BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0463/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Quentin Byrne-Sutton

in the arbitration proceedings between

Mr. Kyle Johnson
c/o John Greig, SportsTalent
704 - 228th Ave N.E. Suite 412, Sammamish, WA 98074

- Claimant -

represented by Mr. Richard Faulkner,
Blume, Faulkner, Skeen & Northam, LSBN 05470,
111 W. Spring Valley Rd. Suite 250, Richardson, TX 75081, USA

vs.

S.S. Sutor Srl
Via Martiri d'Ungheria 108
63812 Montegranaro (FM), Italy

- Respondent -

1. The Parties

1.1 The Claimant

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

1.2 The Respondent

2. S.S. Sutor Srl (hereinafter also referred to as “the Club” or “Respondent”) is a professional basketball club in Montegranaro, Italy.

2. The Arbitrator

3. On 30 October 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 24 July 2012, the Club and the Player entered into an Agreement (the “Agreement”) for the 2012/2013 season, whereby the latter would receive a total salary of USD 47,000, to be paid in installments between 15 September 2012 and 15 June 2013 (as set out in the payment schedule under Article IV of the Agreement), plus the possibility of earning a bonus of USD 5,000 if the Club managed to remain in the Italian League A, to be paid within 7 days from the end of the season (as provided in Article V of the Agreement).

5. The Player declares that he played with the Club for the entire 2012/2013 season and played the final game of the season on 5 May 2013.

6. According to Article VII of the Agreement, all the amounts due to the Player were free of tax and "*Tax receipts of tax deposits shall be provided to the Player at the end of each fiscal year*".

7. Since the Club's results did permit it to remain in the Italian League A for the following season (2013/2014), the total sum of contractual remuneration owed to the Player amounted to USD 52,000.

8. Based on his bank statements adduced as evidence, the Player affirms that a number of the due payments were made late and that others were never made, meaning that the total amount received by him by the end of the season only amounted to USD 21,632.29. The last payment received by the Player from the Club during the 2012/2013 season dates from April 2013.

9. According to the evidence adduced by the Player, the Club paid him a further amount of EUR 3,500 (corresponding to USD 4,725) on 20 September 2013.

10. Thus, according to the Player, the total outstanding remuneration owed to him under the Agreement is **USD 25,642.71** (USD 52,000 - 26,357.29).

11. The Player also submits that, in application of Article IV of the Agreement, he is entitled to receive an amount of **EUR 35,000** as a penalty for the late payments.

3.2 The Proceedings before the BAT

12. The Player filed his Request for Arbitration dated 24 October 2013, in accordance with the BAT Rules, and the BAT received the non-reimbursable handling fee of EUR 2,000 on 25 July 2013 (the overpayment of EUR 475.87 was credited against the Player's Advance on Costs as requested).

13. On 11 November 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:

"Claimant 1 (Mr. Kyle Johnson)	*EUR 3,024.13*
Respondent (S.S. Sutor Srl)	*EUR 3,500.00"*

14. 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 **Monday, 2 December 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*".

15. Both Parties failed to pay their respective portions of the Advance on Costs within the fixed deadlines and the Respondent failed to submit an Answer within the fixed deadline or to communicate with the BAT in any manner in that connection.

16. Consequently, on 4 December 2013, the BAT sent a reminder to the Parties and fixed a new deadline for the payment of the Advance on Costs; and in the Procedural Order also stipulated that the Respondent is

> *"… granted a final opportunity to file an Answer to the Request for Arbitration by no later than **Friday, 13 December 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 deadlines, both Parties again failed to pay their respective portions of the Advance on Costs within the fixed deadlines and the Club failed to submit an Answer.

18. Therefore, by Procedural Order of 18 December 2013, the Parties were given a final deadline to pay their respective shares of the Advance on Costs.

19. On 20 December 2013, the Player filed a "*Request for Expedited Award Without Reasons and Accounting of Attorney's Fees*". In his Request, the Player requested that

> *"…this tribunal immediately close these proceedings, reduce the advance on costs such that Claimant does not have to pay Respondent's share, and issue an award without reasons for the full amount claimed by Claimant, including all attorney's fees already incurred and reasonable and necessary fees for the future collection of the award. In the alternative, Claimant respectfully requests the arbitrator extend the deadline for payment of Respondent's share of the advance on costs to 10 February 2013".*

20. Three exhibits (A, B and C) were attached to the Player's foregoing Request. Exhibit A was a letter dated 13 November 2013 from the Club to the Player's attorneys disputing his claims. Exhibit B was a letter dated 24 September 2013 from the Club to the Player's attorneys indicating that his contract was also valid for the 2013/2014 season, affirming that his claims are unfounded and asking him to return to the Club as he had been convened to do for 13 August 2013. Exhibit C was an "*Accounting of Attorney's Fees*".

21. In his foregoing request, the Player also stated:

> *"Respondent's liability to Mr. Johnson must be reduced by EUR 3,500.00, the amount Respondent paid to Mr. Johnson after the commencement of this case. As stated above, Respondent deposited into Mr. Johnson's bank account EUR 3,500.00 on or about 10 September 2013. This amount must be accounted for so Mr. Johnson does not receive a recovery greater than that which Respondent is obligated to him".*

22. On 3 January 2014, the Player's Counsel made the following request to the BAT by email:

> *"This email is a request that the BAT extend the 3 January 2014 deadline to pay the advance on costs in the above matter to 10 January 2014. On or about 23 December 2013, this law firm emailed to the BAT Claimant's Motion for Expedited Award without Reasons, Accounting of Payment made by Respondent, and Accounting of Attorney's Fees or, in the alternative, Motion to Extend Deadline to Pay Respondent's Share of Advance on Costs. The BAT acknowledged receipt of same on that date. The procedural order from 18 December 2013 issued by the Arbitrator in this matter states: "In the event that the BAT has not received any of the shares of the advance of costs by Friday, 3 January 2014, the Request for Arbitration shall be deemed withdrawn. Subsequent to this procedural order Mr. Johnson paid his share of the advance on costs. Mr. Johnson has*

> *yet to pay the team's share of the advance on costs. In his Motion, Mr. Johnson requested the Arbitrator close the proceedings without requiring Mr. Johnson to pay the team's share of the advance on costs, or, in the alternative, to extend the deadline to pay the team's share to 10 February 2014 to give Mr. Johnson time to gather the funds. The arbitrator has yet to respond to this Motion, and the BAT has yet to acknowledge receipt of Claimant's share of the advance on costs. Because both Christmas and New Year's Day occurred mid-week this Holiday Season we are unsure of the availability of the Arbitrator or the BAT since 23 December 2014. Therefore, out of an abundance of caution, we respectfully request an extension of the 3 January 2014 deadline to pay the remaining advance on costs to 10 January 2014 to give 1) the Arbitrator time to decide on this Motion; 2) our client time to comply with the Arbitrator's decision, whatever that may be; and 3) the BAT time to provide us with a full accounting of funds received relevant to this matter".*

23. By Procedural Order of 3 January 2014, the BAT acknowledged receipt of the Player's requests dated 23 December 2013 and 3 January 2014, acknowledged receipt of the partial payment by the Player of his outstanding share of the Advance on Costs and granted him an extension until 10 January 2014 to pay the rest of his share and to substitute for the Respondent's non-payment of its share of the Advance on Costs, while notifying the Parties

> *"… that the Arbitrator has decided to reject the Claimant's request for an award without reasons because it is clear from both the language and logic of the BAT Arbitration Rules – and is also in conformity with the practice of the BAT – that the proceedings advance in the normal manner if and when a claimant substitutes for a respondent's non-payment of its share of the advance on costs; the purpose of the rule being to enable enough funding to be available for ordinary proceedings including a reasoned award even if a respondent partially or fully defaults. Article 16 of the Rules serves a different purpose. It is designed to allow for the issuance of awards without reasons – subject to the possibility of subsequently requesting the reasons – but only when the amount in dispute does not exceed EUR 30,000; such condition not being fulfilled in this case".*

24. By Procedural Order of 14 January 2014, the Player was requested to answer questions put by the Arbitrator and to file related documents.

25. On 20 January 2014, the Player submitted his response to the questions.

26. By Procedural Order of 22 January 2014, the Respondent was given the opportunity to comment on the Player's response and both parties were invited to submit their statements of costs.

27. On 29 January 2014, the Player filed his statement of costs. The Respondent did not submit any comments on the Player's submission of 20 January 2014 or file any statement of costs.

4. The Positions of the Parties

4.1 The Claimant's Position

28. The Player has formulated three categories of claims. He is requesting damages for breach of contract and the delivery of tax receipts (A), provisional measures (B) and permanent injunctive relief (C).

A. Damages for Breach of Contract and Delivery of Tax Receipts

29. With regard to his damage claim, the Player submits in substance that he duly fulfilled his contractual duties and did not receive in exchange the contractually-provided remuneration, i.e. that the Club breached its contractual obligations and must fully compensate him. The Player argues that the amounts owed are net of tax and that therefore corresponding tax receipts must be delivered by the Club.

30. The Player also argues that he is entitled to a total amount of EUR 35,000 in penalties for late payments based on Article IV of the Agreement – which provides that "*Payments which are received five (5) days later than the dates noted shall be subject to a penalty of 50 EUR (EUR fifty/00) per day*" – and in keeping with the BAT jurisprudence when deciding such issues *ex aequo et bono*.

31. In that relation, the Player formulated the following requests for relief in his Request for arbitration:

> *"(a) $30,367.71 salary for 2012-2013 season plus interest from 30 June 2013 [on 23 December 2013, this claim was reduced by USD 4,725 (corresponding to EUR 3,500) due to a further payment in that amount having been made by the Club on 20 September 2013, meaning that his claim now amounts to* ***USD 25,642.71****];*

(b) 35,000.00 EUR for late-payment penalty plus interest from 30 June 2013;

(c) 2012 tax certificate for amounts already paid in fiscal year 2012—$11,811.80;

(d) 2013 tax certificate for amounts already paid in fiscal year 2013—$9,820.49;

(e) tax certificate for the year in which the amount due is paid".

B. Provisional Measures

32. With respect to his request for provisional measures, the Player submits that:

> *"… Provisional orders are appropriate because (a) the harm caused by Respondent is not adequately reparable by an award of damages, (b) such harm substantially outweighs any harm likely to result to Respondent by an award of provisional orders, and (c) there is a reasonable possibility that Claimants will succeed on the merits of his claims. Upon information and belief, Respondent has recently distributed funds for the sole benefit of the Club for the 2013-2014 season and not to uphold its obligations for the 2012-2013 season. Upon information and belief, Respondent paid to the Italian League the amount required to remain in Serie A for the 2013-2014 season and for taxes owed. Also, Respondent will likely attempt to fill out its roster this summer for the beginning of the 2013-2014 season, which will further deplete its funds. Yet Respondent has failed to remit any payment on its obligations owed for the 2012-2013 season. Clearly a reasonable possibility exists that Claimants will succeed on the merits of their claims as the Agreement is no-cut and guaranteed and none of the Claimants have received the full amount owed''*.

33. In that relation, the Player formulated the following requests for relief in his Request for Arbitration:

> *"A partial final award for security of at least $88,367.71 be placed in a trust account with the Basketball Arbitral Tribunal including:*
>
> *(a) the amount of salary payment due Mr. Johnson under the Agreement in the amount of $30,367.71;*
>
> *(b) the maximum amount of attorney's fees allowed by BAT Rules in the amount of EUR 5,000; and*
>
> *(c) costs and expenses for the arbitration of this claim, including compensation and expenses due the Arbitrator, in an amount to be determined by the Arbitrator."*

C. Permanent Injunctive Relief

34. With respect to his request for permanent injunctive relief, the Player submits that:

> *"The Arbitration Tribunal is empowered with vast authority to enforce its awards through broad remedial awards, sanctions, and injunctive relief. This flexibility of fashioning remedies through arbitral awards is granted to the Arbitrator via the BAT arbitration clauses, now included in nearly every basketball contract governed by FIBA, and the "ex aequo et bono" authority granted to the Arbitrator by the BAT arbitration rules and the express terms of the Agreement. The BAT rules provide that the BAT was created to "provide parties involved in disputes arising in the world of basketball with an efficient and effective means of resolving these disputes." BAT Rule 0.1. However, the BAT website reveals numerous Clubs currently under sanction by FIBA because of unsatisfied or non-complied with arbitral awards. Consequently, additional measures are essential to ensure proper compliance with the decisions of this Tribunal. Thus, Claimants seek permanent injunctive relief be awarded upon final determination by the Arbitrator of the Claimants' claims against Respondent. Permanent injunctive relief is appropriate because (a) Respondent has committed a wrongful act; (b) imminent harm to Claimants and future foreign employees of Respondent is likely; (c) irreparable injury to Claimants and future employees of Respondent is likely; and (d) there is an absence of an adequate remedy at law".*

35. In that relation, the Player formulated the following requests for relief in his Request for arbitration:

> *"(a) barring Respondent from scouting, recruiting, or signing any and all foreign players for participation in basketball activities for which Respondent is allowed to participate for the 2013-2014 season, contingent upon full payment of the award owed to Claimants;*
>
> *(b) barring participation by Respondent in any practices, trainings, physical preparation, or games for the Italian League, or any other basketball activities for which Respondent is allowed to participate, for the 2013-2014 season, contingent upon full payment of the award owed to Claimants;*
>
> *(c) barring Respondent from collecting any and all money or other benefits from sponsors for the 2013-2014 season, contingent upon full payment of the award owed to Claimants;*
>
> *(d) barring Respondent from recruiting or signing any and all new sponsors for the 2013-2014 season, contingent upon full payment of the award owed to Claimants;*
>
> *(e) ordering Respondent to pay any and all appropriate fees and expenses to the Basketball Arbitral Tribunal;*
>
> *(f) ordering Respondent to inform all foreign players for a period of five (5) years in writing in English and/or the player's native language that one (1) or more foreign players have*

not been timely paid money due them under their contacts with Respondent;

(g) ordering Respondent to inform all foreign players in writing for a period of five (5) years in English and/or the player's native language that one (1) or more foreign players have been forced to resort to arbitral proceedings to collect money due them under their contracts with Respondent;

(h) ordering Respondent to file for a period of five (5) years copies with the president of the Basketball Arbitral Tribunal and/or FIBA of (f) and (g) above, confirmed in writing and signed by both the foreign player and Respondent;

(i) ordering Respondent to inform for a period of five (5) years all of their sponsors that they have had an arbitral proceeding initiated against them by a foreign player for Respondent's failure to pay money due the player under his contract with Respondent;

(j) ordering Respondent to inform for a period of five (5) years every team in the Italian League that they have had an arbitral proceeding initiated against them by a foreign player for Respondent's failure to pay money due the player under his contract with Respondent;

(k) in the event that enforcement action is necessary relating to the award by the Arbitrator of this Arbitration, that the Arbitrator order Respondent to deposit into a trust account with the Basketball Arbitral Tribunal or, alternatively, to pay directly to the Claimants additional fees in the amount of 50,000.00 Euros to pursue enforcement of the Arbitral Award in Italy, Europe, and any other State or Nation under the New York Convention or wherever assets of Respondent may be found".

4.2 Respondent's Position

36. 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

37. 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[1].

[1] ATF 120 II 155, *162*.

A. Damages for Breach of Contract and Delivery of Tax Receipts

38. 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).

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

40. 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]

41. The Player is invoking the jurisdiction of the BAT over the dispute on the basis of the arbitration clause contained under Article XII of the Agreement, 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 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."*

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

43. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).

44. Furthermore, the Arbitrator finds that the arbitration agreement covers the subject-

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

matter of the dispute.

45. For the above reasons, the Arbitrator finds he has jurisdiction to adjudicate the Player's claims against the Club.

B. Provisional Measures

46. Under Article 183(1) of the PILA, which is the *lex arbitri*, and Article 10 of the BAT Arbitration Rules, the Arbitrator has jurisdiction to make an order for provisional and conservatory measures relating to the issues in dispute.

47. Therefore the Arbitrator finds he has jurisdiction to decide upon the provisional measures being requested by the Player.

C. Permanent Injunctive Relief

48. The Player's request for permanent injunctive relief contains eleven prayers for relief, which are lettered from C - (a) to (k).

49. Prayers for relief C - (a) to (d) and C - (f) to (k), i.e. ten out of the eleven prayers, are all essentially of the same nature, to the extent they seek in various manners to obtain a form of sanction against the Club, i.e. they request measures to be ordered which extend beyond what may be characterized as contractual remedies aimed at obtaining the performance in kind of contractual obligations or damages for non-performance.

50. For a number of reasons, the Arbitrator lacks the powers and jurisdiction to adjudicate any of those ten prayers for relief.

51. In that respect, it is noteworthy that the Player has partly misunderstood the function and jurisdiction of the BAT when affirming that: "*The Arbitral Tribunal is empowered with vast authority* ***to enforce its awards*** *through remedial awards, sanctions, and injunctive relief*" (emphasis added).

52. An arbitral tribunal only has the powers and jurisdiction which are conferred upon it via the parties' consent to the arbitration agreement and any applicable rules and regulations which affect the scope of that agreement, including any mandatory limitations imposed by the *lex arbitri*.

53. The BAT having been instituted by FIBA as an independent arbitral tribunal – under Articles 27 and 32 of the FIBA General Statutes, the BAT is not a FIBA judicial body but an independent organization recognized by FIBA – the BAT's powers and jurisdiction are partially defined by the delineation of its competence in the FIBA General Statutes and the FIBA Internal Regulations (hereinafter referred to collectively as the "FIBA Regulations") in relation to FIBA's judicial and non-judicial bodies.

54. Consequently, the standard arbitration clause recommended in the BAT Rules as well as any arbitration clause inserted into a contract which constitutes an agreement to arbitrate in front of the BAT must be interpreted as including the limitations of the BAT's jurisdiction and powers deriving from the FIBA Regulations.

55. It is clear from the FIBA Regulations that all powers to take sports or disciplinary sanctions of any nature against basketball clubs, as well as the competence to examine such sanctions upon appeal, are vested only with FIBA's judicial and non-judicial bodies. In other words, as an independent body, the BAT is not invested by the FIBA Regulations with any jurisdiction or powers to take sanctions or to review sanctions against basketball clubs.

56. In addition, Article **3**-300 of the FIBA Internal Regulations lists the sanctions that can be imposed on basketball clubs (and other parties to BAT arbitrations) for failing to honour a BAT award, and Article **3**-301 provides that it is FIBA's Secretary General or his delegate who are exclusively competent for taking any such sanctions upon request and that such sanctions may be appealed to the FIBA Appeals' Panel.

57. For the above reasons, the arbitration agreements forming the basis of the Arbitrator's jurisdiction in this case cannot be deemed to confer on him the powers to order the

sanctions requested by the Player in his prayers for relief C - (a) to (d) and C - (f) to (k).

58. Consequently, the Arbitrator lacks jurisdiction with respect to those prayers for relief.

59. Prayer for relief C - **(e)** is of a different nature, since it requests "*ordering Respondent to pay any and all appropriate fees and expenses to the Basketball Arbitral Tribunal*".

60. It is not altogether clear what the foregoing prayer for relief intends to cover. If it is a reference to the requirement under the BAT Rules that the Respondent pay a share of the Advance on Costs to the BAT Secretariat, that is an administrative matter which is managed by the BAT Secretariat and, in the present case, the BAT Secretariat has already duly handled this matter.

61. If it is a request by the Player to be awarded arbitration costs and legal expenses, that is a matter which falls within the scope of Arbitrator's jurisdiction as determined by the arbitration agreement examined under section 5(A) of this award and which the Arbitrator shall adjudicate under section 8 of this award.

6. Other Procedural Issues

62. Article 14.2 of the BAT Rules specifies that "*the Arbitrator may […] proceed with the arbitration and deliver an award*" if "*the Respondent fails to submit an Answer*." The Arbitrator's authority to proceed with the arbitration in case of default by one of the parties is in accordance with Swiss arbitration law and the practice of the BAT.[3] However, the Arbitrator must make every effort to allow the defaulting party to assert its rights.

63. This requirement is met in the present case. The Respondent was informed of the initiation of the proceedings and of the appointment of the Arbitrator in accordance with

[3] See *ex multis* BAT cases 0001/07; 0018/08; 0093/09; 0170/11.

the relevant rules. It was also given sufficient opportunity to respond to Claimant's Request for Arbitration, and to his Account on Costs. Respondent, however, chose not to participate in this Arbitration.

7. Discussion

7.1 Applicable Law – ex aequo et bono

64. 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".*

65. 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."*

66. Article XII 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*" (this is confirmed in the provision of the Agreement relating to the "Governing Law").

67. 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.

68. 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[4] (Concordat)[5], 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."*[6]

69. 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*".

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

7.2 Findings

A. Provisional Measures

71. The Arbitrator finds that the conditions for ordering the provisional measures being requested are not met in the present case because – beyond asserting that the Club is using its funds/patrimony in manners that are inappropriate and likely to endanger the Club's capacity to pay its alleged debts to the Player – the latter has adduced no evidence to support his affirmations in question, i.e. has not even brought *prima facie* evidence thereof; nor provided *prima facie* evidence that the Club is in a financial and/or legal situation which will prevent it from honouring its debts if they exist. Thus, the Player has not fulfilled the condition of demonstrating the likelihood of irreparable harm.

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4 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).

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

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

72. For the above reasons, no provisional measures were ordered prior to this award and the Player's request for provisional measures will be dismissed.

B. Damage Claim and Request for Tax Receipts

73. Despite having had ample opportunity to make submissions, the Respondent did not contest the Player's allegations as to the facts of his claims on the merits, nor did it challenge the evidence adduced in that connection.

74. Furthermore, on their face, the content of the Player's Agreement and the bank statements filed, confirm the reality of the Claimants' allegation that the Player is still owed a total of **USD 25,642.71** (USD 20,642.71 in outstanding salaries + USD 5,000 as a bonus) under Articles IV and V of the Agreement.

75. The credibility of the claim is further reinforced by the fact that during the course of these proceedings, the Player spontaneously submitted evidence of the fact that he had received a further payment from the Club in September 2013 that reduced the amount of his total claim to the foregoing amount.

76. Consequently, the foregoing amounts will be awarded on the basis that they are contractually owed and in application of the principle *pacta sunt servanda*.

77. Article VII of the Player's Agreement expressly stipulates that all the contractual remuneration is net of all Italian tax and that a receipt of the tax deposits made by the Club shall be delivered to the Player at the end of each fiscal year. Consequently, the amounts awarded shall be net of tax, and because the end of the 2012 and 2013 fiscal years have passed since the Agreement was signed, the Player's request for receipts of tax deposits will be granted for those two years.

78. With respect to the Player's claim for EUR 35,000 as penalties for late payments (based on a contractually-stipulated penalty of EUR 50 per day of delay), the Arbitrator notes that despite being questioned on the subject, he did not allege or adduce

evidence demonstrating that he ever put the Club on notice when the late payments occurred. Furthermore, the Player has not alleged that he ever refrained from practising as a result of the late payments and has declared that he played during the entire 2012/2013 season, including in the team's last game in May 2013.

79. In the above circumstances, the Arbitrator finds it would be unfair to consider the Club should be subject to a *per diem* penalty of EUR 50 as calculated by the Player until the end of the period when his salaries were owed for the 2012/2013 season under the Agreement, i.e. until 30 June 2013.

80. Indeed, if – as appears from the record since the Player neither alleged nor proved the contrary – the Player never claimed any penalties at the time and continued practising and playing until the last game, despite the fact the scheduled payments were continuously late and only partially paid, the Club could in good faith believe the Player was renouncing his contractual right to claim penalties.

81. In addition, based on the wording of the relevant paragraph of Article V of the Agreement and the logic of the penalty clause, the Arbitrator finds that it cannot be interpreted as allowing the Player to claim the *per diem* EUR 50 penalty in an open-ended manner. Instead, Article V provides for several measures, which logically succeed each other and do not cumulate. In case of any late payment, the clause stipulates there is first a *per diem* EUR 50 penalty, then beyond 10 days of delay the Player is entitled to stop taking part in practices and games and, finally, after 15 days of delay, he is entitled to leave the Club and receive his full salary for the season as guaranteed under the Agreement.

82. Given the above findings and the circumstances of this case, where, on a continuous basis (from the beginning until the end of the season), the Player's instalments were only partially paid and with delay, but he nevertheless continued practicing and playing for the team until the last game of the season without apparently putting the Club on notice, the Arbitrator finds it fair and just, i.e. decides *ex aequo et bono*, that a *per diem*

penalty of the contractually-stipulated amount (EUR 50) should be allowed for a period of 10 days in connection which each of the 10 monthly salary instalments (from September 2012 to June 2013) stipulated under the Agreement.

83. Consequently, deciding *ex aequo et bono*, the Arbitrator shall not admit the entire late-penalty claim of EUR 35,000 as calculated by the Player and shall instead allow a penalty payment of **EUR 5,000** (10 days x EUR 50 x 10).

84. With respect to the above principal amounts being awarded to the Player, in keeping with BAT jurisprudence, interest at 5% per annum will be awarded on those sums.

85. In the circumstances of this case, deciding *ex aequo et bono*, the Arbitrator finds it fair that the interest run on all the amounts owed, i.e. the **USD 25,642.71** in outstanding salaries plus the bonus and the **EUR 5,000** allowed as a penalty, from the day after the last payment had to be made according to the Agreement (30 June 2013), i.e. from 1 July 2013 onwards.

8. Costs

86. 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.

87. On 14 March 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 "*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 6,526.59.

88. Considering that the Player prevailed in less than half of his multiple prayers for relief of various nature and that addressing the Player's prayers for relief in question was time consuming, the Arbitrator finds it is fair that 75% of 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 Player in an amount representing 75% of the Player's legal fees deemed admissible and reasonable.

89. Given that the Player paid advances on costs of EUR 7,002.46 as well as a non-reimbursable handling fee of EUR 2,000 (which will be taken into account when determining the Player'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) The BAT shall reimburse EUR 475.87 to the Player;

    (ii) The Club shall pay EUR 4,894.94 to the Player, i.e. 75% of the arbitration costs;

    (iii) The Club shall pay to the Player EUR 7,000 (2,000 for the non-reimbursable fee + 5,000 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.

9. AWARD

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

1. **S.S. Sutor Srl shall pay Mr. Kyle Johnson an amount of USD 25,642.71, net of tax, as contractual damages, plus interest at 5% per annum on such amount from 1 July 2013 onwards.**

2. **S.S. Sutor Srl shall pay Mr. Kyle Johnson an amount of EUR 5,000, net of tax, as penalties for late payments, plus interest at 5% per annum on such amount from 1 July 2013 onwards.**

3. **S.S. Sutor Srl shall deliver to Mr. Kyle Johnson tax certificates for all the sums paid to him relating to the fiscal year 2012 and for all the sums paid to him relating to the fiscal year 2013.**

4. **S.S. Sutor Srl shall pay Mr. Kyle Johnson an amount of EUR 4,894.94 as a partial reimbursement of his arbitration costs.**

5. **S.S. Sutor Srl shall pay Mr. Kyle Johnson an amount of EUR 7,000 as a contribution to his legal fees and expenses.**

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

Geneva, seat of the arbitration, 20 March 2014

Quentin Byrne-Sutton
(Arbitrator)