

ARBITRAL AWARD

(BAT 1919/23)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert

in the arbitration proceedings between

Inception Sports LLC

9442 Norton Commons Blvd., Prospect, KY 40059, USA

- Claimant -

represented by Mr. Sergiu Valentin Gherdan, attorney at law,

vs.

Mr. Carlbe Lee Ervin

- Respondent -

represented by Mr. Vassil Dimitrov, attorney at law,

1. The Parties

1.1 The Claimant

1. Inception Sports LLC (“Agency”) is an American professional sports agency.

1.2 The Respondent

2. Mr. Carlbe Lee Ervin (“Player”) is an American professional basketball player.

2. The Arbitrator

3. On 10 February 2023, Prof. Ulrich Haas, the President of the Basketball Arbitral Tribunal (the “BAT”), appointed Mr. Klaus Reichert as arbitrator (“Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal in force as from 1 January 2022 (“BAT Rules”). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence or to his conduct of these proceedings.

3. Facts and Proceedings

3.1 Summary of the Dispute

4. Agency was, in the past, the professional representative of Player. Their relationship was governed by a representation agreement (the “Contract”) dated 8 May 2022 (with a prior contract in roughly similar terms dated 14 May 2021). The term of the Contract (as per the combination of clauses 4 and 5 of the Contract) was to be, in essence, not less than one year, such period described by the Parties as the “New Client Grace Period”. Thereafter, the Contract could be terminated by means of a thirty-day notice. Player terminated the Contract on 12 July 2022 and shortly afterwards signed for a professional basketball club in Israel. Agency sought payment of its fee of 10% of Player’s salary in

accordance with clause 5(c) of the Contract. According to Agency the Parties exchanged WhatsApp messages and stipulated to a fee of USD 6,000.00 payable in two moieties. This was based on an image sent to Agency capturing the salary provisions of Player's contract with his club in Israel.

5. As is discussed and analysed in more detail below, the Parties do not appear to the Arbitrator to dispute the occurrence of the facts and matters which transpired as between them, rather, the dispute concerns the perceptions, interpretations and legal consequences of such facts. In particular, Player says that his consent to arbitrate has been vitiated, the Contract is invalid, he had just cause for termination due to threats and intimidation and, also, any promise he might have made for payment was obtained under duress.

3.2 The Proceedings before the BAT

6. On 7 January 2023, Agency filed a Request for Arbitration (of the same date) in accordance with the BAT Rules. The non-reimbursable handling fee of EUR 1,000.00 was received in the BAT bank account on 3 February 2023.
7. On 14 February 2023, the BAT informed the Parties that Mr. Klaus Reichert 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 (Inception Sports LLC)</i>	<i>EUR 2,000.00</i>
<i>Respondent (Mr. Carlbe Lee Ervin)</i>	<i>EUR 2,000.00"</i>

8. The advance on costs was adjusted by the BAT on 21 March 2023 as follows:

<i>"Claimant (Inception Sports LLC)</i>	<i>EUR 1,750.00</i>
<i>Respondent (Mr. Carlbe Lee Ervin)</i>	<i>EUR 1,750.00"</i>

9. Agency paid the advance on costs almost in full (EUR 1,996.50 on 8 March 2023 and

EUR 1,500.00 on 3 April 2023).

10. Player filed his Answer on 5 April 2023.
11. On 20 April 2023, the BAT informed the Parties as follows:

"While the amount in dispute in this proceeding falls below the threshold of EUR 50,000.00 established in Article 16.2 of the BAT Rules for the issuance of an award with reasons, the BAT President has determined, pursuant to the discretion afforded to him by Article 16.3 (b) of the BAT Rules, that given the circumstances, certain of the issues that the case raises and the interest of the basketball community in having a sufficient body of publicly-available awards with reasons, a reasoned award is appropriate in this case."

12. On 24 May 2023, Agency filed its Reply dated 23 May 2023.
13. On 6 June 2023, Player filed his Rejoinder.
14. On 7 June 2023, the Parties were invited to set out (by no later than 14 June 2023) how much of the applicable maximum contribution to costs should be awarded to them and why. The Parties were also invited to include a detailed account of their costs, including any supporting documentation in relation thereto. Finally, the Parties were also notified that the exchange of submissions was closed in accordance with Article 12.1 of the BAT Rules.
15. Both Parties filed costs submissions.

4. The Positions of the Parties

4.1 Agency's Position

16. Agency's position on its claim is that the matter is a simple one by which it seeks to assert its express contractual right to a 10% fee on Player's engagement by an Israeli club. Agency's position on the allegations made against it are: (a) the jurisdiction objection

cannot be upheld as Swiss law on the separability of an arbitration agreement from the contract in which it is found means that even if the Contract were vitiated (which Agency does not accept), this would not impugn the BAT clause therein; (b) FIBA Regulations do not supersede, in BAT matters, the contents of contractual obligations; (c) there was no duress or intimidation, rather, at worst, some intemperate and regrettable language borne out of frustration; and (d) Player's subsequent and early release from his contract in Israel is neither here nor there insofar as liability under the Contract is concerned.

17. Agency's requests for relief in the Request for Arbitration were as follows:

"The Claimant requests that the Respondent to be ordered:

1. To pay towards the Claimant the amount of 6.000 USD, alongside default legal interest in amount of 5% per annum (Swiss statutory rate):

a) on the amount of 3.000 USD from 5th of October 2022 (in amount of 38,63 USD at the date of filing this request for arbitration)

b) on the amount of 3.000 USD from 5th of November 2022 (in amount of 25,89 USD at the date of filing this request for arbitration)

2. To pay towards the Claimant all arbitration proceedings costs

3. To pay towards the Claimant all legal fees and expenses incurred in these proceedings

Total amount in dispute: 6.064,52 USD (equivalent of 5.775,73 EUR at the date of lodging the request for arbitration)"

4.2 Player's Position

18. Player challenges BAT jurisdiction and, further, denies any liability to Agency. As regards jurisdiction, he says that the FIBA Agents Regulations have the consequence of invalidating the Contract given that it was entered into by an entity which had no right to represent basketball players, and, further, the Parties' agreement to a BAT clause was vitiated due to duress, threats and intimidation. As regards the merits, Player says that any promise he made to pay Agency was wrongfully obtained via threats and

intimidation. Such promise, therefore, was invalidated. Further, he says that as a matter of the applicable FIBA Agents Regulations he was entitled to use another agent in his dealings with his new Israeli club. Finally, he says that Agency did nothing in connection with Player's retention by his new Israeli club so as to earn a fee.

19. Player's requests for relief in the Answer were as follows:

1. *BAT shall declare that it lacks jurisdiction for the case, because the duress, insults and threats of the Claimant invalidated the whole contract, including the arbitration clause contained within. Moreover, the Claimant is not eligible to be FIBA Agent under the current regulations, because it is a firm, thus the contract is rendered null and void on these grounds as well.*

In the event that BAT decides it has jurisdiction to rule on the merits of the matter:

2. *BAT shall declare that the Respondent does not owe any agency commission to the Claimant because of the following reasons:*
 - *The contract was terminated with just cause by the Respondent, because of the duress and intimidation performed by the Claimant. No party can benefit from their illegal behavior, therefore no commission is owed to a party who used duress and intimidation in attempt to extract such financial gain;*
 - *The Respondent has the right to seek employment on his own or with the help of another agent pursuant to the current FIBA Agents Regulations;*
 - *There is no causal link between the activity of the Claimant and the signed employment contract in Israel;*
 - *The contract in Israel was prematurely terminated by the club, meaning that the Respondent cannot owe agency commission on salaries he never received in full from the Israeli club.*

In any event:

3. *BAT shall order the Claimant to cover all arbitration costs and handling fee for the case.*
4. *BAT shall order the Claimant to cover all legal and attorney fee expenses of the Respondent in the present matter in an amount to be presented in the final account of costs for the case."*

5. The jurisdiction of the BAT

20. First, the Arbitrator notes that prior to his appointment in this case, the BAT President has determined *prima facie*, pursuant to the specific and delineated power he has under Article 11.1 of the BAT Rules, that the subject matter of this arbitration is arbitrable. Thus, in light of such determination the arbitration could proceed further.
21. Recalling Article 1.3 of the BAT Rules, the Arbitrator has the sole authority to finally decide all matters in connection with BAT jurisdiction and will now proceed to do so.
22. 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).
23. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
24. 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) PILA¹.
25. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in clause 6 of the Contract, which reads as follows:

“FIBA Arbitration: Any dispute arising out of, or in relation to, the present contract shall be submitted to the FIBA Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved definitively in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT president. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by chapter 12 of the Swiss Act on Private International Law (PIL) irrespective of the parties’ domicile. The language of the arbitration shall be English. The

¹ Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

arbitrator shall decide the dispute ex aequo et bono."

26. The Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
27. With respect to substantive validity, as already noted above, Player challenges jurisdiction on two bases, invalidity of the Contract due to the FIBA Agents Regulations, and/or duress.
28. The Arbitrator will, first, examine Player's challenge to BAT jurisdiction based on his allegations of duress and, therefore, will ascertain the relevant facts. Logically this will be done in chronological order.
29. The first factual matter in time on the record of this arbitration appears to be a representation contract between the Parties dated 14 May 2021. This had a "New Client Grace Period" (clause 5(b)) whereby Player agreed that upon the initial execution of that contract, he would not be able to terminate for a period of six months (i.e. prior to 14 November 2021).
30. On 1 April 2022, Player sent Agency an email which terminated the aforementioned representation contract. What followed between then and the signing of the Contract was a series of WhatsApp messages which are now recorded in full:

"[4/1/22, 7:20:24 PM] [Agent of the Agency]: No respect I see

[4/1/22, 7:20:57 PM] [Agent of the Agency]: Your words meant nothing I guess... "thank you guys for saving my career" ... "you are the man with the plan"

[4/1/22, 7:21:08 PM] [Agent of the Agency]: You clearly fell for the bullshit of other agents

[4/1/22, 7:21:52 PM] [Agent of the Agency]: You realize we are one of the biggest agencies for Americans in Europe? And the pull we have

[4/1/22, 7:21:57 PM] Carlbe Ervin II: I'm not signing with nobody

[4/1/22, 7:22:19 PM] [Agent of the Agency]: You're going to absolutely fuck your career now

[4/1/22, 7:22:32 PM] Carlbe Ervin II: How

[4/1/22, 7:22:55 PM] [Agent of the Agency]: We have some big teams already interested in you, they won't go after you now I promise

[4/1/22, 7:23:36 PM] [Agent of the Agency]: Teams see when players do these kind of things, everyone knows what we have done for you and this will reflect VERY bad on you

[4/1/22, 7:24:18 PM] [Agent of the Agency]: We have had similar players do this in the past and they try to beg to come back after they have ruined their chances and it's too late then

[4/1/22, 7:25:04 PM] [Agent of the Agency]: [list of other players], I can give you several examples

[4/1/22, 7:26:23 PM] [Agent of the Agency]: But I'm not going to argue with you, you clearly don't want to listen to experts in this business who have taken players from \$900 a month to Euroleague, d2 players to highest paid in Europe, etc

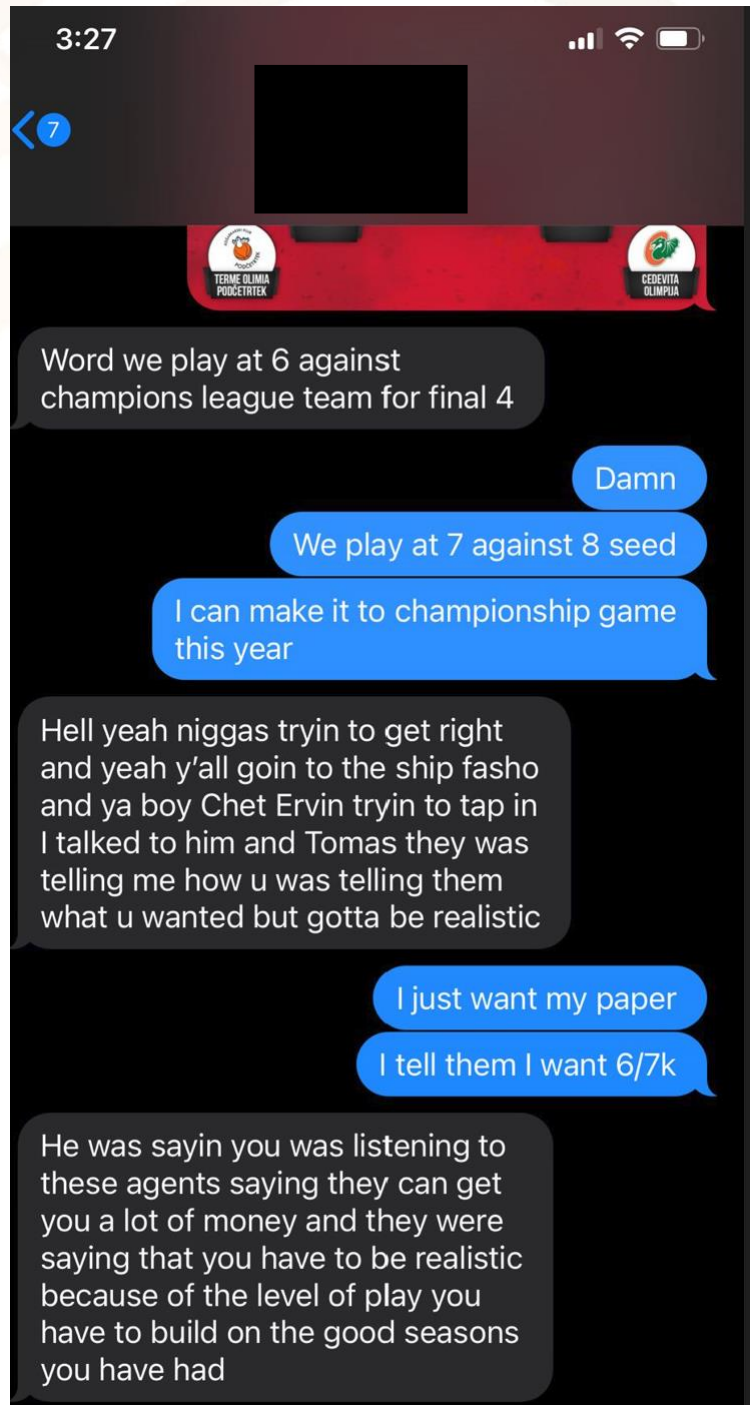
[4/1/22, 7:26:28 PM] [Agent of the Agency]: You no more then us I guess

[5/4/22, 9:31:16 AM] Carlbe Ervin II: This is what I don't understand! You say this I have or big interest from big teams then you say this!

[5/4/22, 9:31:21 AM] Carlbe Ervin II: <attached: 00000446-PHOTO-2022-05-04-09-31-21.jpg>

The aforementioned image sent by Player is as follows (on the next page):

BASKETBALL
ARBITRAL TRIBUNAL



[5/4/22, 10:03:23 AM] [Agent of the Agency]: <attached: 00000447-AUDIO-2022-05-04-10-03-22.opus>

The attachment is an audio message from [Agent of the Agency] to Player advising him to be realistic and not to listen to “cookie cutter” agents.

[5/4/22, 10:04:08 AM] Carlbe Ervin II: *I haven't listen to nobody*

[5/4/22, 10:04:44 AM] Carlbe Ervin II: *I didn't want none of these agents*

[5/4/22, 10:05:08 AM] [Agent of the Agency]: <attached: 00000450-AUDIO-2022-05-04-10-05-07.opus>

The attachment is an audio message from [Agent of the Agency] to Player describing how Agency had success in securing valuable contracts for clients at clubs around Europe.

[5/4/22, 10:05:32 AM] Carlbe Ervin II: *I just want my worth this shit is so stressful!*

[5/4/22, 10:07:17 AM] Carlbe Ervin II: *I don't know what I'm doing & im tired of chasing money!*

[5/4/22, 10:26:51 AM] Carlbe Ervin II: *I want to work with you but I want my worth and I don't want to deal with none of these people*

[5/4/22, 11:21:31 AM] [Agent of the Agency]: <attached: 00000454-AUDIO-2022-05-04-11-21-30.opus>

The attachment is an audio message from [Agent of the Agency] to Player of a “touching base” variety.

[5/8/22, 6:19:29 AM] Carlbe Ervin II: *00 – INCEPTION SPORTS, LLC – FIBA – Exclusive Representation Agreement 2022 (signed).pdf • 3 pages <attached: 00000455-00 – INCEPTION SPORTS, LLC – FIBA – Exclusive Representation Agreement 2022 (signed).pdf>*

The attachment is the Contract as signed by Player.

[5/8/22, 9:33:45 AM] [Agent of the Agency]: 00 – INCEPTION SPORTS LLC – FIBA – Exclusive Representation Agreement 2022 signed.pdf • 3 pages <attached: 00000456-00 – INCEPTION SPORTS LLC – FIBA – Exclusive Representation Agreement 2022 signed.pdf>

The attachment is the Contract as signed and dated by Agency.

31. There was a parallel exchange between Player and another [Employee of the Agency] which is quoted in the Answer (para. 10):

"[Employee of the Agency], non-licensed agent (in violation of FIBA regulations) was quick to add up to the insults against the Respondent: "Clown. Go waste someone else's time. Your dad is clueless and hurt you even more. You got so many clowns on your ear it's scary and you aren't smart enough to block it out". "Your career is fucked before it even starts. Because you let some scrub Dick agent melt your brain"

32. Agency's Reply adds further to the detail of that parallel exchange:

"[4/1/22, 11:07:53 PM] [Employee of the Agency]: You listen to every dumb motherfucker in the world but not me. All of hat time and you still can't understand.

[5/6/22, 9:57:34 PM] [Employee of the Agency]: I emailed you a new Inception Sports rep agreement. Let me know if/when you return it so I can confirm receipt.

[5/7/22, 3:58:56 PM] Carlbe Ervin (G): Sorry I was focus today on getting a win!

[5/7/22, 3:59:13 PM] Carlbe Ervin (G): I'll do it tomorrow when I have free time

[5/7/22, 4:08:42 PM] [Employee of the Agency]: Ok

[5/8/22, 6:19:29 AM] Carlbe Ervin (G): 00 – INCEPTION SPORTS, LLC – FIBA – Exclusive Representation Agreement 2022 (signed).pdf • 3 pages <attached: 00000740-00 – INCEPTION SPORTS, LLC – FIBA – Exclusive Representation Agreement 2022 (signed).pdf>

[5/8/22, 9:19:39 AM] [Employee of the Agency]: Got it

[5/8/22, 11:45:13 AM] Carlbe Ervin (G): Okay 🙏"

33. Player's argument for duress sufficient to vitiate the BAT arbitration clause is as follows

(from the Answer):

"13. Official legal definition of duress is contained in Art. 30 of the Swiss Code of Obligations 'A party is under duress if, in the circumstances, he has good cause to believe that there is imminent and substantial risk to his own life, limb, reputation or property or to those of a person close to him.'

14. Basically, the Claimant threatened the playing career and reputation of the Respondent - 'Your career is fucked before it even starts.'; 'We have some big teams already interested in you, they won't go after you now I promise'. He was presented with a choice, stay with Inception LLC, or Inception LLC will ruin his career so 'you'd be LUCKY to get 4-5/month haha'. This fulfills the legal definition of the duress. Pursuant to Art. 29 of the Swiss Code of Obligations 'Where a party has entered into a contract under duress from the other party or a third party, he is not bound by that contract.'

[...]

*16. Pursuant to decision of the **Swiss Federal Tribunal 4A_514/2010** 'Like any other contract, an arbitration agreement may be affected by a vitiation of consent (Kaufmann-Kohler/Rigozzi, Arbitrage international, 2nd ed. 2010, no. 235). If it is governed by Swiss law it may be invalidated due to undue influence (art. 21 CO), essential mistake (art. 23 et seq. CO), fraud (art. 28 CO) and duress (art. 29 CO).'"*

34. Insofar as the legal test for duress is concerned according to *ex aequo et bono* principles, the Arbitrator considers that, in general, the provisions of the municipal Code (Switzerland) relied upon by Player inform the type of necessary ingredients. Agency does not dispute this matter in the Reply.
35. The Arbitrator is of the view that the analysis, *ex aequo et bono*, follows a two-stage process. First, one examines whether the conduct of the alleged "oppressor" amounts to pressure or coercion of a demonstrably illegitimate nature directed at the intended "target" person. Hard or tough bargaining, or defence or assertion of one's commercial interests, cannot usually be capable to amount to illegitimate conduct. Secondly, whether such conduct (if found to be illegitimate) brought about the consent of the "target" to the contract or particular clause thereof.
36. It may be thought to go without saying, but it is said anyway: vitiation of consent to a

contract based on an allegation of duress is not lightly or easily achieved. It is not an allegation which can be legitimately made without compelling evidence to back it up. Any party seeking to vitiate their apparent consent to a contract has an uphill task evidentially speaking. It is the most basic maxim of evidence known to any experienced trial lawyer, namely, that some things are inherently less likely than others, therefore require a stricter approach to proof. Cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner.

37. Taking the first stage of the process of analysis, the Arbitrator cannot ascertain any words or deeds on the part of Agency's people as recorded above which could arguably rise to the necessary level of illegitimate pressure. The Arbitrator is entirely unmoved by the apparent sensitivity of Player to coarse language. The world of professional basketball is not one for the faint of heart, or the easily offended. If the few, undoubtedly coarse, snippets of language quoted above were treated by the Arbitrator as wholly alien to the world of a tough and physical professional sport, then one could readily foresee contractual chaos breaking out with the offended treating every transgression as a reason to cry foul.
38. The much more likely scenario from the exchanges between the Parties as quoted above is that Agency's people were telling, in trenchant terms, Player a number of home truths about the foolishness of his choices. The Arbitrator reads the exchanges as Agency telling Player that he himself was undermining his future career rather than any scintilla of a threat that it would seek vengeance. Agency was actually looking out for Player's welfare, and the Arbitrator dismisses any suggestion to the contrary. There was no illegitimate pressure.
39. In the foregoing circumstances, Player cannot possibly pass the first stage of the two-stage process, so therefore the second stage is a moot point. However, for completeness, the Arbitrator does note that there is no evidence which could possibly persuade him that consent to the BAT arbitration clause was itself procured by

illegitimate pressure. It was Player who reopened the lines of communication. That is the end of the matter.

40. Given that this Award will enter the public domain, the Arbitrator wishes to make absolutely clear that Player's allegation of duress in the procurement of the BAT arbitration clause is completely unsubstantiated.
41. Turning to the second of Player's objections to jurisdiction, he argues that Agency operates not just through a FIBA licensed agent [Agent of the Agency] but also [Employee of the Agency] (who is not licensed). Thus, Art. 303 of the FIBA Agents Regulations, which permits agents to operate through legal entities, does not extend to Agency as it fails the requirement under such Article that "the FIBA-Licensed Agent continues to be the only responsible person vis-à-vis FIBA". This argument is the predicate or support for a series of consequences, namely, that Agency has no legal capacity to operate as a licensed basketball agency, therefore the Contract must be null and void. In such circumstances, the BAT arbitration clause must also be null and void.
42. This is an argument which neither persuades nor impresses. Quite apart from the long-standing position, which is unquestionably known to every participant in BAT arbitrations over several years, that FIBA Regulation do not control² the outcome *ex aequo et bono* before BAT arbitrators, Player presents no evidence which might indicate that [Employee of the Agency] holds any responsible role vis-à-vis FIBA. Agency's Reply puts the point best when it says (page 4):

² Agency references BAT 0541/14, *Bill A. Duffy International Inc vs. Justin Doellmann*, para. 50: "However, non-compliance of a contractual provision with the F.I.B.A. Internal Regulations does not lead to the invalidity of that contractual provision, but, if at all, to sanctions according to the Articles 3-159 to 3-162 of the F.I.B.A. Internal Regulations, which is, however, not a matter of the Arbitrator's mandate or jurisdiction". To the Arbitrator's knowledge, and he is the second-most senior member of the current (as of the time of writing this Award) BAT panel having been appointed originally in September 2009, this remains the consistent position.

"[...] Nowhere in the F.I.B.A. Player-Agent Regulations is there a mandate for all agency employees to be licensed agents (and rightly so, as it would imply that every person working irrespective of their position within an agency or engaging with specific agency responsibilities would require such accreditation) and, in any case, the majority of the Claimant agency activities are performed by its owner. Therefore, also these arguments lack substantive merit."

43. For the above reasons, the Arbitrator dismisses Player's jurisdiction challenges and decides, finally, that he has jurisdiction to adjudicate Agency's claims.

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

44. 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".

45. Under the heading "Law Applicable to the Merits", Article 15 of the BAT Rules reads as follows:

"15.1 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.

15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead."

46. Clause 7 of the Contract stipulates as follows:

“7. Domestic Jurisdiction and Governing Law: *This agreement shall be interpreted in accordance with the laws of the State of Kentucky, located in the United States of America. In case of dispute (FIBA BAT or otherwise) and the Company prevails in its claim, the Company shall be entitled to recover attorney’s fees as well as all administrative costs, procedural costs, and reasonable expenses incurred, from the Player.”*

47. The question, thus, is how the choice-of-law provision in clause 7 relates to clause 6, wherein it is stated that: “[T]he arbitrator shall decide the dispute *ex aequo and bono*.” The consistent position in prior BAT awards, simply stated, is that where there are apparently competing clauses for governing law and *ex aequo et bono*, the latter prevails for the purpose of determining contentious issues. The former may be of relevance for non-contentious matters. In any event, as neither Party sought to invoke the laws of Kentucky in this arbitration, the Arbitrator does not need to dwell on the matter further.

48. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this arbitration.

49. The concept of “*équité*” (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l’arbitrage³ (Concordat)⁴, under which Swiss courts have held that arbitration “*en équité*” is fundamentally different from arbitration “*en droit*”:

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

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

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

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

50. 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*”.
51. In light of the foregoing considerations, the Arbitrator makes the findings below.

6.2 Findings

52. A number of guiding principles, clearly established by well over a decade of FAT/BAT awards rendered by all of the arbitrators serving in this Tribunal, can be succinctly recalled. First, *pacta sunt servanda* is the key to the resolution of any dispute arising from a contract which has contained within it an arbitration clause stipulating the application of the BAT Rules. Secondly, interpretation of contractual language chosen by parties to such contracts is not a hostage to literalism, but rather the Arbitrator takes care to read all the terms as a whole taking into account the context (particularly the reasonable expectations of participants in the international professional basketball community). However, the phrase *ex aequo et bono*, or justice and equity, is not a reason, in and of itself, to simply discard the ordinary meaning of contractual language merely because it is perceived to be inimical or presently inconvenient to one side or the other. Thirdly, contractual clauses which apply in the context of a breach, or termination for cause, such as penalties, or liquidated damages (this is not a closed list), are subject to careful scrutiny when ruling. In particular, such a clause which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party (e.g. by reference to the primary or substantive obligations in a contract), may be refused enforcement, or moderated in its application. Whether or not a BAT arbitrator might refuse enforcement of such a penalty, or moderate its application to some extent, is usually left to their discretion depending on the individual circumstances of a case. This is a highly fact-sensitive exercise, and the discretion in that regard is not to be taken to be unfettered.

53. Bearing the foregoing in mind, the Arbitrator turns to the case at hand.
54. The logical place to commence is whether the Contract, properly interpreted in the manner described above, does provide for payment by Player of a fee to Agency. If this is so, then the next question will be whether Player has mounted any argument to annul or wipe out such obligation.
55. The relevant provisions in the Contract are as follows:

*"3. **Compensation:** "Agent Fee" shall mean the industry standard 10% of the total net contract value, which shall include both league contracts and image contracts (where applicable). [...]"*

*5. **Termination:** Termination of this agreement will become effective thirty (30) days after written notice of termination is given to the other party. Parties acknowledge the following circumstances regarding such termination:*

a) Termination Period – "Termination Period" will mean the thirty (30) days beginning on, and immediately following, the day that the official notice of termination is received by a party. The Player and the Company acknowledge the nature of the industry and the duties of agents, and parties agree that 30 days is a reasonable amount of time for such Termination Period. If the Player signs to any club during the Termination Period, then the Player shall be personally liable for the payment of the Agent Fee to the Company, whether the Company is a party to the contract with the club or not.

b) New Client Grace Period – The Player agrees that upon the initial execution of this Agreement, he will not be able to terminate this Agreement for a period of one (1) calendar year from the date signed. Parties agree that this is a reasonable amount of time given the nature of the business and gives the Company the opportunity to perform its duties.

c) Future Contracts – "Future Contracts" will be considered to mean any later contract(s) between the Player and a club with which the Player had signed to while under the official representation of the Company, during the Termination Period (5(a)), or as the result of discussions prior to termination (5(d)). In the event the Player terminates the Company, with or without cause, and signs with another agent/agency or proceeds unrepresented, then the Company shall be entitled to the Agent Fee. If, for whatever reason, the Company is not party to the Future Contracts, then the Player will be personally liable for the payment of the Agent Fee to be paid within thirty (30) days of receiving official notice from the Company.

d) [...]"

56. Player terminated the Contract on 12 July 2022. Thus, both clauses 5(a) and 5(b) of the Contract were duly triggered as the prescribed 30-day period commenced ("Termination Period") and/or within the "New Client Grace Period". This appears to the Arbitrator to be consistent with the Parties' chosen contractual language and it further appears that Player does not either advance a case on interpretation, nor does he dispute the position adopted by Agency at page 10 of the Reply in that regard.
57. Player signed with his new club in Israel on 12 July 2022 (as confirmed by the exhibit to the Answer). That is the same day as the day of termination. Thus, clause 5(c) of the Contract appears to be engaged with the requirement, on its terms, for personal liability on Player's part for the "Agent Fee" in the event of a "Future Contract" being signed. The Agent Fee is the usual industry norm of 10%. Player's contract with his new club in Israel had a no cut, fully guaranteed net salary of USD 60,000.00. Thus, the Agent Fee was USD 6,000.00. This has not been paid by Player and the question now is whether he has any legitimate reason to avoid payment.
58. Player makes the same arguments on the substance of the matter as he did for jurisdiction, namely, duress, and invalidity of the Contract due to the FIBA Agents Regulations. Neither fare any better.
59. As regards the alleged invalidity of the Contract due to whatever iteration of the FIBA Agents Regulations Player might invoke, the same conclusion as set out in paras. 41-42 above apply with equal force. There is no need to repeat them here.
60. As regards duress, the only difference to the failed argument made on jurisdiction as set out above is that at para. 20 of the Answer where Player argues as follows:

"After this mistreatment [being the factual matters recorded earlier], the Respondent sent official termination e-mail to the firm on 12 July 2022 (Exhibit R4), informing the firm that the agency relationship with them is over, because the Respondent is terminating it with

immediate effect and just cause – psychological harassment and insults sent by the agents to the player (Exhibit R3). No 30-day notice is required when a player terminates the agreement with just cause.”

61. The Arbitrator finds the allegation that Agency engaged in psychological harassment of Player to be completely unfounded as a matter of fact. The chronology of exchanges demonstrates no such harassment, much less something as ugly as a psychological campaign. Given the seriousness of such a matter, particularly when a professional agency's role vis-à-vis a player-client is one of such a personal importance, the Arbitrator is compelled to specifically note that it is an allegation which manages to combine the minimum merit with the maximum harm. This cannot be permitted to pass without specific adverse comment from the Arbitrator as to its making in this arbitration.
62. There are three further arguments made by Player to avoid payment, namely, that he was entitled to use another agent to contract with his new club in Israel, no activity was performed by Agency in that regard, and in any event Player's contract there was terminated early and he cannot owe agency fees on money he did not earn.
63. None of these arguments persuade.
64. Whether Player was entitled to use another agent is neither here nor there. This did not, in and of itself, dissolve the express obligations on the part of Player in the Contract to pay Agency. Agency was a stranger to whatever arrangement Player had with a third party agent and it would be monstrous for any succour to be given to an argument which permitted contractual obligations to be so conveniently dissolved by a contract breaker.
65. The argument that Agency performed no role or activity in connection with Player's retention by his new club in Israel is one which is blind, entirely, to the provisions of the Contract. The Parties agreed that certain events or consequences would flow from a contract entered into by Player in the Termination Period. That is the end of the matter.

66. Finally, Player's early termination of his Israeli contract has no role in the operation of the Termination Period provisions of the Contract. Player entered into a no cut, fully guaranteed contract with his new Israeli club, and that is the contract upon which the Agent Fee is based. The debt accrued then, and was not subsequently abated or reduced.
67. In summary, Player has not demonstrated, much less substantiated any reason to avoid payment of a debt due to Agency of USD 6,000.00.
68. Turning to interest, Agency generously only seeks interest (usual rate of 5%) at a later point in time to that which might have been the case had it insisted on the Contract's provisions to the letter. The Arbitrator, therefore, awards interest: (a) on USD 3,000.00 from 5 October 2022; and (b) on USD 3,000.00 from 5 November 2022. Interest to run until payment in full.

7. Costs

69. In respect of determining the arbitration costs, Article 17.2 of the BAT Rules provides as follows:

"At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4). [...]"

70. On 31 August 2023, the BAT President determined the arbitration costs in the present matter to be EUR 6,496.50.
71. Moreover, in accordance with Article 18.2 of the BAT Rules, a contribution has been determined to be paid from the BAT Fund towards the arbitration costs in this case. As per the Information Notice accompanying the 2019 edition of the BAT Rules, this amount is EUR 3,000.00.

72. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 of the BAT Rules provides as follows:

“The award shall determine which party shall bear the arbitration costs and in which proportion. [...] When deciding on the arbitration costs [...], the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties.”

73. Further, the clause 7 of the Contract provides as follows, in part:

“In case of dispute (FIBA BAT or otherwise) and the Company prevails in its claim, the Company shall be entitled to recover attorney’s fees as well as all administrative costs, procedural costs, and reasonable expenses incurred, from the Player.”

74. Considering that Agency was the prevailing party in this arbitration, it is consistent with the provisions of the BAT Rules that the fees and costs of the arbitration be borne by Player alone. Given that Agency paid the entire Advance on Costs in the amount of EUR 3,496.50, Player shall pay EUR 3,496.50 to Agency.

75. In relation to the Parties’ legal fees and expenses, Article 17.3 of the BAT Rules provides that

“as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding [...] on the amount of any contribution to the parties’ reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties.”

76. Moreover, Article 17.4 of the BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses.

77. Agency claims legal fees in the amount of EUR 2,500.00. It also claims for the expense of the non-reimbursable handling fee in the amount of EUR 1,000.00.

78. Taking into account the factors required by Article 17.3 of the BAT Rules, the maximum awardable amount prescribed under Article 17.4 of the BAT Rules (in this case,

EUR 5,000.00), the fact that the non-reimbursable handling fee in this case was EUR 1,000.00, and the specific circumstances of this case, the Arbitrator holds that a total of EUR 3,500.00 (including the non-reimbursable handling fee) represents a fair and equitable contribution by Player to Agency in this regard.

79. In summary, therefore, the Arbitrator decides that in application of Articles 17.3 and 17.4 of the BAT Rules:

- (i) Player shall pay EUR 3,496.50 to Agency by way of arbitration costs; and
- (ii) Player shall pay Agency EUR 3,500.00 (EUR 1,000.00 for the non-reimbursable fee plus EUR 2,500.00 for legal fees), representing a contribution by him to its legal fees and other expenses.

8. AWARD

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

- 1. Mr. Carlbe Lee Ervin is ordered to pay Inception Sports LLC, USD 6,000.00, by way of unpaid agency fees, together with interest at 5% per annum on**
 - (a) USD 3,000.00 or any outstanding balance (as may be the case from time to time) thereof from 5 October 2022 until payment in full; and**
 - (b) on USD 3,000.00 or any outstanding balance (as may be the case from time to time) thereof from 5 November 2022 until payment in full.**
- 2. Mr. Carlbe Lee Ervin is ordered to pay Inception Sports LLC, EUR 3,496.50 as reimbursement for its arbitration costs.**
- 3. Mr. Carlbe Lee Ervin is ordered to pay Inception Sports LLC, EUR 3,500.00 by way of contribution to its legal fees and expenses.**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 8 September 2023

Klaus Reichert
(Arbitrator)