

ARBITRAL AWARD

(BAT 0195/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Ms. Shameka Christon,
c/o Mr Mike Cound, The Cound Group LLC,
628 Forest Avenue, Chattanooga, TN 37405, USA

Represented by Mr. Antonio Martin Molina, 10 Carrer del Parnal – (5-2),
AD700 Escaldes-Engordany, Andorra

- Claimant -

vs.

Women's Basketball Club Nadezhda,
Gaya Street 18, Orenburg 460000, Russia

- Respondent -

1. The Parties

1.1 The Claimant

1. Ms. Shameka Christon (hereinafter the “Player”) is a professional basketball player of US nationality. In the present arbitration she is represented by Mr. Antonio Martin Molina from Andorra as her counsel.

1.2 The Respondent

2. Women’s Basketball Club Nadezhda (hereinafter the “Club”) is a professional basketball club located in Orenburg, Russia. It is represented by its President, Mr. Leonid Tsenaev.

2. The Arbitrator

3. On 2 August 2011, Prof. Richard H. McLaren, the President of the Basketball Arbitral Tribunal (hereinafter the “BAT”), 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

4. On 6 May 2010, the Player and the Club entered into a contractual agreement whereby the Club engaged the Player for the 2010-2011 basketball season (hereinafter the “Player Contract”). The Parties agreed that the Player should receive the net amount of USD 180,000.00 payable in 7 instalments for her services in the 2010-2011 season

and that she should arrive in Orenburg on 1 November 2010.

5. On 11 June 2010, while still playing with her former club Chicago Sky in the WNBA, the Player suffered an _____ and underwent _____ surgeries on 9 July and 2 August 2010. The Player did not play any further matches during the WNBA season 2010.
6. After the Club's management had learned about the Player's injury, it sent several letters to the Player's FIBA licensed agent, Mr. Josep Martin (the "Player's Agent"), asking for information about the Player's health status. In mid-September 2010, the Player forwarded a medical report of Mr. Pete Setabutr, MD (_____) to the Club informing about the Player's surgeries and her current health status. The Club replied that the Player Contract would come into force and effect only after a medical examination upon the Player's arrival in Russia.
7. On 1 November 2010, the Player arrived in Russia and the medical examination was performed on the same day. Thereafter, the Player participated in practices and games of the Club's team.
8. On 9 November 2010, the Club sent an email to the Player's Agent which reads in its main relevant part as follows:

"Dear Josep,

1) We would like to inform you that, unfortunately, your players Becky Hammon and Shameka Christon, arrived of the location the club are not physically ready. It has a bad influence on their personal and team's results.(sic)

[...]

Shameka was examined in Moscow by professor, who confirmed that her injury, received in the WNBA, had been healed and doesn't prevent from her performance for the club.

We hope that they will gain their physical and professional form which will give them the possibility to show a high-class play as the most high-paid players of our club. We also hope that Christmas break will not entail a decrease of their professional performance for the club.

[...]

Best regards,

BC Nadezhda”

9. By letter dated 27 November 2010 to the Player’s Agent, the Club complained about the Player’s performance. This letter reads in its main relevant part as follows:

“Dear Josep,

We second time write to you on the subject of the players of your agency Shameka Christon and Becky Hammon. (Letter dated 09/11/2010)

Since receiving the injury at the game in WNBA, we expressed our concern about the state of Shameka’s health, as well as the fact that the player has no game practice and full practices for a long time.

You assured us that «You have signed again one of the best small forwards in the world and you can expect her to be ready to play at that level».

25 days have already passed from the date of Shameka’s arrival in the club, this time is enough for the professional player to started playing at the professional level. At the moment, her game performance is very low, President talk(sic) many times with her about it. She assured that she will be ready to play at high professional level in the shortest possible time.

[...]

Please draw the player’s attention that they must arrive after Christmas holidays on time and have a good shape, because the second part of the Russian championship and the Euroleague is no less intensive and there is no time to prepare. (Schedule)

*Best Regards,
BC Nadezhda”*

10. The Club’s team was eliminated from the Euroleague after its game on 4 February 2011. On 9 February 2011, the Club sent a further letter to the Player’s Agent once more complaining about the Player’s performance and asking for a reduction of the Player’s salary. This further letter reads in its main relevant part as follows:

“Dear Josep!

We have already raised you a claim for the player Sh. Christon. Our claim touched on an insufficient preparedness of the player for the season and her low game performance. In response to our claim, you indicated that the player has not enough playing time: «When she averages 30 minutes per game and she isn’t playing well, let’s talk again». The player is given more playing time, she was in the starting five, played for 25-35 minutes, but unfortunately, her game performance is not increased.

Coach can not (sic) hold the player on the playing court who makes mistakes and does not bring points to the team.

There were all features of our club – playing court, gym health and recreation center, services of trainers, doctors, masseurs, driver at the player's disposal. But S. Christon doesn't often use these facilities even at the direction of the coach, the player has no self-aspirations. Unfortunately, after our letter (27th November.2010) we have not seen positive changes in the quality of game performance.

[...]

We also draw your attention to the unsatisfactory treatment of her health. That's why Sh. Christon did not participate in the semi-final game of the Russian Cup with "Sparta nad K.". From 7th February 2011 the(sic) isn't allowed by player the doctor (sic) to the training process and will miss a game of the National Championship on 13th February 2011 because of _____.

We can state that the player can not(sic) perform her duties at a professional level on the court, it can observe the instability of her game performance from game, good games alternate with frankly failed games. Being one of the highest-paid players, she is not of benefit to the team that we were entitled to expect, having signed the contract.

Given all the above facts, we propose to reduce the amount of wage of the specified player by fifty per cent from February 2011 to the rest of the season 2010-2011.

Best regards,

*Tsenaev Leonid
President
BC 'Nadezhda'"*

11. By letter of 12 February 2011, the Player's agents refused the Club's proposal for a salary reduction but offered to negotiate a "serious offer" to terminate the Player Contract.
12. On 16 February 2011, the Club sent a letter to Mr. Cound, President of The Cound Group, LLC and the Player's US agent cooperating with the Player's Agent, Mr. Josep Martin. The main relevant parts of this letter read as follows:

"Dear Mr. Cound !

[...]

We give you notice of the termination of a contract with the player of your agency Sh. Christon.

We also inform you about imposition of a fine on her in compliance with the local club documents for repeated missing of the official game (13.02.2001 against "Spartak-SVSM" (Moscow)).

[...]

Sincerely,

*Leonid Tsenaev
President
BC Nadezhda"*

13. After receipt of the termination letter the Player left Russia and did not play with any other club until the end of the 2010-2011 season. The Club paid the Player's salary until the date of the termination letter but did not pay the last three instalments in the total amount of USD 60,000.00 due thereafter.

3.2 The Proceedings before the BAT

14. On 10 July 2011, the Player's counsel filed on behalf of the Player a Request for Arbitration in accordance with the BAT Rules.
15. By letter dated 8 August 2011, the BAT Secretariat confirmed receipt of the Request for Arbitration as well as the payment of the non-reimbursable handling fee of EUR 1,986.00 received in the BAT bank account on 27 June 2011. The BAT Secretariat further informed the Parties about the appointment of the Arbitrator. A time limit was fixed for the Club to file its answer to the Request for Arbitration in accordance with Article 11.2 of the BAT Rules by no later than 29 August 2011 (hereinafter the "Answer"). The BAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs by no later than 22 August 2011:

<i>"Claimant (M[s] Shameka Christon)</i>	<i>EUR 4,500</i>
<i>Respondent (Women's BC Nadezhda)</i>	<i>EUR 4,500"</i>

16. By letter of 21 September 2011, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs in a total amount of EUR 8,986.00 (EUR 4,486.00 by

the Player and EUR 4,500.00 by the Club) and forwarded to the Player a copy of the Answer including a DVD. In the same letter, the Arbitrator declared the exchange of documents complete and invited the Parties to submit a detailed account of their costs by 30 September 2011.

17. By email of 22 September 2011, the Player's counsel requested that the Player be provided with the opportunity to comment on the Answer. In particular, Player's counsel was concerned about "some false and wrong assertions".
18. By letter of 23 September 2011, the Arbitrator informed the Parties that in view of the circumstances of the present case, he had decided to grant the Player the right to submit comments on the Answer by no later than 28 September 2011 and that thereafter, the Club would have the chance to comment on the Player's submission. The Arbitrator also informed the Parties that the time limit for the submissions of the Parties' accounts of costs was suspended and that after the Parties' additional submissions, he would decide how to proceed.
19. On 30 September 2011, the BAT Secretariat confirmed receipt of the Player's additional submissions and forwarded them to the Club inviting it to comment thereon by no later than 6 October 2011.
20. On 1 October 2011, the Club requested an extension of the time limit to submit its reply to the Player's additional submission. The Club requested to be provided an extension until 20 October 2011. On 4 October 2011, taking into consideration all circumstances of the present case, the Arbitrator granted the request.
21. By email of 5 October 2011, the Player's counsel opposed the time extension and requested that the Club submit its further submission by no later than 6 or exceptionally 7 October 2011.

22. On 7 October 2011, the Arbitrator informed the Parties that he had decided to uphold the time limit for the Club to comment on the Player's additional submission by no later than 20 October 2011. By email of 20 October 2011, the Club submitted its comments.
23. By letter of 28 October 2011, the BAT Secretariat acknowledged receipt of the Club's comments. In the same letter, the Arbitrator declared the exchange of documents complete and invited the Parties to submit a detailed account of their costs until 8 November 2011.
24. On 7 November 2011, the Player submitted an account of costs (including exhibits) as follows:

"Arbitral Fees

* <i>Handling fee</i>	1986,00 euros
* <i>Advance on costs</i>	4486,00 euros
* <i>Bank fees (45 usd exchange rate: 30,28 eur)</i>	30,28 euros

<i>Sub-total :</i>	6472,00 euros

Legal and Counsel fees

* <i>Study of the case</i>	1300,00 euros
* <i>Preparation and submission of the Request for arbitration and exhibits</i>	5900,00 euros
* <i>Preparation and submission of the Complement to the Request of Arbitration</i>	2700,00 euros
* <i>Contribution mailing, fax, phone fees (48+17)</i>	65,00 euros

<i>Sub-total:</i>	9965,00 euros
<i>TOTAL:</i>	16437,00 euros"

25. By letter dated 8 November 2011, the Club submitted an account of costs as follows:

"Basketball club "Nadezhda" has made following costs:

<i>DHL mail</i>	<i>30.08.2011</i>	<i>2666.92 rub</i>	=63.88 Euro"
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26. On 8 November 2011, the Parties were invited to submit their comments, if any, on the opposing party's account of costs by no later than 14 November 2011. Neither of the

Parties submitted comments.

27. The Parties did not request the BAT to hold a hearing. The Arbitrator therefore decided in accordance with Article 13.1 of the BAT Rules not to hold a hearing and to deliver the award on the basis of the written submissions available.

4. The Positions of the Parties

4.1 The Claimant's Position

28. The Player submits the following in substance:
- a) The Club dismissed the Player “without a serious and just cause”. All alleged violations of the Player Contract as set out in the termination letter of 16 February 2011 are false and do not justify the termination by the Club.
 - b) The Player passed the medical examination at the beginning of the contractual period and the Player Contract came into force without any restrictions or reservations. Therefore, the Club’s complaints about the Player’s performance have no legal relevance. The Club’s proposal for a reduction of the Player’s salary, offered only a few days before the termination letter was sent to the Player’s US agent, clearly shows that the Club’s motivation for the termination was its dissatisfaction with the Player’s performance rather than any (alleged) infringements. In addition, any infringement has to be specifically identified and communicated to the Player’s agent within three days, which was not done in this case.
 - c) The Player also submits that she never failed to attend any games or practices except when she was ill and this was confirmed by the Club’s doctor. According to the Player Contract, in the event of sickness or injury, the Player is entitled to

her full salary. Moreover, the imposed fine for “repeated missing of the official game” lacks validity because the Club did not notify the amount of the fine and the Player had not received the Club’s guidelines on or before the Player’s arrival as stipulated in Clause SECOND, first paragraph, lit. c) of the Player Contract.

- d) The Club only has the right to unilaterally terminate the Player Contract in the event that the Player commits a “*systematically infringements [sic]*” of the Player Contract. No such infringements have been proven. As a result, the Club’s termination of the Player Contract is unjustified. The Player is therefore entitled to her due salaries with applicable interest. In addition, the Club agreed in Clause TENTH of the Player Contract to reimburse “any and all legal costs, which may be necessary should the Player have to obtain the assistance of an attorney or counsel”.
- e) Due to the restrictions for international transfer periods and the termination only about three months before the end of the basketball season, it was impossible for the Player to find a new Club for the rest of the 2010-2011 season.

29. In reply to the Answer, the Player also submits that neither the Player’s statistics nor the video sequences support the Club’s allegations regarding the Player’s performance and her behaviour in games and practices. Furthermore, the Player’s Agent provided the Club with all information about the Player’s injury and her health status as soon as it became clear. In addition, the Player organized a specific workout with a trainer before arriving in Orenburg and therefore arrived in a “reasonable condition”. To avoid sickness she was always well dressed with winter clothes. The respective allegation was made by the Club only in the Answer but never before.

4.2 The Claimant's Request for Relief

30. In her Request for Arbitration dated 10 July 2011, the Player requests the following relief:

"Request for Relief

a) Salaries owed

- 30 000 usd + 5% legal interests(sic) from March 4th 2011
- 20 000 usd + 5% legal interest from April 4th 2011
- 10 000 usd + 5% legal interest from May 1st 2011

b) Handling fees

- 2 000 euros

c) Advance FAT/BAT costs

- Will be determined by the Arbitrator later

d) Legal fees and expenses

- Will be submitted by the Claimant to the Arbitrator as soon as the total fees will be final and fixed

e) Legal and official (sic) Tax receipt

- One for the year 2010 (salaries of november and december(sic)) and one for the year 2011 (salaries from january(sic) till end of season)"

4.3 Respondent's Position

31. The Club submits the following in substance:

- a) The Player and her agents withheld relevant information regarding the Player's injury suffered in June 2010 when playing in the WNBA. Because she did not play any games since that date, she was not able to perform at her usual level upon arrival in Orenburg in November 2010. The Club gave the Player the chance to recover and rehabilitate. The Club fulfilled all its obligations stipulated in the Player Contract, but the Player was not willing to make any efforts to improve her performance. Although she got enough playing time she did not

reach her usual playing level. The medical examination merely confirmed that the Player was healthy. The Player however, was not in sufficiently good shape to compete at that time.

- b) Already in the 2008-2009 season, the Player had been a player of the Club with a total salary of USD 160,000.00. Although a higher amount for the 2010-2011 season was agreed, the Player did not reach her earlier level of performance. This is supported by the Player's statistics. Moreover, the Player frequently disregarded the directions of the Club's coach. This is supported by the video sequences on record.
- c) Furthermore, the Player ignored the Club doctor's statements to dress in warmer clothes and to wear a hat because of the cold climate. Consequently, the Player got sick and could not play in several games.
- d) Most of the Player's duties add up to the duty to play basketball at a "professional level." In February 2011, when the Player continued to play below her expected level, the Club offered to reduce her salary by 50% for the rest of the season, i.e. by 1/6 of the salary for the total season. The Club's offer was rejected by the Player. The Club has made every effort to keep the Player in the team and to allow her to recover and rehabilitate. However the Player's performance did not improve.

32. In reply to the Player's comments on the Answer, the Club submits that it had not been advised of the Player's alleged special preseason workout with a trainer. However, judging from the Player's level and condition when she arrived at the Club, this workout had certainly not been very intense. The Club was highly interested in helping the Player to recover from her injury and to improve her performance level. However, when the Player did not provide any support to her team before the most important games of the championship, the Club's coaches and the management decided to terminate the

Player Contract.

4.4 Respondent's Request for Relief

33. At the end of its Answer dated 29 August 2011, the Club summarizes its submissions as follows:

"Based on the above mentioned we believe:

Basketball Club "Nadezhda" performed its contractual obligations towards the Player Shameka Christon in full; the contract termination was made according to the contract terms resulting from systematic infringement of contract obligations by the Player.

Demands of the Claimant in full are not lawful and should be dismissed by the Court."

5. The Jurisdiction of the BAT

34. 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).
35. The jurisdiction of the BAT presupposes the arbitrability of the dispute and the existence of a valid arbitration agreement between the parties.
36. 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
37. The jurisdiction of the BAT over the dispute results from the arbitration clause

¹ Decision of the Swiss Federal Tribunal 4P.230/2000 dated 7 February 2001, cons. 1, reported in ASA Bulletin 2001, p. 523 et seq., with reference to the decision of the Swiss Federal Tribunal dated 23 June 1992, BGE 118 II 353, 356, cons. 3b.

contained in Clause FOURTEENTH of the Player Contract, which reads as follows:

“Any dispute between player, agent and club, arising from or related to the present contract, including agency commission fees, 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 parties expressly waive recourse to the Swiss Federal Tribunal against awards of the FAT, as provided in Article 192 of the Swiss Act on Private International Law. The arbitrator shall decide the dispute ex aequo et bono.”

38. In accordance with Article 1.1 of the BAT Rules, these rules *“shall apply whenever the parties to a dispute have agreed in writing to submit the same to the BAT – including by reference to its former name “FIBA Arbitral Tribunal (FAT)”* (emphasis in the original). The Parties’ reference to the “FIBA Arbitral Tribunal (FAT)” in Clause FOURTEENTH of the Player Contract is therefore understood as a reference to the BAT (see also Article 18.2 of the BAT Rules).
39. The Player Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
40. 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 agreement under Swiss law (cf. Article 178(2) PILA). In particular, the wording *“[a]ny dispute between player, agent and club, arising from or related to the present contract”* in Clause FOURTEENTH of the Player Contract clearly covers the present dispute.²
41. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Player’s claim.

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

6. Applicable Law – *ex aequo et bono*

42. 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”.

43. 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.”

44. In their arbitration agreement in Clause FOURTEENTH of the Player Contract, the Parties have expressly directed and empowered the Arbitrator to decide this dispute *ex aequo et bono*. Consequently, the Arbitrator will decide the issues submitted to him in this proceeding *ex aequo et bono*.

45. 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 1969³ (Concordat)⁴ under which Swiss courts have held that arbitration “*en équité*” is fundamentally different from arbitration “*en droit*”:

“When deciding ex aequo et bono, the Arbitrators pursue a conception of justice which is

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

⁴ KARRER, in: Basel commentary to the PILA, 2nd ed., Basel 2007, Article 187 PILA N 289.

not inspired by the rules of law which are in force and which might even be contrary to those rules.”⁵

46. 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*”.

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

7. Findings

7.1 Termination of the Player Contract

48. The Club terminated the Player Contract dated 6 May 2010 by a letter sent by email to the Player’s agents, Mr. Cound and Mr. Martin, on 16 February 2011 (hereinafter the “Termination Letter”), which was before the end of the agreed term of the Player Contract (i.e. “the last club official game of the Russian championship”). The Player left the Club after receipt of the Termination Letter and did not attend any further games or practices of the Club. The Arbitrator therefore finds that the Player Contract was terminated on the date of receipt of the Termination Letter, i.e. 16 February 2011.

7.2 Consequences of the early termination of the Player Contract

49. The Player Contract provides for the Club’s unilateral right to terminate the agreement before its contractual termination date and without compensating the Player if the Player “makes systematically infringements of the Agreement”. Before exercising its termination right, the Club “informs in the written form, within 3 days, the Player’s agent regarding all the infringement of the Agreement, made by the Player” (Clause

⁵ JdT (Journal des Tribunaux), III. Droit cantonal, 3/1981, p. 93 (free translation).

SECOND of the Player Contract under the title “Obligations of the Player”). In addition, the Arbitrator accepts that as a matter of general principles of law, an agreement can be terminated with immediate effect by either party upon material breach of contract by the other party. The burden of proof is on the party asserting that the conditions for an early termination have been met. The early termination right of a player’s employment contract with a fixed term is considered to be an exception to the principle of *pacta sunt servanda*. The Arbitrator therefore requires that the terminating party provides clear evidence that the conditions for an early termination have been met.

50. In the Termination Letter, the Club raises three grounds justifying the early termination because of “systematically infringements”, namely: (1) that the Player did not present herself in a satisfactory shape when she arrived at the Club; (2) that the Player violated her duty to train and practice appropriately and to stay in the best possible physical condition to play professional basketball, and (3) that the Player disregarded the directions of the coach. The Club also adds a further violation, namely that Player was unable to participate in the training from 7 to 14 February 2011 because she was sick and missed two games. The Player contests all alleged infringements.

(1) The Player reported to the Club in unsatisfactory shape

51. Undisputedly, the Player suffered from an _____ injury between the signing of the Player Contract and her arrival at the Club. The Club repeatedly asked about the health and fitness of the Player. Upon the Player’s arrival in Moscow, she was medically examined as provided by the Player Contract. It is also undisputed that the Player successfully passed the medical exam and joined the team. The doctor who examined her confirmed that her _____ injury had been healed and did not prevent her from playing professional basketball with the Club.
52. It is also true that in the same email of 9 November 2010 in which the passing of the medical exam was confirmed, the Club also complained about the physical condition in

which the Player (and another player of the same agents) arrived at the Club. According to Clause SECOND – Obligations of the Player – of the Player Contract the Player was obliged “to arrive in the club in good physical form and must be in good health and ready to play for the Club after passing medical exam.” Whether or not this assessment was accurate is disputed in this arbitration.

53. The Arbitrator understands that the Player Contract provides for two conditions precedent before it became valid and binding, namely that the Player: (1) arrived in good shape and health at the Club; and (2) passed a medical examination confirming that she was ready to play professional basketball. While there is written evidence that the Player passed the medical exam, there is no explicit confirmation that the Player also met the other condition, namely to be in good physical form to comply with her assignment. To the contrary, the Club complained about the Player’s lack of fitness at a very early stage of her engagement. However, the Club did not reject the Player because of the alleged shortcomings but expressed its confidence that the Player would regain her physical strength, and included her in the team. The Arbitrator finds that the Club accepted the Player as she was. The Club is therefore barred from invoking the Player’s alleged physical deficiencies to justify the early termination of the Player Contract some three months later.

54. The Arbitrator concludes that this first complaint was not an infringement entitling the Club to terminate the Player Contract early.

(2) The performance of the Player was below the Club’s expectation because of her unsatisfactory physical condition.

55. The Club also justifies the early termination of the Player Contract by submitting that the Player did not exercise enough and that she was not an effective member of the team. In particular, she did not reach the performance level of the 2008/2009 season when she was employed by the Club the first time. She therefore violated Clause

SECOND of the Player Contract according to which she was “obliged to maintain permanently her high physical form.”

56. The Player does not dispute that her sporting performance could have been better. However, she disputes that the performance was unsatisfactory and that the alleged underperformance would allow the Club to terminate the Player Contract early.
57. The Club repeatedly criticised the unsatisfactory performance of the Player, especially when taking her considerable salary into account. The initial patience of the Club converted into open dissatisfaction and eventually led to the early termination of the Player Contract. According to the Club, the underperformance was a result of her insufficient training attitude. The Player complained about too little playing time and pleaded sickness.
58. It is difficult for the Arbitrator to determine, based on the available evidence, whether the performance of the Player was as bad as claimed by the Club and, if yes, what was the reason. The Arbitrator notes however, that the Club was still ready to keep the Player but to cut her salary to reflect her underperformance. Although this proposal was flatly rejected by the Player’s Agent, the Arbitrator considers the Club’s offer as an indication that the Player’s performance did not reach the Club’s expectations. While the Club accepted that the Player needed some time to regain her prior playing skills (especially her performance level of the 2008/2009 season, when she was engaged by the Club the first time), its tolerance was exhausted in February 2011 and it sought for a change.
59. Taken by itself, underperformance of the Player may not be considered as a breach of contract. Clause ELEVENTH, Second paragraph, second sentence of the Player Contract says: *“In the event the Player cannot perform as a professional player due to diminished skills, sickness or injury should in no way affect her right to receive all amounts and compensations detailed in the Third clause of this present agreement for*

the season in wich Player get injury” (sic). Underperformance could however be an indication of the Player’s behaviour in breach of the contract, if e.g. the Player did not regularly participate in the team’s practices or if she cared little about her physical form. Only if such breach would be “systematically”, which is understood by the Arbitrator as intentional and deliberate behaviour demonstrating the Player’s bad faith, the Club would be entitled to rely on Clause SECOND – Obligations of the Player – last paragraph of the Player Contract, to “rescind unilaterally the represent contract without any compensation.”

60. The Arbitrator finds that although there are indeed certain indications that the Player did not live up to her previous and expected playing level, there is no evidence of committing “systematically” infringements of the Player Contract. The Arbitrator therefore finds that also the claimed unsatisfactory performance of the Player does not justify the early termination of the Player Contract.
61. If the parties had intended to make the continuing existence of the Player Contract subject to the Player’s skills, performance level or statistics, they could have done so by introducing and defining the respective criteria in the Player Contract. However, they did not do so. The Club is therefore barred from raising these elements as infringements which entitled it to rescind the Player Contract.

(3) The Player did not follow the coach’s instructions.

62. The Club submits that the Player did not follow the coach’s instructions and did not implement the tactics as directed by the coach.
63. The Player does not agree. She also denies that this allegation was ever a subject of discussions between her and the Club. In fact, she never received a written complaint as provided in Clause SECOND of the Player Contract.

64. The Arbitrator finds that there is no evidence that the Player disregarded the coach's instructions (whether "systematically" or not). The video recording does not demonstrate that the Player was disobedient to the coach. The Club is therefore unable to rescind the Player Contract based on this allegation.

(4) The Player did not exercise and play between 7 and 14 February 2011.

65. In the Termination Letter, the Club also claims that the Player did not participate in the team's activities between 7 and 14 February 2011. This is not disputed by the Player: She explains that she was ill and followed the advice of the Club's team doctor not to exercise and play.

66. The Arbitrator finds that the Player cannot be held responsible for being sick. Sickness is not a breach of contract and does not entitle the Club to terminate the Player Contract early.

(5) The multitude of breaches of the Player Contract

67. While none of the allegations on its own give rise to a right to terminate the Player Contract, the Arbitrator must also consider, whether these reasons, when viewed in totality may amount to a material breach of the Player Contract. Although this might be theoretically possible, this does not apply in the present case simply because there is no such multitude of breaches. The Club has accepted the Player in the physical condition in which she was when she arrived in Orenburg, her disobedience to the coach's directions has not been proven and the Player's absence because of sickness upon advice of the Club's team doctor does not constitute a breach of contract at all. The Arbitrator only accepts the Club's complaint about the underperformance of the Player. Nevertheless, this complaint on its own does not justify the early termination of the Player Contract.

7.3 Compensation claim

68. The Player claims compensation in the amount of the remaining and unpaid salaries until the end of the contractual term. Clause ELEVENTH of the Player Contract provides: *“If the Club unilaterally rescinds the present contract without justification, the Player will have the right to receive the totality of the salary amounts stipulated in the Third clause of this present contract.”*
69. According to Clause THIRD of the Player Contract, the Player is entitled to the following installments:
- USD 30,000.00 until 4 March 2011
 - USD 20,000.00 until 4 April 2011
 - USD 10,000.00 within 3 working days upon the last official game.⁶
70. The remaining contractual salary amounts therefore to USD 60,000.00. The previous installments have been paid and are not subject to this arbitration.
71. Basically, a compensation in the amount of the *“totality of the salary amounts stipulated in the third Clause of this present contract”* is due if the early termination of the Player Contract was not justified. However, there may well be grounds and circumstances which did not meet the high threshold of “systematically infringements” entitling the Club to unilaterally terminate the Player Contract but which must be taken into calculation when the compensation is determined.
72. The Arbitrator finds that the Club had good reasons to be disappointed about the

⁶ According to the Player's Exhibit 34, which is undisputed by the Club, the Club's last official game of the Russian Championship was played on 1 May 2011. Therefore, the last instalment was due on or before 4 May 2011.

performance level of and efforts made by the Player. While the Club was ready to accept the Player after her injury and gave her time to regain her prior strength, the Player did not sufficiently reward the Club's confidence and did not demonstrate a very eager attitude. The Player's agents also acknowledged, at least at the beginning of the contractual term, that the Player had not yet reached her usual playing level. When the Club tried to slightly adjust her salary to take the unsatisfactory performance and efforts into account, the Player insisted on the wording of the Player Contract and did not want to discuss the proposal. The Arbitrator finds the statements of the Club credible according to which the Club demonstrated some tolerance when it accepted the Player despite her state of fitness but that the Player did not make sufficient efforts to live up to the justified expectations of the Club. Deciding *ex aequo et bono*, the Arbitrator therefore reduces the compensation which the Player is entitled to by 25%, i.e. USD 15,000.00. This amount corresponds also to half of the salary reduction asked for by the Club on 9 February 2011. Consequently, the Player is entitled to a compensation in the amount of USD 45,000.00

7.4 Interest

73. The Claimant requests interest at 5% for the outstanding salary instalments.
74. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest on overdue salaries⁷. Although the Player Contract does not provide for the obligation of the debtor to pay default interest, this is a generally accepted principle which is embodied in most legal systems. The Arbitrator considers an interest rate of 5% p.a. to be fair and

⁷ See, *ex multis*, the following BAT awards: 0092/10, *Ronci, Coelho vs. WBC Mizo Pecs 2010*; 0069/09, *Ivezic, Draskicevic vs. Basketball Club Pecs Noi Kosariabda Kft*; 0056/09, *Branzova vs. Basketball Club Nadezhda*.

equitable in the present case and also corresponding to the standing jurisprudence of BAT.

75. Regarding the compensation for the salary payments, the default interest must be calculated from the following day after the respective salary payment became due. Considering the salary reduction in the amount of USD 15,000.00 due to Player's breach of her contractual duties the calculation of the interest is as follows:

- 5% p.a. on USD 15,000.00 since 5 March 2011
- 5% p.a. on USD 20,000.00 since 5 April 2011
- 5% p.a. on USD 10,000.00 since 5 May 2011

7.5 Tax receipt

76. The Player requests two tax receipts for her 2010 tax statements, namely one receipt for the November and December 2010 salaries and one receipt for the salary from January 2011 until the end of the season.

77. Clause THIRD of the Player Contract states: *"Additionally, the Club agrees to provide the Player with a tax document upon request, which shows the amount of tax that has been paid on the Player's behalf by the Club at the end of the season."*

78. The Player requested the tax document by email of 17 April 2011. However, according to the Player Contract, the Club must submit only one tax receipt for the entire engagement of the Player. The Club is therefore obliged to issue a tax receipt covering all taxes paid on behalf of the Player in 2010 and 2011, including the payments to which it is obliged as a consequence of this arbitral award.

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 20 December 2011 - 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 8,986.00.
81. Considering that the Player prevailed in her claim by 75%, it is fair that 75% of the fees and costs of the arbitration are borne by the Club and 25% by the Player. Equally, the Club shall contribute 75% of the Player’s legal fees and expenses, and the Player shall contribute 25% of the Club’s legal fees and expenses.
82. Given that the Player paid advances on costs of EUR 4,486.00 as well as a non-reimbursable handling fee of EUR 1,986.00 while the Club paid an advance on costs of EUR 4,500.00, in application of article 17.3 of the BAT Rules the Arbitrator decides as follows:
- (i) The Club shall reimburse to the Player the costs advanced by her in the amount of EUR 4,486.00.
 - (ii) Furthermore, the Arbitrator considers it adequate that the Player is entitled to the payment of a contribution towards her legal fees and other expenses (Article 17.3



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of the BAT Rules). Taking into consideration the Parties' accounts of costs, the Arbitrator holds it adequate to determine the Player's costs at EUR 11,951.00 and the Club's costs at EUR 63.88. Considering how the Parties prevailed and charging the Parties' contributions against each other, the Player shall finally be entitled to a contribution in the amount of EUR 8,947.28.

9. AWARD

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

- 1. Women's Basketball Club Nadezhda is ordered to pay to Ms. Shameka Christon the amount of USD 45,000.00 plus interest of 5% p.a.**
 - on the amount of USD 15,000.00 since 5 March 2011,
 - on the amount of USD 20,000.00 since 5 April 2011,
 - on the amount of USD 10,000.00 since 5 May 2011.
- 2. Women's Basketball Club Nadezhda is ordered to pay to Ms. Shameka Christon the amount of EUR 4,486.00 as a reimbursement of her advance on arbitration costs.**
- 3. Women's Basketball Club Nadezhda is ordered to pay to Ms. Shameka Christon the amount of EUR 8,947.28 as a contribution towards her legal fees and expenses.**
- 4. Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 27 December 2011

Stephan Netzle
(Arbitrator)