



**BASKETBALL**  
ARBITRAL TRIBUNAL

## **ARBITRAL AWARD**

**(BAT 0409/13)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Quentin Byrne-Sutton**

in the arbitration proceedings between

**Mr. Patricio Prato,**

represented by Mr. Sébastien Ledure, attorney at law,  
Lorenz International Lawyers, Boulevard du Régent 37-40,  
1000 Brussels, Belgium

**- Claimant -**

vs.

**Andrea Costa Imola Basket srl**  
Via Valeriana 7/A, 40026 Imola (BO), Italy

**- Respondent -**

## **1. The Parties**

### **1.1 The Claimant**

1. Mr. Patricio Prato is a professional basketball player (hereinafter also referred to as “the Player” or “the Claimant”).

### **1.2 The Respondent**

2. Andrea Costa Imola Basket srl (hereinafter also referred to as “the Club” or “the Respondent”) is a professional basketball club in Italy.

## **2. The Arbitrator**

3. On 17 June 2013, 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. On 9 July 2010, the Club and the Player entered into a contract for the 2010/2011 and 2011/2012 seasons (the “Agreement”), whereby the latter would receive a total net salary of EUR 115,000 per season.
5. According to the Player, he was also entitled under Italian labour law to a monthly allowance of EUR 700 for transportation costs, from September 2010 to June 2011 and

from September 2011 to June 2012, amounting to a total amount of compensation of EUR 14,000.

6. On 30 August 2011, the Player signed an agreement with “Protalent & Scouting Management s.r.o.” (“Protalent”) relating to the assignment of his image rights for the 2011/2012 season (the “Image-Right Contract”).
7. On 20 September 2012, the Club sent an email to “*annalisafabbri@rochetmail.com*” (which according to the Player is his spouse), the text of which began with the address “*caro Patricio*” (dear Patricio), with a copy to Filippo Nanni (which according to the Player was his agent at the time), acknowledging on that date a total debt of EUR 55,126 and proposing to pay it off by means of seven installments of EUR 7,875 between 15 October 2012 and 31 January 2013.
8. On 12 and 20 March 2013, the Player’s counsel sent two successive letters of notice to the Club, on behalf of Protalent and the Player, indicating that the Club had failed to pay an amount of EUR 49,000 owed to Protalent and an amount of EUR 4,200 owed to the Player (relating to the reimbursement of costs between January and June 2012). The letters indicated that in case of non-payment of the amounts being claimed, a claim would be filed with the BAT.
9. On 21 March 2013, the Club answered by proposing as follows an installment plan: “... *what we can offer to balance the credit 2011-2012 of Mr Patricio Prato for EUR 49,000 is a payment plan starting on April 15, 2013 to September 15, 2013*”.
10. Deeming that the foregoing proposal by the Club was not acceptable because part of the debt owed (an amount of EUR 4,200) was not included therein and because the Club had failed to honour its earlier proposal, the Player refused the offer and filed a request for arbitration with the BAT.

### 3.2 The Proceedings before the BAT

11. The Player filed a Request for Arbitration dated 29 April 2013, in accordance with the BAT Rules, and on 2 May 2013 the non-reimbursable handling fee of EUR 2,000 was received by the BAT.

12. On 19 June 2013, 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:

<i>“Claimant (Mr. Patricio Prato)</i>	<i>EUR 4,000</i>
<i>Respondent (Andrea Costa Imola Basket srl)</i>	<i>EUR 4,000”</i>

13. In the foregoing letter, the BAT also underlined that: *“The Answer shall be filed by the Respondent in accordance with Art. 11.2 of the BAT Rules by no later than **Wednesday, 10 July 2013**”* and reminded the parties 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”*.

14. On 3 July 2013, the Claimant paid his Advance on Costs in an amount of EUR 4,000.

15. The Respondent failed to pay its portion of the Advance on Costs and to submit an Answer within the fixed deadlines or to communicate with the BAT in any manner in that connection.

16. By procedural order of 16 July 2013, the Claimant was given the opportunity to substitute for the Respondent’s non-payment of its portion of the Advance on Costs. At the same time, the procedural order stipulated that the Respondent is *“... granted a **final opportunity to file an Answer to the Request for Arbitration by no later than Tuesday, 23 July 2013.** The Respondent is hereby 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'.*

17. Despite the foregoing extension of the deadline, the Club failed to submit an Answer.
18. On 23 July 2013, the Claimant paid the balance of the Advance on Costs.
19. By procedural order of 8 August 2013, the Claimant was requested to answer various questions by the Arbitrator and submit several documents.
20. On 2 September 2013, the Claimant filed its answers and the requested documents it had in its possession.
21. On 11 September 2013, the proceedings were closed and the parties invited to file their statements of costs.
22. On 16 September 2013, the Claimant filed his statement of costs. The Respondent did not submit any such statement.
23. By procedural order of 19 August 2013, the Respondent was given the opportunity to file comments on the Claimant's statement of costs but did not do so.

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

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

24. The Player submits the following in substance:
  - The Club breached its obligations under article 3 of the Agreement, by failing to pay him an amount of EUR 49,000 out of the salaries owed under that provision.
  - On two occasions, on 20 September 2012 and 21 March 2013, the Club acknowledged owing him that amount.

- Under Italian law, he was also entitled to a monthly allowance from the Club to cover transportation costs, of which an outstanding amount of EUR 4,200 was never paid; and the Club has never contested owing that amount.
- Consequently, based on the Agreement, the principle *pacta sunt servanda* and Italian law, he is entitled to claim those amounts.
- Furthermore, he is entitled to interest on those amounts and to be paid costs in keeping with the BAT jurisprudence and Rules.

25. In his Request for Arbitration dated 29 April 2013, the Claimant requested the following relief:

*“Respondent is liable to pay to Claimant the amount of forty-nine thousand Euro (49,000€) net in principal;*

*Respondent is liable to pay to Claimant the amount of four thousand two hundred Euro (4,200€) net in principal;*

*Respondent is liable to pay to Claimant interest on late payments of 5% per annum on the amount of fifty-three thousand two hundred Euro (53,200€) from June 15, 2012 until the day of complete payment.*

*Respondent shall indemnify Claimant for incurred legal expenses (including compensation for the BAT Handling Fee and attorney’s fees) up to an amount to be determined in the course of the BAT proceedings.”*

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

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

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

27. As a preliminary matter, the Arbitrator wishes to emphasize that, since the Respondent

did not participate in the arbitration, he will examine his jurisdiction ex officio, on the basis of the record as it stands<sup>1</sup>.

28. 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).
29. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
30. 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.<sup>2</sup>
31. The Claimant is invoking the jurisdiction of the BAT over the dispute on the basis of the arbitration clause contained under article 8 of the Agreement, which reads as follows:

*“Any dispute arising from or related to the present contract shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by FAT 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.”*

32. The foregoing arbitration agreement is in written form and thus fulfils the formal requirements of Article 178(1) PILA. Also, in accordance with 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”.
33. With respect to substantive validity, the Arbitrator considers that there is no indication

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<sup>1</sup> ATF 120 II 155, 162.

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

in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).

34. Furthermore, the Arbitrator finds that the arbitration agreement covers the subject matter of the claim.
35. For the above reasons, the Arbitrator finds he has jurisdiction to adjudicate the Player's claims against the Club.

## **6. Discussion**

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

36. 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”.*

37. 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.”*

38. Article 8 of the Agreement includes a sentence providing that if and when any dispute is submitted to the BAT: *“The arbitrator shall decide the dispute ex aequo et bono”.*
39. Consequently, the Arbitrator shall decide *ex aequo et bono* the claims brought by the Player against the Club in this arbitration in front of the BAT.

40. The concept of “équité” (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage<sup>3</sup> (Concordat)<sup>4</sup>, under which Swiss courts have held that arbitration “en équité” is fundamentally different from arbitration “en droit”:

*“When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.”<sup>5</sup>*

41. 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*”.
42. In light of the foregoing considerations, the Arbitrator makes the findings below.

## 6.2 Findings

43. Despite having ample opportunity to make submissions, the Respondent did not contest the Player’s allegations as to the facts of his claim, nor did it challenge the evidence adduced in that connection.
44. Furthermore, on their face, the content of the Agreement, of the Club’s email of 20 September 2012 and of its letter of 21 March 2013, all confirm the reality of the Claimant’s allegation that he is still owed **EUR 49,000** under article 3 of the Agreement.
45. Although the recipients of the email of 20 September 2012 are not clearly established by the evidence adduced, the acknowledgment of debt contained therein is confirmed

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<sup>3</sup> That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

<sup>4</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

<sup>5</sup> JdT 1981 III, p. 93 (free translation).

in the Club's letter of response of 21 March 2013 to the Player's written notices. Also, both the email and the letter in question make it clear that the Club deemed the Player himself to own a contractual right to claim EUR 49,000 against the Club, despite the Player having signed the Image-Right Contract and despite the two notice letters of March 2013 having been sent to the Club on behalf of both the Player and Protalent. Indeed, in the conclusion to its letter of 21 March 2013, the Club states: "*At the end of this letter, what we can offer to balance the credit 2011-2012 of Mr Patricio Prato for EUR 49,000.00 is a payment plan starting on April 15, 2013 to September 15, 2013*".

46. For the above reasons, the Arbitrator finds that the Club's debt of EUR 49,000 towards the Player is established and that he has standing to sue the Club for such amount.
47. As a result, that amount will be awarded to the Player.
48. With respect to the amount of **EUR 4,200** being claimed by the Player as compensation corresponding to a monthly transportation-cost allowance of EUR 700 allegedly owed under Italian law, the Arbitrator finds that the Club's email of 20 September 2012 also establishes that the Club did deem a monthly allowance of EUR 700 for costs to be owed to the Player between January – May 2012 in addition to his salaries.
49. Consequently, and because the contractual monthly salaries to which the cost allowance was related included a last instalment to be paid in June 2012, the Arbitrator shall award the entire amount of EUR 4,200 being claimed by the Player in that connection.
50. In keeping with BAT jurisprudence, interest at 5% per annum will be awarded on the foregoing principal amounts and the Arbitrator finds it fair that such interest run from 16 June 2012, since according to the Agreement all the salaries stipulated under its article 3 were due for payment by 15 June 2012 and according to the evidence adduced the total amount of the transport-cost allowance was also due by such date.

## 7. Costs

51. 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.
52. On 18 October 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 5,555.
53. Considering that the Claimant entirely prevailed in his claim, it is fair that the fees and costs of the arbitration be borne by the Club and that it be required to cover its own legal fees and expenses as well as make a contribution to those of the Claimant in an amount of EUR 3,500. The Arbitrator notes that the Claimant’s counsel has included in his statement of costs time spent in relation to the dispute but not in connection with the BAT proceedings (e.g. drafting notice letters) which may not be compensated through these proceedings.
54. Given that the Claimant paid advances on costs of EUR 8,000 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 Club failed to pay any advance on costs, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:

- (i) BAT shall reimburse EUR 2,445 to the Claimant, being the difference between the costs advanced by him and the arbitration costs fixed by the BAT President.
- (ii) The Club shall pay EUR 5,555 to the Claimant, being the difference between the costs advanced by him and the amount he is going to receive in reimbursement from the BAT;
- (iii) The Club shall pay to the Claimant EUR 5,500 (2,000 for the non-reimbursable fee + 3,500 for legal fees) representing a contribution to his legal fees and other expenses. The total amount awarded does not exceed the maximum compensation stipulated in Article 17.4 of the BAT Rules for cases of this value.

## **8. AWARD**

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

- 1. Andrea Costa Imola Basket srl shall pay Mr. Patricio Prato an amount of EUR 53,200 net of tax as compensation plus interest at 5% per annum on such amount from 16 June 2012 onwards.**
- 2. Andrea Costa Imola Basket srl shall pay Mr. Patricio Prato an amount of EUR 5,555 as reimbursement for his arbitration costs.**
- 3. Andrea Costa Imola Basket srl shall pay Mr. Patricio Prato an amount of EUR 5,500 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, 21 October 2013

Quentin Byrne-Sutton  
(Arbitrator)