BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0382/13)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Ulrich Haas

in the arbitration proceedings between

Mr. Jarvis J. Hayes

- Claimant -

represented by Ms. Debora Zoli, attorney at law,
Via Tuliero 102, 48018 Faenza, Italy

vs.

BC Krasnye Krylia
443011 Samara, Sovetskoy Armll STR 253A-340, Russia

- Respondent -

represented by Mr. Sergey Timofeev, General Director

1. The Parties

1.1 The Claimant

1. Mr. Jarvis J. Hayes (hereinafter also referred to as “the Claimant” or “the Player”) is a professional basketball player of US citizenship.

1.2 The Respondent

2. BC Krasnye Krylia (hereinafter also referred to as “the Club” or “the Claimant”) is a Russian basketball club.

2. The Arbitrator

3. On 18 April 2013, the President of the Basketball Arbitral Tribunal (the "BAT"), Prof. Richard H. McLaren, appointed Prof. Dr. Ulrich Haas as arbitrator (the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (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. In July 2011, Claimant signed an employment agreement with Respondent (hereinafter referred to as the “Contract”). According thereto, Claimant was employed as a professional basketball player for the 2011-2012 season.

5. The main provisions of the Contract read as follows:

> *"**2. Salary Compensation***
>
> *For rendering services as a professional basketball player the CLUB agrees to pay to the PLAYER as follows:*
>
> ***2010-11 season** Five Hundred Thousand Dollars (500,000 USD) net of any Russian Taxes …."*

6. In October 2012, the General Director of the Club, Mr. Sergey Timofeev, sent a letter to the Player's representative, FIBA-licensed agent Mr. Vadim Mikhalevskiy, stating as follows:

> *"Herewith Basketball club Krasnye Krylia agrees that basketball player Jarvis James AYES is owed $ 75,000 for the basketball season 2011-2012.*
>
> *For the present moment the Club is in difficult financial situation. I kindly ask to consider our suggestion on the following payment schedule:*
>
> *$ 9,500 –on or before 25th day of each month from October till May (in total eight instalments)*
>
> *I do really hope for your understanding …"*

7. The Claimant accepted the payment schedule proposed by the Club. On 29 October 2012, the Club paid the amount of USD 7,000 to the Player. This dispute revolves around the Club's alleged failure to pay the rest of the Player's salary under the Contract.

3.2 The Proceedings before the BAT

8. On 27 February 2013, the BAT Secretariat received Claimant's Request for Arbitration (hereinafter referred to as "the RfA"). The non-reimbursable fee of EUR 3,000 was received in the BAT bank account on 26 February 2013.

9. On 18 April 2013, Prof. Ulrich Haas was appointed as Arbitrator in this matter.

10. On 30 April 2013 the BAT Secretariat acknowledged receipt of the RfA filed by the Claimant. Furthermore, it credited the overpayment made by Claimant against his

share of the Advance of Costs in this proceeding. In the same letter, the BAT Secretariat invited the Respondent to file its answer in accordance with Article 11.2 of the BAT Rules by no later than 21 May 2013 (the "Answer"); and fixed the (further) amounts of the Advance on Costs to be paid by the Parties by no later than 10 May 2013 as follows:

"Claimant (Mr. Jarvis J. Hayes)	*EUR*	*3,000*
Respondent (BC Krasnye Krylia)	*EUR*	*4,000"*

11. On 22 May 2013, the BAT acknowledged receipt of the Claimant's share of the Advance on Costs. Furthermore, the BAT informed the Parties that the Respondent had failed to submit an Answer and to pay its share of the Advance on Costs. In the same letter, the BAT Secretariat invited the Claimant to substitute for the Respondent's share of the Advance on Costs. In addition, it granted the Respondent a final deadline (délai de grâce) to file an Answer by no later than 5 June 2013. Finally, it informed the Respondent that in case it failed to submit an Answer, the Arbitrator may nevertheless proceed with the arbitration and deliver an award.

12. On 8 July 2013, the BAT Secretariat acknowledged receipt of the full Advance of Costs. Furthermore, it acknowledged that Respondent had failed to submit an Answer. In light of the above, the BAT Secretariat inquired with the Claimant whether his preference was still for a hearing to be held.

13. By letter dated 9 July 2013, the Claimant informed the BAT Secretariat that it no longer requested a hearing to be held. In addition, Claimant submitted his respective Account of Costs.

14. By letter dated 22 July 2013, the BAT Secretariat acknowledged receipt of Claimant's Account of Costs and invited the Respondent to submit its comments by 2 August 2013.

15. No comments by the Respondent were received by the BAT Secretariat within the above deadline.

16. By letter dated 8 August 2013, the BAT Secretariat declared the exchange of submissions closed and invited Respondent to submit its account of costs. The Respondent did not avail of its right to do so.

4. The Positions of the Parties

17. The following outline of the Parties' positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Arbitrator, however, has carefully considered all the submissions made by the Parties, even if there is no specific reference to those submissions in the following summary.

4.1 Claimant's Position

18. Claimant submits the following in substance:

- The Respondent only partially fulfilled its obligation under the Contract. While the Claimant was to be paid USD 500,000 under the Contract, he only received USD 432,000. The Player's NBA agent at the time (Mr. David Lee) and his FIBA Agent (Mr. Vadim Mikhalevsky) made numerous attempts to resolve the matter concerning the outstanding salaries.

- In October 2012, the General Director of Respondent made a settlement offer on behalf of the Club in which he acknowledged the obligation of the Club to pay the outstanding salaries in the amount of USD 75,000. Furthermore, the Club offered – in view of its financial difficulties – to pay the outstanding amounts in eight (8) instalments of USD 9,500 to be paid on or before the 25th day of each month. The Claimant accepted the Club's offer.

- The Club again failed to honour its obligation arising from the October agreement. On 29 October 2012, it paid to the Claimant only USD 7,000. After that, the Respondent made no further attempt to satisfy the remaining outstanding salaries in the amount of USD 68,000.

- The Claimant submits that he is not only entitled to the outstanding salaries, but also to late penalty payments. He basis this claim on sec. 2 of the Contract according to which "payments more than 20 days late will incur a penalty of $ 200.00 (net of Russian taxes) per day late until scheduled payments and penalties are paid in full."

- In view of the fact that all payments owed by the Club are net of Russian taxes (sec. 3 of the Contract), the Claimant has sought from Respondent, documentation indicating that the applicable Russian taxes have been paid by the Club on behalf of the Player for the year 2012. However, the Respondent has not provided the necessary documentation to the Claimant. Therefore, the Claimant states that in the "*event that penalties, interest or legal action is taken and or placed on the Claimant by the Internal Revenue Service (IRS), the Claimant will request to hold the Respondent liable or at fault/responsible.*"

19. As a result, Claimant requests in its RfA that an award be rendered against Respondent stating as follows:

> *"- $ 68,000 (total outstanding salary/compensation)*
>
> *- $ 200.00 USD per day, from February 4, 2012 – the day the outstanding salary/compensation is paid to the CLAIMANT, for the January 15, 2012 payment.*
>
> *- $ 200.00 USD per day from, July 5, 2012 – the day the outstanding salary/compensation is paid to the CLAIMANT, for te June 15, 2012 payment. …*

- *Any penalties, interest, legal ramifications, amount due, etc. imposed by the Internal revenue Service (IRS) to the Claimant as a result of not having the requested 2012 Salary/Tax certificate. In addition and legal fees and/or expenses incurred by the CLAIMANT to defend himself to the Internal Revenue Service (IRS) against their claim(s)."*

4.2 Respondent's Position

20. Respondent has failed to submit an Answer despite several invitations by the BAT to do so. Respondent chose not participate in these proceedings even though – as has been examined by the Arbitrator ex officio – the notifications of the various orders sent by the BAT Secretariat to the Respondent on behalf of the Arbitrator were successful.

5. Jurisdiction

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

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.

5.1 Arbitrability

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) PILA.[1]

5.2 Formal and substantive validity of the arbitration agreement

25. Sec. 14 of the Contract contains an arbitration clause that reads as follows:

> *"… Any dispute arising from or related to the present contract, governed by Russian Law, shall be resolved by arbitration and 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 in 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 and CAS shall decide the dispute ex aequo et bono."*

26. This arbitration clause included in the Contract and signed by the Parties to the Contract fulfils the formal requirements of Article 178(1) PILA.

27. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast any doubt on the validity of the arbitration agreement in the present matter under Swiss law (cf. Article 178(2) PILA). As to the scope of the arbitration agreement, it seems questionable – at least at first sight – whether the present dispute is covered by the arbitration clause in sec. 14 of the Contract.

28. The Claimant himself submitted that he had accepted the Club's offer of October 2012 to find a solution for the outstanding amounts. The offer of the Club, that was subsequently accepted by the Claimant provides for a certain payment schedule. The dispute before the Arbitrator is rooted in this additional agreement executed between the Parties in October 2012. However, this "settlement agreement" – differently from the Contract – does not provide for an arbitration clause. However, the majority view in

---

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

Swiss legal literature holds that any dispute arising from a subsequent amendment of a contract (containing an arbitration clause) is – absent any indication to the contrary – covered by the arbitration clause contained in the original contract. In the book GIRSBERGER/VOSER, International Arbitration in Switzerland, 2008 it is stated in marg. no. 251 as follows:

> "*Parties to an ongoing business relationship often successively sign more or less identical contracts. It might occur that one (or more) of these contracts does not contain an arbitration clause whereas the others provide for dispute settlement by arbitration. In such situations, it must be asked whether the parties' discussions, behaviour or prior practice lead to the presumption that the parties implicitly agreed that disputes arising out of the contract not containing an arbitration clause would also be submitted to arbitration. In general, disputes arising out of the later legal relationships which are connected to earlier contract containing an arbitration clause, are encompassed by the arbitration agreement. However, if a subsequent contract contains a clause conferring jurisdiction to the state courts or an arbitration clause that differs from the previous clauses, it may not be easily presumed that the earlier clause has been tacitly extended. On the other hand, where a contract deals with the same subject matter as earlier contracts, but contains an arbitration clause that differs from the onte contained in the earlier contract, it may often be inferred that the parties agreed to amend the earlier arbitration clause."*

29. In the book by BERGER/KELLERHALS (International and Domestic Arbitration in Switzerland, 2nd d. 2010) the authors in marg. no. 475 state as follows:

> *"It is generally accepted that an agreement to arbitrate contained in a given contract, in case of doubt, also covers claims arising from subsequent legal relationships between the same parties that are connected to the original contract. This includes, in particular, claims arising from addenda or supplements by which the main contract was changed or amended by mutual agreement, but also claims arising from out-of-court settlement by which the parties agreed to terminate the original contract regardless of whether r not the original contract was novated by such settlement."*

30. The Arbitrator follows this broad interpretation of the scope of the arbitration clause. In view of the above and absent any indication to the contrary, the Arbitrator, therefore,

finds that the wording *"[a]ny dispute arising from or related to the present contract"* in sec. 14 of the Contract, which is very broad,[2] also covers also the present dispute.

31. In addition, the Arbitrator, when interpreting the arbitration clause, takes note of Article 18.2 of the BAT Rules, according to which any reference to FAT shall be understood as a reference to the BAT. Therefore, no contradiction arises from the fact that according to the arbitration clause "FAT" is competent to decide the dispute and that "FAT Arbitration Rules" shall apply.

6. Other Procedural Issues

32. Article 14.2 of the BAT Rules, which the Parties have declared to be applicable in the Contract specifies that: "*the Arbitrator may nevertheless proceed with the arbitration and deliver an award*" if "*the Respondent fails to submit an Answer*".

33. The arbitrator's authority to proceed with the arbitration proceedings in the case of default of one of the parties is in accordance with Swiss laws on arbitration proceedings.[3] However, the Arbitrator must undertake everything possible to allow the defaulting party to assert its rights.[4] This has happened in the current case. In compliance with the relevant rules, the Respondent has been informed of the initiation of the proceedings and of the Arbitrator's appointment. Furthermore, in the letter of the BAT Secretariat dated 30 April 2013, the Respondent was not only given a time limit within which to respond to the RfA, but was also informed as follows:

---

2 *See for instance* BERGER/ KELLERHALS: International and domestic Arbitration in Switzerland, Berne 2010, N 466.

3 Swiss Federal Tribunal SJ 1982, 613, *621*; see also KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, no. 483.

4 KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, no. 484.

> *"5. […]*
>
> *Please note 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."*

34. Hence, the Respondent was well advised as to the consequences of not submitting an Answer, i.e. of the possibility of a judgment by default. Finally, by letter dated 22 May 2013, the Arbitrator granted the Respondent a further grace period (délai de grâce) in order to comment on the case. In addition, the Respondent was again advised of the consequences for not submitting an Answer.

7. Applicable Law

35. 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 reads as follows:

> *"the parties may authorize the arbitral tribunal to decide ex aequo et bono".*

36. 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."*

37. Sec. 14 of the Contract is – at least at first sight – somewhat unclear. While the provision says on the one hand that the Contract is "governed by Russian law", it also provides as follows:

> *"… The arbitrator and CAS shall decide the dispute ex aequo et bono."*

38. The Arbitrator interprets sec. 14 of the Contract to mean that the Parties have expressly agreed that, when a dispute will be submitted to BAT, it will be resolved ex aequo et bono.

39. The concept of équité (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage of 1969[5] (Concordat),[6] under which Swiss courts have held that "arbitrage en équité" is fundamentally different from "arbitrage en droit":

> *"When deciding ex aequo et bono, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules."*[7]

40. In substance, it is generally considered that the arbitrator deciding *ex aequo et bono* receives

> *"the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand".*[8]

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

8. Findings

42. The questions to be resolved in the present matter are, whether or not the Claimant is entitled to the outstanding salaries (see 8.1 below) and whether or not he is entitled to

---

5 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).

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

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

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

late penalty payments (see. 8.2 below). Furthermore, the "Other Request" filed by the Claimant to keep him harmless of any penalties, interest and other amounts imposed on him by the Internal Revenue Services (IRS) needs further analysis (see 8.3 below).

8.1 The Claim for outstanding salaries

43. The Respondent in its letter/offer dated October 2012 acknowledges that it owes to Claimant USD 75,000 in outstanding salaries. Since – according to the documents on file – the Respondent only made one further payment to the Claimant in the amount of USD 7,000, the Respondent still owes Claimant salaries in the amount of USD 68,000.

8.2 Late penalty payment

44. Whether or not Respondent is liable for late penalty payments is questionable. It is true that the Contract provides for late penalty payments in case Respondent does not fulfil its payment obligations within a certain deadline. However, the Parties have entered into a subsequent agreement in October 2012. In its (settlement) offer the Club only refers to a payment schedule, however it does not offer to pay any penalty in case of non-compliance with the schedule. The question, therefore, is, whether or not there is still room for the application of the late penalty clause contained in sec. 2 of the Contract, since the settlement offer does not refer to any clauses in the Contract. The Arbitrator finds that this is not the case. The contents of the settlement agreement must be interpreted in light of the will of the Parties. The settlement agreement was entered into between the Parties after the Respondent had not complied with its original obligations. The settlement agreement was, thus, designed to substitute for sec. 2 of the Contract and – in the eyes of the Arbitrator – to regulate the consequences of the non-performance of the original contract exhaustively and finally. Furthermore, the Claimant has not submitted that he had accepted the settlement offer made by the Respondent only under certain conditions or subject to the application of the late

penalty clause contained in the Contract. Hence, the original sec. 2 of the Contract was amended and, thus, the Claimant no longer can claim late penalty payments.

8.3 The "Other Request"

45. In his RfA, the Claimant has filed under the heading "OTHER REQUESTS" the following motion for relief:

> *"Any penalties, interest, legal ramifications, amount due, etc. imposed by the Internal revenue Service (IRS) to the Claimant as a result of not having the requested 2012 Salary/Tax certificate. In addition and legal fees and/or expenses incurred by the CLAIMANT to defend himself to the Internal Revenue Service (IRS) against their claim(s)."*

46. What goals Claimant pursues with this request is – at least at first glance – not quite clear. In the view of the Arbitrator, the Claimant does not request that Respondent supply him with a document indicating that the applicable Russian taxes have been paid in the name of the Player for the year 2012. Rather, Player seeks a declaratory judgment that should the IRS (in the future) apply penalties, interests or any other payments upon Claimant for income tax related to salaries paid in 2012, the Player will be held harmless by the Club. Such motion for declaratory relief is admissible. Furthermore, it shall be granted, since all payments owed by the Club are net of Russian taxes. In addition, the Claimant requests payment of all expenses incurred as a result of Respondent not complying with his obligations to provide Claimant with the relevant tax document (certificate/receipt) according to sec. 3 of the Contract. So far Claimant has incurred USD 1,625 in fees that he had to pay to his certified accountant in corresponding with the IRS because of the missing documentation. The Arbitrator finds that the Claimant is entitled to reimbursement of this amount.

9. Costs

47. 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 legal fees and expenses incurred in connection with the proceedings.

48. On 26 September 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.

49. Considering that Claimant nearly prevailed with all of his claims and that the financial situation of the Parties does not compel otherwise, the Arbitrator holds it fair that the fees and costs of this arbitration be borne in their entirety by the Respondent and that Respondent be also required to cover its own legal costs as well as an adequate portion of Claimant's legal costs and expenses.

50. The Claimant's claim for legal fees and expenses is directed for reimbursement of EUR 3,000. While the Claimant failed to list the non-reimbursable handling fee under his Account of Costs, the Claimant claimed reimbursement of the latter in his Request for Arbitration. Considering the outcome of the proceedings and the behaviour of the Parties the Arbitrator finds it reasonable and proportionate both by reference to the sums claimed, the sums awarded and the amount of documentation put before the

Arbitrator to fix the total amount due to Respondent at EUR 6,000. This amount is in line with Article 17.4 of the BAT Rules for cases of this value.

51. Given that Claimant paid both shares of the Advance on Costs in the amount of EUR 8,000, the Arbitrator decides that in application of Article 17.3 of the BAT Rules:

(i) Respondent shall pay EUR 7,535.00 to Claimant as reimbursement of arbitration costs. The balance of the Advance on Costs, in the amount of EUR 465 will be reimbursed to Claimant by the BAT.

(ii) Furthermore, the Arbitrator fixes the contribution to be paid towards the Respondent's legal fees and expenses at EUR 6,000.

10. AWARD

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

1. **BC Krasnye Krylia is ordered to pay to Mr. Jarvis J. Hayes outstanding salaries in the amount of USD 68,000.**

2. **BC Krasnye Krylia is ordered to pay to Mr. Javis J. Hayes compensation in the amount of USD 1,625 for not providing the necessary 2012 salary/tax certificate.**

3. **It is herewith determined that BC Krasnye Krylia must hold Mr. Jarvis J. Hayes harmless for any penalties, interest and other amounts imposed upon him by the Internal revenue Services (IRS) as a result of not having provided the requested 2012 salary/tax certificate. Furthermore, it is herewith declared that BC Krasnye Krylia must hold Mr. Jarvis J. hayes harmless in relation to legal fees and/or expenses incurred to defend himself against any claims of the Internal Revenue Service (IRS) resulting from not being provided with the requested 2012 salary/tax certificate.**

4. **BC Krasnye Krylia is ordered to pay to Mr. Jarvis J. Hayes EUR 7,535.00 as reimbursement of the arbitration costs.**

5. **BC Krasnye Krylia is ordered to pay to Mr. Jarvis J. Hayes the amount of EUR 6,000 as a contribution towards his legal expenses.**

6. **All other and further-reaching requests for relief are dismissed.**

Geneva, seat of the arbitration, 30 September 2013

Ulrich Haas

(Arbitrator)