BASKETBALL
ARBITRAL TRIBUNAL

# ARBITRAL AWARD

**(BAT 0343/12)**

by the

# BASKETBALL ARBITRAL TRIBUNAL (BAT)

**Mr. Klaus Reichert SC**

in the arbitration proceedings between

**Ms. Jantel Lavender**

**- Claimant 1 -**

**Mr. Boris Lelchitski**
Sport International Group inc., 267 Kentlands Blvd. Suite 105,
Gaithersburg, MD 20878, Washington, USA

**- Claimant 2 -**

Both represented by Mr Ersü Oktay Huduti, Attorney at Law, Huzur Mah.
Oyaki Sitesi, Blok No: 27 Daire No: 29, 34396 Sisli, Istanbul, Turkey

vs.

**Beşiktaş Jimnastik Kulübü Derneği**
Suleyman Seba Cassesi, No. 48 BJK Plaza, Akaretler,
Besiktas, 34357 Istanbul, Turkey

**- Respondent -**

represented by Mr Emin Ozkurt, Attorney at Law, Inönü Caddesi,
Gözeü Apartmani, No: 35, Kat: 2, Gümüşsuyu-Beyoğlu, Istanbul, Turkey

## 1. The Parties

### 1.1 The Claimants

1. Claimant 1, Jantel Lavender (hereinafter referred to as “Player”) is a professional basketball player who was represented by the other Claimant, Boris Lelchitski (Claimant 2, hereinafter referred to as “Agent”) in her dealings with Respondent.

### 1.2 The Respondent

2. Beşiktaş Jimnastik Kulübü Derneği (hereinafter referred to as “Respondent”) is a professional basketball club in Istanbul, Turkey.

## 2. The Arbitrator

3. On 21 October 2012, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert SC, as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). None 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 Background and the Dispute

4. On 6 June 2011, Player and Respondent entered into an agreement (“the Player Agreement”) whereby the latter engaged the former to play basketball for the 2011-2012 season. The salary of Player was agreed at USD 155,000.00 net of tax with various bonuses depending on specified “on court” successes of the team. The Player Agreement also provided for a payment of USD 15,500.00 by Respondent to Agent.

5. Player played for Respondent until November 2011.

6. By letter dated 25 January 2012, FIBA issued a decision whereby it declared that Player was allowed to register with a club in Poland. For the preceding few months there was a process underway as between Player and the Turkish Basketball Federation as regards a refusal by the latter to issue a letter of clearance. In that process, Respondent made written observations to FIBA. Respondent appealed FIBA's decision. On 30 April 2012, the FIBA Appeals' Panel rejected Respondent's appeal.

7. The Player states that on 15 July 2012 she entered into a settlement agreement ("the Settlement Agreement") with Respondent which resolved all disputes between the Parties. Respondent disputes the power of the person who signed the Settlement Agreement on its behalf.

8. Respondent did not pay to Player the sums set out in the Settlement Agreement. Respondent did not pay the agreed sum to Agent as per the Player Agreement.

**3.2 The Proceedings before the BAT**

9. On 8 November 2012, the Claimants filed a Request for Arbitration dated 6 November 2012 in accordance with the BAT Rules.

10. The non-reimbursable handling fee in the amount of EUR 2,988.65 was paid on 7 November 2012.

11. On 23 November 2012, the BAT informed the Parties that Mr. Klaus Reichert SC had been appointed as the Arbitrator in this matter. Further, the BAT fixed the advance on costs to be paid by the Parties as follows:

*"Claimant 1 (Ms Jantel Lavender) EUR 3,000*

*Claimant 2 (Mr Boris Lelchitzski)* *EUR 1,000*

*Respondent (Besitktas)* *EUR 4,000"*

The foregoing sums were paid as follows (all on behalf of Claimants): 17 December 2012, EUR 3,977.30, and 4 February 2013, EUR 3,977.30.

12. Respondent filed its Answer on 2 January 2013 (pursuant to a Procedural Order of the Arbitrator dated 12 December 2012).

13. On 19 February 2013, Claimants filed their second submission (pursuant to a Procedural Order of the Arbitrator dated 5 February 2013).

14. On 6 March 2013, Respondent filed its second submission.

15. On 7 March 2013, the Parties were invited to submit their statements of costs by 13 March 2013 and were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.

16. On 13 March 2013, the Parties submitted their statements of costs. The Parties were invited to comment on the statement of costs of the other by 19 March 2013. Neither side commented upon the statement of costs of the other by that deadline.

## 4. The Positions of the Parties

17. Player says that Respondent did not perform its obligations under the Settlement Agreement at all.

18. Player says that as a result of Respondent's failure to perform its obligations under the Settlement Agreement, she is entitled to the following relief:

- a declaration that Respondent has breached the Player Agreement and the

Settlement Agreement;

- USD 16,500.00 plus 5% interest per annum from 20 August 2012;
- USD 97,500.00 plus 5% interest per annum from 28 August 2012;
- EUR 2,000.00 plus 5% interest per annum from 30 August 2012;
- USD 50.00 per day from 21 September 2012 as a contractual penalty; and
- arbitration costs, legal fees and expenses.

19. Agent says that he was not paid his agency fee as agreed in the Player Agreement. He says that he is therefore entitled to the following relief:

- a declaration that Respondent has breached the Player Agreement; and
- USD 15,500.00 plus 5% interest per annum from 15 November 2011.

20. Respondent's position is that the purported termination by Agent, on behalf of Player, of the Player Agreement in November 2011 was not valid. Respondent says that the pre-conditions prescribed in the Player Agreement which might lead to a valid termination were not properly fulfilled.

21. Respondent also says that Mr Can Köken is not entitled to represent it with legally binding effect. It says that he is an employee of the Respondent who works at the Basketball division and it refers to the signature circulars or powers of attorney.

22. Respondent further says that any money Player earned in Poland with CCC Polkowice should be deducted in the event that her claim is upheld.

23. Finally, Respondent says that Player's termination of the Player Agreement in November 2011 was unlawful and that it should be compensated for its damages. It requests the appointment of an independent expert to calculate such damages. It also seeks the payment of a disciplinary fine in the amount of USD 6,458.00 imposed on 17 November 2011.

## 5. The Jurisdiction of the BAT

24. 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).

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

26. 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[1].

27. The jurisdiction of the BAT over Claimants' claims is stated to result from the arbitration clauses in the Player Agreement and the Settlement Agreement. These read as follows (Player Agreement, then Settlement Agreement):

> *"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 the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

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

> *"Any dispute arising from or related to the present settlement agreement 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 the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

28. Both the Player Agreement and the Settlement Agreement are in written form and thus the arbitration clauses fulfil the formal requirements of Article 178(1) PILA.

29. 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 clauses under Swiss law (referred to by Article 178(2) PILA).

30. At no stage has Respondent questioned or challenged the jurisdiction of the Arbitrator to adjudicate upon the claims of both Player and Agent. Any jurisdiction challenge would have been required at the time of filing the Answer pursuant to Article 11.2 of the BAT Rules.

31. For the above reasons, the Arbitrator has jurisdiction to adjudicate Claimants' claims.

## 6. Discussion

### 6.1 Applicable Law – ex aequo et bono

32. 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".*

33. 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."*

34. As stated above, both the Player Agreement and Settlement Agreement clearly stipulate that: "*[T]he arbitrator shall decide the dispute ex aequo et bono*".

35. 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[2] (Concordat)[3], 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."*[4]

36. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives *"a mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he/she must stick to the circumstances of the case."*[5]

37. 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*

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2 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).

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

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

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

*any particular national or international law*."

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

**6.2 Findings**

39. The key to the dispute as between Player and Respondent is the Settlement Agreement. Respondent alleges that the person who signed this document did not have the authority to bind it.

40. First, the Arbitrator notes that the Respondent's stamp which was affixed to the Player Agreement is identical to the stamp which was affixed to the Settlement Agreement. Respondent seems to have allowed someone (who may have been outside the internal list of authorised signatories) to have possession in July 2012 of its stamp. This is, in the Arbitrator's assessment, a strong indication that Respondent permitted such person to act on its behalf.

41. Secondly, there is no indication of any kind on the evidence presented to the Arbitrator that Player or Agent had any knowledge whatsoever of the list of authorised signatories of Respondent, or that the person who they were dealing with had any restriction on his authority.

42. Thirdly, the Arbitrator has been referred to a decision of the FIBA Appeals' Panel dated 30 April 2012 which was enclosed with the Request for Arbitration. This document is not challenged in any way, nor indeed referred to, by Respondent in any of its submissions to the Arbitrator. The Arbitrator notes this decision in its entirety, and also for what it is, namely an appeal by Respondent against a decision of FIBA to allow Player register with a club in Poland. This decision is not binding on the Arbitrator as it was not a case as between the parties to this arbitration. The claims disposed of by that decision are different to the claims disposed of in this arbitration. The legal

relationship is different. Finally, the legal order to which this arbitration belongs (namely BAT arbitration seated in Geneva) is different. However, it is a highly detailed and reasoned decision which records positions taken by Respondent in the course of that procedure. The Respondent cannot be taken to resile from such positions (namely it cannot, in good faith, approbate and reprobate). In particular, the Arbitrator notes the discussion on page 9 of the decision on apparent authority. The decision, on the same page, states that "*[I]t is evident that the Appellant admitted Mr. Köken a role towards outside the club by positioning and acquiescence in a way that a third person must be protected in their good faith concerning his power of representation."*

43. Fourthly, the Arbitrator is particularly struck by the submission in the Answer (paragraph 27) which asserts that "[E]ven if Mr. Can Köken was the contact person towards the Player and the Agent, this would still not give him the power to represent Beşiktaş." This clearly suggests to the Arbitrator that the person which Respondent undeniably held out as the contact person vis-à-vis Player and Agent would still have an impediment to their authority, unknown to the third parties. The Arbitrator finds that proposition to be particularly unattractive.

44. Fifthly, there is established and long-standing BAT jurisprudence (FAT Case 22/08, *XL Basketball Agency v Beşiktaş*) in which the question of authority was addressed. The Arbitrator particularly refers to the following extract from the Final Award in that case (para. 52): *"It would ordinarily follow, in the eyes of any third party without knowledge of the internal rules of the Respondent, that such a person had authority to enter into contracts with players and players' agents on behalf of the Respondent."*

45. Taking the foregoing into account, the Arbitrator holds that Mr Can Köken was permitted by Respondent to liaise with Claimants and to be the relevant contact person. The Arbitrator holds that Claimants had no knowledge of any impediment on the part of Mr Can Köken to bind Respondent or that he might not be one of the authorised signatories. The Arbitrator further holds that the fixing of Respondent's

stamp to the Settlement Agreement is a clear representation by Respondent that the person so doing held authority (even if, in accordance with its internal rules, such person might have been under an impediment). In fact, under these circumstances, it would have been unreasonable to expect Claimants to enquire further into the extent of Mr Köken's authority.

46. In light of the foregoing findings, it follows that as a matter of justice and equity Respondent is bound by the Settlement Agreement. It would be inequitable and unjust to find otherwise as it would lead to the circumstance that every player and agent in the field of international basketball would have to constantly question the authority of every person they would deal with on behalf of a club. If a club permits one of its employees to deal with third parties, and hold its stamp, then it must suffer the consequences of not expressly notifying such third parties of any restrictions on authority.

47. The doctrine of *pacta sunt servanda* (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the principle by which the Arbitrator will examine the positions of the parties.

48. As a consequence therefore, Respondent's claims concerning issues prior to the date of the Settlement Agreement cannot be entertained. Clause 4 of the Settlement Agreement is clear in this regard: *"Parties accept and agree that they have no obligations towards each other as of this day other than the ones mentioned in the hereby settlement agreement. Both parties irrevocably release each other from any obligations other than the payment obligations mentioned in the hereby settlement agreement."* Respondent cannot go behind this clause and look for monetary relief as against Player which might have accrued prior to the date of the Settlement Agreement. Respondent's claims for damages and disciplinary fines (to the extent they are admissible, considering that Respondent did not pay its share of the advance on costs and may not raise a counterclaim in these proceedings) are rejected.

49. Respondent has breached the Settlement Agreement. Of that there is no doubt. It did not pay Player the agreed sums set out in paragraph 3.1 of the Settlement Agreement. Respondent's main defence to the merits reposed on seeking to impugn the validity of the Settlement Agreement. It failed in that regard.

50. Respondent expressly took on an obligation to pay to Player USD 114,000.00 for salary and EUR 2,000.00 for her legal expenses incurred in obtaining a Letter of Clearance from FIBA. It also agreed to a specific payment schedule with monthly milestones (20th of each month as and from August 2012) until full discharge. Finally, the Parties expressly agreed that if Respondent failed to pay or partially paid any of the instalments within 7 days of the due date, then all future payments would become immediately due (with a USD 50.00 penalty for each day of delay).

51. As a consequence of Respondent's failure to adhere to the terms of the Settlement Agreement by not even paying the first instalment, the entire amount became due and owing, namely USD 114,000.00 and EUR 2,000.00.

52. Respondent seeks to reduce this amount by any sum paid to Player during her time in Poland. The Arbitrator notes Player's point, namely that this doctrine of mitigation does not arise in this case as the sums claimed are on foot of a settlement agreement. The Arbitrator agrees with Player. The Parties came to their Settlement Agreement in July 2012, after the conclusion of the 2011-2012 playing season and if Respondent wished to agree with Player that the settlement sums would be abated by amounts paid to her in Poland, then it should have done so. It cannot now try to take advantage of a position which may have been open to it prior to the formation of the Settlement Agreement. Also, the express terms of release in the Settlement Agreement noted at paragraph 48 above militate strongly against this after-the-event attempt by Respondent to introduce mitigation. In short, it is too late for Respondent to seek abatement by mitigation.

53. Player is therefore due USD 114,000.00 and EUR 2,000.00 from Respondent as per the Settlement Agreement.

54. The final area for discussion under the heading of Player's claim is the subject of interest and penalties.

55. Player seeks both 5% interest and USD 50.00 per day pursuant to the Settlement Agreement. The Arbitrator does not believe that it is just and equitable for both to be awarded. The Arbitrator is of the belief that a just and equitable solution is for the bargain which the parties struck in the Settlement Agreement to be upheld, namely a penalty fee of USD 50.00. This would also be consistent with the letter of demand dated 27 August 2012 sent by Player's lawyers to Respondent in which the penalty fee is referred to, but not interest.

56. The Arbitrator finds that the date on which the penalty fee was due to commence, in the event of non-payment, was 21 September 2012, which follows a thirty day period from 20 August 2012 (the agreed date of the first instalment in the Settlement Agreement). The Arbitrator holds that it would be just and equitable for the date on which the penalty fee stops to be seven days from the date on which the Respondent was notified of the filing of the Request for Arbitration and of the appointment of the Arbitrator. That period of seven days was ample time for Respondent to put its affairs in order with Player and pay what was unquestionably due and owing. The date of such notification was 23 November 2012, and therefore the last date for the calculation of penalties was 30 November 2012. Respondent is therefore liable to Player for 71 days of penalties, *i.e.* USD 3,550.00. This solution accords with a just and equitable result for the specific situation in this case.

57. Turning to the Agent's case, no defence whatsoever is put forward by Respondent. Also, Respondent does not challenge the jurisdiction of the Arbitrator to adjudicate upon the claims asserted by Agent.

58. The Arbitrator finds that Respondent was obliged to pay Agent USD 15,500.00 by no later than 15 November 2011 (as per clause 6(c) of the Player Agreement). It did not do so and therefore Agent is entitled to the relief claimed in this regard.

59. Agent also seeks interest at 5% from 15 November 2011. Interest at a rate of 5% per annum is a well-established feature of BAT jurisprudence and the Arbitrator believes that it is just and equitable for Respondent to be liable to Agent in this regard. The date from which interest will accrue is 16 November 2011, namely the date immediately after the due date. Interest will run to 30 November 2012, which is consistent with the finding (above at paragraph 56) on Player's case.

## 7. Costs

60. 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.

61. On 04 June 2013 – considering that pursuant to Article 17.2 of the BAT Rules "*the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator*", and that "*the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time*", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised – the BAT President determined the arbitration costs in the present matter to be EUR 6,215.00

62. Considering that Claimants prevailed in their claims, it is fair that the fees and costs of

the arbitration be borne by the Respondent and that it be required to cover its own legal fees and expenses as well as those of the Claimants.

63. Claimants' claim for legal fees and expenses amounts to EUR 3,900.00 (Attorney's fees) and EUR 50.00 (other expenses). In addition there is the non-reimbursable handling fee of EUR 2,988.65. These fees and expenses are reasonable. These are to be borne by Respondent.

64. Given that Claimants paid advances on costs of EUR 7,954.60, as well as a non-reimbursable handling fee of EUR 2,988.65 (which, as noted above, is taken into account when determining Claimants' legal expenses), the Arbitrator decides that in application of article 17.3 of the BAT Rules:

(i) BAT shall reimburse EUR 1,739.60 to Claimants, being the difference between the costs advanced by them and the arbitration costs fixed by the BAT President;

(ii) Respondent shall pay EUR 6,215.00 to Claimants, being the difference between the costs advanced by them and the amount they are going to receive in reimbursement from the BAT;

(iii) Respondent shall pay EUR 6,938.65 to Claimants, representing the amount of their legal fees and expenses.

## 8. AWARD

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

1. **Beşiktaş Jimnastik Kulübü Derneği shall pay Ms. Jantel Lavender USD 114,000.00 net (salary) and EUR 2,000.00 net (legal expenses connected with transfer proceedings before FIBA).**

2. **Beşiktaş Jimnastik Kulübü Derneği shall pay Ms. Jantel Lavender USD 3,550.00 net by way of penalties.**

3. **Beşiktaş Jimnastik Kulübü Derneği shall pay Mr. Boris Lelchitski USD 15,500.00 net (agency fees) plus interest at 5% p.a. from 16 November 2011 to 30 November 2012 inclusive.**

4. **Beşiktaş Jimnastik Kulübü Derneği shall pay Ms. Jantel Lavender and Mr. Boris Lelchitski EUR 6,215.00 as reimbursement for their arbitration costs.**

5. **Beşiktaş Jimnastik Kulübü Derneği shall pay Ms. Jantel Lavender and Mr. Boris Lelchitski EUR 6,938.65 as reimbursement for their legal fees and expenses.**

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

Geneva, seat of the arbitration, 5 June 2013

Klaus Reichert SC

(Arbitrator)