



BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0334/12)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Scafati Basket S.r.l.
Via della Gloria, 84018 Scafati, Italy

represented by Mr. Enrico Zorzi, Studio Legale Zorzi – Comeli
Via Nicola Palma 12, 64100 Teramo, Italy

- Claimant -

vs.

Mr. Paul Lester Marigney

- Respondent -

1. The Parties

1.1 The Claimant

1. Scafati Basket S.r.l. (hereinafter also referred to as “the Club” or “the Claimant”) is a professional basketball club in Italy.

1.2 The Respondent

2. Mr. Paul Lester Marigney is an American professional basketball player (hereinafter referred to as “the Player” or “Respondent”).

2. The Arbitrator

3. On 21 October 2012, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Quentin Byrne-Sutton 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. While the Player was already playing for the Club during the 2011/2012 season, the parties signed another employment contract on 12 February 2012 (the “Contract”), whereby the Club engaged the Player for the 2012/2013 season.
5. Clause 5 of the Contract provided that, depending on whether the Club was playing in the “Lega 1” or in the “Lega 2” during the 2012/2013 season, the Player’s total salary

would be respectively USD 130,000 net or USD 115,000 net for the season and would be paid in monthly instalments of respectively USD 11,000 or USD 10,000.

6. In accordance with clause 5 of the Contract, the Club paid the Player an advance instalment of USD 10,000 on 12 February 2012, in exchange for which the Player signed a receipt the same day stating:

"I declare to receive Scafati Basket S.r.l. the sum of USD 10,000 (ten thousand/00 Usd) like advance payment for the contract of the season 2012/2013. I declare to give back the sum if don't passing the physical examination" [sic].

7. At the end of the 2011/2012 season, the Player returned to his home in the United States.
8. Unexpectedly, on 19 July 2012, the Player informed the Club via the team's General Manager, that he did not intend to return to play with the Club during the forthcoming season.
9. In his email of 19 July 2012, the Player declared:

"I Paul Marigney, who is now represented by Giovanni Funicello. I don't want to return to Legadue because I feel I am a player of the top league. I will pay you the money back that I borrowed but I will need to sign a lucrative contract to insure I can take care of my mothers medical bills and along with supporting my family ... It was a very difficult time for me and my family, and again I want to Thank you so much for the help..." [sic]

10. The same day, the Club's General Manager replied:

"Dear Paul, you have a valid FIBA contract with Scafati Basket S.r.l. Included a agreement with your agents E. Vye and V. Bernardi. In Italy we respect the contract. If you want to go in another top team you or your agent need to speak with us and if we find a good financial settlement, you can do the task, otherwise you remain a player of Scafati Basket S.r.l. for next year. We send to FIBA the contract and if we don't find an economic agreement we will act to legal action. Remember that we gave you money in advance for the next year". [sic]

11. On 20 and 23 July 2012, the Club wrote to the Player to advise on the commencement of pre-season training (August 19), reminding him at the same time, that he must withdraw his visa. Lastly, the Club invited him to indicate whether the flight schedule

proposed by the Club in connection with booking his plane ticket was fine.

12. On 1 August 2012, the Club sent the Player a reminder regarding the proposed flight schedule and reserved the right to request that he fly at his own expense failing a response.
13. On 7 August 2012, the Club wrote to the Player and two other recipients as follows:

“Dear Sirs, we inform you that the behaviour of Mr. Paul Lester Marigney is unprofessional and detrimental to the Scafati Basket which, remember, has an official League contract with the player, it is already punishable by a heavy financial penalty. The lack of answers to a number of communications sent to Mr. Marigney is causing great damage to our club for the composition of the roster right now because we do not know if Mr. Marigney will be or not to Scafati and we are unable to make choices both technically and economically. It is clear that the Club will do everything possible to safeguard it for legal action and believes it is damaged by this behaviour. It asks that we be notified of the intentions of Mr. Marigney within 24 hours of this, otherwise will follow for our protection”.
[sic]

14. The same day, the Player replied:

“Ciao Gino. I received your message. First of all I just want to say thank you for giving me the opportunity to play in Scafati. It was great. Thanks to all my fans and the people who supported me while playing there. At this time I feel it's time for me to move to a higher league. So I am taking my talents to the D-league and NBA's vet camp. So I will not be returning for the 2012-2013 season. We can discuss a financially agreement, just contact Giovanni Funicello for the buyout situation and then we will move forward. Scafati has been great. Thanks”. [sic]

15. The Club therefore proceeded to seek a solution and a settlement agreement in discussions with the Player's agent Mr. Giovanni Funicello.
16. On 24 August 2012, the Club's lawyer put the Player on notice to formalize the settlement agreement which it had discussed with his agent, and on 29 August confirmed that the Club would agree to an amicable solution whereby the Player would buy himself out of the Contract for a total payment of USD 50,000 (inclusive of the agent's fee and the return of the advance payment).
17. However, in the end, those discussions as well as an attempt to place the Player with a

new club in exchange for compensation were to no avail, and in October 2012, the Club discovered that the Player was intending to sign for the upcoming season with another Italian club, which he did.

18. The Player is currently playing in the Italian *LegaDue* for a club named *Basket Veroli*.
19. Given the Player's refusal to honour the Contract in the above circumstances, the Club decided to file an arbitration claim for the reimbursement of the advance payment of USD 10,000 made to the Player and for compensation, in an amount estimated at USD 40,000, for the damages caused to the Club by the Player unilaterally terminating the Contract without cause and refusing to play for the Club during the 2012/2013 season.

3.2 The Proceedings before the BAT

20. On 10 October 2012, the Claimants filed a Request for Arbitration in accordance with the BAT Rules and duly paid the non-reimbursable handling fee of EUR 2,000 on 15 October 2012.
21. On 22 November 2012, the BAT informed the Parties that Mr. Quentin Byrne-Sutton had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

"Claimant (Scafati Basket) EUR 3,500

Respondent (Mr Paul Marigney) EUR 3,500"

22. In the same letter, the BAT informed the Respondent that he must file his Answer by 13 December 2012 and added *"Please note that according to Art. 14.2 of the BAT Rules the Arbitrator may proceed with the Arbitration even if the Respondent fails to submit an Answer or to submit his Answer in accordance with Art. 11.2 of the BAT Rules"*.
23. On 5 December 2012, the Claimant paid its share of the advance on costs.

24. The Respondent failed to submit an Answer within the fixed deadline.
25. On 8 January 2013, the Claimant paid the Respondent's share of the advance on costs in substitution for the latter's non-payment.
26. On 9 January 2013, the BAT forwarded to the Player's new Italian club, to the attention of the Player, two letters concerning the pending arbitration, one of which (dated 8 January 2013) granted the Player a further opportunity to submit an Answer to the Request for arbitration.
27. In its covering letter of 9 January 2013, the BAT added:

"Please ensure that this communication is handed over without delay to Mr Marigney. We would ask you to inform us once the letters have been handed over".
28. The BAT's enclosed letter of 8 January 2012 included the following reminder:

*"Since the BAT's correspondence dated 18 December 2012 (attached) could not be delivered to the Respondent's address, the Respondent is herewith granted a **final** opportunity to file an Answer to the Request for Arbitration by no later than Friday, 11 January 2013. The Respondent is given notice of the fact that, in accordance with Article 14.2 of the BAT Rules, if the Respondent fails to submit an Answer the arbitrator may nevertheless proceed with the arbitration and deliver an award".*
29. The same day, the Player countersigned and returned to the BAT, its foregoing covering letter of 9 January 2013, thereby acknowledging receipt of the attached letters.
30. However, despite acknowledging receipt of the reminder, the Player did not submit an Answer.
31. By Procedural Order of 25 January 2013, the BAT took note of the Respondent's failure to submit an Answer and invited the Claimant to clarify its position with respect to the nature and quantum of its claim for USD 40,000 in damages.
32. On 5 February 2013, the Claimant filed its additional submission with regard to the damages.

33. On 7 February 2013, the Respondent was invited to comment on the Claimant's additional submission.
34. The Respondent did not submit any comments but requested an extension.
35. On 20 February 2013, the Respondent was allowed an extension until 26 February to file his submission.
36. The Respondent did not file any submission within the extended deadline.
37. By Procedural Order of 4 March 2013, the proceedings were closed and the parties invited to submit their statements of costs. Further, the BAT sent a covering letter to the Player's new Italian club, inviting it to hand over the communication to the Player.
38. On 9 March 2013, the Claimant submitted its statement of costs. The Respondent failed to file any statement of costs..
39. On 12 March 2013, the Respondent was invited to file any observations on the Claimant's statement of costs.
40. The Respondent filed no such observations.
41. On 14 March 2013, the Player's new Italian club sent to the BAT the covering letter of 4 March 2013 countersigned by the Player.

4. The Positions of the Parties

4.1 The Claimant's Position

42. In a nutshell and in substance, the Club contends that:
 - The Player breached the Contract by unilaterally deciding, without just cause, not to honour it – by refusing to play for the Club in the 2012/2013 season as he had

contractually undertaken to do – and by not reimbursing the advance payment of USD 10,000 he had received from the Club.

- Accordingly, the Club is contractually entitled to claim back the advance payment of US 10,000 and to seek damages for the breach of the Contract, such damage claim also being justified *ex aequo et bono*.
- It corresponds to general principles of damage law and is equitable that in the circumstances, the Club is entitled to receive as compensation an amount of USD 40,000 in damages, corresponding, among others, to the additional fees paid to a company named “*Lionbridge*” to seek a replacement player.
- Furthermore, the Player should be subject to disciplinary and economic sanctions for the serious violation of his contractual duties and breach of the trust placed in him by the Club. In that relation, the “... *team Scafati had full and complete reliance, having for so signed a contract to that effect, the presence in the team of its best player in the last season*” [...] and it “... *had built and designed the roster on that assumption. The sudden change in the idea of Mr. Marigney, which occurred just prior to the initiation of the season has completely changed the plans and the organization of the team and forcing the company to rethink its technical situation in a hurry*”. [sic]

43. In its Request for Arbitration, the Claimant requested the following relief:

- *To ascertain and declare the responsibility of Mr. Marigney in breach of the contract signed on February 12th 2012;*
- *To order Mr. Marigney to return to the Club the sum of \$10,000 plus interest from February 12th 2012;*
- *To order Mr. Marigney compensation for damage suffered by the Club for the serious breach of the contract, which is quantified in the sum of \$ 40,000.00, or that the court deems equitable;*
- *To pay to the Club all arbitration proceeding costs;*

- *To pay to the Club all legal fees and expenses of accrued to the Club from these arbitration proceedings*

4.2 Respondent's Position

44. As previously stated, despite several invitations to do so, the Player has not made any submissions in these proceedings.

5. The Jurisdiction of the BAT

45. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent did not participate actively in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.¹

46. 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).

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

48. 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.²

49. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under clause 13 of the 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

¹ ATF 120 II 155, 162.

² Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

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."

50. The foregoing arbitration agreement is in written form and thus fulfils the formal requirements of Article 178(1) PILA.
51. With respect to its 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).
52. Moreover, the arbitration agreement covers all aspects of the dispute being raised in this proceeding and the jurisdiction of the BAT has not been challenged.
53. For the above reasons, the Arbitrator has jurisdiction to adjudicate the claims submitted by the Club against the Player.

6. Discussion

6.1 Applicable Law – ex aequo et bono

54. 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”.

55. 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.”

56. Clause 13 of the Contract provides that if and when any dispute between the parties hereto is submitted to the BAT: *“The arbitrator shall decide the dispute ex aequo et bono”*.
57. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Claimant against the Player in this arbitration in front of the BAT.
58. 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’arbitrage³ (Concordat)⁴, 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.”*⁵
59. 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.”*⁶
60. 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”*.

³ 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).

⁴ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

⁵ JdT 1981 III, p. 93 (free translation).

⁶ Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717. pp.625-626.

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

6.2 Findings

62. In sum, the questions that need addressing on the merits of the claim are (i) whether the Club is entitled to be reimbursed the advance payment of USD 10,000 it made to the Player on 12 February 2012 under clause 5 of the Contract, (ii) whether the Club is entitled to damages because the Player abandoned the Club by deciding to not turn up for the 2012/2013 season for which he had been engaged under the Contract, and, if so (iii) what is the amount of compensation to which the Club is entitled as damages.

63. Despite having had ample opportunity to make submissions, the Player did not contest the Club's allegations as to the facts of its claims, nor did he challenge the evidence adduced in that connection.

64. Furthermore, with respect to the request by the Club for the reimbursement of the advance of USD 10,000 made to the Player, the evidence adduced establishes with certainty that the Player did receive that amount from the Club as an advance payment for the 2012/2013 season and that he recognizes a duty to pay it back due to his decision to not return to the Club for that season.

65. Consequently, the Club shall be awarded an amount of USD 10,000 to serve as reimbursement of the advance it made to the Player.

66. The Club is requesting interest on that amount from the date of 12 February 2012 on which the sum was advanced to the Player.

67. The Arbitrator finds that because the sum of USD 10,000 was paid in advance to the Player on the basis of clause 5 of the Contract under the implicit condition that he would be playing for the Club in the 2012/2013 and he decided for his own convenience to disregard that undertaking, the advance payment ended up having been made without due cause.

68. It is therefore fair that interest be awarded and that it begin to run from the day after the advance was made, i.e. from 13 February 2012 onwards when the Club lost the benefit of being able to use that sum of money.
69. In keeping with the jurisprudence of the BAT in cases where an interest rate is not specified in the applicable contract, interest will be awarded on the amount of USD 10,000 at 5% per annum.
70. Concerning the Club's request for damages, it must establish the Player's liability and prove the existence and quantum of the damage.
71. The Arbitrator finds that the Player is liable for breach of contract because he blatantly disregarded the basic principle "*pacta sunt servanda*" by deciding for reasons of personal convenience, to simply not honour the Contract at all, i.e. to abandon the Club without even starting the 2012/2013 season for which he had signed; and in addition he informed the Club very late.
72. Indeed, despite having been one of the Club's best players during the prior season (2011/2012) and therefore being important for the Club, he announced his decision to the Club only about one month before the beginning of the pre-season training for the 2012/2013 season, stating the following: "*I don't want to return to Legadue because I feel I am a player of the top league*".
73. The reason invoked by the Player was also paradoxical and unfair because the Contract he signed on 12 February 2012 for the next season (2012/213) specifically anticipated and stipulated that the Club might remain in the "*Lega 2*" during the 2012/2013 season – depending on the final standing of the team in the season underway – and provided what the Player's salary would be in that case.
74. In other words, the Player had accepted the idea of playing another season in the *LegaDue*, and the Club was counting on him doing so even if it were not promoted to the "*Lega 1*".

75. Furthermore, it turns out that the Player ultimately signed a new contract for the 2012/2013 season with another Italian club, *Basketball Varoli*, which is also playing in the *LegaDue*.
76. Thus, the Player committed a serious breach of contract and acted in an unfair and contradictory manner, which makes him liable to the Club for the ensuing damages.
77. The question remains whether the Club has sufficiently proven the existence and quantum of the USD 40,000 in damages it is claiming.
78. In that relation, it is noteworthy that it is not uncommon under rules and principles of damage law, to allow a judge or arbitrator some discretion in evaluating the quantum of the damage if the exact amount cannot be established because the nature of the damage or the circumstances render the proof particularly difficult, providing the claiming party substantiates the facts leading to the existence of the damage and gives certain indications as to the quantum.
79. Furthermore, in keeping with the jurisprudence of the BAT, the Arbitrator finds that the *ex aequo et bono* clause in the Contract allows for a special indemnity to be fixed as compensation for damages, in order to adequately compensate a party that has convincingly evidenced the existence of damages, while at the same time its nature and/or the particular factual circumstances surrounding the damaging event(s) make the substantiation of the amount difficult or impossible.
80. Here, the Club is claiming it suffered from a certain amount of additional expenses due to the Player's unexpected and late announcement that he would not be returning to the Club for the next season.
81. The Arbitrator finds that the non-return of the Player to the Club without any justified cause, combined with the late announcement to the Club of that unilateral decision by the Player, no doubt caused substantial complications to the Club and disturbed its preparation for the upcoming season because it was relying on his services; and that,

in light of the evidence adduced, overcoming those complications certainly caused the Club to incur additional costs.

82. More specifically, it is clear from the facts and chronology of events evidenced by the Club in relation to its claim that it incurred additional expenses such as internal costs and lawyer's fees caused by having to address the problem, as well as recruiting fees to find a replacement player.
83. However, the amount of such additional expenses is not sufficiently substantiated, and the documents produced to establish the recruiting fees are not specific enough to know what part thereof is linked to the search for a replacement player.
84. The Arbitrator shall therefore fix an indemnity *ex aequo et bono*.
85. In determining the quantum of the special indemnity, the Arbitrator has a broad discretion based on his authority to decide *ex aequo et bono*.
86. That said, because arbitrators officiating under the BAT Rules do not have the power to apply disciplinary sanctions and the Contract does not contain any form of penal clause or liquidated damage clause in favour of the Club, the amount of the indemnity awarded shall not be punitive in nature but compensatory, and it shall be determined with the aim of estimating an amount which is as close as possible to what the actual damage suffered was, bearing in mind all the relevant facts and evidence.
87. In light of the foregoing criteria and having considered the nature of the damages invoked by the Club, i.e. additional costs it had to incur to address the unexpected and late announcement by the Player that he would not be returning to the team, the Arbitrator finds it adequate to award the Club, *ex aequo et bono*, compensation in an amount of USD 20,000.
88. In reaching that figure, the Arbitrator has borne in mind, in relation to the period of time involved, the typical fees of external services such as lawyers and recruiting agents

and the extra time and effort – generating internal expenses – that the Club had to invest in negotiations with the Player and looking for a replacement.

89. Given the equitable nature of the compensation thus fixed by the Arbitrator, it shall bear interest at 5% per annum from the date of this award.

7. Costs

90. 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.
91. On 25 March 2013 - 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 6,966.50.
92. Considering the Claimant prevailed in large part in its claim, it is fair that the fees and costs of the arbitration be borne by the Respondent and that he be required to make a contribution to the legal fees and expenses of the Claimant in an amount of EUR 5,110, which is reasonable in view of the submissions made and the complexity of the matter at hand.
93. Given that the Claimant paid advances on costs of EUR 6,966.50 as well as a non-

reimbursable handling fee of EUR 2,000 (which will be taken into account when determining the Claimant's legal fees and expenses), while the Respondent failed to pay any advance on costs, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

- (i) The Respondent shall pay EUR 6,966.50 to the Claimant, being the amount of the costs advanced by the Claimant;
- (ii) The Respondent shall pay to the Claimant EUR 7,110 (2,000 for the non-reimbursable fee + 5,110 for legal fees) representing the amount of the Respondent's contribution to the Claimant's legal fees and other expenses.

8. AWARD

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

- 1. Mr. Paul Lester Marigney shall pay Scafati Basket S.r.l. an amount of USD 10,000 as reimbursement of monies due, plus interest at 5% per annum on such amount from 13 February 2012 onwards.**
- 2. Mr. Paul Lester Marigney shall pay Scafati Basket S.r.l. an amount of USD 20,000 as compensation for damages, plus interest at 5% per annum on such amount from the date of this award onwards.**
- 3. Mr. Paul Lester Marigney shall pay Scafati Basket S.r.l. an amount of EUR 6,966.50 as reimbursement for its arbitration costs.**
- 4. Mr. Paul Lester Marigney shall pay Scafati Basket S.r.l. an amount of EUR 7,110 as a contribution to its legal fees and expenses.**
- 5. Any other or further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 27 March 2013.

Quentin Byrne-Sutton
(Arbitrator)