

ARBITRAL AWARD

(BAT 1785/22)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mersin Yenişehir Belediyesi Çukurova Basketbol Kulübü
Limonluk Mah. 2404 Sk. No:15, Yenisehir/Mersin, Turkey

- Claimant -

represented by Mr. Arda Güney, attorney at law

vs.

Ms. Chelsea Nichelle Gray

- Respondent -

represented by Mr. Sabin Liviu Gherdan, attorney at law

1. The Parties

1. Mersin Yenişehir Belediyesi Çukurova Basketbol Kulübü (hereinafter referred to as the "Club" or "Claimant") is a professional basketball club competing in the Turkish professional basketball women's league.
2. Ms. Chelsea Nichelle Gray (hereinafter referred to as the "Player" or "Respondent") is a professional American basketball player, who signed an employment contract with the Claimant. The Club and the Player are hereinafter referred to as the "Parties".

2. The Arbitrator

3. On 25 February 2022, Mr. Raj Parker, the Vice-President of the Basketball Arbitral Tribunal (hereinafter referred to as the "BAT"), appointed Mr. Stephan Netzle as arbitrator (hereinafter referred to as the "Arbitrator") pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter referred to as 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 1 March 2021, the Player and the Club entered into an agreement whereby the latter engaged the Player for the 2021/2022 season (hereinafter referred to as the "Employment Contract"). According to Article "THIRD" lit. a) Employment Contract, the Player was entitled to a total salary of USD 110,000.00 net, payable as follows: USD 11,000.00 net upon Player's arrival, USD 22,000.00 net each on or before

15 December 2021, 15 January 2022, 15 February 2022 and 15 March 2022 as well as USD 11,000.00 net on or before 15 April 2022.

5. The Employment Contract provides the following rule regarding the arrival date of the Player:

"[...] It is agreed by all parties that this contract enters in force since its signature but that the Club schedule as it pertains to the Player's presence in Mersin, Turkey shall be following:

ARRIVAL DATE: The Player agrees to provide the Club with her passport copy and departure city/airport info in a timely manner and arrive in Mersin, Turkey for the 2021-22 season, no later than 15.11.2021, subject to the Club arranging suitable transportation from the city of Player's choice in U.S.A. to Mersin, Turkey, and providing the Player with the related transportation info and the airline ticket at least five (5) days before the Player's departure date. The Player agrees to follow all necessary instructions as per Turkish Government Covid Protocol prior to her departure. [...]."

6. Article "EIGHT" lit. g) Employment Contract provides the following consequences in case of an unjustified termination by the Player:

"If the Player unilaterally rescinds the present contract without justification, the Club shall have the right to receive a compensation fee as a penalty in the amount of Player's guaranteed net salary stipulated in Article 'THIRD-a' of this present contract, reserving the right to request FIBA to ban the Player of playing for another team in the world during the term covered by this present contract."

7. Between 15 May 2021 and 8 October 2021, the Player participated in a total of 43 games for the WNBA-club Las Vegas Aces and the American national team.

8. On 18 September 2021, the Player's agent informed the Club as follows:

"[...] Chelsea would like to terminate her contract as she can no longer play overseas this year due to body wear and tear as well as other personal reasons.

Do you have time to discuss this weekend or beginning of next week. This is not a decision that Chelsea has taken lightly and would like to be in good standing with the team, therefore we may have other options for the team of that can play in her stead. [...]"

9. On the same date, a Club's representative answered the agent emphasizing that the Player was an important part of the team structure. In addition, the Club's representative stated: *"[...] the contradiction between your saying that her body is worn and tear and her still playing in Wnba is unacceptable and unethical. Also it's unethical and unprofessional to terminate a contract with a club at the edge of championship, which invests in, spends money and has made up all its plans for winning championship in Eurocup Women. [...] Please consider this email as the first official invitation to Miss Chelsea Gray to arrive in Mersin on November 15th, 2021."*
10. In her response, the Player repeated that she was not coming to Mersin and would not play anywhere else in the off-season to allow her body to heal.
11. In another e-mail to the Player's agent, the Club's representative made clear that the Club wanted to maintain the Employment Contract and that *"[w]hether she is capable of playing the season or not should be decided by medical team of the club after she comes. But just saying that she is not coming is not the right and just way. If our medical team decides that she can't play after the medical examination we can negotiate other options. Once more I would like to tell that club will adhere to the contract and exercise its all rights"*.
12. On 15 November 2021, the Player did not join the Club's team as agreed in the Employment Contract. On the same date, she started medical treatment and rehabilitation at the UNLV Sports Medicine Clinic.
13. With several letters between 16 and 19 November 2021, the Club invited the Player to travel to Mersin and to provide the departure information as soon as possible. In addition, the Club informed the Player that if she would not join the team, *"club will apply to Basketball Arbitral Tribunal for compensation of the damages to be incurred by the club and for other sanctions and remedies"*.

14. On 18 November 2021, the Player's counsel sent a letter to the Club stating that his client is not able to perform the services under the Employment Contract "*due to her current _____*". In addition the Player's counsel attached two medical reports, according to which the Player is recommended not to play in the current season due to a high risk of _____ and to undertake a rehabilitation for the next five months. Finally, the Player's counsel stated that the Player participated in 43 games between 15 May 2021 and 8 October 2021 and that due to this high workload the Player was not able to fulfil her obligations under the Employment Contract.

15. The Club's representative sent the following response to the Player's counsel:

"[] we express our best wishes for Ms. Gray to recover soon.

However, as you would appreciate, it is important and necessary for the Club itself to examine the physical condition of the athlete. As Çukurova B.K. we believe that it is best Ms. Gray to undergo a medical examination in Turkey with the supervision of the therapists of our Club and then negotiate the contract.

In the respect of stated above, in order for the Club to provide flight tickets to Turkey for Ms. Gray, we request all the information to be sent no later than November 26th 2021. If the request is not fulfilled until given time, we state that the Club will take legal actions."

16. On 22 November 2021, the Club published the following press release:

"As it is known, we expected Chelsea Gray to be in Mersin on November 15th. However, [she] stated that [she] could not join the team due to [her] physical exhaustion and terminated [her] contract unilaterally. As a club, we started the FIBA process in this regard. We were in a difficult situation due to the lack of players in the transfer market, but we continue to work to add a player of at least Chelsea Gray calibre to the team. In addition, DeWanna Bonner will be with us in January".

17. By e-mail dated 26 November 2021, the Player's counsel asked the Club why it requested a medical examination of the Player in Turkey as the Employment Contract was, according to the press release, no longer in force.
18. On 30 November 2021, the Club's representative informed the Player's counsel that its president felt obliged to inform the media about the situation with the Player as

rumors and speculations came up. In addition, the Club's representative granted the Player a deadline of 24 hours to indicate whether she accepts to undergo a medical examination in Turkey.

19. By e-mail dated 1 December 2021, the Player's counsel informed the Club that as it had already decided to unilaterally terminate the Employment Contract, there were no contractual obligations between the Parties, and that she would not undergo a medical examination in Turkey.

3.2 The Proceedings before the BAT

20. On 3 February 2022, the Club filed a Request for Arbitration against the Player in accordance with the BAT Rules (received by the BAT on 7 February 2022) and duly paid the non-reimbursable handling fee of EUR 4,000.00.
21. On 2 March 2022, the BAT informed the Parties that Mr. Stephan Netzle had been appointed as the Arbitrator and fixed the Advance on Costs to be paid by the Parties by 14 March 2022 as follows:

<i>"Claimant (Mersin Yenisehir Belediyesi Cukurova)</i>	<i>EUR 5,000.00</i>
<i>Respondent (Chelsea Nichelle Gray)</i>	<i>EUR 5,000.00"</i>
22. On 25 March 2022, the Player submitted the Answer.
23. By letter dated 28 March 2022, the BAT Secretariat confirmed receipt of the Claimant's share of the Advance on Costs and invited the Claimant to pay the Respondent's share of the Advance on Costs until 7 April 2022.
24. On 30 March 2022, the Club requested a copy of the submitted Answer.

25. On the same date, the BAT Secretariat provided the Club with a copy of the Answer and requested it to refrain from making any unsolicited submissions.
26. By letter dated 20 April 2022, the BAT Secretariat acknowledge receipt of the Respondent's share on the Advance on Costs. In order to clarify certain ambiguities in her submission, the Arbitrator asked the Claimant several questions to be answered until 2 May 2022.
27. On 2 May 2022, the Claimant responded to the Arbitrator's questions.
28. By e-mail of 3 May 2022, the BAT Secretariat granted the Respondent a deadline until 13 May 2022 to comment to the Claimant's responses.
29. On 12 May 2022, the Player commented on the Club's submission of 2 May 2022.
30. On 23 May 2022, the BAT Secretariat informed the Parties that the Arbitrator had declared the exchange of submissions complete and that the final award would be rendered as soon as possible. Finally, the BAT Secretariat granted the Parties a deadline until 30 May 2022 to provide a detailed account of their costs.
31. On 30 May 2022, both Parties submitted their cost statements.

4. The Positions of the Parties

4.1 The Club's position

32. The e-mail of the Player's agent dated 18 September 2021 has to be considered an offer to terminate the Employment Contract, which the Club repeatedly rejected. The Player's intention to terminate the Employment Contract was based on subjective and

unspecified grounds without any further explanation and without any evidence for an _____. Therefore, the Club did not accept such offer.

33. The Player also failed to provide the Club with any evidence for an _____ in the subsequent correspondence of 18 November 2021. The attached medical reports represented only the Player's subjective opinion that she was at risk of a _____.
34. The last e-mail of the Player's counsel to the Club dated 1 December 2021 made clear that the Player was not willing to fulfill the Employment Contract. Therefore, the e-mail of the Player's counsel of 1 December 2021 constitutes an unlawful unilateral termination of the Employment Contract.
35. Based on BAT jurisprudence¹, an early termination is only justified under exceptional circumstances that were not present in this case. The Player did not present any document or medical report that supported the alleged "*body wear and tear as well as other personal reasons*" by which the Player justified her termination of contract.
36. The Club repeatedly offered the Player flight tickets to travel to Turkey for a medical examination and to examine the alleged "*body wear and tear*", which is a contractual right of the Club, however, the Player rejected these offers again and again. The Player breached the Employment Contract by not providing the Club with the information about her travel to Turkey and by not joining the team on 15 November 2021.
37. The Player's agent stated several times that the Player wanted to terminate the Employment Contract and was not ready to undergo a medical examination by the Club's doctors. From this it can be concluded without further ado that the Employment

¹ See BAT 0209/11, at para. 66.

Contract was unilaterally terminated by the Player who has expressed her unwillingness to fulfil her contractual obligations. The Player never intended to comply with the Employment Contract. She did not even explain to the Club why she did not want to come to Turkey for a medical examination.

38. The Player played the last game of her WNBA club on 8 October 2021. However, she waited until 15 November 2021 to undergo a medical examination in the USA. Considering the fact that she was obliged to join the Club on that date, this late medical consultation is not acceptable and violates the principle of good faith.
39. According to BAT jurisprudence², it is an essential part of the parties' post-signing ancillary obligations to inform the other side of any circumstances that arose after the signing and that may affect the performance of the contract.
40. As a consequence of the Player's unjustified termination of the Employment Contract, the Club is entitled to a penalty payment in the amount of the Player's guaranteed net salary, i.e. to an amount of USD 110,000.00, as set out in Article "EIGHT" lit. g. This penalty provision does not require the Club to demonstrate any actual loss, as also confirmed by BAT jurisprudence.³
41. In any event, the Club is, based on BAT jurisprudence⁴, entitled to a so-called "special indemnity" even if the suffered damage is difficult or impossible to quantify.
42. The Player was supposed to be a key element for the Club's team. Due to the Player's unjustified termination, the Club suffered a severe damage because it had to find a

² See BAT 1030/17, at para. 67.

³ See BAT 1457/19, at para. 122.

⁴ See BAT 0209/11, at paras. 89 et seqq.

replacement player after the start of the season. As only an extremely limited number of players was available on the market, the Club signed a loan contract with a replacement player (i.e. Ms. Jasmine Thomas) under the condition that she would not play against the lending club during the season. However, since the team roster had limited player options, the Club had no other option but to field Ms. Thomas in the game against the lending club on 26 March 2022. The Club had to pay a compensation of USD 25,000.00 to the lending club for doing so. In addition, the performance of Ms. Thomas was lower than expected and, therefore, she was not able to fully replace the Player.

43. The Player's agent and the Player's counsel offered Ms. Kelsey Plum as a replacement player. However, the Club rejected this offer for two reasons: First, the playing styles of Ms. Kelsey Plum and the Respondent are completely different. Second, there was a big gap on financial terms between these two players. The Club had the right to refuse any offer that exceeded the budget for the season.
44. The Club's claim is further supported by BAT jurisprudence, according to which "[a] player who interferes with such planning by breaking his or her contractual promises without just cause must indemnify the Club for the complications he or she has caused, in particular when the player's departure occurs on the eve of the beginning of a new season".⁵ Without a compensation for the Club, the Player's wrongful conduct would remain without any consequences, which would not be fair to the Club.
45. In its Request for Arbitration of 3 February 2022, the Club requests the following relief:

"Claimant requests that the Respondent to be obliged to pay:

[a.] To pay towards the Claimant the amount of 110.000 USD from the total value of

⁵ See BAT 1030/17, at para. 84.

the Respondent's guaranteed net salary of the Contract.

[b.] All arbitration costs of the Claimant

[c.] All legal fees and expenses incurred in these proceedings" (emphasis original)

4.2 The Player's Position

46. The Player has never taken time off from basketball since her rookie season 2014/2015. She played seven straight years overseas and in the WNBA.
47. In September 2021, the Player noticed that her _____ felt strange and told her agent that she needed proper treatment and rehabilitation. Since her WNBA team was a championship contender, the Player did not have the opportunity to rehab immediately.
48. The Player's agent informed the Club about the Player's body wear on 18 September 2021. As she was unable to predict her physical condition after the end of the WNBA season, no decision about her future was made in September 2021. Therefore, the correspondence of 18 September 2021 cannot be considered a termination or an offer to terminate the Employment Contract.
49. At the end of the WNBA-season, the Player had the feeling that her body was not stable enough to start a whole new season. The Player's counsel informed the Club's president about this circumstance during several phone calls between 28 October 2021 and 11 November 2021. The Club was aware of the Player's precarious health condition and that she was therefore unable to fulfil her obligations under the Employment Contract. The Club offered a salary increase if she would still come, but the Player was only concerned about her state of health.

50. The Player was advised by two different medical opinions not to play basketball in the following months. The Player immediately informed the Club about her health condition. Such information cannot be interpreted as a unilateral termination of the Employment Contract as it is only a temporary impossibility to fulfil the contract. During such a period the effects of the Employment Contract are suspended until the Player's health condition improves. As the Player played successfully with the Club already in the 2018/2019 season, she had no reason to refuse to join the Club and to terminate the Employment Contract. She only needed time to recover, which was however denied to her by the Club.
51. On 22 November 2021, the Club published a press release, according to which the Club had decided to unilaterally terminate the Employment Contract. A notice of termination cannot be rescinded, and the Employment Contract was therefore unilaterally terminated by the Club without just cause. Since there was no longer a contractual relationship between the Parties, the Club was not in a position to request the Player to undergo a medical examination. The Club's medical examination would not have been independent and neutral anyway.
52. The Request for Arbitration does not contain any evidence as to how, when and under what circumstances the Player terminated the Employment Contract before 22 November 2021. Furthermore, the Club provided contradictory conclusions regarding an alleged termination of the Employment Contract by the Player. On the one hand, the Club mentions 1 December 2021 as the termination date. On the other hand, it justifies the press release of 22 November 2021 as a consequence of the Player's termination of contract. As the Club cannot prove when and how the Employment Contract was terminated by the Player, Article "EIGHT" lit. g) Employment Contract does not apply.
53. In any event, the Club has not demonstrated any actual loss that it allegedly suffered following the Player's alleged termination of the Employment Contract.

54. The Player's agent and the Player's counsel offered the Club the services of the American national player Ms. Kelsey Plum, who is playing on the same position and has a similar market value as the Respondent. However, the Club rejected the offer and decided to sign a loan contract with Ms. Jasmine Thomas under the condition that she would not play against the lending club.
55. Furthermore, the Club had a successful 2021/2022 season: It won of the Turkish Cup and achieved the fourth place in the EuroCup Women Championship. This demonstrates that the Player's conduct did not result in poor sporting results.
56. The concept of "special indemnity" cannot replace the Club's obligation to demonstrate the actual damage caused by reliable evidence. According to BAT jurisprudence⁶, the principle of *ex aequo et bono* does not justify a "special indemnity" if the club did not even try to quantify the damages. In that case, the club learned already one day after the conclusion of the employment contract that the player was not willing to fulfil the contract. The same applies to the present dispute. Therefore, no compensation is justified.
57. In any event, a compensation of USD 110,000.00 would constitute an unjustified enrichment of the Club. This is also confirmed by BAT jurisprudence.⁷
58. In her Answer of 25 March 2022, the Player requests the following relief:

"By which we request the Basketball Tribunal Arbitral to decide, through the Award, as follows:

(a) Firstly, to find that the Player did not unilaterally terminate the Agreement, therefore the clause mentioned in article EIGHT letter g) does not operate and the

⁶ BAT 1445/19 quoted in BAT 1583/20, at para. 67.

⁷ BAT 1457/19, at para. 132.

claim shall be entirely rejected;

(b) Secondly, to find that the Claimant did not prove any actual damage incurred, therefore it cannot justify any compensation;

(c) In subsidiary, to find that the amount of 110.000 USD does not represent a compensation which is in accordance with the ex aequo et bone (sic) doctrine since it represents an enrichment without just cause;

(d) To oblige the Claimant to cover all the arbitration proceeding costs and all legal fees and expenses incurred in the present procedure by the Respondent, as they will be determined during the arbitration." (emphasis original)

5. The jurisdiction of the BAT

59. Pursuant to Article 2.1 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 PILA.

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

61. 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) PILA⁸.

62. The jurisdiction of the BAT over the dispute results from the arbitration clause contained under Article "TWELFTH" Employment Contract, which reads as follows:

"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 in 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

⁸ Decision of the Federal Tribunal 4P.230/2000 of 7 February 2001 reported in ASA Bulletin 2001, p. 523.

decide the dispute ex aequo et bono.

The parties expressly waive recourse to the Swiss Federal Tribunal against awards of the BAT as provided in Article 192 of the Swiss Act on Private International Law. In case of any conflict between a local law, a federation rule and any clause of this agreement, the latter shall prevail."

63. The Employment Contract is in written form and thus the arbitration agreement fulfils the formal requirements of Article 178(1) PILA.
64. 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 agreements under Swiss law (referred to by Article 178(2) PILA).
65. The jurisdiction of BAT over the Club's claims arises from the Employment Contract. The wording "[a]ny dispute arising from or related to the present contract [...]" clearly covers the present dispute. None of the Parties has raised any objection to the jurisdiction of the BAT.
66. For the above reasons, the Arbitrator has jurisdiction to adjudicate the Club's claim.

6. Discussion

6.1 Applicable Law – *ex aequo et bono*

67. 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".

68. Under the heading "Applicable Law", Article 15 BAT Rules reads as follows:

"15.1 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.

15.2 If, according to an express and specific agreement of the parties, the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate. In both cases, the parties shall establish the contents of such rules of law. If the contents of the applicable rules of law have not been established, Swiss law shall apply instead."

69. Article "TWELFTH" Employment Contract stipulates that "[t]he arbitrator shall decide the dispute ex aequo et bono".

70. Consequently, the Arbitrator shall decide *ex aequo et bono* the issues submitted to him in this proceeding.

71. 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'arbitrage⁹ (Concordat)¹⁰, 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 not inspired by the rules of law which are in force and which might even be contrary to those rules."*¹¹

⁹ 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).

¹⁰ P.A. Karrer, Basler Kommentar, No. 289 ad Art. 187 PILA.

¹¹ JdT 1981 III, p. 93 (free translation).

72. This is confirmed by Article 15.1 BAT Rules, according to which the Arbitrator applies *"general considerations of justice and fairness without reference to any particular national or international law"*.

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

6.2 Findings

7.2.1 Termination of the Employment Contract

74. It is undisputed that the Employment Contract has been terminated. However, the question arises by whom and when the Employment Contract was terminated. While the Club argues that the Player expressed her intention of termination on 18 September 2021 and unilaterally terminated the Employment Contract on 1 December 2021, the Player says that the Club unilaterally terminated the agreement on 22 November 2022 by informing the public about the termination.

75. According to BAT jurisprudence, an employment contract can be terminated not only by formal (oral or written) termination statements, but also implicitly by actions or statements of a party from which the other party must conclude that the first party was not willing to fulfil the contract.¹²

76. By e-mail of 18 September 2021, the Player's agent informed the Club that *"[the Player] would like to terminate her contract as she can no longer play overseas this year due to body wear and tear as well as other personal reasons"* and invited the

¹² See e.g. BAT 0487/13, at para. 66.

Club's representatives to a call to discuss the conditions of such termination. According to this e-mail, "[t]his is not a decision that [the Player] has taken lightly".

77. The Arbitrator cannot interpret this e-mail in any other way than that the Player was no longer willing to fulfil the signed Employment Contract and to join the team on 15 November 2021, but to find a solution regarding the terms and financial consequences of her termination. Nothing in this e-mail indicates that the Player was ready to fulfil the Employment Contract under different circumstances, not even if her state of health were to improve in the future (cf. the wording "*can no longer play overseas this year*"). Therefore, the Arbitrator is not convinced at all by the Player's argument that her decision only concerned the time of the job entry but not the future. It therefore stands firm with all clarity that the e-mail of 18 September 2021 constitutes not only a termination offer by the Player but actually the unilateral termination, since the offer in the email of 18 September 2021 only concerns the consequences of the termination but not the termination itself: The Player made clear that she had already decided to leave the Club. The Arbitrator is not bound by the other termination dates proposed by the Parties (i.e. 22 November 2021, as indicated by the Player and 1 December as suggested by the Club) but must apply the law on the presented facts: The press release of 22 November 2021 was a consequence of the Player's earlier termination of the employment contract, and also the Player's email of 1 December 2021 just confirmed the decision that the Player had made before.
78. The Club rejected the Player's termination of contract and offer to discuss the consequences of the termination in several e-mails and letters between 18 September 2021 and 19 November 2021. It made clear that it wanted to continue the Employment Contract. Even after the Player had failed to arrive at the Club's premises on the contractually agreed date, i.e. on 15 November 2021, the Club continued to ask the Player to come to Turkey, however without success. There is no evidence in the file which would demonstrate that the Club somehow accepted the Player's termination of the Employment Contract.

79. On 22 November 2021, after the arrival date of the Player had passed without her appearing, the Club had to inform the public for better or worse that she would not join the team and that the Employment Contract must be considered terminated. This can in no way be regarded as a termination of contract on the part of the Club, as argued by the Player. In fact, the 22 November 2021 expressly says the opposite, namely that “*Chelsea Grey [...] terminated [her] contract unilaterally*” (emphasis added). This wording cannot be turned into a unilateral termination by *the Club*. This holds true even more as the Club repeatedly emphasized that it wanted to maintain the Employment Contract and that it still expected the Player to join the team.
80. The Arbitrator understands that even after the media release, the Club did not give up hope that after all the player would still come and undergo the medical examination by Club's doctors. However, this hope was finally dashed by the Player's counsel's e-mail of 1 December 2021. It became clear to all persons involved that the Player would not fulfill the Employment Contract, neither now nor in the future.
81. For all these reasons, the Arbitrator concludes that the Employment Contract was terminated by the Player by her counsel's email of 18 September 2021 and any attempt of the Club to get her to join the team after all was thwarted by the email of the Player's counsel of 1 December 2021.

7.2.2 *Justification of the termination of the Employment Contract*

82. Next, the question arises whether the early termination of the Employment Contract by the Player was justified. The Club argues that the Player breached her duties under the Employment Contract by failing to join the team on 15 November 2021 or later, failing to provide the flight information and refusing to undergo a medical examination by the Club's medical team. In addition, the Club states that it always wanted to hold on to the Employment Contract and that, therefore, the Player was not entitled to assume that the Club agreed to the Player's termination offer, if there ever was one.

83. The legal basis for the Player's rights and obligations vis-à-vis the Club is the Employment Contract, which was concluded on 1 March 2021. Pursuant to Article "FIRST", the contract "*enters in force since its signature*". However, the date on which the Player had to join the Club was not before 15 November 2021.
84. According to BAT jurisprudence, "*the Parties had certain ancillary duties, (such as a duty of care and a duty to act in good faith vis-à-vis the other side) even before the official starting date, namely from the very moment they signed the Player Contract*".¹³ This is because of the considerable time period (more than eight months) between the execution of the Employment Contract on 1 March 2021 and the official starting date on 15 November 2021.
85. One of the Parties' important post-signing ancillary obligations is the duty to inform the other side of any circumstances that occur after the signing of the agreement and which may affect the performance of the contract.¹⁴ Therefore, the question arises whether the Player fulfilled her good faith obligations.
86. According to the Employment Contract, the Player was obliged to "*provide her services as a basketball player to the Club for the 2021-2022 season, taking part in all matches, competitions, practices, functions and activities of the team, as directed by the Club or its sponsors*" and to "*provide the Club with her passport copy and departure city/airport info in a timely manner and arrive in Mersin, Turkey for the 2021-2022 season, no later than 15.11.2021*". In addition, according to Article "FOURTH" Employment Contract, the Player was only allowed to select a doctor of her choice

¹³ See e.g. BAT 1030/17, at para. 66.

¹⁴ See e.g. BAT 1030/17, at para. 67.

after the Club's doctor has conducted his/her medical examination and the Player does not agree with the first examination.

87. Already on 18 September 2021, the Player's agent informed the Club that the Player was not willing to play overseas "*due to body wear and tear as well as other personal reasons*". At that time, no medical examination had been carried out. In addition, the Player played regularly for the WNBA club Las Vegas Aces and continued to do so until 8 October 2021 (i.e. the date of the fifth game of Las Vegas Aces in the Semifinals).
88. Only after the season with her WNBA club, the Player underwent medical examinations, which resulted in a recommendation to ____ for five months. However, the medical report of Mr. Fabrice Gautier did not find an ____, but concluded that the Player "*is at a high risk to ____*". The medical report of Dr. Wade Gaal, the team doctor of Las Vegas Aces, indicates that the Player's ____ was damaged and that the doctor recommended "*3 days a week recovery treatment with ____*". *It is my recommendation that Mrs. Gray continues to work with our staff of athletic trainers and ____ at this time*".
89. These medical reports show indeed that the Player had a medical issue with her ____ which made a rest period and ____ advisable. However, it cannot be disregarded that although she stated on 18 September 2021 that she wanted to terminate the Employment Contract due to "*body wear and tear*", she continued playing for Las Vegas Aces until 8 October 2021 and played for this team since the beginning of the season on 6 May 2022 as a member of the Starting Five. She also played two games for the US national team in February 2022.
90. The Arbitrator is not in the position to express an opinion on how long the Player needed to pause for medical reasons after the end of the WNBA season 2021. However, her actual playing schedule makes it seem likely that her time-out was only

temporary and there were no compelling medical reasons which would have made it objectively impossible for her to fulfil the Employment Contract with the Respondent.

91. Even if there were such medical reasons, it would have been essential for the Player to undergo a medical examination by her new employer's doctor, as this is a contractual obligation pursuant to Article "FOURTH" of the Employment Contract. According to BAT jurisprudence, *"[w]hile it is understandable that the Player wanted to be at home for recovery, it is equally understandable that the Club insisted on taking care of the medical examination and treatment of the valuable players of its team. There is no indication whatsoever that that the Club's medical personnel could not do this as equally well as club doctors in the USA. The Player must accept that the duty to report to the medical personnel of the Club and to be examined by the team doctor first is a material condition to her employment worth of legal protection"*.¹⁵
92. If the Club's doctor had come to the conclusion that the Player was not yet fit to play at least at the start of the season, that would not have been the end of her employment, but she would have had a right to a second opinion from a doctor of her choice. In case of incongruent results, a third (and decisive) medical examination would have been solicited. However, the Player did not face the medical examination by the Club's doctor and did not even give a reason for her refusal. She must therefore bear the consequences of not being able to justify her unilateral termination.

¹⁵ See e.g. BAT 1713/21 and BAT 1718/21, at para. 119.

7.2.3 Financial consequences of the termination of the Employment Contract

93. This leads to the question whether the Club is entitled to the amount of the Player's net salary, i.e. USD 110,000.00, as a penalty for unilaterally terminating the Employment Agreement without justification.
94. According to Article "EIGHT" lit. g) Employment Contract, *"[i]f the Player unilaterally rescinds the present contract without justification, the Club shall have the right to receive a compensation fee as a penalty in the amount of Player's guaranteed net salary stipulated in Article 'THIRD-a' of this present contract, reserving the right to request FIBA to ban the Player of playing for another team in the world during the term covered by this present contract"*.
95. A penalty is not the same as a compensation for damages. It becomes due as a consequence of a breach of contract irrespective of the loss that the other party suffered because of the breach. A penalty shall also serve as a deterrent. It may discourage a party from breaching a contract just because the consequences for damages appear manageable. A penalty cannot come as a surprise but needs to be stipulated in clear language in the contract with respect to both the sanctioned behavior and the penalty amount. A threat of penalty is only effective if it can actually be claimed when the sanctioned circumstance occurs.
96. According to BAT jurisprudence and many legal systems, the parties are free to determine the amount of a contractual penalty. In some legal systems, the penalty for not showing up for a job despite contractual obligation is limited. In BAT cases, the Arbitrator may reduce penalties that he or she considers excessive. Whether a penalty

is considered excessive under the circumstances shall be decided *ex aequo et bono*.¹⁶ A penalty is considered excessive if there is a blatant imbalance between the penalty amount and the value of the correct performance of the contract. However, a penalty is definitely not excessive just because it exceeds the loss which the other party may have suffered due to the breach.

97. When examining the penalty amount, the Arbitrator takes the following circumstances into consideration that justify the imposition of a severe penalty:
- a. The penalty provision is part of the signed Employment Contract. Hence, the Player could predict the consequences of her termination of the Employment Contract before she even joined the team.
 - b. The Player did not make any attempts to find an amicable solution which would have taken her alleged need for a timeout into account.
 - c. The Player has not only terminated the Employment Contract without just cause, but also refused to undergo a medical examination to allow the Club's medical team to examine the alleged justification for her being unable to take up work.
 - d. The Club was required on short notice to replace the Player who had been signed as an important pillar of the team.
 - e. The Player continued to play for the Las Vegas Aces and the US National Team.

¹⁶ See e.g. BAT 1030/17, at para. 85; BAT 1172/18, at para. 125; BAT 1713/21 and BAT 1718/21, at para. 137.

- f. The withdrawal of the Player from a signed contract only shortly before she was expected to join the team would send a very unfortunate message to the professional basketball market if it would pass without or with a mild sanction: Players could sign a contract and continue to shop around for better offers. The principle of *pacta sunt servanda* would be undermined.
98. On the other hand, there are also circumstances that call for a significant reduction of the sanction:
- a. The penalty amount corresponds to the entire annual net salary of the Player, which is very high compared to penalty amounts provided by labor law for non-appearance at a new job. Such legal penalties range from 25% – 100% of a monthly salary.
 - b. The Player's termination of the Employment Contract has certainly caused additional efforts and expenses to the Club. However, the Club has not provided evidence that the loss was even close to the amount of the penalty compensation.
 - c. The Club's team played well in the 2021/2022 season, reached the finals of the Turkish KBSL and qualified for the Euroleague. It is speculative to make any statement on whether the sporting results had been even better if the Player had participated in the team.
99. By considering all circumstances of the present case and by applying the principle of *ex aequo et bono*, the Arbitrator considers it fair and adequate that the Club is entitled to a penalty in the amount of USD 44,000.00 net, which represents two monthly salaries based on Article "THIRD" Employment Contract.

7.2.4 Interest

100. With regard to interest, the Club makes the following statement:

"It is a generally accepted principle embodied in most legal systems and reflected in the BAT jurisprudence that default interest at a rate of 5% per annum can be awarded even if the underlying agreement does not explicitly provide for a respective obligation." (emphasis original)

101. However, the Club does not mention interest in its prayers for relief and does not clarify the period for which interest should be ordered.

102. The unspecific wording does not preclude the Arbitrator from awarding interest for the following reasons: First, it is a general legal principle and long-standing BAT jurisprudence that interest may be ordered for the period since default until payment in full. Second, the Request for Arbitration explicitly refers to *"interest at a rate of 5%"* and, thereby, indicates the will of the Club to request interest.

103. The Employment Contract does not provide a regulation concerning interest. According to standing BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest. This is a generally accepted principle, which is embodied in most legal systems. As requested by the Coach and in correspondence with the standing BAT jurisprudence the default interest rate is of 5% per annum.

104. The Arbitrator notices that it became absolutely clear on 1 December 2021 that the Employment Contract was terminated and any attempts to of the Club to persuade the Player to join the team after all had failed. Therefore, the starting date for the interest for the penalty shall be 2 December 2021.

7. Conclusion

105. Based on the foregoing, and after taking into due consideration all the evidence submitted and all arguments made by the parties, the Arbitrator finds that the following payment is owed:
106. The Player shall pay the Club a penalty of USD 44,000.00 net, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 2 December 2021 until payment in full.

8. Costs

107. In respect of determining the arbitration costs, Article 17.2 BAT Rules provides as follows:

"At the end of the proceedings, the BAT President shall determine the final amount of the arbitration costs, which shall include the administrative and other costs of the BAT, the contribution to the BAT Fund (see Article 18), the fees and costs of the BAT President and the Arbitrator, and any abeyance fee paid by the parties (see Article 12.4). [...]"

108. On 10 August 2022, the BAT President determined the arbitration costs in the present matter to be EUR 7,925.00.
109. As regards the allocation of the arbitration costs as between the Parties, Article 17.3 BAT Rules provides as follows:

"The award shall determine which party shall bear the arbitration costs and in which proportion. [...] When deciding on the arbitration costs [...], the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties."

110. The Arbitrator has upheld the Club's claim for the payment of a penalty but used his discretion to reduce the contractually agreed penalty amount. Nevertheless, the

Arbitrator finds that the Player shall pay the full arbitration costs. It would not be fair to charge the Club with a part of the arbitration costs since it simply asked for the amount stipulated in the Employment Contract, but has not contributed in any way to the change of mind of the Player. The balance of the advance on costs in the amount of EUR 2,075.00 will be reimbursed to the Club by the BAT.

111. In relation to the Parties' legal fees and expenses, Article 17.3 BAT Rules provides that

"as a general rule, the award shall grant the prevailing party a contribution towards any reasonable legal fees and other expenses incurred in connection with the proceedings (including any reasonable costs of witnesses and interpreters). When deciding [...] on the amount of any contribution to the parties' reasonable legal fees and expenses, the Arbitrator shall primarily take into account the relief(s) granted compared with the relief(s) sought and, secondarily, the conduct and the financial resources of the parties."

112. Moreover, Article 17.4 BAT Rules provides for maximum amounts that a party can receive as a contribution towards its reasonable legal fees and other expenses.
113. The Club claims legal fees in the total amount of EUR 10,000.00. It also claims for the expense of the non-reimbursable handling fee in the amount of EUR 4,000.00.
114. The Player claims legal costs and fees in the total amount of EUR 7,450.00.
115. Based on the same considerations which led the Arbitrator to the decision to oblige the Player to bear the full arbitration costs, he also finds that she shall contribute to the legal costs and fees of the Club in the amount of 8,000.00 including the non-reimbursable handling fee and bear her own legal costs.

9. AWARD

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

- 1. Ms. Chelsea Nichelle Gray shall pay Mersin Yenisehir Belediyesi Cukurova Basketbol Kulübü a penalty of USD 44,000.00 net, together with interest at 5% per annum on any outstanding balance (as may be the case from time to time) thereof from 2 December 2021 until payment in full.**
- 2. Ms. Chelsea Nichelle Gray shall pay Mersin Yenisehir Belediyesi Cukurova Basketbol Kulübü an amount of EUR 7,925.00 as reimbursement for its arbitration costs.**
- 3. Ms. Chelsea Nichelle Gray shall pay Mersin Yenisehir Belediyesi Cukurova Basketbol Kulübü a contribution to its legal fees and expenses of EUR 8,000.00.**
- 4. Any other or further requests for relief are dismissed.**

Geneva, seat of the arbitration, 30 August 2022

Stephan Netze
(Arbitrator)