BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0845/16)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Mr. Marco Mordente

- Claimant -

represented by Mr. Giuseppe Cassi, attorney at law,
Via Archimede 18, 97100 Ragusa, Italy

vs.

Juvecaserta srl
Via Ricciardi 51, 81100 Caserta, Italy

- Respondent -

represented by Giuseppe Cicala, attorney at law,
Corso Trieste n. 149, 81100 Caserta, Italy

1. The Parties

1.1 The Claimant

1. Mr. Marco Mordente (“Player”) is an Italian professional basketball player.

1.2 The Respondent

2. Juvecaserta srl (“Respondent”) is a professional basketball club in Caserta, Italy.

2. The Arbitrator

3. On 24 June 2016, 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

4. On 20 July 2013, Player and Respondent entered into an agreement (“the Agreement”) whereby Respondent engaged Player to play basketball for the 2013-2014 season and the 2014-2015 season. The salary of Player was agreed at a guaranteed sum of EUR 90,000.00, net, for the first season, and EUR 100,000.00, net, for the second season. Further, Player was to be paid bonuses by reference to certain defined on-court successes.

5. Player says that at the end of the second season he was owed EUR 47,000.00 by

Respondent. Respondent counters by saying that the Agreement was superseded by two subsequent agreements (3 October 2013 and 4 September 2014 respectively) entered into between the Parties which provided for arbitration in Bologna. Thus, Respondent challenges the jurisdiction of the Arbitrator. In any event, and without waiver of its jurisdiction argument, Respondent also denies that it owes any money to Player.

3.2 The Proceedings before the BAT

6. On 26 May 2016, Player filed a Request for Arbitration of the same date in accordance with the BAT Rules.

7. The non-reimbursable handling fee in the amount of EUR 2,000.00 was paid on 30 May 2016.

8. On 27 June 2016, 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 (Mr. Marco Mordente) EUR 5,500.00*
>
> *Respondent (Juvecaserta srl) EUR 5,500.00"*

The foregoing sums were paid as follows: 6 July 2016, EUR 5,500.00 by Player; and 13 July 2016, EUR 5,500.00 by Respondent.

9. Respondent filed its Answer on 18 July 2016.

10. Player filed his Reply on 10 August 2016.

11. Respondent filed its Rejoinder on 25 August 2016.

12. On 31 August 2016, the Parties were invited to submit their statements of costs by 7 September 2016 and were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.

13. On 31 August 2016, Respondent submitted its statement of costs.

14. On 7 September 2016, Player submitted his statement of costs.

15. On 9 September 2016, the Parties were invited to comment on the statements of costs. Neither did so.

4. The Positions of the Parties

16. Player's position is as sought in his claim for relief in the Request for Arbitration (in summary):

    (a) EUR 47,000.00 net; and

    (b) Interest, costs, and fees.

17. Respondent seeks a dismissal of the claim based on an absence of jurisdiction, and, in any event, a denial of the claim based on its position that no money is owed to Player. Respondent also seeks costs and expenses.

5. The Jurisdiction of the BAT

18. 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).

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

20. 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]

21. The jurisdiction of the BAT over Player's claims is stated to result from the arbitration clause in clause (m) of the Agreement, which reads as follows (taken from the translation into English presented by Player):

> *"Any dispute arising from or related to the present agreement, shall be submitted to the FIBA Arbitral Tribunal (FAT) addressed in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President. The arbitration shall be governed by Chapter 12 of the Swiss ACT on Private International Law (PIL), regardless of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

22. According to Article 18.2 of the BAT Rules, any reference to BAT's former name "FIBA Arbitral Tribunal (FAT)" shall be understood as referring to the BAT.

23. The arbitration clause is in written form and thus fulfils the formal requirements of Article 178(1) PILA.

24. 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).

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

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

26. For the above reasons, the Arbitrator has jurisdiction to adjudicate Player's claims, subject to Respondent's jurisdiction challenge which will be examined below.

6. Discussion

6.1 Applicable Law – ex aequo et bono

27. 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".*

28. 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."*

29. As noted in paragraph 22 above, the arbitration clause in the Agreement expressly provides that the Arbitrator shall decide any dispute *ex aequo et bono*. The Arbitrator finds that the parties have made an express choice with regards to disputes decided by the BAT, namely that "*[t]he Arbitrator shall decide the dispute ex aequo et bono*."

30. 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]

31. 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]

32. 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."

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

6.2 Findings

34. As already noted above, Respondent raises a jurisdiction issue, namely, that the Agreement was superseded by two subsequent agreements (3 October 2013 and 4 September 2014 respectively) entered into between the Parties which provided for arbitration in Bologna.

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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.

35. Respondent says that the two subsequent agreements must, by reason of being more recent in time, supersede the Agreement. Player counters by saying that there is no language in either of the two subsequent agreements which demonstrates that the Agreement is to be superseded (and the Arbitrator notes that this is indeed the case).

36. Player cites a number of prior BAT awards in support of his position, and, in particular, 0531/14. The pertinent parts of that Award are now reproduced:

> *"46. Accordingly, it is necessary to determine the extent to which the Contract governs the Parties' contractual relations in order to determine whether BAT has jurisdiction over the present dispute.*
>
> *47. The starting point is that when faced with multiple contracts, it is for the Arbitrator to determine the contractual relationship between the parties. As was recognised in BAT 0431/13"*
>
> > *"It is not uncommon for players to sign more than one contract with a given club. There are often league or national association requirements stipulating that a pro-forma contract must be executed and registered. Such contracts are sometimes executed in a addition to a second contract that is not limited by the prescriptive requirements of a league or national association pro- forma contract. Additional contracts (including image rights contracts) may also be executed in an effort to obtain tax, or other, advantages. Where inconsistencies and contradictions exist between competing contracts, it is for the Arbitrator to determine what the contractual relationship between the parties actually is, in order to resolve the dispute."*
>
> *48. The Arbitrator also notes that, in accordance with BAT jurisprudence, the mere fact that there are two contracts on the same issues between the parties does not automatically lead to invalidity of one of them, unless it was the parties' intention that one contract shall substitute the other (see BAT 0402/13). In particular, in relation to league contracts, it was recognised in BAT 0402/13 that:*
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> > *"As is well-known, a number of national basketball leagues require their clubs to submit the player contracts for registration by the league management. Sometimes, the leagues request that a standard contract shall be presented but the clubs and the players nevertheless agree on an individually drafted contract. The individual contracts and the contracts provided to the league management are for whatever reasons not always congruent, especially with respect to the financial terms. Still, the principle pacta sunt servana applies to both of them."*
>
> *49. Having regard to terms of the Contract and the League Contracts, as well as the*

principles from BAT case law referred to above, the Arbitrator finds that neither the Contract nor the League Contracts evince an intention on behalf of the parties that the Contract shall be substituted by the League Contracts. In reaching this conclusion, the Arbitrator has regard to the following factors:

(i) There is no express wording in either the Contract or the League Contracts to the effect that that the Contract is or will be superseded following entry into the League Contract. If the Respondent's submissions were to be accepted, clear wording to this effect would be required.

(ii) On the contrary, properly construed, the terms of the Contract and the League Contracts make it clear that the Contract is an operative, binding agreement that is intended to govern the employment relationship between the Parties throughout the 2012-2013 and 2013-2014 seasons.

(iii) In this regard, the Arbitrator notes that Clause 1 of the Contract provides that the Claimant "agrees to play for the whole contract term..."; Clause 2 provides that the payment by the Respondent is "guaranteed" and that the Respondent "agrees that this contract cannot be terminated..."; and Clause 7 provides the Claimant with a right of termination in the event that a scheduled payment is not received. The plain wording and effect of these clauses (and the Contract as a whole) is entirely inconsistent with the submission that the Parties intended that the Contract should be replaced by the League Contracts.

(iv) Properly interpreted, and contrary to the Respondent's submission, Clause 5 of the Contract requires the Parties to sign and submit a League Contract in accordance with requirements imposed by the league. The League Contracts themselves, which are in standard form, are consistent with this interpretation.

50. Accordingly, the Arbitrator finds that the Contract is and remains a valid and enforceable agreement that governs the contractual relationship between the Parties. Therefore, BAT has jurisdiction to adjudicate the Claimant's claim in accordance with Clause 8 of the Contract."

37. The Arbitrator does not accept Respondent's argument that the mere fact that a contract is entered into a later point in time automatically overrides an earlier contract between the same parties on the same subject matter. Rather, the position is, as set

out in detail in Award 0531/14 (as above), that it is for the Arbitrator to determine the relationship between the Parties and, further, this is a process of interpretation of what was, or was not agreed.

38. As regards interpretation, the Arbitrator recalls the language of Award 0756/15:

> *"59. Taking the first aspect, namely, proper interpretation of an agreement, it is abundantly clear that an arbitrator, sitting in Switzerland and mandated to rule ex aequo et bono, is not bound by any particular set of national legal rules. However, it is also the case that such an arbitrator is not free to do whatever it is they want and, for example, completely disregard the words used by parties in their contractual documentation. The sort of principles which might inform the exercise of interpretation in the context of a BAT arbitration include:*
>
> *- looking at all of the contractual language chosen by parties through the eyes of a reasonable reader to see what is the ordinary and natural meaning of the words used;*
>
> *- the overall background context of professional basketball and general common understanding amongst such users together inform the ordinary and natural meaning of the words used;*
>
> *- when it comes to considering the centrally relevant words to be interpreted in a particular case, the less clear they are, or, to put it another way, the worse their drafting, the more ready an arbitrator might be to depart from the ordinary and natural meaning. That is simply the obverse of the sensible proposition that the clearer the ordinary and natural meaning the more difficult it is to justify departing from it;*
>
> *- the description or label given by parties to something in a contract is not inflexibly determinative of its true nature;*
>
> *- the mere fact that a contractual arrangement, if interpreted according to its ordinary and natural language as described above, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from that language; and*
>
> *- in general, it is not the function of an arbitrator when interpreting an agreement to relieve a party from the consequences of his or her imprudence or poor advice. Accordingly, when interpreting a contract, ex aequo et bono, an arbitrator avoids re-writing it in an attempt to assist an unwise party or to penalise an astute party. Also, parties should not seize on a literal translation of the phrase ex aequo et bono and consider that "justice" and "equity" provide them with a route to unprincipled and unmoored indulgence for poor contractual choices."*

39. Bearing in mind the foregoing approach to contract interpretation in the BAT context, the Arbitrator now turns to the actual provisions of the Agreement.

40. Clause (a) provides that Respondent "hires the Athlete as professional basketball player for 2013-2014 and 2014-2015 sport seasons. The present agreement is valid for a period of two sport seasons and is to be considered guaranteed and not to be cut according to the terms and conditions of the following paragraphs, respecting the provisions of the Collective Agreement and Standard Contract of professional basketball players and of the rules of the A Division Basketball League as well."

41. Clause (f) provides that "the present agreement and the amounts herein agreed, are fully guaranteed, as per The Collective Agreement and Standard Contract for Professional Basketball Players and as provided by the rules of the basketball A Division League."

42. Clause (l) provides that "the parties agree until now to report as soon as possible all the economic and not economic provisions agreed under this contract in the standard form of Lega-Giba 2013-2014."

43. Clause (n) provides that "[T]he Athlete and the Club acknowledge and accept that the only agreement valid between the parties is the present agreement which replace any other contract or previous settlement, and that the present agreement shall be the only one to be submitted to arbitration by the parties, as ruled on the paragraph above."

44. It is obvious to the Arbitrator that the Parties have expressly contemplated that local regulatory arrangements with the Italian league would be complied with, and this is just the sort of background information which the Arbitrators referenced in Awards 0402/13, 0431/13, and 0531/14. It is, as they have said, common-place for there to be local requirements for standard-form league contracts, and this is a factor which can be taken account of when interpreting professional basketball contracts.

45. The Parties have made clear that the Agreement and any local requirements for notification and so on, are to function simultaneously, but, critically and expressly, they

have made it abundantly clear that in the event of disputes, only the Agreement can be subjected to arbitration. Secondly, the Parties have also expressed that the Agreement is to be guaranteed for two years, and not to be cut. This is strongly indicative of an intention that the Agreement was to have a life for two years.

46. Nowhere in the language of either of the two subsequent agreements can the Arbitrator find any language which displaces or changes the contractual arrangements set out in the Agreement. Had the Parties wished to change the contractual obligations set out in the Agreement, or replace them, then they would have required express language in order to have achieved that. They did not do so, and, as already noted, the mere fact that a contract follows later in time does not automatically dissolve a prior contract.

47. In summary, the Arbitrator dismisses the jurisdiction challenge of Respondent.

48. Turning to the substance of the case, 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 principle by which the Arbitrator will examine the merits of the claims.

49. Player says that at the end of the Agreement's term, namely at the end of the 2014-2015 season, he was owed EUR 47,000.00. That is the extent of the analysis or proof presented in the Request for Arbitration, with a demand for payment, written in similar terms by Player's Counsel on 10 March 2016. Player gives some further detail in his Reply when he presents a calculation of the overall claimed sum as follows: (a) EUR 7,000.00 outstanding from the due salary payment of February 2015, though this is expressed by Player as being an instalment "*expired on 29 February 2015*" (there is no such date as 2015 was not a leap year, presumably this was a typographical error); and (b) EUR 10,000.00 on each of the 10th day of March, April, May, and June 2015.

50. Respondent's position is that the two subsequent agreements were complied with in

full by it. The agreement for the purposes of the Italian league for the 2013-2014 season provides for a salary of EUR 78,500.00. The agreement for the purposes of the Italian league for the 2014-2015 season provides for a salary of EUR 100,000.00. Thus, on Respondent's own case, it has paid Player a total of EUR 178,500.00 for the two seasons. The Agreement, on the other hand, provides that Player will receive a total net salary of EUR 190,000.00 (per clause (c)). There is an obvious gap between the amount provided for in the Agreement, and the amounts provided for in the subsequent agreements, namely, EUR 11,500.00. Thus, even on Respondent's case, it has not paid Player in full in accordance with the terms of the Agreement.

51. However, there is a further consideration applicable to the two subsequent agreements, namely, that the amounts are expressly stated to be "*[Q]uale corrispettivo la Società si obbliga a corrispondere ali'Atleta i seguenti importi da intendersi al lordo di ogni onere fiscale o contributivo*". This, loosely translated, means unambiguously that the amounts to be paid pursuant to the two subsequent agreements were to be gross of tax, and not, like the Agreement, net of tax. Thus, even on the case of Respondent, the net amount which Player was to receive under the two subsequent agreements was going to be considerably less that EUR 178,500.00 (it can be reasonably presumed that local Italian taxes were not of a marginal or insignificant nature).

52. While the Arbitrator does not consider that Player's initial verification of the amount claimed in the Request for Arbitration was satisfactory in that all that was presented was a bare demand for monies owed, the overall position does tend to suggest that he was indeed left short. Respondent has asserted that it paid the amounts under the two subsequent agreements, but inevitably means that it did not pay the contracted-for total amount under the Agreement.

53. Taken all together, the Arbitrator considers that it is the case that Player is owed EUR 47,000.00, net, by Respondent arising from his time at the club. Therefore, the Arbitrator awards Player that amount by way of unpaid salary. The Arbitrator is fortified

in that conclusion by the fact that even when the precise calculation was put forward by Player in the Reply, Respondent did not tackle it head-on in the Rejoinder and rather relied upon its stated position that the two subsequent agreements were all that mattered.

54. As regards interest (sought at a rate of 5%, which is generally accepted in BAT awards), the Arbitrator has not seen any of the demands made of Respondent prior to 10 March 2016, even though there is reference in his Counsel's letter of that date to earlier demands. The Arbitrator does not find any explanation for the delay from the end of the 2014-2015 season (when the debt finally arose in total) to the written demand of 10 March 2016, and then to the filing of the Request for Arbitration on 26 May 2016. It would be unfair to Respondent to apply interest from a date earlier than 21 March 2016 (being the day after the deadline in Counsel's letter), and, therefore, the Arbitrator awards Player interest at 5% from 21 March 2016 until payment in full by Respondent.

7. Costs

87. 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.

88. On *21 February 2017* – 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 11,000.00.

89. Considering that Player prevailed in this arbitration, it is consistent with the provisions of the BAT Rules that, in general, the fees and costs of the arbitration, as well as Player's reasonable costs and expenses, be borne by Respondent. Of specific relevance in this regard is an aspect of Article 17.3 of the BAT Rules ("*[W]hen deciding on the arbitration costs and on the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties*"). Additionally, the Arbitrator notes the provisions of Article 17.4 of the BAT Rules as follows:

> *"The maximum contribution to a party's reasonable legal fees and other expenses (including the non-reimbursable handling fee) shall be as follows:*
>
> | Sum in Dispute
(in Euros) | Maximum contribution
(in Euros) |
> |---|---|
> | up to 30,000 | 5,000 |
> | from 30,001 to 100,000 | 7,500 |
> | from 100,001 to 200,000 | 10,000 |
> | from 200,001 to 500,000 | 15,000 |
> | from 500,001 to 1,000,000 | 20,000 |
> | over 1,000,000 | 40,000 |
>
> *In case of multiple Claimants and/or Respondents, the maximum contribution is determined separately for each party according to the foregoing table on the basis of the relief sought by/against this party."*

90. Given that the sum in dispute in this case fell in the range of EUR 30,001 to 100,000, the maximum possible amount which could be awarded by the Arbitrator as a

contribution to reasonable legal fees and other expenses is EUR 7,500.00.

91. Turning to Player's actual claim for legal fees and expenses, he seeks EUR 7,500.00 (the maximum amount awardable). As noted already, EUR 2,000.00 was paid by Player in respect of the non-reimbursable handling fee. Thus, subtracting that amount from the maximum awardable amount of EUR 7,500.00 results in a maximum awardable figure for legal fees of EUR 5,500.00.

92. The Arbitrator has noted already that the presentation of the computation of the claim was not satisfactory, but was upheld in all the circumstances of the case and materials presented to the Arbitrator. The Arbitrator also notes that, by far, the majority of the case was taken up with a jurisdiction challenge mounted by Respondent, which did not prevail.

93. Taking into account the factors required by Article 17.3 of the BAT Rules, the maximum amount prescribed under Article 17.4 of the BAT Rules, and the specific circumstances of this case, the Arbitrator holds that EUR 6,500.00 represents a fair and equitable contribution by Respondent to Player's legal costs and expenses, including the non-reimbursable handling fee. This decision has been strongly influenced by the unsuccessful jurisdiction challenge mounted by Respondent.

94. The Arbitrator decides that in application of Article 17.3 of the BAT Rules:

    (i) Respondent shall pay EUR 5,500.00 to Player, being the amount of the costs advanced by him and now owed to Player;

    (ii) Respondent shall pay EUR 6,500.00 to Player, representing a contribution by it to his legal fees and expenses.

8. AWARD

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

1. **Juvecaserta srl shall pay Mr. Marco Mordente EUR 47,000.00, net, as unpaid salary, together with interest at 5% per annum from 21 March 2016.**

2. **Juvecaserta srl shall pay Mr. Marco Mordente EUR 5,500.00 as reimbursement for his arbitration costs.**

3. **Juvecaserta srl shall pay Mr. Marco Mordente EUR 6,500.00 as a contribution to his legal fees and expenses.**

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

Geneva, seat of the arbitration, 1 March 2017

Klaus Reichert
(Arbitrator)