BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0440/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Ms. Player 1

- Claimant 1 -

Ms. Player 2

- Claimant 2 -

vs.

Club

- Respondent -

BASKETBALL
ARBITRAL TRIBUNAL

1. The Parties

1.1 The Claimants

1. Claimant 1, [Ms. Player 1] (“[Player 1]”), is an American professional basketball player.

2. Claimant 2, [Ms. Player 2] (“[Player 2]”), is an American professional basketball player.

1.2 The Respondent

3. [Club] (“Respondent”) is a professional basketball club in [city and country of the Club].

2. The Arbitrator

4. On 16 October 2013, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert SC, as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). None of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

3. Facts and Proceedings

3.1 Summary of the Dispute

5. On 4 June 2012, Player 1 and Respondent entered into an agreement (“the Player 1 Agreement”) whereby the latter engaged the former to play basketball for the 2012-2013 season. The salary of Player 1 was agreed at a guaranteed sum of USD 69,000.00 net of tax, payable in six equal instalments of USD 11,500.00.

6. On 4 June 2012, Player 2 and Respondent entered into an agreement (“the Player 2

Agreement") whereby the latter engaged the former to play basketball for the 2012-2013 season. The salary of Player 2 was agreed at a guaranteed sum of USD 69,000.00 net of tax, payable in six equal instalments of USD 11,500.00.

7. Player 1 and Player 2 say that the Respondent terminated their respective agreements in November 2012, and left them short of the majority of their respective salaries.

8. Respondent says that both Player 1 and Player 2 signed so-called Budget Control Agreements dated 5 May 2012, which it further says Claimants concealed from the Arbitrator. Respondent says that Claimants asked to be released from their obligations to Respondent, Respondent concurred, and therefore no liability attaches from that point onwards.

3.2 The Proceedings before the BAT

9. On 9 May 2013, Claimants filed a Request for Arbitration dated 8 May 2013 in accordance with the BAT Rules.

10. The non-reimbursable handling fee in the amount of EUR 2,980.50 was paid on 10 May 2013.

11. On 22 October 2013, and after having received clarifications from the Claimants regarding the identification of the handling fee payment, the BAT informed the Parties that Mr. Klaus Reichert, SC had been appointed as the Arbitrator in this matter. Further, the BAT fixed the advance on costs to be paid by the Parties as follows:

"Claimant 1 (Ms [Player 1]*)*	*EUR 1,750*
Claimant 2 (Ms [Player 2]*)*	*EUR 1,750*
Respondent ([Club]*)*	*EUR 3,500"*

On 4 November 2013 Player 2 paid EUR 3,500.00 on behalf of Claimants. On 11 December 2013, Player 1 paid EUR 3,571.13 as a substitute payment for Respondent's share.

12. Following an extension of time, Respondent filed its Answer on 5 December 2013.

13. By Procedural Order of 11 December 2013 the Arbitrator gave Claimants an opportunity to comment on the Answer. Claimants did so on 13 January 2014 following an agreed extension of time. Thereafter Respondent filed comments on 17 February 2014.

14. On 25 February 2014 the Arbitrator directed Claimants to confirm the **exact** amounts received from: (a) Targoviste (Player 1); and (b) Good Angels (Player 2). The answers, received on 3 March 2014, were: (a) USD 25,500.00; and (b) 32,000.00, respectively.

15. On 3 March 2014 the Arbitrator wrote to the Parties as follows (in relevant part):

> *"The Arbitrator has noted that Respondent has filed an affidavit of Mr* [Chairman of the Club] *confirming, under oath (and the Arbitrator further notes the Advocate's Confirmation at the end of the Affidavit) that Claimants signed the Budget Control Agreements as he looked on. Claimants have stated, through Counsel's written submissions that the Budget Control Agreements BAT 0440/13 produced in this arbitration contain forged signatures and that they did not sign these documents. The Arbitrator invites* ***Claimants*** *to state, under Oath in an affidavit, that they did not sign these documents."*

16. On 10 March 2014 Player 2 signed an affidavit, swearing an Oath and under penalty of perjury, that she did not sign a Budget Control Agreement as alleged by Respondent. On 13 March 2014 Player 1 signed an affidavit, swearing an Oath and under penalty of perjury, that she did not sign a Budget Control Agreement as alleged by Respondent.

17. On 27 March 2014 the Arbitrator directed that the originals of the Budget Control Agreements, the Player 1 Agreement, and the Player 2 Agreement, be furnished to the BAT Secretariat.

18. On 4 April 2014 Claimants stated that they did not have the originals of the Player 1 Agreement or the Player 2 Agreement, saying further that these had been sent to them as fax/scans, were signed, and then mailed to Respondent. They also said that they did not have the Budget Control Agreements.

19. On 10 April 2014 Respondent stated that it had:

> *"already located one of the original contracts that are the subject of the dispute, having said that the Respondent still requires additional time to locate the other original agreement which the honorable Arbitrator had requested to be presented to him."*

20. On 7 May 2014 the Respondent stated that:

> *"the original Budget Control Agreement of Ms.* [Player 2] *was sent to offices of the BAT".*

21. On 8 May 2014 the Respondent stated:

> *"[T]he Respondent wishes to inform the BAT that it had searched for the Original Budget Control Agreement of Claimant 1, Ms.* [Player 1] *but was, unfortunately, unable to locate the original copy of said agreement since the Respondent had submitted it to the Budget Control Authority after Ms.* [Player 1] *had signed it and when the Respondent asked the Budget Control Authority to provide with the Original Budget Control Agreement, it was informed, that it too had only a copy.*
>
> *Therefore, The Respondent has in its possession only a copy of the Budget Control Agreement of Claimant 1, Ms.* [Player 1]*, and it has been attached to Respondent's Statement of Defense and marked as Exhibit 1.*
>
> *As for the Employment Agreements, as previously claimed by The Claimants in their response dated April 4th, 2014, a signed copy of The Contractual Agreements was sent as facsimile to the Respondent by the Claimants. The Respondent, therefore, does not possess the original Contractual Agreements."(sic)*

22. On 9 May 2014 the Arbitrator wrote to the Parties as follows:

> *"The Arbitrator notes that in the letter of 4 April 2014 from Claimants' Counsel it is stated that the two Player Agreements, when signed by Claimants, were mailed to Respondent.*
>
> *The Arbitrator wants to have it clarified exactly whether Claimants meant posted, or emailed, when the word "mailed" was used. If email was meant, could Claimants please describe what happened to the original Player Agreements which they signed (i.e. were*

the actual documents kept, or discarded).

The Arbitrator requires Respondent to explain why the original of the [Player 1] *Budget Control Agreement is not available when the original of the* [Player 2] *Budget Control Agreement is available."*

23. On 12 May 2014 the BAT Secretariat received Respondent's letter dated 4 May 2014 which enclosed what it stated to be the original of the Budget Control Agreement in respect of Player 2. It further stated that it could not locate the original of the Budget Control Agreement in respect of Player 1, and that a copy thereof had already been attached to the Answer.

24. On 13 May 2013 Claimants confirmed that "mailed" meant sending by email, and that the original pieces of paper which had been signed by Player 1 and Player 2 had been discarded.

25. On 13 May 2013 Respondent stated the following:

"Both Budget Control Agreements were delivered to the Budget Control Authority.

The Budget Control Agreement of Ms. [Player 2] *was sent back to the Respondent, who in turn sent it as asked to the Honorable Arbitrator.*

The Budget Control Authority returned to the Respondent a copy of the Budget Control Agreement, which Ms. [Player 1] *had signed, and therefore the Respondent cannot present to the Honorable Arbitrator the original copy of the Budget Control Agreement of Ms.* [Player 1].

The Respondent had contacted the Budget Control Authority and asked that it confirms that the copy that it has in its possession is the true copy of the original Budget Control Agreement that was delivered by the Respondent (this copy was included as an attachment of the Respondent's Statement Of Defense). The Budget Control Authority is expected to provide this confirmation in the upcoming days, and this confirmation will be immediately thereafter sent to the honorable Arbitrator.

It should be clarified and stressed, that there was another original copy of the Budget Control Agreement that was given to Ms. [Player 1] *right after she si[gn]ed it. Ms.* [Player 1]*'s denial of its existence and its concealment were misconducts done in bad faith. Moreover, the Respondent is willing for the Budget Control Agreement to be examined by a graphologist, an examination that will prove that the signatures on Ms.* [Player 1] *Budget Control Agreement are indeed authentic."*

26. On 14 May 2014 the Arbitrator directed that the Respondent obtain the original of the Player 1 Budget Control Agreement as there appeared to be no impediment given that the Player 2 Budget Control Agreement was apparently returned from the Budget Control Authority.

27. Following further correspondence from the Respondent on 26 May 2014, the Arbitrator directed as follows on 27 May 2014:

> *"...it still remains unclear as to why the Respondent cannot obtain the original of the* [Player 1] *Budget Control Agreement from the Budget Control Authority. The fact that a copy was returned in the past is not an impediment to the Respondent now asking the Budget Control Authority for the original to be sent back. The Respondent is directed to ask the Budget Control Authority for the original of the* [Player 1] *Budget Control Agreement and in doing so to tell that Authority that this is on the direction of the Arbitrator acting pursuant to the FIBA Basketball Arbitral Tribunal Rules."*

28. On 27 May 2014 Respondent wrote to [Chairman of the Budget Control Authority] of the [National Federation of the Club], asking for the original of the [Player 1] Budget Control Agreement.

29. On 18 June 2014 Respondent stated as follows:

> *".....the Chairman of the Budget Control Authority,* [Name of Chairman of Budget Control Authority] *contacted* [Name of Chairman of the Club]*, Chairman of* [Club]*, and told him that while the Respondent did send the original Budget Control Agreement, at present the Budget Control Authority doesn't have the Original Budget Control Agreement of Ms.* [Player 1] *in its possession.*
>
> *So there will be no doubt that the original Budget Control Agreement of Ms.* [Player 1] *was indeed submitted to the Budget Control Authority by the Respondent, the Budget Control Authority attached stamped verification of "true copy", and delivered said true copy to* [Chairman of the Club] *who in turn sent it to the offices of the BAT."*

30. On 23 June 2014 the Arbitrator directed Claimants to each provide samples of their handwriting as follows: (a) each to write on a blank sheet of paper several signatures with a ball point pen; (b) insofar as is possible, to find documents in their possession which bear their original signature or handwriting, and dating from in or about May

2012.

31. On 2 July 2014 Respondent stated the following (the Arbitrator has underlined a certain portion thereof for emphasis):

> *"1. The Respondent would argue that the Claimants have demonstrated their bad faith by concealing various documents from the honorable Arbitrator and by raising false claims and groundless accusations that are contradicted by written evidence.*
>
> *2. In light of the aforesaid, the Respondent submits that the Arbitrator's requirement that the Claimants will write their signatures on paper to be sent to the honorable Arbitrator, will not lead to the finding out of the truth, Since the Claimants could easily intentionally change the appearance of their signature, and sign in a different manner from which they are used to. Or worse, have someone sign in their place and present these signatures as their own. Hence, there will be no certain way to know whether the signatures on the Budget Control Agreement are in fact the Claimant's signatures or not.*
>
> *3. The Respondent maintains therefore that the appropriate, efficient and certain manner to get to the truth and reveal whether the signatures on the Budget Control Agreement are indeed the Claimant's, is by presenting signatures of the Claimants from the same period or from a time close to it, on documents which both parties would not dispute were signed by the Claimants and compare these signatures with the signatures on the contested Claimant's signatures on the Budget Control Agreement.*
>
> *4. The Respondent believes that it has in its possession, most likely, additional documents that bare the signatures of the Claimants, and therefore it is proper and just to compare these signatures with the signatures on the Budget Control Agreement.*
>
> *5. The chairman of the Respondent,* [Name of Chairman of the Club] *is presently out of the country (until July 15th , 2014) and therefore is unable to conduct the search for the aforementioned additional documents.*
>
> *6. Therefore, should the honorable Arbitrator accept the Respondent's request in this matter he is also requested to take into account that* [Name of Chairman of the Club] *will be available to search for the documents only after July 15th, 2014.*
>
> *7. Additionally the honorable Arbitrator is requested not to permit the Claimants to submit the paper baring their alleged signatures, since as was argued above it is crystal clear that the Claimants will intentionally change the appearance of their signature, and sign in a different manner from which they are used to. Or worse, have someone sign in their place and present these signatures as their own. All this in effort to prevent any resemblance between these signatures and the one's on the Budget Control Agreement, thus preventing the honorable Arbitrator from discerning the truth."*

32. On 8 July 2014 Claimants sent the materials directed on 23 June 2014, including

examples of their handwriting.

33. On 22 July 2014 the Arbitrator directed Respondent to send such original documents as it wished to put before the Arbitrator bearing the original signature of the Claimants, ideally from in or around May 2014. Copies, regardless of how good their quality or certification, would not be sufficient.

34. On 28 July 2014 Respondent stated:

> *"The Respondent wishes to inform the BAT that in accordance with the honorable Arbitrator's instruction from July 22nd, 2014, The Respondent's Chairman* [Name of Chairman of the Club] *has sent by mail to the BAT, the following original documents that relate to the Claimant Ms.* [Player 1]*:*
>
> *1. Employee's personal statement (AKA form 101 of the* [Nationality of the Club] *taxes authority) given on January 3rd, 2011.*
>
> *2. Medical statement given on the October 21st, 2010.*
>
> *3. Confirmation by the* [Nationality of the Club] *taxes authority given on December 12th, 2010.*
>
> *The Respondent expects all of the above mentioned documents to reach the BAT secretariat by tomorrow, July 29th, 2014."*

35. On 10 September 2014 the Arbitrator informed the Parties that he had appointed Ms. Beate Wuelbeck from Munich, Germany, as Tribunal-appointed neutral calligraphic expert. An additional advance on costs was directed as follows:

"Claimant 1 (Ms [Player 1]*)*	*EUR 1,125*
*Claimant 2 (Ms [*Player 2]*)*	*EUR 1,125*
Respondent ([Club]*)*	*EUR 2,250"*

36. Player 1 paid EUR 1,158.84 on 25 September 2014, and EUR 1,060.54 on 16 October 2014.

37. On 20 October 2014 Respondent stated:

> *"1. Since the Request for Arbitration is petty and disproven by written evidence, which was submitted to The Honorable Arbitrator by the Respondent, there is a very high possibility that the Respondent will not have the need to pay the amounts claimed by the claimants in their Request for Arbitration.*
>
> *2. The Respondent fears that as a result of the fact that the Claimants is currently not in the State of* [Country of the Club]*, the Respondent will not receive the amounts mentioned in the Email, as would have been paid in respect of the proceedings in the Bat, back to her possession.*
>
> *3. Therefore, the Respondent hasn't pay its share."(sic)*

38. On 20 October 2014 the Arbitrator stated:

> *"The Arbitrator reminds the Respondent of what was stated by it on 13 May 2014, in part: "[…] Moreover, the Respondent is willing for the Budget Control Agreement to be examined by a graphologist….". Secondly, the Arbitrator notes that Procedural Order of 10 September 2014 directing the further advances on costs for the handwriting expert expenses has not been objected to by the Respondent in any manner since that date.*
>
> *Taking these matters into account, does the Respondent wish to maintain its position as stated in its email of 20 October 2014, or forthwith pay the advance on costs as directed? The Respondent is directed to state its position by no later than close of business, Munich time, on Wednesday, 22 October 2014."*

39. On 22 October 2014 Respondent confirmed it would pay its share of the advance on costs. Respondent paid EUR 2,235.00 on 4 November 2014.

40. On 17 December 2014 the reports of the Tribunal-appointed expert, Ms. Wuelbeck, together with translations into English (from German) thereof, were circulated to the Parties. The Parties were invited to comment by 7 January 2015.

41. On 7 January 2015 Claimants submitted their comments on the expert reports. On 15 January 2015 (following an extension) Respondent submitted its comments on the expert reports. The Parties were afforded an opportunity further comment, and both sides did so on 26 January 2015.

42. On 28 January 2015 the Arbitrator (in accordance with Article 12.1 of the BAT Arbitration Rules) declared that the exchange of documents was completed.

43. On 4 February 2015 the Parties filed their respective statements of costs. On 11 February 2015 Respondent commented upon the statement of costs of Claimants. Claimants did not comment upon the statement of costs of Respondent.

4. The Positions of the Parties

44. Player 1's position is as sought in her claim for relief in the Request for Arbitration:

- USD 64,011.00 in respect of unpaid salary together with interest;
- USD 1,712.50 in respect of an unpaid agent's fee for Stephanie Stanley; and
- costs.

45. Player 2's position is as sought in her claim for relief in the Request for Arbitration:

- USD 64,011.00 in respect of unpaid salary together with interest;
- USD 1,712.50 in respect of an unpaid agent's fee for Stephanie Stanley; and
- costs.

46. The Respondent's position in its Answer is that the claims should be dismissed, with costs.

5. The Jurisdiction of the BAT

47. 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).

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

49. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.[1]

50. The jurisdiction of the BAT over Claimants' claims is stated to result from the arbitration clauses in "THIRTEEN" of both the Player 1 Agreement and the Player 2 Agreement, which read as follows:

> *"Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (BAT) in Geneva. Switzerland and shall be resolved in accordance with the FAT 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 (PIL), irrespective of the parties' domicile. The language of the arbitration shall be English. Awards of the BAT can be appealed to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the BAT and against decisions of 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."*

51. While there is some intermingling of the previous name for BAT by the single use of FAT in the arbitration clauses, it is abundantly clear that for FAT the parties must have meant BAT. However, in light of Article 18.2 of the BAT Rules, there can be no doubt

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

that BAT is operative and binding.

52. The arbitration clauses are in written form and thus fulfil the formal requirements of Article 178(1) PILA.

53. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration clauses under Swiss law (referred to by Article 178(2) PILA).

54. The language of the arbitration clauses is quite clear, namely, the Parties have opted for BAT arbitration.

55. Finally, the Parties have fully joined issue with each other in this case without reservation or hesitation.

56. For the above reasons, the Arbitrator has jurisdiction to adjudicate Claimants' claims.

6. Discussion

6.1 Applicable Law – ex aequo et bono

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

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

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

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

59. As noted in paragraph 50 above, the arbitration clause in both the Player 1 Agreement and the Player 2 Agreement expressly provides that the Arbitrator shall decide any dispute *ex aequo et bono*.

60. The concept of "équité" (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage[2] (Concordat)[3], under which Swiss courts have held that arbitration "en équité" is fundamentally different from arbitration "en droit":

> *"When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[4]

61. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives *"a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case."*[5]

62. This is confirmed by Article 15.1 of the BAT Rules *in fine*, according to which the Arbitrator applies "*general considerations of justice and fairness without reference to any particular national or international law*."

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

3 P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

4 JdT 1981 III, p. 93 (free translation).

5 Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717. pp.625-626.

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

6.2 Findings

64. By way of introductory comment, the doctrine of *pacta sunt servanda* (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the guiding general principle by which the Arbitrator will examine the merits of the claims.

65. First, the Arbitrator will determine whether the Budget Control Agreements are genuine, or not.

66. In approaching this issue, the Arbitrator considers it appropriate to set certain basic matters of assessment of the evidence before him.

67. Issues which may arise in any dispute under the BAT Arbitration Rules cover a wide spectrum of matters. Some may be readily proved without much evidential or forensic debate, such as whether or not the fact of the making of a payment of money is established. As BAT practice has emerged throughout the ever-increasing number of awards published, many such issues are usually decided upon in a straight-forward manner and parties are not over-burdened with excessive formality of proof (such as, for example, proof that a person wrote an email, or an agent acted for a player, or a player played in a number of matches, or a club had certain successes, and so on and so forth). Many of these usual sorts of issues which arise in BAT arbitration are in-of-themselves inherently probable in the context of basketball related disputes. This inherently-probable characteristic is key to the ease of proof of many issues in BAT arbitration, and therefore key to the basic functioning of the system of a (principally) documents-only dispute resolution process pursuant to *ex aequo et bono*.

68. However, the inherent probability of many issues which arise in BAT arbitration does not extend to all issues as the process of proof is not a one-size-fits-all exercise, but rather it is more flexible in its application. It is a matter of logic and basic forensics that the more improbable or serious the event, the stronger must be the evidence that it did occur before its occurrence will be established. This is an important flexibility which a BAT arbitrator can choose to retain in the process of assessing whether something improbable or serious occurred or not. This flexibility is also mandated by Article 3.1 of the BAT Rules:

> *"To the extent not provided otherwise herein the Arbitrator shall determine in his/her sole discretion the procedure in the proceedings before him/her."*

69. In addition, the mandate to decide a dispute *ex aequo et bono*, confers a wide power upon a BAT arbitrator to assess the positions advanced by either side in case in a manner consistent with justice and equity.

70. The dispute over the Budget Control Agreements is not a usual one seen in BAT arbitration. Rather, the positions adopted by the Parties in this case give rise to most serious and diametrically-opposite competing views: in short, Claimants say that their apparent signatures on the Budget Control Agreements are forgeries, whereas Respondent says that the signatures are genuine.

71. It is, in the Arbitrator's view, inherently improbable a professional basketball club would forge a player's signature on a document, and that such forged documents would be put in evidence in a BAT arbitration. Forgery is a very serious matter, regardless of the system of law or principles by which any dispute is to be measured.

72. In light of the obviously inherent improbability of forged documents (particular those of a contractual nature) in a professional basketball context, the Arbitrator will carefully assess the strength of the evidence which is now before him.

73. The first factor which the Arbitrator considers of importance are the conclusions of Ms. Wuelbeck in respect of each Budget Control Agreement. The Parties differ widely about these conclusions, and each side asks the Arbitrator to take Ms. Wuelbeck's opinion as conclusively in their favour. Having taken due note of the positions advocated by the Parties, the Arbitrator will now review her conclusions.

74. In relation to Player 1, Ms Wuelbeck's conclusion is that:

> *"The question must remain unresolved as to whether the signatures in question in player agreement no. 100175, dated 05 May 2012, are authentic abbreviations or initials by Ms.* [Player 1] *or forgeries from the hand of an unknown third party."*

75. Ms Wuelbeck helpfully gives her conclusion a percentage as to the authenticity of the signatures at "~ 50%".

76. In relation to Player 2, Ms. Wuelbeck states:

> *"Although there are no indications of forgery, the question must remain unresolved as to whether the signatures in question in player agreement No. 100167, dated 05 May 2012, are authentic signatures by Ms.* [Player 2] *or forgeries from the hand of an unknown third party."*

77. Similarly to Player 1, Ms Wuelbeck's percentage for Player 2 is "~ 50%".

78. In light of the conclusions of Ms. Wuelbeck, the Budget Control Agreements are equally likely to be authentic or forgeries. That is the direct and obvious conclusion to be drawn from the percentage likelihood of authenticity assessed by her. The issue of authenticity versus forgery is, therefore, finely balanced.

79. The second factor which the Arbitrator will examine is whether, in his view, there are matters which push the conclusion in respect of each Budget Control Agreement either in the direction of authenticity or forgery. The assessment of these is a matter which

would not, and could not have been in the purview of Ms. Wuelbeck's investigation as an expert.

80. As described in the procedural history set out above (paragraphs 17-43 inclusive), the Arbitrator has gone to considerable trouble to have every effort made to have the original (i.e. the actual pieces of paper as purportedly signed by Claimants) of the Budget Control Agreements made available to Ms. Wuelbeck. As also noted in those paragraphs, the originals were not available and only copies (whether described as true or otherwise) were furnished by Respondent.

81. Respondent explains that it requested the original (Player 1) of the Budget Control Agreement from the [National Federation of the Club] as it had previously been sent by it to that body. Respondent says that:

> *"…the Chairman of the Budget Control Authority,* [Name of Chairman of Budget Control Authority] *contacted* [Name of Chairman of the Club]*, Chairman of* [Club]*, and told him that while the Respondent did send the original Budget Control Agreement, at present the Budget Control Authority doesn't have the Original Budget Control Agreement of Ms.* [Player 1] *in its possession.*
>
> *So there will be no doubt that the original Budget Control Agreement of Ms.* [Player 1] *was indeed submitted to the Budget Control Authority by the Respondent, the Budget Control Authority attached stamped verification of "true copy", and delivered said true copy to Mr.* [Name of Chairman of the Club] *who in turn sent it to the offices of the BAT."*

82. In a similar vein, the original of the Player 2 Budget Control Agreement was not available for examination, but rather a copy was furnished.

83. The consequence of not having the originals of the Budget Control Agreements available for examination is clearly described by Ms. Wuelbeck. She says, in respect of both Player 1 and Player 2, that the possibilities of graphic analysis and evaluation were substantially limited.

84. It seems to be the position that Respondent says that it sent the originals of both

Budget Control Agreements to the [National Federation of the Club], but that only copies were obtainable from that body. That essentially means (and no other inference is possible) that [National Federation of the Club] received original documents of some apparent importance from a professional club, copied them, disposed of the originals, and retained only copies. That, in of itself, is an entirely improbable method of document management by a national federation, and indeed is scarcely credible.

85. Next, the dates of the Budget Control Agreements are curious. They are 5 May 2012, whereas the Player 1 Agreement and the Player 2 Agreement are dated 4 June 2012. This means that the Budget Control Agreements were, on Respondent's case, signed a full month prior to the Player 1 Agreement and the Player 2 Agreement. The position becomes even more curious when considering Respondent's evidence as to the actual signing by Claimants of the Budget Control Agreement as contained in the Affidavit of [Chairman of the Club]. He does not depose or swear that the Budget Control Agreements were signed on 5 May 2012, but rather he testifies (paragraph 8) that the signing took place in November 2012. An occasion of signing in November 2012 is irreconcilable with documents dated 5 May 2012. Respondent says that Mr. Goshen (Claimants' representative) filled in that date but that that happened in November 2012. The reason for this rather unusual arrangement according to Respondent is that Mr. Goshen wanted the Budget Control Agreements to go into effect soon after the signing of the Player 1 Agreement and the Player 2 Agreement. However, that cannot be so as the dates of the Budget Control Agreements are prior to the date of the Player 1 Agreement and the Player 2 Agreement. This position on the part of Respondent is simply impossible to understand.

86. Respondent places particular emphasis on an email from Mr. Goshen dated 22 November 2012 as probative of the Budget Control Agreements beyond a reasonable doubt. It is stated that Mr. Goshen is asking for Respondent's fax number in order to send "[Player 1]'s Budget Control Authority Agreement". Claimants say that by that point in time the Player 1 Agreement and the Player 2 Agreement were already

terminated by Respondent on 22 November 2012, so therefore it is difficult to understand why anything was being sent by then.

87. It appears to be the case that Mr. Goshen sought the fax number of Respondent for the purposes of sending the Player 1 Budget Control Agreement. However, there is no evidence that any such fax was actually sent, and the Player 1 Budget Control Agreement as presented to the Arbitrator by Respondent bears no fax header.

88. Taking all of these factors together, namely the matters set out in paragraphs 80-87 inclusive above, and the unequivocal testimony under penalty of perjury by both Claimants, the Arbitrator has come to the conclusion that the balance of the evidence and the explanations furnished by both sides tips the issue of the authenticity of the Budget Control Agreements towards a finding that they are forgeries. The Arbitrator has come to this conclusion following a most searching and exhaustive analysis of the evidence bearing in mind the seriousness of the issue concerned, and also taking full account of the extensive examination of the documentation by Ms. Wuelbeck and her findings.

89. In light of this finding, the Budget Control Agreements form no part of the adjudication of Claimants' claims. They are forgeries and of no probative value. Their introduction into this arbitration will have, however, consequences in costs for Respondent.

90. The Arbitrator now turns to the substance of the case.

91. It is clear from the email from Respondent to Mr. Goshen (or at least his forwarded-to-Claimants translation thereof) of 6 November 2012 that due to financial problems it wanted him to place Claimants with other clubs. The translation of the email reads as follows:

"Hi Gil,

In the light of financial difficulties of the team and rejection of contracts
By the [Nationality of the Club] *Budget Control Office and according to budgetary compulsion*
I am asking you to find another team all over the world for the following players:
[Player 1]
[Player 2]
Amanda Jackson"

92. Respondent does not take issue with the fact that it was in financial difficulties at that time. However, Respondent says that the email from it was indicative of it respecting the wishes of Claimants to be released from their contractual obligations. It further says that Claimants wished to be released due to Respondent leaving the Eurocup.

93. The Arbitrator does not see how the email of 6 November 2012 can possibly bear the meaning put forward by Respondent. The only interpretation capable of being drawn from that email is that Respondent needed to be rid of Claimants due to its financial problems.

94. The Arbitrator therefore finds that Respondent terminated the Player 1 Agreement and the Player 2 Agreement in November 2012. This termination was not, in the Arbitrator's finding, at the behest of Claimants, but rather a decision taken by Respondent. It was certainly not a termination by mutual consent with a full release as and from that moment.

95. As both the Player 1 Agreement and the Player 2 Agreement were guaranteed and expressly provided for full payment in the event of their being rescinded by Respondent (paragraph "TEN"), Respondent became liable to Claimants upon termination to all contractual salary.

96. The Arbitrator finds that both Claimants were only paid one salary installment each during their time in [Country of the Club]. This is not in dispute between the Parties.

97. In light of this finding, the Arbitrator finds that the balance of the contracted-for salary

due to Claimants as of termination in November 2012 was, for each, five installments of USD 11,500.00. This results in a total of unpaid salary for each Claimant of USD 57,500.00. Respondent is held to be liable to each Claimant for this amount. However, the Arbitrator also notes that each Claimant found subsequent employment to their time in [Country of the Club]: (a) Targoviste (Player 1) paid USD 25,500.00; and (b) Good Angels (Player 2) paid USD 32,000.00.

98. It is an established approach in BAT arbitration that parties must mitigate their damages. This usually applies to multi-year contracts for seasons after that in which termination occurred.

99. Notwithstanding the fact that both Claimants spent most of the 2012-2013 season playing at clubs after their time with Respondent, and also notwithstanding the fact that Claimants were a very short time with Respondent, the Arbitrator will not give any credit to Respondent for the sums earned with Targoviste (Player 1) and Good Angels (Player 2). The Arbitrator's reason for so doing is that Respondent has engaged in a highly aggressive and personalized attack on Claimants. Quite apart from filing forged documents, Respondent has also explicitly stated that Claimants would engage in falsification of their own signatures for the nefarious purpose of subverting the Arbitrator's appointment of a hand-writing expert; such an accusation strays beyond any orderly or reasonable concept of vigorous client representation. Given the above, in the Arbitrator's view it would run contrary to the principles of *ex aequo et bono* to credit Respondent with the sums earned by Claimants after termination during that same season. Put another way, Respondent's conduct in this arbitration is a paradigm example of the legal equivalent of a line paraphrased from *Hamlet*, namely, they doth protest too much.

100. Claimants also seek relief in respect of a pre-contractual period amount to 17 days at USD 383.00 per day. The Arbitrator does not see any obligation on the part of Respondent to pay such sums to either Claimant. No such obligation is to be found in

either the Player 1 Agreement or the Player 2 Agreement. The Arbitrator does not uphold these claims for relief.

101. As regards the claims for the unpaid portion of agent's fees due in respect of both Player 1 and Player 2 to [Ms. Agent], being an amount of USD 1,712.50 per player, the relief sought is expressed in terms of an order that such monies be paid to Ms. Agent.

102. The manner in which the relief is framed presents some complexity. Claimants do not seek payment to them of the agent's fees for onward transmission to Ms. Agent and no such obligation of the Respondent arises from the Agreements. Further, Ms. Agent is not a named party to this arbitration. There is no indication on file, and none brought forward by the Claimant, on what basis the Claimants are entitled to sue the Respondent seeking payment to a third party.

103. Consistent with BAT jurisprudence, the Arbitrator finds that the Claimants have no standing to sue for Ms. Agent's agent fees. This portion of the claim must be dismissed.

104. Finally, as regards interest, it is an established remedy and found throughout a substantial number of BAT awards. The established rate is 5% per annum, with the usual question as to from when, and to when will it run.

105. In light of the matters described in paragraph 99 above, the Arbitrator holds, finds and determines that interest at 5% per annum on all sums payable to Claimants will run from 7 November 2012, namely the day after Respondent indicated its desire to be rid of Player 1 and Player 2 due to its financial position. Further, such interest will run until payment in full of all sums.

7. Costs

106. Article 17 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and that the award shall determine which party shall bear the arbitration costs and in what proportion; and, as a general rule, shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

107. On 9 March 2015 – considering that pursuant to Article 17.2 of the BAT Rules "*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*", and that "*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time*", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 11,525.52.

108. Considering that Claimants prevailed in their claims, it is fair that the fees and costs of the arbitration be borne by Respondent as well as those of Claimants.

109. Claimants' claim for legal fees and expenses comprises: (a) EUR 3,000.00, namely the non-reimbursable handling fee (however EUR 2,980.50 was the amount actually received by the BAT – presumably as a result of banking charges being deducted); and (b) USD 15,000.00 for legal fees.

110. Respondent objects to Claimants' claim for legal fees and suggests that it goes beyond the limit prescribed by Article 17.4 of the BAT Rules. However, Respondent's objection is misplaced as there are two claimants in this case, and the limits set out in Article 17.4 apply to individual claimants, not cumulatively to all claimants.

111. Taking into account the assessment of the conduct of Respondent in this case (as already described in paragraph 99 above) the Arbitrator considers that Claimants' claim for legal fees and expenses is to be awarded in full and without deduction. The Arbitrator holds that Respondent is liable to Claimants for USD 15,000.00 for legal fees and EUR 3,000.00 expenses.

112. Given that Claimants paid advances on costs totalling EUR 9,290.52 as well as a non-reimbursable handling fee of EUR 3,000.00 (which, as noted above, is taken into account when determining Claimants' legal fees and expenses), the Arbitrator decides that in application of article 17.3 of the BAT Rules:

    (i) Respondent shall pay EUR 9,290.52 to Claimants representing reimbursement by it to them for the sums paid to the BAT for arbitration costs;

    (ii) Respondent shall pay EUR 3,000.00 and USD 15,000.00 to Claimants, representing a contribution by it to their legal fees and expenses.

8. AWARD

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

1. **Club is ordered to pay Ms. Player 1 USD 57,500.00 net for unpaid salary, together with interest at 5% per annum from 7 November 2012 until payment in full.**

2. **Club is ordered to pay Ms. Player 2 USD 57,500.00 net for unpaid salary, together with interest at 5% per annum from 7 November 2012 until payment in full.**

3. **Club is ordered to pay jointly to Ms. Player 1 and Ms. Player 2 EUR 3,000.00 and USD 15,000.00 as a contribution to their legal fees and expenses.**

4. **Club is ordered to pay jointly to Ms. Player 1 and Ms. Player 2 EUR 9,290.52 by way of reimbursement of arbitration costs.**

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

Geneva, seat of the arbitration, 17 March 2015

Klaus Reichert
(Arbitrator)