

CORRECTED ARBITRAL AWARD

(BAT 1092/17)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netze

in the arbitration proceedings between

Mr. Linton Johnson

- Claimant -

represented by Mr. Giovanni Allegro, attorney at law,
Via S.C. Alessandrina n. 9, 84125 Salerno, Italy

vs.

Società Sportiva Scandone Basket S.p.A.
Contrada Zoccolari, c/o Pala Del Mauro, 83100 Avellino, Italy

- Respondent -

represented by Mr. Edoardo Lombardi, attorney at law,
Via Borgogna 8, 20122 Milan, Italy

1. The Parties

1.1. The Claimants

1. Mr. Linton Johnson (hereinafter the “Player”) is a professional basketball player. He is a citizen of the United States. He played with the Club from 2010 until 2013.

1.2. The Respondent

2. Società Sportiva Felice Scandone S.p.A. (hereinafter the “Club”) is a professional basketball club located in Avellino, Italy. The Club plays under its sponsor’s name “Sidigas Avellino”.

2. The Arbitrator

3. On 19 October 2017, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren OC appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). Neither 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. On 2 July 2012, the Player and the Club signed a guaranteed, no-cut employment agreement for the 2012/2013 basketball season (the “Player Contract”). Under the Player Contract the Player was entitled to salaries in the total amount of EUR 280,000.00, to bonuses for certain results of the Club’s team and to amenities including contributions to the rent for his apartment and the car.

5. On 28 October 2012 the Player participated in a game against Vitrus Segafredo Bologna BC which the Club's team won and which triggered an exceptional bonus of EUR 1,000.00 which is not in dispute.
6. The 2012-2013 season ended with the last game of the Club on 5 May 2013. The Club had managed to avoid relegation from the Serie A (A1) league to the second tier league. According to Art. 6 lit. c) of the Player Contract, the Player was therefore entitled to a bonus of USD 25,000.00 payable within 7 days (i.e. 12 May 2013).
7. Until the end of the 2012/2013 season the Club had made payments to the Player in the total amount of EUR 285,446.29 according to the Player or EUR 295,246.29 according to the Club.
8. On 8 May 2017, the Player asked the Club to pay the then outstanding amounts, namely the contributions to the rent of the apartment and the car and the bonus for avoiding relegation. In addition, the Player requested the payment of a daily penalty fee for belated payments in a total amount of EUR 146,000.00 (1,460 days x EUR 100.00).
9. On 30 August 2017, the Club paid the bonus for avoiding relegation of USD 25,000.00 but it did not pay the requested late payment penalty and the contributions to the car rent and the rent for the apartment.
10. The present dispute is about the accrued late payment penalty and the reimbursement of the car rent and the rent for the apartment.

3.2. The Proceedings before the BAT

11. On 25 September 2017, the Player filed a Request for Arbitration in accordance with the BAT Rules, which was received by the BAT on 12 October 2017. A non-reimbursable handling fee of EUR 3,000.00 was received in the BAT bank account on 14 July 2017.

12. By Procedural Order of 23 October 2017, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Club to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 13 November 2017. The BAT Secretariat also requested that the Parties pay the following amounts as Advance on Costs by no later than 2 November 2017:

<i>"Claimant (Mr. Linton Johnson)</i>	<i>EUR 4,000.00</i>
<i>Respondent (Scandone Avellino Basket)</i>	<i>EUR 4,000.00"</i>

13. By Procedural Order of 12 December 2017, the BAT Secretariat acknowledged the receipt of the full Advance on Costs equally paid by both Parties, and the Answer to the Request for Arbitration from the Club. It also invited the Player to comment on the Answer by no later than 15 December 2017. The Player was specifically asked to provide evidence of the exact sum of money he actually spent during the 2012/2013 season for the rent of the apartment and the car. By email of 12 December 2017, the Player asked for an extension of the time limit until 22 December 2017, which was accepted by the Arbitrator.
14. By email dated 27 December 2017, the BAT Secretariat acknowledged receipt of the Player's second submission of 22 December 2017 and invited the Club to provide its comments by no later than 12 January 2018.
15. On 24 January 2018, the BAT Secretariat acknowledged receipt of the Club's comments. The Arbitrator closed the proceedings and invited the Parties to submit their accounts of costs until 31 January 2018. Both Parties provided their accounts of costs on that date.

4. The Positions of the Parties

4.1. Claimant's Position

16. According to Art. 6 lit. d) Player Contract, the Club owes the Player a bonus in the amount of USD 25,000.00 because the Club managed to remain in the Italian Serie A (A1) league for the 2013/2014 season. The Club paid the bonus only on 30 August 2017. The date was later corrected to 29 August 2017.
17. The bonus of USD 25,000.00 should have been paid “within seven days of achievement” i.e. by no later than 12 May 2013. It was actually paid with a huge delay, namely only on 29 August 2017. Art. 2 of the Player Contract provides for a penalty fee of EUR 100.00 per day for any belated payment. Between the due date of the bonus and the date when the Player requested payment 1,460 days elapsed according to the Player's calculation. The Club therefore owed the Player a penalty fee of 1,460 x 100.00 EUR, i.e. EUR 146,000.00. Until the Request for Arbitration, the amount of the penalty accrued to EUR 156,000.00.
18. The Player denies the allegation of the Club that it had proposed a settlement agreement for the payment of the due amounts by instalments. The Club just delayed the payment of the bonus by four years. The bonus payment was guaranteed as all other payments under the Player Agreement. As a consequence, late payment of the guaranteed bonus led to the late payment penalty because that was “by its nature a form of credit guaranteed.”
19. According to Art. 5 lit. b) and c) of the Player Contract, the Club is obliged to pay the Player a monthly amount of EUR 1,000.00 as a contribution to the rent of his car, and of EUR 1,500.00 to the rent of his apartment. According to the Player's calculation, this amounts to a total sum of EUR 18,000.00. In his second submission, the Player specified that the Club should cover an amount of EUR 8,000.00 for the car. The actual car costs amounted to EUR 7,720.04 which had been paid by the Player. He had also spent EUR 9,848.31 for the rent of the apartment and a real estate agent fee of EUR

847.00 which had to be reimbursed by the Club (i.e. a total of EUR 18,415.35 for apartment and car).

20. Only EUR 42,000.00 of the payment made on 7 November 2012 in the amount of EUR 51,800.00 was intended to the Player. The difference of EUR 9,800.00 was supposed to be transferred to the Agent for his agency services. Therefore the total amount paid to the Player was EUR 285,446.29.
21. Other than asserted by the Club, the contributions to the rents for the apartment and the car have not fully been covered by the payments of EUR 285,446.29 received by the Player, which means that EUR 15,402.00 are still outstanding.

4.2. Claimant's Request for Relief

22. The Request for Arbitration of 25 September 2017 contains the following Request for Relief:

"Club should have made his payment no later than 7 days of achievement of the bonus (last game was on 5/5/2013) but it didn't; although a lot of letter of requests sent by the player, and by the Counsel too via registered mail.

The claimant requests in particular that the honorable Arbitrator:

- *declares the right of the Player Mr. Linton Johnson to receive from the Respondent S.S. SCANDONE BASKET AVELLINO the amount of USD 156,000.00 as agreed penalties late fee, in force of non compliance with the payment obligation (as letter d of the article 6) plus €18.000,00 (plus interest) as reimbursement for anticipated costs for Automobile (let. B article 5) and apartment (let. C); plus interest for the delayed payment of the agreed bonus from (9th June 2012 to 30th August 2017)*
- *forces the club to pay all cost involved as legal expanses, BAT fee etc"*

4.3. The Club's Position

23. The Club confirms that it owed the Player a bonus in the amount of USD 25,000.00 from the end of the 2012-2013 season until 30 June 2017. The payment was made on 29 August 2017.

24. The Club made payments of EUR 295,246.29 including the fee due to the Agent for his agency services amounting to EUR 9,800.00 (plus EUR 1,630.00) but without the bonus of USD 25,000.00 for remaining in the league Serie A to the Player. The said bonus was paid later. The Club has therefore settled all claims under the Player Contract, including the due compensation for the rent of the Player's apartment and his car.
25. The penalty fee included in the Player Contract does not apply to all late payments but only to the payment of salary instalments for the following reasons:
- The wording in Art. 6 of the Player Contract ("*fully guaranteed by the Club in the same manner than all payments to Player are guaranteed hereunder*") only means that the relevant bonus must be paid to the Player, regardless whether or not he played for the Club at the time of the achievement of the goal triggering the payment of the bonus and does not make reference to the penalty fee.
 - The wording in Art. 2 of the Player Contract stipulates that only "*the above payments*" are subject to a penalty fee. This means that any payments addressed after Art. 2 of the Player Contract are not subject to the penalty fee.
26. Subsidiarily, the Club claims, that if a penalty fee is imposed, the requested amount must be deemed excessive and therefore reduced by the Arbitrator *ex aequo et bono*. This duty of the Arbitrator derives on the one hand from Art. 1384 Italian Civil Code, which provides that manifestly excessive contractual penalties must be reduced by the judge, and on the other hand by the fact the Club waited too long for claiming the bonus which was due since 2013.

4.4. The Club's Request for Relief

"Respondent's requests

- 1) *The rejection of Claimant's requests;*
- 2) *payment by Claimant to the Respondent of all arbitration proceeding costs, including the reimbursement of the advance on costs for €4.000 paid by the*

Respondent on 30 October 2017, also taken into account Claimant's procedural behaviour and the high amount claimed by the latter, which will be recognized as not due at all;

- 3) *payment by Claimant to the Respondent of all legal fees and expenses accrued by S.S.Scandone, taken into account the difference between his requests and the minimum potentially due to Mr Johnson (in case he will demonstrate the payments of €700,00 for each of the 8 months of the duration of the lease contract)."*

5. Jurisdiction

27. 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).
28. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
29. 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.
30. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Article 11 of the Player Contract:

"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 [PIL], irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."

31. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

32. The Arbitrator considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording “[a]ny dispute arising from or related to the present contract” in Article 9 of the Player Contract covers the present dispute. In addition, the Club explicitly consented to the jurisdiction of the BAT.
33. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Player’s claims.

6. Applicable Law – ex aequo et bono

34. 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”.

35. 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.”

36. In Article 11 of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to him *ex aequo et bono*.

37. 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 of 1969¹ (Concordat),² under which Swiss courts have held that “*arbitrage en équité*” is fundamentally different from “*arbitrage 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.”³

38. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

“the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand”.⁴

39. In light of the foregoing matters, the Arbitrator makes the following findings.

7. Findings

7.1. The open payments

40. Undisputedly, the bonus of USD 25,000.00 for remaining in the Serie A (A1) League also in the 2013/2014 season has been paid on 29 August 2017 as demonstrated by the bank statement provided by the Club.
41. The Club also owed contributions to the rents for the Player's apartment and car. According to Art. 5 b) and c) of the Player Contract, the contributions were intended to

¹ 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).

² KARRER, in: Basel commentary to the PILA, 3rd ed., Basel 2013, Art. 187 PILA N 290.

³ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

⁴ POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

cover the full rental costs up to EUR 1,000.00 per month for the car and EUR 1,500.00 per month for the apartment.

42. The Club alleges that it had made overall payments in the total amount of EUR 295,246.29. The Player confirms having received this amount in his bank account. However a sum amounting to EUR 9,800.00 was intended to be paid to his Agent and not to himself. All other payments remained undisputed. Both Parties agree that the agency fee was due in the amount of 7% of the Player's base salary (without fee on image rights). This amount corresponds to the difference between the total amount the Club claims having paid and the Player accepts having received as salary. It therefore seems obvious that the amount of EUR 9,800.00 was paid to the Player as an agency fee. The Arbitrator accepts the Player's submission and documentary evidence and considers that the Club had made payments to the Player in the total amount of EUR 295,246.29 of which EUR 9,800.00 must be deducted as they were intended to the Agent and not to the Player. Hence a total amount of EUR 285,446.29 was paid to the Player.
43. The Club owed the Player salaries of EUR 280,000.00 for salaries, an extra bonus for the victory against Bologna of EUR 1,000.00 and the contributions to the car rent and the apartment rent. With respect to the car costs, the Player Contract provides that the Player shall be entitled to a lump sum of EUR 1,000 per month for the period of 10 months, which amounts to EUR 10,000, although the actual car costs amounted to EUR 7,720.04 only. The rent paid for the apartment amounted to EUR 9,848.31. In sum, the Player was entitled to EUR 300,848.31. After the payment of EUR 285,446.29 there remained an unpaid difference of EUR 15,402.02.
44. The Club's argument that any open amount must be set off against the price of tickets to games of the Club (EUR 1,630.00), is not accepted by the Arbitrator. It would be unusual for a club to charge ticket prices to a player who invites his friends and family to watch games in which he is participating. There is no evidence that such ticket costs have ever been claimed or invoiced by the Club before.

7.2. Penalty claim

45. The Player claims the payment of a daily penalty fee of USD 100.00 amounting to USD 156,000.00. According to the Request for Arbitration, the penalty amounted to USD 146,000.00 on 30 June 2017, which means that the Player started counting on 30 June 2013 as the due date. The additional USD 10,000.00 indicate another 100 days of delay which means that the Player requests a penalty payment until 10 October 2017. The Arbitrator does not understand the Player's calculation. If at all, the bonus was payable on 12 May 2013 and was paid on 29 August 2017 which would then be the relevant period for the calculation of the penalties. If the penalty also applied to the unpaid amount of EUR 15,402.02, the final date would be 12 October 2017, i.e. the date when the Request of Arbitration was received.
46. The Club argues that the delay of the bonus payment did not trigger the penalty payment because it was not listed as a payment subject to penalty payment. Indeed, Art. 2, last paragraph on page 3 of the Player Contract, reads as follows:
- "It is agreed that any payment to the Player pursuant to the above shall be subject to an interest penalty of One Hundred US Dollars (\$100.00 USD) per day for each day said payment was due. (...)"*
47. The bonus payments are regulated in Art. 6 of the Player Contract. It is obvious that these bonus payments did not belong to the "payment(s) to the Player pursuant to the above". Nor is there any reference to the consequences of non-payment of other amounts agreed in the Player Contract.
48. Art. 2, last paragraph on page 3 of the Player Contract states however, that the Club's failure to make "any scheduled payments" within 15 days entitled the Player to refuse performance under the Player Contract and to terminate the agreement is not received within 30 days. The Arbitrator therefore understands that the penalty payment was a consequence of the delay in paying the base salary on time only whereas the Club's delay in paying a bonus or settle any other financial obligation would have allowed the Player to stop playing and to early terminate the Player Contract, but not to claim a

penalty. Hence, the Arbitrator concludes that no penalty payment can be claimed for the delay of the bonus payment.

49. The same applies to the claimed contribution to the Player's expenses for the apartment and the car. These contributions are regulated in Art. 5 b) and c) of the Player Contract and do therefore not fall under the payments subject to a penalty if delayed (i.e. the base salary).
50. The Arbitrator dismisses the Player's claim for penalty payment. It is therefore not necessary to review whether the penalty payment was disproportionate or forfeited because the Player failed to request payment for more than four years.

7.3. Interests

51. The Player is requesting default interest at the applicable Swiss statutory rate on the awarded amounts. The Swiss statutory default interest rate is 5% p.a.
52. No contractual provision in the Player Contract stipulates the obligation to pay interest on overdue amounts. According to standing BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. This is a generally accepted principle which is embodied in most legal systems. However, it is also generally accepted that the obligee has to request payment of interest from the obligor if not agreed in the underlying agreement in advance or where the contract makes it clear that the parties intended that performance take place at or before a precise point in time. To the extent default interest is awarded, the Arbitrator, deciding *ex aequo et bono*, follows consistent BAT jurisprudence and considers interest at 5% p.a. to be fair and equitable also in the present case.
53. The Player Contract does not explicitly provide for an obligation to pay interest for the bonus payments or the contributions of the rent of the automobile and the apartment. However, the Player Contract explicitly indicates the dates on which such payments were due: The bonus for the Club remaining in the Serie A (A1) league became due on

12 May 2013. The contribution to the rental fees for the car was payable on the first day of each month. No payment date is indicated for the contribution to the apartment rent. In any event, all claims under the Player Contract became due upon its expiration which was 5 May 2013 after the last official game was played.

54. As a consequence, the Arbitrator finds that the Club must pay interest of 5% p.a. on USD 25,000.00 from 13 May 2013 (i.e. the day following the date when the bonus became due) until 29 August 2017 (i.e. the date of payment), and on EUR 15,402.02 since 6 May 2013 (i.e. the day following the expiration of the Player Contract) until payment of said amount.

8. Costs

55. 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.
56. On 16 April 2018. – considering that pursuant to Article 17.2 of the BAT Rules *“the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator”*, and that *“[t]he 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 6,950.00.
57. Considering the circumstances and the outcome of this arbitration, the Arbitrator finds it fair that the fees and costs of the arbitration be equally borne by both Parties.

58. Given that the Advance on Costs of in total EUR 8,000.00 was equally paid by both Parties as set forth in para. 10 *supra*, in application of Articles 17.3 of the BAT Rules the Arbitrator decides that the BAT shall reimburse the remainder of the respective advances in the amount of EUR 1,050.00 equally to each Party;
59. The Arbitrator also finds that the Parties shall bear their own legal fees and expenses, including the handling fee.

9. AWARD

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

- 1. Società Sportiva Scandone Basket S.p.A. is ordered to pay to Mr. Linton Johnson the amount of EUR 15,402.02 net, plus interest of 5% p.a. since 6 May 2013 until payment.**
- 2. Società Sportiva Scandone Basket S.p.A. is ordered to pay to Mr. Linton Johnson interest of 5% p.a. on the amount of USD 25,000.00 from 13 May 2013 until 29 August 2017.**
- 3. Società Sportiva Scandone Basket S.p.A. and Mr. Linton Johnson shall bear the arbitration costs in equal shares.**
- 4. Società Sportiva Scandone Basket S.p.A. and Mr. Linton Johnson shall bear their own legal costs and expenses.**
- 5. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration 22 May 2018

Stephan Netzle
(Arbitrator)