

ARBITRAL AWARD

(BAT 0462/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Giuliano Maresca

- Claimant -

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

vs.

Basket Juvecaserta s.r.l.
Via Patturelli n. 37, 81100 Caserta, Italy

- Respondent -

represented by Mr. Enrico Zorzi, attorney at law
Studio Legale Zorzi – Corneli – Di Francesco
Via Nicola Palma 12, 64100 Teramo, Italy

1. The Parties

1.1. The Claimant

1. Mr. Giuliano Maresca (hereinafter the “Claimant” or the “Player”) is a professional basketball player of Italian nationality.

1.2. The Respondent

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

2. The Arbitrator

3. On 14 November 2013, 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 28 June 2012, the Player and the Club signed a two-year employment agreement (the “Player Contract”) for the basketball seasons 2012/2013 and 2013/2014. The Player Contract provides for a salary of the Player of EUR 100,000.00 net for the season 2012/2013 and of EUR 110,000.00 net for the season 2013/2014 plus certain bonuses.
5. The Player played with the Club’s team during the basketball season 2012/2013. At the end of the season 2012/2013, the Parties terminated the Player Contract and signed a

settlement agreement (the “Settlement Agreement”) which bears the date of 6 May 2013. There is a dispute between the Parties as to whether the Settlement Agreement was actually signed on 6 May 2013 or whether it was signed only on 22 July 2013.

6. According to the Settlement Agreement, the Club is obliged to pay to the Player a total amount of EUR 67,500.00 (the “Settlement Amount”) in the following installments:

- EUR 12,500.00 on the date of the signing of the Settlement Agreement
- EUR 11,000.00 by August 30, 2013
- EUR 11,000.00 by September 30, 2013
- EUR 11,000.00 by October 30, 2013
- EUR 11,000.00 by November 30, 2013
- EUR 11,000.00 by December 30, 2013

7. Clause 1 para. 2 of the Settlement Agreement then says that

„(...) in case of delay of more than 30 days even of a single installment (...), the Player will be able to request immediately the payment of the whole amount in a lump sum to be paid since the thirty day on late, included the installment expired and not paid.”

8. Between June and November 2013, the Club made the following payments to the Player:

- EUR 2,276.00 on 12 June 2013
- EUR 3,000.00 on 8 July 2013
- EUR 7,000.00 on 13 July 2013
- EUR 12,500.00 on 22 July 2013

- EUR 5,224.00 on 4 or 11 November 2013

In total: EUR 30,000.00

The Parties disagree on whether or not the Respondent paid another EUR 12,500.00 on 6 May 2013.

9. Since July 2013, the Claimant plays for Basket Barcellona in Italy.

3.2. The Proceedings before the BAT

10. On 17 October 2013, the Player filed a Request for Arbitration. The non-reimbursable handling fee of EUR 2,000.00 was received in the BAT bank account on 21 October 2013.

11. By letter dated 20 November 2013 to the Parties, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about the appointment of the Arbitrator. Furthermore, the BAT Secretariat requested the Club to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 11 December 2013. The BAT Secretariat also asked the Parties to pay the following amounts as an Advance on Costs by no later than 2 December 2013:

| | |
|--|-------------------|
| <i>"Claimant (Mr Giuliano Maresca)</i> | <i>EUR 4,000</i> |
| <i>Respondent (Basket Juvecaserta)</i> | <i>EUR 4,000"</i> |

12. By email dated 10 December 2013 to the BAT Secretariat, the Club submitted its Answer and also a Counterclaim. The Counterclaim consisted of a damage claim for legal fees and damages corresponding to "the value of the contract at issue", caused by the "vexatious litigation" which had been initiated by the Claimant.
13. The Club and the Player each paid their respective share of the Advance of Costs. Because of the Counterclaim, the Club was requested to pay an additional Advance on Costs of EUR 2,000.00 by no later than 31 January 2014.

14. Within the same time limit, the Player was requested to indicate all payments (including their respective amounts and dates of payment) received from the Respondent after the signing of the Settlement Agreement.
15. By email dated 28 January 2014 to the BAT Secretariat, the Player asked to be allowed to submit a clarification regarding the Respondent's Answer and Counterclaim.
16. By email dated 31 January 2014 to the BAT Secretariat, the Player produced an unsolicited reply to the Respondent's Answer and Counterclaim.
17. By letter dated 6 February 2014 to the Parties, the BAT Secretariat confirmed receipt of the additional Advance on Costs paid by the Club for the Counterclaim and asked the Player to comment on the Club's Counterclaim by 20 February 2014. The Club was invited to comment on the Player's submissions of 28 and 31 January 2014 within the same time limit. Both Parties provided their comments within the time limits set by the Arbitrator.
18. By letter dated 10 March 2014, the BAT Secretariat informed the Parties that the Arbitrator had taken note of the Player's request for a hearing, which was however refused. The BAT Secretariat also stated that the Arbitrator had declared the exchange of documents complete and invited the Parties to submit their detailed account of costs by no later than 17 March 2014, which they did in time.
19. Neither of the Parties commented on the respective other party's account of costs.

4. The Positions of the Parties

4.1. The Claimant's Position

20. In his Request for Arbitration dated 17 October 2013, the Claimant submitted the following in substance:

- The Settlement Agreement provides for a payment of the Club to the Player of EUR 67,500.00. However, the Respondent paid only the amount of EUR 12,500.00 which was due on the date of signature of the Settlement Agreement. The amount of EUR 55,000.00 remained unpaid (5 x 11,000.00/month to be paid between August and December 2013).
 - According to clause 1 para. 2 of the Settlement Agreement, the entire Settlement Amount became due when the Respondent was late by 30 days with the payment of one of the instalments. The Player therefore requested payment of the whole unpaid Settlement Amount.
21. In his second submission dated 31 January 2014, the Player submitted that the Settlement Agreement was not signed on 6 May 2013, but rather on 22 July 2013. It was on 22 July 2013 (and not on 6 May 2013) when the first instalment of the Settlement Amount of EUR 12,500.00 was paid. Only the payments received on or after 22 July 2013 (i.e. the payment of EUR 12,500.00 on 22 July 2013 and EUR 5,224.00 on 11 November 2013) had to be considered as payments under the Settlement Agreement. The remaining amount of EUR 49,776.00 was still open.
 22. Payments before 22 July 2013 (i.e. the payments of EUR 2,276.00 on 12 June 2013, of EUR 3,000.00 on 8 July 2013 and of EUR 7,000.00 on 13 July 2013, which amount to EUR 12,276.00) had been made as salary payments under the Player Contract and did not count as payments under the Settlement Agreement.
 23. In his submission dated 20 February 2014, the Player rejected the Club's Counterclaim. He also explained that only after the termination of the Player Contract, he was able to sign a new agreement with Basket Barcellona for the seasons 2013/2014 and 2014/2015.

4.2. The Claimant's Request for Relief

24. In his Request for Arbitration dated 17 October 2013, the Player requested the following relief:

*„The Claimant requests the BAT to declare his right to receive from the Respondent the amount of **Euros 55,000** (fifty five thousand) **net after all taxes**, and to order the Club to pay the Player the same amount, with interests (5% per year) since the date of the not paid instalments. Moreover the claimant requests the BAT to force the club to pay all costs involved (legal expenses, BAT fee etc).”*

25. In his submission dated 31 January 2014, the Claimant reduced the claimed amount and stated:

*„(...) the sum of the Settlement Agreement that the Respondent has still to pay to the Claimant is **Euros 49,776** (67,500 – 12,500 paid on 22 July 2013 – 5,244 paid on 11 November 2013).”*

26. In his submission dated 20 February 2014 regarding the Respondent’s Counterclaim, the Claimant requested the following relief:

„The Counterclaim is totally unfounded and must be rejected, because the Claimant has acted properly in order to obtain protection of its economic expectations.”

4.3. The Respondent's / Counterclaimant’s Position

27. In its Answer and Counterclaim dated 10 December 2013, the Club submitted the following in substance:

- The Settlement Agreement dated 6 May 2013 replaced all previous agreements between the Parties.
- On 1 October 2013, the Player sent a request to the Club regarding the payment of EUR 55,000.00 for the alleged non-payment of accrued instalments.
- The Club paid the following amounts to the Player:
 - EUR 12,500.00 on 6 May 2013
 - EUR 2,276.00 on 12 June 2013¹

¹ In its Answer and Counterclaim, the Respondent stated having paid an additional amount of EUR 2,776.00 to the Player „on installment due on October 30th“. The Arbitrator, however, assumes that this payment

- EUR 3,000.00 on 8 July 2013
- EUR 7,000.00 on 13 July 2013
- EUR 12,500.00 on 22 July 2013
- EUR 5,224.00 in November 2013².

The total amount of EUR 42,500.00 net was made under the Settlement Agreement.

- At the date of the Request for Arbitration, the Club was not in default with any payments to the Player. According to the Settlement Agreement, the Club was supposed to pay EUR 12,500.00 on the date of the signing of the Settlement Agreement plus EUR 11,000.00 by 30 August 2013 and 30 September 2013 each which it actually did.
- The Player filed the Request for Arbitration despite the fact that the Club had fully complied with the payment requirements according to the Settlement Agreement. The Player sued the Club in violation of the principles of honesty and fairness. The Player should be obliged to reimburse all legal fees incurred by the Club as well as damages to be quantified on an equitable basis, taking into account the total value of the Player Contract and the Settlement Agreement and being caused by the so-called "*lite temeraria*" (vexatious litigation) as described in article 96 of the Codice di Procedura Civile Italiano (Italian Code of Civil Procedure).

28. In its submission dated 18 February 2014, the Club re-iterated the following:

corresponds to the Respondent's payment of 12 June 2013 in the amount of EUR 2,276.00 and that the Respondent made a clerical mistake in writing when stating EUR 2,776.00 (instead of EUR 2,276.00).

²

There is a controversy between the Parties whether such payment of EUR 5,224.00 was made on 4 November 2013 (as alleged by the Respondent) or on 11 November 2013 (as alleged by the Claimant). The Arbitrator holds that the exact date of such payment is only relevant for the calculation of the default interests. In the context of such calculation, the Arbitrator finds that by attachment 7 to the Answer and Counterclaim, the Respondent proved that it paid the amount of EUR 5,224.00 on 4 November 2013. Therefore, the Arbitrator calculated the default interests based on the assumption that the amount of EUR 5,224.00 was paid on 4 November 2013.

- The Settlement Agreement was not signed on 22 July 2013, but on 6 May 2013.
- The first instalment according to the Settlement Agreement was paid on 6 May 2013; the Settlement Agreement itself constitutes the receipt of the payment of such amount.
- The Club had no reason not to make the agreed payments agreed upon in the Settlement Agreement.
- The Club never disputed its debts towards the Player. However, it was not in delay with any payments when the Player filed the Request for Arbitration.

4.4. The Respondent's / Counterclaimant's Request for Relief

29. In its Answer, the Respondent requested the following relief:

„REQUEST FOR RELIEF

Basketball Juvecaserta s.r.l (Club) asks the Arbitrator to take in favor of the Club the following decisions:

- *To declare the request for arbitration filed by Mr. Maresca on October 17th 2013, unfounded because it lacks the factual and legal;*
- *To declare that the requests of reliefs made by Mr. Maresca in the request for arbitration on October 17th 2013 must all be rejected;*
- *To order the Claimant to pay to the Club all arbitration proceeding costs;*
- *To order the Claimant to pay to the Club all legal fees and expenses of accrued from this arbitration proceeding;*

COUNTER CLAIM

Basketball Juvecaserta s.r.l (Club) asks the Arbitrator to take in favor of the Club the following decisions:

- *To ascertain that the request for arbitration filed by Mr. Maresca is vexatious and reckless proposal, or at least in violation of the principles of fairness and sportsmanship;*
- *consequently to condemn the Claimant to compensation for damage suffered by the Respondent to be quantify on an equitable basis taking into account the total value of the contract at issue;*
- *To order the Claimant to pay to the Club all arbitration proceeding costs;*
- *To order the Claimant to pay to the Club all legal fees and expenses of*

accrued from this arbitration proceeding.”

5. Jurisdiction

30. 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”; Article 2.2 of the BAT Rules).
31. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the Parties.
32. The Arbitrator finds that the dispute referred to him is of financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.
33. The jurisdiction of the BAT regarding this dispute results from the arbitration clause contained in clause 4 of the Settlement Agreement which reads as follows:

„The parties expressly agrees that in case of any dispute arising from or related to the present settlement agreement, the Player will be able to waive the Federations and League rules, and shall submit it for resolution before the FIBA Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and the dispute shall be resolved definitely in accordance with the BAT Arbitration Rules by a single Arbitrator appointed by the BAT President. In this case the parties already agree to accept the terms and procedure provided by the BAT rules unreservedly. The arbitrator shall decide the dispute in according to article 12 of Private International Law of Swiss Law, irrespective of the parties’ domicile . The language of the arbitration shall be Italian language or that one imposed by the proceedings.

If the player fails to exercise this option, the Arbitration clause provided for by Federal and Basketball League regulations remains valid.”

34. Also the Player Contract contains an arbitration clause in favour of the BAT (see section 7 of the Player Contract).
35. The Settlement Agreement is in written form. Thereby, the arbitration agreement fulfils the formal requirements of Article 178(1) PILA. The Arbitrator also considers that there is no indication in the file which could cast doubts on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording *„any dispute arising from or related to the present settlement agreement”* in

clause 4 of the Settlement Agreement covers the present dispute. In addition, the Respondent did not object to the jurisdiction of the BAT.

36. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the dispute at hand.

6. Other procedural issues

6.1. Request for a hearing

37. In its submission dated 20 February 2014, the Claimant requested a hearing in order to hear Mr. Riccardo Sbezzi (agent of the Claimant), Mr. Marco Valenza (agent of the Claimant) and Mr. Antonella Riva (General Manager of the Club Basket Barcellona) as witnesses.

38. According to Article 13.1 of the BAT Rules,

„[n]o hearings are held in arbitration proceedings under these Rules unless one of the parties requests a hearing and/or the Arbitrator decides to hold a hearing. (...)”.

39. BAT proceedings are supposed to be an efficient and effective way of resolving disputes in the world of basketball (see Preamble of the BAT Rules). Thus, the BAT Rules are designed to provide for a simple, quick and inexpensive means to solve disputes. Considering these interests of BAT procedures, it is in the discretion of the Arbitrator whether a hearing should be held or not.

40. In the case at hand, the Arbitrator is convinced – considering also the witness statement filed by the Claimant – that a hearing respectively the examination of witnesses would not change his decision in the case at hand. As a result, and with due regard to the facts that (i) the hearing was not requested by both Parties, but only by the Claimant, and that (ii) the witnesses asked to be examined by the Claimant are expected to confirm their written statements (which are to be taken into account by the Arbitrator in his consideration of evidence anyway) as well as with regards to the

interests of BAT procedures just set out above, the Arbitrator decides to rely on the written submissions of the Parties and not to hold a hearing.

6.2. Language of the proceedings

41. Article 4.1 of the BAT Rules states that the working language of the BAT shall be English. Clause 4 of the Settlement Agreement further holds that „[t]he language of the arbitration will be Italian or that one imposed by the proceeding.” As both the BAT Rules as well as the arbitration clause contain the possibility to conduct the proceedings in English, English shall be the language of the BAT proceedings at hand. Both parties filed their submissions in English language during the proceedings.

7. Applicable Law – *ex aequo et bono*

42. 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”.

43. 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.”

44. The arbitration agreement in clause 4 of the Settlement Agreement states that the

„(...) parties already agree to accept the terms and procedure provided by the BAT rules unreservedly. (...)”

45. Therefore, the Parties empowered the Arbitrator to decide this dispute applying the BAT Rules and thus *ex aequo et bono* without reference to any other law. The Arbitrator will therefore decide the proceedings at hand *ex aequo et bono*.

46. 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 1969³ (Concordat),⁴ 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.”⁵

47. 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.”⁶

48. This implies that the Arbitrator does not apply any national law, i.e. also not article 96 of the Codice di Procedura Civile Italiano (Italian Code of Civil Procedure) which the Club requests to be applied in the case at hand.

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

³ That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and the Swiss Code of Civil Procedure (governing domestic arbitration).

⁴ KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Art. 187 PILA N 289.

⁵ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

⁶ POUURET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.

8. Findings

8.1. The disputed issues

50. To begin with, it has not been disputed that the Settlement Agreement was validly concluded and replaced the Player Contract. According to the Settlement Agreement, the Club was supposed to pay the amount of EUR 67,500.00 to the Player.
51. Also undisputed are the following payments by the Club to the Player:
- EUR 2,276.00 on 12 June 2013
 - EUR 3,000.00 on 8 July 2013
 - EUR 7,000.00 on 13 July 2013
 - EUR 12,500.00 on 22 July 2013,
52. The Parties agree that the Club made a further payment of EUR 5,224.00. They disagree however on the date of payment which was 4 November 2013 according to the Club and 11 November 2013 according to the Player.
53. The Parties also disagree on whether the Club had made an additional payment of EUR 12,500.00 already on 6 May 2013 and whether the Settlement Agreement was signed on 6 May 2013 (Club) or only on 22 July 2013 (Player). Finally, the Parties also disagree on the question whether the Player was entitled to accelerate the payment of the full Settlement Amount, since the Club asserts that it was not in delay at the time of the Request for Arbitration (i.e. 17 October 2013).
54. Irrespective of any disagreement, the Arbitrator takes note of the fact that the Club refuses the payment of the sum of money which it does not contest, i.e. the amount of EUR 25,000.00, although it admits that it has no financial problems. This uncontested amount results from the subtraction of the amounts which the Club claims having paid (EUR 42,500.00) from the agreed Settlement Amount (EUR 67,500.00). The Club seems to retain this amount based on a Counterclaim against the Player because he dared to initiate this proceeding against the Club. The Arbitrator finds that the

Counterclaim has clearly no merits at all. It is not substantiated and it is based on legal provisions which are not applicable in this arbitration. The Player was definitely not acting in bad faith when he tried to enforce the payments due and recognized by the Club. The Counterclaim is therefore dismissed. The questions remain, however, which amounts were actually due and whether the Player was entitled to initiate this arbitration.

55. The Arbitrator will therefore address the issues in the following order:

1. When was the Settlement Agreement signed?
2. Was there a payment of EUR 12,500.00 by the Club to the Player on 6 May 2013?
3. If the signing date was not on 6 May 2013, have the amounts paid by the Club between 12 June and 13 July 2013 been made under the Player Contract or in anticipation of the Settlement Agreement?
4. Was the Player entitled to accelerate the full Settlement Amount?

8.2. The date of the Settlement Agreement

56. While none of the Parties challenges the validity of the Settlement Agreement, the Parties' opinions diverge regarding the signature date: The Player alleges that the Settlement Agreement was signed on 22 July 2013, while the Club holds that the Settlement Agreement was signed on 6 May 2013. Accordingly, the Claimant submits that all payments of the Respondent which were effected prior to 22 July 2013 should be attributed to the Player Contract, while the Respondent counters that all payments made to the Claimant after 6 May 2013 must be deducted from the Settlement Amount.
57. The date of 6 May 2013 has been written twice on the signed Settlement Agreement, namely right below the title "SETTLEMENT AGREEMENT" as well as after the text of the agreement besides the indication of the location "Caserta". That is strong *prima*

facie evidence of the date when the Settlement Agreement was signed. Since it is the Player who derives certain rights from a later date of signature, he must bear the burden of proof that the Settlement Agreement was not signed on 6 May 2013, but only on 22 July 2013.

58. There is no direct evidence of a signature date of 22 July 2013 instead of 6 May 2013. However, the Player offers circumstantial evidence such as the following:

- a) Mr. lavazzi, the Club's president, returned the signed Settlement Agreement to the Player and his agent Mr. Sbezzi by email of 22 July 2013.
- b) The payment plan in the Settlement Agreement does not provide for payments in June and July 2013 (which would have been logic if the Settlement Agreement had been signed in May 2013), but for a first payment on the date of signing and then uninterrupted monthly payments starting in August 2013, which may indicate that the first payment was made only in July 2013;
- c) The Respondent did not submit any written evidence that it paid EUR 12,500.00 to the Claimant on 6 May 2013 as the alleged date of signing, as he did with the other installments.
- d) If the Settlement Agreement was signed on 6 May 2014, the Club "prepaid" the installment which it claims was due only on 30 August 2013: It paid EUR 2,276.00 on 12 June 2013, EUR 3,000.00 on 8 July 2013 and EUR 7,000.00 on 13 July 2013 (amounting to EUR 12,276.00) although no payments were due in June and July 2013. There is no reasonable explanation for such an unusual prepayment.
- e) According to the "Pro-Veritate Statement" from the general manager of Basket Barcellona, Mr. Antonello Riva, dated 20 February 2014, the latter "understood that the Player was still under contract" with the Club in July 2013. That was the reason why the Player could not be hired before.

59. The Club relies on the date of 6 May 2013 as explicitly indicated on the Settlement Agreement and also in the Request for Arbitration. According to the Club, none of the circumstantial evidence offered by the Player demonstrated that the Settlement Agreement was signed only on 22 July 2013:
- a) The email of the Club's president of 22 July 2013 referred "probably" to a copy of the Settlement Agreement at the end of the negotiations about the agent fee.
 - b) The payment of the first instalment of EUR 12,500.00 on 6 May 2013 is proven by the Player's signature of the Settlement Agreement which says: "EUROS 12,500.00 (...) on the date of signing of this agreement, which is a receipt". No further receipt was required.
 - c) The Player cannot complain about any "prepayments" since these early payments were made for his benefit.
60. The fact that the signature date of 6 May 2013 appears twice on the Settlement Agreement and was also referred to in the Request for Arbitration constitutes strong, but not conclusive evidence. The way how the Settlement Agreement was executed speaks however a different language.
61. First, the email of the Club's president dated 22 July 2013 indicates that the Settlement Agreement was signed and returned only on that day. The Club's explanation that this email covered a complimentary copy of the Settlement Agreement which was needed in the context of the negotiations of the agent fee is not supported by any further evidence and is not convincing.
62. Second, and decisive for the Arbitrator, it would be highly coincidental if at the same day (22 July 2013) the Club would have made a "voluntary" payment of EUR 12,500.00 to the Player although the payment schedule in the Settlement Agreement did not require the Club to make any payments before 30 August 2013, if that voluntary payment of EUR 12,500.00 consisted of exactly the same amount as the initial installment (although all other installments amounted to EUR 11,000.00), and despite

the fact that the Club had already made payments in the amount of EUR 12,276.00 before, leading to a total balance in favor of the Player of EUR 24,776.00, more than a month before the first monthly installment of 30 August 2013 became due. The Club's explanation that it "gradually" paid the amounts due to the Settlement Agreement, even before their due dates, is difficult to accept also considering the fact that the Club has stopped the payment of the monthly installments since August 2013 before the Player initiated any enforcement procedures (with the only exception of a partial payment of EUR 5,224.00 in November 2013). The Player's explanation that the payment of EUR 12,500.00 on 22 July 2013 was indeed the initial installment under the Settlement Agreement and was paid on the date of signing which was on 22 July 2013 is definitely more credible.

63. The Arbitrator has also taken into consideration the payment receipts submitted by the Club regarding the undisputed payments from the Respondent to the Claimant on 12 June 2013 (EUR 2,276.00), on 8 July 2013 (EUR 3,000.00), on 13 July 2013 (EUR 7,000.00) as well as on 22 July 2013 (EUR 12,500.00). They all state that the payment was made "in riferimento al contratto esistente tra le parti". However, this does not necessarily mean that they all referred to the same agreement. In fact, the payments prior to 22 July 2013 could have been made under the then existing Player Contract, and the payment of 22 July 2013 under the Settlement Agreement which replaced the Player Contract.
64. The Arbitrator has carefully considered the further evidence in favor of a signing date of 6 May 2013, especially also the further emails which explicitly refer to that date. It is however doubtful whether the authors of these emails really wanted to make a statement relating to the signing date or whether they simply identified the Settlement Agreement by the date which was printed on it, without further considerations.
65. When balancing the evidence offered by the Parties, the Arbitrator favors – not without hesitation – the explanations given by the Player and holds that the Settlement Agreement must have been signed on the 22 July 2013, i.e. on the day when the president of the Club returned the signed Settlement Agreement to the Player and his

agent and when the payment of EUR 12,500.00, corresponding to the initial installment provided by the Settlement Agreement, was made.

8.3. Was there a payment of EUR 12,500.00 on 6 May 2013?

66. The Player disputes that he had received a payment of EUR 12,500.00 on 6 May 2013. The Club did not provide any banking statement to demonstrate the alleged payment, but referred to the Settlement Agreement which states that the Player's signature of the Settlement Agreement also serves as receipt of the Club's first payment of EUR 12,500.00 on that date. Hence, an additional receipt was not required.

67. Still, the Arbitrator already found that the Settlement Agreement was signed only on 22 July 2013, i.e. the date on which an amount of EUR 12,500.00 was undisputedly paid to the Player. On the other hand, the Arbitrator finds it highly unlikely that the Club paid exactly the same amount twice, especially since the payment schedule in the Settlement Agreement provides for a payment of this amount only once, namely at the signature date. All other installments amounted to EUR 11,000.00. The fact that the Player signed a receipt that he was paid EUR 12,500.00 on 22 July 2013, although such receipt was not strictly necessary under the Settlement Agreement, cannot be regarded as *e contrario* evidence for a payment of the same amount on 6 May 2013 for which no receipt was produced.

68. The Arbitrator therefore concludes that there is no sufficient evidence for the Club's allegation that it paid the amount of EUR 12,500.00 twice, namely on 6 May 2013 and on 22 July 2013, i.e. the Arbitrator finds that there is no evidence that such payment was made on 6 May 2013.

8.4. Do the amounts paid between 12 June and 13 July 2013 count as settlement payments?

69. The Player submits that since the Settlement Agreement was signed only on 22 July 2013, all prior payments of the Club do not count against the Settlement Amount.

70. The Arbitrator disagrees: The fact that the Settlement Agreement bears the date of 6 May 2013 cannot easily be set aside. Although there is prevailing evidence that the signature date was only on 22 July 2013, also the Player agrees that the Parties started in good faith negotiating a settlement before. It is likely that a draft for negotiation was dated 6 May 2013 although it was not yet signed. This also means that the Parties intended to find a settlement on the salaries which were outstanding at the beginning of their negotiations. The Arbitrator concludes that any payments made after the beginning of the negotiations are deemed to fall under the settlement and it would be difficult to understand if the Club would make any payments in that negotiation phase which would not be taken into consideration in the final settlement.
71. Hence, the Arbitrator finds *ex aequo et bono* that any payment by the Club to the Player which was made after the beginning of the settlement discussions must be counted against the Settlement Amount. This leads to the following calculation:

| Date | Payment due | Payment made | Balance |
|-------------------|----------------------|----------------------|------------------------|
| 12 June 2013 | 0 | EUR 2,276.00 | + EUR 2,276.00 |
| 8 July 2013 | 0 | EUR 3,000.00 | + EUR 5,276.00 |
| 13 July 2013 | 0 | EUR 7,000.00 | + EUR 12,276.00 |
| 22 July 2013 | EUR 12,500.00 | EUR 12,500.00 | + EUR 12,276.00 |
| 30 August 2013 | EUR 11,000.00 | 0 | + EUR 1,276.00 |
| 30 September 2013 | EUR 11,000.00 | 0 | - EUR 9,724.00 |
| 30 October 2013 | EUR 11,000.00 | 0 | - EUR 20,724.00 |
| 4 November 2013 | 0 | EUR 5,224.00 | - EUR 15,500.00 |
| 30 November 2013 | EUR 11,000.00 | 0 | - EUR 26,500.00 |
| 30 December 2013 | EUR 11,000.00 | 0 | - EUR 37,500.00 |
| Total | EUR 67,500.00 | EUR 30,000.00 | - EUR 37,500.00 |

Accordingly, of the entire Settlement Amount of EUR 67,500.00, the amount of EUR 37,500.00 remains unpaid.

8.5. Was the Player entitled to accelerate the full Settlement Amount?

72. According to the Settlement Agreement, the Player was entitled to request the payment of the entire Settlement Amount if the Club was late with the payment of one installment by more than 30 days.
73. On 1 October 2013, the Player notified the Club that it had failed to pay the installments for August and September 2013 and accelerated the entire Settlement Amount. The Request for Arbitration was filed on 17 October 2013.
74. On 1 September 2013 (i.e. 30 days before the Player accelerated the entire Settlement Payment) and because the Arbitrator now considered the payments of 12 June, 8 July and 13 July 2013 as settlement payments, the Club was not yet in default, but there was still a balance in its favor of EUR 1,276.00.
75. On the other hand, when the Player sent the reminder to the Club on 1 October 2013, he was of the firm opinion that the payments of 12 June, 8 July and 13 July 2013 did not count against the Settlement Amount and that therefore, the full August 2013-installment was delayed by 30 days. In addition, there was no indication on 1 October 2013 that the Club would timely meet its obligations under the Settlement Agreement. Finally, it is an accepted principle in civil law that a statutory or contractual time limit may not be used as a defense against an otherwise justified claim if it is obvious under the circumstances that the debtor would not have met its obligations anyway. The Club's non-compliance with the payment schedule of the Settlement Agreement since at least September 2013 leads to the *ex aequo et bono*-conclusion that the 30-day deadline cannot be held against the Player.
76. The Arbitrator finds therefore *ex aequo et bono* that the Player was entitled to accelerate the entire (at that time) open Settlement Amount by letter of 1 October 2013.

8.6 Default interests

77. The Claimant requests the payment of default interests of 5% “since the date of the not paid instalments.”

78. Although the Settlement Agreement does not explicitly provide for default interests, this is a generally accepted principle which is embodied in most legal systems. The Arbitrator, deciding *ex aequo et bono* and in line with the jurisprudence of the BAT, finds that an interest rate of 5% per annum is to be applied on the amounts due by the Respondent, to be calculated as follows:

- 5% on the amount of EUR 9,724.00, starting from 1 October 2013 until 30 October 2013;
- 5% on the amount of EUR 20,724.00, starting from 31 October 2013 until 4 November 2013;
- 5% on the amount of EUR 15,500.00, starting from 5 November 2013 until 30 November 2013;
- 5% on the amount of EUR 26,500.00, starting from 1 December 2013 until 30 December 2013;
- 5% on the amount of EUR 37,500.00, starting from 31 December 2013.

9. Costs

9.1 Arbitration costs

79. 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.

80. On 10 June 2014, 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 10,000.00.

81. Considering the amount in dispute, which the Arbitrator determines at EUR 100,000.00 including the Respondent's Counterclaim, the circumstances and the outcome of the present case (Article 17.3. of the BAT Rules), the Arbitrator deems it appropriate that the Club bears 85 % of the arbitration costs, i.e. EUR 8,500.00 and the Player bears 15 % of the arbitration costs, i.e. EUR 1,500.00. Thereby, the Arbitrator takes into consideration that on the one side, the fact that the signature date of the Settlement Agreement was never formally corrected has added to the complexity of this case and that, on the other side this proceeding could have been resolved or even avoided if the Club had timely paid the uncontested amounts and that the Counterclaim was dismissed in its entirety.

82. Given that the Claimant paid an Advance on Costs of EUR 4,000.00 and the Respondent EUR 6,000.00, i.e. EUR 4,000.00 for the Answer and EUR 2,000.00 for the Counterclaim, the Arbitrator decides that the Respondent shall pay the amount of EUR 2,500.00 to the Claimant, i.e. the difference between the advance on costs paid by the Claimant and the share of arbitration costs that the Claimant must actually bear.

9.2 Legal fees and expenses

83. The account of costs submitted by the Claimant's counsel states legal fees and expenses in the total amount of EUR 8,644.00 (including the non-reimbursable

handling fee of EUR 2,000.00). The account of costs submitted by the Respondent's counsel amounts to EUR 8,517.60.

84. According to article 17.4 of the BAT Rules, in case of a sum in dispute of between EUR 30,001.00 and EUR 100,000.00, the maximum contribution to a party's reasonable legal fees and other expenses shall be EUR 7,500.00 (including the non-reimbursable handling fee). The Arbitrator therefore accepts EUR 7,500.00 as reasonable legal fees and costs including the non-reimbursable handling fee for the Claimant and EUR 5,500.00 for the Respondent which did not have to pay a non-reimbursable handling fee. In accordance with the distribution of the arbitration costs, the Arbitrator finds that the Club shall bear 85 % and the Player 15 % of the contribution to the legal fees and other expenses incurred by the other party. Therefore, the Arbitrator decides that the Respondent shall pay the amount of EUR 5,550.00 to the Claimant.

10. AWARD

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

- 1. Basket Juvecaserta s.r.l. is ordered to pay to Mr. Giuliano Maresca the amount of EUR 37,500.00 plus interest**
 - of 5% on the amount of EUR 9,724.00, starting from 1 October 2013 until 30 October 2013;
 - of 5% on the amount of EUR 20,724.00, starting from 31 October 2013 until 4 November 2013;
 - 5% on the amount of EUR 15,500.00, starting from 5 November 2013 until 30 November 2013;
 - 5% on the amount of EUR 26,500.00, starting from 1 December 2013 until 30 December 2013;
 - 5% on the amount of EUR 37,500.00, starting from 31 December 2013.

- 2. Basket Juvecaserta s.r.l. is ordered to pay to Mr. Giuliano Maresca the amount of EUR 2,500.00 as a reimbursement of his advance on arbitration costs.**

- 3. Basket Juvecaserta s.r.l. is ordered to pay to Mr. Giuliano Maresca the amount of EUR 5,550.00 as a contribution to his legal fees and expenses.**

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

Geneva, seat of the arbitration, 13 June 2014

Stephan Netzle
(Arbitrator)