ARBITRAL AWARD

(BAT 0212/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Klaus Reichert SC

in the arbitration proceedings between

Ms. Rebecca Hammon
c/o At 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

represented by its President, Mr. Leonid Tsenaev

- Respondent -

1. The Parties

1.1 The Claimant

1. Ms. Rebecca Hammon (hereinafter referred to as “the Claimant”) is a professional basketball player, who was retained by the Respondent, Women's Basketball Club Nadezhda, for two seasons pursuant to an agreement dated 30 April 2010.

1.2 The Respondent

2. Women's Basketball Club Nadezhda (hereinafter referred to as “the Respondent”) is a professional basketball club in Orenburg, Russia.

2. The Arbitrator

3. On 20 October 2011, Prof. Richard H. McLaren, President of the Basketball Arbitral Tribunal (the "BAT"), appointed Mr. Klaus Reichert SC as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules"). 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 Background Facts and the Dispute

4. On 30 April 2010, the Claimant and the Respondent entered into an agreement whereby the latter engaged the former to play basketball for the 2010-2011 and 2011-2012 seasons (the “Agreement”).

5. Under the heading “SECOND” of the Agreement, the Claimant is obliged, as one of her

main obligations, to follow the coach's instructions. Also, under the same heading, the Respondent is to inform the Claimant's Agent in writing, within three days of the occurrence of any infringements of the Agreement committed by the Claimant. In the case of systematic infringements, the Respondent has the right to terminate the Agreement without the requirement to pay compensation.

6. Under the heading "THIRD" of the Agreement, the salary arrangements for the Claimant are set out (USD 375,000.00 for 2010-2011 and USD 400,000.00 for 2011-2012 – both net amounts). The Respondent agreed to pay the Claimant by way of instalment on a monthly basis. In addition, there is a requirement for the Respondent to pay bonuses in defined circumstances, and also arrange for an apartment and other related day-to-day matters.

7. Under the heading "ELEVENTH" of the Agreement, it is agreed that all compensation and bonuses are guaranteed, and in the event that the Claimant cannot perform, due to diminished skill, sickness or injury, this should not impact upon her right to receive such monies.

8. While there has been much discussion in the written argument put before the Arbitrator as to the circumstances of the Claimant's arrival with the Respondent, the pertinent fact for present purposes is that she did arrive and did play pursuant to the Agreement. While she was unable to play for periods of time, this does not detract from the fact that she played, particularly in January 2011.

9. In essence, what has triggered this arbitration. is a letter dated 16 February 2011 from the Respondent to the Claimant's representatives terminating the Agreement.

3.2 The Proceedings before the BAT

10. On 5 September 2011 the Claimant filed a Request for Arbitration dated 25 August

2011 in accordance with the BAT Rules and duly paid the non-reimbursable handling fee in the amount of EUR 3,990.00.

11. On 24 October 2011, the BAT informed the Parties that Mr. Klaus Reichert SC had been appointed as the Arbitrator in this matter and fixed the advance on costs to be paid by the Parties as follows:

"Claimant (Ms. Rebecca Hammon)	*EUR 6,000*
Respondent (Women's BC Nadezhda)	*EUR 6,000"*

The foregoing sums were paid as follows: 1 November 2011, EUR 6,000.00 by the Respondent; and 23 November 2011, EUR 5,990.00 by Rapid Fire Protection Inc (on behalf of the Claimant).

12. On 25 November 2011, the Respondent submitted its Answer to the Request for Arbitration.

13. By procedural order of 29 November 2011, the BAT informed the Parties that a second exchange of briefs was required.

14. On 19 December 2011, the Claimant filed her comments on the Answer of the Respondent.

15. On 3 January 2012, the Respondent filed its reply to the Claimant's comments.

16. On 5 January 2012, the Parties were invited to submit their statements of costs and were notified that the exchange of documentation was closed.

17. By letter dated 6 January 2012, the Claimant set out her statement of costs. The Respondent did not furnish a statement of costs nor did it comment on the Claimant's

statement of costs within the time permitted by the Arbitrator.

18. By Procedural Order dated 14 March 2012, the Claimant was requested to identify the details of her subsequent employment after leaving the Respondent particularly for the 2011-2012 season.

19. By email of 14 March 2012, the Claimant stated that she was under contract with Spartak Moscow for the 2011-2012 season at a salary of USD 340,000.00. A copy of that contract was produced. The Respondent was afforded an opportunity to comment by 22 March 2012. It did not do so.

4. The Positions of the Parties on the key issue

4.1 The key issue

20. Prior to setting out the various positions regarding what is relevant for the purposes of properly disposing of this dispute, the Arbitrator notes that the Parties have filed extensive and fluid submissions ranging over a wide range of matters stemming from the very beginning of the Agreement. These have included much by way of debate about injury, national team duty and on-court performance. The Arbitrator has not been assisted by much of this discussion. What is pertinent and relevant is whether the Respondent was entitled to terminate the Agreement by its letter dated 16 February 2011 ("termination letter"). Either the termination letter stands up to scrutiny, or it does not. This, for the arbitrator, is the key issue.

21. The termination letter relies upon three matters, which are referred to by the Respondent as systematic breaches:

    i. The Claimant violated her obligation to arrive in good physical form, in good health and ready to play for the Respondent;

ii. The Claimant performed poorly; and

iii. The Claimant did not follow the coach's instructions.

The Respondent also noted the provision in the Agreement, referred to in paragraph 5 of this Award, of the requirement to notify of infringements of the Agreement within three days, and complained of the Claimant's inability to play a match on 13 February 2011 due to food poisoning.

4.2 The positions of the Parties

22. The Claimant refutes the legitimacy of the termination letter. She says that a few days before the termination letter arrived the Respondent wanted to continue the Agreement but for a salary which would be reduced by half. When the Claimant did not accept that suggestion, the Respondent then decided to terminate the Agreement. The Claimant says that such alleged infringements as were set out in the termination letter cannot be described as gross unprofessional conduct if the Respondent still wanted to continue with a player who was guilty of such acts. The Claimant also says that alleged gross unprofessional conduct requires termination with delay.

23. The Respondent's position is encapsulated as follows from its second round written argument:

> *"We are not afraid to repeat, because this fact shows the player's readiness – while the Player's staying in the Club (4 months), she spent more than 32 days for the various treatments, recovery, rehabilitation, missed the important games both in the Russian Championship and the Euroleague, did not participate in the training process, however her contract payments were made for 5 months. All this time the Club were waiting patiently when «she will be on the court giving you her 100% as soon as she can go full speed» and paid the money.*
>
> *But our patience was worn out, too! We talked a lot and often with the player, we wrote letters to her agents for assistance, but all was in vain. By our recent proposal to reduce the player's salary by 50% till the end of the season (ie 20% from the total amount) we hoped to motivate the player in order that she proved that her raising of money was not*

for nothing for the preceding half a year. But our proposal was rejected by Agents of the Claimant.

We consider our club professional, and we pay money to the players for professional fulfillment of their duties. We participate in the present proceeding as the two sides, who were unable to come to agreement about our positions in the termination of the contract and had recourse to an independent arbitrator to resolve these differences. We are very displeased that the Claimant in her claims is behaving unprofessionally insulting to the club, the club staff (coaches, doctors, managers) and a country in toto ("the former Soviet Union philosophy"). We consider it inappropriate in the relations between the professional club and professional player (represented by a counsel).

We ask the Arbitrator to understand that even if the player has fulfilled her obligations of 70-80%, we would never have resorted to such a radical way as a termination of contract. The time that we gave the player to restore, rehabilitate shows how we sincerely wanted that she could help our team in achieving goals. Unfortunately, communication with player and agents yielded no results.

As a result of the foregoing, we think that the club fulfilled its obligations in full compliance with its obligations under the Agreement towards the player B. Hammon.

Termination of the contract was made in full accordance with the terms of the contract."

5. The Jurisdiction of the BAT

24. Pursuant to Article 2.1 of the BAT Rules, "[t*]he seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland*". Hence, this BAT arbitration is governed by Chapter 12 of the Swiss Act on Private International Law (PILA).

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

26. The Arbitrator finds that the dispute referred to him is of a financial nature and is thus

arbitrable within the meaning of Article 177(1) PILA1.

27. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under the heading "FOURTEENTH" of the Agreement, 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 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."*

28. The Agreement is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.

29. With respect to substantive validity, the Arbitrator considers that there is no indication in the file that could cast doubt on the validity of the arbitration agreement under Swiss law (referred to by Article 178(2) PILA).

30. The jurisdiction of BAT over the Claimant's claim arises from the Agreement. The wording "[a]*ny dispute …….. arising from or related to the present Agreement* …" clearly covers the present dispute. In addition, the jurisdiction of BAT has not been disputed by the Respondent.

31. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Claimant's claim.

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

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

32. With respect to the law governing the merits of the dispute, Article 187(1) PILA provides that the arbitral tribunal must decide the case according to the rules of law chosen by the parties or, in the absence of a choice, according to the rules of law with which the case has the closest connection. Article 187(2) PILA adds that the parties may authorize the Arbitrators to decide "en équité" instead of choosing the application of rules of law. Article 187(2) PILA is generally translated into English as follows:

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

33. Under the heading "Applicable Law", Article 15.1 of the BAT Rules reads as follows:

> *"Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law."*

34. As seen above the Agreement clearly stipulates that: "[t]*he arbitrator shall decide the dispute ex aequo et bono*".

35. The concept of "équité" (or *ex aequo et bono*) used in Article 187(2) PILA originates from Article 31(3) of the Concordat intercantonal sur l'arbitrage2 (Concordat)3, under which Swiss courts have held that arbitration "en équité" is fundamentally different from arbitration "en droit":

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

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

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

> *not inspired by the rules of law which are in force and which might even be contrary to those rules."*[4]

36. 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*."

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

6.2 Findings

38. The doctrine of *pacta sunt servanda* (which is consistent with justice and equity – parties who make a bargain are expected to stick to that bargain) is the principle by which the Arbitrator will examine the positions of the parties and the key issue as to whether the termination letter was a valid termination of the Agreement.

39. Consistent with the doctrine of *pacta sunt servanda*, it appears to the Arbitrator that for the Respondent to legitimately terminate the Agreement, it must properly invoke the relevant provisions. Those provisions are as follows:

> *"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. In case if the Player makes systematically infringements of the Agreement, the Club has the right to rescind unilaterally the present contract without any compensation."*

40. The Arbitrator analyses these two sentences as being interlinked and not separate. The threshold for the Respondent to terminate for systematic infringement of the Agreement is that there must be a pattern of written warnings. These written warnings must take place three days after the occurrence of a particular infringement.

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

41. Hypothetically speaking, if there were infringements, and the Respondent does not issue written warnings but then, at a later date, attempts to use such infringements for the purpose of termination, it would be incompatible with the structure of the Agreement as set out above. The Respondent must, in light of these provisions in the Agreement, give the Claimant a warning within three days of an infringement. These provisions ensure that the parties can move forward throughout the life of the Agreement knowing where they stand vis a vis each other.

42. The question which will resolve the key issue in this case is whether or not there were written warnings issued by the Respondent to the Claimant's Agent in respect of infringements, and whether or not the written warnings were made within three days of the occurrence of such infringement; and there is a further requirement, not only were there such written warnings issued by the Respondent, that these were in respect of systematic infringements, *viz.* repeated warnings made in writing about the same or similar infringements.

43. The Arbitrator has carefully reviewed the entire file of exhibits and evidence placed before him in this Arbitration and nowhere can he find any written warning (prior to the date of the termination letter) issued by the Respondent of the type required under the Agreement (*i.e.* three days after an alleged infringement) much less a systematic pattern of infringements backed up by written warnings. If the Respondent had a legitimate complaint during the lifetime of the Agreement, then it should have issued a written warning within three days of the relevant act or infringement. It did not do so and the Arbitrator does not find it necessary, nor indeed permissible, to review complaints which the Respondent might have had but did not act upon by way of appropriate written warning.

44. The Arbitrator finds, therefore, that the Respondent did not have the necessary pattern of written warnings in place prior to its issuance of the termination letter.

45. The Arbitrator accepts the Claimant's position which points out the inconsistency in the Respondent's argument, namely that a few days prior to the termination letter, it was willing to keep the Claimant on, but at a reduced salary. This is not behaviour indicative or probative of a basketball club dealing with a player guilty of systematic infringement. In short, it seems that the Respondent wished to renegotiate its commercial arrangements with the Claimant and when she refused to accede to those demands, the Respondent terminated.

46. The Arbitrator finds, in accordance with his mandate to decide the dispute *ex aequo et bono*, that the Respondent wrongfully terminated the Agreement. The termination letter was not issued on valid grounds within the framework of the Agreement and therefore the Claimant's claim succeeds, subject to what follows next in this Award.

47. The Claimant was not paid the balance of her 2010-2011 salary instalments by the Respondent. The Claimant did not find alternative employment for the balance of the 2010-2011 season. The Arbitrator finds that the Claimant is entitled the relief she seeks in respect of the 2010-2011 season, namely USD 150,000.00. This figure is made up of three instalments of USD 50,000.00 which should have been paid, had the wrongful termination not taken place, on the last days of February, March and April 2011.

48. The Claimant also seeks the entirety of the sum which she would have been paid for the 2011-2012 season. However she has found alternative employment, as already noted, albeit for a lesser amount (USD 340,000.00 vs. USD 400,000.00). The Arbitrator does not find that the Claimant is entitled, as a matter of justice and equity, to the entire amount which she would have been paid by the Respondent had the Agreement not been terminated and she were presently playing in her second season. The Arbitrator finds that the just and equitable outcome is that the Claimant is awarded the difference between the two sums set out above, namely USD 60,000.00 as appropriate compensation for the difference between what she is earning at Spartak Moscow and what she would have earned with the Respondent during the course of the 2011-2012

season.

49. The Claimant seeks image damages. The Arbitrator finds that this claim is not well founded. Apart from the fact that no proof has been adduced to support this claim, it is clear from the fact that the Claimant's reputation and skill have been recognised by Spartak Moscow for the 2011-2012 season that her reputation and image have not been adversely affected by the Respondent's actions.

50. The Claimant also seeks a legal and official tax receipt for the sums received by her in November and December 2010 and one for all sums received (or to be received) for 2011. The Arbitrator agrees with the Claimant and directs the furnishing by the Respondent of such receipts. The Claimant contracted with the Respondent for net payments and she is a Russian national. It is appropriate that she have written comfort from the Respondent in relation to tax.

51. The Claimant is also requesting the payment of interest on the sums arising from the 2010-2011 season.

52. It is a generally recognized principle embodied in most legal systems, which is underpinned by motives of equity, that late payments give rise to interest – in order that the creditor be placed in the financial position she/he would have been in had payments been made on time. It is normal and fair that interest is due on the late payments. An interest rate of 5%, which in this case seems fair and reasonable and is in line with BAT jurisprudence, will be awarded.

53. It is an established principle that interest runs from the day after the date on which the principal amounts are due. The relevant amounts and dates are: (a) USD 50,000.00 from 1 March 2011; (b) USD 50,000.00 from 1 April 2011; and (c) USD 50,000.00 from 1 May 2011.

7. Costs

54. 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.

55. On 2 April 2012 - 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 5,600.00.

56. Considering, that the Claimant prevailed in her claim, it is fair that the fees and costs of the arbitration be borne by the Respondent and that it be required to cover its own legal fees and expenses as well as those of the Claimant.

57. The Arbitrator finds that the legal costs claimed by the Claimant (EUR 9,965.00 – which figure does not include the non-reimbursable handling fee) must be assessed in light of the relatively simplistic and specific issue which resolves this Arbitration. Much of the discussion in the submissions went into matters which were not specifically germane to the key issue. A figure of EUR 5,000.00 is reasonable in the circumstances of this case. Legal costs in this amount are to be borne by the Respondent.

58. Given that the Claimant paid an advance on costs of EUR 5,995.00 as well as a non-reimbursable handling fee of EUR 3,990.00 (which will be taken into account when

determining the Claimant's legal fees and expenses) and that the Respondent paid an advance of costs of EUR 6,000.00, the Arbitrator decides that in application of article 17.3 of the BAT Rules:

(i) BAT shall reimburse EUR 5,990.00 to the Claimant, being the amount of the arbitration costs advanced by her;

(ii) BAT shall reimburse EUR 400.00 to the Respondent, being the difference between the amount of the arbitration costs advanced by it and the arbitration costs fixed by the BAT President;

(iii) The Respondent shall pay to the Claimant EUR 8,990.00 (for both the non-reimbursable handling fee and legal fees) representing the amount of her legal fees and other expenses.

8. AWARD

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

1. **Women's Basketball Club Nadezhda shall pay Ms. Rebecca Hammon compensation for salary as follows: (a) USD 50,000.00 with interest at 5% on that sum from 1 March 2011; (b) USD 50,000.00 with interest at 5% on that sum from 1 April 2011; and (c) USD 50,000.00 with interest at 5% on that sum from 1 May 2011.**

2. **Women's Basketball Club Nadezhda shall pay Ms. Rebecca Hammon compensation for salary in the amount of USD 60,000.00.**

3. **Women's Basketball Club Nadezhda shall provide Ms. Rebecca Hammon with a legal and official tax receipt for payments received by her in November and December 2010 and all payments made in respect of the calendar year 2011.**

4. **Women's Basketball Club Nadezhda shall pay Ms. Rebecca Hammon an amount of EUR 8,990.00 as reimbursement for her legal fees and expenses.**

5. **Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 4 April 2012

Klaus Reichert SC
(Arbitrator)