

## **ARBITRAL AWARD**

**(BAT 0708/15)**

by the

**BASKETBALL ARBITRAL TRIBUNAL (BAT)**

**Mr. Stephan Netzle**

in the arbitration proceedings between

**Mr. Marcus Lynn Cousin Jr.**  
c/o Mr. Juan de Dios Crespo Pérez

**- Claimant 1 -**

**Mr. Eric Fleisher**  
c/o Mr. Juan de Dios Crespo Pérez

**- Claimant 2 -**

both represented by Mr. Juan de Dios Crespo Pérez, attorney at law,  
Avda. Reino de Valencia 19, 4<sup>a</sup>, 46005 Valencia, Spain

vs.

**BC Krasny Oktyabr,**  
Dvorets Sporta Volgogradskih Profsouzov, Lenin avenue, 65,  
2nd floor, 206 office, 400005 Volgograd, Russia

**- Respondent -**

represented by Dr. Joseph Fesenmair and Mr. Roman Brtka, attorneys at law,  
Maximiliansplatz 22, 80333 München, Germany

## **1. The Parties**

### **1.1. The Claimants**

1. Mr. Marcus Lynn Cousin Jr. (hereinafter the “Player”) is a professional basketball player of U.S. nationality.
2. Mr. Eric Fleisher (hereinafter the “Agent”) is a FIBA certified agent of U.S. nationality.

### **1.2. The Respondent**

3. BC Krasny Oktyabr (hereinafter the “Club”) is a professional basketball club located in Volgograd, Russia.

## **2. The Arbitrator**

4. On 18 June 2015, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), Prof. Richard H. McLaren, appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the “BAT Rules”). Neither of the Parties has raised any objections to the appointment of the Arbitrator or to his declaration of independence.

## **3. Facts and Proceedings**

### **3.1. Summary of the Dispute**

5. On 4 August 2014, the Player and the Club entered into an employment agreement (hereinafter “the Player Contract”) for one season (2014-2015). The Player had played with the Club’s team already during the previous season (2013-2014). The salary of the Player was agreed at an amount “not exceeding” USD 160,000.00, net, payable in 9 monthly instalments of USD 16,000.00, due on the 30<sup>th</sup> day of each month, starting on 30 August 2014, and one instalment for May 2015 “on per-day basis, depends on

how long basketball season will last for the Club". The Player was also entitled to bonuses payable if the Club's team would reach certain defined goals, and certain amenities, e.g. four round trip economy class tickets for the Player or his family.

6. The Player Contract, which was also signed by the Agent, provides for an agent fee of USD 8,000.00 ("Agent Fee") payable until 15 December 2014.
7. On 17 December 2014, Club qualified for the round of Last-32 in the EuroCup.
8. On 9 January 2015, respectively on 18 January 2015, the Club's doctor found that the Player suffered from [injury]] The Club's doctor recommended "*Physical activity full restriction for 5-6 weeks*".
9. On 23 February 2015 the Club requested the Player to attend a medical examination which was scheduled for 24 February 2015. The Player did not appear for the examination. The Player did not attend the other medical examinations scheduled on 25, 26 and 27 February 2015 either.
10. By letter of 24 February 2015, the Player informed the Club that he had decided to unilaterally terminate the Players Contract with immediate effect because of Club's overdue payment.
11. By letter of 25 February 2015, the Club replied that it considered the Player's termination as invalid and imposed a fine on the Player for non-compliance with the Club's doctor prescriptions. By emails of 25 February 2015, the Agent emphasised that the Player was not obliged to appear at the doctor's because he had already terminated the Player Contract.
12. On 25, 26 and 27 February 2015, the Club imposed further fines on the Player.
13. By letter dated 27 February 2015, the Club terminated the Player Contract.

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

14. On 4 June 2015, the Player and the Agent filed a Request for Arbitration in accordance with the BAT Rules. A non-reimbursable handling fee of EUR 2,000.00 was received in the BAT bank account on 1 June 2015.
15. By Procedural Order of 25 June 2015, the BAT Secretariat confirmed receipt of the Request for Arbitration and informed the Parties about the appointment of the Arbitrator. Furthermore, a time limit was fixed for the Club to file its Answer in accordance with Article 11.2 of the BAT Rules by no later than 16 July 2015. The BAT Secretariat also requested that the Parties pay the following amounts as Advance on Costs by no later than 6 July 2015:

<i>"Claimant 1 (Mr. Marcus Lynn Cousin)</i>	<i>EUR 4,500.00</i>
<i>Claimant 2 (Mr. Eric Fleisher)</i>	<i>EUR 1,000.00</i>
<i>Respondent (BC Krasnyi Oktyabr)</i>	<i>EUR 5,500.00"</i>

16. By Procedural Order of 28 August 2015, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs, and the Club's Answer to the Request for Arbitration. The Arbitrator invited the Parties to a second round of written submissions which were filed on 14 September 2015 and 2 October 2015 respectively.
17. On 22 October 2015, the Arbitrator closed the submissions period and invited the Parties to submit detailed statements of their respective accounts of costs by 27 October 2015. The accounts of costs of both parties were filed on 27 October 2015 but were not commented upon further.

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

### **4.1. The Claimants' Position**

18. The Claimants submit the following in substance:
- a) The Parties signed a Player Contract which was fully guaranteed.

- b) The Club did not comply with its contractual duty to pay the Player's bonus for reaching the Last-32 stage of the Eurocup. Such bonus had to be paid within 7 business days "of [it] being earned." The Player was therefore entitled to terminate the Player Contract due to late payment in accordance with Article IV of the Player Contract. As a consequence of the termination of the Player Contract, the Player is entitled to all payments until the agreed expiration date.
- c) The wording of Article IV para. 2 of the Player Contract (*"In case of scheduled payments not being made by the Club within 30 (thirty) days of the scheduled payment to the Player or the Agent, the Player and Agent shall be entitled to all moneys in accordance with the Contract..."*) implies that this Article does not only apply in cases of outstanding salaries but also in cases of outstanding bonuses. Neither the Russian nor the English version of the Player Contract refer to unpaid salaries only, but to "scheduled payments" (English version) or "any amount due" (Russian version). There can be no question that the bonuses had to be considered as "scheduled payments".
- d) Only when the Player terminated the Player Contract, the Club reacted with the imposition of a fine for alleged non-compliance with the prescriptions of the Club's doctor, based on the Club's Internal Regulations. The penalties imposed by the Club were not justified. The Player had no knowledge that he had doctor's appointments on 24 and 25 February 2015. In any case, the Internal Regulations had never been made available to the Player.
- e) The Club's termination of the Player Contract was invalid because the alleged incidents did not take place but were set up. Also the penalties imposed by the Club were not justified: the Club called the Player to a medical examination although it was well aware that the Player was abroad.
- f) The Club was not entitled to terminate the Player Contract. The Player had not "re-injured" [medical details]. In January 2015 the doctor did not diagnose a new injury but simply confirmed a pre-existing injury which was already recorded in

the Player Contract. Like the majority of the professional basketball players, the Player suffers from [injury].

- g) Although the Arbitrator has to decide *ex aequo et bono*, he should not disregard the principles embodied in Russian labour law and in the regulations of the Russian Basketball Federation that the Club must continue paying the salary also when a player is temporarily unable to play because of a sports injury.
- h) The Club terminated the Player Contract on 27 February 2015 in bad faith as it was not only in default of the agreed payments but also because the Player was recovering from an injury at the time of termination. The Club never notified the alleged termination of 9 January 2015.
- i) The Player Contract has actually been terminated by the Player on 29 January 2015, i.e. after 45 days of the scheduled payment date. The Club's allegations that the Player violated the Player Contract are therefore irrelevant since the Player was no longer under contract when the Club called him to further medical examinations.
- j) The requested invoice for the Agency Fee has been sent to the Club already on 24 November 2014.
- k) In addition to the salary and bonus payments, the Player is entitled to the reimbursement of airplane tickets in the amount of USD 2,532.04 as agreed in Article VII lit. c of the Player Contract.

#### **4.2. The Claimants' Request for Relief**

19. The Request for Arbitration of 4 June 2015 contains the following Request for Relief:

*"The Claimants respectfully request the BAT:*



- (i) *To condemn the Respondent to pay to the Player Mr. MARCUS LYNN COUSIN the following amounts as outstanding salaries:*
  - *USD 5.000 as bonus for qualification to Last-32 stage in EuroCup;*  
*USD 16.000 as monthly salary of January 2015;*  
*USD 13.714,29 for the days of February elapsed until the termination of the contract (24 days).*  
*TOTAL OUTSTANDING SALARIES: USD 34.714.29.*
- (ii) *To condemn the Respondent to reimburse the Player Mr. MARCUS LYNN COUSIN the amount of USD 2.532.04 corresponding to the airplane tickets.*
- (iii) *To condemn the Respondent to pay to the Player Mr. MARCUS LYNN COUSIN the amount of USD 34.285.71 as compensation due to the termination of the employment contract with just cause.*
- (iv) *To condemn the Respondent to pay to Mr. ERIC FLEISHER USD 8.000 (net) as outstanding agency commission fee;*
- (v) *To condemn the Club to pay all the whole arbitration costs and arbitrators fees.*
- (vi) *To condemn the Club to pay legal fees and expenses incurred by the Claimant in connection with the proceeding, in a range of a minimum of EUR 15.000.*

#### **4.3. The Respondent's Position**

20. With regard to the merits of the claim, the Club submits the following:

- a) The Player's termination of 24 February 2015 is invalid. The Player was not entitled to terminate the Player Contract because of allegedly outstanding bonus payments. Article IV para. 2 of the Player Contract does not confer any right of termination of the Player Contract. Furthermore, Article IV para. 2 of the Player Contract only applies in cases of outstanding salaries but not in cases of outstanding bonuses or outstanding agent fees.
- b) The Parties had already signed a contract on 29 November 2013 which was amended on 3 December 2013 because of the Player's diagnosed [injury]. In particular, it was agreed that the Respondent was allowed to cut

the contract in the event of a re-injury which prevented the Player from participating in games for more than four consecutive weeks.

- c) On 4 August 2014, the Parties signed a new Player Contract for the season 2014/2015 which contained a reference to the Player's medical condition. On 27 August 2014, a [injury] was diagnosed. The Player underwent surgery and declared to be fit to play.
- d) In December 2014, the Player was not able to participate in the Club's games because of his ongoing medical problems. The Player informed the team doctor about his medical problems. On 9 January 2015, the Player underwent a further medical examination that revealed that he was still suffering from [injury]. According to the report of the examining doctor of 18 January 2015, total avoidance of any physical activities for a minimum of 5 to 6 weeks was recommended.
- e) Against this background and the fact that the Player could not play with the team, it seemed economically unjustified for the Club to continue paying the Player's salary in January 2015.
- f) The Club asked the Player to undergo further medical examinations. Such an examination was scheduled for 24 February 2015 but the Player did not show up. That constituted a violation of the Club's Internal Regulations, but the Club did not impose a fine then.
- g) Instead, the Club received a termination letter from the Player because of non-payment of the bonus payment.
- h) A new medical examination was scheduled for 25 February 2015, and when the Player still did not show up, the Club decided to impose a fine of USD 8,000 on the Player. After the Player also disregarded the examination scheduled for 26 February, a further sanction of USD 8,000 was added. Due to the Player's repeated violations of the Internal



Regulations, the Club eventually terminated the Player Contract by its termination letter of 27 February 2015.

- i) Pursuant to Article III para. 4 of the Player Contract, the Club was entitled to cut the contract because his injury prevented the Player from participating in professional basketball already on 9 January 2015. Subsequently, the Club had no further financial obligations towards the Player, except to pay his salary on a pro-rated basis, i.e. for the time before the medical examination on 9 January 2015. The Club is not obliged to pay to the Claimants any allegedly outstanding salaries or agent fees.
- j) Only as a matter of precaution, the Club submits that it formally terminated the Player Contract on 27 February 2015. The Club's financial obligations, however, ceased already on 9 January 2015.
- k) The Player is entitled to a bonus payment in the amount of USD 5,000. The bonus payment has been set off against the imposed penalties. The Player accepted the Club's Internal Regulations when he signed the Player Contract. He must therefore follow these rules and also accept the disciplinary sanctions in case of a rule violation, including the penalties and fines.
- l) The Agent is entitled to an Agent Fee in the amount of USD 8,000. Up to now the Club could not make the payment because of lack of a formal invoice from the Agent.
- m) The Player is not domiciled in Washington. Furthermore, it was the common understanding that the Club will only pay for four flight tickets, in case that the respective flights are in the direction from the Player's domicile to the Club. The Club is not obliged to reimburse the costs for the flight tickets.

#### **4.4. The Respondent's Request for Relief**

21. The Club requests the following:

*"The Respondent requests:*

- 1. that the Claimants' request from the Request for Arbitration of 4 June 2015 be dismissed to that extend, that it exceeds the payment of a total amount of USD 9.645.16.*
- 2. as a matter of precaution, - in the event that the Tribunal does not follow the Respondent's view that the Contract was cut by the Respondent on 9 January 2015 – that the Claimants' requests from the Request for Arbitration of 4 June 2015 be dismissed to that extend, that it exceeds the payment of a total amount of USD 6.028,57.*
- 3. that the Claimants are ordered to pay the entire costs of the arbitration, and*
- 4. that the Claimants are ordered to pay the Respondent's legal costs of the arbitration at hand, amounting EUR 15.000.-."*

#### **5. Jurisdiction**

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) PILA.
25. The jurisdiction of the BAT over the dispute results from the arbitration clause contained in Article IX of the Player Contract which reads as follows:

*"IX. ARBITRATION*

*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, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bone."*

26. The Player Contract is in writing and thus the formal requirements for an arbitration agreement under Article 178(1) PILA are met. The Arbitrator also considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA). In particular, the wording "[a]ny unresolved dispute arising from or related to the present contract" in Article IX of the Player Contract covers the present dispute. In addition, neither party objected to the jurisdiction of BAT.
27. The Player Contract has also been signed by the Agent. The arbitration agreement therefore is binding upon all parties to this dispute.
28. For the above reasons, the Arbitrator finds that he has jurisdiction to adjudicate the Claimants' claim.

**6. Applicable Law – ex aequo et bono**

29. 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".*

30. 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.”*

31. In the arbitration agreement in Article IX of the Player Contract, the Parties have explicitly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono* without reference to any other law. Consequently, the Arbitrator will decide the issues submitted to him *ex aequo et bono*.

32. However, the Player Contract contains in Article X the following reference to Russian law:

*“This contract shall be interpreted and enforced in accordance with the laws of Russian Federation. Mutual relations, arising from this Contract [recte Contract], are being regulated by the Civil Code of the Russian Federation.”*

33. The Claimants refer to the Labour Code of the Russian Federation and especially to Article 348.10 (“additional guarantees and compensations to sportsmen, coaches”). The reference to Russian law may be in conflict with the instruction to the Arbitrator to decide the dispute *ex aequo et bono*, which has also explicitly been confirmed in the Claimants’ Submissions (RfA, para. 5 and Reply para. 41). The Arbitrator concludes that the parties did not intend to deviate from the principle that any dispute relating to the Player Contract should be decided *ex aequo et bono*. The reference to Russian law may at best be understood as a declaration that the Player Contract has validly been concluded and is binding under Russian law but not as a choice of law. It does not in any way affect the Arbitrator’s mandate to decide the dispute *ex aequo et bono*.

34. 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<sup>1</sup> (Concordat),<sup>2</sup> under which Swiss courts have held that “arbitrage en *équité*” is fundamentally different from “arbitrage en droit”:

---

<sup>1</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).

<sup>2</sup> KARRER, in: Basel commentary to the PILA, 3<sup>rd</sup> ed., Basel 2013, Art. 187 PILA N 290.

*“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>3</sup>*

35. 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”.<sup>4</sup>*

36. In light of the foregoing matters, the Arbitrator makes the following findings.

## **7. Findings**

### **7.1. Termination of the Player Contract**

#### **7.1.1. No termination without notice**

37. The parties agree that the Player Contract is no longer effective but they disagree about the reasons and the date of termination. According to the Player, the Player Contract was terminated by notice of 24 February 2015 because of the Club's delay in paying a due bonus. According to the Club the Player Contract was terminated either on 9 January 2015 when the Player's incapacity to continue professional basketball because of his [injury] was confirmed, or on 27 February 2015 because of the Player's breach of his contractual duty to appear at the medical examination.
38. The Parties rely on different provisions of the Player Contract and of the Club's Internal Regulations which provide for the possibility of the Player to early terminate the agreement in case of payment delays of the Club, and for the Club to “cut” the agreement if the Player was found to be incapable to continue playing professional

---

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

<sup>4</sup> POUDRET/BESSON, Comparative Law of International Arbitration, London 2007, N 717, pp. 625-626.



basketball because of [injury] or to terminate the agreement in case of breach of the Club's disciplinary rules.

39. It is common to all these rules and provisions, and also constitutes a principle in contract and especially employment law that a contract does not simply cease to exist as soon as one of the grounds for termination occurs but that the occurrence of one of these grounds entitles a party to terminate the agreement. Being entitled to terminate also means that the respective party must exercise its right and duly notify the other party of its decision to terminate the agreement. The termination does not automatically happen since the entitled party may still decide not to terminate but to continue the agreement. Termination therefore requires a notice which indicates the date and the reason for termination.

#### **7.1.2. Termination by the Player because of unpaid bonus?**

40. The Player submits that he terminated the Player Contract by letter of 24 February 2015 because the Club had not paid the contractually agreed bonus for the Last-32 stage in Eurocup.
41. The Arbitrator finds that the Player's letter of 24 February 2015 indeed reflects the Player's intention to terminate the Player Contract. The question remains however, whether the Player was entitled to exercise the termination right of Article IV para. 2 of the Player Contract.
42. The Claimants derive the right to terminate the Player Contract from Article IV para. 2 titled "IV. SALARY COMPENSATION" and Article V with the headline "BONUS COMPENSATION" which read in extracts as follows:

Article IV para. 2:

*"In case of scheduled payments not being made by the Club within 30 (thirty) days of the scheduled payment to the Player of the Agent, the Player and Agent shall be entitled to all moneys in accordance with the Contract, but the Player shall not have to perform in practice sessions or games until all scheduled payments have been made plus appropriate penalties and such non-performance will not be considered a breach of contract. In the event that payments are not made by Club, within 45 (forty five) days of the scheduled payment date, player shall immediately*



*be entitled to the entire salary and shall have no further obligations to the Club. Upon receipt of a request from the National Federation to issue the Player's Letter of Clearance, the Club must authorize the Federation to do so unconditionally within 24 (twenty four) hours without charging a transfer fee."*

Article IV para. 3:

*"The Agents shall be paid a total commission of \$16,000 (Sixteen thousand US Dollars) payable until 15th day of December, 2014 upon passing of physical examination. Commission will be split and paid to:*

*\$8.000 to Eric Fleisher*

*\$8.000 to Stanislav Ryzhov"*

Article IV para. 4:

*"Delays in agents fees shall be treated the same as player's salary and a cause for breach of contract."*

Article V:

*"Player will receive the following bonuses (cumulative) in basketball season 2014-2015:*

*[...]*

*EuroCup*

*° \$5,000 USD net for reaching Last-32*

*[...]*

*All bonuses must be paid by the Club to the Player within 7 (seven) business days of their being earned."*

43. The Club disputes that Article IV para. 2 of the Player Contract contains a right of termination in case of non-payment of the salaries. Although the word "termination" is not used in this provision, the Arbitrator finds that it is obvious from the other consequences described therein (*"In the event that payments are not made by Club, within 45 (forty five) days of the scheduled payment date, player shall immediately be entitled to the entire salary and shall have no further obligations to the Club."*) that the Club's payment delay of 45 days entitles the Player to terminate the Player Contract and ask for the Letter of Clearance.
44. The Arbitrator finds however that Article IV para. 2 of the Player Contract does not apply to outstanding bonus payments. The wording and the positioning of the respective provisions speak a clear language. According to the title of Article IV, i.e. "SALARY COMPENSATION", Article IV refers to salary payments. Article IV para. 4 of the Player Contract then adds that "Delays in agents fees shall be treated the same as

player's salary and a cause for breach of contract" (emphasis added). Bonus compensations, however, are regulated in a separate provision, namely Article V titled "BONUS COMPENSATION". Article V does not include provisions similar to Article IV para. 2 or Article IV para. 4 of the Player Contract. The right of refusing further services because of late Bonus payment cannot, therefore, be read into Article V of the Player Contract nor does it apply to overdue bonus compensations by analogy.

45. With regard to the Claimants' reference to the Russian version of the Player Contract it should be noted that Article XI of the Player Contract states that "*[i]n case any discrepancies between the two versions exist, the English version of the Contract will be the basic.*" Therefore, the English version prevails anyway and references to the Russian version are of no consequence.
46. A different treatment of salary and agent fee payments on the one hand and bonus compensations on the other hand is also justified because of the nature of the compensation. Salary and agent fees form a fixed part of the Player Contract and are ongoing compensations for services delivered as a *quid pro quo*. Bonus payments are incentives and rewards which may or may not become due, and a delay in payment does not immediately endanger the Player's or Agent's economic situation. While contractual payment schedules must be complied with and can be enforced, it makes sense to agree to apply the additional consequence of stopping the delivery of services or terminating the contract only to the salary and agent fee payments but not to bonus payments.
47. Thus, the Arbitrator, deciding *ex aequo et bono*, finds that the Player's termination of 24 February 2015 is invalid and that he is not entitled to the entire salary for the 2014/2015 season.

#### **7.1.3. Termination of the Player Contract because of unpaid Agent Fee?**

48. The Claimants argues in the alternative that the Player Contract was already terminated on 29 January 2015, i.e. after 45 days of the scheduled payment date for the Agent Fee (cf. Claimants' second submission, para. 62). The Club submits that it

was willing to pay the Agent Fee but could not make the payment because of lack of a formal invoice from the Agent.

49. The Claimants have demonstrated that the requested invoice has been sent to the Club on 24 November 2014 and that the Club was well aware of the Agent's bank details. As the Club does not deny that it did not pay the Agency Fee up to now, the prerequisites of the above cited Article IV para. 2, 3 and 4 of the Player Contract (cf. para. 40 above) are actually met. According to Article IV para. 5, "[d]elays in agent fees shall be treated the same as player's salary and a cause for breach of contract", which, as the Claimants argue, entitled them to terminate the Player Contract in case of a delay in paying the Agent Fee. However, whether or not that is an accurate interpretation, the payment delay did not *per se* terminate the Player Contract but still required the Player to provide the Club with a termination notice. 29 January 2015 may have been the date when the 45 days period for payment ended but there is no termination notice bearing this date on record. The Arbitrator therefore finds that also the Club's delay of 45 days in paying the Agent Fee did not terminate the Player Contract.

#### **7.1.4. Termination of the Player Contract by the Club because of the alleged breach of contract by the Player?**

50. The Club offers two other termination dates, namely 9 January 2015, when it "cut" the Player Contract according to Article III para. 4 because the Player was unable to play professional basketball because of his ongoing [injury] problems or, alternatively, 27 February 2015 when it terminated the Player Contract after the Player did not show up at the medical examination with the team doctor.

##### **7.1.4.1. 9 January 2015**

51. On 9 January 2015, the Player underwent a medical examination that revealed that Player 1 still suffered from [injury]. The Club argues that pursuant to Article III para. 4 of the Player Contract it was entitled to "cut" the Player Contract on 9 January 2015. The

Claimants respond that the Player did not [injury] and therefore, Article III para. 4 of the Player Contract was not applicable.

52. Article III paras. 3 and 4 of the Player Contract stipulate, in extracts, the following:

*“Medical examination conclusion declared following: [medical details]”*

*“Club agree that guarantees of signed Contract will be in place with following condition that Player agrees to: In case Player re-injures [medical details] and this injury prevents him from participation in professional basketball games for a period of more than four consecutive (4) weeks this contract can be cut by Club without further financial, and any other obligations towards Player – not including Agent fee, expect obligation to pay his salary on a pro-rated basis and bonuses for the period he was in the Club through the date of his releases. Medical report shall be send to Player and his Agent proving [injury].”*

53. The Club disagrees with the Claimants’ arguments: in the context of the Player Contract the terms “re-injures” or “injury” cannot be understood in a way that the application of Article III para. 4 of the Player Contract would require a “new injuring event” such as an accident (cf. Claimants’ second submission, para. 39). Whether the Player is kept from playing basketball because of an accident or because of an ongoing degeneration cannot be relevant. The Arbitrator agrees with the Club’s argument and finds that Article III para. 4 of the Player Contract must also apply if there is a recurrence of the already known problem with the Player’s [injury] which impaired his ability to play basketball for more than four weeks.
54. The question remains, however, what exactly must be understood as “cut(ting)” the Player Contract. The wording of Article III para. 4 of the Player Contract indicates that after “cutting” the contract, the Club had no further obligations towards the Player which means that it was entitled to terminate the Player Contract. A similar wording (“no further obligations to the Club”) was also used in Article IV para. 3 of the Player Contract and interpreted as a right of termination by the Player.
55. While the Club may have been entitled to terminate the Player Contract on 9 January 2015 because of the doctor’s verdict about the Player’s [injury], it actually did not exercise its right and did not notify the Player accordingly. The Player Contract was

therefore not terminated on 9 January 2015. This is also confirmed by the fact that the Club still invited the Player to further medical examinations which would have been futile if the Player Contract had been terminated already on 9 January 2015.

**7.1.4.2. 27 February 2015**

56. The Club also argues that the Player missed several scheduled medical examinations on 24, 25, 26 and 27 February 2015. Furthermore, instead of observing the team doctor's instructions the Player informed the Club by letter of 24 February 2015 that the Player Contract was terminated with immediate effect. Against this background the Club argues that it was entitled to terminate the Player Contract according to Internal Club Regulations respective according to no. 10 of the Sanctions List on 27 February 2015.
57. The Claimants dispute the validity of Club's termination of 27 February 2015. They argue that i) it was not possible to terminate an inexistent relationship, ii) the Player had not been notified of the alleged medical check on 24 February 2015 and iii) any hypothetical obligation to appear for a medical examination in Volgograd became impossible for the Player to fulfil after he had left Russia on 24 February 2015.
58. Article I of the Player Contract reads, in extracts, as follows:
- "The Player further agrees to comply with all rules established by the Club regarding disciplinary conduct of the players, and follow the internal Club Regulations (Internal Club Regulations annexed to this contract). The Player must follow the Internal Regulations of the Basketball Club "Krasnyi Oktyabi" which is an integral part of the contract."*
59. Article III para. 1 of the Player Contract includes, in extract, the following:
- "This Contract may be terminated by the Club under terms and conditions of the Internal Club Regulations only if Player is in breach of the obligations set forth herein, which breach is proven beyond a reasonable doubt."*
60. Article 2.2 of the Internal Regulations – which are signed by the Player – stipulates the following:



*“The Player must participate in all practice sessions and follow all instructions by the coach.”*

61. No. 10 of the Sanction List, which has been signed by the Player, reads, in extracts, as follows:

<b>Violation</b>	<b>Amount withheld in % of month salary compensation</b>	<b>Additional sanctions</b>
<i>10. Appearance at games or any official, promotional or advertising event of the Club in state of intoxication. Non-fulfilment of club's doctor prescriptions during, precautions, rehabilitation and recovering period against any diseases and injury</i>	Up to 90% or ->	Contract termination

62. As a matter of fact, the Player had a medical history and was examined by the Club's doctor on 18 January 2015. Total avoidance of any physical activity for five to six weeks was urgently recommended. Further medical examinations were scheduled in order to check the improvement of the Player's health condition, in particular on 24 February 2015, and, when the Player did not appear, re-scheduled on the following days. It is undisputed that the Player did not follow these invitations.
63. The Arbitrator finds that these invitations to appear at the Club's doctor constituted binding orders and “prescriptions” according to the Club's internal regulations. Non-compliance of these obligations may lead to the sanctions listed therein.
64. The issue is therefore whether the Player had justified reasons not to attend the scheduled medical examinations. Since it was already found before that the Player Contract was not validly terminated by the Player's termination notice of 24 February 2015, the Player's main argument that he was not obliged to attend the medical examinations because he was no longer bound by the Player Contract is of no avail. Furthermore, the Arbitrator also finds that the Club correctly invited the Player to the medical examination on February 2015 and made further efforts to bring the Player to the doctor, e.g. by trying to pick him up at his domicile and by re-scheduling the



examination three times after the Player did not show up at the initially provided date. The Player left Russia without the Club's permission. His absence cannot therefore be counted as an excuse for not having followed the Club's instruction.

65. The Claimants also argue that the Club's termination was not in good faith and cannot be valid since at that time, it was already in arrear with bonus and salary payments. As a matter of principle, non-payment of salaries or bonuses do not bar a club from exercising its termination rights if the contractual conditions for an early termination have been met, although the specific facts may lead to a different result. The club remains in any case obliged to fulfil its payment duties.
66. Against this background and in consideration of the above mentioned Article III para. 1 of the Player Contract and the Internal Regulations and the Sanction List, which all have been signed and accepted by the Player, the Arbitrator finds that under the circumstances, the Club was entitled to unilaterally terminate the Player Contract by letter of 27 February 2015. Until then, the Player Contract remained in full force and effect.

## **7.2. Legal consequences of the termination of the Player Contract by the Club**

### **7.2.1. Outstanding salaries**

67. The parties agree that the December 2014 salary has been the last salary paid by the Club to the Player. The Arbitrator has determined that the Player Contract was terminated by the Club's termination notice of 27 February 2015.
68. In principle, the Player is entitled to his salaries until the termination date (i.e. 27 February 2015). However, since the Player left the Club without permission already on 24 February 2015, he cannot claim salary payments from this date on. Hence, he is entitled only to the outstanding salary for January 2015 and 1 – 23 February 2015.
69. The January 2015 salary amounts to USD 16,000 and the salary from 1 to 23 February 2015 amounts to USD 13,142.90, totalling to USD 29,142.90.

#### **7.2.2. Bonus**

70. The Parties agree that the Player is entitled to a bonus payment in the amount of USD 5,000.00 because the Club's team reached the round of the Last-32 of the Eurocup. Therefore, the Club shall pay a bonus of USD 5,000.00 to the Player.

#### **7.2.3. Deduction of outstanding payments on account of disciplinary sanctions**

71. The Club submits that the Player's outstanding salary and bonus payment must be reduced by penalties of USD 30,400.00 in total as a consequence of the Player's misconduct. The Claimants do not accept the proposed deduction and argue, inter alia, i) that the Player Contract was already terminated when the Club imposed the fines; ii) the Player had not been notified of the alleged medical check on 24 February 2015, iii) any hypothetical obligation to appear for a medical examination in Volgograd would be impossible to fulfil by the Player as he left Russia on 24 February 2015, iv) the imposed sanctions violate the principles of fair disciplinary procedure and the right to be heard and v) the sanction in the amount of 140% of monthly salary is clearly disproportional.
72. The Internal Regulations indeed allow to impose a fine and to terminate the Player Contract if the Player violates the disciplinary rules. The sanctions must however be proportionate, when considering their overall effect. Under the circumstances, the Arbitrator accepts that the Club terminated the Player Contract which also brought its financial obligations to an end. The educational or preventive effects of fining the Player are therefore rather limited, and imposing a fine of such an amount, in relation to the Player's salary, would therefore be clearly disproportionate. The Arbitrator, deciding *ex aequo et bono*, reduces the amount of the fine to USD 2,500.00 which he considers adequate.

#### **7.2.4. Agent Fee**

73. The Club agreed that the Agent was entitled to an Agent Fee of USD 8,000.00 and withheld payment only because of the allegedly missing invoice. The Arbitrator has

already determined that this was not a valid defence and that the Agent Fee should have been paid as contractually agreed. Therefore, the Club shall pay an Agent Fee of USD 8,000.00 to the Agent.

#### **7.2.5. Costs for the Airplane Tickets**

74. The Claimants claim the reimbursement of some airplane tickets paid by the Player in the amount of USD 2,532.04 with reference of Article VII lit. c of the Player Contract which states, inter alia, the following:

*“The Club agrees to provide the Player with the following amenities at no cost to the Player for the duration of this Contract:*

*c) Four (4) round trip economy class tickets for player or his family between Player’s residence and location of the Club.”*

75. The Club disputes that the flights were between the place of the Club and the residence of the Player. Furthermore, the Club argues that it was common understanding that the Club would only pay for four flight tickets for flights to and not from the Club.
76. The Club disputes that the Player resided in Washington D.C. Thus, the BAT Secretariat requested the Claimants to provide the Player’s address details. However, there is no information about the Player’s domicile on record, nor do the Claimants submit that the Player’s residence was actually in Washington D.C. The Claimants therefore did not substantiate their claim and the Club is not obliged to pay the costs for the airplane tickets.

#### **7.2.6. Summary**

77. The Club shall compensate the Player as follows:

Outstanding salary:	USD	29,142.90
Outstanding bonus	USD	5,000.00

./ fine	USD	-2,500.00
<b>Total</b>	<b>USD</b>	<b>31,642.90</b>

78. The Agent is entitled to an Agent Fee of USD 8,000.00.

## 8. Costs

79. 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.

80. On 21 December 2015 – 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 “[t]he 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 8,930.00. Since Claimants prevailed by approximately half of their primary claims, the Arbitrator holds it fair that 50% of the fees and the costs of this arbitration shall be borne by the Club and 50% by the Claimants (Article 17.3. of the BAT Rules).

81. Given that the Advance on Costs of EUR 11,000.00 were equally advanced by both parties (minus banking fees of EUR 175.45), in application of Article 17.3 of the BAT Rules the Arbitrator decides that the amounts of EUR 947.28 will be reimbursed to the Claimants and EUR 947.28 will be reimbursed to the Club by the BAT.

82. The Claimants have submitted an account of costs of EUR 5,000.00 (plus the non-reimbursable handling fee of EUR 2,000) while the Respondent’s account of costs amounts to EUR 9,963.00. Considering the amount in dispute and in view of the above

analysis regarding arbitration costs, the Arbitrator considers it adequate that each party shall bear its own legal fees and expenses.

## **9. AWARD**

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

- 1. BC Krasny Oktyabr is ordered to pay to Mr. Marcus Lynn Cousin Jr. the net amount of USD 31,642.90.**
- 2. BC Krasny Oktyabr is ordered to pay to Mr. Eric Fleisher the net amount of USD 8,000.00.**
- 3. The arbitration costs shall be borne 50% by Mr. Marcus Lynn Cousin Jr. and Mr. Eric Fleisher and 50% by BC Krasny Oktyabr.**
- 4. Each party shall bear its own legal fees and expenses.**
- 5. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 5 January 2016

Stephan Netzle  
(Arbitrator)