

ARBITRAL AWARD

(BAT 0805/16)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Henry Domercant

- Claimant -

represented by Mr. Brett Friedman, attorney at law,
2275 Research Blvd., Suite 500, Rockville, MD 20850, USA

vs.

Basket Juvecaserta s.r.l.

PalaMaggiò, Via Sannitica – loc. Pezza delle Noci,
81020 Castel Morrone CD, Italy

- Respondent -

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

1. The Parties

1.1. The Claimant

1. Mr. Henry Domercant (hereinafter “the Player”) is a professional basketball player of US and Bosnian nationality.

1.2. The Respondent

2. Basket Juvecaserta s.r.l. (hereinafter the “Club”) is a professional basketball club located in Caserta, Italy.

2. The Arbitrator

3. On 10 March 2016, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren, 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 15 January 2015, the Parties entered into an employment contract (hereinafter “the Player Contract”) for the remainder of the 2014-2015 season. The salary of the Player was agreed at USD 80,000 net of any Italian taxes, payable in one instalment of USD 15,000 upon passing of the medical entry examination, and 5 monthly instalments of USD 13,000 due on the last day of each month, starting on 30 January 2015. The Player was also entitled to a bonus of USD 20,000 if the Club’s team would not be relegated to the Italian Second Division for the 2015-2016 season. In addition, the Parties agreed on certain benefits for the Player including the Club’s obligation to pay

for housing and transportation expenses, including four round-trip economy class airplane tickets USA-Italy-USA.

5. On 22 January 2015, the Parties also signed a so-called "Simple Contract". That is a template contract provided by the Federazione Italiana Pallacanestro (Italian Basketball Federation) to be submitted to the league administration. The Simple Contract provides for a base salary of EUR 79,000 and a bonus of EUR 24,500 if the team would "Stay in League A".
6. According to the rankings at end of the 2014-2015 season, the Club's team would have been relegated to the Second Division. It was however allowed to remain in the First Division because another club (Acea Virtus Roma), due to administrative reasons, was not promoted to the First Division.
7. The Player played with the Club's team until the end of the 2014-2015 season.

3.2. The Proceedings before the BAT

8. On 11 February 2016, the Player filed a Request for Arbitration in accordance with the BAT Rules. A non-reimbursable handling fee of EUR 2,000 was received in the BAT bank account on 18 February 2016.
9. By Procedural Order of 14 March 2016, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties that the Arbitrator had been appointed. 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 4 April 2016. The BAT Secretariat also requested that the Parties pay the following amounts as Advance on Costs by no later 24 March 2016:

<i>"Claimant (Mr Domercant)</i>	<i>EUR 5,000.00</i>
<i>Respondent (Basket Juvecaserta s.r.l.)</i>	<i>EUR 5,000.00"</i>

10. On 1 April 2016, the Club filed its Answer and a counterclaim.

11. The BAT Secretariat received the full Advance on Costs of EUR 10,000 on 29 March 2016 (Respondent's share paid by the Club) and 30 March 2016 (Claimant's share paid by the Player).
12. On 18 April 2016, the BAT Secretariat instructed the Club that it had to pay a separate non-reimbursable handling fee of EUR 1,500 by 28 April 2016, otherwise the counterclaim would be deemed withdrawn.
13. By letter of 4 May 2016, the BAT Secretariat informed the Parties that the Club had not paid the additional non-reimbursable handling fee in time and that the counterclaim was therefore deemed withdrawn.
14. Upon invitation by the BAT Secretariat, the Player commented on the Player's Answer on 24 May 2016 and the Club filed a Reply on 20 June 2016.
15. On 29 June 2016, the Player's counsel notified the BAT that he did not claim any legal fees because he had performed the legal work in his role as in-house counsel for the Player's agency. This did not concern the Player's claim for the non-reimbursable handling fee. On the same day, the Club's counsel submitted his account of costs.

4. The Positions of the Parties

4.1. The Player's Position

16. The Player submits the following in substance:
17. The Player Contract provides for a guaranteed base salary of USD 80,000. The Player received only USD 61,444.45. The Player accepts that the Club was entitled to an amount of USD 4,694.55 because of certain travelling and hotel costs that were advanced by the Club and that had to be reimbursed by the Player. The Player therefore requests payment of the remaining amount of USD 13,861.05, net of Italian taxes.

18. The only relevant agreement in this arbitration is the Player Contract which is a guaranteed contract. The Simple Contract is a league contract mainly for registration purposes. In case of conflict, the Player Contract prevails.
19. Although the Club's team finished the 2014-2015 season last, it was not relegated to the Second Division. The reservation in the Simple Contract according to which the Club was entitled to a 20% deduction from the Player's salary in case of relegation to the Second League does not apply and the Club is not entitled to make any deductions.
20. The Player also requests late payment fees, as provided by the Player Contract.
21. Concerning the Club's claim for reimbursement of costs (flight upgrades, hotel costs and car repair):
 - (a) The car repair costs are disputed since no accident happened. In any case, such costs should be covered by the insurance.
 - (b) The Player has already "paid" USD 4,694.50 of the claimed flight ticket costs, corresponding to one flight upgrade and the hotel costs. He received only USD 61,444.45 although USD 66,138.95 were due by the end of the 2014-2015 season.
 - (c) Of the claimed flight upgrade and hotel costs of EUR 9,266.67 (corresponding to USD 10,333.97), USD 4,694.50 has been "paid" by the Player. There remains an amount of USD 5,639.37 (i.e. EUR 5,035.15 applying the same exchange rate of 1.12 USD/EUR), which must be borne by the Club and cannot be reclaimed from the Player because the Club (Mr. Iavazzi) confirmed to the Player's agent during the contract negotiations that the Club would cover the flight upgrade costs. The Club is not able to show the exact price of these flight upgrades and it has claimed these costs only more than one year after the date when these costs occurred.

4.2. The Claimants' Request for Relief

22. The Request for Arbitration of 29 November 2016 contains the following Request for Relief:

"Claimant requests to be immediately paid his outstanding salary for the 2014-15 season of \$ 13,861.05, net of Italian taxes.

Pursuant to Article 4(A), Claimant also requests late fees of \$ 100 USD per day since June 16th, 2015, a total of \$ 24,100 USD (241 days X \$ 100 USD per day).

Should Claimant's request for late fees be for any reason denied, Claimant requests that interest be assessed at a reasonable rate on all amounts that Arbitrator determines that Respondent owes Claimant.

Claimant requests that Respondent should pay all of the costs of this arbitration, as later determined by the President of the BAT.

Claimant requests reimbursement from Respondent of the advance of BAT costs.

Claimant requests that Respondent should pay all of Claimants legal fees."

4.3. The Club's Position

23. With regard to the merits of the claim, the Club submits the following:

- (a) The Simple Contract (league contract) was signed later and is the only relevant agreement between the parties. That is also stipulated in paragraph 6 of the Simple Contract. It prevails over the Player Contract.
- (b) The Club was in fact relegated to the Second Division of the Italian League because it finished last at the end of the 2014-2015 season. That led to an automatic deduction of 80% from the Player's salary, as provided by the Simple Contract. That is also confirmed by the Collective Labour Agreement to which the Simple Contract refers.

- (c) The Club remained in the First Division only because another Club was relegated for “non-sporting” reasons. To be re-registered with the First Division led to substantial costs for the Club.
- (d) The Club incurred several costs for the Player in the total amount of EUR 12,546.67 (consisting of flight upgrade costs in the amount of EUR 8,706.67, costs of hotel accommodation of EUR 520 and car repair costs of EUR 3,320). These costs must be reimbursed since they are not part of the agreement with the Player. The costs are to be repaid either by way of a counterclaim or at least set off against any compensation which will be awarded to the Player.

4.4. The Club's Request for Relief

24. The Club requests the following:

1. *As already clarified, the Claimant has no right to receive the sum of \$ 13.861,05, because it's been correctly curtailed because of the relegation of the Club in the Italian Second Division;*
2. *Consequently, it's not due neither the further amount of \$ 24.000,00 asked by the Player for the delay in pay the sum of preceding point 1;*
3. *Therefore, the Respondent requests that the BAT:*
 - *Rejects the Claimant's Request for lack of jurisdiction, because it had not to be proposed at the Bat but at the “Arbitration Board located in Bologna”;*
 - *Declares that nothing is owed by the Basket Juvecaserta s.r.l. towards the Player, as the consequence of the Club's relegation in the Second Division;*
 - *Declares that Mr. Domercant has nothing to pretend by the Club;*
 - *Orders the Claimant to return to the Club the sums and the expenses prepaid by It on behalf of the Player, that is:*
 - *Price difference of the Flight tickets (business class rather than economy class);*
 - *Price of the fifth flight ticket, not contractually due;*
 - *Price of the “data change ticket”, not contractually due;*
 - *Price of the two nights spent in “Plaza Caserta” in full board, not contractually due;*
 - *Price for restore the damages caused by Mr. Domercant to the car given to him, as a contractually held;*

The whole, for the total amount of € 12.546.67.

- *Orders the Claimant to pay all costs involved as legal expenses, BAT fees, etc.*

- *In a subordinate position, in the unlikely event of upheld of the Claimant's Request, offsets the amount of the previous point 1. and 2. With the expenses made by Club to present point 3." (sic)*

5. Jurisdiction

25. 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).
26. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
27. 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.
28. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Article 5 of the Player Contract which reads as follows:

"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."

29. The Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
30. 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 5 of the Player Contract covers the present dispute.

31. The Club objects to the jurisdiction of BAT because in its opinion the only relevant contract was the Simple Contract (i.e. the league contract) which provides for a dispute resolution procedure before the Permanent Board of Conciliation and Arbitration located in Bologna as defined in the “Professional Players 2003” collective Labour Agreement.
32. The Player’s claim has been submitted to the BAT based on the arbitration agreement contained in the Player Contract. Whether the Simple Contract replaced the Player Contract is a matter the arbitrator must decide as part of the merits of the claim. According to Article 178(3) PILA, “[t]he validity of an arbitration agreement may not be contested on the ground that the principal contract is invalid or that the arbitration agreement concerns a dispute not yet existing.”
33. Since the arbitration clause in the Player Contract constitutes a valid arbitration agreement, the Arbitrator finds that he has jurisdiction to adjudicate the Player’s claim.

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 5 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.

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.

7. Findings

7.1. The Player Contract is the applicable agreement in this case

40. The Player Contract was validly signed by both Parties on 15 January 2015. That is the agreement on which the Player bases his claim. It is known and accepted that in the Italian League, a template agreement must be filed for registration purposes. That is the Simple Contract. It is not unusual that therefore, two signed agreements between the Club and the Player exist.
41. Under comparable circumstances, BAT jurisprudence has constantly held that the individually negotiated agreement will prevail unless there are indications that the parties intended to replace the individual agreement by the template league contract (see e.g. BAT 0477/13 and 0531/14). In the present case, no evidence has been submitted by the Club which would indicate that the Player Contract should be disregarded or that the Simple Contract was intended to replace the Player Contract which was negotiated and signed only a few days before. The global reference in the Simple Contract to the “Professional Players 2003” collective Labour Agreement without any further explanations from the Club is not enough to convince the Arbitrator that he should disregard the Player Contract.

7.2. The salary amount actually received by the Player

42. The Player claims outstanding salaries of USD 13,861.05 of an agreed total of USD 80,000. He submits in his comments to the Club’s Answer that he had received only USD 61,444.45. The difference of USD 4,694.50 corresponded to the costs for one additional flight ticket and the hotel costs as claimed, *inter alia*, by the Club in its Answer. The Player also submits that this amount had been deducted from his salary already before (see paragraph 7.4 below).

43. The Club submits that the Player had received USD 66,138.85 and not USD 61,444.45 and that no deduction had been made before, but it does not provide any proof of payment. The Player never asserted having received USD 66,138.85.
44. The Arbitrator finds that there is no evidence that the Player had received more than USD 61,444.45. He also finds it credible that USD 4,694.50 had been offset before against the costs of the additional flight plus the hotel costs (see paragraph 7.4 below).

7.3. No 20% salary reduction

45. The Player Contract, which is the relevant agreement in this case, does not contain a reservation that the Player must accept a 20% reduction of his salary in case of relegation of the Club's team to the Second League.
46. As a matter of fact, while the team would have been relegated to the Second Division based on the results and the ranking at the end of the 2015 season, it was allowed to remain in the First Division since a better placed club (Acea Virtus Roma) was relegated from the First Division due to administrative reasons. Even if the Simple Contract were to apply, a deduction of 20% from the Player's salary is justified only in case of an *effective* relegation. The wording in the Simple Contract is clear and does not make a difference when it comes to the reasons of relegation or non-relegation. The deduction from the salary may be justified because the Club will earn less from ticket sales, broadcasting and sponsoring fees if its team must play in the Second Division. However, such restrictions do not apply if the Club is continuing to play in the First Division, irrespective of the reasons of its non-relegation.
47. As a result, the Arbitrator notes that the Club was not relegated and therefore finds that the exception (salary deduction of 20%) does not apply. The Player is therefore entitled to the difference between the salary agreed (USD 80,000) and the salary actually received (as determined in paragraph 7.2), subject to any claims by the Club to be set off against the Player's claim (as determined in paragraph 7.4).

7.4. The Club's Counterclaim

48. Together with its answer, the Club filed a counterclaim for the reimbursement of certain costs which it incurred for the benefit of the Player. After the Club failed to pay the additional non-reimbursable fee to the BAT, the counterclaim was deemed to be withdrawn.
49. The Club may nevertheless claim that these costs shall be *offset* against any compensation awarded to the Player. While a counterclaim would have to be adjudicated independently from the Player's main claim, the Club's costs may still be offset against the Player's claim to the extent the Player's main claim has been granted. As such, the offsetting of costs shares the fate of the main claim whereas a counterclaim is a separate claim and must be adjudicated independently from the main claim.

(a) Car repair costs of EUR 3,320.00

50. The Arbitrator dismisses the claim for repayment of any car repair costs of EUR 3,320.00 since the Club failed to provide any evidence of such repair costs and any reasoning why such costs, if they had occurred at all, had not been covered by the car insurance policy.

(b) Hotel costs of EUR 520.00

51. The Player accepts that these hotel costs were incurred and that they had to be borne by him. He submits however that these costs have already been set off against the Player's salary claim and are part of the difference of USD 4,694.50 between the salary not paid by the Club and the salary claimed in this arbitration. The Arbitrator shares the view of the Player and dismisses the Club's request to reduce the Player's claim by the claimed hotel costs (see paragraph 7.2 above).

(c) Costs of the airplane tickets 17 Feb 2015/21 Feb 2015 [item #3 of the Club's Answer]:

52. The Player also accepts that these costs were incurred and that they had to be borne by him. Also these costs have already been set off against the Player's salary claim and are part of the difference of USD 4,694.50 between the salary not paid by the Club and the salary claimed in this arbitration. The Arbitrator shares the view of the Player and dismisses the Club's request to reduce the Player's claim by the ticket costs of 17 Feb 2015/21 Feb 2015 (see paragraph 7.2 above).

(d) Flight upgrades [items #1, #2, #4, #5, #6 of the Club's Answer]:

53. The Club submits that the Player upgraded certain flights to and from the US from economy to business class. The additional costs were advanced by the Club but must be reimbursed by the Player. The Player does not contest that these flight upgrades took place upon his request. However, he argues that he was promised by the Club that these costs would not have to be reimbursed, and disputes the price of these upgrades.
54. The Player does not provide any evidence for the Club's promise that the latter would bear the upgrade costs. On the other hand, Article 4 C ("Other benefits") paragraph 2 of the Player Contract explicitly states: *"Any difference in business class will be paid directly by the Player."* The Arbitrator does therefore not accept the Player's argument that the Club promised to bear these costs but finds that he must reimburse them, as he accepted reimbursement of the flight costs of 17 Feb 2015 – 21 Feb 2015 and the hotel costs. The Arbitrator cannot verify the cost of these flight upgrades based on the evidence submitted by the Club. The calculation in the Player's answer resulting in a total of USD 5,639.37⁵ may be a good starting point. However, the Arbitrator also takes into consideration that the Club did not claim these costs before, e.g. when the Player left the Club after the Player Contract came to an end, but raised them only in its Answer. Therefore, deciding *ex aequo et bono*, the Arbitrator finds that the Club is

⁵ The Arbitrator accepts the exchange rate of 1.12 USD/EUR which was applied by the Player.

entitled to a compensation of USD 3,500.00 which must be set off against the Player's claim of USD 13,861.05, resulting in an amount of USD 10,361.05.

7.5. Late payment penalty

55. The Player Contract provides for a late payment penalty of USD 100 per late day after 15 days upon maturity date. The salary was to be fully paid by 31 May 2015 at the latest.
56. Late payment penalties may be awarded until the termination of a contract or, at the latest, the date of filing of the Request for Arbitration (i.e. 11 February 2016). According to BAT jurisprudence, the amount of the penalty shall be limited if the delay in submitting the claim was unreasonable and not explained, if the penalty is disproportionate in relation to the claimed amount and in any event if the amount exceeds 100% of the claimed amount.
57. The Claimant provided no explanation why he waited until 11 February 2016 to submit his claim. Under the circumstances of this case, the Arbitrator finds the penalty excessive and, therefore, considering also the high amount of the daily penalty (USD 100) accepts that a reasonable period during which late penalty payments should run is 30 days. Thus, the Arbitrator limits the amount of the penalty to USD 3,000.

7.6. Summary

58. The Player shall be entitled to the unpaid salary for the 2014-2015 season (USD 13,861.05) against which certain costs which were pre-paid by the Club (USD 3,500) shall be set off. That results in an amount of **USD 10,361.25** to which a late payment penalty of **USD 3,000.00** shall be added. The Club is therefore obliged to pay **USD 13,361.25** (net of Italian taxes) to the Player.

8. Costs

59. 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.
60. On 25 July 2016 – 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.
61. Considering the circumstances, the claimed amounts and the outcome of case, the Arbitrator finds it fair that the fees and costs of the arbitration be equally borne by the Club and the Player. The remainder of the Advances on Costs paid by the parties will be repaid to them in equal shares.
62. The Arbitrator finds that, for the same reasons as explained in para. 60 above, each Party shall bear its own costs and legal fees.

9. AWARD

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

- 1. Basket Juvecaserta s.r.l. is ordered to pay to Mr. Henry Domercant the amount of USD 13,361.25, net of Italian taxes.**
- 2. The costs of this arbitration shall be equally borne by both parties.**
- 3. Each party shall bear its own legal fees and expenses.**
- 4. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 3 August 2016

Stephan Netzle
(Arbitrator)