agreement which was terminated by the Act of Resolution.

99. In claiming that the documents put forward by the Claimant are fraudulent, the Respondent cites as evidence its own lack of any record of these documents having been signed, the documents being undated, differences in signatures and a lack of the Club stamp.

100. Although it is the Claimants who rely on the Employment Agreement and Settlement Agreement and therefore must prove their existence, having produced *prima facie* valid documents, the burden of proving that the documents are forgeries shifts to the Respondent.

101. In BAT case 0440/13 the arbitrator held that in light of the inherent improbability of forged documents (particular those of a contractual nature) in a professional basketball context, the Arbitrator has to carefully assess the strength of the evidence before him. As outlined

above and on inspection, there is no obvious defect in either the Settlement Agreement or the Employment Agreement. Contrary to the Respondent's assertion, both are dated (the Settlement Agreement being dated 30 November 2016 and the Employment Agreement being dated 2 August 2016) and both bear three signatures on each page (for the Club, Head Coach and Agent). The Settlement Agreement bears a stamp that says "PALLACANESTRO CANTU S.p.A. Mr. Gerasimenko's signature is, in fact, consistent throughout the Employment Agreement account taken for resizing of the e-signature image on the document.

102. The signature of Mrs. Irina Gerasimenko on the meeting minutes provided by the Respondent appears to be the same as that on the Settlement Agreement put forward by the Claimant.

103. As explained above, the Arbitrator considers that, although genuine, the Sport Agreement and Act of Resolution were entered into to comply with the requirements of the Italian league and do not preclude the existence of the Employment Agreement or the Settlement Agreement which are genuine documents. This is so notwithstanding the evidence of Mr. Paparelli and Mr. Berti who may not have been made aware of the existence or terms of the Employment Agreement, which was signed on behalf of the Respondent by Mr. Gerasimenko.

104. The Respondent alleges that it only agreed to pay the First Claimant the EUR 80,000.00 salary shown in the Sport Agreement and that the salary in the Employment Agreement is greater than what could have been paid without specific shareholder authorisation. In response, the Claimants adduced evidence that the First Claimant's subsequent salary under his contract with Vsl Krepsinio Rytas/BC Lieuvos Rytas was EUR 290,000.00 and the Claimants have provided a BAT award that shows that the First Claimant previously earned EUR 500,000.00 at BC Khimki. The Arbitrator therefore considers that the EUR 250,000.00 per season salary in the Employment Agreement is consistent with the market value of the First Claimant's services. Moreover, the fact that the First Claimant

would have expected to earn well in excess of the EUR 80,000.00 salary in the Sport Agreement is further evidence that it was not the only contract entered into by the Parties. The Employment Agreement is therefore not only more in line with market practice as a contract but also, more consistent with the market value of the First Claimant's services and his expectations.

105. As concerns the Respondent's objection that the Employment Agreement is, in any event, not binding on it because its value exceeded EUR 400,000.00 and Mr. Gerasimenko, therefore, needed shareholder approval, the Arbitrator considers that the Claimants were entitled to rely on Mr. Gerasimenko's apparent authority as owner of the Respondent and dismisses this objection.

106. In any event, the Arbitrator considers that in respect of evidence which is not obviously flawed, and where forensic evidence has not been introduced to prove falsification, there is a presumption of legitimacy, with a significant burden of proof on the party impugning the evidence, here the Club.

107. The Arbitrator finds the Respondent has not met this burden and that the Employment Agreement and Settlement Agreement are valid and binding.

C. Waiver

108. The Respondent argues that the Claimants waived their rights to receive compensation in the Act of Resolution. In response, the Claimants claim that this document was a mere notification to the league that a settlement had been reached.

109. In the Arbitrator's judgment a waiver – in particular in such amounts – is rather the exception than the rule. Thus, as a matter of fairness and equity, a waiver of rights must be expressed using clear language and should be narrowly construed. The Act of Resolution provides simply that:

"*"With the present letter we declare that we resolve by mutual consent, with no exceptions, the professional contract no. 57 dated 27 September 2016 registered in the headquarters of the League on 27 September 2016 Prot. No. 4Z."*

110. On its face, this clause confirms that the Sport Agreement was terminated by the Parties' mutual consent. The Arbitrator considers that the words "*with no exceptions*" are insufficiently clear to constitute a waiver of the Claimants' claims arising under the Settlement Agreement, which was concluded shortly before and, in any event, is not referred to at all.

111. The Arbitrator therefore finds that the Claimants did not waive the claims subject of these proceedings in the Act of Resolution or at all.

D. Mitigation

112. The Claimants made clear their intention to substitute their claim for specific performance of the Settlement Agreement with a claim for breach of the Settlement Agreement. In their submission of 1 October 2019, they clarified that:

> *"By filing request for the amounts 366.725 EUR for the Claimant 1 and 35.000 EUR for the Claimant 2 in the Claimants' Submission dated 16.06.2019., previous request incorporated to RfA ceased to exist. This is the only request and there is no alternative request."*

113. The effect of this statement is to amend the Claimants prayers for relief and to confirm that the Claimants do not maintain a claim for specific performance of the Settlement Agreement as set out in the Request for Arbitration.

114. The duty of Claimants to mitigate their losses is well-established in BAT case law. Typically, in assessing whether a claimant has made reasonable efforts to mitigate his

losses, BAT arbitrators consider several factors including the difference in salary between the old and new club; the timing of the termination; and the time needed to find new employment.

115. In addition to the prevailing duty to mitigate losses that has been established and confirmed in prior BAT cases, the Employment Agreement also contains an express duty to mitigate in Article 6B.

116. The Claimants argue that mitigation principles should not apply to their claims under the Settlement Agreement because payment under Article 5 in the event of default is due "*immediately*" and, given the relatively short time period during which the Respondent undertook to pay the termination payments in Article 2, the Parties could not have intended subsequent income from the same season to be deducted. In this regard, the Claimants also argue that the sums due following breach of the Settlement Agreement were intended by the Parties compensate the Claimants for the damage to the First Claimants' reputation caused by termination of the Employment Agreement and that they should therefore not be characterised as unpaid salaries.

117. According to the principles laid down in cases BAT 0826/16 and BAT 0828/16, the mitigation principle "*cannot be applied in the same manner to such settlement agreements. Rather the mitigation principles should only be applicable, as a matter of principle, under particular circumstances*". One such circumstance is where "*the settlement agreement provides for a* ***"resurrection" of the original player contract*** *so that the Player's claim becomes a damages claim subject to the terms of the original contract"*.

118. It therefore falls to the Arbitrator to decide whether the Settlement Agreement, properly construed, "*resurrects*" the Claimants' claims under the Employment Agreement or whether, alternatively, it provides for payment of a fixed sum.

119. As a preliminary matter, the Arbitrator will first consider whether the pre-conditions for a claim under Article 5 of the Settlement Agreement have been satisfied. Article 5 contains two such pre-conditions. First, delay of payment under Article 2 by more than 15 days and second, a written notice of termination to be sent via email as follows:

> *"If any of the above payment is delayed by more than 15 days, then this Settlement Agreement may be terminated by Kurtinaitis or his Agent by means of a notice in writing via email to Pallacanestro Canto, effective upon receipt, and in such event Kurtinaitis shall have the right to immediate all payments by Pallacanestro Cantu from Article A and his agent from Article D of this agreement within 15 days after receipt by Pallacanestro of the termination notice of Kurtinaitis or his Agent."*

120. It is uncontested between the Parties that the first condition (delayed payment) is satisfied since the Respondent itself asserts that it never made any payments at all under the Settlement Agreement.

121. As regards the second condition, the Arbitrator considers that the clear effect of Article 5 is that, before the Claimants' right to claim payments under Articles A and D vests, they must first send a notice in writing via email to the Respondent.

122. The Claimants aver that they sent the Notice on 24 January 2019 and, although the Respondent denies having received it, relying on the evidence of Mr. Gorini, this does not affect the Arbitrators' findings below because, in any event, the requisite notice for the purposes of Article 5 was incontrovertibly given and received just over one month later, on 26 February 2019, in the Request for Arbitration. In the Request for Arbitration, the Claimants clearly claim the sums outstanding under the Settlement Agreement without prejudice to their right to later claim a higher sum under Articles 5, A and D of the Settlement Agreement as follows:

> *"Since Respondent didn't pay anything in accordance with the Notice, the entire debt is now due to pay, in accordance with the Article 5 of the Settlement Agreement.*

With aim to preserve good relations with the Club and understanding the financial situation, Claimants gave the instruction to the Counsel to claim only the amounts stipulated in the Article 1.3 of this RfA."

123. Therefore, in accordance with Article 5, the Claimants' right to payment under Articles A and D of the Settlement Agreement vested upon filing the Notice of Arbitration at the latest, or, at the earliest, on 24 January 2019 if the Respondent did receive the Notice.

124. As regards the question whether the mitigation principle applies to the Claimants' claim in principle, this turns on whether, as a matter of interpretation, the effect of the Settlement Agreement was to resurrect the Claimants' claims under the Employment Agreement.

125. Article A of the Settlement Agreement refers to the Employment Agreement without setting out an independent obligation on the Respondent to pay the First Claimant a fixed sum. It simply states, almost by way of background, that the Parties entered into the Employment Agreement and that it provided for the First Claimant to be paid a salary of EUR 250,000.00 net of all Italian taxes per season. It provides:

> *"Pallacanestro Cantu and Kurtinaitis entered into a contract on 2nd August 2016 and signed Employment Agreement (the "**Contract**"), which provided that Pallacanestro Cantu employed the Head Coach (Kurtinaitis) for the period covering the 2016-2017, and 2017-2018 basketball seasons: the Contract provided, with respect to the all two seasons the amount of 500.000 (Five Hundred Thousand) Euro's Net of all Italian Taxes, or per each basketball season 250.000 (Two Hundred fifty Thousand) Euro's Net of all Italian taxes"*

126. Similarly, Article D of the Settlement Agreement provides:

> *"Pallacanestro agreed to pay Agent of Kurtinaitis for his services according to the Contract for the period covering the 2016-2017, and 2017-2018 basketball seasons:*

the Contract provided, with respect to the all two seasons the amount of 50.000 (Fifty Thousand) Euro's Net of all Italian Taxes, or per each basketball season 25.000 (Twenty five Thousand) Euro's Net of all Italian taxes,"

127. The Arbitrator considers that by referring to the Employment Agreement, the Parties demonstrated a clear intention to resurrect the Claimants' claims under that agreement in the event of a default by the Respondent. Had the Parties intended the Claimants right to compensation to be absolute, they might very easily have stipulated that, in the event of a default, the First Claimant would be entitled to a fixed sum of EUR 500,000.00 and the Second Claimant to EUR 50,000.00. The Claimants' argument that this could not have been the case because of the short time-frame for performance of the Settlement Agreement is flawed. The final payment under the schedule in Article 2 of the Settlement Agreement fell due on 15 May 2017, right at the end of the season and in plenty of time for the First Claimant to secure alternative employment. In fact, the earliest date that the Claimants' claim under Article 5 of the Settlement Agreement could have vested was 15 January 2017, 30 days after the first instalment fell due on 15 December 2016. This was still more than one and a half months after the Settlement Agreement was concluded which afforded the First Claimant ample opportunity to secure alternative employment.

128. Therefore, the Arbitrator considers that the Parties intended the Claimants to mitigate their losses by finding alternative employment for the First Claimant as set out in Article 6B of the Employment Agreement. Therefore, the sums the First Claimant earned while at Vsl Krepsinio Rytas/BC Lietuvos Rytas and the commission that the Second Claimant received, should be deducted from their claims.

129. Under the contract between the Claimants and Vsl Krepsinio Rytas/BC Lieuvos Rytas entered into on 14 February 2017, the First Claimant earned EUR 40,000.00 for the remaining part of the 2016-2017 season and EUR 250,000.00 for the 2017-2018 season. Considering that it was fairly late in the season when the Respondent entered into the contract (14 February 2017), and considering the terms and conditions of the contract

including its term, the Arbitrator considers that the First Claimant fully discharged his duty to mitigate his losses and exercised reasonable efforts to do so on the facts.

130. The salary paid to the First Claimant, and the commission owed to the Second Claimant for the 2017-2018 season at Vsl Krepsinio Rytas/BC Lietuvos Rytas were the same as what they would have earned at the Respondent, therefore, the Claimants successfully mitigated all their losses for this season.

131. The First Claimant received EUR 133,275.00 from the Respondent under the Settlement Agreement for the 2016-2017 season leaving a sum of EUR 116,725.00 remaining. Of this sum, the First Claimant earned EUR 40,000.00 at Vsl Krepsinio Rytas/BC Lietuvos Rytas during the remainder of the 2016-2017 season leaving an outstanding sum of EUR 76,725.00.

132. The Second Claimant received EUR 15,000.00 from the Respondent under the Settlement Agreement for the 2016-2017 season leaving a sum of EUR 10,000.00 remaining. Of this sum, the Second Claimant earned EUR 4,000.00 in commission from the First Claimant's contract with Vsl Krepsinio Rytas/BC Lietuvos Rytas leaving an outstanding sum of EUR 6,000.00.

133. The Arbitrator therefore finds the Respondent liable to pay the First Claimant EUR 76,725.00 and the Second Claimant EUR 6,000.00 by way of compensation for breach of the Settlement Agreement.

10. Interest

134. The Claimants claim interest at 5% per annum from the date of receipt of the Request for Arbitration until the date of full payment.

135. It has been consistently held in previous BAT cases that interest on unpaid sums at a

rate of 5% per annum can be imposed starting from the day following the day the relevant payment fell due if the Claimants have pursued their claim diligently. Otherwise, interest at this rate can be imposed from the date of the Request for Arbitration.

136. Since the Claimant claims interest from the date of the Request for Arbitration, the question as to whether he has pursued his claim diligently does not fall to be decided.

137. The Arbitrator therefore finds that, in line with BAT case law, the Respondent is liable to pay the Claimant interest at a rate of 5% per annum from 26 February 2019 to the date of full payment.

11. Costs

A. Costs Claimed

138. The Claimants claim the following costs:

Cost	Amount (EUR)
Attorney's Fees	4,080.00
Advance on Costs (Claimants' share)	4,500.00
Handling Fee	3,000.00
Total	**11,580.00**

139. The Respondent claims the following costs:

Cost	Amount (EUR)
Attorney's Fees	10,500.00
Advance on Costs (Respondent's share)	4,500.00
Total	**15,000.00**

B. Findings

140. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration (which include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator) shall be determined by the BAT President and may either be included in the award or communicated to the Parties separately. It also provides 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*". The BAT President has determined that the costs of the present proceedings are in the amount of EUR 11,983.31.

141. Article 17.3 of the BAT Rules provides that, as a general rule, the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings. In doing so, "*the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and financial resources of the parties*".

142. The Claimants have been partially successful in establishing their claim for compensation under the Settlement Agreement, but the requirement for the Claimants to mitigate their

losses has not been met, reducing the amount the Claimants can recover. On the other hand, the assessment of the conduct of the Respondent in alleging forgery (as described in paragraphs 98-107 above) should also be taken into account.

143. The Arbitrator therefore finds, considering all the circumstances, that the Respondent should bear 50% of the cost of the present proceedings. Considering that the Claimants (EUR 6,000) and Respondent (EUR 5,983.31) have advanced the full costs, the Respondent shall pay EUR 8.34 as reimbursement of the arbitration costs.

144. The Claimants claim EUR 4,050.00 in legal fees. Under Article 17.4 of the BAT Rules, the maximum permissible contribution towards the Claimants legal fees is EUR 15,000.00. The Claimant provided a full breakdown of these fees including the time spent by counsel on specific tasks.

145. Considering the sum in dispute, the complexity of the case and the allegations of forgery that the Claimants were forced to answer, the Arbitrator considers that these fees are reasonable.

146. Therefore, for these reasons, the Arbitrator finds the Club liable to pay the Claimants EUR 4,050.00 in legal fees and EUR 5,000.00 in respect of the non-reimbursable handling fee.

12. Award

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

1. **Pallacanestro Cantu shall pay Mr. Rimas Kurtinaitis EUR 76,275.00, net of Italian taxes as compensation for unpaid compensation payments plus interest on this sum at a rate of 5% per annum starting from 26 February 2019 until the date of full payment.**

2. **Pallacanestro Cantu shall pay Mr. Obrad Fimic EUR 6,000.00, net of Italian taxes as compensation for unpaid compensation payments plus interest on this sum at a rate of 5% per annum starting from 26 February 2019 until the date of full payment.**

3. **Pallacanestro Cantu shall jointly pay Mr. Rimas Kurtinaitis and Mr. Obrad Fimic EUR 8.34 as reimbursement for their arbitration costs.**

4. **Pallacanestro Cantu shall jointly pay Mr. Rimas Kurtinaitis and Mr. Obrad Fimic EUR 9,050.00 as a contribution to their legal fees and expenses.**

5. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 23 January 2020

Amani Khalifa

(Arbitrator)