FIBA

We Are Basketball

FIBA Arbitral Tribunal (FAT)

ARBITRAL AWARD

(0092/10 FAT)

rendered by

FIBA ARBITRAL TRIBUNAL (FAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Mr. Paolo Ronci, PR Sports srl, Via Laghi 69/6, 48018 Raenza, Italy

- Claimant 1 -

and

Ms. Graziane de Jesus Coelho, c/o PR Sports srl, Via Laghi 69/6, 48018 Raenza, Italy

- Claimant 2 -

jointly referred to as "the Claimants"

vs.

WBC Mizo Pecs 2010, Dr. Veress Endre str.10, 7633 Pecs, Hungary

- Respondent -

Av. Louis Casaï 53
P.O. Box 110
1216 Cointrin / Geneva
Switzerland

Tel: (+41-22) 545 0000
Fax: (+41-22) 545 0099
info@fiba.com
www.fiba.com

1. The Parties

1.1. The Claimants

1. Mr. Paolo Ronci (hereinafter “Mr. Ronci” or “Claimant 1”) is a certified FIBA agent registered with FIBA under the FIBA agent license No. 2007018739. He represents professional basketball players, among others Claimant 2, and is the owner of the agency PR Sports srl (hereinafter “PR Sports”).

2. Ms. Graziane de Jesus Coelho (hereinafter “Ms. Coelho” or “Claimant 2”) is a professional basketball player of Brazilian nationality. Claimants are not represented by counsel.

1.2. The Respondent

3. WBC Mizo Pecs 2010 (hereinafter "the Club" or “Respondent") is a professional basketball club with its seat in Pecs, Hungary. Respondent is not represented by counsel. Respondent’s submissions in this proceeding have been signed by Mr. Gábor Rozsa, general manager of the Club.

2. The Arbitrator

4. On 19 May 2010, the President of the FIBA Arbitral Tribunal (the "FAT") appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the FIBA Arbitral Tribunal (hereinafter the "FAT Rules").

5. On the same day, the Arbitrator accepted his appointment and signed a declaration of acceptance and independence.

6. None of the Parties has raised objections to the appointment of the Arbitrator or to the declaration of independence rendered by him.

3. Facts and Proceedings

3.1. Background Facts

7. On 26 May 2008, Claimant 2 and Respondent signed a contract (hereinafter referred to as the "Player Contract") according to which Claimant 2 was to be employed by Respondent from 1 September 2008 to 30 May 2009, or until two days after the Respondent's last official game of the 2008-2009 season. Pursuant to the Player Contract, Respondent undertook to pay a total net salary of EUR 75,000.00 to Claimant 2, payable in monthly installments as follows:

> ***"IV.-COMPENSATION:***
> *A) For performance of Player's services, the Club will pay the salary net of taxes of 75.000 Euros (seventy five thousand Euros) for the period of one sport season.*
> *The Club will pay the Player a yearly salary net of taxes as follows:*
>
> > *Season 2008-09 total salary: 75.000 Euros (net of taxes)*
> > *Schedule of payments:*
> >
> > *8.333 Euro to be paid September 30, 2008*
> > *8.333 Euro to be paid October 30, 2008*
> > *8.333 Euro to be paid November 30, 2008*
> > *8.333 Euro to be paid December 30, 2008*
> > *8.333 Euro to be paid January 30, 2009*
> > *8.333 Euro to be paid February 30, 2009*
> > *8.333 Euro to be paid March 30, 2009*
> > *8.333 Euro to be paid April 30, 2009*
> > *8.333 Euro to be paid May 25, 2009*

If the Club is more than fourteen (14) days late in the payment of any monthly salary payment or the Agent's commission, the Player may choose to refrain from participating in team practice sessions and/or any official games until the total amount owed to the Player is remitted in full to the Player. If the Player chooses to take this action, there shall be no sanction levied against the Player and the Club can not consider this action as a breach of the agreements set forth in this contract.

[...]"

8. Clauses X and XI of the Player Contract read as follows (sic):

*"**X.-BREACH OF CONTRACT:***
Club agrees that Player may void this contract without having to indemnity Club, in the event that

A) Any Payment mandated by this contract (Clause IV) A) is more than 14 days late.
B) Club ignores or does not perform Clause IV) B) or Clause VII) of this contract.

In either case, any unpaid balance remaining of the sum per IV) A) and any other compensation provided herein shall become immediately due and payable.

XI.-CONTRACT CANCELATION PROCEDURE:
In order to exercise the Clause X, the Player will first have to officially (via registered mail or via fax) notify the Club of a delay of a agreed upon payment, as described in this contract, and if within seven days the problem has not been remedied than the Player has the right to request and automatically have her unconditional release and free agency granted in 48h00. Thereafter, Club agrees to comply fully with requests made by Agent or by Player to transfer her rights to any other Club without compensation. In either case, any unpaid balance remaining of the sum per IV) A) and any other compensation provided herein shall become immediately due and payable."

9. On the same day, Claimant 1 and Respondent signed a contract concerning the services of Claimant 1 rendered in connection with Claimant 2 (hereinafter referred to as the "Coelho Agent Agreement"). Accordingly, Respondent agreed to pay EUR 7,500.00 to PR Sports (hereinafter referred to as the "Coelho Agent Fee"). Clauses 2 and 3 of the Coelho Agent Agreement read as follows:

> ***"2) AGENT FEE:***
> *The Club agrees to pay seven thousand five hundred Euros (7.500 €) to the PR Sports srl for the services rendered in connection with the Player Graziane de Jesus Coelho. Payment will be made in the following manner:*
> *7.500 € to be paid AT THE SIGNATURE OF THE CONTRACT.*
>
> ***3) LATE PAYMENT:***
> *In the event any payment described in Clause 2), is more than 14 days late, the Club agrees to pay to the Agent a service charge of 100 euros (one hundred euros) per week."*

10. On 24 June 2008, Claimant 1 and Respondent signed another contract concerning Mr. Ronci's services rendered in connection with the player Szilvia Torok (hereinafter referred to as the "Torok Agent Agreement") according to which Respondent agreed to pay EUR 2,200.00 to PR Sports (hereinafter referred to as the "Torok Agent Fee"). Clauses 2 and 3 of the Torok Agent Agreement read as follows:

> ***"2) AGENT FEE:***
> *The Club agrees to pay two thousand seven* (sic) *hundred Euros (2.200 €) to the PR Sports srl for the services rendered in connection with the Player Szilvia Torok. Payment will be made in the following manner:*
> *2.200 € to be paid AT THE SIGNATURE OF THE CONTRACT.*
>
> ***3) LATE PAYMENT:***
> *In the event any payment described in Clause 2), is more than 14 days late, the Club agrees to pay to the Agent a service charge of 100 euros (one hundred euros) per week."*

11. Respondent faced certain difficulties to pay the Coelho Agent Fee on time. Claimant 1 therefore proposed in an email dated 27 June 2008 that payment should be made in two installments on 15 July 2008 and 31 August 2008. By email of the same day, Respondent replied that it was not able to pay anything before 20 August 2008.

12. By email of 1 July 2008, Claimant 1 suggested to Respondent to pay at least a first

(even smaller) installment of the Torok Agent Fee right away and the rest on 31 August 2008. By email of the same day, Respondent answered once again that it was not able to pay anything before 20 August 2008.

13. The Agent Fees for both players remained unpaid despite several reminders by Claimant 1. In addition, Respondent became late also with the payment of the salaries of Claimant 2, as it appears e.g. from Claimant 1's email dated 26 November 2010. Respondent justified these delays by referring to the global financial crisis as well as currency issues, and asked for further patience.

14. By email of 1 December 2008, Claimant 1 summarized that the Agent Fees had not been paid for more than six months and Claimant 2's salary was outstanding since more than two months. A last time limit for payment was set on 9 December 2008.

15. On 21 December 2008, Respondent forwarded to Claimant 1 an email from a certain Mr. János Jancsó who would be representing the Club in the future. The forwarded email says (sic):

> *"Dear Paco and Paolo!*
>
> *Further to our yesterday's phone conversations and according to your request let us just put also in written form our intention to finish our cooperation with the Player Graziane from January.*
> *As I described You our current situation this hard decision we had to make was due to the fact that – as a negative effect of the financial crisis of the last months – we unfortunatelly could not contract a major sponsor we have been in negotiations for almost a year! Because of this financial crisis this banking and insurance company finally decided not help us a name-sponsor, which makes our financing very much complicated.*
> *It is very simple: we do not have as much income as we planed by starting the season, consequently we have to decrease our budget and cut our costs as much as possible, so we can not afford to keep Grazie as we could not pay her. We trying to be correct and not to fool You and Her by promises knowing that we would not be able to fulfil our duties. We will do our best to complete all pending pay-*

ments towards Grazie and You by January, of course.
Though this decision is based on economical reason I described above we also have to mention that Grazie's performance was less compared to the last season's and to her raised renumeration.

We wish You a Merry Christmass and that You experience good health, happiness, success and prosperity in the upcoming year of 2009!

Thanking You very much for your kind cooperation,

Best regards:
János JANCSÓ"

16. By email dated 22 December 2008, Claimant 1 insisted on the outstanding payments and announced that he would initiate legal action.

17. By email dated 21 January 2009, Claimant 1 requested once more the payments of the outstanding Agent Fees. He also demanded payment of the late payment penalties related to the unpaid Coelho Agent Fee in the amount of EUR 3,200.00 (32 weeks) and the unpaid Torok Agent Fee in the amount of of EUR 2,700.00 (27 weeks). Attached to this email was a letter from Claimant 2 to Respondent, dated 18 January 2009. This letter reads as follows:

"January 18th 2009.

To: Mizo Pecs 2010
7633 Pecs, Dr. Veress E. U. 10 (Hungary)

Dear Sir

This is to inform you that

in reference to the contract signed by and between

a) Mr. Gabor Rosza adult, located at 7633 Pecs, Dr. Veress E. u. 10., as General Manager of the Entity surnamed «Pecsi Noi Kosarlabda Kft.» (from now on Club)

b) *Ms. Graziane De Jesus Coelho born on January 18, 1983 (from now on player)*

*The club has broken the contract as per **late and missing paymentys*** (sic) *and according to clauses X and XI the player has the right to ask for all her compensation and to be released with also no more obligations in front of the Club.*

*The debt of the Club is **13.332 €** until December 30th 2008.*

Please consider this letter as official start of the action versus the Club.

Best regards,

Graziane De Jesus Coelho"

18. In February 2009, Claimant 2 signed a contract with Brazil basketball club Catanduva Basquete Clube (hereinafter referred to as "Catanduva"). On 10 March 2009 the Brazilian basketball federation requested the Letter of Clearance which was confirmed by Respondent the following day.

19. Throughout the year 2009 Claimant 1 continued demanding the outstanding payments, setting time limits and announcing his intention to proceed to arbitration. Respondent promised later payments on numerous occasions. However, no payments were ever made.

20. On 7 January 2010, Claimant 1 sent an email to Respondent which reads as follows (sic):

"Dear Gabor,

As you requested here you find the list of debts of your club:

- *Podrug Emilija € 5.000 (five thousand)*
- *Graziane De Jesus Coelho € 13.500 (thirteen thousand five hundred)*
- *PR Sports srl € 9.900 (nine thousand nine hundred)*

Please consider that the above mentioned debts are net from penalities included in

contracts.
As per the very long late, the penalities should be applicated. Anyway, we want to show one more time our honesty and ask only for the base debts, IF THEY WILL BE PAID IN SHORT TIME.

Best regards,

Paolo Ronci
PR Sports srl"

21. Again, the Club did not make any payments.

3.2. The Proceedings before the FAT

22. On 11 May 2010, Claimants filed a Request for Arbitration in accordance with the FAT Rules.

23. By letter dated 26 May 2010, the FAT Secretariat acknowledged receipt of the Request for Arbitration. In the same letter, the FAT Secretariat confirmed the payment of the non-reimbursable handling fee of EUR 2,000.00 and informed the Parties of the appointment of the Arbitrator. Furthermore, a time limit was fixed for Respondent to file its Answer to the Request for Arbitration in accordance with Article 11.2 of the FAT Rules by no later than 17 June 2010 (hereinafter the "Answer"). The Parties were also requested to pay the following amounts as an Advance on Costs by no later than 10 June 2010:

"Claimant 1 (Mr Ronci)	*EUR 1,000*
Claimant 2 (Ms Coelho)	*EUR 2,500*
Respondent (WBC Mizo Pecs)	*EUR 3,500"*

24. By email of 17 June 2010, Respondent submitted its Answer which included a settlement offer.

25. By letter dated 18 June 2010, the FAT Secretariat confirmed receipt of Claimants' share of the Advance on Costs and Respondent's Answer. Furthermore, the FAT Secretariat informed that Respondent had failed to pay its share of the Advance on Costs. In accordance with Article 9.3 of the FAT Rules Claimants were invited to substitute for the missing payment of Respondent to ensure that the arbitration would proceed.

26. By letter dated 9 July 2010, the FAT Secretariat confirmed receipt of the full amount of the Advance on Costs. Given that in its Answer Respondent had made a proposal for an amicable settlement and that according to Article 12.3 of the FAT Rules, the Arbitrator is *"authorized to attempt to bring about a settlement to the dispute",* the Parties were asked whether they wanted to settle their dispute by way of a Settlement Agreement which could then become part of a FAT Consent Award. The Arbitrator invited the Parties to notify whether or not they agreed to the said proposal by no later than 16 July 2010.

27. By letter dated 16 July 2010, Claimants informed the FAT Secretariat that they did not accept Respondent's proposal as set out in the Arbitrator's letter and that they wanted to pursue their case before FAT. By email of the same day, the FAT Secretariat confirmed receipt of Claimants' aforementioned letter, forwarded it to Respondent and invited the Parties to simultaneously answer the questions listed below and to submit any supporting documents by no later than 30 July 2010. The Arbitrator's questions were the following:

    - *Is Respondent's statement accurate that the Parties mutually agreed to terminate the Players Contract, dated 26 May 2008, to the end of December 2008?*
    - *Is Respondent's statement accurate that the Claimants requested a "Letter of clearance" for Ms. Coelho and that the Respondent sent such a letter to the Claimants in the spring of 2009?*

28. By email of 29 July 2010, Respondent submitted its reply and attached a copy of the

request for a Letter of Clearance relating to Claimant 2. Due to sudden technical problems with their server Claimants were not able to send the requested statement by email in time. Considering these problems and in accordance with Article 7.2 FAT Rules the Arbitrator extended the time limit by no later than Monday, 2 August 2010. Claimants' reply, dated 30 July 2010 and sent by email was received by the FAT Secretariat on 1 August 2010.

29. By letter dated 13 August 2010, the FAT Secretariat acknowledged receipt of Claimants' reply to the Procedural Order dated 9 July 2010. On behalf of the Arbitrator, it requested the Claimants to respond to the following questions:

    1. *Since which date is Claimant 2 under contract with her new club in Brazil and what is the name of this club?*
    2. *Please provide a copy of said contract and specify the amounts that Claimant 2 earned at her new club in Brazil until 30 May 2009.*

30. In the same letter, the Arbitrator noted that the Parties had chosen Italian law in the Agent Agreements, and Hungarian law in the Player Contract. In order to comply with FAT's mission to "*provide for a simple, quick and inexpensive means to resolve disputes*", the Arbitrator proposed to the Parties to decide their dispute *ex aequo et bono,* in accordance with Article 15.1 of the FAT Rules, unless one of them insisted on the application of Italian or Hungarian law, in which case they had to raise a specific objection by no later than Friday, 20 August 2010.

31. By letter dated 19 August 2010, the Claimants submitted the contract between Claimant 2 and Catanduva and informed the FAT about the compensation, which Claimant 2 and Catanduva had agreed upon. Claimants explicitly accepted the Arbitrator's proposal to have the dispute decided *ex aequo et bono*.

32. Respondent did not submit any further statements.

33. By letter of 30 August 2010, the FAT Secretariat informed the Parties that the Arbitrator declared the exchange of documents complete and invited the Parties to submit a detailed account of their costs until 8 September 2010.

34. By letter dated 7 September 2010, the Claimants submitted the following account on costs:

> *"1. Concerning Claimant 1, Mr Paolo Ronci: a total amount of **9000€ (Nine thousand Euro)**, which includs* (sic) *2.000€ (Two thousand Euro) as the non reimbursable fee, 1.000€ (One thousand Euro) as the Claimant 1 share on costs, 2.500€ (Two thousand Five hundred Euro) as the Claimant 2 share on costs, 3.500€ (Three thousand Five hundred Euro) as the Respondent's share on costs.*
>
> *2. Concerning Claimant 2, Ms Graziane de Jesus Coelho: a total amount of **4.800€ (Four thousand Eight hundred Euro)** as the Counsel's fee."*

35. Respondent did not submit an account on costs.

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

4. The Parties' Submissions

4.1. Summary of Claimants' Submissions

37. Claimants request payment of the outstanding Agent Fees in a total amount of EUR 9,700.00, service charges in a total amount of EUR 20,000.00 and a further amount of

EUR 3,000.00 for "breach of trust and bad faith". Claimants submit that Respondent never paid the Coelho Agent Fee in the amount of EUR 7,500.00 and the Torok Agent Fee in the amount of EUR 2,200.00. The service charge of EUR 20,000.00 was calculated on the basis of a flat fee of EUR 100.00 per week and a delay of 102 weeks with respect to the Coelho Agent Fee (EUR 10,200.00) and a delay of 98 weeks with respect to the Torok Agent Fee (EUR 9,800.00). Claimant 1's claim of EUR 3,000.00 "for breach of trust and bad faith" was not motivated any further.

38. Claimants then request the payment of Claimant 2's outstanding salaries in the amount of EUR 54,997.00 plus interest of 5%. Claimants contend that Respondent breached the Player Contract when it failed to timely pay Ms. Coelho's salary. Since such delay lasted more than 14 days, Claimant 2 was entitled to void the contract, which she did by letter dated 17 January 2010, and to ask for any unpaid compensation according to Clause IV of the Player Contract. This unpaid compensation amounted to EUR 54,997.00 and consisted of the amount due to Claimant 2 in December 2008 (EUR 13,332.00) and the remaining five monthly salaries of EUR 8,333.00 from January 2009 until May 2009. Claimants also ask for default interest of 5% on the unpaid salary payments.

4.2. Claimants' Request for Relief

39. The Request for Arbitration contains the following Request for Relief (sic):

> *"With reference to all the factors mentionned above, the Claimants request the following relief:*
>
> - *To establish that the Respondent is in default of respecting their obligations set forth in the Agreement signed on May 26, 2008 and on June 24, 2008 with the first Claimant, Mr Paolo Ronci.*
> - *To establish the fact that the Respondent is in default of respecting their obli-*

gations set forth in the Agreement signed on May 26, 2008 with the second Claimant, Ms Graziane de Jesus Coelho.

- *To condemn the Respondent to pay Ms Graziane de Jesus Coelho an overdue amount of the contract makes up **54.997 Euro** (Fifty-Four thousand Nine hundred and Ninety-Seven Euro)*
- *To establish that this early termination of contract, in the middle of the season, caused prejudice against Ms Graziane de Jesus Coelho's career, as since then she couldn't find another team in Europe and her career of professional Basketball player has been interrupted. For that reason she is requesting the payment of **5% of interest**.*
- *To condemn the Respondent to pay Mr Paolo Ronci the overdue amount of the Agent's fee in the total amount of **9.700 Euro** (Nine thousand Seven hundred Euro) which is composed of the following:*
    - ***7.500 Euro** (Seven thousand and Five hundred Euro) for the services rendered in connection with the Player Graziane de Jesus Coelho,*
    - ***2.200 Euro** (Two thousand and Two hundred Euro) for the services rendered in connection with the Player Szilvia Torok,*
- *With reference to Clause 3) of the contracts signed on May 26, 2008 and on June 24, 2008, and with reference to the case law of Petrosean vs St Petersburg where the CAS agreed for the payment of the interests scheduled in the contract, Mr Paolo Ronci asks for the stipulated payment of **20.000 Euro** (Twenty thousand Euro) of interests. This amount is composed of the following:*
    - *10.200 Euro (Ten thousand two hundred Euro) calculated on the basis of 100 Euro (one hundred Euro) per week of delay (as set forth in the contract signed on May 26, 2008), that is to say 102 weeks of delay.*
    - *9.800 Euro (Nine thousand Eight hundred Euro) calculated on the basis of 100 Euro (one hundred Euro) per week of delay (as set forth in the contract signed on June 24, 2008), that is to say 98 weeks of delay.*
- *To condemn the Respondent to pay Mr Paolo Ronci **3.000 Euro** (Three thousand Euro) for breach of trust and bad faith.*
- *To condemn the Respondent to pay compensation of the "non-reimbursable handling fee" for the FAT request in the amount of **2.000 Euro** (Two thousand Euro),*
- *To condemn the Respondent to reimburse all the advance on costs which will be fixed by the Arbitrator and which will be paid by both Claimants,*

- *To condemn the Respondent to reimburse all the legal fees and expenses which will be paid by both Claimants,"*

4.3. Summary of Respondent's Submissions

40. Respondent admits owing a certain amount of money to Claimants but disagrees regarding the quantum of the claim.

41. Respondent alleges that the Parties agreed to terminate the Player Contract and that the cooperation was finished in December 2008. Accordingly, Respondent still has to pay the pending salary of Claimant 2 in the amount of EUR 13,332.00. Respondent submits that the Player Contract was terminated not only because of economic reasons but also because of certain health problems and the unsatisfactory performance of Claimant 2.

42. Claimant 2's unsatisfactory performance was already mentioned in Mr. Jancsó's email dated 21 December 2008. Respondent further submits that the agreement with Claimant 2 to terminate the Player Contract was supported by the undisputed facts that Claimant 2 did not join the team at the beginning of January 2009 but requested the Letter of Clearance, and that in their correspondence with the Club, Claimants never referred to the compensation for the remaining months of the Player Contract but only to the outstanding salaries due at the end of December 2008 which amounted to EUR 13,332.00.

43. Respondent submits that there was no bad intention not to pay the Agent Fees and Claimant 2's salary but it was prevented from doing so by the global financial crisis.

44. With regard to the Agent Fees, Respondent submits that the amount due was less than

requested, namely only EUR 5,600.00 (i.e. EUR 3,350.00 + EUR 2,250.00) plus 5% interest, instead of EUR 7,500.00.

45. Respondent rejects the claims for the service charges in the amount of EUR 20,000.00 and for compensation because of "breach of trust and bad faith" in the amount of EUR 3,000.00.

4.4. Respondent's Request for Relief

46. Respondent's Answer contains the following Request for Relief (sic):

> *"1. As per the above mentioned facts and arguments we can not accept to pay more than EUR 13.332 (plus 5% interest).*
>
> *2. We refuse to be blamed in any way for hintering Ms Coelho's further career (and to pay whatever ?% interest for it) as a pro basketball player, furthermore: it happened to the contrary.*
>
> *3. Per the above mentioned we disagree on the sums to be payed as agent's fee, while the legitim amounts are EUR 3.350 and EUR 2.250 (plus 5% interest).*
>
> *4. We feel that to request EUR 20.000 interest on such amounts is much to exaggerated, but we are willing to pay additional 5% interest on all due payments that are rightful.*
>
> *5. We refuse to pay Mr. Paolo Ronci EUR 3.000 "for breach of trust and bad faith" as we never did so whatever."*

5. Jurisdiction

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

48. The jurisdiction of the FAT presupposes the arbitrability of the dispute as well as the existence of a valid arbitration agreement between the parties.

5.1. Arbitrability

49. The Arbitrator notes that the dispute referred to him is clearly of a financial nature and is thus arbitrable within the meaning of Article 177(1) PILA.[1]

5.2. Formal and substantive validity of the arbitration agreement

50. The existence of a valid arbitration agreement will be examined in light of Article 178 PILA, which reads as follows:

> *"1 The arbitration agreement must be concluded in writing, by telegram, telex, telefax or any other means of communication which allow proof of the agreement by text.*
>
> *2 Furthermore, the arbitration agreement shall be valid if it conforms to the law chosen by the parties, to the law governing the dispute, in particular the principal contract, or to Swiss law."*

5.3. Regarding the Parties

51. The Arbitrator finds that the jurisdiction of the FAT over the dispute between Claimant 1 and Respondent results from Clause 8 of the Coelho Agent Agreement and from Clause 8 of the Torok Agent Agreement, which are identical and read as follows:

---

[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.

> *"Any dispute arising out of or in connection with this Agreement shall be settled exclusively by arbitration by FIBA with possibility to appeal the award to CAS in Lausanne (Switzerland)."*

52. Furthermore, the Arbitrator finds that the jurisdiction of the FAT over the dispute between Claimant 2 and Respondent results from Clause XIII of the Player Contract, which reads as follows:

> *"Any dispute arising out of or in connection with this Agreement shall be settled exclusively by arbitration by FIBA with possibility to appeal the award to CAS in Lausanne (Switzerland)."*

53. The Agent Agreements and the Player Contract are in written form and thus the arbitration agreements fulfill the formal requirements of Article 178 (1) PILA.

54. With respect to substantive validity, the Arbitrator considers that there is no indication in the file which could cast doubt on the validity of the arbitration agreements under Swiss law (cf. Article 178 (2) PILA). In particular, the wording "*Any dispute arising out of or in connection with this Agreement (…)*" in Clause 8 of the Agent Agreements and Clause XIII of the Player Contract clearly covers the present dispute.[2]

55. The fact that the arbitration agreements do not explicitly mention the FAT but refer to "arbitration with FIBA" does not affect the competence of the FAT to decide this dispute since the FAT is the only arbitration body of FIBA dealing with such disputes. Furthermore, the Arbitrator notes that none of the Parties has raised any objection with regard to the jurisdiction of the FAT or against these FAT proceedings and both the Claimants and the Respondent have addressed the merits of this case in their submissions.

---

[2] *See for instance* BERGER/KELLERHALS: Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, N 466.

56. The Arbitrator thus finds that he has jurisdiction to decide the claims of Claimant 1 and Claimant 2.

6. Discussion

6.1. Applicable Law – *ex aequo et bono*

57. 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",* as opposed to a decision according to the rules of law referred to in Article 187(1). Article 187(2) PILA is generally translated into English as follows:

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

58. The Coelho and Torok Agent Agreements provide for Italian law, and the Player Contract provides for Hungarian law as the respective applicable laws. The Arbitrator therefore proposed to the Parties to decide the dispute *ex aequo et bono* as provided by Art. 15.1 of the FAT Rules, unless either of them insisted on the choice of laws provided for in the above-mentioned contracts. Given that Claimants explicitly authorized the Arbitrator to decide the dispute *ex aequo et bono* and Respondent did not file any objections, the Arbitrator shall decide the present matter *ex aequo et bono*.

59. 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*[3] (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 not inspired by the rules of law which are in force and which might even be contrary to those rules."*[5]

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

> *"the mandate to give a decision based exclusively on equity, without regard to legal rules. Instead of applying general and abstract rules, he must stick to the circumstances of the case at hand".*[6]

61. This is confirmed by Article 15.1 of the FAT Rules *in fine* according to which the arbitrator applies "general considerations of justice and fairness without reference to any particular national or international law".

62. In light of the foregoing developments, the Arbitrator makes the following findings:

---

3 That is the Swiss statute that governed international and domestic arbitration before the enactment of the PILA. Today, the Concordat governs exclusively domestic arbitration.

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

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

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

6.2. Findings

63. Respondent does not dispute that

a. Claimant 1 was entitled to receive certain Agent Fees according to the Coelho and Torok Agent Agreements;

b. the Agent Fees have not been paid on time;

c. it owes to Claimant 2 unpaid salaries in the amount of EUR 13,332.00.

64. The main issues for the Arbitrator to decide are the following:

a. What is the exact amount of the Agent Fees due to Claimant 1?

b. Is Claimant 1 entitled to a service charge because Respondent failed to timely pay the Agent Fees?

c. Is Claimant 1 entitled to a compensation “for breach of trust and bad faith”?

d. What is the correct amount of the unpaid salaries payable to Claimant 2?

e. Is Claimant 2 entitled to interest because Respondent failed to pay her salary in a timely manner?

6.2.1 The Agent Fees

65. Clause 2 of the Coelho Agent Agreement provides for an Agent Fee *“for the services*

rendered in connection with the Player Graziane De Jesus Coelho" of EUR 7,500.00 to be paid *"at the signature of the contract".* Clause 1 of the Coelho Agent Agreement specifies the services which are expected by the Club and for which the agent should be compensated, namely *"(to) assist the Club in the negotiation and execution of labour contracts for the Players initially referred to the Club by the Agent."* A Player Contract was indeed signed with Claimant 2 and it has not been disputed that Claimant 1 provided the services as agreed in Clause 1 of the Coelho Agent Agreement. The condition for the payment of the Coelho Agent Fee has therefore been met. Nothing in the Agent Agreement stipulates that the amount of the Coelho Agent Fee related somehow to the duration of Ms. Coelho's employment. The Arbitrator therefore finds that Claimant 1 is entitled to the entire Coelho Agent Fee of EUR 7,500.00 for his services related to Claimant 2.

66. Claimant 1's right to receive the full Torok Agent Fee has not been disputed. The Arbitrator therefore confirms that Claimant 1 is entitled to the entire Agent Fee of EUR 2,200.00 for his services related to Ms. Torok.

6.2.2 The "service charges"

67. According to Clause 3 of the Coelho Agent Agreement and the Torok Agent Agreement Respondent is obliged to pay a "service charge" of EUR 100.00 per week if the Agent Fee is overdue by more than 14 days.

68. Such a "service charge" constitutes a contractual penalty, i.e. a flat fee for each week of late payment which is cumulatively calculated without limitation as long as the Agent

Fee has not been paid.[7]

69. In most jurisdictions and as a consequence of the freedom of contract the parties are entitled to stipulate contractual penalties. However, such penalties are subject to judicial review and can be adjusted if they are excessive. Whether a contractual penalty is excessive is usually left to the discretion of the judge and depends on the individual circumstances. As a general rule, a contractual penalty is considered to be excessive if it is disproportionate to the basic obligation of the debtor.

70. Although the Arbitrator understands the purpose of the contractual penalty, namely to discourage Respondent from withholding any payments due, he finds that the contractual provisions regulating the "service charge" may lead to excessive penalties, which is demonstrated by the following circumstances:

a. The amount of the service charge is not capped. In fact, the service charge claimed by Claimant 1 exceeds the Torok Agent Fee already after a few months and now results in a claim for an amount which is a multiple of the Torok Agent Fee of EUR 2,200.00. Claimant 1 requests a penalty of EUR 100.00 per week for a delay of 98 weeks. Accordingly, the total penalty due would be in excess of EUR 9,800.00 (i.e. more than four times the amount of the Torok Agent Fee).

b. The amount of the service charge does not depend on the amount of the unpaid Agent Fee. It amounts to EUR 100.00 per week irrespectively of whether the due amount is EUR 7,500.00 (Coelho Agent Fee) or EUR 2,200.00 (Torok Agent Fee).

---

7 *See* 0036/09 FAT, Petrosean vs. Women Basketball Club "SPARTAK" St. Petersburg.

71. When determining the appropriate amount for the service charge as a contractual penalty and in line with the jurisprudence of the FAT[8], the Arbitrator takes the following considerations into account:

    a. The Arbitrator accepts that a contractual penalty shall constitute a credible deterrent against deliberate withholding of due payments.

    b. A contractual penalty in the form of a flat fee, applying equally to small or large sums, is problematic and may call for adjustment depending on the circumstances.

    c. The service charge should be capped. Only under exceptional circumstances (e.g. if the period of default clearly exceeds one year or if the behavior of the debtor calls for a higher sanction), such cap shall exceed the compensation whose payment is secured by the contractual penalty.

    d. The Arbitrator should also take the behavior of the Parties into account: the duty to mitigate one's own damage requires that contractual penalties should be reduced if the creditor deliberately delays the enforcement proceedings.[9]

72. The outstanding Agent Fees have not been paid for a period of more than two years. Furthermore, Respondent repeatedly promised payment but postponed it again and again and to date, it did not even pay the undisputed amounts of the Agent Fees.

---

8 *See* 0036/09 FAT, Petrosean vs. Women Basketball Club "SPARTAK" St. Petersburg.

9 *See* 0008/08 FAT, Djoric vs. PBC Lukoil Academic Sofia Basketball Club.

73. Still, the Arbitrator is not prepared to accept a flat fee which does not relate to the principal amount due and to leave the service charge uncapped. Applying the principles and considerations above, deciding *ex aequo et bono* and taking into account the circumstances of the present case, the Arbitrator finds that the annual amounts of the service charges have to be capped at 100 % of the principal obligation of the debtor. Thus, the Arbitrator acknowledges the amount of the service charge relating to Claimant 2 (EUR 5,200.00 per year) which does not exceed the Coelho Agent Fee of EUR 7,500.00. However, he reduces the annual service charge relating to Ms. Torok to the amount of the Torok Agent Fee (EUR 2,200.00) which results in a weekly service charge of EUR 42.30 instead of the claimed amount of EUR 100.00.

74. The service charges are principally owed until the date of the present Arbitral Award. However, in their Request for Relief Claimants explicitly asked for payment in the amount of EUR 20,000.00 consisting of the service charges for 102 weeks related to Ms. Coelho and 98 weeks related to Ms. Torok. Therefore, Respondent has to pay a service charge for the delay in the payment of the Coelho Agent Fee in the amount of EUR 10,200.00 (102 weeks at EUR 100.00) and a service charge for the delay in the payment of the Torok Agent Fee in the amount of EUR 4,145.40 (98 weeks at EUR 42.30) which results in a total amount of EUR 14,345.40.

6.2.3 Penalty for breach of trust and bad faith

75. Claimant 1 requests the payment of EUR 3,000.00 for “breach of trust and bad faith”. In support of this claim, Claimant 1 submits that Respondent’s promises were in vain and that it never showed good will to fulfill its payment obligations. However, the Arbitrator finds that this claim is unsubstantiated since Claimant 1 did not make any further submission regarding the kind of alleged breach or the damage suffered in excess of the outstanding monies. The claim for a penalty for breach of trust and bad faith is there-

fore rejected.

6.2.4 Compensation of Claimant 2

76. The Parties disagree on the question whether or not an agreement on the termination of the Player Contract as of the end of December 2008 was reached. Respondent bases its allegation in the affirmative on the fact that after having received Mr. Janscó's email of 21 December 2008, stating Respondent's wish to terminate the Player Contract, Claimant 2 did not show up at the Club in January 2009, that she asked for a Letter of Clearance to join a Brazilian team and that her own termination letter of 18 January 2009 referred to an outstanding amount of EUR 13,332.00 *"until December 30th 2008."*

77. It is true that a termination agreement does not need to be in writing, especially since the Player Contract does not require a particular form for any amendments or changes. However, it remains the burden of the Respondent to prove that Claimant 2 accepted its offer for an early termination of the Player Contract of 21 December 2008. Because of the principle of *pacta sunt servanda*, such acceptance may not easily be assumed.

78. The Arbitrator finds that the facts from which Respondent deducts such acceptance are not sufficient evidence of the existence of a termination agreement:

a. The allegation that Claimant 2 did not show up after the Christmas break is not substantiated or supported by any evidence. The same applies to the alleged health problems of Claimant 2.

b. The Letter of Clearance was requested by the Brazilian Basketball Confederation on 10th March 2009. It is undisputed that the Player Contract was already termi-

nated at the time when the Letter of Clearance was requested. However, the request itself does not constitute evidence of the date or the modality of the termination of the Player Contract.

c. Although it is true that Claimant 2's letter dated 18 January 2009 speaks of a debt of the Club of EUR 13,332.00 corresponding to the outstanding salary until 30 December 2008 and that Claimant 1's email of 7 January 2010 speaks of a debt of EUR 13,500.00 relating to Claimant 2, it does not restrict the claim to these amounts but refers to the contractual right *"to ask for all her compensation and to be released with also no more obligations in front of the Club"* (sic). Also in their further correspondence, Claimants never waived the right to claim full compensation. They rather offered repeatedly to reduce the outstanding claim if the payments would be made within a short period of time before the arbitration proceeding was initiated. Still, Respondent did not make use of this option and can therefore no longer rely on such offers.

79. Under these circumstances, the Arbitrator finds that there is no evidence of a mutual termination agreement as per 30 December 2008 but that Claimant 2 was entitled to unilaterally terminate the Player Contract based on its Clause X and to ask for full compensation according to Clause IV for the entire term of the Player Contract, and not only for the outstanding salaries until the termination date. It does not matter, whether Claimants followed the formal requirements of Clause XI, first sentence of the Player Contract because Respondent was aware of its obligations to pay the outstanding salary as stipulated in its correspondence, particularly in its email of 21 December 2008.

80. However, in order to avoid Claimant 2 being in a better position as a consequence of her right to unilaterally terminate the Player Contract because of Respondent's breach of contract than without said breach, everything which Ms. Coelho earned because she

provided her services elsewhere must be deducted from her claim for compensation. Such deduction is in line with the jurisprudence of FAT[10]. Ms. Coelho submits that after the termination of the Player Contract she had been under contract with the Brazilian club Catanduva and received three payments of "4,500 reais" each until 30 May 2009, which at the average exchange rate of this time corresponds to EUR 1,520.00 per payment. Therefore, Claimant 2 received a total amount of EUR 4,560.00 from Catanduva, which has to be deducted from her full compensation of EUR 54,997.00.

81. Thus, the Arbitrator finds that Respondent has to pay the amount of EUR 50,437.00 to Claimant 2.

6.2.5 Interest on the outstanding compensation

82. Claimants request interest of 5% on the outstanding compensation of Claimant 2. According to Claimants, such interest should be considered as an indemnity for the interruption of Claimant 2's career because she could not find a new club in Europe after having left Respondent's team.

83. However, interest is not a substitution for damages but reflects the time value of outstanding monies. That said, the Arbitrator is not restricted to the legal reasoning of the Claimants and is allowed to base his findings on different legal grounds than those suggested by Claimants, in accordance with the maxim *iura novit curia*.

84. According to FAT jurisprudence, default interest can be awarded even if the respective

---

10 *See ex multis* 0024/08 FAT, Sakellariou, Dimitropoulos vs. S.S. Felice Scandone Spa. 1948 Avellino.

agreement does not explicitly provide for an obligation to pay interest on overdue salaries[11] and even if a player is entitled to full compensation after executing the right to unilaterally terminate an employment contract[12]. Although the Player Contract does not explicitly provide the obligation of the debtor to pay default interest, this is a generally accepted principle which is embodied in most legal systems. The Arbitrator, deciding *ex aequo et bono*, considers the claimed interest rate of 5% p.a. to be fair and equitable in the present case.

85. Pursuant to Clause X of the Player Contract, Respondent agreed that *"Player may void this contract"* and that in this case any agreed compensation *"shall become immediately due and payable"*. Therefore, the starting date of interest is the day following the termination of the Player Contract, i.e. 19 January 2009.

6.2.6 Further claims

86. Claimants ask the Arbitrator to declare that Respondent is in default of respecting its obligations set forth in the Coelho and Torok Agent Agreements as well as in the Player Contract. However, Claimants did not set out at all to what extent Respondent disregarded other contractual duties than the duty to pay the Agent fees and the compensation to the player. These claims are therefore dismissed.

---

11 *See* 0069/09 FAT, Ivezic, Draskicevic vs. Basketball Club Pecsi Noi Kosariabda Kft *and* 0056/09 FAT, Branzova vs. Basketball Club Nadezhda.

12 *See* 0080/10 FAT, Dacic vs. Besiktas Jimnastik Kulübü *and* 0062/09 FAT, Haper et al. vs. Besiktas Jimnastik Kulübü *and* 0027/08 FAT, Dalmau, Paris vs. Ural Great Professional Basketball Club.

6.2.7 Summary

87. Claimants are therefore awarded the following amounts:

Claimant 1:	
Agent Fee (Coelho)	EUR 7,500.00
Agent Fee (Torok)	EUR 2,200.00
Service Charges on Agent Fees	EUR 14,345.40
Total Claimant 1	*EUR 24,045.40*
Claimant 2:	
Compensation according to Clause IV of the Player Contract less salary received in Brazil	EUR 50,437.00 (plus 5% interest)

7. Costs

88. Article 17.2 of the FAT Rules provides that the final amount of the costs of the arbitration shall be determined by the FAT President and may either be included in the award or communicated to the parties separately. Furthermore, article 17.3 of the FAT Rules states that the award shall grant the prevailing party a contribution towards its reasonable legal fees and expenses incurred in connection with the proceedings.

89. The Claimants' arbitration costs include the non-reimbursable handling fee of EUR

2,000.00, the Advance on Costs paid by the Claimants (EUR 3,500.00) as well as the Advance on Costs of Respondent, also paid by the Claimants (EUR 3,500.00). Such costs amount to EUR 9,000.00 in total.

90. On 4 October 2010, considering that pursuant to Article 17.2 of the FAT Rules "the FAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of FAT and the fees and costs of the FAT 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 FAT 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 FAT President determined the arbitration costs in the present matter at EUR 7,000.00.

91. In the present case, 90% of the costs shall be borne by Respondent and 10% by Claimants in line with Article 17.3 of the FAT Rules, as the Claimants have been awarded approx. 90% of their claims and there is no indication that either the financial resources of the Parties or any other circumstance compel otherwise.

92. Given that the Claimants paid the totality of the Advance on Costs of EUR 7,000.00, the Tribunal decides that:

(i) Respondent shall pay to Claimants 90% of the costs advanced by the Claimants, i.e. EUR 6,300.00.

(ii) Furthermore, the Arbitrator considers it adequate that Claimants are entitled to the payment of a contribution towards their reasonable legal fees and other expenses (Article 17.3. of the FAT Rules). The Arbitrator holds it adequate to take into account the non-reimbursable fee when assessing the expenses incurred by the

Claimants in connection with these proceedings. After having reviewed and assessed all the circumstances of the case at hand, the Arbitrator fixes the contribution towards the Claimants' legal fees and expenses at EUR 6,120.00.

8. AWARD

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

1. **WBC Mizo Pecs 2010 is ordered to pay to Mr. Paolo Ronci the amount of EUR 24,045.40.**

2. **WBC Mizo Pecs 2010 is ordered to pay to Ms. Graziane de Jesus Coelho the amount of EUR 50,437.00 plus interest of 5% p.a. from 19 January 2009.**

3. **WBC Mizo Pecs 2010 is ordered to pay to Ms. Graziane de Jesus Coelho and Mr. Paolo Ronci the amount of EUR 6,300.00 as a reimbursement of the advance on arbitration costs.**

4. **WBC Mizo Pecs 2010 is ordered to pay to Ms. Graziane de Jesus Coelho and Mr. Paolo Ronci the amount of EUR 6,120.00 as a reimbursement of their legal fees and expenses.**

5. **Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 15 October 2010

Stephan Netzle

(Arbitrator)