



**BASKETBALL**  
ARBITRAL TRIBUNAL

## **ARBITRAL AWARD**

**(BAT 1954/23)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Clifford J. Hendel**

in the arbitration proceedings between

**Pallacanestro Cantù s.p.a. s.s.d.**  
Via Matteotti, 53  
22072 Cermenate (CO), Italy

**- Claimant -**

represented by Mr. Giovanni Allegro, attorney at law,  
and Mr. Claudio Vassallo, attorney at law,

vs.

**Fortitudo Pallacanestro Bologna 103 s.s.d. a r.l.**  
Viale San Donato 82  
Bologna, Italy

**- Respondent -**

represented by Mr. Enrico Cassí, attorney at law,

## **1. The Parties**

### **1.1 The Claimant**

1. Pallacanestro Cantù s.p.a. s.s.d. ("Cantù") is an Italian basketball club currently competing in the Italian basketball league Serie A2.

### **1.2 The Respondent**

2. Fortitudo Pallacanestro Bologna 103 s.s.d. a r.l. ("Fortitudo", and together with the Claimant, "the Parties") is an Italian basketball club currently competing in the Italian basketball league Serie A2.

## **2. The Arbitrator**

3. On 25 April 2023, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Clifford J. Hendel as arbitrator (hereinafter the "Arbitrator") pursuant to Articles 0.4 and 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 January 2022 (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**

4. The relevant facts and allegations presented in the written submissions and evidence are summarised below. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows.
5. Although the Arbitrator has considered all the facts, allegations and evidence submitted

in the present proceedings, he refers in this Award only to those necessary to explain its reasoning.

### **3.1.1. The Agreement**

6. On 24 July 2021, the Parties entered into an agreement, executed in the Italian language, whereby Fortitudo undertook to compensate Cantù for the sports training of the [Basketball Player], as well as to make some further payments to Cantù under certain conditions (the “Agreement”).<sup>1</sup> The Agreement was also signed by [legal representative of Sigma S.r.L] as guarantor of the second payment of 25.000 EUR due from Fortitudo to Cantù under Section 1 of the Agreement and undertaker of the commitment to advise Cantù of any negotiations or buyout under Sections 2 or 3 of the Agreement (each such Section is set out below).
7. [Basketball Player] had previously been under contract with Cantù and had signed, on 23 July 2021, an employment contract (entitled “Professional Sports Performance Agreement”) with Fortitudo for the 2021/22, 2022/23 and 2023/24 basketball seasons (the “Fortitudo-[Basketball Player] Agreement”).<sup>2</sup>
8. The dispute between the Parties arises out of the Agreement. However, due to the connection between the two contracts, the Arbitrator will also refer in this section to some relevant clauses of the Fortitudo-[Basketball Player] Agreement.
9. According to the Preamble of the Agreement:

*“d) ... Fortitudo declares that it has reached an agreement for the signing of a “Sports Performance Contract” for the 2021/2022, 2022/2023 and 2023/2024 sports seasons*

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<sup>1</sup> Exhibit 1 to the Request for Arbitration (“RfA”).

<sup>2</sup> Exhibit 1 to the Answer.

(hereinafter also the “Agreement”).

e) The aforementioned Contract envisages, among other things, the possibility for the Player to withdraw, at the end of each sporting season, in the event of acceptance of a contractual offer by an NBA franchise (communicating this decision no later than on July 15, 2022 and/or July 15, 2023), upon payment – to be paid by the NBA franchise no later than 30<sup>th</sup> of August of the same season in which the right of withdrawal is exercised – of a compensation for the withdrawal.

f) At the same time, the same Contract also provides for the possibility for the Player to withdraw, at the end of the 2021/2022 and 2022/2023 Basketball seasons, in the event of acceptance of a contractual offer by another non-NBA club (communicating this decision no later than 30<sup>th</sup> of June 2022 and 30<sup>th</sup> of June 2023 respectively), upon payment – to be paid by the new club no later than 30<sup>th</sup> August of the same season in which the right of withdrawal is exercised – of a compensation for withdrawal. [...]

10. Clause 1 of the Agreement provides:

“Fortitudo undertakes to pay Cantù, by way of compensation for the Player’s sports training, the net sum of Euro 50.000,00 (fifty thousand Euros) plus VAT, to be paid in two equal parts of Euro 25.000,00 (twenty-five thousand Euros), of which the first part no later than 15<sup>th</sup> of September 2021 and the second part no later than 15<sup>th</sup> of September 2022 [...]

11. According to Clauses 2 and 3 of the Agreement:

“2) In the event that the [Basketball Player] - at the end of the 2021/2022 or 2022/2023 season – signs a contract with an NBA club, the Parties agree that Cantù will be owed a part of the compensation paid by the NBA club to Fortitudo for an amount equal to 170.000 (one hundred and seventy thousand US Dollars) net.

In the event that the NBA franchise pays Fortitudo directly, the latter, hereby undertakes to pay the aforementioned amount (170.000 US Dollars) in favor of Cantù within 5 (five) working days of receipt of the bank transfer, by the NBA franchise. [...]

3) In the event that the Player -at the end of the 2021/2022 or 2022/2023 season – moves to another non-NBA club, the Parties agree on the payment of compensation, in favor of Cantù, by the new club, or alternatively by Fortitudo, in the terms indicated below:

- In the event when the Player moves to another club that does not fall under any of the cases referred to in the following two points of this article 3), for an amount equal to €30.000,00 (thirty thousand Euros);
- In the event that the Player moves to a Eurocup or Euroleague club (excluding the following Clubs: Real Madrid, Barcelona, EFES Plisen Istanbul, Fenerbahce, Olimpia Milano and CSKA Moscow, for an amount equal to €50.000,00 (fifty thousand Euros);

thousand Euros);

- *In the event that the Player moves to one of the following Euroleague clubs - Real Madrid, Barcelona, EFES Plisen Istanbul, Fenerbahce, Olimpia Milano and CSKA Moscow – for an amount equal to €70.000,00 (seventy thousand euros)."*

12. Clause 4 of the Agreement provides, in its relevant part, that *"the validity of this agreement remains subordinate to the stipulation of the Sports Contract between Fortitudo and [Basketball Player] [...]"*.

13. Under Article 1.1 of the Fortitudo-[Basketball Player] Agreement:

*"The Player undertakes, in his capacity as a FIB [Italian Basketball Federation] member, to lend his athletic and competitive activity [sic] to the Club for the 2021/2022, 2022/2023 ad 2023/2024 sports seasons."*

14. Article 1.2 of the Fortitudo-[Basketball Player] Agreement provides:

*"At the end of the 2021/2022 and 2022/2023 sports seasons, the Player will have the right to withdraw/go out from this agreement by communicating it in writing, by email directly or through his representative/agent, no later than 30 June 2022 and/or 30 June 2023 at 11:59 pm and paying to the Club directly or through another Club by 30 August 2022 and/or 30 August 2023 a sum which may vary according to the following criteria:*

*1.2.1. €60,000.00 (sixty thousand euros) to be paid in the event that the Player intends to sign an agreement with another Club that participates in the European Cups or is entitled to participate in the following season, in the case that he has played less than 20 minutes a match...*

*1.2.2. €100,000.00 (one hundred thousand euros) to be paid if the Player intends to sign an agreement with another Club participating in the Eurocup or Euroleague excluding the following Clubs: Real Madrid, Barcelona, EFES Plisen Istanbul, Fenerbahce, Olimpia Milano and CSKA Moscow.*

*1.2.3. €140,000.00 (one hundred and twenty [sic] thousand euros) to be paid if the Player intends to sign an agreement with the following Clubs participating in the Euroleague: Real Madrid, Barcelona, EFES Plisen Istanbul, Fenerbahce, Olimpia Milano and CSKA Moscow."*

15. Additionally, according to Article 1.3 of the Fortitudo-[Basketball Player] Agreement:

*“At the end of the 2020/2021, 2021/2022 and 2022/2023 football [sic] seasons, the Player will have the right to withdraw from this agreement by communicating it in writing, by email directly or through his representative, by 15 August 2021 and/or 15 July 2022 and/or on July 15, 2023 at 11:59 pm and by paying the Company directly or through another Club, by August 30, 2021, a sum equal to \$800,000.00 (eight hundred thousand dollars) and no later than August 30, 2022 and/or 30 August 2023 a sum equal to \$800,000.00 (eight hundred thousand dollars) to be paid in the event that the Player intends to sign an agreement with a Club participating in the American league of the NBA.”*

16. Finally, Article 1.4 of the Fortitudo-[Basketball Player] Agreement provides:

*“The Player undertakes to work as a professional athlete on behalf of the Club, by participating in the Championship, Italian Cup, Super Cup, International Cups, All Star Games, competitions and friendly tournaments, according to the Club’s seasonal commitments, as well as training sessions and retreats, at the times and places set by the Club. In the event that the Club were relegated to an [sic] no professional league, the player would no longer be able to offer his professional services and consequently this agreement would lose all effectiveness and validity.”*

### 3.1.2 Factual background of the dispute

17. At the end of the 2021/2022 basketball season, Fortitudo was relegated to the *Serie A2* (the top level of the Italian amateur basketball league).<sup>3</sup>
18. According to the Answer, on 8 July 2022, [Basketball Player] signed a professional sports contract with Alba Berlin, a German basketball club participating in the Euroleague, for the 2022/23, 2023/24 and 2024/25 basketball seasons.<sup>4</sup>
19. On 22 July 2022, the Claimant sent a letter to Respondent requesting the payment of the amount of EUR 50,000 agreed under Clause 3 of the Agreement, claiming that the

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<sup>3</sup> Exhibits 4 and 4 bis to the Answer.

<sup>4</sup> See also press release, Exhibit 2 to the RfA.

player had been transferred by Fortitudo to Alba Berlin.<sup>5</sup>

20. Upon receipt of such request, the Respondent asked the player's agent for advice. [Agent of Basketball Player] replied to Fortitudo on 25 July 2022, stating in essence:<sup>6</sup>

- “[...] the prerequisite of the request of compensation by Cantu could be claim [sic] only in the case in which Fortitudo had received in turn a compensation for the transfer of the player to another Club”;
- “In this case, given the relegation of Fortitudo, the player has become free to go, the Fortitudo did not received [sic] any compensation and consequentially Cantu in turn has no right to do further claim”.

21. Fortitudo replied to Cantù's request by letter of 27 July 2022, stating the following:<sup>7</sup>

*“We formulate this letter to acknowledge receipt of your pec dated July 22nd, relating to the request for payment of an indemnity of € 50,000.00 (plus VAT) for the transfer of the athlete [Basketball Player] from our Club to Alba Berlin.*

*Given that the second point of article 3 (and not paragraph 3) of the agreement of 24.07.2021 established that the compensation was due to Pallacanestro Cantù (to be paid by the new Club non-NBA or Fortitudo club) of € 50,000.00 was due to Pallacanestro Cantù in the event of player transfer at the end of the 2021-2022 season to a Eurocup or Eurolegua club [sic], it should be noted that the provision does not apply in the present case.*

*In fact, there was no transfer from Fortitudo to another club of the athlete (and Fortitudo did not receive any buyout) as [Basketball Player] became “free agent” following the club's relegation to Serie A2.*

*In confirmation of the above, it should be noted, inter alia, that [legal representative of Sigma S.r.L] has never communicated to you -despite being contractually obliged in the event that (unlike the present case) there had been an onerous transfer of the athlete – that Fortitudo had received a buyout or had had negotiations in progress.*

*For these reasons, we can only sanction the total groundlessness of your request,*

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<sup>5</sup> Exhibit 5 to the Answer.

<sup>6</sup> Exhibits 6 and 7 to the Answer.

<sup>7</sup> Exhibit 8 to the Answer.

*considering the question evidently the result of a misunderstanding definitively resolved.”*

### **3.2 The Proceedings before the BAT**

22. On 3 April 2023, the BAT received a Request for Arbitration dated 15 March 2023, filed by Claimant in accordance with the BAT Rules. The non-reimbursable handling fee in the amount of EUR 4,000 was received in the BAT bank account on 3 April 2023 and 6 April 2023.

23. On 25 April 2023, the BAT informed the Parties that Mr. Clifford J. Hendel had been appointed as the Arbitrator in this matter, invited the Respondent to file her Answer by 16 May 2023, and fixed the advance on costs to be paid by the Parties as follows:

*“Claimant (Pallacanestro Cantu) EUR 3,500.00  
Respondent (Pallacanestro Bologna) EUR 3,500.00”*

24. On 11 May 2023, the BAT received an advance on costs paid by Claimant in the amount of EUR 3,500.

25. On 16 May 2023, Respondent submitted its Answer.

26. On 17 May 2023, the BAT informed the Parties that the Respondent had failed to pay its share of the advance on costs and, in accordance with Article 9.3 of the BAT Rules, invited the Claimant to substitute for Respondent’s share by 30 May 2023.

27. On 8 June 2023, Claimant paid Respondent’s share of the advance on costs in the amount of EUR 3,500.

28. On 9 June 2023, after review of all documents submitted by the Parties, the Arbitrator declared that the exchange of submissions was closed in accordance with Article 12.1 of the BAT Rules. The Parties were granted a deadline until 16 June 2023 to set out how much of the applicable maximum contribution to costs should be awarded to them and

why, and to include a detailed account of their costs, including any supporting documentation in relation thereto.

29. On 19 June 2023, the BAT Secretariat distributed copies of the cost submissions filed by the Parties.

#### **4. The Positions of the Parties**

##### **4.1 The Claimant's Position**

30. The Claimant submits that pursuant to Clause 3 of the Agreement, the Parties agreed that *"should the athlete [Basketball Player] move at the end of the 21/22 season to a club participating in EURO CUP or EUROLEGUE, Fortitudo would pay [an] additional compensation of € 50,000.00"*.
31. Given that the player, at the end of the 2021/22 season *"signed for Alba Berlin, a club participating in the Euroleague"*, Claimant contends that the condition set forth in Clause 3 of the Agreement did occur and therefore, according to the principle of *pacta sunt servanda*, the Respondent is subject to make the agreed payment of EUR 50,000.
32. The Claimant alleges that *"the parties have linked the compensation [...] under the contract of 24/7/2021 to the sole fact of the signing of the athlete [Basketball Player] to a club participating in the Euroleague [...] a circumstance that actually occurred"* and that *"there were no other clauses or conditions"* for the agreed compensation to become due by Fortitudo.
33. Additionally, Cantù requests default interest at a rate of 5% per annum, starting from 8 July 2022, *"the date of [Agent of Basketball Player] signing with Alba Berlin"*.
34. In its Request for Arbitration, the Claimant requested relief as follows:

"1. Fortitudo Pallacanestro Bologna shall pay to Pallacanestro Cantù the following amounts:

- Amount of 50.000,00 Eur, plus interests in the amount of 1705,48 Eu net

2. The costs of the arbitration (advance on costs) shall be borne by Fortitudo Pallacanestro Bologna

3. Fortitudo Pallacanestro Bologna shall pay for the Claimants' legal fees and expenses (attorney's fees and handling fee)."

#### **4.2 Respondent's Position**

35. Respondent contends that the contractual condition agreed in Clause 3 of the Agreement "*has not occurred*" and therefore, Fortitudo does not owe any sum to the Claimant.

36. In the Respondent's view, Clause 3 of the Agreement must be interpreted in connection with the Fortitudo-[Basketball Player] Agreement. Respondent alleges that the Parties subjected the payment by Fortitudo of the EUR 50,000 compensation to the occurrence of a double condition:

- First, that the player had exercised the buy-out clause included in the Fortitudo-[Basketball Player] Agreement, which is expressly referred to in the Agreement (letters d, e, f of its Preamble) by given written notice to Fortitudo;
- Second, that the player's new club had paid an economic compensation to Fortitudo for such buyout.

37. However, the Respondent submits that neither of these conditions actually occurred because, at the end of the 2021/22 season, Fortitudo was relegated to the Serie A2, an amateur league, and pursuant to its Article 1.4, the Fortitudo-[Basketball Player] Agreement was terminated. The player thus became a "free agent" and autonomously

negotiated a new contract with the Euroleague club Alba Berlin. Therefore, there was no transfer from Fortitudo to a Euroleague club, and Fortitudo did not receive any compensation for the signing of the player by his new club.

38. It is Respondent's position that "*Cantù would have had the corresponding right to receive from Fortitudo a further sum proportionally linked to the amount of compensation due to Fortitudo by the new Club and/or by the player for the withdrawal [buy out] (and the consequent transfer of the latter)*".
39. For these reasons, Respondent requests the following relief:

*"A) Reject any request from the Claimant Pallacanestro Cantù s.s. dil.*

*B) Declare that all the costs of arbitration (advance on costs) and defense of the Respondent Fortitudo Pallacanestro Bologna 103 ss d a rl (legal fees and expenses) shall be borne by Claimant Pallacanestro Cantù."*

## **5. The jurisdiction of the BAT**

40. 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).
41. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
42. The dispute is of a financial nature and is thus arbitrable within the meaning of Article

177(1) PILA<sup>8</sup>.

43. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under Clause 6 of the Agreement, which reads as follows:

*“Any dispute arising out of or relating to this document will be referred to the (BAT) Basketball Arbitral tribunal, located 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 in Geneva, Switzerland. The arbitration shall be governed on the basis of chapter 12 of the Swiss Act of Private International Law, regardless irrespective [sic] of the parties’ domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono. [translated from Italian]*

*Or according to the English version:*

*“Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties’ domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.”*

44. The Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
45. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).
46. The jurisdiction of BAT over the Claimant’s claims arises from the Agreement. The wording “[a]ny dispute arising from or related to the present contract [...]” clearly covers the present dispute. Moreover, the Respondent has fully participated in the proceeding

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<sup>8</sup> Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

without any objection, thus accepting the jurisdiction of the BAT.

47. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimant's claim.

## **6. Other Procedural Issues**

48. Neither of the Parties requested a hearing. In accordance with Article 13.1 of the BAT Rules, the Arbitrator will decide the Claimant's claims based on the written submissions and the evidence on record.

## **7. Discussion**

### **7.1 Applicable Law – *ex aequo et bono***

49. 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".*

50. Under the heading "*Law Applicable to the Merits*", Article 15 of the BAT Rules reads as follows:

*"15.1 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.*

*15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the*

*rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead.”*

51. Clause 6 of the Agreement expressly provides that the Arbitrator shall decide the dispute *ex aequo et bono*.
52. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.
53. 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*<sup>9</sup> (Concordat),<sup>10</sup> 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.”<sup>11</sup>*

54. 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*”.
55. In light of the foregoing considerations, the Arbitrator makes the findings below.

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<sup>9</sup> 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).

<sup>10</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

<sup>11</sup> JdT 1981 III, p. 93 (free translation).

## 7.2 Findings

56. The main issue in dispute between the Parties is one of interpretation of the Agreement. The positions of the Parties are at opposite corners: while the Claimant supports a strict and literal interpretation of Clause 3 of the Agreement, the Respondent contends that its clauses should be interpreted systematically and in connection with the Fortitudo-[Basketball Player] Agreement.
57. The Arbitrator observes the slight difference in the drafting of the first paragraphs of Clauses 2 and 3 of the Agreement:
- *“In the event that the [Basketball Player] - at the end of the 2021/2022 or 2022/2023 season – signs a contract with an NBA club, the Parties agree that Cantù will be owed a part of the compensation paid by the NBA club to Fortitudo for an amount equal to 170.000 [...].”*
  - *“In the event that the Player -at the end of the 2021/2022 or 2022/2023 season – moves to another non-NBA club, the Parties agree on the payment of compensation, in favor of Cantù, by the new club, or alternatively by Fortitudo [...].”*
58. In the first provision -buyout of the player by an NBA club- it is clear that the eventual compensation to the Claimant represents a part of the compensation paid by the NBA club to Fortitudo. That logically excludes the right of Cantù to claim any compensation if Fortitudo has not received any amount from the player’s new club.
59. However, in the second provision -buyout of the player by a European club- the drafting is not as neat; it does not specifically mention that the compensation to be paid to Cantù would be a part of that received by Fortitudo from the new club and adds the words “*or alternatively by Fortitudo*”. This drafting could support an interpretation of Clause 3

whereby the Claimant was eventually entitled to compensation even if Fortitudo had not received any payment from the new club, i.e., as a consequence of the Player's "moving" to a new, non-NBA club.

60. In the Arbitrator's view this is the only point in favour of Claimant's interpretation of the Agreement. However, for the following reasons, the Arbitrator believes that the interpretation supported by Respondent is both more adjusted to the Parties' agreement and more reasonable from an economic perspective.
61. First, while, as mentioned above, the drafting of the first paragraph of Clauses 2 and 3 of the Agreement is not identical, letters e) and f) of the Preamble -both referring to the buyout options included in the Fortitudo-[Basketball Player] Agreement - are indeed identically drafted:
- Letter e) on the buyout by an NBA club - *"The aforementioned Contract envisages, among other things, the possibility for the Player to withdraw, at the end of each sporting season, in the event of acceptance of a contractual offer by an NBA franchise (communicating this decision no later than on July 15, 2022 and/or July 15, 2023), upon payment – to be paid by the NBA franchise no later than 30<sup>th</sup> of August of the same season in which the right of withdrawal is exercised – of a compensation for the withdrawal [...]"* (emphasis added).
  - Letter f) on the buyout by a non-NBA/European club – *"... the same Contract also provides for the possibility for the Player to withdraw, at the end of the 2021/2022 and 2022/2023 Basketball seasons, in the event of acceptance of a contractual offer by another non-NBA club (communicating this decision no later than 30<sup>th</sup> of June 2022 and 30<sup>th</sup> of June 2023 respectively), upon payment – to be paid by the new club no later than 30<sup>th</sup> August of the same season in which the right of withdrawal is exercised – of a compensation for withdrawal [...]"* (emphasis added).

62. Second, Clause 3 of the Agreement was not drafted in a vacuum and must be interpreted in the context of the deal between the clubs- a deal that evidently involves the [Basketball Player] and thus, the Fortitudo-[Basketball Player] Agreement. This is obvious in the drafting of the Agreement, that refers in its Preamble (letter d) to the contract concluded by Fortitudo and [Basketball Player]. Moreover, according to Clause 4 of the Agreement *“the validity of this agreement remains subordinate to the stipulation of the Sports Contract between Fortitudo and [Basketball Player] [...]”*. The connection between the two contracts is clear.
63. In this respect, two provisions of the Fortitudo-[Basketball Player] Agreement are relevant to the interpretation of the clause in dispute:
- Article 1.4 provides that in the event of relegation of Fortitudo to a non-professional league (as was the case at the end of the 2021/22 season), the contract would *“lose all effectiveness and validity”*. This is confirmed by the evidence on the record, in particular the email of 25 July 2022 sent by the player’s agent, stating that [Basketball Player] became a “free agent” following the relegation of Fortitudo, and thus there was no transfer from the Respondent to Alba Berlin.
  - Article 1.2 regulates the player’s buyout right in three different scenarios, depending on the category of the new club. It is significant that the compensation to be paid to Cantú under Clause 3 of the Agreement represent exactly half in each case (EUR 30,000, EUR 50,000 and EUR 70,000) of the compensation to be received by Fortitudo from the new club in the event of the exercise of the buyout option under Article 1.2 of the Fortitudo-[Basketball Player] Agreement (EUR 60,000, EUR 100,000 and EUR 140,000).
64. Reading Clause 3 of the Agreement together with the two articles referred to in the previous paragraph, the Arbitrator reaches the conclusion that the Parties agreed on

sharing (50/50) the eventual profits of a transfer of the player to a new club by means of the eventual exercise of his contractual buyout option. In the absence of such a transfer, and consequently of any compensation paid by a new club, a right of the Claimant to receive the amounts claimed would make little economic sense in the context of the deal between the Parties.

65. Therefore, the Arbitrator concludes that the Claimant is not entitled to receive any compensation from the Respondent. Consequently, all Cantú's claims are dismissed.

## **8. Costs**

66. In respect of determining the arbitration costs, Article 17.2 of the BAT Rules provides as follows:

*“At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4). [...]”*

67. On 30 August 2023, the BAT President determined the arbitration costs in the present matter to be EUR 6,100.

68. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 of the BAT Rules provides as follows:

*“The award shall determine which party shall bear the arbitration costs and in which proportion. [...] When deciding on the arbitration costs [...], the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties.”*

69. Considering that the Respondent was the prevailing party in this arbitration, it is consistent with the provisions of the BAT Rules that costs of the arbitration be borne by the Claimant alone. Given that the Claimant paid the entire Advance on Costs in the

amount of EUR 7,000, EUR 900 will be reimbursed to the Claimant by the BAT.

70. In relation to the Parties' legal fees and expenses, Article 17.3 of the BAT Rules provides that

*“as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding [...] on the amount of any contribution to the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties.”*

71. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses (in this case, up to EUR 7,500).

72. By submission of 16 June 2023, Respondent has claimed legal fees in the total amount of EUR 5,000.

73. Taking into account that the Respondent is the prevailing party in this arbitration and that its account of costs is sufficiently prudent, the Arbitrator considers it fair and reasonable to award the amount of EUR 5,000 in legal fees.

74. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:

- (i) The Claimant shall bear the costs of this arbitration;
- (ii) The BAT shall reimburse EUR 900 to the Claimant, being the difference between the costs advanced by the Claimant and the arbitration costs fixed by the BAT President;
- (iii) The Claimant shall pay to the Respondent EUR 5,000 as a contribution to its legal



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fees.

## **9. AWARD**

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

- 1. Pallacanestro Cantù s.p.a. s.s.d.'s requests for relief are dismissed in their entirety.**
- 2. Pallacanestro Cantù s.p.a. s.s.d. shall bear the costs of this arbitration.**
- 3. Pallacanestro Cantù s.p.a. s.s.d. shall pay Fortitudo Pallacanestro Bologna 103 s.s.d. a r.l. an amount of EUR 5,000.00 as a contribution to its legal fees and expenses.**

Geneva, seat of the arbitration, 4 September 2023

Clifford J. Hendel  
(Arbitrator)