



**BASKETBALL**  
ARBITRAL TRIBUNAL

**ARBITRAL AWARD**

(BAT 0347/12)

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Klaus Reichert SC**

in the arbitration proceedings between

**Mr Joe Alexander**

- Claimant 1 -

**The Neustadt Group**

9107 Gaither Road, Suite B, Gaithersburg, Maryland 20877, USA

- Claimant 2 -

**ProTalent Sports Management**

P.T. House S.r.l., Via Montiano 14, 06073 Castelvioto – Corciano, Italy

- Claimant 3 -

represented by Mr Doug Neustadt and Mr Brett Friedman,  
The Neustadt Group, 9107 Gaither Road, Suite B, Gaithersburg,  
Maryland 20877, USA

vs.

**BC Krasnye Krylia Samara**

Sovetskoy Armii Str. 253a - 340, Samara 443011, Russia

- Respondent -

## **1. The Parties**

### **1.1 The Claimants**

1. Claimant 1, Joe Alexander (hereinafter referred to as "Player") is a professional basketball player who was represented by the other Claimants, The Neustadt Group (Claimant 2, hereinafter referred to as "Neustadt") and ProTalent Sports Management (Claimant 3, hereinafter referred to as "ProTalent"; and together with Neustadt the "Agents"), in his dealings with Respondent.

### **1.2 The Respondent**

2. BC Krasnye Krylia Samara (hereinafter referred to as "Respondent") is a professional basketball club in Samara, Russia.

## **2. The Arbitrator**

3. On 20 December 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 21 July 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 450,000.00 net of tax with

various bonus fees depending on specified “on court” successes of the team. On the same day, the Agents and the Respondent entered into an agreement whereby the latter would pay the former, USD 45,000 as fees for the Agents’ assistance in locating and contracting with the Player (“the Agent Agreement”).

5. In April 2012, the parties, including Neustadt and ProTalent entered into a written “Settlement Agreement” whereby the Respondent agreed to pay certain discounted (from the then due sums under the Player Agreement) amounts to Player and also confirm its liability to the Agents.
6. Respondent did not perform in full the obligations it took on under the Settlement Agreement in that only certain of the agreed sums were paid to Claimants. The dispute has been brought about by the Respondent’s failure to perform in full its obligations under the Settlement Agreement.

### **3.2 The Proceedings before the BAT**

7. On 30 October 2012, the Claimants filed a Request for Arbitration dated 24 October 2012 in accordance with the BAT Rules.
8. The non-reimbursable handling fee in the amount of EUR 3,000.00 was paid on 2 November 2012.
9. On 27 December 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 (Mr Joe Alexander) EUR 4,000*

*Claimant 2 (The Neustadt Group) EUR 1,000*

*Claimant 3 (ProTalent Sports Management) EUR 1,000*

*Respondent (BC Krasnye Krylia Samara) EUR 6,000”*

The foregoing sums were paid as follows (all on behalf of Claimants): 9 January 2013, EUR 6,000.00, and 4 February 2013, EUR 6,000.00.

10. Respondent did not participate in the arbitration and did not file an Answer, despite several invitations by the BAT to do so.
11. On 8 February 2013, the Parties were invited to submit their statements of costs by 15 February 2013 and were notified that the exchange of documentation was closed in accordance with Article 12.1 of the BAT Rules.
12. On 11 February 2013, Claimants submitted their statement of costs. Respondent did not submit any costs. Respondent did not comment on the costs claim of Claimants despite having been invited by the BAT to do so.

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

13. Claimants say that the Settlement Agreement was not adhered to by Respondent in the following manner:
  - Respondent paid only two of the five agreed payments to Player (as per paragraph 2 of the Settlement Agreement) and therefore was in breach of its obligations. Paragraph 2 of the Settlement Agreement required Respondent to pay Player five instalments: USD 22,500.00 within 72 hours of execution; USD 22,500.00 on or before 15 May 2012; USD 22,500.00 on or before 31 May 2012; USD 22,500.00 on or before 30 June 2012; and USD 45,000.00 on or before 31 July 2012.
  - Respondent paid only the first of two agreed payments to Neustadt and

ProTalent (as per paragraph 5 of the Settlement Agreement). Paragraph 5 of the Settlement Agreement required Respondent to pay Neustadt and ProTalent USD 45,000.00 in two instalments: USD 22,500.00 on or before 31 May 2012; and USD 22,500.00 on or before 30 June 2012.

14. Claimants say that as a result of Respondent's failure to perform its obligations under the Settlement Agreement, they are entitled to the following relief:
- USD 112,500.00 net due to Player for salary;
  - USD 10,000 net due to Player by way of bonus;
  - USD 22,500.00 net due to Neustadt and ProTalent by way of commission payment;
  - USD 50.00 per day by way of "late fees";
  - a tax certificate for Player; and
  - arbitration costs, legal fees and expenses.
15. As already noted, despite several invitations by the BAT, Respondent did not participate in this arbitration.

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

16. As a preliminary matter, the Arbitrator wishes to emphasize that, since Respondent did not participate in the arbitration, he will examine his jurisdiction *ex officio*, on the basis of the record as it stands.

17. 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).
18. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
19. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA<sup>1</sup>.
20. The jurisdiction of the BAT over Claimants’ claims is stated to result from the arbitration clause in paragraph 10 of the Settlement Agreement, which reads as follows (the reference to FAT is the former name of BAT, see also Article 18.2 of the BAT Rules):

*“Any dispute arising from or related to the present agreement shall be submitted to the FIBA Arbitral Tribunal (FAT) in Geneva, Switzerland and shall be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PIL), irrespective of the parties domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono.”*
21. The Settlement Agreement is in written form and thus the arbitration clause fulfils the formal requirements of Article 178(1) PILA. For the sake of completeness, the Arbitrator notes that both the Player Agreement and the Agent Agreement contain an arbitration clause referring disputes to BAT, in their Article 5 and paragraph 6 respectively.
22. 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 clause under Swiss law

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

(referred to by Article 178(2) PILA).

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

## 6. Discussion

### 6.1 Applicable Law – ex aequo et bono

24. 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”.*

25. 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.”*

26. As stated above, the Settlement Agreement clearly stipulates that: “[T]he arbitrator shall decide the dispute ex aequo et bono”.

27. The concept of “*équité*” (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage<sup>2</sup> (Concordat)<sup>3</sup>, under

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<sup>2</sup> That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA (governing international arbitration) and, most recently, the Swiss Code of Civil Procedure (governing domestic arbitration).

which Swiss courts have held that arbitration “en équité” is fundamentally different from arbitration “en droit”:

*“When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.”<sup>4</sup>*

28. 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.”<sup>5</sup>
29. 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.*”
30. In light of the foregoing considerations, the Arbitrator makes the findings below.

## 6.2 Findings

31. 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.
32. It appears clear to the Arbitrator that the aforementioned failures (described in paragraph 13 above) by Respondent are breaches of the Settlement Agreement. Respondent cannot commit to make payments and then not adhere to the agreed

<sup>3</sup> P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

<sup>4</sup> JdT 1981 III, p. 93 (free translation).

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

schedule. That is the antithesis of *pacta sunt servanda*.

33. As a consequence of the foregoing, Claimants point to paragraph 7 of the Settlement Agreement which provides as follows (in relevant part):

*“Should Club fail to pay any of the amounts in above Sections 2, 3, 4, or 5, within 30 (thirty) days of their being due, Club shall immediately owe Player all outstanding funds under the Playing Contract, and Representative all outstanding funds under this Settlement Agreement.”*

34. It appears correct to the Arbitrator that Claimants’ argument that this provision of the Settlement Agreement has been triggered. Again, the parties made specific provision for a situation whereby if Respondent were to be in default it would then have specific liabilities to Claimants.
35. As a consequence of the breach by Respondent of the Settlement Agreement and paragraph 7 thereof, Respondent immediately owes Player all the outstanding amounts under the Player Agreement, and outstanding amounts to Neustadt and ProTalent under the Settlement Agreement.
36. Player says that the amount outstanding under the Player Agreement as of the time of the making of the Settlement Agreement was USD 157,500.00. Player further says that he was paid USD 45,000.00 on foot of the Settlement Agreement. Thus, he says, the outstanding amount which remains due to him by reason of paragraph 7 of the Settlement Agreement is USD 112,500.00. The Arbitrator agrees with this calculation and further finds that this comports with the language of paragraph 7 of the Settlement Agreement and flows as a direct consequence from the breach of Respondent discussed earlier in this Award. Player is entitled to the relief he seeks in this regard.
37. Player further claims that Respondent owes him USD 10,000.00 by reason of the

Club's reaching the Russian Top 8 Playoffs. Paragraph 4 of the Settlement Agreement provides that should Respondent achieve any of the Russian League Bonuses in Article 4(b) of the Player Agreement, then Respondent agreed to add the relevant amount of the bonus to the next scheduled payment under the Settlement Agreement.

38. Player presents proof that Respondent did achieve a Top 8 Playoff berth. It therefore flows as a consequence from paragraph 4 of the Settlement Agreement and paragraph 4 of the Player Agreement that Player is entitled to USD 10,000.00. This has not been paid by Respondent and therefore Player is entitled to the relief he seeks in this regard.
39. As the money which Player was to be paid by Respondent is all expressly agreed to be "net" in both the Player Agreement and the Settlement Agreement, and Player seeks a tax certificate to indicate the taxes paid on his behalf for the calendar years 2011 and 2012, it seems appropriate to the Arbitrator that he be given the relief sought in this regard.
40. Neustadt and ProTalent have not been paid the USD 22,500.00 expressly stated to be owing to them by Respondent as a second instalment provided for in the Settlement Agreement. This is a clear breach by Respondent and those claimants are entitled to the relief they seek.
41. The final area for discussion is Claimants' claim for late fees. The Arbitrator notes, initially, that Claimants do not seek interest. This is a relevant factor when coming to assess this claim. The provision in the Settlement Agreement is found in paragraph 6:

*"In the event that Club is late with any of the payments promised herein, a late fee of \$50 (fifty dollars) per each late day may be assessed."*

42. Respondent did not pay the third instalment to Player (due on 31 May 2012) pursuant to the Settlement Agreement. The Arbitrator also notes, again, the provisions of

paragraph 7 of the Settlement Agreement which is at the heart of the claims made in this case. That paragraph specifically provides for a 30 day period which the Arbitrator considers important in the ascertaining of when time starts to run for the purposes of a “late fee”. It therefore appears to the Arbitrator that the relevant date for the purposes of the “late fee” in respect of Player was thirty days after 31 May 2012, namely 30 June 2012.

43. The Arbitrator also notes that paragraph 6 of the Settlement Agreement is permissive, not mandatory, signified by the use of the word “may”:

*“In the event that Club is late with any of the payment promised herein, a late fee of \$50 (fifty dollars) per each late day may be assessed”.*

44. In light of the fact that Claimants are not seeking interest, it seems appropriate to the Arbitrator that the “late fee” is indeed imposed upon Respondent. Thus, the Arbitrator holds that Respondent is liable to Player for a late fee of USD 50.00 per day starting on 30 June 2012 and that this late fee should continue to accrue until the date of the filing of the Request for Arbitration, namely 30 October 2012 (123 days). This period, in the Arbitrator’s view, accords with the justice and equity of the position. At USD 50.00 per day multiplied by 123 days, this results in an amount of USD 6,150.00.
45. The Arbitrator does not agree that any further late fee should be imposed upon Respondent in respect of Player. Imposition of the late fee from 1 July 2012 until 30 October 2012 is, in the Arbitrator’s assessment of the evidence before him, in accordance with the justice and equity of the situation.
46. Applying similar logic to the claim for a late fee by Neustadt and ProTalent, the second instalment due to them by Respondent was to be paid on 30 June 2012, and therefore the relevant date is 30 days thereafter. That date is 30 July 2012. The Arbitrator therefore holds that Respondent is liable to Neustadt and ProTalent for a late fee of USD 50.00 per day starting on 30 July 2012 and that this late fee should continue to

accrue until the date of filing of the Request for Arbitration (30 October 2012). For the avoidance of any doubt, the Arbitrator is not awarding USD 50.00 per day to each of Neustadt and ProTalent, but rather USD 50.00 jointly to them. The aforementioned time period is 93 days in duration, and at USD 50.00 per day, results in a late fee of USD 4,650.00.

47. The Arbitrator considers that the justice and equity of the case merits the imposition of the late fees (as set out in the foregoing paragraphs) due to Respondent's part performance of the Settlement Agreement. In particular the Arbitration notes the following sequence of events: Respondent negotiated and agreed a discount on an existing player contract; Respondent part-performed that discounted arrangement; and finally Respondent sought to walk away from the remainder of its obligations even though it had negotiated and obtained a discount. This behaviour is unjust and inequitable.

## **7. Costs**

48. 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.
49. On 22 March 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 7,535.00.

50. 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.
51. Claimants' claim for legal fees and expenses amounts to EUR 3,000.00, namely the non-reimbursable handling fee. This is to be borne by Respondent.
52. Given that Claimants paid advances on costs of EUR 12,000.00, as well as a non-reimbursable handling fee of EUR 3,000.00 (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 4,465.00 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 7,535.00 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 3,000.00 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. BC Krasnye Krylia Samara shall pay Mr Joe Alexander USD 112,500.00 net for salary.**
- 2. BC Krasnye Krylia Samara shall pay Mr Joe Alexander USD 10,000.00 net for bonus.**
- 3. BC Krasnye Krylia Samara shall pay Mr Joe Alexander USD 6,150.00 for late fees.**
- 4. BC Krasnye Krylia Samara shall pay The Neustadt Group and ProTalent Sports Management jointly USD 22,500.00 net for commission payments.**
- 5. BC Krasnye Krylia Samara shall pay The Neustadt Group and ProTalent Sports Management jointly USD 4,650.00 for late fees.**
- 6. BC Krasnye Krylia Samara shall provide Mr Joe Alexander a tax certificate to indicate the taxes paid on his behalf for the calendar years 2011 and 2012.**
- 7. BC Krasnye Krylia Samara shall pay Mr Joe Alexander, The Neustadt Group and ProTalent Sports Management EUR 7,535.00 as reimbursement for their arbitration costs.**
- 8. BC Krasnye Krylia Samara shall pay Mr Joe Alexander, The Neustadt Group and ProTalent Sports Management EUR 3,000.00 as reimbursement for their legal fees and expenses.**
- 9. Any other or further-reaching requests for relief are dismissed.**



**BASKETBALL**  
ARBITRAL TRIBUNAL

Geneva, seat of the arbitration, 25 March 2013

Klaus Reichert SC  
(Arbitrator)