BASKETBALL
ARBITRAL TRIBUNAL

ARBITRAL AWARD

(BAT 0169/11)

by the

BASKETBALL ARBITRAL TRIBUNAL (BAT)

Mr. Stephan Netzle

in the arbitration proceedings between

Ms. Naomi Halman

- Claimant 1 -

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

- Claimant 2 -

vs.

ASD Basket Parma
Via Lazio 5, 43122 Parma, Italy

- Respondent -

Represented by Ms. Monica Alpini, Attorney-at-law,
Via F. Cavallotti 32, 43121 Parma, Italy

1. The Parties

1.1. The Claimants

1. Ms. Naomi Halman (hereinafter “the Player” or “Claimant 1”) is a professional basketball player of Dutch nationality. She is represented by her agent Mr. Paolo Ronci, Claimant 2, as counsel.

2. Mr. Paolo Ronci (hereinafter “the Agent” or “Claimant 2”) is a FIBA certified agent of Italian nationality. He is affiliated with the agency PR Sports srl located in Faenza, Italy.

1.2. The Respondent

3. ASD Basket Parma (hereinafter the “Club” or “Respondent") is a professional basketball club located in Parma, Italy. Its President is Mr. Gianni Bertolazzi. The Club is represented by Ms. Monica Alpini, Attorney-at-law in Parma, Italy.

2. The Arbitrator

4. On 14 April 2011, the President of the Basketball Arbitral Tribunal (hereinafter the "BAT") appointed Dr. Stephan Netzle as arbitrator (hereinafter the “Arbitrator”) pursuant to Article 8.1 of the Rules of the Basketball Arbitral Tribunal (hereinafter the "BAT Rules").

5. 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

6. On 28 April 2009, the Player and the Club signed an employment contract (hereinafter referred to as the "Player Contract") according to which the Player was employed by the Club as a basketball player for the 2009-2010 and the 2010-2011 seasons.

7. The Player Contract[1] provides for net salaries of EUR 30,000.00 for the 2009-2010 season and of EUR 35,000.00 for the 2010-2011 season, for bonuses and for specified "incidental services" to be rendered by Respondent.

8. In addition, Clause 10 of the Player Contract provides for agent fees in favour of the Agent and states the Club's obligation to pay to the Agent, *"as a consequence of the business carried out"*, a sum of 10% plus VAT of the Player's 2009-2010 salary and of the Player's 2010-2011 salary. The agent fees were payable on 15 October 2009 and on 15 October 2010.

9. After her arrival in Parma in September 2009, the Player successfully passed the physical and medical examinations. In the 2009-2010 season, the Player participated in 24 of 25 championship games, missing only the first game on 10 October 2009. During that season, the Player suffered from physical problems with _____ and received medical treatment provided by the Club's medical staff. However, these physical problems did not prevent her from continuing playing for the Club's team. The Club paid all salary instalments and the agent fee for the 2009-2010 season as stipulated in the Player Contract.

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[1] The original of the Player Contract is in Italian language. An English translation has been provided by Claimants.

10. After the last game of the 2009-2010 season in April 2010, the Player left Parma and it was agreed with the Club that she would report back for the training camp at the beginning of the 2010-2011 season. It is in dispute between the Parties whether the Club had provided the Player with a "physical preparation program" which she had to follow during the summer break.

11. In July 2010, when the Player practiced with the Dutch National Team, _____ appeared again. She stopped training, underwent a MRI examination on 8 July 2010 and reported the recurring pain to the Club's coach in a correspondence via "Facebook" on 12 July 2010.

12. The Player returned to Parma on 30 August 2010. On 31 August 2010, she underwent a medical examination provided by the Italian Olympic Committee (CONI).

13. On 6 September 2010, the Club's President wrote an email to the Agent with the following content[2]:

> *"Dear Paolo,*
>
> *As agreed, I am reporting that the player HALMAN appeared at the 1st September meeting in an awful athletic condition, with a very significant excess weight of 7 kg and showing, from the first runs, new and not well defined health problems of _____ that had already been painful last year. Sincerely wishing to find a gradual remedy to this situation, I give you notice that if such a situation continues, it could lead us to consider cancelling the contract.*
>
> *Regards.*
> *Gianni BERTOLAZZI"*

14. After one week of practicing with the Club's team, the pain _____ appeared again and the Player went to an orthopaedic surgeon on 13 September 2010. The surgeon

[2] The following is an English translation, provided by Claimants, of the original email in Italian.

proposed three solutions, namely a) to continue treatment and to play with pain; b) _____; and c) a surgery, which was the preferred option of the surgeon.

15. By emails of 4 and 13 October 2010, the Agent and the Player asked the Club for a statement about the Player's future in the Club's team and the further treatment of her injury.

16. By email of 15 October 2010, the Club's President responded as follows[3]:

> *"With reference to your letter dating back to last October 10th, I am compelled to make it clear as follows.*
>
> *The current disagreement about the sports contract signed between us and dating back to April 24th, 2009 has long been a topic of discussion and difference of opinion with your agent, Paolo Ronci, who is consequently the only person entitled to deal with the club for all the matters concerning the fulfilment of the agreement itself. Your assertions about our utter silence on this matter are untrue, considering, besides, the fact that the Club has repeatedly made clear orally to you where it stands.*
>
> *In any case, I assert that, by returning to Parma after the summer break in a physical and athletic condition – confirmed by medical specialists – that was utterly unacceptable and especially incompatible with the regular performance of the sports service which is the subject matter of the contract, so much so that your behaviour justifies our intention to cancel the contract for non-fulfilment. Whilst awaiting a final decision about the most appropriate measures to adopt, I am nonetheless compelled to say that, in the meantime, under section 1460 of the Civil Code, the Club intend[s] to suspend your remuneration, given that you are unable to provide the service which is the subject matter of the contract.*
>
> *I agree that the Club should however be open to an amicable resolution of the disagreement.*
>
> *Regards.*
>
> *Gianni BERTOLAZZI"*

17. There is no response of the Claimants on record. By letter of 3 November 2010 to Claimants, the Club terminated the Player Contract[4]:

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3 The following is an English translation, provided by Claimants, of the original email in Italian.

4 The following is an English translation, provided by Claimants, of the original letter in Italian.

"Ref : cancellation of April 28th 2009 sports contract

With regards to the contract under reference, Gianno Bertolazzi, the undersigned, as the President of ASD Parma - the head office of which is located at 5 A Lazio Street, is authorised to represent the Club for the following statement.

Due to her lack of physical condition, as ascertained at the time she returned to Parma after the summer break, as finally confirmed by new medical examinations dating back to October 10th 2010, Mrs Halman has not been able to perform the sports service she was required to under the terms of this contract. Such a situation, confirmed by medical specialists, is to be exclusively attributed to the lack of physical and athletic condition Mrs Halman demonstrated when arriving at the first training session in September because she had stopped the exercise programme she should have followed if she wanted to maintain her condition during the summer break, thus taking advantage of this whole period to build up a level of performance in accordance with the standards required at the beginning of the new sports season. Consequently, it is obvious that such behaviour is contrary to the obligations of good faith and honesty as quoted in sections 1176 and 1375 of the Civil Code, which constitutes a serious breach of contract for non-fulfilment.

On account of what has been said above, considering Mrs Halman's bad results in the first stage of the Italian Cup and the first two games of the championship, in addition to the subsequent period of rest prescribed by the doctors, which inevitably made her unable to perform the activity she was required under this contract, and which also prevents her from taking part in the next games of the championship, the undersigned hereby believes that the sports contract signed on April 28th 2009 is cancelled solely by the actions of Mrs Hallman and exclusively because of her fault in accordance with section 1453 of the Cilvil Code and he consequently requires that the player should immediately vacate the flat located at _____ in Parma and return the Lancia Beta tg AS644FB car, both being placed at her exclusive disposal. He warns her that if she refuses to comply with this order she will be charged for all costs deriving from the inappropriate use of the said assets. Also, however, the Club reserves its right to claim reimbursement for any subsequent damage caused by the player.

Yours sincerely."

18. After confirming receipt of that letter by signing it with the comment *"I signed this letter not because I agree but because I received"*, the Player left Parma. Thereafter, she underwent physical therapy in the Netherlands and in Greece at her own expenses. Until the end of the 2010-2011 season, the Player neither entered into a new employment relationship nor played for another basketball club. On 27 May 2011, she signed an employment contract with Club Atletico Faenza in Italy for the 2011-2012 season.

19. For the 2010-2011 season, the Club paid the Player the first salary instalment due on 30 September 2010 but did not pay the further instalments stipulated in the Player Contract. The Club did not pay the agent fee for the 2010-2011 season either.

3.2. The Proceedings before the BAT

20. On 24 February 2011, Claimants filed a Request for Arbitration in accordance with the BAT Rules, which was received by the BAT on 1 March 2011.

21. By letter dated 17 April 2011, the BAT Secretariat confirmed receipt of the Request for Arbitration and its several exhibits as well as of the non-reimbursable handling fee of EUR 2,000.00 received in the BAT bank account on 1 March 2011 and informed the Parties about the appointment of the Arbitrator. In addition, the BAT Secretariat informed the Parties that the FIBA Arbitral Tribunal (BAT) had been renamed Basketball Arbitral Tribunal (BAT) as of 1 April 2011 and that, absent any objections by the Parties on or before 26 April 2011, the new name would be applied also to the present proceedings. None of the Parties raised any objections within the said time limit. 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 BAT Rules by no later than 11 May 2011 (hereinafter the "Answer"). The BAT Secretariat also requested the Parties to pay the following amounts as an Advance on Costs, by no later than 4 May 2011:

"Claimant 1 (Ms Halman)	*EUR 3,000*
Claimant 2 (Mr Ronci)	*EUR 1,000*
Respondent (ASD Basket Parma)	*EUR 4,000"*

22. By letter dated 29 June 2011, the BAT Secretariat acknowledged receipt of the full amount of the Advance on Costs and informed the Parties that Respondent had submitted its Answer together with several exhibits which were attached for the

Claimants' information. In the same letter, the Parties were requested to submit further specific information and documents by no later than 11 July 2011.

23. On 6 July 2011, Respondent submitted the requested documents. By email of 11 July 2011, Claimants also submitted the requested information, commented on the Answer and submitted further exhibits.

24. By letter dated 21 July 2011, the BAT Secretariat acknowledged receipt of the Parties' replies and invited Respondent to comment on Claimants' reply by no later than 29 July 2011.

25. On 29 July 2011, Respondent submitted its comments on Claimant's reply together with corresponding exhibits and an account of costs as follows:

> *"ACCOUNT OF COSTS FOR THE RESPONDENT*
>
> *Legal Fees …… € 5.000,00*
> *Expenses for Advance on Cost …….... € 4.000,00*
> *Expenses for the legal translation of documents …….. € 623,10*
>
> ***TOTAL AMOUNT …….. € 9.623,10**"*

26. By letter of 10 August 2011, the Arbitrator declared the exchange of documents complete and invited the Parties to submit a detailed account of their costs until 19 August 2011.

27. On 19 August 2011, Claimants submitted an account of costs as follows:

*"1. Concerning Claimant 1, Ms Naomi Halman, a total amount of **12.420€ (Twelve thousand four hundred and twenty Euro)** which includs*(sic):

- *2.000€ (Two thousand Euro) as the non reimbursable fee,*
- *3.000€ (Three thousand Euro) as the Claimant 1 share on costs,*
- *7.000€ (Seven thousand Euro) as the legal fee,*
- *420€ (Four hundred and Twenty Euro) as the translation costs.*

*2. Concerning Claimant 2, Mr Paolo Ronci, a total amount of **1.000€ (One thousand Euro)** as the Claimant 2 share on costs.*

And any other additional costs of the arbitration that the arbitrator may fix."

28. The Parties were invited to submit their comments, if any, on the other Parties' account of costs by no later than 27 August 2011. On 24 August 2011, Respondent submitted comments to Claimant's account of costs whereas Claimants did not submit any comments.

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

4. The Positions of the Parties

4.1. Summary of Claimants' Submissions

30. Claimants submit that the Player Contract is a "NO-CUT" agreement as stipulated in Clauses 3, 7-d and 12. Therefore, even if the Player was injured or if her sporting performance was below expectations, she was entitled to the entire remuneration and the Club was obliged to the reimbursement of the Player's medical costs.

31. Claimants submit that the reason for the Player's ongoing problems with _____ was an injury which appeared for the first time in the Club's pre-season training for the 2009-2010 season. This is allegedly supported by the medical statement regarding the

MRI examination of 8 July 2010 which notes that the *"finding could be the result of* _____ *(beginning of the season)"* and allegedly recognized by the Club's President in his email of 6 September 2010.

32. The Player neither breached the Player Contract nor violated any internal rules of the Club. In this context, Claimants submit that the internal rules of the Club for the 2010-2011 season were never signed by the Player. Furthermore, when the pain _____ recurred in July 2010, the Player immediately stopped training with the Dutch National Team and received medical treatment in the Netherlands. That treatment was provided by the Dutch National Team and later by the Dutch physiotherapist Dianne van der Pennen. In addition, the Player informed the Club orally and the Club's coach by chat on "Facebook" about her pain.

33. Regarding the Club's alleged training directions for the summer break, the Player maintains that she *"had not been suggested any medical treatment at the end of the first sports season"* and "*she did not receive from the Respondent an official notification or any advice regarding treatment"*. In addition, the Club did not provide the Player with any advice for specific practice. Because of that, the Player was *"free to follow a regular practicing mode before coming back to the pre-season training camp".*

34. When the pain _____ reappeared at the beginning of the 2010-2011 season, the Player was in Parma and ready for any treatment provided by the Club. Because the Club did not treat her injury at this time, it appears that the Club intended to utilize the injury as an excuse to terminate the Player Contract early due to *"health grounds as it was clearly expressed in the President's e-mail"* of 6 September 2010.

35. Although only an initial medical examination was contractually agreed to as a requirement for the validity of the Player Contract, the Player acquiesced to being examined once again right after her return to Parma on 31 August 2010. She

successfully passed both examinations without any suspicious notification. That is why the Club paid the first instalment of the Player's 2010-2011 salary.

36. Regarding the applicable law, Claimants submit that, although the Player Contract stipulates that the applicable law should be Italian law and EC law (the law of the European Community), the only way to solve any disputes between the Parties is FIBA arbitration in accordance with the (then) FAT Rules, which include the principle of *ex aequo et bono*.

4.2. Claimants' Request for Relief

37. In their Request for Arbitration, Claimants submit the following Requests for Relief:

> *"With reference to all the factors mentioned above, the Claimants ask the Arbitrator to establish that the contract signed on April 28th, 2009 was in effect and valid until its term and as a consequence, to establish that the Club didn't have the right to early terminate the contract.*
>
> *As a result, the Claimants ask the Arbitrator to condemn the Respondent to pay the following:*
>
> - *an overdue amount of the contract makes up **35.200 Euros (Thirty Five thousand and Two hundred Euro)**. This amount is composed of the following:*
>
> - *the overdue Claimant's salary in the amount of **31.000 Euros (Thirty One thousand Euro)**,*
>
> - *the payment of the agent's fee, as it is mentioned in the Clause 10 of the contract signed on April 29th, 2009, which is settled as 10 (ten) % + IVA of the total amount of the contract, that is to say 3.500€ (Three thousand Five hundred Euro) + 20 (twenty) % IVA, so the total sum amounts to **4.200€ (Four thousand Two hundred Euro)**,*
>
> - *the payment of **5% of interest** for both outstanding salary and outstanding Agent's fee,*
>
> - *considering the fact that the Claimant got injured while being under the responsibility of the Respondent and she had not fully recovered when*

*the Respondent broke the contract and asked her to leave, the Claimant asks for a compensation in the amount of **995€ (Nine Hundred and Ninety Five Euro)** corresponding to the medical costs she had to bear. (See exhibit 10 and 11),*

- *a compensation of the "non-reimbursable handling fee" for the FAT request in the amount of **2.000€ (Two thousand Euro)**,*
- *a reimbursement of all the advance on costs which will be fixed by the Arbitrator and which will be paid by the Claimants,*
- *a reimbursement of all legal fees and expenses which will be paid by the Claimant,*

38. In their second submission, Claimants add:

> *"As a result, we kindly ask the arbitrator to reject the Respondent's motion for relief and we keep on asking what we already asked in the request for Arbitration dated from February 24, 2011."*

4.3. Summary of Respondent's Submissions

39. Respondent insists that Italian law is applicable as expressly stipulated in Clause 8 of the Player Contract. In addition, the second part of Article 187(1) of the Swiss Act on Private International Law (PILA) obliges the Arbitrator to apply Italian law because this is the law with the closest connection to the case.

40. Respondent also disputes the jurisdiction of BAT. Due to the fact that Italian law shall be applicable, Article 1341 of the Italian Civil Code must be respected. The arbitration clauses are considered *"unfair"* and would be effective only if they would be *"specifically approved in writing"*. This is supported by the jurisprudence of the Italian Supreme Court. As a consequence, the present arbitration clause is invalid and BAT has no jurisdiction over the present dispute.

41. Respondent also disputes the admissibility of Claimants' second submission. According to the Arbitrator's procedural order of 29 June 2011, Claimants were

requested to submit further information specified by the Arbitrator. In accordance with Article 12 of the BAT Rules, Claimants were not permitted to add new facts and related documents which were not requested by the Arbitrator.

42. Subsidiarily, Respondent submits that right from the beginning of her stay in Parma, the Player complained about intense pain _____ which originated from the training with the Dutch National Team in summer 2009, as confirmed by the Player's own statements.

43. After the 2009-2010 season, the Player left Parma *"in good health".* The Club's staff provided her with a *"support program"* in order to *"maintain an optimal condition to face the restart of training without excessive trauma"* for the summer break. From that moment on, the Club did not receive any further information about the status of the Player's health. Informing the Club's coach via Facebook on 12 July 2010, i.e. more than one month after the reappearance of the pain when training with the Dutch National Team, was not an adequate notification to the Club.

44. At the medical examination provided by CONI at the beginning of the 2010-2011 pre-season training, the athletes were examined only with regard to their respiratory function and cardiac function under strain. There was no examination of _____.

45. The Player violated the Player Contract and the internal regulations of the Club, because: she did not inform the Club's management or its medical staff that she experienced pain again; she received medical care without the Club's authorization; and because she arrived in Parma at the end of August 2010 for the pre-season training in bad physical condition. The internal regulations were given to the Player at the beginning of the 2009-2010 season and were valid for the entire term of the Player Contract. In addition, the Player's behaviour must be considered to be *"in total disregard of the contractual duties of fair play and good faith (bona fides)"*, principles which apply both under Italian law and *ex aequo et bono*. If the Player had informed the

Club's management or its medical staff about her health condition, the Club would have treated the Player with appropriate medical care during the summer 2010, *"avoiding a long-lasting absence of the [P]layer during the sport season 2010/2011"*.

46. The unilateral termination of the Player Contract by the Club was *"legitimate"* because of the Player's breach of contract and the violation of the principles of *fair play* and *good faith*. The Player's injury was not the reason for the Club's termination of the Player Contract.

47. After the termination, the Player underwent medical treatment and physiotherapy only in January 2011. Thereby, she was delaying her own recovery and *"consequently eliminating any possibility of being able to locate a new contract elsewhere before the end of the playing season of reference"*.

48. In any event, the "NO-CUT" clause in the Player Contract has to be considered as invalid because it restricts the Parties of that contract from rescinding the Player Contract. For validity, in accordance with Italian law this should have been specifically approved in writing.

4.4. Respondent's Request for Relief

49. Respondent's Answer contains the following request for relief:

> *"In conclusion, I request that all the claims put forward by the Claimants are rejected because they are inadmissible, illegitimate unfounded, and I request that the counterparts are charged to refund all expenses incurred and to be incurred for the present procedure, including legal fees."*

50. This is confirmed in Respondent's second submission dated 27 July 2011 as follows:

> *"In the light of the foregoing, with reference to every previous defense, we demand dismissal of the Claimants' demands and ask that they be ordered to reimburse the Respondent for all the expenses relative to this proceeding,*

including legal fees, as shown in the attached document (exhibit 10).“

5. Jurisdiction

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

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

5.1. Arbitrability

53. 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.[5]

5.2. Formal and substantive validity of the arbitration agreement

54. 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.*

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[5] 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.

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."

55. The Arbitrator finds that the jurisdiction of the BAT over the dispute between *the Player* and the Club results from Clause 9 of the Player Contract which reads as follows:

"9) FIBA ARBITRATOR

*Any dispute arising out of or in connection with this Agreement shall be settled exclusively by the special **FIBA arbitrator** whose decision can be appealed to the CAS, in Lausanne (Switzerland)." (emphasis in the original)*

56. Moreover, the Arbitrator finds that the jurisdiction of the BAT over the dispute between *the Agent* and the Club results from the reference to the aforementioned Clause 9 of the Player Contract contained in Clause 10 of the Player Contract which reads in its main relevant parts as follows:

"10) FIBA AGENT

*Each party acknowledges to pay, as a consequence of the business carried out, **the FIBA agent Paolo Ronci from PR SPORTS srl** […]. The Club agrees to pay the aforementioned FIBA agent such sum by October 15th 2099 (first season) and October 15th 2010 (second season).*

If the agent is not paid, clause 9 applies and the agent shall resort exclusively to the FIBA arbitrator." (emphasis in the original)

57. Although the wording of Clause 9 of the Player Contract does not correspond to the model arbitration clause recommended by the BAT Arbitration Rules, the Arbitrator has no doubt that the Parties agreed on arbitration with the BAT:

(a) The Parties agreed that any dispute in connection with the Player Agreement should be settled by *arbitration* and not by a procedure before a state court;

(b) The Parties identified the arbitration tribunal by reference to the *"special FIBA arbitrator whose decision can be appealed to the CAS in Lausanne (Switzerland)."* At the time of signing of the Player Contract, the BAT was still called the "FIBA Arbitral Tribunal (FAT)" while it has changed its name to "BAT". In this respect, Article 18.2 of the BAT Rules

specifically provides that "Any reference to BAT's former name "FIBA Arbitral Tribunal (FAT)" shall be understood as referring to the BAT". In addition, the disputes referred to the FAT (and now BAT) were (and still are) settled by a sole arbitrator.

(c) Also the reference to the right of appeal was correct at the time of signing the Player Contract.[6]

58. There was and is no other arbitrator or arbitral tribunal available which would meet the definition of an arbitrator as agreed by the parties.[7] The Arbitrator therefore finds that Clause 9 of the Player Contract contains a valid arbitration clause in favour of BAT.

59. Respondent argues that the arbitration clause does not meet the requirements of Article 1341 of the Italian Civil Code since it is *"unfair and therefore … effective only if specifically approved in writing."* In particular, Respondent submits that according to the jurisprudence of the Italian Supreme Court, the general reference to clauses 1 - 14 of the Player Contract was not sufficient to cover the consent of the Club also to Clauses 9 and 10 which contain the arbitration agreement. This objection is of no avail. The principle of *favor validitatis* as embodied in Article 178(2) PILA requires that the arbitration agreement meets the requirement of *either* the law chosen by the parties, *or* the law governing the contract *or* Swiss law. Since the Arbitrator finds that the arbitration agreement is valid at least under Swiss law, it is not necessary to review the validity also under any other law.

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

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6 The reference to the appeal right has been deleted from the FAT/BAT Rules in the meantime.

7 See also case 0092/10 FAT, Ronci and de Jesus Coelho vs. WBC Mizo Pecs 2010, para. 55.

61. 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 *"[a]ny dispute arising out of or in connection with this Agreement"* in Clause 9 of the Player Contract clearly covers the present dispute.[8]

62. The Arbitrator thus finds that he has jurisdiction to decide the claims of Claimants.

6. Other Procedural Issues

63. Respondent objected to the admissibility of Claimants' second submissions of 11 July 2011.

64. The Arbitrator agrees with Respondent that in the letter dated 1 July 2011, Claimants did not only answer the specific questions posed, but also made further statements and added new documentary evidence in support of their claim. By letter of 29 July 2011, also Respondent submitted further arguments and documents in excess of the response of the specific questions of the Arbitrator. In order to respect both parties' due process rights, the Arbitrator prefers to accept the additional submissions of both parties instead of disregarding them.

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[8] *See for instance* BERGER/ KELLERHALS: International and domestic Arbitration in Switzerland, Berne 2010, N 466.

7. Applicable Law – *ex aequo et bono*

65. 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).

66. According to Clause 8 of the Player Contract, *"the Agreement shall be subject to Italian law and the law of the European Community"*. This choice of law of the Parties must be respected by the Arbitrator. According to Article 15.1 of the BAT Rules, the Arbitrator shall decide the dispute *ex aequo et bono* only unless the parties have agreed otherwise.

8. Findings

8.1. Breach of the Player Contract

67. It is common ground that the _____ injury of the Player first occurred around the time when she joined the Club in 2009. The injury did not however, prevent the Player from playing with the team during the season 2009-2010. The _____injury reappeared or worsened during the summer break between the seasons 2009-2010 and 2010-2011. As a result, the Player was not able to exercise or play with the team when she returned to Parma in August 2010, despite the medical treatment she had received in the Netherlands during the summer break.

68. It was not the injury which led to the decision of the Club to terminate the Player Contract but rather the facts that the Player did not notify her medical condition to the

Club; that she resorted to medical assistance in the Netherlands instead of reporting to the Club's medical services; and that she returned with an overweight of 7 kg. This overweight may have been one of the reasons for the aggravation of her _____ injury and also evidence supporting Respondent's allegation that she had not followed the off-season training plan.

69. To determine whether the behaviour of the Player has to be considered as a breach of contract, the Arbitrator must primarily refer to the Player Contract itself.

70. Clause 1 of the Player Contract provides:

> *"(…) The Player promises to perform her services in favor of the Club during the period covered by this agreement. The player agrees to take part in all the training sessions scheduled by the Club and play throughout the training, pre-championship, championships and cup games in which the Club must be involved. Moreover, she commits herself to inform the Club promptly about any injury she may have. (…)"*

71. Clause 3 of the Player Contract provides that

> *"[t]his is a guaranteed no-cut contract which means that neither the Club nor its successor nor the League, nor the Federation shall be entitled to cancel or cause the cancellation of this agreement in the case of injury or if the Player does not achieve the performance targets expected by the Club. This agreement also remains valid in case of disease, contracted during the season and leading to temporary or permanent inactivity imposed by the circumstances. Finally, the agreement also remains valid in the case of an injury that is not related to the sports activities unless the Player commits a serious offence according to the definition given in the Civil Code. (…)."*

72. According to Clause 7 of the Player Contract, the Club must provide certain "incidental" services in addition to the payment of the salary, such as health insurance and medical care (see Clause 7 d):

"If the Player has an injury during the period if this agreement and is not able to continue playing, all the remuneration planned in the agreement shall still be paid in addition to all medical expenses arising from the injury. In case of serious injury (require a major operation), the Player is authorized to get a second medical opinion from reliable medical specialists."

73. Clause 14 reads:

"This contract covers all the agreements made between the Club and the Player and it shall not be altered or modified without another written agreement made between the Club and the Player."

74. The Club relies also on its *Internal Regulations* which stipulate:

"1) Registered team members are bound to the duty of loyalty towards the Company. They must conduct a lifestyle that is consistent with the need to always maintain the best physical and psychological condition, also following the suggestions issued by the Staff. (…)

5) The athlete is due to maintain an excellent physical and psychological condition also by following advice provided by the medical and technical staff. In case of illness, injury or disposition, the athlete should immediately report to the company doctor or to medical staff. It is forbidden to take medication that has not been prescribed by the company medical staff and to consult other doctors without the previous authorization of the company itself (...)."

75. The primary source of law to resolve the dispute is the Player Contract. When it comes to the specific rights and duties of the Parties, the Arbitrator also takes recourse to the Club's Internal Regulations. The Internal Regulations are not an amendment to the Player Contract but documentary evidence of the directions given by the Club as an employer to the Player as its employee. The employer's right to issue such instructions to the employees is embodied in Article 2104 para. 2 of the Italian Civil Code (CC) and does not require the consent of the employee. The signature of the parties is therefore not a requirement for the applicability of the Internal Regulations but rather evidence

that the employee has received them. Such receipt can also be demonstrated by other means.

76. The Claimants dispute the applicability of the Internal Regulations for the 2010-2011 season, but not for the 2009-2010 season. The Arbitrator concludes that the Player was at least aware of the Internal Regulations which were presented to her at the beginning of her employment. There was no need to renew the Internal Regulations for the following season. They simply continued to be valid as the Player does not assert that the Internal Regulations had been changed in the 2010-2011 season nor does she challenge the validity of the content of the Internal Regulations. The Arbitrator will therefore rely on both the Player Contract and the Internal Regulations.

77. As admitted by Respondent, it was not the injury itself which led to the termination of the Player Contract. Respondent accepted that the Player suffered from an injury of _____ from the beginning of the employment. It also accepted the risk that the Player's _____ injury could re-surface or worsen during the two-year employment. In fact, that is how Clause 3 of the Player Contract must be understood, namely that the injury itself could neither be a reason to reduce the agreed payments to the Player nor allow early termination of the employment by the Club.

78. However, Clause 3 of the Player Contract does not immunize the Player against any breach of contract. According to Respondent, the Player breached the contract when she failed to inform the Club about the worsening pains _____, when she visited a doctor and therapists in the Netherlands without notifying the Club and by disregarding the off-season training programme provided by the Club which may have led to her overweight of 7 kg.

79. The Arbitrator finds that the Player indeed disregarded her obligations as an employee when she did not formally notify the medical personnel about the re-appearance of her _____ pains as provided by the Clause 1 of the Player Contract and the Internal

Regulations; and when she sought medical assistance from medical personnel in the Netherlands. The rather informal chat with her coach by Facebook was certainly not a sufficient notification and she cannot put the blame on the coach for not having forwarded her message to the medical staff of the Club. By failing to follow these rules, she deprived the Club of the opportunity to take the measures it deemed appropriate to restore the Player's fitness to play. The quality of medical assistance the Player received in the Netherlands is irrelevant in this context. It is also irrelevant whether the medical personnel of the Club would have been in a better position to heal the injury and to restore her ability to play with the team faster. The Arbitrator finds it decisive that the Club was not given the opportunity, as provided by the Club's Internal Regulations, to take the appropriate measures to restore her health and fitness.

80. The fact that the Player returned to Parma with an overweight of 7 kg has not been disputed. Did this constitute another breach of her obligations as an employee of Respondent? The substantial overweight might indicate that the Player did not follow her off-season training programme which may have contributed to the worsening of her _____ pains. The medical reports submitted by Respondent remain silent about this point. However, the facts of the substantial overweight are an indication that the Player disregarded a significant obligation of any professional athlete, namely to take care that she always maintained an optimum physical condition, whether or not such a duty was explicitly stipulated in the Player Contract. In the present case, such requirement is at least set out in para. 1 of the Internal Regulations.

81. The Player disputes that she was given specific training or rehabilitation instructions to be followed during the 2010 summer break. The submissions of Respondent including testimonial evidence of Ms. Rota confirm that the Player did not get an individual and specific training programme but that all players were provided with an off-season training programme. The Player's statement may at least indicate that she did not feel obliged to follow that general training programme, especially since she was exercising with the Dutch national team which most likely had its own training regime.

82. As a result, the Arbitrator finds that the Player disregarded her obligations towards Respondent as her employer when she did not properly inform the Club about her newly occurring _____ pains; when she visited a medical practitioner without the consent of her employer; and when she returned to Parma with an overweight of 7 kg.

8.2. Early termination of the Player Contract

83. The issue is however, whether the Player's violations of her contractual duties entitled Respondent to terminate the Player Contract prior to its regular term.

84. Neither the Player Contract nor the Internal Regulations include any provision on early termination. Still, the Internal Regulations contain a detailed "List of Fines" which apply if a player violates or disregards certain obligations towards the Club. However, there is no specific provision for the kind of contractual breach committed by the Player. The Arbitrator must therefore take recourse to the relevant provisions of Italian law.

85. Also Italian contract law is governed by the principle of *pacta sunt servanda*. The termination of a contract is therefore to be considered as *ultima ratio* and not as the first remedy if one party commits a breach of contract. Primarily, the affected party may request the other party to comply with the contract and/or to pay damages if the affected party suffered a loss because of the breach of contract (Articles 1223 CC). An early termination of a contract can only be taken into consideration when the respective legal requirements are met.

86. According to Article 2119 CC, a contract can be terminated with immediate effect for cause if the debtor fails to comply with one of his or her material duties and if therefore it is unreasonable to continue the agreement. Depending on the kind and severity of the breach, a termination may require a warning and an adequate time limit for

compliance. On the other hand, a non-material breach may not justify an early termination.

87. Again, it is not the injury which constitutes the material breach of contract, but rather the Player's failure to notify the Club about the re-appearance of the pain, by seeking for medical assistance outside of the Club and by returning to the Club overweight. The Arbitrator finds however, that disregarding these duties cannot be regarded as a violation of *major* contractual obligations of the Player. They did not render the co-operation between the employer and the employee impossible or unreasonable and cannot justify an early termination of the employment.

88. Since the Club accepted the Player in the team and since it agreed to sign a "guaranteed, no-cut Agreement" it must bear the consequences of the worsening of the injury and continue to pay the salary. However, it can claim those remedies which are appropriate to cover the loss caused by the Player's breach of contract mentioned in para. 82 above, which are damages, but not the termination of the Player Contract.

8.3. Damages

89. None of the parties has made any submissions which would assist the Arbitrator in determining the damages caused by the Player's behaviour. According to Article 1226 CC, the Arbitrator must therefore assess the Club's damage at his discretion in the light of the normal course of events and the steps taken by the injured party.

90. The Arbitrator finds that the breach of contract by the Player deprived the Club of its opportunity to take the appropriate medical and other measures to bring the Player back to the court as quickly as possible. The injury re-surfaced in July 2010, but the medical treatment under the control of the Club could start only in September 2010 after the Player's return to Parma. Months later, the medical report of the sports

medical center of Leiden, dated 11 July 2011, stated that *"the new MRI scan showed no more abnormalities"* by the end of March 2011. The Player continued with therapeutic treatment and sport-specific training and competed again in summer 2011.

91. Based on the medical reports in the file, the Arbitrator concludes that (a) the entire medical process of restoring the Player's health lasted approximately 8 months (July 2010 to March 2011), and (b) the delay in the initiation of the proper medical treatment which was caused by the Player's failure to immediately report the injury to the Club amounted to approximately 2 months (July and August 2010). The Arbitrator therefore concludes that if the Player would have timely notified the Club and if the appropriate medical measures would have immediately been taken, she would have been able to play for the Club's team on or before February 2011.

92. Under the circumstances, the burden would have been on the Player to demonstrate that her failure to properly notify the Club about her injury, the medical assistance received by the Dutch therapists and her overweight either had no impact on the speed of her recovery, or a smaller impact on the recovery. On the other hand, it would have been for the Club to prove that the Player would have been back on the team sooner had she complied with her reporting duties and/or if she had followed the off-season training programme in a disciplined way. However, no such evidence was submitted by either party. The Arbitrator's assumption must therefore stand and is the basis for his calculation of the damages.

93. According to the Arbitrator's assessment, the Player's breach of her contractual duties led to a prolongation of the recovery process of approximately 1/4 of the 2010-2011 season. While she basically remains entitled to compensation as an employee, she cannot claim compensation for the period of time during which she could not play because of her own fault. The annual compensation for the 2010-2011 season in the total amount of EUR 35,000.00 must therefore be reduced by 1/4 and amounts to EUR

26,250.00. Considering the already paid EUR 4,000.00, the outstanding salaries amount to EUR 22,250.00.

8.4. Costs of physiotherapy

94. The claim for compensation of the costs for the Player‘s physiotherapy in January and February 2011 is dismissed. The Arbitrator cannot reproduce the details of the treatments just based on the invoices and the Player therefore has not sufficiently proved her claim regarding costs of physiotherapy.

8.5. Agent Fee

95. The Arbitrator accepts the claim for the payment of the agent fee for the 2010-2011 season. The agent fee was payable in two instalments due on 15 October 2009 and 15 October 2010 and was meant to be a compensation for the agent’s services. Whether or not the existence of a valid player contract was a condition for the payment of the second instalment can be left open since the Arbitrator found that the Club was not entitled to unilaterally terminate the Player Contract. The second instalment of the agent fee is therefore due in the amount of 3,500.00 plus VAT of 20% amounting to EUR 4,200.00.

9. Interest

96. The Claimants request interest at 5% for outstanding salary and outstanding agent fee.

97. According to BAT jurisprudence, default interest can be awarded even if the underlying agreement does not explicitly provide for an obligation to pay interest on overdue salaries[9]. Although the Player Contract do not provide for the obligation of the debtor to pay default interest, this is a generally accepted principle which is embodied in most legal systems. The Arbitrator considers an interest rate of 5% p.a. to be fair and equitable in the present case and also corresponding to the standing jurisprudence of BAT.

98. With regard to the compensation for the salary payments, the default interest must be calculated from the following day after the respective salary payment became due. Considering the salary reduction in the amount of EUR 8,750.00 due to Player's breach of her contractual duties the calculation of the interest is as follows:

Due date (salary)	Amount (EUR)	Commencement date (interest)
30 October 2010	4,000.00 - 8,750.00 ---------- - 4,750.00	------
30 November 2010	4,000.00 - 4,750.00 ---------- - 750.00	------
30 December 2010	4,000.00 - 750.00 ---------- 3,250.00	31 December 2010

9 *See* 0092/10 BAT, Ronci, Coelho vs. WBC Mizo Pecs 2010; 0069/09 BAT, Ivezic, Draskicevic vs. Basketball Club Pecsi Noi Kosariabda Kft; 0056/09 BAT, Branzova vs. Basketball Club Nadezhda.

30 January 2011	4,000.00	31 January 2011
28 February 2011	4,000.00	1 March 2011
30 March 2011	4,000.00	31 March 2011
30 April 2011	4,000.00	1 May 2011
15 May 2011	3,000.00	16 May 2011

99. With regard to the agent fee, the default interest must be calculated from 16 October 2010, i.e. the following day after the second instalment of the agent fee became due.

10. Costs

100. Article 17.2 of the BAT Rules provides that the final amount of the costs of the arbitration shall be determined by the BAT President and may either be included in the award or communicated to the parties separately. Furthermore, Article 17.3 of the BAT 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.

101. On 29 September 2011, considering that pursuant to Article 17.2 of the BAT Rules "the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator", and that "the fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time", taking into account all the circumstances of the case, including the time spent by the Arbitrator, the complexity of the case and the procedural questions raised, the BAT President determined the arbitration costs in the present matter at EUR 8,000.00.

102. In the present case, in line with Article 17.3 of the BAT Rules and considering that Claimants prevailed in approximately 3/4 of their claims, the Arbitrator finds it fair that 3/4 of the fees and costs of the arbitration be borne by Respondent and 1/4 by Claimants.

103. Given that each party paid its share of the Advance on Costs (see *supra* para. 21) in the total amount of EUR 8,000.00 and considering how the Parties succeeded, the Arbitrator decides that:

(i) Respondent shall reimburse to Claimants 3/4 of the costs advanced by them (EUR 3,000.00 + EUR 1,000.00) minus 1/4 of the costs advanced by Respondent (EUR 4,000.00), which results in an amount of EUR 2,000.00.

(ii) Furthermore, the Arbitrator considers it adequate that Claimants are entitled to the payment of a contribution towards their legal fees and other expenses (Article 17.3. of the BAT Rules). Taking into account the invoices of the Parties, Respondent's comments to the Agent's invoice and the non-reimbursable handling fee received in the BAT bank account, the Arbitrator holds it adequate to determine the Claimant's costs at EUR 8,420.00 and Respondent's costs at EUR 5,632.10. Since Claimants succeeded by approximately 3/4 of their claims, they shall be entitled to a contribution corresponding to 3/4 of their own costs minus 1/4 of Respondent's costs which results in an amount of EUR 4,906.97.

11. AWARD

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

1. **ASD Basket Parma is ordered to pay to Ms. Naomi Halman the amount of EUR 22,250.00 plus interest of 5% p.a.**
   - **on the amount of EUR 3,250.00 since 31 December 2010,**
   - **on the amount of EUR 4,000.00 since 31 January 2011,**
   - **on the amount of EUR 4,000.00 since 1 March 2011,**
   - **on the amount of EUR 4,000.00 since 31 March 2011,**
   - **on the amount of EUR 4,000.00 since 1 May 2011,**
   - **on the amount of EUR 3,000.00 since 16 May 2011.**
2. **ASD Basket Parma is ordered to pay Mr. Paolo Ronci the amount of EUR 4,200.00 plus interest of 5% p.a. since 16 October 2010.**
3. **ASD Basket Parma is ordered to pay jointly to Ms. Naomi Halman and Mr. Paolo Ronci the amount of EUR 2,000.00 as a reimbursement of their advance on arbitration costs.**
4. **ASD Basket Parma is ordered to pay jointly to Ms. Naomi Halman and Mr. Paolo Ronci the amount of EUR 4,906.97 as a contribution towards their legal expenses.**
5. **Any other or further-reaching claims for relief are dismissed.**

Geneva, seat of the arbitration, 10 October 2011

Stephan Netzle
(Arbitrator)